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

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

14 ChromaDex, Inc.,
 15 Plaintiff,

16 v.

17 Elysium Health, Inc.,
 18 Defendant.

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

**CHROMADEx’S ANSWER TO
 ELYSIUM’S FIRST AMENDED
 COUNTERCLAIM**

Judge: Hon. Cormac J. Carney
 Courtroom: 9B

19 Elysium Health, Inc.,
 20 Counterclaimant,

21 v.

22 ChromaDex, Inc.,
 23 Counter-Defendant.

NATURE OF THE CASE

1
2 1. ChromaDex admits that Elysium purports to bring an action for fraud,
3 breach of contract, unfair competition, and declaratory judgment. ChromaDex notes
4 that the Court dismissed Elysium’s unfair competition claim with prejudice.
5 ChromaDex admits it entered into three contracts with Elysium (the “Agreements”).

6 2. ChromaDex denies knowledge or information sufficient to form a belief
7 about the truth of the allegations.

8 3. Admitted.

9 4. This paragraph contains legal conclusions to which no response is
10 required. To the extent a response is required, ChromaDex denies knowledge or
11 information sufficient to form a belief about the truth of the allegations, and otherwise
12 denies the allegations.

13 5. ChromaDex admits that it has in-licensed several patents relating to
14 nicotinamide riboside. This paragraph contains legal conclusions to which no response
15 is required. Except as expressly admitted herein, denied.

16 6. Denied.

17 7. Denied.

18 8. ChromaDex refers to the NR Supply Agreement itself for the terms of the
19 parties’ agreement. This paragraph contains legal conclusions to which no response is
20 required. ChromaDex otherwise denies the allegations.

21 9. ChromaDex refers to the NR Supply Agreement itself for the terms of the
22 parties’ agreement. This paragraph contains legal conclusions to which no response is
23 required. ChromaDex otherwise denies the allegations.

24 10. ChromaDex refers to the NR Supply Agreement itself for the terms of the
25 parties’ agreement. This paragraph contains legal conclusions to which no response is
26 required. ChromaDex otherwise denies the allegations.

27 11. Denied.

28 12. Denied.

1 13. Denied.

2 14. Denied.

3 15. ChromaDex admits that on June 30, 2016 Elysium submitted to it
4 purchase orders for 3000 kg of “Nicotinamide Riboside – Niagen” and 580 kg of
5 “Pterostilbene – pTeroPure.” ChromaDex denies knowledge or information sufficient
6 to form a belief about the truth of the remaining allegations, and otherwise denies the
7 allegations.

8 16. Denied.

9 17. Denied.

10 18. Denied.

11 19. Denied.

12 20. ChromaDex admits that Elysium purports to seek to rescind the License
13 and Royalty Agreement, obtain restitution and recover for damages. Except as
14 expressly admitted herein, denied.

15 **JURISDICTION AND VENUE**

16 21. Admitted.

17 22. Admitted.

18 **THE PARTIES**

19 23. ChromaDex denies knowledge or information sufficient to form a belief
20 about the truth of the allegations.

21 24. Admitted.

22 **FACTUAL ALLEGATIONS**

23 25. Admitted.

24 26. ChromaDex admits that nicotinamide riboside is found in nature, that
25 Elysium purports to quote the text of “marketing materials” that are quoted out of
26 context, and that NIAGEN® is the federally registered trademark ChromaDex uses to
27 market its nicotinamide riboside product. Except as expressly admitted herein, denied.

28 27. This paragraph contains legal conclusions to which no response is

1 required. ChromaDex otherwise denies the allegations.

2 28. Admitted.

3 29. Denied.

4 30. ChromaDex admits that it utilizes a third-party contract manufacturer to
5 manufacture NIAGEN and that the third-party contract manufacturer is prohibited
6 from distributing NIAGEN to any other party. Except as expressly admitted herein,
7 denied.

8 31. Denied.

9 32. This paragraph contains legal conclusions to which no response is
10 required. ChromaDex otherwise denies the allegations.

11 33. Admitted.

12 34. Admitted.

13 35. Admitted.

14 36. Admitted.

15 37. Admitted.

16 38. Denied.

17 39. Denied.

18 40. Denied.

19 41. ChromaDex denies knowledge or information sufficient to form a belief
20 about the truth of the allegations.

21 42. Admitted.

22 43. ChromaDex admits that Jaksch sent an email to Leonard Guarente on
23 August 26, 2013, and refers to that email for its contents. Except as expressly
24 admitted, ChromaDex denies the allegations.

25 44. Denied.

26 45. ChromaDex admits that Marcotulli sent an email to ChromaDex on
27 November 8, 2013, and refers to that email for its contents. Except as expressly
28 admitted, ChromaDex denies the allegations.

1 46. ChromaDex admits that Jaksch sent an email to Elysium on December
2 13, 2013, and refers to that email for its contents. Except as expressly admitted,
3 ChromaDex denies the allegations.

4 47. ChromaDex admits that Jaksch sent an email to Elysium on December
5 13, 2013, and refers to that email for its contents. Except as expressly admitted,
6 ChromaDex denies the allegations.

7 48. Denied.

8 49. ChromaDex admits that Jaksch sent an email to Elysium on December
9 20, 2013, and refers to that email for its contents. Except as expressly admitted,
10 ChromaDex denies the allegations.

11 50. ChromaDex admits that Jaksch sent an email to Elysium on December
12 27, 2013, and refers to that email for its contents. Except as expressly admitted,
13 ChromaDex denies the allegations.

14 51. Denied.

15 52. Denied.

16 53. ChromaDex admits that the parties entered into a Supply Agreement and
17 a Trademark License and Royalty Agreement on February 3, 2014, and refers to that
18 email for its contents. Except as expressly admitted, ChromaDex denies the
19 allegations.

20 54. ChromaDex admits that the Supply Agreement contains no express
21 license to ChromaDex's patent rights. Except as expressly admitted, ChromaDex
22 denies the allegations.

23 55. ChromaDex refers to the Trademark License and Royalty Agreement for
24 its contents. Except as expressly admitted, ChromaDex denies the allegations.

25 56. Denied.

26 57. ChromaDex refers to the Trademark License and Royalty Agreement for
27 its contents. Except as expressly admitted, ChromaDex denies the allegations.

28 58. ChromaDex refers to the Trademark License and Royalty Agreement for

1 its contents. Except as expressly admitted, ChromaDex denies the allegations.

2 59. Denied.

3 60. ChromaDex refers to the Supply Agreement, as amended, for its
4 contents. Except as expressly admitted, ChromaDex denies the allegations.

5 61. ChromaDex refers to the Supply Agreement, as amended, for its
6 contents. Except as expressly admitted, ChromaDex denies the allegations.

7 62. ChromaDex admits that the parties amended the Supply Agreement on
8 February 19, 2016. ChromaDex refers to the Supply Agreement, as amended, for its
9 contents. Except as expressly admitted, ChromaDex denies the allegations.

10 63. Denied.

11 64. ChromaDex admits that Alminana sent Jaksch an email on May 29, 2016,
12 and refers to that email for its contents. Except as expressly admitted, ChromaDex
13 denies the allegations.

14 65. ChromaDex admits that Jaksch sent an email to Elysium on June 13,
15 2016, and refers to the email for its contents. Except as expressly admitted,
16 ChromaDex denies the allegations.

17 66. Denied.

18 67. Denied.

19 68. Denied.

20 69. Denied.

21 70. ChromaDex admits that Jaksch sent an email to Elysium on June 14,
22 2016, and refers to that email for its contents. Except as expressly admitted,
23 ChromaDex denies the allegations.

24 71. Denied.

25 72. Denied.

26 73. Denied.

27 74. Denied.

28 75. Denied.

1 76. ChromaDex admits that its website refers to pterostilbene as “closely
2 related to resveratrol.” Except as expressly admitted, ChromaDex denies the
3 allegations.

4 77. Denied.

5 78. Denied.

6 79. Denied.

7 80. ChromaDex admits that it had several discussions with Elysium
8 regarding this dispute, and that Jaksch, Will Black, Rob Fried, and Steve Block were
9 involved in some of those discussions. ChromaDex admits that the parties exchanged
10 proposals. Except as expressly admitted, ChromaDex denies the allegations.

11 81. Denied.

12 82. Denied.

13 83. Admitted.

14 84. ChromaDex admits that it issued a non-renewal notice to Elysium that
15 terminated the Supply Agreement as of February 2, 2017. Except as expressly
16 admitted, ChromaDex denies the allegations.

17 85. Denied.

18 86. Denied.

19 87. Denied.

20 88. Denied.

21 **FIRST COUNTERCLAIM FOR RELIEF**

22 89. ChromaDex incorporates its responses in paragraphs 1 to 88 above as if
23 fully set forth herein.

24 90. Admitted.

25 91. Denied.

26 92. Denied.

27 93. Denied.

28 94. Denied.

1 95. Denied.

2 96. Denied.

3 97. Denied.

4 **SECOND COUNTERCLAIM FOR RELIEF**

5 98. ChromaDex incorporates its responses in paragraphs 1 to 97 above as if
6 fully set forth herein.

7 99. This paragraph contains legal conclusions to which no response is
8 required. To the extent a response is required, ChromaDex denies knowledge or
9 information sufficient to form a belief about the truth of the allegations, and otherwise
10 denies the allegations.

11 100. Denied.

12 101. Denied.

13 102. Denied.

14 **THIRD COUNTERCLAIM FOR RELIEF**

15 103. ChromaDex incorporates its responses in paragraphs 1 to 102 above as if
16 fully set forth herein.

17 104. Admitted.

18 105. Denied.

19 106. Denied.

20 107. Denied.

21 108. Denied.

22 109. Denied.

23 110. Denied.

24 **FOURTH COUNTERCLAIM FOR RELIEF**

25 111. ChromaDex incorporates its responses in paragraphs 1 to 110 above as if
26 fully set forth herein.

27 112. Denied.

28 113. This paragraph contains legal conclusions to which no response is

1 required. To the extent a response is required, ChromaDex denies the allegations.

2 114. Denied.

3 115. Denied.

4 **FIFTH COUNTERCLAIM FOR RELIEF**

5 116. ChromaDex incorporates its responses in paragraphs 1 to 115 above as if
6 fully set forth herein.

7 117. No response is required because the Court dismissed Elysium's
8 counterclaim for unfair competition (Cal. Bus. & Prof. Code § 17200). To the extent
9 a response is required, ChromaDex denies the allegations.

10 118. No response is required because the Court dismissed Elysium's
11 counterclaim for unfair competition (Cal. Bus. & Prof. Code § 17200). To the extent
12 a response is required, ChromaDex denies the allegations.

13 119. No response is required because the Court dismissed Elysium's
14 counterclaim for unfair competition (Cal. Bus. & Prof. Code § 17200). To the extent
15 a response is required, ChromaDex denies the allegations.

16 120. No response is required because the Court dismissed Elysium's
17 counterclaim for unfair competition (Cal. Bus. & Prof. Code § 17200). To the extent
18 a response is required, ChromaDex denies the allegations.

19 121. No response is required because the Court dismissed Elysium's
20 counterclaim for unfair competition (Cal. Bus. & Prof. Code § 17200). To the extent
21 a response is required, ChromaDex denies the allegations.

22 122. No response is required because the Court dismissed Elysium's
23 counterclaim for unfair competition (Cal. Bus. & Prof. Code § 17200). To the extent
24 a response is required, ChromaDex denies the allegations.

25 ChromaDex denies that Elysium is entitled to any of the relief requested.
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SEPARATE AND ADDITIONAL DEFENSES

For its separate and additional defenses, ChromaDex alleges as follows:

FIRST SEPARATE AND ADDITIONAL DEFENSE

Elysium lacks standing to assert the counterclaims.

SECOND SEPARATE AND ADDITIONAL DEFENSE

Elysium fails to state a claim upon which relief can be granted.

THIRD SEPARATE AND ADDITIONAL DEFENSE

Elysium consented to and/or ratified any actions that it now alleges to be unlawful.

FOURTH SEPARATE AND ADDITIONAL DEFENSE

Elysium did not sustain any loss, damage, harm, or detriment in any amount as a result of the allegations against ChromaDex.

FIFTH SEPARATE AND ADDITIONAL DEFENSE

Elysium acquiesced to any actions it now alleges to be unlawful or wrongful.

SIXTH SEPARATE AND ADDITIONAL DEFENSE

Elysium's counterclaims are barred by the doctrine of unclean hands.

SEVENTH SEPARATE AND ADDITIONAL DEFENSE

Elysium is barred from recovery, in whole or in part, by the doctrines of laches, estoppel, election of remedies, and other applicable equitable doctrines.

EIGHTH SEPARATE AND ADDITIONAL DEFENSE

Elysium has engaged in conduct and activities with respect to the subject matter of this dispute by reason of which they have waived any claims or demands.

NINTH SEPARATE AND ADDITIONAL DEFENSE

Elysium's breach of contract counterclaims are barred because Elysium failed to fulfill its contractual obligations under the contracts and/or there was a failure of consideration.

TENTH SEPARATE AND ADDITIONAL DEFENSE

The counterclaims are barred because Elysium would be unjustly enriched by

1 any recovery against ChromaDex.

2 **ELEVENTH SEPARATE AND ADDITIONAL DEFENSE**

3 ChromaDex has acted reasonably, in good faith, and with innocent intent with
4 respect to the conduct alleged.

5 **TWELFTH SEPARATE AND ADDITIONAL DEFENSE**

6 Elysium’s cause of action for declaratory judgment of patent misuse is barred
7 because ChromaDex has purged any and all alleged patent misuse.

8 In its First Amended Counterclaim, Elysium alleges that ChromaDex engaged
9 in patent misuse by “tying [] access to its patent rights to a royalty-bearing trademark
10 license” (FACC ¶ 111) and, “in some instances,” by “requir[ing] purchasers not only
11 to license, but also to use ChromaDex trademarks in order to obtain a supply of
12 nicotinamide riboside” (FACC ¶ 39). ChromaDex moved to dismiss Elysium’s
13 counterclaim for declaratory judgment of patent misuse on March 20, 2017 on
14 multiple grounds and contends that there is no viable allegation of patent misuse as a
15 matter of law and fact. (Dkt. 34.) However, the Court denied ChromaDex’s motion to
16 dismiss the patent misuse counterclaim by order dated May 10, 2017, permitting
17 Elysium to attempt to prove its allegation of patent misuse at trial. (Dkt. 44.)

18 ChromaDex denies that it has ever engaged in any act of alleged patent misuse
19 and specifically denies that it has engaged in patent misuse by “tying [] access to its
20 patent rights to a royalty-bearing trademark license” (FACC ¶ 111) and, “in some
21 instances,” by “requir[ing] purchasers not only to license, but also to use ChromaDex
22 trademarks in order to obtain a supply of nicotinamide riboside” (FACC ¶ 39).
23 ChromaDex further denies that Elysium’s allegations constitute patent misuse as a
24 matter of law. However, to eliminate an issue from this litigation, to conserve the
25 parties’ and the Court’s resources and to streamline this action, and without prejudice
26 to ChromaDex’s arguments and contentions, ChromaDex hereby unequivocally
27 renounces any rights to collect, charge, or obtain royalties under the Trademark
28 License and Royalty Agreement with Elysium. Pursuant to Section 14.1 of the

1 Trademark License and Royalty Agreement and ChromaDex's notice sent to Elysium
2 on October 31, 2016, the Trademark License and Royalty Agreement was
3 permanently terminated along with the NIAGEN Supply Agreement effective on
4 February 2, 2017. Accordingly, the allegedly offending terms of the Trademark
5 License and Royalty Agreement as alleged by Elysium are no longer of any operative
6 effect. The terminations of both agreements were made in the ordinary course of
7 business and are noted here for the purpose of confirming the purge of any alleged
8 patent misuse.

9 ChromaDex likewise hereby unequivocally renounces any rights to charge,
10 obtain, or collect royalties on sales of non-trademark bearing NIAGEN from
11 customers other than Elysium, or to require the use of its trademarks under any such
12 agreement. ChromaDex represents that it is immediately terminating all such
13 trademark license agreements. These terminations are made for the purpose of purging
14 any alleged patent misuse. ChromaDex is further refunding and/or crediting any and
15 all past royalties paid by all customers pursuant to all "royalty-bearing trademark
16 licenses." ChromaDex represents to the Court that it will provide a credit to Elysium
17 for all past royalties against the damages owed by Elysium in this case, including for
18 the failure to pay for product purchased.

19 These voluntary and proactive actions by ChromaDex are not an admission of
20 any wrong doing or acts of patent misuse, but instead are intended to prophylactically
21 and completely eliminate issues in this and any other dispute related to ChromaDex's
22 patents by purging any and all allegedly unlawful conduct with respect to all
23 allegations by Elysium of patent misuse. In particular, these voluntary acts are made
24 to dissipate any and all alleged effects of any alleged patent misuse in the market.
25 These voluntary steps taken by ChromaDex are intended to moot Elysium's allegation
26 and counterclaim for a declaratory judgment that ChromaDex has misused any of its
27 patents. Such counterclaim should be promptly voluntarily dismissed by Elysium, or
28 dismissed *sua sponte* by the Court based on the unequivocal terminations and

1 renouncements made herein.

2 **THIRTEENTH SEPARATE AND ADDITIONAL DEFENSE**

3 Elysium’s cause of action for declaratory judgment of patent misuse is moot.

4 **FOURTEENTH SEPARATE AND ADDITIONAL DEFENSE**

5 Elysium’s counterclaims are barred by their respective statutes of limitations.

6 **RESERVATION OF DEFENSES**

7 ChromaDex reserves the right to add additional defenses as the factual bases for
8 each of Elysium’s claims and allegations become known. Future discovery may reveal
9 additional facts that support additional affirmative defenses presently available to, but
10 unknown to, ChromaDex.

11 **PRAYER FOR RELIEF**

12 Wherefore, ChromaDex prays for relief and judgment as follows:

- 13 1. That the Court deny Elysium’s prayer for relief in its entirety and that
14 Court dismiss the counterclaims with prejudice and enter judgment in ChromaDex’s
15 favor.
- 16 2. That the Court award ChromaDex its costs, expenses, and attorney’s fees
17 as permitted by law.
- 18 3. That the Court award ChromaDex such other and further relief that it
19 deems appropriate.

20 **DEMAND FOR JURY TRIAL**

21 ChromaDex requests a jury trial as to all issues to which it is entitled.
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1 Dated: May 24, 2017

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