MICHAEL R. MATTHIAS, Bar No. 057728
mmathias@bakerlaw.com
ELIZABETH M. TRECKLER, Bar No. 282432
etreckler@bakerlaw.com
BAKER & HOSTETLER LLP
11601 Wilshire Boulevard, Suite 1400
Los Angeles, California 90025-0509
Telephone: (310) 820-8800
Facsimile: (310) 820-8859

JOSEPH N. SACCA, (admitted *pro hac vice*)
jsacca@bakerlaw.com
ESTERINA GIULIANI (admitted *pro hac vice*)
egiuliani@bakerlaw.com
BENJAMIN D. PERGAMENT (admitted *pro hac vice*)
bpergament@bakerlaw.com
KRISTIN L. KERANEN (admitted *pro hac vice*)
kkeranen@bakerlaw.com
BAKER & HOSTETLER LLP
45 Rockefeller Plaza
New York, New York 10111-0100
Telephone: (212) 589-4290
Facsimile: (212) 589-4201

Counsel continued on following page

BAKER & HOSTETLER LLP
ATTORNEYS AT LAW
LOS ANGELES

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ChromaDex, Inc.,

Plaintiff,

v.

Elysium Health, Inc. and Mark Morris,

Defendants.

Elysium Health, Inc.,

Counterclaimant,

v.

ChromaDex, Inc.,

Counter-Defendant.

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

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

Judge: Hon. Cormac J. Carney
Date: September 18, 2019
Time: 9:00 a.m.
Trial: October 15, 2019
Pretrial Conference: September 18, 2019

DONALD R. WARE, (admitted *pro hac vice*)
dware@foleyhoag.com
MARCO J. QUINA, (admitted *pro hac vice*)
mquina@foleyhoag.com
JULIA HUSTON, (admitted *pro hac vice*)
jhuston@foleyhoag.com
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, Massachusetts 02210
Telephone: (617) 832-1000
Facsimile: (617) 832-7000

Attorneys for Defendant and Counterclaimant
ELYSIUM HEALTH, INC. *and Defendant*
MARK MORRIS

I. INTRODUCTION

Defendant and Counterclaimant Elysium Health, Inc. ("Elysium") and Defendant Mark Morris ("Morris," together, "Defendants") respectfully submit this Reply in further support of their Motion *in limine* to exclude the testimony of Lance E. Gunderson ("Gunderson"), Plaintiff ChromaDex, Inc.'s ("ChromaDex") expert damages witness, pursuant to Federal Rule of Evidence 702 ("Rule 702"). Gunderson sets forth his opinions and evidence regarding ChromaDex's purported damages in his initial expert report dated June 21, 2019 (ECF No. 245-5) ("Gunderson Report"), his rebuttal/supplemental expert report dated July 26, 2019 (ECF No. 246-17) ("Gunderson Rebuttal"), and testimony from his deposition on August 9, 2019 (ECF No. 245-06 ("Gunderson Tr.")).[1] As discussed in Defendants' opening brief and below, Gunderson's testimony and methodology offered to prove ChromaDex's purported damages are fundamentally flawed and unreliable, and thus fail to meet the threshold requirements under Federal Rule of Evidence 702 or *Daubert*. Because Gunderson's opinions are not just incorrect, but also based on an unsound methodology—calculating aggregate damages for each of ChromaDex's claims arising from the totality of Elysium's alleged wrongful acts—that renders them unhelpful to a jury, the Court should exclude them in accordance with its gatekeeper role. *Primiano v. Cook*, 598 F.3d 558, 564-65 (9th Cir. 2010).

II. GUNDERSON'S TESTIMONY IS UNHELPFUL AND UNRELIABLE

A. Gunderson's Methodology Is Improperly Applied to Every One of ChromaDex's Claims Notwithstanding the Material Differences Between Those Claims

In his expert report, Gunderson relies on a methodology that aggregates ChromaDex's purported damages as arising from the totality of Elysium's alleged

[1] Capitalized terms not otherwise defined here shall have the meanings ascribed in Defendants' initial Motion *in Limine* to Exclude Expert Testimony of Lance Gunderson (ECF No. 292).

"wrongful acts" writ large, without establishing causation or apportioning damages to any particular claim. (ECF No. 245-5 at 86, 118-123). In other words, Gunderson conflates all of ChromaDex's claims, offering only an undifferentiated analysis attributing all of the alleged damages to all of the alleged wrongs at issue in the case, without any attempt to identify which damages flowed from which wrongs. (ECF No. 245-5 at 3, 83). This is inappropriate, because to recover on each of its claims, ChromaDex must not only prove the existence of an actionable wrong, but also that damages resulted from that actionable wrong. *See, e.g., Mattel, Inc. v. MGA Entmn't, Inc.*, 616 F.3d 904, 910–11 (9th Cir. 2010) (rejecting over-inclusive damages award that included defendants' "sweat equity" or "hard work, creativity, and legitimate efforts" not to be traceable to the trade secret misappropriation claim) (internal marks omitted); *James v. Public Finance Corp*. 47 Cal.App.3d 995, 1000-01 (1975) ("The concurrence of both an actionable wrong and damages are necessary elements for a cause of action.").

In its opposition brief ("Opp."), ChromaDex argues that Gunderson is not required to apportion damages on a claim-by-claim basis for his opinions to be admissible. (Opp. at 4). The cases ChromaDex cites do not sweep so broadly. ChromaDex relies extensively on *BladeRoom Grp. Ltd. v. Facebook, Inc.*, 2018 WL 1611835 (N.D. Cal. Apr. 3, 2018). The opinion in *BladeRoom* is so heavily redacted that it is difficult to discern how the court determined that the expert there need not apportion damages between claims for trade secret misappropriation and breach of contract, rendering the decision of little persuasive value. What can be gleaned from the court's opinion, however, does not support ChromaDex's argument. When the *BladeRoom* court stated "Wagner's opinion that the misappropriation and breach claims [Redacted] is consistent with the applicable law," it cited *Ajaxo Inc. v. E*Trade Grp., Inc.*, 135 Cal. App. 4th 21 (2005), a case on which ChromaDex also relies. *BladeRoom*, 2018 WL 1611835, at *6. *Ajaxo* is readily distinguishable from the case here, which suggests *BladeRoom* is as well.

In *Ajaxo*, the plaintiff "proceeded under [the] theory that E*Trade was unjustly enriched because of the breach of the NDA *and* misappropriation of Ajaxo's trade secrets," and thus sought the same damages on each claim, without apportionment between them. *Ajaxo Inc.*, 135 Cal. App. 4th at 62 (emphasis in original)). Crucially, however, in determining that Ajaxo could properly pursue and recover the same damages for each of those claims, the court observed that E*Trade's breach of the NDA "was the basis for the misappropriation claim." *Id.* In other words, the alleged conduct underlying Ajaxo's claims for breach of contract and trade secret misappropriation against E*Trade was entirely coextensive. In contrast, here, Gunderson applies the same collective damages analysis to every one of ChromaDex's claims even though the alleged conduct underlying each of those claims varies substantially; for example, whereas ChromaDex's trade secret claims are based on the alleged misappropriation of twelve pieces of information it divides into four discrete categories, its breach of contract and breach of fiduciary duty claims, by Gunderson's own estimation, involve more than 140 pieces of information that are *not* alleged to be trade secrets. (ECF No. 245-5 at Schedules 15, 15A). Thus, unlike in *Ajaxo*, the alleged conduct underlying ChromaDex's trade secrets claims is distinct from, not coextensive with, the alleged conduct underlying ChromaDex's other claims. For example, ChromaDex bases its trade secrets claims in large part on information concerning the dates, prices, and volume of its sales of ingredients to its customers. (ECF No. 153 ¶¶ 103-105, 192-197). Its breach of contract claims, however, rest in large part on Elysium's purported use of information related to the manufacture of NR, such as the specifications for NR attached to the NR Supply Agreement that ChromaDex made public by attaching them to an SEC filing. (*Id.* ¶¶ 116-119, 121-122; ECF No. 246-7 at 767).

ChromaDex cites to *CrossFit Inc. v. Martin*, 2017 WL 3308989 (D. Ariz. Aug. 3, 2017) to argue that "different claims can be tied to the same harm." (Opp. at 4). In that terse opinion, the court stated that the expert was not required to apportion

damages among claims because the claims all "substantially related to the same set of operative facts." *CrossFit*, 2017 WL 3308989 at *2. Here, in contrast, ChromaDex's claims are based on widely disparate facts. For example, as described above, ChromaDex's claims for trade secret misappropriation are based on twelve purported trade secrets, whereas its claims for breach of contract based on the alleged disclosure of (1) purportedly confidential information or (2) certain terms of the parties' agreements, in contrast, are based on a handful of entirely different documents, many of which ChromaDex made public, making them the antithesis of trade secrets. (ECF No. 245-5 at 176-79; ECF No. 246-02 at 2-5 (Schedule 15A to Report); ECF No. 246-07 at 767, 775 (ChromaDex 10-Q)).

Gunderson's damages opinions should be excluded, because if admitted, they could only result in damages awards that are plainly overinclusive for each of ChromaDex's claims. *See*, *e.g.*, *Mattel*, 616 F.3d at 910–11.

B. ChromaDex Admits That Gunderson's Methodology to Determine Trade Secret Damages Does Not Apportion Damages Among ChromaDex's Alleged Trade Secrets

Gunderson's damages methodology is also fatally flawed and unreliable because it does not provide a potential juror with the means to determine damages arising from any single alleged act of trade secret misappropriation. Indeed, Gunderson confirmed this point at this deposition when asked if his Report expressed an opinion on damages attributable to any one of the specifically alleged trade secrets. (ECF No. 245-06 at 36:24-39:10) ("I didn't break it out that way. No. … I don't. … Same answer. … I didn't break it out that way. … I didn't break it out that way. … Same answer. … The same answer.").

ChromaDex contends that California's Uniform Trade Secrets Act does not require that "an expert assign damages amongst the trade secrets for his or her opinion to be admissible." (Opp. at 5). This argument ignores, however, that by conflating all of the various trade secrets ChromaDex claims to have been

misappropriated – which ChromaDex itself asserts fall into four entirely distinct categories of information (ECF No. 246-09, Ex. 60 at 16 [ChromaDex Supp. Initial Disclosures]) – not just with each other, but with all of the other purported "confidential and/or proprietary" information underlying ChromaDex's other claims, Gunderson has provided no "reasonable basis" on which to calculate damages flowing from each of the twelve alleged trade secrets ChromaDex claims were misappropriated. (ECF No. 248-13). ChromaDex must have a "reasonable basis for the computation of [its] damages." *Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1407-1408 (9th Cir. 1993) (and cases cited therein), abrogated on other grounds by *SunEarth, Inc. v. Sun Earth Solar Power Co.*, 839 F.3d 1179 (9th Cir. 2016). And to be reasonable, the damages must be "caused by" the trade secret misappropriation, meaning that ChromaDex must "sufficiently show [] a causal link between a potential misappropriation of a trade secret and the alleged damages." *Sci. of Skincare, LLC v. Phytoceuticals, Inc.*, 2009 WL 2050042, at *5 (C.D. Cal. July 7, 2009); *see also LivePerson, Inc. v. [24]7.AI, Inc.*, 2018 WL 6257460, at *2 (N.D. Cal. Nov. 30, 2018) (granting motion to exclude certain testimony of expert witness because he did "not apportion trade secret misappropriation damages among particular trade secrets").

ChromaDex attempts to gloss over Gunderson's improper bundling of allegedly misappropriated trade secrets with non-trade secret information purportedly used or disclosed by Defendants by citing to a case where the expert stated his damages calculations would be the same whether one or more of the alleged trade secrets was found to be misappropriated because all related to the plaintiff's "unique trade secret process for extracting iodine," *Iofina, Inc. v. Igor Khalev*, 2016 WL 6242930, at *2-3 (W.D. Okla. Oct. 25, 2016), and one where, similarly, the alleged trade secrets were all technical information related to just one product (deicing controllers, *Ice Corp. v. Hamilton Sundstrand Corp.*, 615 F. Supp. 2d 1256, 1261-64 (D. Kan. 2009). Neither of those cases supports what Gunderson

did here, which was to perform a damages analysis only in the aggregate, encompassing not just misappropriation of all alleged trade secrets, but all other alleged wrongdoing notwithstanding that the nature of the conduct underlying those varying claims varies substantially, as discussed above. *See e.g.*, ECF No. 245-5 at 86 (stating trade secret damages analysis includes "the alleged misappropriation of ChromaDex's trade secrets, confidential and/or proprietary information at issue, and [] the alleged aiding and abetting of Mark Morris's breach of fiduciary duty").

This total failure to apportion or differentiate ChromaDex's alleged damages renders Gunderson's methodology fatally flawed and any related testimony subject to exclusion.

C. ChromaDex Cannot Justify Gunderson's Reliance on Allegations Already Dismissed by the Court or Based on Future Profits It Never Would Have Received

ChromaDex's opposition also fails to address the additional deficiencies in Gunderson's methodology. ChromaDex maintains that the alleged "price discount" ChromaDex offered to Elysium – based on Elysium's alleged statements that it "was 'ramping up' its business" – can still be part of Gunderson's damages calculations even though the Court dismissed with prejudice a fraudulent deceit claim based on those very statements. (Opp. at 8). To be sure, ChromaDex asserts that this Court "did not hold that the loss associated with this price discount could not be recovered under any possible theory." (*Id.*) The problem with this argument, of course, is that ChromaDex does not identify "any possible theory" under which it is pursuing these damages other than the theory that Elysium obtained the discount by virtue of misleading ChromaDex by making misrepresentations about the likelihood it would place future orders, which is precisely the claims this Court dismissed with prejudice. (ECF No. 44 at 13-14). ChromaDex cites no authority for its attempted end-run around this Court's prior ruling.

ChromaDex's defense of Gunderson's opinion on ChromaDex's "lost

profits" is similarly flawed. (ECF No. 245-5 at 84). ChromaDex admits that it terminated the NR Supply Agreement in November 2016, effective February 2017. As a result, that termination relieved Elysium of any obligation to make purchases, because the minimum purchase provisions did not, by the NR Supply Agreement's terms, survive termination. (ECF No. 153-03). Elysium cannot be held liable for not making minimum purchases that were rendered impossible by virtue of ChromaDex's own conduct in terminating the NR Supply Agreement. ChromaDex's argument ignores basic tenets of contract law, including the general proposition that "a party cannot recover damages flowing from consequences which that party could reasonably have avoided." *Sun Mortgage Corp. v. Western Warner Oils, Ltd.*, 567 N.W.2d 632, 635 (S.D. 1997) (*quoting* 22 Am. Jur.2d Damages § 495, at 579 (1988)). Rather, the injured party has a duty to make "reasonable exertion to render the injury as light as possible." *Id.* Had ChromaDex wished to make additional sales to Elysium, it could have pursued its claims against Elysium for non-payment without terminating the NR Supply Agreement.

The same is true for Gunderson's consideration of purported forecasts for future purchases of NR that Elysium made in its discussions with Grace – purchases that Elysium never actually made, and forecasts that are not alleged to have been communicated to ChromaDex. (ECF No. 265-6 at 193:22-196:16; ECF No. 265-7 at 325:2-4). Indeed, Gunderson chose to ignore the available evidence of Elysium's actual 2017 NR purchases in favor of less reliable projections provided to a non-party that were more favorable to ChromaDex's theory. (ECF No. 265-6 at 194:19-195:10). This "cherry-picking" of evidence renders a damages expert's opinion unreliable and thus warrants exclusion. *See, e.g., Fail-Safe, L.L.C. v. A.O. Smith Corp.*, 744 F. Supp. 2d 870, 889-94 (E.D. Wis. 2010) (excluding expert's opinion where, inter alia, his treatment of evidence undermining his conclusion made it "readily apparent that Dr. Keegan all but 'cherry picked' the data he wanted to use, providing the court with another strong reason to conclude that the witness utilized

an unreliable methodology").

III. CONCLUSION

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

Respectfully submitted,

Dated: September 4, 2019

BAKER & HOSTETLER LLP

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

Attorneys for Defendant and Counterclaimant ELYSIUM HEALTH, INC. *and Defendant* MARK MORRIS