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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  
Morris,  
21 Defendants.

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

**ELYSIUM HEALTH, INC.'S AND  
MARK MORRIS'S MEMORANDUM  
OF CONTENTIONS OF LAW AND  
FACT [L.R. 16-4]**

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

Pre-Trial Conference: September 18, 2019  
Trial: October 15, 2019

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1 Defendant and Counterclaimant Elysium Health, Inc. (“Elysium”) and  
2 Defendant Mark Morris (“Morris”) (collectively, “Defendants”) hereby submit,  
3 pursuant to Local Rule 16-4, the following contentions of law and fact regarding their  
4 claims and defenses in this matter.

5 **I. INTRODUCTION**

6 Elysium sells a direct-to-consumer (“DTC”) product called Basis, a dietary  
7 supplement that supports cellular health by increasing and sustaining NAD+ levels  
8 and activating sirtuins. Basis is comprised principally of two ingredients:  
9 nicotinamide riboside (“NR”) and pterostilbene (“PT”). Under three different  
10 agreements, from 2014 to 2016, Elysium purchased NR and PT from ChromaDex:  
11 the NR Supply Agreement, executed in February 2014 and amended in  
12 February 2016 (the “Amendment”); the Trademark License and Royalty Agreement,  
13 executed in February 2014 (“TLA”); and the pTeroPure Supply Agreement, executed  
14 in June 2014. ChromaDex was the sole commercial supplier of NR, and was the  
15 exclusive licensee of certain NR-related patents.

16 Over time, ChromaDex grew envious of Elysium’s success in the DTC market,  
17 and it ultimately developed a strategy to, in the words of its then-CEO, “Be our own  
18 Elysium.” In 2015, ChromaDex executed a NR supply agreement with a company  
19 founded and owned by one of its directors called Healthspan Research, LLC  
20 (“Healthspan”). Healthspan planned to sell a NR supplement in the DTC market.  
21 ChromaDex’s agreement with Healthspan provided for ChromaDex to supply  
22 Healthspan with a substantial amount of NR at no cost in exchange for a small equity  
23 stake in Healthspan. From this initial foray, ChromaDex’s strategy evolved to the  
24 point where it decided to acquire Healthspan outright as a platform for it to sell NR  
25 in the DTC market. Another prong of this strategy called for ChromaDex to eliminate  
26 its existing NR customers, including Elysium, from the DTC market by ceasing sales  
27 of NR to them. Indeed, ChromaDex completed its acquisition of Healthspan just a  
28 month after it effected a termination of its agreement to supply Elysium with NR.

1 Elysium was unaware that ChromaDex was using it and ChromaDex’s other  
2 customers as a stalking horse to create the dietary supplement market for NR so that  
3 ChromaDex could then introduce its own DTC product, cut off the ingredient supply  
4 to its customers, and seize the market for itself. Even though ChromaDex was  
5 keeping its intentions quiet, however, it was making its contempt for Elysium as a  
6 long-term customer clear. The parties’ relationship deteriorated over the course of  
7 2016 after Elysium became aware that ChromaDex had breached the most-favored-  
8 nations pricing provision (“MFN Provision”) of the parties’ NR supply agreement,  
9 but ChromaDex refused to provide Elysium with the information necessary to  
10 determine the amount of refund or credit it was owed by ChromaDex. While that  
11 issue remained unresolved, Elysium learned that ChromaDex was in violation of its  
12 agreement to give Elysium exclusivity over products containing NR and PT or any  
13 substantially similar ingredients, and then subsequently discovered that ChromaDex  
14 had been, through the life of their relationship, in breach of the NR supply  
15 agreement’s provision requiring ChromaDex to deliver NR manufactured to  
16 standards agreed to in the NR Supply Agreement. Elysium also learned that  
17 ChromaDex’s CEO had defrauded it into executing the TLA, which required it to pay  
18 royalties to ChromaDex and gave it access to ChromaDex trademarks it did not want  
19 to, and never did, use, by falsely representing that it required every one of its NR  
20 customers to sign a similar agreement.

21 The parties were unable to reach agreement on their disputes – in hindsight, no  
22 surprise, since ChromaDex had determined to eliminate Elysium as an NR customer  
23 as part of its plan to take the DTC market for itself – and this litigation followed.

24 **II. PLAINTIFF’S CLAIMS**

25 **A. Summary**

26 ChromaDex asserts eight claims for relief: (1) breach of contract by Elysium  
27 (pTeroPure Supply Agreement); (2) breach of contract by Elysium (NR Supply  
28 Agreement); (3) misappropriation of trade secrets under California’s Uniform Trade

1 Secrets Act (“CUTSA”) by Defendants; (4) violation of Federal Defense of Trade  
2 Secrets Act (18 U.S.C. § 1836) by Defendants; (5) breach of contract by Morris  
3 (“Receipt & Acknowledgment of Employee Handbook”); (6) breach of contract by  
4 Morris (“Confidentiality and Non-Solicitation Agreement (For New Employees)”);  
5 (7) breach of fiduciary duty by Morris; and (8) aiding and abetting a breach of  
6 fiduciary duty by Elysium.

7 **B. Elements Required to Establish Plaintiff’s Claim Against Elysium**  
8 **for Breach of Contract (pTeroPure Supply Agreement & NR**  
9 **Supply Agreement) (Claims 1 & 2)**

10 Plaintiff ChromaDex must establish the following in order to recover damages  
11 on these claims:

- 12 1. That Elysium breached the pTeroPure Supply Agreement by not paying for  
13 its last order of pterostilbene (\$580,750);
- 14 2. That Elysium breached the NR Supply Agreement by not paying for its last  
15 order of NR (\$2,402,600);
- 16 3. That ChromaDex’s report purporting to determine that pterostilbene is safe  
17 (the “pTeroPure GRAS Report”) was “Confidential” under the terms of §  
18 15.1 of the pTeroPure Supply Agreement;
- 19 4. That Elysium breached the pTeroPure Supply Agreement by disclosing the  
20 pTeroPure GRAS Report to a third party;
- 21 5. That ChromaDex’s PT Specifications were “terms” of the pTeroPure  
22 Supply Agreement pursuant to § 15.2 of that agreement;
- 23 6. That Elysium breached the pTeroPure Supply Agreement by disclosing  
24 ChromaDex’s PT Specifications to a third party;
- 25 7. That what ChromaDex calls the “NR Study Data,” which are the results of  
26 a clinical trial, were “Confidential” under the terms of § 4.1 of the NR  
27 Supply Agreement;
- 28

- 1 8. That Elysium breached the NR Supply Agreement by disclosing the NR
- 2 Study Data to a third party;
- 3 9. That what ChromaDex calls the NRCl Analytical Method, which is a
- 4 method for testing the purity of NR, was “Confidential” under the terms of
- 5 § 4.1 of the NR Supply Agreement;
- 6 10. That Elysium breached the NR Supply Agreement by disclosing the NRCl
- 7 Analytical Method to a third party;
- 8 11. That ChromaDex’s NR Investigator’s Brochure was “Confidential” under
- 9 the terms of § 4.1 of the NR Supply Agreement;
- 10 12. That Elysium breached the NR Supply Agreement by disclosing
- 11 ChromaDex’s NR Investigator’s Brochure to a third party;
- 12 13. That ChromaDex’s NR Specifications were “terms” of the NR Supply
- 13 Agreement pursuant to § 4.2 of that Agreement;
- 14 14. That Elysium breached the NR Supply Agreement by disclosing
- 15 ChromaDex’s NR Specifications to a third party;
- 16 15. That ChromaDex suffered damages for each individual alleged breach
- 17 outlined above; and
- 18 16. That ChromaDex’s own breaches of the NR Supply Agreement did not
- 19 excuse Elysium’s alleged breaches.

20 1. Elysium’s Evidence in Opposition to Plaintiff’s Claims for

21 Breach of Contract (Claims 1 & 2)

22 *First*, the evidence will show that because of ChromaDex’s breach of the MFN

23 Provision of the NR Supply Agreement, discussed *infra* at 23, ChromaDex owes

24 Elysium a credit larger than the combined amount of the orders of PT and NR that it

25 claims Elysium did not pay for, and therefore that ChromaDex cannot succeed on its

26 claims for breach of contract.

27 *Second*, the evidence will show that Elysium did not breach either the NR

28 Supply Agreement or the pTeroPure Supply Agreement by disclosing to a third party

1 the NR Specifications and PT Specifications that ChromaDex contends constituted  
2 part of the “terms” of those agreements. ChromaDex does not even allege, much less  
3 can it prove, that Elysium provided to any third party either the NR or the PT  
4 Specifications that were referenced in and attached to the NR Supply Agreement and  
5 the pTeroPure Supply Agreement, respectively. Indeed, ChromaDex concedes that  
6 the specifications for NR and PT Elysium provided to a third party differ from the  
7 NR and PT Specifications attached to the parties’ contracts. Moreover, the evidence  
8 will show that ChromaDex publicly disclosed the NR Supply Agreement and the  
9 pTeroPure Supply Agreement, *with the NR Specifications and the PT Specifications*  
10 *attached*, as part of a quarterly filing it made with the United States Securities and  
11 Exchange Commission *months* before it alleges that Elysium disclosed any set of  
12 specifications to a third party.

13 *Third*, the evidence will show that none of the documents ChromaDex claims  
14 were improperly disclosed by Elysium were in fact “confidential” under the terms of  
15 the parties’ contracts. The relevant confidentiality clauses of the supply agreements  
16 state that information is not confidential if it “become[s] publicly known, without  
17 fault on the part of the other party, subsequent to disclosure of such information by  
18 the disclosing party to the other party.” ChromaDex publicly disclosed the NR Study  
19 Data on multiple occasions, including at scientific conferences and through  
20 publication of an article in a scientific journal. The NRC1 Analytical Method can be  
21 found publicly on the internet, and there is no evidence Elysium put it there, because  
22 it did not. ChromaDex provided its NR Investigator’s Brochure (a document that  
23 largely summarizes data from articles published in scientific publications) to a third  
24 party and granted that third party permission to use it, and was fully aware that  
25 Elysium had contracted with (and paid) that third party to create the Basis  
26 Investigator’s Brochure ChromaDex now complains improperly borrows from the  
27 NR Investigator’s Brochure. Notably, not only was ChromaDex aware of this,  
28 ChromaDex gave permission for the third party to use this brochure. Finally,



1 ChromaDex appears to have widely circulated its pTeroPure GRAS Report to  
2 persons and entities who were not under any obligation to maintain the document as  
3 confidential.

4 *Fourth*, the evidence will show that ChromaDex cannot prove damages for the  
5 alleged disclosure of the NR or PT Specifications or of any purported “confidential”  
6 information. Its damages expert, upon whose testimony ChromaDex solely relies to  
7 establish its claims for damages, did not purport to establish that any one of these  
8 alleged disclosures caused injury to ChromaDex or unjust benefit to Elysium, and  
9 instead improperly conducted an undifferentiated damages analysis, attributing all  
10 alleged damages to all claims, rather than calculating damages for each alleged  
11 wrongful act. *See, e.g., Bennion & Deville Fine Homes, Inc. v. Windermere Real*  
12 *Estate Servs. Co.*, 2016 WL 11498956, at \*1 (C.D. Cal. Nov. 30, 2016) (granting  
13 summary judgment because asserted contractual damages included damages from  
14 other claim in case).

15 **C. Elements Required to Establish Plaintiff’s Claim Against**  
16 **Defendants for Misappropriation of Trade Secrets Under**  
17 **California’s Uniform Trade Secrets Act and Violation of Federal**  
18 **Defense of Trade Secrets Act (18 U.S.C. § 1836) (Claims 3 & 4)**

19 Plaintiff must establish the following in order to recover damages for its claims  
20 of trade secret misappropriation:

21 California’s Uniform Trade Secrets Act (“CUTSA”) and the Federal Defense  
22 of Trade Secrets Act (“DTSA”) share the same elements and require that ChromaDex  
23 prove that it (1) owned a trade secret, (2) that Elysium or Morris acquired, disclosed,  
24 or used ChromaDex’s trade secret through improper means, and (3) Elysium or  
25 Morris’s actions damaged ChromaDex. *Sci. of Skincare, LLC v. Phytoceuticals, Inc.*,  
26 2009 WL 2050042, at \*5 (C.D. Cal. July 7, 2009); *Cedars Sinai Med. Ctr. v. Quest*  
27 *Diagnostic Inc.*, 2018 WL 2558388, at \*3 (C.D. Cal. Feb. 27, 2018) (“Because the  
28 pleading standards of Cedars–Sinai’s DTSA and CUTSA claims are the same, the



1 Court will analyze those two claims together.”); *Becton, Dickinson & Co. v. Cytek*  
2 *Biosciences Inc.*, 2018 WL 2298500, at \*2 (N.D. Cal. May 21, 2018) (“The elements  
3 of a misappropriation of trade secrets claim under the Defend Trade Secrets Act  
4 (“DTSA”) and California Uniform Trade Secrets Act (“CUTSA”) are essentially the  
5 same.”).

6 *First*, for each trade secret allegedly misappropriated—whether two or any  
7 other number ChromaDex now claims—ChromaDex must first prove that the  
8 information in question is a trade secret. A trade secret is information that “derives  
9 independent economic value, actual or potential, from not being generally known to  
10 the public or to other persons who can obtain economic value from its disclosure or  
11 use” and “is the subject of efforts that are reasonable under the circumstances to  
12 maintain its secrecy.” *See* Cal. Civ. Code § 3426.1(d).

13 *Second*, ChromaDex must prove that Elysium or Morris acquired, disclosed,  
14 or used that *specific* trade secret through improper means, and not simply that  
15 Elysium or Morris was in possession of the trade secret. If Elysium or Morris were  
16 merely in possession of one of ChromaDex’s trade secrets, that is not enough for  
17 ChromaDex to succeed on a claim of misappropriation of trade secrets. *See S. Cal.*  
18 *Inst. of Law v. TCS Educ. Sys.*, 2011 WL 1296602, at \*7 (C.D. Cal. Apr. 5, 2011)  
19 (holding that “[a]lleging mere possession of trade secrets is not enough” to state a  
20 claim under CUTSA). “Misappropriation” means:

21 (1) Acquisition of a trade secret of another by a person who knows or  
22 has reason to know that the trade secret was acquired by improper  
23 means; or

24 (2) Disclosure or use of a trade secret of another without express or  
25 implied consent by a person who:

26 (A) Used improper means to acquire knowledge of the  
27 trade secret; or  
28

1 (B) At the time of disclosure or use, knew or had reason to  
2 know that his or her knowledge of the trade secret was:

3 (i) Derived from or through a person who had  
4 utilized improper means to acquire it;

5 (ii) Acquired under circumstances giving rise  
6 to a duty to maintain its secrecy or limit its  
7 use; or

8 (iii) Derived from or through a person who  
9 owed a duty to the person seeking relief to  
10 maintain its secrecy or limit its use; or

11 (C) Before a material change of his or her position, knew  
12 or had reason to know that it was a trade secret and that  
13 knowledge of it had been acquired by accident or mistake.

14 Cal. Civ. Code § 3426.1. “Improper means” includes theft, bribery,  
15 misrepresentation, breach or inducement of a breach of a duty to maintain secrecy,  
16 or espionage through electronic or other means. *See* Cal. Civ. Code § 3426.1.

17 *Third*, ChromaDex must prove that Elysium or Morris’s actions damaged  
18 ChromaDex. *Prunty v. Ark. Freightways, Inc.*, 16 F.3d 649, 652 (5th Cir. 1994).  
19 (“[W]hen one of the prima facie elements of a claim is damages and the claimant  
20 fails to introduce evidence of those damages, he or she commits a fatal error.”); *see*  
21 *also Propulsion Techs., Inc. v. Attwood Corp.*, 369 F.3d 896, 905 (5th Cir. 2004)  
22 (“the missing link for recovery of such damages remains: there is no evidence that  
23 Attwood used trade secrets to generate those profits”).

24 1. Defendants’ Evidence in Opposition to Plaintiff’s Claims for  
25 Misappropriation of Trade Secrets Under California’s Uniform  
26 Trade Secret Act and Violations of Federal Defense of Trade  
27 Secrets Act (18 U.S.C. § 1836) (Claims 3 & 4)  
28

1 The evidence will show that ChromaDex cannot (1) prove that the information  
2 it alleges were trade secrets were, in fact, trade secrets because it will be unable to  
3 demonstrate that the information had independent economic value to ChromaDex  
4 from not being generally known or that it took steps to maintain its alleged secrets;  
5 (2) prove that Elysium or Morris acquired, disclosed, or used each trade secret  
6 through improper means; and (3) prove that Elysium’s or Morris’s actions damaged  
7 ChromaDex. In short, the evidence will show that ChromaDex cannot prove any of  
8 the elements of a misappropriation of trade secrets claim let alone all the elements  
9 needed, under either CUTSA or DTSA.

10 The Fifth Amended Complaint alleges two instances of trade secret  
11 misappropriation, both of which relate to a single document ChromaDex called the  
12 Ingredient Sales Spreadsheet (“ISS”), which tracked ChromaDex’s quarterly  
13 ingredient sales by customer, amount, and price, among other information. On the  
14 night discovery closed, *after* Elysium deposed ChromaDex’s damages expert,  
15 ChromaDex supplemented its response to an interrogatory served six months ago and  
16 identified a list of twelve purported trade secrets that are subject of its  
17 misappropriation claims, divided into four categories: (1) “ChromaDex’s ingredient  
18 sales information, including customer purchasing histories and customers’ relative  
19 market positions,” which includes the ISS; (2) “the price ChromaDex paid to obtain  
20 NR from its contract manufacturer;” (3) “ChromaDex’s research and development  
21 work regarding different salts for use in manufacturing NR;” and (4) “ChromaDex’s  
22 research and development work regarding different methods for manufacturing NR.”

23 *First*, the evidence will show that none of the information in these four  
24 categories meets the definition of trade secrets, and that neither Elysium nor Morris  
25 misappropriated the information in question. With respect to the first category, the  
26 ISS contained information about ChromaDex’s customers’ order history (and the  
27 other items in ChromaDex’s asserted first category of trade secrets are sub-sets of  
28 information contained in the ISS), but the evidence will show that ChromaDex did

1 not treat the price and volume of its customers' purchases as trade secrets because it  
2 did not take reasonable steps to maintain their secrecy. For example, ChromaDex's  
3 CEO freely shared with Elysium information about the price and volume of Niagen  
4 purchases made by another of its customers, and ChromaDex even sent Elysium  
5 copies of some of that customer's invoices. ChromaDex's CEO also shared with a  
6 competitor of Elysium detailed information about the volume of Elysium's NR  
7 purchases. *See Cornwell v. Belton*, 245 Fed. Appx. 592, 594 (9th Cir. 2007)  
8 (affirming district court's denial of plaintiff's claim for trade secret misappropriation  
9 where plaintiff failed to make reasonable efforts to maintain secrecy of purported  
10 trade secret).

11 ChromaDex claims that possession of the ISS gave Elysium an unfair  
12 advantage in its contract negotiations with ChromaDex. The evidence will show,  
13 however, that Elysium negotiated its last purchase from ChromaDex on  
14 June 30, 2016, and did not possess the ISS until weeks later, when Morris joined  
15 Elysium. Elysium could not have benefited during that negotiation from information  
16 it did not then have. ChromaDex also alleges that Elysium could have derived some  
17 competitive benefit from knowing its competitors' purchases, but there is no  
18 evidence in the record that anyone at Elysium even saw the ISS before Morris deleted  
19 it from his computer, much less that Elysium ever changed any part of its competitive  
20 strategy on the basis of the ISS. ChromaDex's theory that Elysium was unjustly  
21 enriched by the possession of the ISS is therefore "blatantly contradicted by the  
22 record." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

23 ChromaDex also claims that Morris disclosed trade secrets to Elysium by  
24 telling Elysium in May 2016 that ChromaDex sold NR to a customer called Live Cell  
25 for an amount below Elysium's price, and the date and volume of Live Cell's recent  
26 purchases. Testimony from ChromaDex's then-CFO will establish that it was part  
27 of Morris's responsibilities at ChromaDex to inform Elysium if it was entitled to a  
28 lower price per the MFN provision, which is exactly what Morris did. The evidence

1 will also show that ChromaDex’s then-CEO did likewise, telling Elysium that Live  
2 Cell paid less than Elysium and was a lower volume purchaser than Elysium—the  
3 same information Morris allegedly wrongfully conveyed. As a result, ChromaDex  
4 cannot premise its claim on Morris’s alleged disclosure of information that: (1) he  
5 was authorized to disclose to Elysium in the first place, and (2) Elysium was also  
6 receiving from others at ChromaDex, both of which demonstrate that ChromaDex  
7 did not consider Live Cell’s price and volume information to be a trade secret, and  
8 further because the information was provided by ChromaDex, ChromaDex cannot  
9 demonstrate that either Elysium or Morris misappropriated the Live Cell information.  
10 Further, given that ChromaDex’s CEO gave substantively the same information as  
11 Morris gave Elysium during the course of the negotiations over the June 30 order, it  
12 would be impossible to conclude that Elysium derived some benefit from the  
13 information provided by Morris. The evidence will show that ChromaDex freely  
14 shared within and among its customers information concerning other customer orders  
15 and pricing.

16 With respect to the second category of asserted trade secrets, information  
17 Morris provided to Elysium about the price ChromaDex paid its contract  
18 manufacturer for NR, the evidence will also show that ChromaDex did not treat this  
19 information as a trade secret and in fact freely provided it to Elysium. ChromaDex’s  
20 CEO told Elysium during negotiations over Elysium’s final order for NR the margin  
21 ChromaDex sought to maintain on its NR sales (meaning that the information was  
22 not misappropriated), and the evidence will demonstrate that this information was  
23 tantamount to a disclosure of the price ChromaDex was paying to obtain NR from its  
24 manufacturer. Moreover, ChromaDex cannot establish that Elysium used this  
25 purported trade secret to its benefit or ChromaDex’s detriment. ChromaDex’s  
26 damages expert suggested that Elysium used its knowledge of the amount that  
27 ChromaDex paid for NR to secure investment from a potential investor. But all that  
28 Elysium told that investor in August 2016 was that it hoped to be able to bring down

1 its cost for NR to \$300/kg within several months; it never disclosed what ChromaDex  
2 paid for NR, which was nowhere close to the \$300/kg price Elysium stated it hoped  
3 to achieve. No jury will be able to find that Elysium informed its expectation of a  
4 \$300/kg price by knowing ChromaDex’s substantially different price, much less that  
5 this one communication was the reason for that investor’s decision to invest, which  
6 followed months of extensive due diligence and negotiations.

7 The third category of alleged trade secrets, ChromaDex’s alleged research and  
8 development work relating to certain input material used in the manufacture of NR,  
9 again is not a trade secret. ChromaDex discloses publicly that the input material at  
10 issue is used in the manufacture of its NR, including by listing it on jars of its product,  
11 Tru Niagen. And as to this third and the final category, alleged information related  
12 to ChromaDex’s research and development work on different methods of  
13 manufacturing NR, ChromaDex will be unable to prove that the sparse, general  
14 information about which it complains had any independent economic value, was  
15 misappropriated, or was used by Elysium to its benefit or ChromaDex’s detriment.

16 *Second*, ChromaDex cannot prove damages, the required third element of a  
17 trade secrets claim. ChromaDex cannot prove damages because ChromaDex relies  
18 solely on its expert witness to support its damages claims, and its expert did not  
19 differentiate between damages for alleged trade secret misappropriation and damages  
20 for ChromaDex’s other claims, nor did he calculate damages on a trade-secret-by-  
21 trade-secret basis. The expert’s purported “analysis of trade secret misappropriation  
22 damages” is, as he admits, based on alleged conduct that ChromaDex does not even  
23 plead as trade secret misappropriation, including Elysium’s purported use of  
24 “confidential and/or proprietary information at issue” that were made public by  
25 ChromaDex (such as the NR and PT Specifications ChromaDex publicly filed with  
26 the SEC) and Elysium’s “alleged aiding and abetting of Mark Morris’s breach of  
27 fiduciary duty.” Damages must be tied to an actionable wrong, not other conduct.  
28 *See, e.g., Mattel, Inc. v. MGA Entmn’t, Inc.*, 616 F.3d 904, 910–11 (9th Cir. 2010)



1 (rejecting over-inclusive damages award that included amounts not traceable to the  
2 actionable wrong); *In re Providian Credit Card Cases*, 96 Cal. App. 4th 292, 304  
3 (Cal. Ct. App. 2002) (“[p]ublic disclosure, that is the absence of secrecy, is fatal to  
4 the existence of a trade secret.”).

5 The expert’s opinion, ChromaDex’s only evidence of damages, is therefore  
6 inadmissible. *See, e.g., LivePerson, Inc. v. [24]7.AI, Inc.*, 2018 WL 6257460, at \*2  
7 (N.D. Cal. Nov. 30, 2018) (excluding expert report because “he does not apportion  
8 trade secret misappropriation damages among particular alleged trade secrets, and  
9 offers no methodology for the jury to calculate trade secret misappropriation damages  
10 on fewer than all of the 28 alleged trade secrets in the case”); *O2 Micro Intern. Ltd.*  
11 *v. Monolithic Power Sys.*, 399 F. Supp. 2d 1064, 1076, 1079 (N.D. Cal. 2005)  
12 (“expert testimony regarding damages for misappropriation of all trade secret [sic]  
13 was useless to the jury” because “[t]he jury was then left without sufficient evidence,  
14 or a reasonable basis, to determine the unjust enrichment damages”); *see also E.I. du*  
15 *Pont de Nemours & Co. v. Kolon Indus., Inc.*, 2011 WL 4625760, at \*9 (E.D. Va.  
16 Oct. 3, 2011) (damages expert report failed to set forth specific damages calculations  
17 for the trade secret and non-trade secret claims); *MGE UPS Sys., Inc. v. GE Consumer*  
18 *& Indus., Inc.*, 622 F.3d 361, 369 (5th Cir. 2010) (plaintiff’s trade secret damages  
19 calculation impermissibly included damages not attributable to the  
20 misappropriation). Without this expert report, ChromaDex has no evidence of  
21 damages.

22 **D. Elements Required to Establish Plaintiff’s Claim Against Morris**  
23 **for Breach of Contract (“Receipt & Acknowledgment of Employee**  
24 **Handbook,” (Claim 5) and “Confidentiality and Non-Solicitation**  
25 **Agreement (For New Employees)” (Claim 6))**

26 Plaintiff ChromaDex must establish the following in order to recover damages  
27 on these claims:  
28



- 1 1. That the “Receipt & Acknowledgement of Employee Handbook” is a
- 2 valid contract;
- 3 2. That the “Confidentiality and Non-Solicitation Agreement (For New
- 4 Employees)” is a valid contract;
- 5 3. That Morris disclosed trade secrets, confidential, or proprietary
- 6 information in violation of those contracts; and
- 7 4. That ChromaDex was damaged by *each* disclosure.

- 8 1. Morris’s Evidence in Opposition to Plaintiff’s Claims for Breach
- 9 of Contract (“Receipt & Acknowledgement of Employee
- 10 Handbook,” (Claim 5) and “Confidentiality and Non-Solicitation
- 11 Agreement (for New Employees)” (Claim 6))

12 ChromaDex claims Morris breached these contracts when he disclosed  
13 allegedly confidential information, as well as alleged trade secrets, to Elysium while  
14 employed by ChromaDex. ChromaDex also claims Morris retained copies of some  
15 of ChromaDex’s allegedly confidential information after he departed ChromaDex.  
16 The evidence will show, however, that ChromaDex cannot prove that Morris  
17 transmitted information that was either confidential or a trade secret. Testimony from  
18 ChromaDex’s former CFO will show that it was part of Morris’s job responsibilities  
19 to give to customers like Elysium information that ChromaDex now alleges to be a  
20 trade secret or confidential, and therefore not a breach of his contract. And, as  
21 discussed above, the evidence will also demonstrate that others at ChromaDex,  
22 including its own CEO, freely provided to Elysium and to other of ChromaDex’s  
23 customers information substantively identical to the types of information  
24 ChromaDex now contends Morris provided to Elysium, demonstrating that this  
25 information did not constitute trade secrets or confidential or proprietary information.  
26 The evidence also shows that nobody at Elysium actually saw the ISS, which is the  
27 principal trade secret ChromaDex contends Morris disclosed. Moreover, as further  
28 described above, ChromaDex itself has failed to maintain the asserted confidentiality

1 of many of the documents in question, as much of the information ChromaDex claims  
2 is confidential and proprietary has been publicly disclosed or otherwise widely  
3 circulated by ChromaDex without restriction.

4 With respect to Claim Six, ChromaDex alleges that, in return for Morris  
5 signing the Confidentiality and Non-Solicitation Agreement (for New Employees)  
6 upon his departure from ChromaDex, it provided him with continued employment  
7 and benefits, access to confidential information, and forbore certain actions. The  
8 evidence will show that none of those allegations are true. By the time he signed this  
9 agreement, Morris had already relinquished all access to ChromaDex systems,  
10 including his computer, phone, and building key card. Immediately after executing  
11 the agreement, Morris exited ChromaDex’s offices for the last time. ChromaDex did  
12 not provide him with continued employment or benefits, access to confidential  
13 information, or “forbear” any actions. Moreover, forbearance as consideration  
14 requires a “meeting of the minds,” which did not happen here. *Blonder v. Gentile*,  
15 149 Cal.App.2d 869, 875 (1957).

16 Additionally, ChromaDex violated the California Labor Code by threatening  
17 to withhold Morris’s final paycheck—more than \$12,000—in order to coerce Morris  
18 into signing the New Employee Agreement, rendering the contract void under  
19 California Civil Code § 1608 and California Labor Code §§ 202(a), 203, and 206.

20 Finally, as explained above, the evidence will show that ChromaDex cannot  
21 prove damages for the alleged breaches. Its expert improperly conducted an  
22 undifferentiated damages analysis, attributing all alleged damages to all claims,  
23 instead of calculating damages for each alleged wrongful act. *See, e.g., Bennion &*  
24 *Deville Fine Homes, Inc. v. Windermere Real Estate Servs. Co.*, 2016 WL 11498956,  
25 at \*1 (C.D. Cal. Nov. 30, 2016) (granting summary judgment because asserted  
26 contractual damages included damages from other claim in case); *E.I. du Pont de*  
27 *Nemours & Co. v. Kolon Indus., Inc.*, 2011 WL 4625760, at \*9 (E.D. Va. Oct. 3,  
28

1 2011) (expert report failed to set forth separate damages calculations for the trade  
2 secret and non-trade secret claims).

3 **E. Elements Required to Establish Plaintiff’s Claim Against Morris**  
4 **for Breach of Fiduciary Duty (Claim 7)**

5 Plaintiff ChromaDex must establish the following in order to recover damages  
6 on this claim:

- 7 1. That Morris was a fiduciary to ChromaDex;
- 8 2. That Morris acted in a manner inconsistent with his fiduciary duties; and
- 9 3. That ChromaDex was harmed by each alleged breach of fiduciary duty  
10 by Morris.

11 Under California law, a plaintiff asserting breach of fiduciary duty must prove  
12 the following elements: “(1) existence of a fiduciary duty; (2) breach of the fiduciary  
13 duty; and (3) damages.” *Gutierrez v. Girardi*, 194 Cal. App. 4<sup>th</sup> 925, 932 (Cal. Ct.  
14 App. 2011).

15 1. Morris’s Evidence in Opposition to Plaintiff’s Claim for Breach  
16 of Fiduciary Duty (Claim 7)

17 ChromaDex argues that Morris was an officer of ChromaDex and that he  
18 purportedly breached his fiduciary duties to ChromaDex by allegedly (1)  
19 manipulating ChromaDex to Elysium’s advantage during contract negotiations  
20 between the parties, (2) lying to ChromaDex about his decision to work for Elysium,  
21 (3) recruiting a ChromaDex employee to Elysium, (4) withholding information about  
22 Elysium’s intent to stockpile Niagen and pTeroPure, withhold payments from  
23 ChromaDex, and develop competing supplies of NR and pterostilbene, (5) not telling  
24 ChromaDex he retained information upon his departure from the company; and (6)  
25 withholding information about Elysium’s outreach to ChromaDex’s contractual  
26 partners in an attempt to undermine ChromaDex’s relationships with them. The  
27 evidence will show that Morris was not a fiduciary to ChromaDex. Morris’s job  
28 responsibilities at ChromaDex were limited to interacting with its customers and

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1 potential customers to increase sales. He had little autonomy or managerial authority,  
2 and virtually no role in the company's decision-making processes. For example,  
3 Morris was not permitted to establish pricing with customers and instead needed  
4 approval from his superiors.

5 Moreover, ChromaDex will be unable to prove its alleged breaches of  
6 fiduciary duty even if Morris is a fiduciary. Morris's supposed "manipulation" of  
7 ChromaDex relates to the same conduct ChromaDex claims constitutes trade secret  
8 misappropriation, *i.e.*, Morris providing the same information to Elysium regarding  
9 ChromaDex's sales to a customer that ChromaDex's own CEO also gave to Elysium  
10 during negotiations. This claim will fail for substantially the same reason as the trade  
11 secret misappropriation claims. ChromaDex will not be able to prove that Morris  
12 was obligated to tell it where he would work next after resigning from ChromaDex,  
13 let alone that not doing so violated any "fiduciary" obligations or that this "failure"  
14 caused it any harm. The evidence shows that Morris did not recruit the ChromaDex  
15 employee in question on behalf of Elysium, and demonstrates further that Morris was  
16 no longer even employed by ChromaDex at the time Elysium began to recruit that  
17 employee. The evidence disproves that Elysium intended to stockpile quantities of  
18 Niagen and pTeroPure at the time of its June 30<sup>th</sup> purchase orders, and that it intended  
19 not to pay for those orders. There is thus no evidence that Morris was aware of either  
20 non-existent intention. ChromaDex's contention that Morris did not advise it that he  
21 retained some ChromaDex information when he left the company is undercut by the  
22 fact that Morris was unaware he had any ChromaDex information, and is otherwise  
23 co-extensive with ChromaDex's deficient breach of contract claims against Morris.  
24 Moreover, ChromaDex will be unable to prove that Elysium's contact with any of its  
25 contractual partners caused ChromaDex any harm at all; all of its contractual  
26 relationships are still in place. Finally, to the extent ChromaDex's fiduciary duty  
27 claim relies on ChromaDex's alleged trade secrets, it is preempted by CUTSA.  
28 *Anokiwave, Inc. v. Rebeiz*, 2018 WL 4407591, at \*4 (S.D. Ca. Sept. 17, 2018).

1 ChromaDex also will be unable to prove damages on its claim for breach of  
2 fiduciary duty, because the fundamental defects inherent in its expert’s  
3 undifferentiated damages analysis apply with equal force to this claim.

4 **F. Elements Required to Establish Plaintiff’s Claim Against Elysium**  
5 **for Aiding and Abetting a Breach of Fiduciary Duty (Claim 8)**

6 Plaintiff ChromaDex must establish the following in order to recover damages  
7 on this claim:

- 8 1. That Morris was a fiduciary of ChromaDex;
- 9 2. That Morris acted in a manner inconsistent with his fiduciary duties;
- 10 3. That Elysium had actual knowledge of that breach of fiduciary duty;
- 11 4. That Elysium rendered substantial assistance or encouragement to  
12 Morris’s breach; and
- 13 5. That Elysium’s conduct was a substantial factor in causing harm to  
14 ChromaDex.

15 Under California law, to make a claim for aiding and abetting a breach of  
16 fiduciary duty, a plaintiff must show that (1) defendants knew the purported  
17 fiduciary’s conduct constituted a breach of fiduciary duty; and (2) provided  
18 “substantial assistance or encouragement” to the purported fiduciary to accomplish  
19 the breach. *Estate of Migliaccio v. Midland Nat’l Life Ins. Co.*, 436 F. Supp. 2d 1095,  
20 1107 (C.D. Cal. 2006) (quoting *In re Textainer P’ship Sec. Litig.*, 2005 WL 3801596,  
21 at \*16 (N.D. Cal. Dec. 12, 2005).

22 1. Elysium’s Evidence in Opposition to Plaintiff’s Claim for  
23 Aiding and Abetting a Breach of Fiduciary Duty (Claim 8)

24 As discussed above, the evidence will show that Morris was not a fiduciary of  
25 ChromaDex, and that, even if he was, he did not breach any fiduciary duty.  
26 Therefore, there can be no claim of “aiding and abetting” such a breach. The  
27 evidence will also show that Elysium did not encourage Morris to breach any alleged  
28 fiduciary duty, nor did it offer him employment in exchange for the receipt of

1 confidential and proprietary ChromaDex information. Moreover, to the extent that  
2 this claim relies on ChromaDex's alleged trade secrets, it is preempted by CUTSA.  
3 *Anokiwave, Inc. v. Rebeiz*, 2018 WL 4407591, at \*4 (S.D. Ca. Sept. 17, 2018). And,  
4 like with ChromaDex's claim for breach of fiduciary duty, the fundamental defects  
5 inherent in its expert's undifferentiated damages analysis will preclude it from  
6 proving damages on this claim as well.

7 **III. ELYSIUM'S COUNTERCLAIMS**

8 As set forth in Elysium's Third Amended Counterclaims (ECF No. 103) and  
9 Answer to Fourth Amended Complaint and Restated Counterclaims (ECF No. 118),  
10 Elysium has pleaded and is pursuing the following counterclaims against  
11 ChromaDex in this matter:

12 Counterclaim 1: Breach of Contract Against ChromaDex (NR Supply  
13 Agreement and Amendment)

14 Counterclaim 2: Breach of the Implied Covenant of Good Faith and Fair  
15 Dealing

16 Counterclaim 3: Fraudulent Inducement

17 Counterclaim 4: Patent Misuse

18 Counterclaim 5: Unjust Enrichment

19 Counterclaim 6: Breach of Contract Against ChromaDex (NR Supply  
20 Agreement and Amendment)

21 **A. Elements of Elysium's Counterclaim for Breach of Contract**  
22 **Against ChromaDex (NR Supply Agreement and Amendment)**  
23 **(Counterclaims 1 and 6)**

24 Elysium will establish the following in order to prove that ChromaDex is liable  
25 to Elysium for breaching the NR Supply Agreement and the Amendment thereto:

- 26 1. That ChromaDex sold Niagen to other customers at lower prices than  
27 the prices paid by Elysium, even though Elysium purchased higher  
28



- 1 volumes than those customers, and ChromaDex failed to provide
- 2 Elysium with refunds or credits due;
- 3 2. That ChromaDex did not manufacture Niagen in compliance with Parts
- 4 210 and 211 of Title 21 of the United States' Code of Federal
- 5 Regulations;
- 6 3. That ChromaDex allowed customers to sell products that combined
- 7 Niagen and resveratrol;
- 8 4. That resveratrol is "substantially similar" to pterostilbene;
- 9 5. That the Niagen sold by ChromaDex to Elysium contained acetamide at
- 10 levels above the No Significant Risk Levels established by California's
- 11 Proposition 65 and that ChromaDex failed to notify Elysium of that fact;
- 12 6. That Elysium was damaged by each of these actions.

13 "[A] breach of contract is a failure, without legal excuse, to perform any

14 promise that forms the whole or part of a contract." *Hosp. of Barstow, Inc. v.*

15 *California Nurses Ass'n*, 2013 WL 6095559, at \*5 (C.D. Cal. Nov. 18, 2013).

16 **B. Elements of Elysium's Counterclaim for Breach of the Implied**

17 **Covenant of Good Faith and Fair Dealing (NR Supply Agreement)**

18 **(Counterclaim 2)**

19 Elysium will establish the following in order to prove that Plaintiff is liable to

20 Elysium for breach of the implied covenant of good faith and fair dealing:

- 21 1. That Elysium fulfilled its obligations under the NR Supply Agreement;
- 22 2. That ChromaDex enabled and encouraged at least one customer to
- 23 manufacture, sell, or distribute products containing both NR and
- 24 resveratrol;
- 25 3. That resveratrol is "substantially similar" to pterostilbene; and
- 26 4. That Elysium was damaged by ChromaDex's actions.

27 *See* CACI No. 325; *HRN Servs., Inc. v. XL Specialty Ins. Co.*, 2018 WL

28 4959053, at \*1 (C.D. Cal. Apr. 30, 2018) ("In order to state a claim for breach of the



1 implied covenant of good faith and fair dealing, a plaintiff must allege the defendant’s  
2 failure or refusal to discharge contractual responsibility, prompted not by an honest  
3 mistake, bad judgment or negligence but rather by a conscious and deliberate act,  
4 which unfairly frustrates the agreed common purposes and disappoints the reasonable  
5 expectations of the other party.”) (citations omitted).

6 **C. Elements of Elysium’s Counterclaim for Fraudulent Inducement**  
7 **(License and Royalty Agreement) (Counterclaim 3)**

8 Elysium will establish the following in order to prove that Plaintiff is liable to  
9 Elysium for fraudulent inducement:

- 10 1. That ChromaDex’s then-CEO told Elysium that all of ChromaDex’s NR  
11 customers were required to execute trademark license and royalty  
12 agreements;
- 13 2. That this representation was knowingly false when made;
- 14 3. That ChromaDex intended to defraud Elysium by forcing it to pay  
15 royalties under an agreement to license trademarks it neither wanted nor  
16 used;
- 17 4. Elysium justifiably relied on ChromaDex’s representation; and
- 18 5. Elysium was damaged by paying ChromaDex royalties.

19 *Romero v. San Pedro Forklift, Inc.*, 2008 U.S. App. LEXIS 2607, at \*7-8 n.2 (9th  
20 Cir. Feb. 1, 2008) (claim for fraudulent inducement has the same elements as claim  
21 for fraud under California law) (citing *Lazar v. Superior Court*, 909 P.2d 981, 984  
22 (1996)); CACI Nos. 1900, 1901, 1902.

23 **D. Elements of Elysium’s Counterclaim for Patent Misuse**  
24 **(Counterclaim 4)**

25 For its counterclaim for declaratory judgment of patent misuse, Elysium must  
26 prove that:

- 27 1. ChromaDex conditioned access to its patent rights or a patented product  
28 in a way that has impermissibly broadened the scope of those patent rights. *Blonder*

1 *Tongue Labs. v. University of Illinois Found.*, 402 U.S. 313, 343 (1971); *B.B. Chem.*  
2 *Co. v. Ellis*, 314 U.S. 495 (1942); *Morton Salt Co. v. G.S. Suppinger Co.*, 314 U.S.  
3 488, (1942); *Carbice Corp. of Am. v. Am. Patents Dev. Corp.*, 283 U.S. 27, 33 (1931);  
4 *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 518 (1917).

5 2. ChromaDex “has market power in the relevant market for the patent or  
6 patented product on which the license or sale is conditioned.” 35 U.S.C. § 271(d)(5).

7 Once Elysium has shown the above two<sup>1</sup> elements, the burden shifts to  
8 ChromaDex to show that the misuse has been purged. *B.B. Chem. Co. v. Ellis*, 314  
9 U.S. 495, 498 (1942). A showing of purgation requires proof by ChromaDex that:

10 a. The misuse of the patent has been fully abandoned. *Id.*

11 b. The consequences of the misuse have been fully dissipated. *Id.*

12 **E. Elements of Elysium’s Counterclaim for Unjust Enrichment**  
13 **(Counterclaim 5)**

14 For its counterclaim for restitution for unjust enrichment, Elysium must  
15 prove that:

16 1. It paid royalties to ChromaDex under the Trademark and License  
17 Agreement whether Elysium used ChromaDex’s trademarks or not.

18 2. ChromaDex’s retention of those payments for its benefit would be unjust.

19 “Under California law, the elements of unjust enrichment are: (1) receipt of a  
20 benefit; and (2) unjust retention of the benefit at the expense of another.” *Baggett v.*  
21 *Hewlett-Packard Co.*, 582 F. Supp. 2d 1261, 1270 (C.D. Cal. 2007).

22 **F. Elements for Punitive Damages**

23 Elysium will establish the following in order to recover a punitive damages  
24 award against ChromaDex:

25 1. ChromaDex committed fraudulent inducement;

26  
27 <sup>1</sup> As discussed in more detail in Section VI (Issues of Law) below, some Federal  
28 Circuit cases list “anticompetitive effect” as an additional element of patent misuse.  
These Federal Circuit cases are inconsistent with recent Supreme Court case law,  
which makes clear that anticompetitive effect is not an element of patent misuse.

1           2.     ChromaDex acted with “oppression, fraud or malice;”

2           3.     Elysium can establish ChromaDex’s “oppression, fraud or  
3 malice” by “clear and convincing evidence.”

4     See Cal. Civ. Code § 3284(a).

5     **IV. ELYSIUM’S COUNTERCLAIMS ARE AMPLY SUPPORTED BY THE**  
6     **EVIDENCE IN THIS ACTION**

7           The following key evidence establishes the existence of each element of  
8 Elysium’s counterclaims:

9           **A. Evidence Supporting Elysium’s Claims for Breach of Contract**  
10           **(Counterclaims 1 and 6)**

11          The NR Supply Agreement contains the following provisions:

- 12          •     Section 3.1 (“the MFN Provision”) states that if “at any time during the  
13           Term, ChromaDex supplies Niagen (or a substantially similar product)  
14           to a Third Party at a price that is lower than that at which Niagen is  
15           supplied to Elysium Health under this Agreement, then the price of  
16           Niagen supplied under this Agreement shall be revised to such Third  
17           Party price with effect from the date of the applicable sale to such Third  
18           Party and ChromaDex shall promptly provide Elysium Health with any  
19           refund or credits thereby created; provided Elysium Health purchases  
20           equal volumes or higher volumes than the Third Party.”
- 21          •     Section 3.7 (the “cGMP Provision”) provides that “ChromaDex  
22           warrants that the Niagen sold hereunder shall be . . . manufactured in  
23           accordance with cGMP,” which the agreement defined as “current good  
24           manufacturing practices . . . as described in Parts 210 and 211 of Title  
25           21 of the United States’ Code of Federal Regulations.” (§ 1.3.) These  
26           regulations apply to the manufacture of pharmaceutical-grade  
27           ingredients.

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- Section 3.9 (the “Product Purity Provision”), which required ChromaDex to promptly inform Elysium of any information concerning or that could potentially impact the safety, identity, strength, quality or purity of Niagen of which it became aware.
- Section 3.11.3 of the Amendment (the “Exclusivity Provision”), which granted Elysium the exclusive right to sell products combining NR and pterostilbene (or any substantially similar ingredients).
- Section 4.2 (the “Confidentiality Provision”), which prohibits the parties from disclosing “any terms or conditions of this Agreement to any Third Party without the prior consent of the other party.”

1. The MFN Provision

The evidence will show that ChromaDex breached the MFN Provision nine separate times, by selling Niagen to Elysium at a higher price than it sold NR to a third party, even though Elysium had purchased a higher volume of NR. For example, on February 5, 2014, ChromaDex supplied Niagen to a customer called Innovations 4 Health (a “Third Party,” as defined in the agreement) at a price per kilogram well below the price it charged to Elysium for its June 27, 2014 purchase of a substantially higher quantity of Niagen than Innovations 4 Health had bought. Subsequently, on February 2, 2015, ChromaDex sold Niagen to Proctor & Gamble (“P&G”) (a “Third Party,” as defined in the agreement) at a price per kilogram significantly below the price paid by Elysium for eight purchases it made following that February 2, 2015 sale to P&G, each of which was for a substantially higher volume of NR than P&G had purchased. ChromaDex never issued Elysium a refund or a credit for these overcharges as required by the MFN Provision.

The complete record of ChromaDex’s breaches of the MFN Provision is explained and analyzed in detail in the expert report of Dr. Iain Cockburn, along with the damages Elysium suffered as a result of the breaches of the MFN provision.

2. The cGMP Provision

1 ChromaDex does not dispute that it violated the cGMP Provision. The  
2 evidence will show, through both documents and testimony, that its contract  
3 manufacturer never manufactured Niagen pursuant to Pharmaceutical cGMPs, nor  
4 was it ever able to do so.

5 The cGMP provision of the NR Supply Agreement warrants that “THE  
6 NIAGEN SOLD HEREUNDER SHALL BE (i) MANUFACTURED IN  
7 ACCORDANCE WITH cGMP AND APPLICABLE LAWS AND REGULATIONS  
8 IN THE UNITED STATES . . . .” The term “cGMP” was defined in the agreement  
9 as “current good manufacturing practices (i) as described in parts 210 and 211 of  
10 Title 21 of the United States’ Code of Federal Regulations and the latest FDA  
11 guidance pertaining to manufacturing and quality control practice, and (ii) as  
12 applicable in each other country in which Elysium Health advises ChromaDex in  
13 writing that Niagen products are intended to be sold.”

14 Despite ChromaDex’s obligation under the NR Supply Agreement, Elysium  
15 discovered that none of the NR ChromaDex supplied to it was, in fact, manufactured  
16 in accordance with cGMPs as described in parts 210 and 211 of Title 21, the standard  
17 for pharmaceutical grade ingredients. ChromaDex never advised Elysium of its  
18 breach of this provision. As a result of this breach, Elysium has suffered economic  
19 harm, with damages measured as the difference between the price Elysium paid for  
20 the NR it purchased less the price Elysium would have negotiated it had it been aware  
21 ChromaDex was not supplying pharmaceutical cGMP-grade NR, multiplied by the  
22 quantity purchased by Elysium. These damages are laid out in detail in the expert  
23 report of Dr. Iain Cockburn.

24 3. The Exclusivity Provision

25 The evidence will show that ChromaDex breached the Exclusivity Provision  
26 by permitting four of its customers to sell NR in combination with resveratrol, an  
27 ingredient that is substantially similar to pterostilbene. In February 2016,  
28 ChromaDex granted Elysium exclusivity over products that combine NR and PT or

1 substantially similar products, such as resveratrol, yet it enabled other customers to  
2 sell products in violations of that exclusivity grant. Elysium’s expert Dr. Iain  
3 Cockburn analyzed sales of third-party combined products in breach of the  
4 exclusivity provision between the date of the exclusivity grant and the termination of  
5 the NR Supply Agreement and estimated the portion of those sales that Elysium  
6 would have captured if, as provided for under the contract, it had been the only seller  
7 of combined product. Dr. Cockburn conservatively eliminated sales of a combined  
8 product called Thorne Extra Nutrients because the ratio of NR to resveratrol in the  
9 product rendered the too dissimilar from Elysium’s own product Basis to conclude  
10 that Elysium would have captured any of Thorne’s sales. As to each of the remaining  
11 three combined products sold during the relevant period with similar ingredient  
12 ratios, Dr. Cockburn considered a number of factors specific to each (such as  
13 marketing channel, price, dosage, and ratio of NR to resveratrol relative to Basis) and  
14 reached the conclusion that Elysium would have captured between 10% and 90% of  
15 sales of a product called Mitoboost, between 10% and 75% of sales of a product  
16 called “Optimized Resveratrol with NR”, and as much as 11.25% of sales of a product  
17 called ResveraCel. The damages Elysium suffered as a result of the breach of the  
18 cGMP Provision are laid out in detail in the expert report of Dr. Iain Cockburn.

19           4.     The Product Purity Provision

20           The evidence will show that ChromaDex breached the Product Purity  
21 Provision when it failed to inform Elysium of elevated levels of acetamide, an  
22 industrial solvent, in its NR. Third party testing of the NR ChromaDex supplied to  
23 Elysium that was conducted in the Spring of 2017 revealed levels of acetamide above  
24 the No Significant Risk Levels established by California’s Proposition 65. Although  
25 ChromaDex proffered an expert witness on the issue of acetamide testing, it  
26 apparently declined to show these test results to her, and she does not opine on them.  
27 During the time ChromaDex was selling NR to Elysium, it did not test for the  
28 presence of acetamide in the product, despite knowing that acetamide was a likely



1 byproduct of the manufacturing process. Elysium suffered damages because of the  
2 costs it incurred to uncover on its own the information ChromaDex wrongfully failed  
3 to provide, including through the costs of the third-party testing Elysium had to  
4 commission.

5           5.     Improper Disclosure

6           The evidence will show that Section 4.2 of the NR Supply Agreement prohibits  
7 the parties from disclosing “any terms or conditions of this Agreement to any Third  
8 Party without prior consent of the other party.” The NR Specifications were annexed  
9 to the NR Supply Agreement and provided part of the definition of “Niagen” therein.  
10 ChromaDex contends that the NR Specifications were “terms” of the agreement, and  
11 that Elysium violated the NR Supply Agreement’s prohibition on disclosing the terms  
12 of the agreement to third parties by providing NR specifications (albeit not the ones  
13 attached to the NR Supply Agreement) to a third party. If this was a breach of the  
14 agreement, then so too were ChromaDex’s multiple disclosures of the NR  
15 Specifications to other ChromaDex customers.

16           **B. Evidence Supporting Elysium’s Counterclaim for Breach of the**  
17           **Implied Covenant of Good Faith and Fair Dealing (Counterclaim 2)**

18           The evidence will show that ChromaDex unfairly interfered with Elysium’s  
19 bargained-for exclusivity rights under the NR Supply Agreement when it encouraged  
20 at least one customer to sell a combination of NR and resveratrol, a product  
21 substantially similar to pterostilbene. The damages evidence for this claim overlaps  
22 with the evidence of damages on Elysium’s counterclaim for breach of the  
23 Exclusivity Provision.

24           **C. Evidence Supporting Elysium’s Counterclaim for Fraudulent**  
25           **Inducement (Counterclaim 3)**

26           Defendants will present evidence at trial that, during the negotiations that led  
27 to the NR Supply Agreement, ChromaDex’s then-CEO falsely informed Elysium that  
28 ChromaDex required all of its customers who purchased nicotinamide riboside to



1 sign trademark license and royalty agreements, and that Elysium relied on this  
2 representation to execute a trademark license and royalty agreement that obligated it  
3 to pay royalties to ChromaDex. The evidence also will show that ChromaDex’s then-  
4 CEO’s statement was false; he later admitted in an email to Elysium that at least one  
5 customer that purchased NR prior to and during the course of Elysium and  
6 ChromaDex’s negotiations never signed a trademark license and royalty agreement  
7 or paid royalties. Elysium was damaged by this fraud in the amount of the royalties  
8 it paid to ChromaDex under the trademark and license agreement it was fraudulently  
9 induced to sign.

10 **D. Evidence Supporting Elysium’s Counterclaim for Patent Misuse**  
11 **(Counterclaim 4)**

12 1. ChromaDex impermissibly broadened the scope of its patent  
13 rights by tying supply of NR to its customers’ use or licensing of  
14 the NIAGEN® mark

15 Defendants will present evidence that ChromaDex is the exclusive licensee of  
16 various patents that ChromaDex has described as covering NR, its use, or its  
17 manufacture.

18 More broadly, evidence will show that it was ChromaDex’s express business  
19 strategy to identify niche ingredients that may be subject to patent rights, obtain those  
20 rights, and then improperly use those patents to build out a durable trademark that  
21 would extend beyond expiration of the patent rights. In particular, evidence will  
22 show that ChromaDex used its market and patent power to condition the supply of  
23 NR on use of, or purchase of a license to use, ChromaDex’s NIAGEN® trademark.  
24 ChromaDex’s very first NR supply agreement provided that “Buyer agrees to use the  
25 Product trademark NIAGEN.” Numerous NR supply agreements with other  
26 purchasers similarly conditioned supply of NR on the purchaser’s use of  
27 ChromaDex’s trademark when it sold the purchaser’s product, stating that “Buyer  
28 shall use the Product trademark NIAGEN....” The evidence will show that Elysium

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1 was required to pay substantial royalties for a license to use the NIAGEN® mark,  
2 which Elysium did not want to do, but was told by ChromaDex it must sign such a  
3 license as a condition to obtaining an NR supply agreement. (SAMF ¶ 18).

4 Evidence will also show that ChromaDex recognized it had caused its  
5 customers to make a “substantial investment... with respect to the use of the brand  
6 name NIAGEN.” (SAMF ¶ 29). This conduct allowed ChromaDex’s patent  
7 monopoly to strengthen the NIAGEN® brand. The NIAGEN® brand is not a right  
8 conferred by the patent grant. Moreover, trademarks are more durable than patents.  
9 Unlike patents, trademarks do not expire, and, unlike patents, trademarks cannot be  
10 invalidated as obvious by prior art or as covering unpatentable subject matter such as  
11 a natural molecule found in common foodstuff.

12 2. ChromaDex has market power in the market for the patented  
13 product

14 Supply of NR as a Distinct Product Market

15 Evidence, including the testimony of Elysium’s economist expert Dr. Iain  
16 Cockburn, will show that there is a distinct market for the supply of NR. This  
17 testimony will be confirmed by admissions by ChromaDex and the recognition of  
18 others that a market for supply of NR exists. The evidence will show that NR has  
19 unique properties, and that products, including other NAD precursors, are not  
20 substitutes. The evidence will show, therefore, that NR is not reasonably  
21 interchangeable with other products. NR’s marketed mechanism of action is as an  
22 effective oral dose NAD+ precursor. The evidence will show that NR is unique in  
23 that it is highly efficient and does not have unpleasant side effects. Evidence,  
24 including statements by ChromaDex’s chief scientific advisor, will show that “there  
25 is no NAD precursor that can do what NR does.” ChromaDex’s internal and external  
26 documents are consistent on this score, and repeatedly describe NR a highly efficient  
27 NAD precursor with unique properties.

28

1 The evidence will further show that ChromaDex and others have recognized a  
2 distinct market for NR. These includes statements by ChromaDex, its executives,  
3 and third parties discussing “the NR market.” Moreover, evidence will show that  
4 ChromaDex believes that its patent and trademark rights, and other barriers to entry,  
5 gave it control over a market consisting of the supply of NR. Other evidence will  
6 also support Elysium’s market definition, including pricing data.

7 The evidence will further show that the relevant geographic market is the  
8 supply of NR in the United States.

9 ChromaDex’s Market Power

10 Evidence will also show that ChromaDex has market power in a market for the  
11 supply of NR. Dr. Cockburn will provide testimony regarding ChromaDex’s market  
12 power. Evidence will show that during the relevant period, ChromaDex was the sole  
13 supplier of NR. As such, ChromaDex repeatedly described itself as the source of the  
14 “1<sup>st</sup> and Only Commercially Available Nicotinamide Riboside.” Additional evidence  
15 will also show that ChromaDex CEO Frank Jaksch explained that “ChromaDex does  
16 control the NR market and will for quite some time,” having “created [a] multilayered  
17 fort around NR, protecting our controlling position in the market.” Further evidence  
18 will show barriers to entry in the NR supply market, including patent rights, access  
19 to manufacturing, and other barriers. For example, ChromaDex has publicly touted  
20 that “Niagen™ is the first and only commercially available brand of NR...  
21 ChromaDex believes its patent rights create a significant and meaningful barrier to  
22 entry for would-be competitors in the NR market.” Referencing its NR patent rights,  
23 ChromaDex has told investors, that it is “in the enviable position of ‘gatekeeper’ to  
24 the entire NAD+ precursor category.” The evidence will also show that ChromaDex  
25 was able to discriminate between customers in price and contractual terms.  
26 ChromaDex was also able to enjoy high price/cost margins in the supply of NR to its  
27 customers.

28 3. ChromaDex’s conduct had anticompetitive effects

1 Although (as discussed in more detail below<sup>2</sup>) proof of anticompetitive effect  
2 is not an element of a patent misuse claim, Elysium is prepared to present evidence  
3 showing that ChromaDex’s conduct had such an effect.

4 The evidence will show that ChromaDex’s coupling of its patent and  
5 trademark rights allowed it to use its patent rights to strengthen the NIAGEN® brand  
6 and increase the distinctiveness of its product, at the expense of healthy competition.  
7 This evidence includes the expert testimony of Dr. Cockburn, who opines as an  
8 economist that ChromaDex’s conduct had anticompetitive effects. The admissions  
9 of ChromaDex’s own expert will also confirm the anticompetitive effects of  
10 ChromaDex’s conduct.

11 The evidence will show that ChromaDex’s conduct minimized brand  
12 competition among NR products sold to consumers and reduced consumer choice.  
13 The evidence will show that ChromaDex’s patent misuse distorted its trademark  
14 rights and have given it an undue and unearned advantage. ChromaDex recognized  
15 that it had caused its customers to make a “substantial investment . . . with respect to  
16 the use of the brand name NIAGEN.” ChromaDex’s trademark use requirement had  
17 the purpose and effect of leveraging ChromaDex’s NR patent rights in order to  
18 strengthen ChromaDex’s NIAGEN trademark, increasing barriers to entry and  
19 foreclosing competition more effectively and durably than could ChromaDex’s  
20 patent rights alone. As ChromaDex recognized in internal documents, its “NIAGEN  
21 ingredient TM strategy strengthens the overall NR business . . .” because it  
22 “[p]rovides differentiation for CDX [ChromaDex] if/when NR competition arrives.”

23 The evidence will also show that ChromaDex’s conduct reduced the likelihood  
24 of ChromaDex experiencing meaningful competition. ChromaDex created a strong  
25 mark that made it more difficult for new entrants to compete. Elysium was required  
26 to pay almost half a million dollars in exchange for an unwanted license for use of  
27 the NIAGEN® mark. This substantial expense diminished Elysium’s ability to  
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<sup>2</sup> See Section E., below.

1 innovate and provide broader choice to consumers. It also made it more difficult and  
2 costly for Elysium to provide brand competition against the NIAGEN® mark.

3 The evidence will also show that, after forcing NR customers to invest  
4 substantially in the NIAGEN® mark and grow the intrinsic value of the mark by  
5 conditioning supply of NR on the customers' use of the mark, ChromaDex then  
6 moved to capture that goodwill for itself. ChromaDex abruptly cut off supply to  
7 those customers and commenced its own sales of NIAGEN® directly to consumers.  
8 Based on the strength of the NIAGEN® brand, ChromaDex was able to supplant all  
9 of its direct-to-consumer licensees in 2017 by terminating their supply agreements  
10 and catapulting itself to become a major direct-to-consumer seller of a product that it  
11 now markets as TRU NIAGEN®. The evidence will show that ChromaDex has  
12 capitalized on its patent misuse and unearned commercial advantage. ChromaDex to  
13 this day tells customers to "Look for 'Niagen®' on the label" to determine if an NR  
14 product is "authentic, safe, & effective."

15 4. ChromaDex has not purged its misuse

16 The evidence will show that ChromaDex has not purged its misuse by  
17 completely abandoning its wrongful conduct, and that the effects of that conduct have  
18 not been, and never can be, fully dissipated. The evidence will show that ChromaDex  
19 continues to exploit the NIAGEN mark. Not only that, ChromaDex took steps to  
20 take for itself the unearned goodwill in the NIAGEN® mark that it had caused its  
21 licensees to build by requiring use of the mark as a condition of supply. ChromaDex  
22 has exploited, and continues to exploit, the NIAGEN mark. The evidence will show  
23 that ChromaDex continues to tell customers to "Look for 'Niagen® on the label'" to  
24 determine if a product is "authentic, safe, & effective." Moreover, ChromaDex has  
25 not repaid Elysium for the trademark royalties Elysium was forced to pay. And,  
26 expert testimony and other evidence will show, ChromaDex's conduct has distorted  
27 the market in ways that cannot be repaired or dissipated.  
28

1           **E. Evidence Supporting Elysium’s Counterclaim for Unjust**  
2                           **Enrichment (Counterclaim 5)**

3           The evidence will show that Elysium paid royalties to ChromaDex under the  
4 Trademark Royalty and License Agreement, and that Elysium was required to do so,  
5 whether or not it used ChromaDex’s trademarks, as a condition of purchasing NR  
6 from ChromaDex under the Supply Agreement. As discussed in part D(a), the  
7 evidence will show that the License and Royalty Agreement was unenforceable and  
8 that requiring the royalty payments constituted patent misuse. Further, the evidence  
9 will show that ChromaDex has retained for its own benefit, and not reimbursed  
10 Elysium for, the royalties Elysium paid to ChromaDex under the License and Royalty  
11 Agreement.

12           **F. Evidence Supporting Elysium’s Claim for Punitive Damages**

13           With respect to Elysium’s claim for punitive damages, the evidence listed in  
14 above establishes the existence of each element required for recovering punitive  
15 damages from ChromaDex. Elysium will also rely on ChromaDex’s financial  
16 statements and other disclosures filed with the SEC in support of its claim for punitive  
17 damages.

18           **V. ANTICIPATED EVIDENTIARY ISSUES**

19           Elysium anticipates evidentiary issues relating to the confidentiality of  
20 material to be presented as evidence at trial as well as the admissibility of various  
21 purported pieces of evidence. Those issues are the subject of pending motions *in*  
22 *limine*.

23           **VI. ISSUES OF LAW**

24           The following issue of law is germane to Elysium’s counterclaim for a  
25 declaration of patent misuse.

26           **Whether, after the Supreme Court’s decision in *Kimble v. Marvel Entm’t,***  
27 ***LLC*, proof of anticompetitive effects is not required for conduct to constitute**  
28 **patent misuse.** Although the Federal Circuit has stated that misuse requires proof of



1 “anticompetitive effect,” *Princo Corp. v. ITC*, 616 F.3d 1318, 1328 (Fed. Cir. 2010),  
2 this requirement is inconsistent with more recent subsequent Supreme Court case  
3 law. As the Supreme Court recently held in *Kimble v. Marvel Entm’t, LLC*, proof of  
4 anticompetitive effect is not an element of patent misuse. 135 S. Ct. 2401, 2413  
5 (2015) (“The patent laws—unlike the Sherman Act—do not aim to maximize  
6 competition....”). In *Kimble*, Marvel agreed to pay a 3% royalty for Kimble’s patent  
7 without an end date. *Id.* at 2406. Kimble argued this was an economically efficient  
8 arrangement that should not be struck down as patent misuse. The Court rejected  
9 Kimble’s argument that the Court should engage in a “practice specific analysis” that  
10 balanced benefits and harms to the parties and to competition. *Id.* at 2413 and 2408-  
11 09. Instead, the Court held that the parties’ agreement was unenforceable due to  
12 patent misuse, stating, “all patents, and all benefits from them, must end” even if the  
13 conduct was arguably desired or beneficial to the parties or to competition. *Id.* at  
14 2408. The Court was clear that “patent (not antitrust) policy gave rise to the Court’s  
15 conclusion that post-patent royalty contracts are unenforceable—utterly regardless  
16 of a demonstrable effect on competition.” *Id.* at 2413. Given these clear  
17 pronouncements by the Supreme Court that patent policy is with “carefully guarding  
18 [the patent law’s] cut-off date [and]... subject matter limits”, *id.* at 2407, rather than  
19 maximizing competition, it would be legal error for a court to require a showing of  
20 anticompetitive effect to prove patent misuse.

## 21 **VII. ISSUES TRIABLE TO A JURY AND TO THE COURT**

### 22 **A. Counterclaim 4 (Declaratory Judgment of Patent Misuse)**

23 Patent misuse is an equitable claim that is not triable to a jury as of right. *See*  
24 *Cordance Corp. v. Amazon.com, Inc.*, 2009 U.S. Dist. LEXIS 64986 (D. Del. July  
25 28, 2009). Given the equitable nature of this claim, its strong public policy  
26 grounding, the Defendants’ request for declaratory relief, and the potential for jury  
27 confusion, Elysium agrees with ChromaDex that patent misuse is properly tried to  
28 the Court. However, for efficiency, Elysium proposes that to the extent there is

1 overlapping testimony on jury triable issues that is relevant to patent misuse, the  
2 testimony can be used in the patent misuse trial.

3 **B. Counterclaim 5 (Unjust Enrichment)**

4 Because Elysium’s unjust enrichment counterclaim is tied directly to its patent  
5 misuse claim, Elysium believes that this claim should also be tried to the Court and  
6 not to a jury.

7 **C. All Other Claims and Counterclaims**

8 Defendants believe all other claims and counterclaims at issue in this litigation  
9 are properly tried to a jury.

10 **D. Punitive Damages**

11 Elysium has a right to a jury trial regarding its claim for punitive damages: “It  
12 is established that suits for money damages, including punitive damages, are legal in  
13 nature entailing the right to a jury trial, and that this right cannot be abridged even if  
14 the damages are considered incidental to the equitable claims.” *Malone v. Norwest*  
15 *Fin. Cal., Inc.*, 245 B.R. 389, 399 (E.D. Cal. 2000) (citing *Curtis v. Loether*, 415 U.S.  
16 189, 196 n. 11 (1974)).

17 **VIII. BIFURCATION OF ISSUES**

18 Elysium does not believe that bifurcation is appropriate in this action. With  
19 respect to the patent misuse claim, Elysium has addressed bifurcation above in  
20 connection with the discussion of whether the claim should be tried to the Court or  
21 to the jury.

22 **IX. ABANDONMENT OF ISSUES**

23 Elysium has not abandoned any of its counterclaims.  
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Respectfully submitted,

Dated: August 28, 2019

**BAKER & HOSTETLER LLP**

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