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11 **IN THE UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**
13 **WESTERN DIVISION**

14 ChromaDex, Inc.,
15 Plaintiff,
16 v.
17 Elysium Health, Inc. and Mark
18 Morris,
19 Defendants.

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

Case No.: 8:16-cv-02277-CJC-DFM

Judge: Hon. Cormac J. Carney

**ELYSIUM HEALTH, INC.'S AND
MARK MORRIS'S NOTICE OF
MOTION AND MOTION *IN LIMINE*
TO EXCLUDE EXPERT TESTIMONY
OF LANCE GUNDERSON**

*[Filed Concurrently with Declaration of
Joseph Sacca; and (Proposed) Order]*

Date: September 18, 2019

Time: 9:00 a.m.

Pretrial Conference: September 18, 2019

Trial: October 15, 2019

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on September 18, 2019, at 9:00 a.m., or as soon thereafter as they may be heard, Defendant and Counterclaimant Elysium Health, Inc. and Defendant Mark Morris will and do hereby move *in limine* for an order excluding the testimony of Lance Gunderson, Plaintiff ChromaDex, Inc.’s expert damages witness, pursuant to Federal Rule of Evidence 702. This motion (“Motion”) will be made in Courtroom 7C of the above-referenced court, located at 350 West 1st Street, Los Angeles, California, 90012.

This Motion is based made upon this Notice, the accompanying Memorandum of Points and Authorities, Declaration, Exhibits, and [Proposed] Order filed contemporaneously herewith, all the pleadings and papers on file in this action, and such further oral argument or any other evidence as may be presented at the hearing on this Motion.

Pursuant to Local Rule 7-3, this Motion is made following a conference of counsel that took place on August 15, 2019.

Dated: August 21, 2019

BAKER & HOSTETLER LLP

/s/ Joseph N. Sacca

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND BACKGROUND**

3 Defendant and Counterclaimant Elysium Health, Inc. (“Elysium”) and
4 Defendant Mark Morris (“Morris,” together, “Defendants”) respectfully submit this
5 Memorandum of Points and Authorities in support of their Motion *in limine* to
6 exclude the testimony of Lance E. Gunderson (“Gunderson”), Plaintiff ChromaDex,
7 Inc.’s (“ChromaDex”) expert damages witness, pursuant to Federal Rule of
8 Evidence 702 (“Rule 702”). Gunderson sets forth his opinions and evidence
9 regarding ChromaDex’s purported damages in his initial expert report dated
10 June 21, 2019 (ECF No. 245-5) (“Gunderson Report”),¹ his rebuttal/supplemental
11 expert report dated July 26, 2019 (ECF No. 246-17) (“Gunderson Rebuttal”), and
12 testimony from his deposition on August 9, 2019 (ECF No. 245-06 (“Gunderson
13 Tr.”)).

14 ChromaDex was for a time Elysium’s supplier of the two principal
15 ingredients (nicotinamide riboside (“NR”) and pterostilbene) in Elysium’s direct-
16 to-consumer dietary supplement, Basis. Morris is a former ChromaDex employee
17 who now works for Elysium. ChromaDex’s claims in this case allege that Elysium
18 breached its supply agreements with ChromaDex by, in part, disclosing information
19 designated as confidential under those agreements; that Elysium and Morris
20 misappropriated trade secrets; that Morris breached his employment agreements
21 by sharing purportedly confidential information with Elysium; and that Morris
22 breached his fiduciary duties to ChromaDex, and Elysium aided and abetted that
23 breach.

24 Gunderson purports to estimate damages for these claims. In what he
25 describes as his “analysis of trade secret misappropriation damages,” Gunderson
26 includes what he contends are Elysium’s profits “resulting from the alleged
27

28 ¹ See Declaration of Joseph N. Sacca (“Sacca Decl.”). Unless otherwise stated, all references to Exhibits herein refer to exhibits attached to the Sacca Declaration.

1 misappropriation of ChromaDex’s trade secrets, confidential and/or proprietary
2 information at issue, and from the alleged aiding and abetting of Morris’s breach of
3 fiduciary duty,” ChromaDex’s supposed lost profits from sales of NR it did not
4 make to Elysium after the parties’ relationship ended, and various other categories.
5 He then incorporates by reference this “analysis of trade secret misappropriation
6 damages” as his estimate of ChromaDex’s damages on each of its remaining claims.

7 Gunderson’s testimony and methodology offered to prove ChromaDex’s
8 purported damages are fundamentally flawed, unreliable, and unhelpful, and thus
9 fail to meet the threshold requirements for admissibility under Rule 702. First,
10 Gunderson fails to apportion damages on a claim-by-claim basis, notwithstanding
11 that the grounds for the claims differ substantially. Instead, Gunderson’s expert
12 reports and testimony conflate all of ChromaDex’s claims, offering only an
13 undifferentiated analysis attributing all the alleged damages to all the alleged
14 wrongs at issue in the case, without any attempt to establish causation or to identify
15 which damages flowed from which wrongs. This results, for example, in
16 Gunderson expressing the opinion that Elysium should be liable in purported trade
17 secret misappropriation damages for allegedly using information that ChromaDex
18 does not even allege to constitute a trade secret (such as documents it has filed
19 publicly with the SEC), and that Morris should be liable in contract damages for
20 Elysium’s purported disclosure of information that ChromaDex does not even
21 contend Morris gave Elysium at all, much less in violation of any confidentiality
22 agreement. This critical failure to allocate damages by claim renders Gunderson’s
23 opinions and testimony too unhelpful to be useful to a jury.

24 Meanwhile, Gunderson’s opinion with respect to damages on the trade secret
25 misappropriation claims suffers from an additional defect that flows naturally from
26 his failure to allocate among claims – he also fails to allocate damages on a trade
27 secret-by-trade secret basis. Because ChromaDex plainly cannot succeed on all of
28 its alleged trade secrets (in fact, we submit it will succeed on none), and because

1 Gunderson provides no means for the jury to allocate damages to individual alleged
2 trade secrets and thus no basis to calculate damages if ChromaDex prevails on fewer
3 than all of its trade secret claims, Gunderson’s opinion on trade secret damages is
4 inadmissibly unhelpful on this additional ground as well.

5 Finally, Gunderson’s opinion that ChromaDex suffered damages by giving
6 Elysium a “price discount” should be barred because it is based on ChromaDex’s
7 contention that Elysium misled it by promising future orders, despite the fact that
8 this Court has already dismissed ChromaDex’s claim on those grounds with
9 prejudice. Similarly, his opinion concerning ChromaDex’s purported “lost profits”
10 to Elysium is fatally flawed because it is contrary to undisputed facts and based on
11 unduly speculative assumptions.

12 For these reasons, set forth in more detail below, Gunderson should be
13 excluded from offering expert opinion on damages at trial in this matter.

14 **II. LEGAL STANDARD**

15 **A. Admissibility of Expert Testimony under FRE 702 and Daubert**

16 Under Rule 702 of the Federal Rules of Evidence, a court may permit opinion
17 testimony from an expert only if “(a) the expert’s scientific, technical, or other
18 specialized knowledge will help the trier of fact to understand the evidence or to
19 determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the
20 testimony is the product of reliable principles and methods; and (d) the expert has
21 reliably applied the principles and methods to the facts of the case.” Fed. R. Evid.
22 702; *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591-92 (1993). The test
23 for reliability of expert testimony under *Daubert* is flexible and depends on the
24 particular circumstances of the case. *Alaska Rent-A-Car, Inc. v. Avis Budget Grp.,*
25 *Inc.*, 738 F.3d 960, 969 (9th Cir. 2013).

26 A trial court’s “gatekeeping” obligation to admit only expert testimony that
27 is both reliable and relevant is especially important “considering the aura of
28 authority experts often exude, which can lead juries to give more weight to their

1 testimony.” *Mukhtar v. Cal. State Univ.*, 299 F.3d 1053, 1063-64 (9th Cir. 2002).
2 In addition, the trial court has “broad latitude” in deciding how to determine the
3 reliability of an expert’s testimony and whether the testimony is in fact reliable.
4 *Id.* at 1064.

5 **III. GUNDERSON’S TESTIMONY IS UNHELPFUL AND UNRELIABLE**

6 **A. Gunderson’s Methodology is Irredeemably Flawed Because It**
7 **Applies the Same Analysis for Every One of ChromaDex’s Claims**
8 **Notwithstanding the Material Differences Between Those Claims**

9 Gunderson’s so-called “analysis of trade secret misappropriation damages”
10 is, by his own admission, based on alleged conduct that ChromaDex does not even
11 plead as trade secrets, including Elysium’s purported use of “confidential and/or
12 proprietary information at issue”² and Elysium’s “alleged aiding and abetting of
13 Mark Morris’s breach of fiduciary duty.” (Gunderson Report at 86). This is
14 manifestly improper, because damages must be tied to an actionable wrong, not
15 other conduct. *See, e.g., Mattel, Inc. v. MGA Entmn’t, Inc.*, 616 F.3d 904, 910-11
16 (9th Cir. 2010) (rejecting over-inclusive damages award that included amounts not
17 traceable to the actionable wrong).

18 Then, without any economic or rational basis, Gunderson simply repurposes
19 his flawed trade secrets analysis, so that rather than providing separate damages
20 opinions for each of ChromaDex’s respective claims – for breach of contract by
21 Elysium, breach of contract by Morris, breach of fiduciary duty by Morris, or
22 aiding and abetting by Elysium – he instead repeatedly “incorporate[s] by
23 reference” his earlier trade secret misappropriation damages analysis. (Gunderson
24 Report at 118-123). At his deposition, Gunderson acknowledged that he does not
25 purport to calculate damages individually for any of ChromaDex’s claims.

26
27 ² This information includes, for example, the specifications for NR and pterostilbene that were attached to the supply
28 agreements between ChromaDex and Elysium (Schedule 15A to Gunderson Report) (ECF No. 246-02) that
ChromaDex filed publicly with the SEC (Gunderson Report at 176-79; Schedule 15A at 2-5; ECF No. 246-07 at
767, 775 (ChromaDex 10-Q) and thus cannot possibly constitute trade secrets.

1 (Gunderson Tr. at 97:11-20, 124:4-10, 200:18-203:23). Gunderson employs this
2 nonsensical approach despite the fact that those claims are based on different
3 alleged conduct by different parties, involving different facts and evidence.

4 For example, Gunderson opines that Elysium should be answerable in
5 contract under the NR Supply Agreement not just for the purported damages
6 arising from the alleged disclosure of the only four documents ChromaDex alleges
7 are confidential and which Elysium wrongfully disclosed under that agreement, but
8 also for damages that would account for the harm to ChromaDex or benefit to
9 Elysium supposedly attributable to Elysium’s alleged use of the over 140 items
10 Gunderson collectively describes as “trade secrets, confidential and/or proprietary
11 information.” The overwhelming majority of these items do *not* form the basis of
12 ChromaDex’s contract claim. (Gunderson Tr. at 97:11-20, 124:4-10, 200:18-
13 203:23).

14 By way of further example, Gunderson opines that Morris can be held liable
15 for damages on ChromaDex’s contractual claims for breach of his confidentiality
16 agreements even with respect to information that was indisputably not provided to
17 Elysium by Morris. (Gunderson Report at 119). This plain error is shown by the
18 undisputed facts that the NR Study Data and specifications for NR and
19 pterostilbene, items that are each lumped into Gunderson’s undifferentiated
20 combination of “trade secrets, confidential and/or proprietary information,” were
21 sent to Elysium by individuals other than Morris. (Exs. A, B).

22 Gunderson’s attempt to graft his one-size-fits-all and misnamed trade secrets
23 damages analysis onto each and every claim made by ChromaDex should be
24 rejected. His methodology is manifestly improper because his opinions would
25 result in damages awards that are plainly overinclusive for each claim. *See, e.g.,*
26 *Mattel*, 616 F.3d at 910–11; *see also In re Novatel Wireless Sec. Litig.*, 2013 WL
27 494361, at *4 (S.D. Cal. Feb. 7, 2013) (excluding export report that “did not
28

1 apportion the loss causation and damages among the individual claims alleged by
2 Plaintiffs or provide a method for the Court to do so.”)

3
4 **B. Gunderson’s Methodology to Determine Trade Secret Damages is**
5 **Fundamentally Unreliable Because It Fails to Apportion Damages**
6 **Among ChromaDex’s Alleged Trade Secrets**

7 Under California’s Uniform Trade Secrets Act (“CUTSA”), “a *prima facie*
8 claim for misappropriation of trade secrets requires the plaintiff to demonstrate
9 that: (1) the plaintiff owned a trade secret, (2) the defendant acquired, disclosed,
10 or used the plaintiff’s trade secret through improper means, and (3) *the*
11 *defendant’s actions damaged the plaintiff.*” *Sci. of Skincare, LLC v.*
12 *Phytoceuticals, Inc.*, 2009 WL 2050042, at *5 (C.D. Cal. July 7, 2009) (emphasis
13 added); *see also S. Cal. Inst. of Law v. TCS Educ. Sys.*, 2011 WL 1296602, at *7
14 (C.D. Cal. Apr. 5, 2011) (holding that “[a]lleging mere possession of trade secrets
15 is not enough” to state a claim under CUTSA).³ Damages for an actual loss must
16 be “caused by” the misappropriation, meaning that the plaintiff must “sufficiently
17 show[] a causal link between a potential misappropriation of a trade secret and the
18 alleged damages.” *Sci. of Skincare*, 2009 WL 2050042, at *5.

19 In addition, “[d]amages . . . need to rest on a ‘reasonable basis.’” *O2 Micro*
20 *Intern. Ltd. v. Monolithic Power Sys., Inc.*, 399 F.Supp.2d 1064, 1076 (N.D. Cal.
21 2005) (internal quotation marks omitted). And to be reasonable, damages should
22 be apportioned among the allegedly misappropriated trade secrets. *See id.* at 1077
23 (finding expert’s failure to provide “a reasonable basis for the jury to apportion
24 damages” rendered expert testimony “useless”). Accordingly, a damages expert’s
25 methodology must connect the damage with each alleged harm in order to be
26 useful to the trier of fact and for any related testimony to be admissible.

27 ³ Likewise, under the federal Defend Trade Secrets Act (“DTSA”), a plaintiff must offer proof of damages, unjust
28 enrichment, or a reasonable royalty to prevail on its claim. *See* 18 U.S.C.A. § 1836(b)(3)(B); *Cedars Sinai Med. Ctr.*
v. Quest Diagnostic Inc., 2018 WL 2558388, at *3 (C.D. Cal. Feb. 27, 2018) (“Because the pleading standards of
Cedars-Sinai’s DTSA and CUTSA claims are the same, the Court will analyze those two claims together.”).

1 Gunderson’s methodology here is fundamentally unhelpful because it fails to
2 apportion ChromaDex’s purported damages among each of the alleged trade secrets
3 at issue, and instead offers only an undifferentiated analysis attributing all the
4 alleged damages to all acts of wrongdoing collectively, without any attempt to
5 establish causation or identify which damages flowed from the alleged
6 misappropriation of any specific trade secret.⁴ Gunderson’s failure to apportion
7 damages is a fatal flaw.

8 ChromaDex has identified twelve trade secrets it claims were
9 misappropriated, which it divided into four categories. (ECF No. 248-13).
10 Gunderson, however, did not apportion the damages arising from the purported
11 misappropriation among the twelve items at issue, or even among the four
12 categories of trade secret information in which ChromaDex’s claims they fall.
13 (Gunderson Tr. at 97:11-20, 124:4-10, 200:18-203:23). Indeed, despite the quantity
14 of trade secrets and confidential information alleged, the varied nature and relative
15 importance (or lack thereof) of the information contained therein,⁵ and the widely
16 varying dates of the alleged misappropriations, Gunderson offers no analysis as to
17 how, or by how much, Elysium’s alleged misappropriation of each claimed trade
18 secret information supposedly unjustly benefitted Elysium or purportedly caused
19 ChromaDex to suffer any losses. Because Gunderson does not apportion
20 ChromaDex’s estimated damages, his opinion provides no helpful methodology to
21 the jury for determining damages if any one of ChromaDex’s misappropriation
22 theories fails. (Gunderson Tr. at 97:11-20).

23 This is a fatal flaw here, where ChromaDex certainly cannot prevail on each
24 and every one of its allegedly misappropriated trade secret claims. For example,

25 _____
26 ⁴ Indeed, as discussed above, not only does Gunderson impermissibly fail to address the trade secrets on an
27 individual basis, but he also conflates his purported trade secrets analysis with items that are indisputably *not* trade
28 secrets. Throughout his report, Gunderson bases his damages opinions on an amalgam of “trade secrets, confidential
and/or proprietary information.” (See Gunderson Report at 86, 92, 93, 94, 95, 104).

⁵ For example, some of the claimed trade secrets relate to ChromaDex’s transactions with other customers and date
as far back as the spring of 2015 (ECF No. 239-13; ECF No. 245-02; Ex. C), whereas others instead purportedly
relate to the manufacture of NR and are alleged to have been misappropriated in mid-2016. (Ex. D).

1 ChromaDex alleges that Morris provided Elysium with the price and volume of NR
2 purchases for a customer called Live Cell that Elysium purportedly used to its
3 benefit in the negotiations with ChromaDex for Elysium’s last purchase of NR. But
4 the evidence shows that ChromaDex’s own CEO provided materially the same
5 information to Elysium during the course of those discussions, rendering the
6 information provided by Morris superfluous. In view of the fact that ChromaDex’s
7 CEO freely gave Elysium substantially the same information as Morris,
8 ChromaDex cannot plausibly assert that this information is a trade secret. (ECF
9 Nos. 245-08 and 245-09). ChromaDex also contends that Elysium benefitted in
10 those same negotiations from possession of a spreadsheet listing ChromaDex’s
11 quarterly ingredient sales by customer, price, and volume, yet ignores that Elysium
12 did not allegedly possess that spreadsheet until weeks after the negotiations
13 concluded and Elysium placed and ChromaDex accepted its final purchase order.⁶

14 As courts in the Ninth Circuit have recognized, a methodology like
15 Gunderson’s is fundamentally flawed as it fails to provide a “reasonable basis” for
16 damages on each claim, which requires instead that damages be apportioned among
17 the allegedly misappropriated trade secrets. *See O2 Micro*, 399 F. Supp. at 1079.
18 For example, in *O2 Micro*, the plaintiff’s expert at trial only presented damages
19 testimony on the misappropriation of all eleven alleged trade secrets as a whole, but
20 gave no testimony on the damages attributable to misappropriation of any one of
21 the trade secrets or any subset of them. *Id* at 1076. The jury found fewer than all
22 eleven of the trade secrets were misappropriated, and as a result, the Court found
23 that the “expert testimony regarding damages for misappropriation of all trade
24 secret [sic] was useless to the jury” because “[t]he jury was then left without
25 sufficient evidence, or a reasonable basis, to determine the unjust enrichment

26 _____
27 ⁶ ChromaDex also muses that the spreadsheet may have helped Elysium against its competitors – an odd assertion,
28 given that Elysium was not, like ChromaDex was at the time, a seller of dietary supplement ingredients – but the
record is devoid of evidence that anyone at Elysium even saw the spreadsheet, much less that Elysium took any
strategic or other action based on it. (ECF No. 235-03 at 6-30:12, 26:22-27:4, 29:9-15; 31:10-14; ECF No. 244-06 at
316:14-318:16; ECF No. 245-03 at 5; ECF No. 235-01 at 277:17-278:20).

1 damages.” *Id.* at 1077. Likewise, here, Gunderson’s analysis will be useless to the
2 jury.

3 Similarly, in *LivePerson, Inc. v. [24]7.AI., Inc.*, the plaintiff’s expert
4 analyzed the collective damages flowing from misappropriation of all 28 alleged
5 trade secrets at issue, but the initial trial in the case only concerned 15 of those
6 alleged trade secrets. 2018 WL 6257460, at *2 (N.D. Cal. Nov. 30, 2018). Because
7 the expert did “not apportion trade secret misappropriation damages among
8 particular alleged trade secrets, and offer[ed] no methodology for the jury to
9 calculate trade secret misappropriation damages on fewer than all of the 28 alleged
10 trade secrets in the case,” the expert’s testimony was excluded. *Id.*

11 Here, Gunderson has provided no “reasonable basis” on which to calculate
12 damages flowing from each of the specific alleged trade secrets claims. Moreover,
13 Gunderson has also improperly bundled alleged misappropriated trade secrets with
14 non-trade secret information purportedly used or disclosed by Elysium. This would
15 lead to the nonsensical result that if, for example, one of the misappropriation claims
16 relating to a portion of the purchasing history of one ChromaDex customer survived
17 (which it will not) but every other claim fails, ChromaDex is essentially saying that
18 it was as damaged by Elysium knowing that sole piece of information as it would
19 have been if Elysium had misappropriated all of ChromaDex’s historical pricing
20 and sales information (which Elysium did not). (Gunderson Report at 43-44).

21 These fundamental flaws should compel exclusion of Gunderson’s trade
22 secret damages opinions and all related testimony.

23 **C. Gunderson’s Opinions Are Also Flawed Because They Are Based on**
24 **Allegations Already Dismissed by the Court, Are Contrary to**
25 **Undisputed Facts and Are Based on Improper Assumptions**

26 Aside from the impermissible flaws discussed above, Gunderson’s opinions
27 on damages suffer from additional fatal deficiencies. For example, to show how
28 ChromaDex was damaged by agreeing to supply large quantities of NR at a

1 purportedly reduced price, Gunderson purports to calculate damages for a supposed
2 “price discount” ChromaDex offered to Elysium during negotiations regarding the
3 parties’ pricing dispute, and makes repeated reference to, and relies on, alleged
4 statements by Elysium that it was “ramping up” its business. (Gunderson Report at
5 102). These same statements were the basis of ChromaDex’s failed fraudulent
6 inducement claim, a claim that has been dismissed with prejudice by the Court.
7 (ECF No. 44 at 13-14). Gunderson’s attempt to attribute economic harm to
8 ChromaDex on a claim that has already been dismissed by the Court should be
9 rejected as an impermissible run-around this Court’s prior ruling.

10 Gunderson’s opinion on ChromaDex’s “lost profits” is similarly flawed.
11 Gunderson purports to analyze and calculate damages for sales that ChromaDex
12 supposedly lost because Elysium did not make the minimum purchases for 2017
13 and 2018 as outlined in the parties’ NR Supply Agreement (Gunderson Report at
14 84), but ignores the undisputed fact that ChromaDex itself terminated the Supply
15 Agreement in November 2016, effective February 2, 2017, thereby making any
16 such additional purchases by Elysium impossible. Gunderson also bases an
17 alternative lost profits opinion on purported forecasts for future purchases of NR
18 that Elysium made in direct discussions with W.R. Grace & Co.-Conn (“Grace”),
19 the company that manufactures NR for ChromaDex, despite the fact that Elysium
20 never actually ordered any NR from Grace and that the Elysium forecasts were
21 never even alleged to have been communicated to ChromaDex. (Ex. E at 193:22-
22 196:16; Ex. F at 325:2-4). Moreover, despite evidence that, as a start-up company,
23 Elysium’s forecasting was consistently unreliable (*see* Ex. F at 194:21-195:23),
24 Gunderson took no steps to assess the reliability of the forecast on which he bases
25 his opinion, such as comparing the hypothetical forecast Elysium discussed with
26 Grace that he relies on to establish lost sales to any of Elysium’s actual purchases
27 over the relevant time period. (Ex. E at 194:19-195:10). This failure renders
28 Gunderson’s analysis speculative and unsupported, providing additional ground to

1 exclude his testimony.

2 **IV. CONCLUSION**

3 For the foregoing reasons, Defendants respectfully request that the Court
4 grant its motion *in limine* and exclude the expert testimony of Gunderson in the case
5 and at trial.

6
7 Respectfully submitted,

8 Dated: August 21, 2019

BAKER & HOSTETLER LLP

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10 By: /s/ Joseph N. Sacca
JOSEPH N. SACCA

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