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10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**
12 **(SOUTHERN DIVISION)**

13
14 ChromaDex, Inc.,
15 Plaintiff,
16 v.
17 Elysium Health, Inc.,
18 Defendant.

Case No. SACV 16-02277-CJC(DFMx)

**OPPOSITION TO ELYSIUM’S
MOTION TO DISMISS THE FOURTH,
FIFTH, AND SIXTH CLAIMS OF
CHROMADDEX’S FIRST AMENDED
COMPLAINT**

Date: April 24, 2017
Time: 1:30 p.m.
Judge: Hon. Cormac J. Carney
Courtroom: 9B

19
20 Elysium Health, Inc.,
21 Counterclaimant,
22 v.
23 ChromaDex, Inc.,
24 Counter-Defendant.

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1 **I. INTRODUCTION**

2 Plaintiff and Counter-Defendant ChromaDex, Inc. (“ChromaDex”) is the only
3 authorized United States commercial supplier of nicotinamide riboside (“NR”), a
4 vitamin B₃ metabolite covered by ChromaDex’s patent estate and sold under the brand
5 name NIAGEN. Defendant and Counterclaimant Elysium Health, Inc. (“Elysium”) is
6 one of ChromaDex’s customers. Elysium purchases NIAGEN and another
7 ChromaDex product, pTeroPure, and combines them with inactive ingredients in a
8 consumer health supplement called Basis. Basis is Elysium’s only product and source
9 of revenue.

10 ChromaDex filed its Complaint against Elysium for breach of contract and
11 fraud, and supplemented its allegations in a First Amended Complaint (“FAC”),
12 adding trade secret misappropriation claims. In 2016, Elysium cheated ChromaDex in
13 two ways. First, Elysium fraudulently induced ChromaDex to fill extraordinarily
14 large purchase orders of NIAGEN and pTeroPure, but never paid the upfront purchase
15 price or the back-end purchase price royalties for the products, and never intended to
16 pay them. Second, Elysium simultaneously solicited two ChromaDex employees and
17 conspired with them to steal ChromaDex’s proprietary trade secret data and
18 information, and induced them to breach their non-disclosure agreements with
19 ChromaDex. Elysium currently owes ChromaDex over \$5 million on the breach of
20 contract and fraud claims alone.

21 Elysium now moves to dismiss ChromaDex’s fraud and trade secret
22 misappropriation claims. Elysium argues that ChromaDex’s fraud claim is barred by
23 the economic loss rule and that ChromaDex has not pleaded reliance on Elysium’s
24 affirmative misrepresentations. Elysium is wrong. “[A] contract is not a license
25 allowing one party to cheat or defraud the other.” *Robinson Helicopter Co. v. Dana*
26 *Corp.*, 34 Cal. 4th 979, 992 (2004) (citation omitted). The California Supreme Court
27 has long held that tort damages may accompany contract claims when “the duty that
28 gives rise to tort liability is either completely independent of the contract or arises

1 from conduct which is both intentional and intended to harm.” *Erlich v. Menezes*, 21
2 Cal. 4th 543, 552 (1999). Elysium’s conduct falls under both exceptions: (1) it had a
3 statutory duty to state its product requirements in good faith (*see* Cal. Com. Code §
4 2306(1)) and (2) its false statements were made intentionally and with intent to harm
5 ChromaDex (FAC ¶¶ 27, 40–41). Moreover, ChromaDex pleads both reliance on
6 Elysium’s false statements and resulting harm, by alleging that Elysium induced
7 ChromaDex to supply unreasonably large quantities of NIAGEN and pTeroPure at a
8 highly discounted price.

9 As to the trade secret misappropriation claims, Elysium argues that ChromaDex
10 has failed to plead all the required elements or to sufficiently identify the trade secrets
11 at issue. Elysium’s contentions are incorrect because it (1) misstates the required
12 elements of a trade secret misappropriation claim, which does not require the pleading
13 of actual damages, and (2) misstates ChromaDex’s burden for identifying its trade
14 secrets at this early pleading stage, as opposed to the discovery stage. *See* Cal. Civ.
15 Proc. Code § 2019.210.

16 Accordingly, the Court should deny Elysium’s motion to dismiss ChromaDex’s
17 fourth, fifth, and sixth causes of action.

18 **II. STATEMENT OF FACTS**

19 **A. ChromaDex Supplies Elysium with NIAGEN and pTeroPure.**

20 ChromaDex is the exclusive United States commercial supplier of NR, a
21 naturally occurring form of vitamin B₃ that promotes healthy metabolic processes.
22 (FAC ¶¶ 12–13.) ChromaDex sells NR under the trademarked name NIAGEN. (FAC
23 ¶ 13.) ChromaDex has exclusively in-licensed a number of patents that cover the
24 production and supply of NR in the United States. (Elysium’s First Amended
25 Counterclaim (“FACC”) ¶ 5, ECF 31.) ChromaDex sells NIAGEN to several direct-
26 to-consumer retail companies, like Elysium, who include NIAGEN as an ingredient in
27 their health supplements. (FAC ¶ 11.)

28 Elysium sells a single product: a dietary supplement named “Basis” that

1 combines NIAGEN and pterostilbene, another health supplement ingredient supplied
2 by ChromaDex under the brand name pTeroPure. (FAC ¶ 19.) The supply
3 relationship between the parties is governed by three agreements: the NIAGEN
4 Supply Agreement signed on February 3, 2014 and amended on February 19, 2016
5 (FAC Exs. A & B), the Trademark License and Royalty Agreement, signed on
6 February 3, 2014 (FAC Ex. D), and the pTeroPure Supply Agreement, signed June 26,
7 2014 (FAC Ex. C).

8 The NIAGEN Supply Agreement states a maximum purchase price (FAC Ex. A
9 § 3.1), but the parties transacted at lower price throughout most of their relationship
10 (FAC ¶¶ 22–23). In the second quarter of 2016, Elysium first raised a question about
11 whether a sudden increase in its volume of NIAGEN purchases triggered a most
12 favored nation (“MFN”) pricing provision in the NIAGEN Supply. (FAC ¶ 21; Mot.
13 at 4.) The MFN provision is only triggered if Elysium “purchases equal volumes or
14 higher volumes than” any of ChromaDex’s other customers as measured over a period
15 of time. (FAC Ex. A § 3.1; Mot. at 4.) ChromaDex explained why the MFN clause
16 was not triggered and believed the issue was resolved when Elysium did not advance
17 the issue further. (FAC ¶ 21.)

18 It subsequently became clear that Elysium’s principals were not satisfied with
19 the apparent resolution of the MFN pricing issue when, on June 28, 2016, without any
20 prior notice or further invitation for discussion, Elysium sent ChromaDex purchase
21 orders for NIAGEN and pTeroPure demanding the products at *less than half* the
22 parties’ agreed upon price (the “June 28 Purchase Orders”). (FAC ¶ 22.) The June 28
23 Purchase Orders further called for the delivery of more than *two times more* NIAGEN
24 than *all* of Elysium’s past orders *combined*. (FAC ¶ 22.) In recognition of the
25 obvious disconnect between the two parties, ChromaDex immediately tried to discuss
26 the issues with Elysium’s principals, who initially refused to engage, and ChromaDex
27 only later succeeded after relying on its then-employee Mark Morris (who was
28 perhaps simultaneously being recruited to Elysium) to schedule a call with Elysium on

1 June 30, 2016. (FAC ¶¶ 24–25.)

2 **B. Elysium Fraudulently Induces ChromaDex to Supply It with**
3 **Extraordinary Large Amounts of NIAGEN and pTeroPure at a**
4 **Heavy Discount.**

5 On June 30, 2016 Frank Jaksch and Will Black of ChromaDex, joined a call
6 with Elysium’s CEO, Eric Marcotulli, and COO, Dan Alminana (the “June 30 Call”).
7 (FAC ¶ 26.) On the June 30 Call, the parties discussed Elysium’s pricing concerns
8 and the appropriate pricing of NIAGEN for the extraordinarily large orders Elysium
9 wished to place. (FAC ¶ 27.)

10 Elysium, through Alminana and Marcotulli, made many false representations on
11 the June 30 Call. (FAC ¶¶ 27, 28, 95, 97.) First, Marcotulli and Alminana stated that
12 Elysium intended to be a good business partner to ChromaDex. (FAC ¶ 27.) Second,
13 Marcotulli and Alminana falsely represented that Elysium needed to place the
14 extraordinarily large orders because it was substantially ramping up its sales. (FAC
15 ¶¶ 27, 95.) Third, Marcotulli and Alminana falsely represented that the planned ramp
16 up was so dramatic that it anticipated exhausting the ordered NIAGEN in just the next
17 few months. (FAC ¶¶ 27, 97.) Fourth, Marcotulli and Alminana false represented that
18 Elysium would place additional large orders for NIAGEN in the third and fourth
19 quarters of 2016. (FAC ¶ 27.) Fifth, after ChromaDex relied on these representations
20 of Elysium’s additional forthcoming voluminous orders and agreed it would supply
21 Elysium with NIAGEN at a price lower than the parties’ usual price based on those
22 representations (FAC ¶ 27), Marcotulli and Alminana further falsely represented that
23 Elysium would accept and pay that discounted price for an immediate order, so that
24 Elysium’s supply would not be interrupted, and that Elysium would work to resolve
25 any other remaining concerns about pricing at another time (FAC ¶¶ 28, 97). Based
26 on those representations and false promises, ChromaDex filled the orders.

27 The representations made by Elysium’s senior management team were abjectly
28 false and made with the intention of defrauding ChromaDex: the NIAGEN and
pTeroPure that Elysium represented would last only “a few months” (FAC ¶ 27), has

1 instead so far been a sufficient supply for more than **nine months**, and there is still no
2 indication that Elysium is running out of NIAGEN. In fact, Elysium now says in this
3 litigation that it “is highly confident it will continue to supply its customers” with its
4 product (Elysium’s Answer to the Complaint (“Answer”) at 2, ECF 11.), which can
5 only mean that it still has remaining stockpiled inventory from ChromaDex. Thus, it
6 is now clear that Elysium was not ramping up sales as Alminana and Marcotulli
7 represented it would, nor did Elysium place any further orders for NIAGEN and
8 pTeroPure, let alone place orders totaling the amounts it represented it would need in
9 the June 28 Purchase Orders.

10 ChromaDex relied on Elysium’s false statements and promptly filled the
11 purchase orders for NIAGEN and pTeroPure, in good faith, immediately after the June
12 30 Phone Call. (FAC ¶¶ 29–30.) Thus, ChromaDex delivered to Elysium an amount
13 of NIAGEN that was more than **double** any previous order Elysium had ever placed,
14 at a price materially below the parties’ usual price. (FAC ¶¶ 27, 29–30.) The two
15 purchase orders totaled \$2.98 million, before the calculation of interest. (FAC ¶ 37.)

16 Then on August 10, 2016, one day after Elysium physically received
17 ChromaDex’s shipments of NIAGEN under the June 30 Order, Alminana made clear
18 that it was Elysium’s true intent not to pay for the product it purchased at all, until
19 ChromaDex capitulated to Elysium’s spurious demands regarding alleged breaches of
20 the NIAGEN Supply Agreement. (FAC ¶ 34.) Elysium held ChromaDex’s payment
21 hostage, like a modern day pirate over a commercial vessel and its crew in the Indian
22 Ocean. ChromaDex promptly responded with invitations to meet, by phone and in
23 person, but over the next several weeks Alminana steadfastly refused and ignored
24 offers to constructively engage with ChromaDex, and yet still refused to pay until its
25 unilateral demands were resolved. (FAC ¶¶ 34–36.) Elysium extended its hostage
26 tactic further in the fall of 2016, refusing to pay ChromaDex the deferred product
27 purchase price royalties on Elysium’s actual sales of NIAGEN. (FAC ¶¶ 37, 38, 63.)

28 Elysium’s fraud and deceit has injured ChromaDex beyond the nonpayment of

1 the millions of dollars due under the parties' agreements. Elysium's false
2 representations induced ChromaDex to assume a disproportionate amount of
3 economic risk, as it has been essentially acting as Elysium's bank since August 2016.
4 (FAC ¶ 43.) The FAC alleges that Elysium's self-help refusal to pay for the
5 extraordinarily large volumes of NIAGEN ordered and shipped under the June 30
6 Purchase Orders, which was all supplied at a materially discounted price based on
7 Elysium's fraudulent misrepresentations, has caused ChromaDex to experience
8 financial pressure which Elysium has leveraged against the company in its demands
9 related to its allegations of breach of the NIAGEN Supply Agreement. (See FAC ¶¶
10 40, 100.) Rather than acting in good faith by asserting a legal claim for any alleged
11 breach, Elysium chose instead to simply welch on its payment obligations, shifting the
12 risk of loss to ChromaDex by forcing it to unwillingly and unknowingly finance
13 Elysium's business plan.

14 **C. Elysium Misappropriates ChromaDex's Trade Secrets.**

15 While ChromaDex was unsuccessfully attempting to engage in a constructive
16 dialogue with Elysium over the payment for the June 30 Orders, it learned for the first
17 time that two of its former senior employees, who had abruptly resigned earlier in the
18 summer with little or no notice, were now employed by Elysium. The two employees
19 included (1) Mark Morris, ChromaDex's former Vice President of Business
20 Development and the key relationship manager for the Elysium account (FAC ¶¶ 25,
21 69); and (2) Ryan Dellinger, ChromaDex's former Director of Scientific Affairs (FAC
22 ¶ 70). ChromaDex's subsequent investigation revealed that these two employees'
23 relationship with Elysium during their employ with ChromaDex was far cozier than
24 either had let on and that, in violation of their confidentiality agreements with
25 ChromaDex, Morris and Dellinger disclosed ChromaDex trade secrets and
26 confidential information to Elysium without ChromaDex's knowledge or consent.

27 The trade secrets concern intellectual property related to the commercial
28 manufacture of NIAGEN and pterostilbene—the the products ChromaDex supplied to

1 Elysium. (FAC ¶ 13; FACC ¶ 28.) Elysium had an obvious economic interest in, and
2 motive to acquire, ChromaDex’s trade secrets and confidential information. For
3 example, when Elysium first approached ChromaDex concerning NR in 2013, it
4 demanded “a license granting Elysium the right to manufacture nicotinamide riboside
5 on its own,” which ChromaDex declined. (FACC ¶ 45.) After Elysium refused to pay
6 for its June 30 Purchase Orders, ChromaDex stopped supplying Elysium with
7 pTeroPure and NIAGEN. (FAC ¶ 56.) Thus, if Elysium does not still have a
8 backorder stockpile of ChromaDex’s products from the June 30 Orders, Elysium will
9 require an alternate supply of the two products and would undoubtedly prefer to
10 commercially manufacture one or both of the ingredients itself. (*See* Answer at 2
11 (stating that the ingredients for Basis are “today” supplied by ChromaDex and
12 assuring that, despite the current state of affairs with ChromaDex, it “intends to, and is
13 highly confident it will continue to, supply its customers” with its product).) Stealing
14 the method of manufacture know-how from ChromaDex would accelerate that
15 process.

16 ChromaDex’s recent investigation has further revealed that Morris and
17 Dellinger, before leaving ChromaDex for Elysium in the summer of 2016, disclosed
18 ChromaDex’s trade secrets to Elysium concerning ChromaDex’s customers, potential
19 customers and business partners. For example, on April 28, 2016 Morris disclosed
20 information to Elysium about ChromaDex’s confidential business dealings with a
21 potential customer. (FAC ¶ 73.) A month later, on May 25, 2016, Morris sent
22 Dellinger an unusual request for the contact information of one of ChromaDex’s
23 confidential research partners. (FAC ¶ 74.) The request was highly unusual because
24 Morris’ responsibilities with ChromaDex did not require this sort of information. (*See*
25 FAC ¶ 69.) Dellinger responded, providing Morris with the information and then,
26 when ChromaDex’s partner asked Dellinger about being contacted by Elysium and the
27 propriety of discussing his confidential research and his research partnership with
28 ChromaDex with Elysium, Dellinger, without disclosure or consent from ChromaDex,

1 encouraged the partner to talk directly and openly with Elysium. (FAC ¶ 74.)
2 Dellinger never disclosed the communications or Elysium’s activities to ChromaDex’s
3 senior management team, let alone ask them for permission to share ChromaDex’s
4 confidential information with Elysium. (FAC ¶ 74.) And then two months later, both
5 Morris and Dellinger abruptly resigned from ChromaDex and became Elysium
6 employees, at the same time that Elysium became hostile towards ChromaDex,
7 refusing to pay for the June 30 Purchase Orders. Morris’ last day as a ChromaDex
8 employee was on July 16, 2016, when most of the product fraudulently ordered by
9 Elysium on June 30 was delivered by ChromaDex to Elysium. (FAC ¶¶ 30, 75.)
10 Dellinger resigned, effective immediately, three weeks later on August 10, 2016 (FAC
11 ¶ 76)—the very day that Elysium told ChromaDex that it would hold payment for the
12 June 30 Purchase Orders hostage until ChromaDex acceded to Elysium’s other
13 demands under the NIAGEN Supply Agreement (FAC ¶ 34). The timing turned out
14 to be much more than suspicious.

15 **D. Procedural History**

16 On December 29, 2016, ChromaDex filed its Complaint against Elysium,
17 alleging that Elysium fraudulently ordered and refused to pay the upfront purchase
18 price portion of approximately \$3 million for NIAGEN and pTeroPure, and further
19 refused to pay its back-end deferred purchase price royalty obligations. (ECF 1.) In
20 response, Elysium answered the Complaint and filed its Counterclaim. (ECF 11.)
21 ChromaDex filed its FAC on February 15, 2017, adding state and federal claims
22 against Elysium for misappropriation of trade secrets. (ECF 26.) Elysium filed a First
23 Amended Counterclaim on March 6, 2017. (ECF 31.)

24 **III. LEGAL STANDARD**

25 On a motion to dismiss, all material allegations in the complaint must be
26 accepted as true and construed in the light most favorable to the non-moving party.
27 *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). “To survive a
28 motion to dismiss, a complaint must contain sufficient factual material, accepted as

1 true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556
2 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).
3 “Factual allegations must be enough to raise a right to relief above the speculative
4 level.” *Twombly*, 550 U.S. at 555. In making this determination, the Court should
5 “construe the complaint liberally and [is] not bound by its formal language.”
6 *Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424, 1433 (9th Cir. 1995). A
7 complaint need not “plead evidence” without the benefit of discovery in order to
8 survive a motion to dismiss. *Id.* Indeed, “a well-pleaded complaint may proceed even
9 if it strikes a savvy judge that actual proof of those facts is improbable.” *Twombly*,
10 550 U.S. at 556.

11 **IV. ARGUMENT**

12 **A. ChromaDex States A Claim for Fraudulent Deceit.**

13 **1. The Economic Loss Rule Does Not Bar or Undermine** 14 **ChromaDex’s Fraud Allegations.**

15 Elysium incorrectly argues that the economic loss rule under California law
16 bars ChromaDex’s recovery for fraud. (Mot. at 7-10.) Elysium fails to note, however,
17 that ChromaDex’s FAC allegations of fraud, committed with the intent to harm
18 ChromaDex, directly fall within the black letter law exception to the economic loss
19 rule. As clearly summarized and stated by the California Supreme Court, “*a contract*
20 *is not a license allowing one party to cheat or defraud the other.*” *Robinson*
21 *Helicopter*, 34 Cal. 4th at 992 (citation omitted) (emphasis added).

22 In California, the economic loss rule prohibits a plaintiff from recovering in
23 contract for more than “purely economic loss due to disappointed expectations, unless
24 he can demonstrate harm above and beyond a broken contractual promise.” *Id.* at 988.
25 The purpose of the rule is to “prevent the law of contract and the law of tort from
26 dissolving one into the other.” *Id.* (citation omitted). However, the California
27 Supreme Court has long held that tort damages *may* accompany contract claims when
28 “the duty that gives rise to tort liability is either completely independent of the

1 contract or arises from conduct which is both intentional and intended to harm.”
2 *Erlich*, 21 Cal. 4th at 552.

3 Elysium’s conduct, as alleged in the FAC, falls under both of these exceptions.
4 First, Elysium had both a common law and statutory duty not to deceive and lie to
5 ChromaDex regarding the amount of NIAGEN it required and its “ramp up period.”
6 The FAC alleges that, in the June 28 Purchase Orders, Elysium represented that it
7 immediately required an extraordinarily large volume of NIAGEN—more than double
8 the amount of NIAGEN than all of Elysium’s past orders combined. (FAC ¶ 22.)
9 Elysium doubled down on that fraudulent misrepresentation by reaffirming during the
10 June 30 Call that it immediately required that volume because it was “ramping up
11 sales” and would sell through “all the NIAGEN ordered over the next few months and
12 would place additional large orders in Q3 and Q4 2016.” (FAC ¶ 27.) The June 30
13 Purchase Orders constitute yet another false misrepresentation of Elysium’s product
14 requirements. (FAC ¶ 29.) These representations violated and breached Elysium’s
15 duty not to lie to and deceive ChromaDex. As the California Supreme Court noted,
16 the duty exists because a “party to a contract cannot rationally calculate the possibility
17 that the other party will deliberately misrepresent terms critical to that contract” and
18 “[n]o rational party would enter into a contract anticipating that they are or will be lied
19 to.” *Robinson Helicopter*, 34 Cal. 4th at 993 (citation omitted).

20 Further, in contracts such as the NIAGEN Supply Agreement, where the
21 contract measures the quantity to be supplied by the requirements of the buyer,¹
22 California law imposes a duty on the buyer to act in good faith and to state their
23 requirements in good faith. *See* Cal. Com. Code § 2306(1) (“A term which measures
24 the quantity by the output of the seller or the requirements of the buyer means such
25 actual output or requirements as may occur in good faith, except that no quantity
26 _____

27 ¹ The NIAGEN Supply Agreement provides that “ChromaDex shall sell and deliver,
28 and Elysium Health shall purchase from ChromaDex, such Niagen as Elysium Health
orders from time to time.” (FAC Ex. A § 3.)

1 unreasonably disproportionate to any stated estimate or in the absence of a stated
2 estimate to any normal or otherwise comparable prior output or requirements may be
3 tendered or demanded.” (Emphasis added.) *See also Shea-Kaiser-Lockheed-Healy v.*
4 *Dep’t of Water & Power*, 73 Cal. App. 3d 679, 689 (1977) (finding that in a contract
5 subject to Cal. Com. Code § 2306(1), the statute’s “requirements of good faith and
6 reasonable elasticity were thereby added to the obligations of the parties under their
7 contract”). Elysium’s representations were clearly not made in good faith: the
8 NIAGEN and pTeroPure ordered on June 30 has been a sufficient supply for more
9 than nine months (Answer at 2), rather than the “few” months that Alminana and
10 Marcotulli represented when they said “due to the sales ramp up” Elysium would use
11 “all of the NIAGEN ordered over the next few months and would place additional
12 large orders in Q3 and Q4 2016.” (FAC ¶ 27.) By falsely representing the amount
13 and timing of NIAGEN and pTeroPure that Elysium required, Elysium failed to fulfill
14 its independent statutory duty to act in good faith and not to lie.

15 Second, Elysium’s conduct as alleged in the FAC was “intentional and intended
16 to harm.” *Erlich*, 21 Cal. 4th at 552. Ninth Circuit precedent holds that under
17 California law, it is appropriate for the court to “decline[] to apply the economic loss
18 rule to fraud and misrepresentation claims where . . . one party has lied to the other.”
19 *Hannibal Pictures, Inc. v. Sonja Prods. LLC*, 432 F. App’x 700, 701 (9th Cir. 2011).
20 The reasoning supporting the fraud exception to the economic loss rule is simple:
21 “[b]ecause of the extra measure of blameworthiness inhering in fraud, and because in
22 fraud cases we are not concerned about the need for ‘predictability about the cost of
23 contractual relationships,’” fraud plaintiffs may recover losses beyond purely
24 contractual remedies.² *Lazar v. Superior Court*, 12 Cal. 4th 631, 646 (1996) (citation
25

26 ² Compare with Mot. at 7–8 (citing *UMG Recordings, Inc. v. Glob. Eagle Entm’t, Inc.*,
27 117 F. Supp. 3d 1092, 1105 (C.D. Cal. 2015) for the proposition that “[b]usinesses
28 should not have to worry that simple disputes about bills and contract performance
will routinely lead to the threat of punitive damages”) (citations omitted).

1 omitted).

2 The FAC’s allegations were drafted intentionally to satisfy these exceptions to
3 the economic loss rule. ChromaDex alleges that Elysium (1) intentionally
4 misrepresented the amount of NIAGEN and pTeroPure it needed, the timing of when
5 it required those products, its acceptance of the parties’ newly-agreed-upon price for
6 NIAGEN per the June 30 Orders, and its intent to be a good business partner to
7 ChromaDex (FAC ¶¶ 27–28), (2) with the intent of harming ChromaDex by causing it
8 to supply Elysium with NIAGEN at a price significantly lower than it normally
9 would, and to use its failure to pay for such large quantities of product and the
10 resulting financial pressure to extract a more favorable resolution of its concerns
11 regarding the NIAGEN Supply Agreement, and to exert economic leverage over
12 ChromaDex (FAC ¶¶ 27, 40–41). These allegations fall within the well-established
13 fraud exception to the economic loss rule.

14 Moreover, the authority Elysium relies on is distinguishable. For example,
15 Elysium cites *Goodbreak, LLC v. Hood By Air, LLC*, 2016 WL 146418 (C.D. Cal.
16 Jan. 12, 2016) as an example of a case where a retailer “allegedly made false promises
17 to induce the plaintiff to manufacture clothing on a trial basis at a discounted rate.”
18 (Mot. at 7.) However the complaint in that case failed to allege a false promise and
19 the court considered only whether the first exception to the economic loss rule applied
20 to the fraud claims (*i.e.*, whether the conduct “violates a duty independent of the
21 contract arising from principles of tort law”). *Goodbreak*, 2016 WL 146418, at *5
22 (citation omitted). The court simply found that plaintiff identified no such duty and
23 dismissed the claims. *Id.* *UMG Recordings* is likewise distinguishable because it
24 found that the defendant’s alleged conduct consisted of “nothing more than
25 [defendants’] alleged failure to make good on its contractual promises.” 117 F. Supp.
26 at 1106 (citation omitted). Similarly, in *Hale Bros. Inv. Co., LLC v. StudentsFirst*
27 *Inst.*, 2017 WL 590255, *7 (E.D. Cal. Feb. 14, 2017) the court found that the plaintiff
28 could not show that defendant’s “omissions were separate from the breach itself.”

1 None of these cases present facts analogous to Elysium’s fraudulent
 2 misrepresentations made with the clear intent to deceive and harm ChromaDex by
 3 inducing it to supply Elysium with extraordinarily large volumes of NR and
 4 pTeroPure, at extraordinarily low prices.

5 **a. The FAC Alleges that ChromaDex Was Distinctly**
 6 **Damaged by Elysium’s Fraud.**

7 The economic loss rule does not bar ChromaDex’s claim for a second reason:
 8 the FAC alleges that ChromaDex has been distinctly damaged by Elysium’s fraud.
 9 Specifically, the FAC alleges that Elysium’s false representations induced
 10 ChromaDex to supply Elysium with NIAGEN at a significantly reduced price
 11 compared to the price at which the parties transacted in the normal course of business.
 12 (FAC ¶¶ 27–28.) The transaction at this lower price did not violate the parties’
 13 agreements, but ChromaDex was damaged by its increased financial risk and exposure
 14 for Elysium’s failure to pay, essentially using ChromaDex as a bank and then
 15 defaulting on the loan, all in reliance on Elysium’s false statements. The FAC alleges
 16 that Elysium’s fraud was part of a deliberate plan to induce ChromaDex to take on a
 17 disproportionate amount of risk due to the size of the orders—more than double the
 18 largest of any of Elysium’s past orders—and then exploit ChromaDex’s weakened
 19 financial position when Elysium knew it would default on the payment obligation.
 20 (FAC ¶¶ 40–41.) This conduct and the resulting harm to ChromaDex concern more
 21 than Elysium’s mere performance under the Supply Agreements and the resulting
 22 damages are not barred by the economic loss rule. For this independent reason,
 23 Elysium’s motion should be denied.

24 **2. ChromaDex Justifiably Relied on Elysium’s False Statements.**

25 Elysium also argues that ChromaDex’s fraud claim insufficiently pleads
 26 reliance because ChromaDex “was already *contractually obligated* to fulfill” the
 27 orders which Elysium induced it to fill. (Mot. at 9.) This is not true—ChromaDex
 28 was not contractually obligated to fill the orders and only did so in reliance on

1 Elysium’s false statements. Nor was ChromaDex contractually obligated to fill the
2 order for NIAGEN at the discounted price offered to Elysium for the June 30 Purchase
3 Orders and it only did so in reliance on Elysium’s fraudulent misrepresentations.

4 The contracts at issue are “requirements” contracts. “A ‘requirements contract’
5 is ‘formed when one party agrees to furnish, and the other to accept and pay for, a
6 commodity in such quantity as the buyer’s business will require or need’” *Am.*
7 *Induction Techs., Inc. v. KBK, Inc.*, 2012 WL 12888105, at *3 (C.D. Cal. Apr. 20,
8 2012) (quoting *Fisher v. Parsons*, 213 Cal. App. 2d 829, 834 (1963)). The Supply
9 Agreements do not specify the quantities of NIAGEN or pTeroPure that Elysium must
10 order in a year, or with any single purchase order, but only an annual minimum
11 purchase requirement. (FAC Ex. B § 3.11.) When one pairs the language stating that
12 “ChromaDex shall sell and deliver, and Elysium Health shall purchase from
13 ChromaDex, such Niagen as Elysium Health orders from time to time” (FAC Ex. A §
14 3), with the context of ChromaDex being the exclusive authorized U.S. commercial
15 supplier of NR, it is clear that the Supply Agreements are requirements contracts. *See*
16 *Mozaffarian v. Breitling*, 1998 WL 827596, at *8–9 (N.D. Cal. 1998) (A requirements
17 contract exists “where the seller agrees to supply all of the buyer’s requirements.”).

18 As described above, California Commercial Code section 2306(1) states that
19 such terms in requirements contracts “means such actual output or requirements as
20 may occur **in good faith**, except that no quantity unreasonably disproportionate to any
21 stated estimate or in the absence of a stated estimate to any normal or otherwise
22 comparable prior output or requirements may be tendered or demanded.” (Emphasis
23 added.) This statute imposes two requirements on orders in such agreements: (1) that
24 the amount ordered must be for requirements that occur in good faith, and (2) that no
25 unreasonably disproportionate quantity may be demanded. Elysium’s June 30
26 Purchase Orders fail both of these requirements.

27 First, as discussed in Section IV.A.1 above, neither the June 28 or the June 30
28 Purchase Orders represented, “in good faith,” Elysium’s requirements for NIAGEN

1 and pTeroPure. The extraordinarily huge product volume ordered and supplied in July
2 and August of 2016, which Elysium represented to be its requirements only for the
3 period prior to Q3 2016, has in reality lasted through Q3 2016, Q4 2016 and now past
4 Q1 2017—three times longer than represented by Elysium, so far. Indeed, in its
5 Answer, Elysium admits that it still has a sufficient supply and is clearly
6 communicating to its customers and the public that the product supply will last during
7 the entire duration of this lawsuit. Elysium cannot reasonably argue that an
8 overstatement of 300%–600% was made in good faith. *See Homestake Min. Co. v.*
9 *Washington Pub. Power Supply Sys.*, 476 F. Supp. 1162, 1168 (N.D. Cal. 1979), *aff'd*
10 *sub nom. Homestake Mining Co. v. Washington Pub. Power Supply Sys.*, 652 F.2d 28
11 (9th Cir. 1981) (“A buyer under a requirements contract is not acting in good faith if it
12 insists on delivery of unneeded goods, even if at the time delivery was first requested
13 it had actual requirements.”). Clearly Elysium made the overly large orders to both
14 stockpile inventory and to simultaneously unwillingly conscript ChromaDex into
15 becoming Elysium’s bank to finance its product purchases. Neither of these actions
16 was in good faith.

17 Second, the June 30 Order was unreasonably disproportionate to the stated
18 estimates of the agreement and the prior amounts ordered by Elysium. Comment 3 to
19 California Commercial Code section 2306 specifically states that “[a]ny minimum or
20 maximum set by the agreement shows a clear limit on the intended elasticity.” *Amber*
21 *Chem., Inc. v. Reilly Indus., Inc.*, 2007 WL 512410, at *7 (E.D. Cal. Feb. 14, 2007).
22 The NIAGEN Supply Agreement states a minimum quantity term of 1,000 kg, which
23 was negotiated only four months before the June 28 and June 30 Purchase Orders.
24 Yet, the June 30 Purchase Order exceeded this amount several times over, and the
25 June 28 Purchase Order, which was double the June 30 Purchase Order, was even
26 more unreasonably disproportionate to this stated minimum.³ Even considering
27

28 ³ In fact, the unreasonably disproportionate quantity ordered in the June 28 Purchase

1 Elysium’s past orders as an alternative measure of reasonableness, the same
2 conclusion is reached. The FAC alleges that the June 30 Purchase Order was more
3 than double all of Elysium’s past orders combined. (FAC ¶ 22.) The June 28 and June
4 30 Purchase Orders are thus easily unreasonably disproportionate to the contract. *See*
5 *Shea–Kaiser–Lockheed–Healy*, 73 Cal. App. 3d at 691 (finding a 20 percent increase
6 was unreasonably disproportionate).

7 Thus, given that the purchase orders were both (1) made in bad faith and (2)
8 unreasonably disproportionate, ChromaDex would have been well-within its rights to
9 decline to fill the orders based on those factors alone. However, ChromaDex did not
10 refuse to fill the June 30 Purchase Orders and instead reasonably relied on Elysium’s
11 misrepresentations regarding its requirements.

12 Even further, ChromaDex was not contractually obligated to sell NIAGEN to
13 Elysium at any price. The NIAGEN Supply Agreement does not specify the price at
14 which the parties will transact, but only specifies a maximum price at which NIAGEN
15 can be sold to Elysium. (FAC Ex. A § 3.1.) Instead, the parties transacted at a
16 negotiated price. (FAC ¶¶ 22–23.) When negotiating that price, consistent with
17 normal economic forces, ChromaDex was willing to offer a lower price for larger
18 orders. Thus, when Elysium falsely represented that it would require extraordinarily
19 large volumes of product, ChromaDex reasonably relied on those statements when it
20 agreed to supply Elysium with NIAGEN at a significantly reduced price.

21 **B. ChromaDex Sufficiently Pleads All the Necessary Elements for Its**
22 **Misappropriation of Trade Secrets Claims.**

23 Elysium claims that ChromaDex fails to allege “even one” of the elements of its
24 claims for misappropriation of trade secrets (Mot. at 10), but Elysium fundamentally
25 misconstrues the pleading requirements. “To state a claim for misappropriation of
26

27 _____
28 Orders is, in part, why ChromaDex refused to fill that order and Elysium has not and
could not claim that such refusal was a breach.

1 trade secrets under the [California] Uniform Trade Secrets Act (‘UTSA’), Plaintiff
 2 must plead two primary elements: (1) the existence of a trade secret, and (2)
 3 misappropriation of the trade secret.” *Dealertrack, Inc. v. Huber*, 460 F. Supp. 2d
 4 1177, 1183 (C.D. Cal. 2006). *See also Oculus Innovative Scis., Inc. v. Nofil Corp.*,
 5 2007 WL 4044867, at *6 (N.D. Cal. Nov. 15, 2007); *Whyte v. Schlage Lock Co.*, 101
 6 Cal. App. 4th 1443 (2002); Cal. Civ. Code § 3426.1(b). ChromaDex pleads both of
 7 these elements.

8 **1. ChromaDex Does Not Have to Plead Actual Damages in Order**
 9 **to State a Claim for Trade Secret Misappropriation.**

10 Elysium argues that ChromaDex’s trade secret misappropriation claims fail
 11 because they do not plausibly plead damages, which Elysium incorrectly argues is an
 12 “essential element of a claim for misappropriation of trade secrets.” (Mot. at 19.)
 13 Elysium is wrong: actual damage is not a required element of a claim under CUTSA
 14 or the DTSA. The statutes provide that a plaintiff may recover a “reasonable royalty”
 15 even in those circumstances where “neither damages nor unjust enrichment caused by
 16 misappropriation are provable.” Cal. Civ. Code § 3426.3; *see also* 18 U.S.C. §
 17 1836(b)(3)(B). Further, the Ninth Circuit has held that even where a jury finds no
 18 harm arising from a misappropriation of trade secrets, a plaintiff can still obtain this
 19 relief. *Atl. Inertial Sys., Inc. v. Condor Pac. Indus. of Cal., Inc.*, 545 F. App’x 600,
 20 601 (9th Cir. 2013) (holding that the “district court erred in ruling, at the damages
 21 stage, that the jury’s finding of no harm precluded a reasonable royalty”). Thus even
 22 a complete failure to plead damages is not a basis to dismiss a claim for trade secret
 23 misappropriation under either the CUTSA or the DTSA. Yet, even if damages were
 24 required, the FAC does include allegations of both actual and threatened harm. (*See*
 25 FAC ¶¶ 114, 116.)

26 Elysium next weakly argues that ChromaDex’s “assertion of damage is not
 27 facially plausible” because the two companies “are not competitors.” (Mot. at 19.)
 28 However, Elysium does not need to be a competitor to harm ChromaDex by stealing

1 trade secrets and disrupting ChromaDex’s commercial relationships and activities.
2 (FAC ¶ 4.) Additionally, Elysium’s argument ignores Elysium’s need and ambition to
3 commercially manufacture or otherwise obtain an alternate supply of NR and
4 pterostilbene when its inventory from ChromaDex is exhausted, to continue producing
5 and selling Elysium’s sole product Basis. (See FAC ¶ 56; Answer at 2; FACC ¶¶ 28,
6 45.) ChromaDex would be gravely injured if Elysium achieves these goals by stealing
7 ChromaDex’s trade secrets or infringing ChromaDex’s patent rights. (FAC ¶ 1.)

8 Moreover, Elysium untenably stretches its construction of the law. The cases
9 Elysium relies on to argue that ChromaDex does not sufficiently plead damages do
10 not apply the urged standard *at the pleading stage*. Elysium cites *Magic Laundry*
11 *Servs., Inc. v. Workers United Serv. Emps. Int’l Union*, 2013 WL 1409530, at *3
12 (C.D. Cal. Apr. 8, 2013) to state a three-pronged test for whether ChromaDex’s FAC
13 states a claim for the misappropriation of trade secrets. (Mot. at 10.) However, *Magic*
14 *Laundry* analyzes whether a plaintiff had established a prima facie claim for trade
15 secret misappropriation in the context of a special motion to strike pursuant to
16 California’s Anti-SLAPP statute, where a substantive decision must be made by the
17 court as to whether the plaintiff can prove a claim on the merits. *Magic Laundry*, 2013
18 WL 1409530, at *1, 3–4; *see also* Cal. Civ. Code § 425.16. Thus the three-pronged
19 standard was used to determine if plaintiff had made a “showing that the claim is
20 legally sufficient and supported by a prima facie showing of facts sufficient for a
21 judgment in the plaintiff’s favor if the evidence relied on is credited.” *Id.* at *1
22 (emphasis added). This is clearly a much higher and much different standard than the
23 plausibility standard applicable to the pleading stage here.⁴

24
25
26 ⁴ Further, *Magic Laundry* cites the test from *Cytodyn, Inc. v. Amerimmune Pharm.,*
27 *Inc.*, 160 Cal. App. 4th 288, 297 (2008), a case reversing a decision on *summary*
28 *judgment* and which itself relies on *Sargent Fletcher, Inc. v. Able Corp.*, 110 Cal.
App. 4th 1658, 1665 (2003) for the standard, a decision analyzing whether the parties
satisfied their burden of proof *at trial*.

1 ChromaDex is not required to plead damages for its trade secret claims and
2 even if it was, ChromaDex has plausibly alleged that damage.

3 **2. ChromaDex Pleads the Existence of a Trade Secret and**
4 **Identifies Those Trade Secrets with Sufficient Specificity at the**
5 **Pleading Stage.**

6 Elysium argues that ChromaDex (1) “fails to explain how the purported trade
7 secrets at issue here are, in fact, protectable as trade secrets” (Mot. at 15) and (2) fails
8 “to identify any trade secret with the specificity needed to survive a motion to
9 dismiss” (Mot. at 13). Elysium is wrong on both counts—the alleged trade secret
10 information is protectable under CUTSA and the DTSA, and the FAC identifies the
11 trade secrets at issue with sufficient specificity. In fact, Elysium incorrectly conflates
12 the *pleading* standard with the *discovery* standard under California Code of Civil
13 Procedure section 2019.210.

14 **a. ChromaDex Pleads the Existence of a Trade Secret.**

15 Elysium alleges that “ChromaDex has failed to plead facts showing that the
16 subject matter of its purported trade secrets is protectable.” (Mot. at 14.) The test for
17 the existence of trade secrets is “whether the matter sought to be protected is
18 information (1) which is valuable because it is unknown to others and (2) which the
19 owner has attempted to keep secret.” *Dealertrack*, 460 F. Supp. 2d at 1183–84 (citing
20 *Whyte*, 101 Cal. App. 4th at 1443).

21 First, ChromaDex adequately alleges that the trade secrets at issue were
22 valuable because they were not known to others. (FAC ¶ 106 (alleging that the value
23 of the trade secrets at issue is “that their use has resulted and continues to result in
24 retention and renewal of existing accounts and customers as well as referrals to other
25 potential customers and accounts”).)⁵ Further, courts have found that in some

26 ⁵ While Elysium questions whether the identity of customers and collaborators can be
27 a trade secret, it is well established that where a plaintiff “has expended time and
28 effort identifying customers with particular needs or characteristics,” such information
is a trade secret. *Morlife, Inc., v. Perry*, 56 Cal. App. 4th 1514, 1521 (1997).

1 circumstances, “[i]t is self evident that some of the types of information” would “not
 2 [be] generally known to others in the trade.” *TMX Funding, Inc. v. Impero Techs.,*
 3 *Inc.*, 2010 WL 2509979, at *4 (N.D. Cal. June 17, 2010). In *TMX Funding* the court
 4 found that “[e]ntities outside of [plaintiff] certainly would not have general knowledge
 5 of” information such as “data, formulas, business methods, marketing plans, or margin
 6 data.” *Id.* These are precisely the sorts of trade secrets that ChromaDex alleges. (*See,*
 7 *e.g.*, FAC ¶ 105.) Thus ChromaDex’s FAC satisfies the first prong of the test for the
 8 existence of a trade secret.

9 Second, Elysium’s claim that the FAC only alleges “as a general proposition”
 10 that ChromaDex made reasonable efforts to keep its trade secret information secret, is
 11 false. (Mot. at 15.) ChromaDex alleges that it takes at least four actions “to ensure
 12 that its trade secret information remains secret.” (FAC ¶ 107.) These include:

- 13 1. “informing its employees of the restricted and prohibited use of the information
 14 and that it constitutes a trade secret;”
- 15 2. “making its employees with access to such information party to confidentiality
 16 agreements as conditions of their employment with ChromaDex;”⁶
- 17 3. “by restricting access to its trade secret information to only employees who
 18 have executed its confidentiality agreement and acknowledged and agreed to
 19 keep ChromaDex’s trade secrets secret;” and
- 20 4. “employing policies restricting the dissemination and use of its proprietary
 21 information.”

22 (FAC ¶ 107.) Similar allegations are regularly and consistently found to satisfy this
 23 requirement. *See e.g., Teva Pharm. USA, Inc. v. Health IQ, LLC*, 2013 WL
 24 12134185, at *3 (C.D. Cal. July 2, 2013) (finding allegations that defendant “trained
 25 and instructed its employees not to reveal confidential information to unknown
 26

27 ⁶ ChromaDex further alleges that it required Morris and Dellinger to enter
 28 confidentiality agreements as part of their employment with ChromaDex. (FAC ¶ 71.)

1 persons,’ had a policy in place prohibiting disclosure of confidential information,
 2 and required individuals with access to its confidential information to sign
 3 confidentiality agreements,” were “sufficient to plead the ‘reasonable steps’
 4 element.”); *Hanger Prosthetics & Orthotics, Inc. v. Capstone Orthopedic, Inc.*, 556
 5 F. Supp. 2d 1122, 1135 (E.D. Cal. 2008) (finding reasonable the protection of
 6 information “through having employees sign Employment Confidentiality/ Training
 7 Attestations”).

8 **b. ChromaDex Identifies the Trade Secrets with Sufficient**
 9 **Specificity at the Pleading Stage.**

10 Elysium argues that the “phrases” used by ChromaDex to describe the trade
 11 secrets “are plainly insufficient to permit Elysium to ascertain ‘the boundaries within
 12 which the secret lies.’” (Mot. at 13 (citing *GeoData Sys. Mgmt.*, 2015 WL 12731920,
 13 at *11).)⁷ However, the categories of information that ChromaDex identifies, when
 14 considered in context of the parties’ relationship, quite clearly provide Elysium and
 15 the court with sufficient notice of the information at issue at this pleading stage.

16 To state a claim for trade secret misappropriation, “the complainant should
 17 describe the subject matter of the trade secret with sufficient particularity to separate it
 18 from matters of general knowledge in the trade or of special knowledge of those
 19 persons who are skilled in the trade, and to permit the defendant to ascertain at least
 20 the boundaries within which the secret lies.” *Diodes, Inc. v. Franzen*, 260 Cal. App.
 21 2d 244, 252–53 (1968). On the other hand, “[o]ne who seeks to protect his trade
 22 secrets from wrongful use or disclosure does not have to spell out the details of the
 23 trade secret to avoid [dismissal]. To so require would mean that the complainant

24 _____
 25 ⁷ Elysium misconstrues ChromaDex’s burden at the pleading stage. The CUTSA
 26 requires that “*before commencing discovery relating to the trade secret*, the party
 27 alleging the misappropriation shall identify the trade secret with reasonable
 28 particularity.” Cal. Civ. Proc. Code § 2019.210 (emphasis added). This is, of course,
 customarily handled with a section 2019.210 statement served (but not filed), subject
 to a protective order.

1 would have to destroy the very thing for which he sought protection.” *Id.* at 252
 2 (citation omitted). *See also Meggitt San Juan Capistrano, Inc. v. Yongzhong*, 575 F.
 3 App’x 801, 803 (9th Cir. 2014) (noting appellants failure to cite authority requiring
 4 trade secret plaintiff to “identif[y] the particular trade secrets *at the pleading stage.*”) (emphasis in original).⁸ The particularity required in describing trade secrets differs
 5 on a case-by-case basis; for example, “incremental variations on . . . art in a highly
 6 specialized technical field” may require more particularity than less crowded or
 7 technical disciplines. *Brescia v. Angelin*, 172 Cal. App. 4th 133, 145–46 (2009).

9 Elysium’s criticisms of the “phrases” used to describe the alleged trade secrets
 10 is not the correct inquiry. Rather, the Court must look at whether ChromaDex’s
 11 identification of its trade secrets is “reasonable, i.e. fair, proper, just and rational . . .
 12 under all of the circumstances” *Advanced Modular Sputtering, Inc. v. Superior*
 13 *Court*, 132 Cal. App. 4th 826, 836 (2005). *See also Nextdoor.Com, Inc. v. Abhyanker*,
 14 2013 WL 3802526, at *6 (N.D. Cal. July 19, 2013) (holding that while “some of these
 15 listed trade secrets [were] somewhat more general, the list as a whole provides
 16 sufficient specificity to give [defendants] notice of [the plaintiff’s] allegations, at least
 17 at the pleading stage.”).

18 ChromaDex sufficiently specifies the trade secrets Elysium misappropriated.
 19 The trade secrets at issue are not alleged to be highly technical, and include “the
 20 identity of potential customers and collaborators, knowledge of those customers, and
 21 the contact information of one or more partners of ChromaDex” (FAC ¶ 111),
 22 “clinical study designs, clinical safety reports, and clinical study data” (FAC ¶ 112).
 23 Considered in context—where Elysium’s sole product is comprised of NIAGEN and
 24 pTeroPure, which are solely sourced by ChromaDex—the FAC alleges that Elysium
 25 is interested in information related to the manufacture, supply, and use of NIAGEN

26 _____
 27 ⁸ *New Show Studios LLC v. Needle*, 2014 WL 2988271, at *9 (C.D. Cal. June 30,
 28 2014) (finding Cal. Civ. Proc. Code § 2019.210 “does not provide grounds for
 dismissing a trade secret claim at the pleading stage”).

1 and pTeroPure. The FAC also alleges that the trade secret information includes
2 ChromaDex’s “information about the skills and abilities of its employees and agents,
3 and their salaries and benefits.” (FAC ¶ 105). The “boundaries” of the
4 misappropriated trade secrets are further defined by the fact that they were transmitted
5 by ChromaDex’s former employees and now Elysium’s employees, Morris and/or
6 Dellinger, to Elysium. The alleged trade secrets, when considered in context of
7 ChromaDex’s allegations in the FAC, are identified with more than sufficient
8 specificity to give Elysium notice of ChromaDex’s allegations.

9 Indeed, identifications of trade secrets far less specific than those alleged by
10 ChromaDex in the FAC have been determined sufficient by courts, including this
11 court. *See Teva Pharm. USA*, 2013 WL 12134185, at *3 (Carney, J.) (denying
12 motion to dismiss where alleged trade secrets “consist[ed] of ‘[t]he progress and
13 results of ongoing pre-clinical and clinical trials . . . ,’ ‘the timing of product
14 launches,’ and pricing for [plaintiff’s] products”); *Premiere Innovations, Inc. v. IWAS*
15 *Indus., LLC*, 2007 WL 2873442, at *4 (S.D. Cal. Sept. 28, 2007) (finding plaintiff’s
16 allegations that trade secrets were “‘the Products’ design, manufacture, pricing, and
17 market opportunity” were “sufficiently specific” “[f]or purposes of notice pleading”);
18 *New Show Studios LLC*, 2014 WL 2988271, at *9 (denying motion to dismiss where
19 plaintiffs “consistently allege[d] that the trade secrets concern client data and business
20 strategies”); *Edirect Publ’g, Inc. v. Livecareer, Ltd.*, 2014 WL 11974992, at *4 (S.D.
21 Cal. Mar. 18, 2014) (finding list of “broad categories of information” provided
22 defendant with “notice of the kinds of information that allegedly constitute trade
23 secrets”).

24 The cases Elysium cites do not lead to a different result. In *GeoData Sys.*
25 *Mgmt., Inc. v. Am. Pac. Plastic Fabricators, Inc.*, 2015 WL 12731920 (C.D. Cal.
26 Sept. 21, 2015) the court found that plaintiffs had not sufficiently identified the
27 alleged trade secrets, because the complaint’s main failing was the allegation that the
28 trade secret information, in addition to a specific list, also concerned “everything else

1 related” to the product at issue. *Id.* at *12. Such all-inclusive generalized and
 2 nebulous language did not “permit the defendant to ascertain at least the boundaries
 3 within which the secret lies.” *Id.* (citing *Nextdoor.Com, Inc.*, 2013 WL 3802526 at
 4 *5). *GeoData* is inapposite because ChromaDex intentionally did not use such
 5 overbroad generalizations in its pleading.

6 Similarly, in *Logtale, Ltd. v. IKOR, Inc.*, 2013 WL 4427254, at *5 (N.D. Cal.
 7 Aug. 14, 2013), the plaintiff alleged that “numerous manufacturing, packaging, and
 8 marketing ‘protocols’” had been misappropriated by defendant. However, the court
 9 found that plaintiff had failed “to explain which of these protocols, if any, are
 10 proprietary and actually pertain to its own pharmaceutical products,” and “only one
 11 relate[d] to a specific IKOR drug.” *Id.* at *5. In stark contrast, ChromaDex’s FAC
 12 alleges that the clinical trial protocols at issue belong to ChromaDex and involved the
 13 ingredients Elysium is concerned with, NR and pterostilbene. (FAC ¶ 112.)⁹

14 3. ChromaDex Adequately Pleads Misappropriation.

15 Elysium argues that “ChromaDex fails to allege a *single* act by Elysium—not a
 16 phone call, meeting, e-mail or anything else—where Elysium allegedly *sought*
 17 information that was purportedly a trade secret.” (Mot. at 17 (emphasis added).) But
 18 “seeking out” trade secret information is not an element of a trade secret
 19 misappropriation claim in any United States jurisdiction.¹⁰ Rather, the key elements
 20 are “acquisition by improper means” and/or “disclosure” or “use”.

21
 22 ⁹ See also *S. Cal. Inst. of Law v. TCS Educ. Sys.*, 2011 WL 1296602, at *7 (C.D. Cal.
 23 Apr. 5, 2011) (finding that, though plaintiff identified a large number of documents
 24 which obviously contained non-trade-secret information, plaintiff did “not identify
 25 which of those contain[ed] trade secrets”).

26 ¹⁰ ChromaDex alleges that Morris and Dellinger abruptly resigned from ChromaDex
 27 to work for Elysium and specifically alleges that the former employees wrongfully
 28 transmitted and Elysium acquired, ChromaDex’s trade secret information during their
 employ. (FAC ¶¶ 72, 75, 76.) These factual allegations raise the quite plausible
 inference that Elysium induced Morris and Dellinger to breach their confidentiality
 agreements with ChromaDex, including their non-disclosure obligations. (FAC ¶ 72.)

1 For example, the CUTSA provides that misappropriation may be proven by
2 alleging that the defendant, “[a]t the time of disclosure or use, knew or had reason to
3 know that his or her knowledge of the trade secret was . . . [a]cquired under
4 circumstances giving rise to a duty to maintain its secrecy or limit its use; or . . .
5 [d]erived from or through a person who owed a duty to the person seeking relief to
6 maintain its secrecy or limit its use.” Cal. Civ. Code § 3426.1(b)(2). *See also* Cal.
7 Civ. Code § 3426.1(b)(1) (defining misappropriation to also mean “[a]cquisition of a
8 trade secret of another by a person who knows or has reason to know that the trade
9 secret was acquired by improper means.”). By articulating a non-existent, straw-man,
10 burden of proof and a non-existent element of a claim, Elysium attempts to confuse
11 the Court into requiring ChromaDex to comply with a more stringent standard than
12 required:

13 [M]isappropriation and misuse can rarely be proved by convincing direct
14 evidence. In most cases plaintiffs must construct a web of perhaps
15 ambiguous circumstantial evidence from which the trier of fact may draw
16 inferences . . . that it is more probable than not that what plaintiffs allege
happened did in fact take place.

17 *UniRAM Tech., Inc. v. Taiwan Semiconductor Mfg. Co.*, 617 F. Supp. 2d 938, 944
18 (N.D. Cal. 2007) (quoting *Q-Co Indus., Inc. v. Hoffman*, 625 F. Supp. 608, 618
19 (S.D.N.Y.1985)). Once discovery commences on the trade secret claim, smoking gun
20 evidence of Elysium’s requests, encouragement, or instructions to Morris and
21 Dellinger may indeed surface, but under long-standing black letter law, that proof is
22 not required at this pleading stage.

23 ChromaDex’s pleading satisfies its notice pleading obligations with respect to
24 the trade secret misappropriation claim: ChromaDex alleges that (1) Elysium
25 acquired ChromaDex trade secret information from Morris and Dellinger (FAC ¶ 73–
26 74, 77, 111, 112), (2) that such acquisition was improper because it was in breach of
27 Morris’ and Dellinger’s confidentiality agreements with ChromaDex (FAC ¶ 72), and
28 (3) that Elysium knew or should have known that Morris and Dellinger were

1 contractually obligated to maintain the confidentiality of such information (FAC ¶
2 113).

3 Elysium’s case law on this issue is, again, off point. For example,
4 ChromaDex’s allegations of wrongful conduct by its former employees are
5 distinguishable from allegations such as those in *Epicor Software Corp. v. Alt. Tech.*
6 *Sols., Inc.*, 2013 WL 12130024, at *3 (C.D. Cal. Dec. 2, 2013), that rely on “a
7 misappropriation theory akin to the inevitable disclosure doctrine.” Unlike *Epicor*,
8 ChromaDex specifically alleges instances that Morris and Dellinger wrongfully
9 disclosed information to Elysium while both were still employed by ChromaDex. (*See*
10 FAC ¶ 73–74, 77, 111, 112). *See also Nextdoor.Com*, 2013 WL 3802526, at *6
11 (denying motion to dismiss where plaintiffs provided “general allegations that
12 [defendants] misappropriated [plaintiff’s] trade secrets,” but “specific factual
13 allegations supporting misappropriation claims for only a few of the alleged trade
14 secrets”).

15 The Ninth Circuit’s decision in *Meggitt San Juan Capistrano, Inc. v.*
16 *Yongzhong*, 575 F. App’x at 801 is instructive. In *Meggitt* the Ninth Circuit affirmed
17 the finding that plaintiffs had adequately alleged misappropriation. There the plaintiff
18 alleged that the trade secret was acquired “via a ‘breach . . . of a duty to maintain
19 secrecy’” in the form of a confidentiality agreement. *Id.* at 803. In that case, the
20 plaintiff was not even a party to the alleged confidentiality agreement. *Id.*
21 ChromaDex alleges similar facts to support its claim of misappropriation. Even if the
22 Court here could credit Elysium’s implausible argument that it could bury its head in
23 the sand and should not have known that Morris and Dellinger had confidentiality
24 agreements with ChromaDex,¹¹ Elysium knew or should have known of the former
25

26 ¹¹ If Elysium can prove that, in fact, it did not know of the confidentiality agreements
27 with Morris and Dellinger before hiring them, it calls into question Elysium’s abject
28 failure to conduct any pre-employment reasonable diligence and Elysium’s reckless
willful blindness.

1 employees’ general common law legal duty to not use information gained during their
2 employment to harm ChromaDex. *See e.g., Diodes*, 260 Cal. App. 2d at 251 (“A
3 director, officer, or employee who, by reason of his relationship to his corporation,
4 acquires trade secrets of his employer during his employment, cannot thereafter use
5 nor disclose to another his employer’s secret to the detriment of his employer.”).

6 **C. ChromaDex States A Claim For Misappropriation of Trade Secrets**
7 **Under the Federal Defend Trade Secrets Act.**

8 Elysium argues that the FAC “fail[s] to allege any conduct governed by the
9 Defend Trade Secrets Act (“DTSA”)” because it “do[es] not identify any act *by*
10 *Elysium* to obtain information from ChromaDex after the effective date” of the DTSA.
11 (Mot. at 20.) Elysium’s argument fails because it misstates the allegations of the
12 FAC.

13 ChromaDex clearly alleges several acts by Elysium occurring after May 11,
14 2016, the effective date of the DTSA. The FAC alleges that Morris made an unusual
15 request for the contact information of a ChromaDex research partner on May 25, 2016
16 and that Elysium, apparently acting with information from Morris, contacted that
17 same researcher just a few weeks later, in mid-June 2016. (FAC ¶ 74.) It can also be
18 properly inferred from the FAC’s allegations that Elysium took further action in
19 violation of ChromaDex’s trade secret rights after that date by discussing confidential
20 NIAGEN research with that individual after Dellinger, acting in concert with Elysium,
21 wrongfully and secretly gave permission to and encouraged that researcher to engage
22 with Elysium. (FAC ¶ 74.)

23 Moreover, if the FAC’s allegations regarding these specific dates occurring
24 after May 11, 2016 were somehow insufficient, the FAC also alleges that Morris and
25 Dellinger transmitted, and Elysium received, additional trade secrets during their
26 employment with ChromaDex. (FAC ¶¶ 77, 111, 112.) Morris’ resigned from
27 ChromaDex on July 16, 2016 (FAC ¶ 75)—more than two months after the effective
28 date of the DTSA. Dellinger resigned even later, on August 10, 2016. (FAC ¶ 76.)

1 When paired with the allegations that Morris transmitted ChromaDex trade secrets to
2 Elysium in April 2016 (FAC ¶ 73) and immediately started working at Elysium after
3 his resignation (FAC ¶ 75), it is a plausible inference that Elysium improperly
4 received further trade secret information from Morris between those two dates,
5 including the two month period between May 11, 2016 and July 16, 2016. These
6 allegations satisfy the DTSA's requirement that the misappropriation occur after May
7 11, 2016.

8 **V. CONCLUSION**

9 For all the foregoing reasons, ChromaDex respectfully requests that the Court
10 deny, in its entirety, Elysium's motion to dismiss the FAC's fourth, fifth, and sixth
11 causes of action.

12 Dated: April 3, 2017

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