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14 **UNITED STATES DISTRICT COURT**  
15 **CENTRAL DISTRICT OF CALIFORNIA**  
16 **WESTERN DIVISION**

17 ChromaDex, Inc.,  
18 Plaintiff,  
19 v.  
20 Elysium Health, Inc. and Mark  
21 Morris,  
22 Defendants.

Case No.: 8:16-cv-02277-CJC-DFM  
[Assigned to the Hon. Cormac J. Carney]

**ELYSIUM HEALTH, INC.'S AND  
MARK MORRIS'S REPLY  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
THEIR MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

[*Filed Concurrently with Declaration of  
Joseph N. Sacca*]

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

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. PRELIMINARY STATEMENT**

For years, ChromaDex grossly overcharged Elysium for NR in violation of the MFN Provision of the parties’ NR Supply Agreement, before effectuating its scheme to seize the direct-to-consumer NR market for itself by seeking to eliminate not just Elysium, but its other NR customers as well. Rather than challenge Elysium’s irrefutable proof that it overcharged Elysium by millions of dollars and refused to issue the required refund or credit, ChromaDex instead tries in vain to manufacture an ambiguity that does not exist in the plain language of the MFN Provision, much of which ChromaDex itself drafted. But its failure to offer any alternative reading of the MFN Provision at all, let alone a plausible one, dooms ChromaDex’s opposition. Because ChromaDex is bound to honor the terms of the agreement as written, not as ChromaDex wishes they were written, and because there is no factual dispute that ChromaDex violated those plain terms, Elysium is entitled to summary judgment as to ChromaDex’s liability for breach of the MFN Provision of the NR Supply Agreement.<sup>1</sup>

Defendants are also entitled to summary judgment on the majority of ChromaDex’s affirmative claims for relief, due to its failure to prove the essential element of damages. ChromaDex’s damages expert calculated purported damages on the assumptions that: Defendants’ alleged “wrongful acts” having nothing to do

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<sup>1</sup> Capitalized terms not otherwise defined herein shall have the meaning assigned to them in Elysium’s memorandum of points and authorities in support of its motion for partial summary judgment. (ECF No. 230-01). Citations to “Opp. At \_\_\_” refer to ChromaDex’s Memorandum and Points of Authorities in Opposition to Elysium Health, Inc.’s and Mark Morris’s Motion for Partial Summary Judgment (ECF No. 295). Citation to Elysium Health, Inc.’s and Mark Morris’s Statement of Uncontroverted Facts and Conclusions of Law in Support of its Motion for Partial Summary Judgment, ECF No. 231, is indicated by “LR 56-1 ¶ \_\_\_”. And citation exhibits attach to the Declaration of Joseph N. Sacca in Further Support of Elysium Health’s and Mark Morris’s Motion for Partial Summary Judgment, filed concurrently herewith, is indicated by “Sacca Decl. Ex. \_\_\_.”

1 with purported trade secret misappropriation are compensable under California and  
2 federal trade secret law; Defendants’ alleged “wrongful acts” having nothing to do  
3 with the parties’ contracts are compensable under those contracts; and Defendants’  
4 alleged “wrongful acts” having nothing to do with fiduciary duties are compensable  
5 under California’s common law of fiduciary duty.

6 Faced with the dire consequences of those errors, ChromaDex asserts that it  
7 “may rightfully seek recovery for its harms with different claims.” (Opp. at 2). Be  
8 that as it may, the gulf between the delimited scope of recovery available under each  
9 of its claims and the undifferentiated damages analysis ChromaDex attributes to none  
10 of them in particular is too wide for the jury to cross. Because ChromaDex’s alleged  
11 proof of damages does not set forth the specific or identifiable damages arising from  
12 alleged acts in violation of trade secret law, nor from alleged acts in breach of the  
13 parties’ contracts, nor even from alleged acts in violation of fiduciary duties, that  
14 proof is grossly insufficient as to the damages element of those claims, entitling  
15 Defendants to summary judgment.

16 Finally, ChromaDex’s claim that Morris breached the New Employee  
17 Agreement he signed on his way out the door fails as a matter of law. The undisputed  
18 facts show that Morris received nothing in exchange for his signature on the  
19 document and that he did not continue to work for ChromaDex (nor that it was  
20 contemplated that he would do so) after signing the document. ChromaDex’s  
21 response—that consideration exists because Morris thanked his former colleagues  
22 before leaving for the last time—shows just how implausible ChromaDex’s theory  
23 of consideration actually is. Because the New Employee Agreement Morris signed  
24 in his last moments at ChromaDex is unenforceable for lack of consideration, Morris  
25 is entitled to summary judgment on ChromaDex’s claim for breach thereof.

26 **II. CHROMADDEX’S “STATEMENT OF FACTS”**

27 Instead of addressing the relevant facts underlying Elysium’s motion,  
28 ChromaDex offers a diatribe largely focused on Elysium’s contacts with [REDACTED]



1 [REDACTED] and Dartmouth  
2 University (ChromaDex’s then and current patent licensor). That discussion has no  
3 bearing on this motion and is packed with unsupported, misleading, and outright false  
4 statements.

5 Beneath the hyperbole and insinuation, ChromaDex’s complaint is that  
6 Elysium reached out to ChromaDex’s contract manufacturer and its patent licensor  
7 and discussed doing business with them. But in fact Elysium’s contacts with [REDACTED]  
8 and Dartmouth had no conceivable effect on ChromaDex’s relationship with  
9 them: [REDACTED] is still and always has been ChromaDex’s exclusive contract  
10 manufacturer, and Dartmouth is still and always has been ChromaDex’s exclusive  
11 patent licensor. In other words, Elysium’s contacts with [REDACTED] and Dartmouth  
12 harmed ChromaDex not a whit.

13 Nor does ChromaDex allege that those contacts entailed the disclosure of any  
14 of ChromaDex’s purported trade secret or confidential information. ChromaDex’s  
15 most aggressive contentions, such as its unsourced claim that “Elysium knew that  
16 when ChromaDex discovered that effort to undermine its exclusive partnership with  
17 [REDACTED] ChromaDex would cut off Elysium’s NR supply for the foreseeable future,”  
18 lack any evidence in the record. And while Elysium did initiate *inter partes* review  
19 proceedings before the U.S. Patent Trial and Appeal Board (“PTAB”), e.g., Elysium  
20 Health, Inc. v. Trustees of Dartmouth College, C.A. No. 19-1630, this hardly  
21 supports ChromaDex’s suggestion of improper attacks. The proceeding was amply  
22 justified, as it resulted in the PTAB invalidating four of five claims in one of the  
23 patents ChromaDex licenses, and Dartmouth dropped its appeal of that ruling.

24 When ChromaDex finally does get to the relevant part of its story, it fares no  
25 better. ChromaDex’s thesis is: “Having failed with [REDACTED] Elysium turned to its  
26 backup plan. Morris, leading the charge for Elysium, took key ChromaDex files—  
27 including certain NR specifications, analytical methods for NR, and the NR GRAS  
28 Dossier—and retyped or simply took screen shots ...” to help develop an alternative



1 source of NR. The problem for ChromaDex is that *each of those documents is*  
2 *public*. ChromaDex attached the NR specifications to SEC filings. (LR 56-1 ¶ 88).  
3 The analytical methods are available on the Internet. (See  
4 [https://www.docdroid.net/AJLBuaW/cdxa-atr-8292-00-ord79140-nicotinamide-](https://www.docdroid.net/AJLBuaW/cdxa-atr-8292-00-ord79140-nicotinamide-riboside-chloride.pdf)  
5 [riboside-chloride.pdf](https://www.docdroid.net/AJLBuaW/cdxa-atr-8292-00-ord79140-nicotinamide-riboside-chloride.pdf) (last accessed May 6, 2019)). And the NR GRAS dossier is  
6 publicly available on FDA’s website. (LR 56-1 ¶ 90). Stripped of rhetoric, then, the  
7 devious “backup plan” ChromaDex describes consists of using public information to  
8 develop a new source of NR.<sup>2</sup> So too in the case of the [REDACTED] related information that  
9 Elysium is alleged to have misappropriated: ChromaDex’s own product labels reveal  
10 its poorly guarded secret that [REDACTED] are used in the manufacture of its NR.  
11 ([https://www.truniagen.com/product\\_page.html](https://www.truniagen.com/product_page.html)).

12 ChromaDex also overreaches when it tries to show that Elysium misused its  
13 financial and sales data. ChromaDex claims that Morris “unlawfully divulged” to  
14 Marcotulli the price that ChromaDex paid its contract manufacturer for NR, and that  
15 Elysium CEO Eric Marcotulli then “rel[ied] on” that information “to reassure and  
16 persuade his investors that Elysium was on track for profitability.” (Opp. at 12).  
17 Here, the devil is in the details. The specific price Marcotulli provided to investors  
18 was not the price ChromaDex paid its manufacturer at all, and in fact it was  
19 *substantially lower* than the price ChromaDex paid its contract manufacturer  
20 [REDACTED]—a price, it bears mentioning, which ChromaDex’s CEO  
21 effectively disclosed to Elysium when he revealed ChromaDex’s margins. (Opp. at  
22 11; ECF No. 245-05 at 612). And if this pattern sounds familiar, that’s because it is.  
23 ChromaDex freely shared with Elysium price and sales data for its customer called  
24 Live Cell, only to later claim that it had been very much aggrieved when Morris (the  
25  
26  
27

28 <sup>2</sup> And even then, ChromaDex cites no evidence that any of those pieces of information actually helped Elysium develop its new source of NR.

1 ChromaDex employee charged with developing and maintaining the relationship  
2 with Elysium) allegedly told Elysium the same thing.<sup>3</sup>

3 **III. ARGUMENT**

4 **A. The MFN Provision Is Unambiguous As a Matter of Law and**  
5 **ChromaDex Breached It.**

6 The MFN Provision of the NR Supply Agreement requires ChromaDex to  
7 issue a refund or credit to Elysium if ChromaDex sells Niagen to another purchaser  
8 for a lower price than Elysium paid for the same or greater volume. ChromaDex  
9 does not dispute that it was obligated to comply with the MFN Provision during the  
10 pendency of the NR Supply Agreement. Nor does it contest that it supplied Niagen  
11 to other parties at lower prices than it charged Elysium during the Term of the  
12 Agreement; that Elysium's purchases of Niagen were of a higher volume than these  
13 other parties; or that ChromaDex never gave Elysium any credit or refund.  
14 Specifically, ChromaDex does not dispute that it made all of the sales alleged in  
15 Elysium's motion for summary judgment, and that it made them at the volume (with  
16 one exception) and price (with one exception) alleged by Elysium. Because at best  
17 these quibbles go to the amount of damages to which Elysium is entitled for  
18 ChromaDex's breach of the MFN, and cast no doubt on the fact of the breach,  
19 summary judgment is warranted on liability on this Counterclaim.

20 ChromaDex nonetheless tries to avoid the inevitable by straining to find  
21 ambiguity in the plain language of the MFN Provision. Under California law,  
22 whether a contract is ambiguous is a question of law. *Yi v. Circle K Stores, Inc.* 258

23 <sup>3</sup> ChromaDex claims that Jaksch "declined" to provide Elysium with Live Cell  
24 information. (Opp. at 6). Not so. When asked for the information, Jaksch initially  
25 responded that he was unsure what he could share, but he eventually disclosed to  
26 Elysium extensive information concerning Live Cell's order and price history,  
27 including: (1) that Live Cell purchased three times Elysium's volume in 2015 but  
28 was trailing Elysium on volume in 2016, (2) that Live Cell had made its last  
significant order in the third quarter of 2015, and (3) that Live Cell's price was  
\$800/kg, a price 20% below the price at which ChromaDex was selling to Elysium.  
(LR 56-1 ¶¶ 57-59, 77-78).

1 F. Supp. 3d 1075, 1082–83 (C.D. Cal. 2017). If the parties disagree about  
2 interpretation, the court follows a two-step approach. First, it considers whether the  
3 contract is ambiguous as a matter of law: “that is, the court considers extrinsic  
4 evidence to determine whether the contract is reasonably susceptible to a party’s  
5 proffered interpretation.” *Id.* at 1083. Courts attempt to “ascertain [the parties’]  
6 intention solely from the written contract, if possible.” *Starlight Ridge S.*  
7 *Homeowners Ass’n v. Hunter-Bloor*, 177 Cal. App. 4th 440, 447 (2009). If the court  
8 determines the contract is ambiguous, parol evidence is admissible to interpret the  
9 contract. *Yi*, 258 F. Supp. 3d at 1083. “Ambiguity does not arise merely because a  
10 word or phrase has multiple meanings, and ambiguity cannot be based on a strained  
11 instead of a reasonable interpretation of the contract’s terms.” *Id.* (citation and marks  
12 omitted).

13 The language of the MFN Provision is straightforward:

14 If, at any time during the Term, ChromaDex supplies Niagen (or a  
15 substantially similar product) to a Third Party at a price that is lower  
16 than that at which Niagen is supplied to Elysium Health under this  
17 Agreement, then the price of Niagen supplied under this Agreement  
18 shall be revised to such Third Party price with effect from the date of  
19 the applicable sale to such Third Party and ChromaDex shall promptly  
20 provide Elysium Health with any refund or credits thereby created;  
21 provided Elysium Health purchases equal volumes or higher volumes  
22 than the Third Party. For the sake of clarity this Section does not apply  
23 to inter-Affiliate transfers.

24 (ECF No. 153-03 at § 3.1). “Third Party” is defined in Section 1.15 of the Agreement  
25 as “any Person, other than ChromaDex, Elysium Health or their Affiliates.”<sup>4</sup> This  
26 language plainly contemplates that a single sale to a Third Party can trigger Elysium’s  
27 right to a lower price: its speaks of a sale “at any time,” not sales at “times;” it speaks

28 <sup>4</sup> “Person,” in turn, is defined in Section 1.13 as “an individual, corporation,  
partnership, limited liability company, trust, business trust, association, joint stock  
company, joint venture, pool, syndicate, sole proprietorship, unincorporated  
organization, governmental authority or any other form of entity not specifically  
listed herein.” (ECF No. 153-03).

1 of a sale “at a price that is lower,” not sales at “prices that are lower;” and it talks of  
2 Elysium’s entitlement to an adjustment to pricing “from the date of the applicable  
3 sale to such Third Party,” not from “the dates of the applicable sales” to the Third  
4 Party. Seeking to avoid this result, ChromaDex asserts that “supplies” and  
5 “volumes” are ambiguous terms. It is wrong. Moreover, even if ChromaDex is right  
6 about what “volumes” means, it still breached the MFN Provision.

7 When interpreting a contract, the Court should construe it as a whole, and  
8 words should be given their ordinary and popular meaning. Cal. Civ. Code § 1644;  
9 *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18–19 (Cal. 1995), *as modified on*  
10 *denial of reh’g* (Oct. 26, 1995) (“[L]anguage in a contract must be interpreted as a  
11 whole .... Courts will not strain to create an ambiguity where none exists.”). To  
12 “supply” is defined as to “to make available for use : PROVIDE.” MERRIAM-  
13 WEBSTER, <https://www.merriam-webster.com/dictionary/supply> (last visited Sept. 4,  
14 2019). Nothing in the NR Supply Agreement suggests that the parties meant to  
15 diverge from this ordinary meaning here.

16 ChromaDex contends that instead of its ordinary meaning, “supplies” means  
17 “given to a third party with which ChromaDex has a supply agreement or continuing  
18 supply relationship.” (Opp. at 25). It cites to absolutely nothing in support of this  
19 bald contention.<sup>5</sup> And it is no surprise that ChromaDex can find no support for its

20 \_\_\_\_\_  
21 <sup>5</sup> ChromaDex contends it would not have given discounted promotional prices  
22 to “a major customer like Elysium with an ongoing supply.” (Opp. at 25). But  
23 arguing that this compels the conclusion that “supplies” as used in the MFN Provision  
24 means “supplies pursuant to a supply agreement or in the course of an ongoing supply  
25 arrangement” is pure sophistry. The way ChromaDex could have avoided selling to  
26 Elysium at discounted prices was by not having sold to others at discount prices;  
27 indeed, the whole purpose of the MFN Provision was to ensure that ChromaDex  
28 would not favor other customers over Elysium on price. ChromaDex also contends  
that Elysium’s damages expert admitted that a fact finder might reject the lower  
prices at which ChromaDex sold to other customers, thus making summary judgment  
inappropriate. Not so. Elysium’s expert merely noted a discrepancy in the data  
provided as part of ChromaDex’s sworn interrogatory responses, and observed that  
the discrepancy could potentially affect the *amount* of damages a jury might find, not

1 argument; it runs contrary to the plain terms of the rest of the NR Supply Agreement.  
2 As described above, “Third Party” is a defined term expansively encompassing any  
3 conceivable individual or entity “other than ChromaDex, Elysium Health or their  
4 affiliates.” (ECF No. 153-03 § 1.15). ChromaDex’s proffered interpretation would  
5 excise that broad definition from the contract entirely, and instead replace it with a  
6 narrow definition of Third Party restricted to a party “with which ChromaDex has a  
7 supply agreement or continuing supply relationship.” (Opp. at 25). “It is clear,  
8 however, that if the provisions of a contract are not ambiguous, it is the duty of the  
9 court to enforce the contract as written and agreed upon by the parties.” *In re Air*  
10 *Passenger Comput. Reservations Sys. Antitrust Litig.*, 724 F. Supp. 744, 747 (C.D.  
11 Cal. 1989) (quoting *Div. of Labor Stand. Enf. v. Dick Bullis, Inc.*, 72 Cal. App. 3d  
12 Supp. 52, 56–57 (1977)).

13 Similarly, “[v]olumes” cannot reasonably mean anything other than the  
14 volumes purchased. A party can demonstrate ambiguity in contract language if “the  
15 contract is reasonably susceptible to a party’s proffered interpretation.” *Yi*, 258 F.  
16 Supp. 3d at 1083. But ChromaDex fails even to articulate what it thinks the word  
17 “volumes” means. ChromaDex cites internal, self-serving emails sent after the MFN  
18 conflict arose to assert that ChromaDex understood that volumes “referred to  
19 purchases over a period of time.” (Opp. at 24). But instead of explaining what  
20 “period of time” ChromaDex thought it was agreeing to – in language it drafted (ECF  
21 No. 238-05 at 198)—ChromaDex claims other parts of the contract contain “various  
22 commercially viable options, such as calendar year, 12-month trailing average, or  
23 quarterly trailing average.” *Id.* Any one of these options, it says, would be  
24 “reasonable” and would deprive Elysium of its entitlement to a refund. (Opp. at 24-  
25 25).

26  
27  
28 that it could cause a jury to find no breach. (ECF No. 308-03 ¶ 178). That is why  
Elysium seeks summary judgment on liability, but not on damages.

1 ChromaDex does not actually cite to any provision of the NR Supply  
2 Agreement to support its statement that the Agreement contains these three  
3 purportedly “viable options,” nor could it, because its statement is untrue. The NR  
4 Supply Agreement contains only one provision where anything is to be measured  
5 over a period of twelve months, and that is the provision that provides for the annual  
6 minimum purchases to be made by Elysium, measured in twelve month periods  
7 beginning from the date of Elysium’s first commercial sale of its product Basis. (ECF  
8 No. 153-03 § 3.11). ChromaDex does not offer this as a “viable option.” *Workman-*  
9 *Johnson v. Kaplan Higher Educ. Corp.*, 2008 WL 11336910, at \*3 (S.D. Cal. Aug.  
10 11, 2008) (a party to a contract “cannot create ambiguity in the contract by pointing  
11 to irrelevant language”). At deposition, each of ChromaDex’s senior executives  
12 offered a different version of what he believed the “period of time” was that should  
13 be used under the MFN Provision to compare the purchases between Elysium and a  
14 Third Party (ECF Nos. 244-01 at 347-348; 244-08 at 393-396; 246-11 at 934-935),  
15 and ChromaDex continues its inability to actually propose an interpretation of the  
16 contract to compete with Elysium’s interpretation through its opposition to this  
17 motion.

18 The reason for ChromaDex’s struggle to propose a competing interpretation is  
19 obvious; the type of interpretation ChromaDex seeks is found nowhere in the  
20 contract’s language. The purpose of contract interpretation is not to find out how  
21 many possible meanings a party can come up with for a particular word. It is to “give  
22 effect to the mutual intention of the parties as it existed at the time of contracting.”  
23 Cal Civ. Code § 1636. If ChromaDex really intended the MFN Provision to be  
24 triggered only by purchases “over a period of time,” it would have put that language  
25 in the contract when it drafted the provision at issue, and it certainly would now be  
26 able to specify what period of time applied, and specify the language in the contract  
27 supporting its interpretation. Ambiguity cannot be created by pointing out that “a  
28 word ... has multiple meanings;” *Yi*, 258 F. Supp. 3d at 1083; rather, there must be



1 ambiguity as to the parties’ mutual objective intent, demonstrated by the words of  
2 the contract and the contract as a whole. *In re Air Passenger Comput. Reservations*  
3 *Sys. Antitrust Litig.*, 724 F. Supp. at 747 (quoting *Yoshida v. Liberty Mut. Ins. Co.*,  
4 240 F.2d 824, 826–27 (9th Cir. 1957)) (“Where there is no ambiguity, there is  
5 nothing to be construed. And a court cannot and should not do violence to the plain  
6 terms of a contract by artificially creating ambiguity where none exists.”).

7 The notion that the MFN Provision would be triggered only by sales over a  
8 “period of time” is inconsistent with its plain language.<sup>6</sup> The MFN Provision is  
9 triggered if ChromaDex supplies Niagen to a Third Party “at any time” during the  
10 three-year term of the Agreement, and in addition to receiving a refund or credit,  
11 Elysium’s price is to be adjusted from “the date of the applicable sale” to that Third  
12 Party. (ECF No. 153-03 § 3.1). This language is consistent with a single sale on a  
13 particular date triggering the provision; it is not consistent with ChromaDex’s current  
14 position that multiple sales need to be considered. In contrast, when the parties really  
15 did require volumes to be measured over a period of time, such as with Elysium’s  
16 minimum purchase requirements, they said so explicitly. (*Id.* § 3.11 (specifying  
17 different periods of time for Elysium’s various minimum purchase commitments)).

18 Finally, even if the relative volumes of Elysium’s purchases were to be  
19 measured under the MFN Provision against those of a Third Party receiving a lower  
20 price during some twelve month period of time—and, as discussed above, they were  
21 not—ChromaDex still breached the MFN Provision. ChromaDex sold [REDACTED]  
22 of Niagen to Innovations 4 Health for [REDACTED] on February 5, 2014, before it sold  
23 Elysium 100 kilograms of Niagen on June 27, 2014 for \$1,300 per kilogram. (LR  
24 56-1 ¶¶ 34-35). It followed this with additional sales to Elysium, *but never sold*

25 <sup>6</sup> Even if the language were ambiguous, the principle that ambiguities are to be  
26 construed against the drafter (in this case, ChromaDex) would bar adoption of  
27 ChromaDex’s preferred interpretation. *See Sandquist v. Lebo Auto., Inc.*, 1 Cal. 5th  
28 233, 247 (Cal. 2016) (“ambiguities in written agreements are to be construed against  
their drafters.”); Cal. Civ. Code § 1654 (“In cases of uncertainty not removed by the  
preceding rules, the language of a contract should be interpreted most strongly  
against the party who caused the uncertainty to exist.”).



1 *Niagen to Innovations 4 Health again.* Thus, under any version of a twelve month  
2 period tossed out by ChromaDex, Elysium purchased higher volumes than  
3 Innovations 4 Health, and was entitled to a refund or credit from the date of the sale  
4 to Innovations 4 Health.<sup>7</sup> (ECF No. 237-11).

5 Accordingly, Elysium is entitled to summary judgment on liability on its  
6 counterclaim for breach of the MFN Provision.

7 **B. ChromaDex’s Trade Secrets Damages Theory Fails as a Matter of**  
8 **Law.**

9 In his report, ChromaDex’s damages expert puts forth a damages calculation  
10 on ChromaDex’s trade secret misappropriation claims that includes purported harms  
11 to ChromaDex or benefits to Elysium that do not arise from the alleged  
12 misappropriation of trade secrets, but instead relate to alleged conduct going to other  
13 of ChromaDex’s claims. (ECF No. 245-05). This stems from the expert’s erroneous  
14 assumption that the totality of damages and unjust enrichment arising from the  
15 totality of Elysium’s alleged “wrongful acts” is recoverable under each cause of  
16 action. (*Id.* at 83-121). Alerted to this unforced and fatal error that renders the  
17 expert’s opinion unhelpful to the jury, ChromaDex in its opposition papers falls back  
18 and claims that the “unitary harm” described in the expert’s report is recoverable  
19 “even assuming that Defendants misappropriated only one of ChromaDex’s trade  
20 secrets ....” (Opp. at 15, 18). This new theory of causation is inconsistent with the  
21 Gunderson Report, or at a minimum beyond its scope, and does not save ChromaDex  
22 from its inability to prove the damages element of its claims.<sup>8</sup>

23 \_\_\_\_\_  
24 <sup>7</sup> So too with respect to ChromaDex’s sale to Proctor & Gamble. Under any  
25 permutation of ChromaDex’s twelve-month period, Elysium purchased higher  
26 volumes of Niagen than did Proctor & Gamble. (ECF No. 237-11).

26 <sup>8</sup> ChromaDex suggests in a footnote that it would seek a “reasonable royalty”  
27 if its damages and unjust enrichment theories fail. (Opp. at 22 n. 12). But  
28 ChromaDex’s complaint does not seek such a royalty, nor does Gunderson purport  
to calculate one. The failure to provide any basis for a royalty calculation is fatal to  
the request. *Unilogic, Inc. v. Burroughs Corp.*, 10 Cal. App. 4th 612, 628 (1992)

1           1.    ChromaDex’s expert repeatedly conflates all of the alleged  
2                    wrongdoing supporting all of ChromaDex’s causes of action to  
3                    come to his opinion on damages.

4           The causal assumption on which ChromaDex’s expert based his damages  
5 opinion is that all the alleged wrongs caused an aggregate of harm to ChromaDex  
6 and unjust enrichment to Elysium. Purporting to calculate that aggregate amount,  
7 Gunderson repeatedly states his assumption that each aspect of the damages and  
8 unjust enrichment calculations arises from Elysium’s alleged “wrongful acts” writ  
9 large, which the Report defines to include each and every instance of wrongdoing by  
10 Defendants that ChromaDex alleges. (ECF No. 245-05 at 3, 83). At his deposition,  
11 Gunderson confirmed this point. In response to the question whether his Report  
12 “express[es] any opinion” on damages to ChromaDex and unjust enrichment to  
13 Elysium attributable to any one of the specifically alleged trade secrets, Gunderson  
14 testified: “I don’t look at it that way. I think it -- it’s damages caused by all of those  
15 elements in -- in concert. *Those elements in concert is the best way to put it.*” (Sacca  
16 Decl. Ex. 1 at 36:24-37:5 (emphasis added)).

17           ChromaDex tries to repair this deficiency by claiming that Gunderson’s  
18 “damages calculation would not change ‘to the extent that the jury finds that the one  
19 trade secret allowed Elysium to stay in business.’” (Opp. at 18). But Gunderson’s  
20 Report does not bear out that contention. ChromaDex claims that Gunderson’s  
21 Report supports its argument that “disgorgement of Elysium’s unjust profits is proper  
22 because there are sufficient facts for a jury to find that Defendants used ChromaDex’s  
23 trade secrets to get a new supply of NR and thus stay in business.” (Opp. at 16 (citing  
24 Report at 89)). This argument does not survive scrutiny when compared against the  
25 cited portion of Gunderson’s Report itself, in which Gunderson suggests that Elysium  
26 \_\_\_\_\_  
27 (“Just as Burroughs presented no evidence of the degree of Unilogic’s enrichment,  
28 Burroughs likewise presented no evidence that would allow the court to determine  
what royalty, if any, would be reasonable under the circumstances.”).

1 was able to stay in business “with funds from its Series B financing, which it obtained  
2 *in part due to its use of ChromaDex trade secrets, confidential, and proprietary*  
3 *information, and Mark Morris’s assistance before he terminated his employment with*  
4 *ChromaDex.”* (ECF No. 245-05 at 89 (emphasis added)). This opinion by  
5 Gunderson cannot, as ChromaDex contends, assist a jury to reach a conclusion on  
6 damages arising from the alleged use of one or even all of the claimed trade secrets  
7 by Elysium when it does not calculate damages on that basis, rendering disgorgement  
8 of all of its profits an inappropriate remedy. Because Gunderson does not limit his  
9 opinion to the alleged misappropriation of trade secrets, and instead sweeps within it  
10 alleged conduct related to entirely different claims, such as its breach of contract and  
11 breach of fiduciary duty claims against Morris and Elysium. Defendants are entitled  
12 to summary judgment on ChromaDex’s trade secret claims. (Sacca Decl. Ex. 1 at  
13 35:1-41:9).

14           2.     The divergence between the theory ChromaDex seeks to present  
15                   to the jury and the theory on which its expert’s opinion is based  
16                   distinguishes this case from the cases ChromaDex cites.

17           The authorities ChromaDex cites in support of its trade secrets damages  
18 analysis state that, in some cases, an expert need not separately calculate damages  
19 arising from individual trade secrets if the alleged trade secrets were part of a “unified  
20 structure” such that the misappropriation of any one trade secret would have caused  
21 all the damages sought in the expert’s calculation. Those cases are all distinguishable  
22 from this one.<sup>9</sup>

23           In *Ice Corp. v. Hamilton Sundstrand Corp.*, 615 F. Supp. 2d 1256, 1261–64  
24 (D. Kan. 2009), the plaintiff alleged misappropriation of three trade secrets that all

25           <sup>9</sup> ChromaDex’s reliance on *BladeRoom Grp. Ltd. v. Facebook, Inc.*, 2018 WL  
26 1611835 (N.D. Cal. Apr. 3, 2018), is curious. The heavily redacted opinion in that  
27 case renders the court’s reasoning almost entirely opaque and thus of little persuasive  
28 value; indeed, the decision redacts entirely the portions of the expert’s opinion in  
which he apparently stated his rationale for his decision not to apportion damages  
among the alleged trade secrets. *Id.* at \*6. Without that explanation, the reason why  
the court did not require apportionment is unknowable.

1 related to the sale of one product on one project. Similarly, the court in *Steves &*  
2 *Sons, Inc. v. JELD-WEN, Inc.*, 2018 WL 2172502, at \*11 (E.D. Va. May 10, 2018),  
3 relied on the expert’s opinion that there was a “critical mass” to the benefit the trade  
4 secrets provided, and that “once the user has a sufficient number of Trade Secrets, in  
5 aggregate, they provide a significant level of knowledge and know-how to derive  
6 meaningful and substantial benefits.” In *Iofina, Inc. v. Igor Khalev*, 2016 WL  
7 6242930 at \*3 (W.D. Okla. Oct. 25, 2016), the damages expert stated that “the  
8 damages are the same if any one trade secret is misappropriated” because all the  
9 alleged trade secrets were aspects of the plaintiffs’ “unique trade secret process for  
10 extracting iodine.” And in *ATS Prod. Inc. v. Ghiorso*, 2012 WL 253315, at \*2 (N.D.  
11 Cal. Jan. 26, 2012), there is no indication that the expert report incorporated any acts  
12 beyond those relevant to the trade secret claim.

13 Here, in contrast, Gunderson, as evidenced by his Report, neither opines nor  
14 assumes that any harm to ChromaDex or unjust benefit to Elysium resulted from  
15 misappropriation of just one of the twelve trade secrets ChromaDex alleges, or some  
16 “critical mass” of them, or even all of them. Instead, and thus distinguishing this  
17 case from any of those ChromaDex cites, Gunderson bases his trade secret  
18 misappropriation damages on virtually every act of wrongdoing alleged by  
19 ChromaDex not just on its trade secret claims, but on its contract and fiduciary duty  
20 claims as well, as clearly demonstrated by the repeated incantations in his Report to  
21 the effect that his trade secret damages calculation is predicated on “the alleged  
22 misappropriation of ChromaDex’s trade secrets, confidential and/or proprietary  
23 information at issue, and from the alleged aiding and abetting of Mark Morris’s  
24 breach of fiduciary duty.” (*See, e.g.*, ECF No. 245-05 at 3, 6, 86, 87, 92).  
25 ChromaDex cites no case in which a court has allowed an expert before a jury to  
26 opine that trade secret damages should be awarded for alleged conduct that does not  
27 include the claimed misappropriation of trade secrets, and Defendants are aware of  
28 none. Having elected to pursue a legally infirm theory and base its expert report

1 thereon, ChromaDex cannot now salvage its defective expert report by claiming that  
2 it describes damages it plainly does not.<sup>10</sup> The resulting damages calculation is  
3 therefore unsound and should not be presented to the jury. Elysium is entitled to  
4 summary judgment on ChromaDex’s claims for trade secret misappropriation.

5 3. ChromaDex’s new causation theory does not salvage its breach of  
6 contract or fiduciary duty claims.

7 Trade secret law does not apply to the taking of information that itself is not a  
8 trade secret. *Agency Solutions.Com, LLC v. TriZetto Grp., Inc.*, 819 F. Supp. 2d  
9 1001, 1030 (E.D. Cal. 2011). And claims for breach of fiduciary duty that are  
10 grounded in the taking of trade secrets are preempted. *ChromaDex, Inc. v. Elysium*  
11 *Health, Inc.*, 369 F. Supp. 3d 983, 989 (C.D. Cal. 2019) (Carney, J.) (ECF No. 182  
12 at 10). Despite this, and despite the divergent factual predicates underlying its claims  
13 for trade secret misappropriation, breach of contract, and breach of fiduciary duty,  
14 ChromaDex insists that its damages for all three claims are identical. Indeed,  
15 ChromaDex in its brief reverts back to the Gunderson Report’s erroneous conflation  
16 of harms when it argues that it has proved damages on its *breach of contract* and  
17 *breach of fiduciary duty* claims because “there are sufficient facts ... for a jury to  
18 conclude that Elysium stayed in business only through Defendants’ use of  
19 ChromaDex’s *trade secrets* ....” (Opp. at 21 (emphasis added)).  
20  
21

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22 <sup>10</sup> ChromaDex argues that the burden-shifting framework set forth in Section  
23 45 of the Restatement (Third) of Unfair Competition applies. Even if that framework  
24 applies here – and Defendants dispute that it does – ChromaDex has failed to meet  
25 its initial burden. The Gunderson Report does not purport to calculate damages  
26 specifically attributable to trade secrets (whether individually or in the aggregate),  
27 and so ChromaDex has failed to carry its burden “to establish sales attributable to  
28 [Defendants’] alleged trade secrets misappropriation.” *T-Mobile USA, Inc. v.*  
*Huawei Device USA, Inc.*, 122 U.S.P.Q.2d 1671 at \*1 (W.D. Wash. May 4, 2017).  
As a result, the burden never shifts to Elysium to prove portions of sales not  
attributable to any alleged trade secret misappropriation.

1           Unsurprisingly, none of ChromaDex’s authorities find the taking of trade  
2 secret information to be a proper basis for fiduciary duty claims, nor do they stand  
3 for the proposition that damages for trade secret misappropriation may encompass  
4 harms arising from acts other than the misappropriation of trade secrets. The best  
5 ChromaDex can do is cite to *Ajaxo Inc. v. E\*Trade Grp., Inc.*, 135 Cal. App. 4th 21  
6 (2005), but in that case, the acts alleged to have violated CUTSA were entirely co-  
7 extensive with those alleged to have breached the parties’ contract, rendering the  
8 damages under both claims also identical. *Id.* at 61 (“Ajaxo’s allegation that E\*Trade  
9 breached the NDA was the basis for the misappropriation claim”). Here, in contrast,  
10 ChromaDex’s trade secret, breach of contract, and breach of fiduciary duty claims  
11 are based on different factual predicates, rendering *Ajaxo* inapposite. And  
12 ChromaDex’s citation to *CrossFit Inc. v. Martin*, 2017 WL 3308989 (D. Ariz. Aug.  
13 3, 2017), fares even worse. There, the court denied a motion to exclude the counter-  
14 plaintiff’s damages report even though it failed to apportion damages between the  
15 two counter-defendants on the claim against each for tortious interference, reasoning  
16 that the harm on each claim was “substantially related to the same set of operative  
17 facts.” *Id.* at \*2.

18           Here, in contrast, both the *elements* of ChromaDex’s various claims and the  
19 *operative allegations* on which those claims are based vary substantially. Whereas  
20 ChromaDex’s claims for breach of contract against Elysium are based in relevant part  
21 on its allegations that Elysium disclosed to third parties documents ChromaDex  
22 provided to Elysium concerning the composition, specifications, and manufacture of  
23 its ingredients (ECF No. 153 ¶¶ 150-188), ChromaDex’s trade secret claims are much  
24 narrower and focus primarily on ChromaDex’s sales data (*Id.* ¶¶ 189-213). The  
25 fiduciary duty claims are even further afield, and “are premised on two theories  
26 distinct from the misappropriation of confidential information”: first, that Morris  
27 allegedly concealed from ChromaDex his relationship with Elysium as well as  
28 Elysium’s alleged intention to compete with ChromaDex, and second, that Morris



1 recruited another ChromaDex employee away from ChromaDex to come work for  
2 Elysium. (ECF No. 182 at 10, *ChromaDex, Inc. v. Elysium Health, Inc.*, 369 F. Supp.  
3 at 989). Indeed, with regard to ChromaDex’s claim for breach of fiduciary duty,  
4 preemption ensures that *there can be no overlap* with the trade secret claims at all.  
5 Because ChromaDex’s sole damages calculation is based on alleged trade secret  
6 misappropriation, that calculation by definition cannot satisfy ChromaDex’s burden  
7 to prove damages associated with the non-preempted aspects of its claims for breach  
8 of fiduciary duty and aiding and abetting thereof. As with its trade secret  
9 misappropriation claims, ChromaDex’s desperate attempt to recharacterize the  
10 Gunderson Report’s damages analysis on its breach of contract and breach of  
11 fiduciary duty claims fails.

12 **C. The New Employee Agreement Lacks Consideration.**

13 ChromaDex is wrong to persist in its argument that forbearance substitutes for  
14 the manifest lack of consideration supporting the New Employee Agreement Morris  
15 signed in his last moments on ChromaDex’s premises. In California, “[t]he  
16 surrendering of a legal right is valid consideration if ‘the minds of the party [sic.]  
17 meet on the relinquishment of the right as a consideration.’” *In re Zamora*, 2012 WL  
18 2792938, at \*15 (Bankr. N.D. Cal. July 9, 2012) (quoting *Blonder v. Gentile*, 149  
19 Cal. App. 2d 869, 875 (1957)). ChromaDex is unable to point to any evidence that  
20 both Morris and it understood his signing of the document to be given in exchange  
21 for ChromaDex’s “*relinquishment*” of any right. Nor can ChromaDex point to any  
22 “legal right” it relinquished. Although it suggests that it refrained from “tak[ing]  
23 further action to protect its interests” in the allegedly confidential information Morris  
24 is accused of taking, nowhere does it even attempt to establish it had a legal right to  
25 take action during the “voluntary exit interview” other than to seek to enforce any  
26 confidentiality obligations Morris had. (ECF No. 295-03 ¶ 8 (Robles Decl.)). And  
27 because ChromaDex is presently before this Court seeking to enforce the very rights  
28



1 it claims to have forbore, it has not relinquished anything at all. ChromaDex’s  
2 forbearance theory of consideration fails as a result.

3 ChromaDex is also wrong to persist in its argument that ChromaDex provided  
4 even a peppercorn of consideration in connection with the New Employee Agreement  
5 that *its departing employee signed during his exit interview*. As ChromaDex’s own  
6 evidence confirms, when Morris signed that document, he had already relinquished  
7 his ChromaDex electronic devices; his final checks had already been printed; and he  
8 had been provided information on post-employment COBRA benefits available to  
9 him. (ECF No. 246-12; Morris Decl. ¶¶ 18-21, ECF No. 234-01 (testifying that  
10 everything checked or initialed on Morris’s separation checklist had been taken care  
11 of prior to or during the exit interview)). And ChromaDex’s HR representative does  
12 not dispute that Morris left the premises immediately after she had him sign the New  
13 Employee Agreement. (ECF No. 295-3 ¶ 24 (Robles Decl.); ECF No. 234-01 ¶¶ 20-  
14 23 (Morris Decl.)). These facts plainly contradict the notion that Morris had anything  
15 left to do but say his goodbyes, which ChromaDex cites in a quixotic stab at proving  
16 consideration. (Opp. at 23). To find consideration on these facts—facts which  
17 eviscerate the presumption of consideration in California Civil Code § 1614—  
18 requires the suspension of common sense. Morris received nothing in exchange for  
19 his signature on the New Employee Agreement, which is therefore unenforceable for  
20 lack of consideration.

#### 21 **IV. CONCLUSION**

22 Defendants’ motion for summary judgment should be granted in favor of  
23 Elysium as to liability for ChromaDex’s breach of the MFN Provision (Elysium’s  
24 First Counterclaim) and in favor of Defendants as to ChromaDex’s claims for trade  
25 secret misappropriation (Third and Fourth Claims). Summary judgment should also  
26 be granted in favor of Defendants and against ChromaDex on: ChromaDex’s claims  
27 against Elysium for breach of contract (First and Second Claims) except as those  
28 claims relate to Elysium’s alleged failure to pay invoices issued in connection with

1 its June 30, 2016 orders; ChromaDex’s claims against Morris for breach of contract  
2 (Fifth and Sixth Claims); ChromaDex’s claim against Morris for breach of fiduciary  
3 duty (Seventh Claim); and ChromaDex’s claim against Elysium for aiding and  
4 abetting breach of fiduciary duty (Eighth Claim).

5 Respectfully submitted,

6 Dated: September 5, 2019

**BAKER & HOSTETLER LLP**

7  
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