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14 **UNITED STATES DISTRICT COURT**  
15 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**  
16 **(SOUTHERN DIVISION)**

17 ChromaDex, Inc.,  
18 Plaintiff,  
19 v.  
20 Elysium Health, Inc.,  
21 Defendant.

Case No. SACV 8:16-02277-CJC(DFM)

**ELYSIUM HEALTH, INC.'S BRIEF IN  
OPPOSITION TO CHROMADEx, INC.'S  
SUPPLEMENTAL BRIEF IN SUPPORT OF ITS  
MOTION TO COMPEL PRODUCTION OF  
DOCUMENTS**

22  
23 Elysium Health, Inc.,  
24 Counterclaimant,  
25 v.  
26 ChromaDex, Inc.,  
27 Counter-Defendant.  
28

Date: December 13, 2017  
Time: 8:30 a.m.  
Judge: Hon. Douglas F. McCormick  
Courtroom: 6B

Discovery Cut-Off: June 14, 2018  
Pretrial Conference: September 10, 2018  
Trial: September 18, 2018

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1 ChromaDex's motion to compel production of documents (the "Alternate  
2 Source Documents") relating to Elysium's attempts to secure an alternate source of  
3 nicotinamide riboside ("NR") seeks documents that are not relevant to this action.  
4 ChromaDex's shifting and increasingly attenuated explanations for why production is  
5 necessary, and refusals to accept Elysium's reasonable proposals to address those  
6 rationales, suggests that ChromaDex seeks these documents for an improper purpose  
7 and to use in a manner that cannot be prevented by any protective order.

8 **I. FACTUAL AND PROCEDURAL BACKGROUND**

9 In entering into an agreement (the "Supply Agreement") to supply Elysium  
10 with NR in February 2014, ChromaDex committed to give Elysium "most favored  
11 nation" ("MFN") pricing, and to refrain from facilitating the sale by other companies  
12 of products combining NR and certain other ingredients (the "Exclusivity  
13 Provision"). In mid-2016, ChromaDex's attempts to mislead Elysium into believing  
14 it was receiving MFN pricing instead revealed that ChromaDex was in breach, as  
15 further investigation by Elysium confirmed. Assured by ChromaDex that it would  
16 investigate and grant Elysium a credit, Elysium placed an order for NR on June 30,  
17 2016. That order constituted Elysium's final order for NR placed with ChromaDex,  
18 which was, the parties agree, the sole commercial supplier of NR in the United States  
19 in early 2014. Elysium now sells its product incorporating NR sourced elsewhere.

20 In August 2017, ChromaDex (which had recently introduced its own product  
21 in competition with Elysium's product, Basis) submitted what Elysium contends to  
22 be a sham citizen petition to the FDA claiming the newly-sourced NR in Basis posed  
23 a danger to consumers because it purportedly contained trace amounts of a solvent.  
24 Elysium commenced litigation in the Southern District of New York on September  
25 27, 2017, for this disparagement. On October 26, 2017, ChromaDex, represented by  
26 the same counsel as it is here, served Elysium with a complaint in the same court  
27 echoing its sham petition. Discovery has been stayed in both actions.

1 The day before it filed that complaint, ChromaDex filed its motion to compel  
 2 (ECF No. 66-1), in which its sole argument in support of compelling production of  
 3 the Alternate Source Documents was that Elysium's pursuit of lost profits required it  
 4 to prove that it had or could have attained a sufficient supply of NR to make the lost  
 5 sales. (*See id.* at 13-18.) In a supplemental brief filed a few days later, ChromaDex  
 6 newly claimed entitlement to information on whether an alternative source "would  
 7 satisfy quality and safety standards" (ECF No. 68 at 2)—exactly the issues central to  
 8 the New York suits but not at issue in this case. At the same time, the parties briefed  
 9 a motion to dismiss Elysium's claim for patent misuse during which Elysium  
 10 highlighted threats by ChromaDex to sue for infringement. (*See* ECF No. 73.)

11 In response to ChromaDex's proffered rationale that these documents were  
 12 necessary for damages, Elysium proposed to stipulate that it would not have filled  
 13 any order during the Exclusivity Provision period with NR sourced other than from  
 14 ChromaDex (the "Stipulation"), thus rendering irrelevant the Alternate Source  
 15 Documents. ChromaDex declined, and introduced new arguments for why the  
 16 Alternate Source Documents were relevant, now in its supplemental brief ("Br"). In  
 17 response, Elysium offered to produce Alternative Source Documents relating to  
 18 attempts to locate an alternative source up to the entry into the 2014 agreement  
 19 underlying the patent misuse claim (the "2014 Proposal"). ChromaDex refused.

## 20 **II. THE ALTERNATE SOURCE DOCUMENTS ARE CUMULATIVE AND IRRELEVANT**

21 Elysium has previously committed to produce myriad categories of documents  
 22 that directly relate to the rationales ChromaDex offers.<sup>1</sup> The Stipulation and the  
 23 2014 Proposal directly address the discovery needs ChromaDex claims.

24 \_\_\_\_\_  
 25 <sup>1</sup> *See* Supplemental Powell Declaration, Ex. A ("Responses") at Response Nos.  
 26 7-8, 68-69 & ECF No. 76 ("JS") at Request Nos. 44-45, 47-48, 76-77 (lost profits);  
 27 Response Nos. 9-13 (patent misuse); Response Nos. 36-39 (unclean hands);  
 Response No. 5-6, 23-24, JS at Request Nos. 76-77, ECF No. 66-1 at 25 for Request  
 Nos. 71-75 (similarity); and Response Nos. 35-39 (substantial performance).

1 ChromaDex's newly claimed entitlement to all of the Alternate Source documents,  
 2 including information on sourcing through the present (a new demand, *see* ECF No.  
 3 76 at 2-3), due to its tenuous explanations of relevance<sup>2</sup> ignores Rule 26's  
 4 requirement that a party produce documents that are "proportional to the needs of the  
 5 case, considering [*inter alia*] the importance of the discovery in resolving the issues,  
 6 and whether the burden . . . outweighs its likely benefit." Fed. R. Civ. P. 26.  
 7 ChromaDex, arguing only relevance, addresses none of these factors, nor the extent  
 8 to which the Stipulation or 2014 Proposal address its claimed issues.<sup>3</sup> *See Sanofi-*  
 9 *Aventis U.S. v. Genentech, Inc.*, 2016 WL 7444676, at \*1 (C.D. Cal. Mar. 30, 2016)  
 10 (documents "marginally relevant" and cumulative not compelled).

### 11 **III. CHROMADEx DOES NOT JUSTIFY PRODUCTION THROUGH THE PRESENT**

12 ChromaDex has particularly failed to show that documents relating to  
 13 Elysium's alternate sourcing of NR through the present are relevant. First,  
 14 ChromaDex's broad requests are not relevant to issues raised by the patent misuse  
 15 claim. In this case, Elysium alleges that ChromaDex committed patent misuse by  
 16 conditioning its supply of NR to a license of ChromaDex's trademarks. (ECF No. 65  
 17 at ¶ 6). Conditioning a license with such a tying arrangement is patent misuse if the  
 18 patentee "has market power" in the relevant market. 35 U.S.C. § 271(d)(5). As the  
 19 statute's language makes clear, the relevant question is the patentee's market power

20 \_\_\_\_\_  
 21 <sup>2</sup> For example, ChromaDex's contention that whether Elysium "willfully"  
 22 breached the Supply Agreement is relevant to Elysium's "substantial performance"  
 23 (Br. at 5) relies on caselaw relating to substantial performance in constructing a  
 24 building—totally irrelevant here. *See Murray's Iron Works, Inc. v. Boyce*, 158 Cal.  
 25 App. 4th 1279, 1292 (2008); *cf. Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7  
 26 Cal. 4th 503, 517 (1994) (in breach of contract claim, "motivation is irrelevant").

27 <sup>3</sup> *See Broncel v. H&R Transp., Ltd.*, 2011 U.S. Dist. LEXIS 12592, at \*7-8  
 28 (E.D. Cal. Jan. 28, 2011) (excusing defendants from responding to discovery  
 requests on liability where defendants offered to stipulate to liability); *see also*  
*Bowerman v. Field Asset Servs.*, 2013 U.S. Dist. LEXIS 163197, at \*6-7 (N.D. Cal.  
 Nov. 14, 2013) (declining to compel production of relevant yet highly sensitive tax  
 documents where party had offered to stipulate to facts sought to be revealed).

1 only at the time of misuse. Once the patentee, in possession of market power,  
2 imposes the unlawful condition, then the misuse has occurred, even if it loses market  
3 power later. In this case, the challenged license agreement was executed in early  
4 2014. (ECF No. 1 at Ex. D). ChromaDex makes no effort to argue that Elysium's  
5 alternative sources of supply to the present has any relevance to its market power in  
6 2014. Nor can it, as it is undisputed that in 2014 ChromaDex was the sole supplier  
7 of NR. (*See* ECF No. 48 at ¶ 18.) And even if market power at a later date were  
8 relevant, ChromaDex makes no effort to explain how its sweeping Requests—  
9 including, *e.g.*, documents relating to Elysium's "representations" concerning its  
10 supply chain (*see* Request Nos. 41 & 42) are at all tailored to the issue.

11 ChromaDex cites to antitrust cases to argue that market power should be  
12 evaluated "over time." But these antitrust cases do not relate to the section of the  
13 Patent Act, discussed above, directed to market power in connection with a specific  
14 challenged license at a particular point in time. *Cf. Kimble v. Marvel Entm't, LLC*,  
15 135 S. Ct. 2401, 2413 (2015) (distinguishing between patent and antitrust law);  
16 *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 140-41 (1969) (same).  
17 Although ChromaDex argues that it may have entered into other impermissible tying  
18 arrangements later, it does not identify any in its brief or elsewhere that justify its  
19 sweeping discovery demands. As such, ChromaDex's demands for market power  
20 discovery related to unknown and undisclosed licenses is speculative. Elysium  
21 represents that it does not allege any such licenses were entered into after June 2016.

22 ChromaDex next argues that this information is relevant to whether its misuse  
23 had an "anticompetitive" effect. (Br. at 3 (citing *Princo Corp. v. Int'l Trade Comm'n*,  
24 616 F.3d 1318, 1334 (Fed. Cir. 2010)). But ChromaDex overlooks that *Princo* stated  
25 that "the key inquiry under the patent misuse doctrine is whether, by imposing the  
26 condition in question, the patentee has impermissibly broadened the physical or  
27 temporal scope of the patent grant and has done so in a manner that has

1 anticompetitive effects." 616 F.3d at 1328 (emphasis added). This language thus  
2 limits inquiry into anticompetitive effects to those related to the impermissible  
3 broadening. *See also Berlenbach v. Anderson & Thompson Ski Co.*, 329 F.2d 782,  
4 784 (9th Cir. 1964) (proof of substantial lessening of competition not prerequisite to  
5 patent misuse). Thus, the inquiry must relate to the effects from strengthening  
6 ChromaDex's trademarks, which is the anticompetitive broadening alleged. (ECF  
7 No. 65 at ¶ 41). Discovery into Elysium's alternative (non-public, non-commercially  
8 available, and non-trademarked) NR source is thus irrelevant. For ChromaDex's  
9 rationales of unclean hands and substantial performance, these explanations involve  
10 Elysium's intent up through placing the June 30 order (Br. at 4-5) and thus only  
11 support production of Alternate Source Documents through that date.

#### 12 **IV. THE POTENTIAL FOR MISUSE WEIGHS AGAINST PRODUCTION HERE**

13 Elysium has a credible concern that ChromaDex, which has offered shifting  
14 explanations for why the Alternate Source Documents are relevant, intends to use  
15 them, improperly, for purposes other than this litigation. ChromaDex, represented  
16 by the same counsel on all fronts, in its new complaint has suggested that Elysium's  
17 new source of NR is somehow illegitimate; the Alternate Source documents would  
18 effectively allow ChromaDex's counsel advance discovery to inform its strategy—an  
19 opportunity denied Elysium. The Alternate Source Documents may also relate to  
20 whether ChromaDex may sue Elysium for patent infringement as it has threatened.  
21 It is improper to use discovery to investigate unpled causes of action, *see Altman v.*  
22 *HO Sports Co.*, 2010 U.S. Dist. LEXIS 133280, at \*6 (E.D. Cal. Dec. 2, 2010), and  
23 to seek discovery for use in other litigations. *See Hupp v. San Diego Cty.*, 2014 U.S.  
24 Dist. LEXIS 52741, at \*36 n.9 (S.D. Cal. Apr. 9, 2014). The potential for misuse,  
25 particularly of documents postdating the June 30 order, in combination with  
26 ChromaDex's attenuated arguments of relevance, counsel against compelling  
27 production here.



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Dated: December 8, 2017

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