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

18 CHROMADEX, INC.,
 19 Plaintiff,
 20 v.
 21 ELYSIUM HEALTH, INC.,
 22 Defendant.

Case No. 8:16-cv-02277-CJC-DFM
**ELYSIUM HEALTH, INC.’S
 REPLY MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 FURTHER SUPPORT OF
 MOTION TO DISMISS THIRD,
 FOURTH, AND FIFTH CLAIMS
 OF THE FOURTH AMENDED
 COMPLAINT**

Date: August 6, 2018
 Time: 1:30 p.m.
 Courtroom: 9B, 9th Floor

Judge: Hon. Cormac J. Carney

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1 **I. PRELIMINARY STATEMENT**

2 The myriad defects in its Fourth Amended Complaint¹ laid bare by Elysium’s
3 opening submission, ChromaDex lards its response (“Opp.”) with rhetoric and
4 references to Elysium’s purported misconduct (including a request that the Court
5 decline to hear Elysium’s motion altogether because of a purported one-day delay in
6 requesting to meet and confer) in an effort to distract the Court from its plain failure
7 to state a claim through the new allegations in the FAC. ChromaDex is silent, of
8 course, on its own repeated acts of fraud and bad faith dealing, like:

- 9
- 10 • its ignition of the parties’ dispute by attempting to conceal from
11 Elysium that it was being cheated out of the MFN pricing to which it
12 was entitled (including, discovery has only recently revealed, through a
13 sweetheart deal ChromaDex gave a customer set up to compete with
14 Elysium, which was awarded under half the price Elysium was given);
 - 15 • ChromaDex’s fraudulent misrepresentations and abuse of the patents it
16 licenses to extort contractual concessions from Elysium;
 - 17 • its facilitation and encouragement of its customers to create products
18 that would compete with Elysium’s Basis despite the exclusivity
19 provision to which the parties had agreed;
 - 20 • its bald-faced lie that the NR it sold was pharmaceutical-grade, when in
21 reality ChromaDex’s Niagen was not even close to up to standard; and
 - 22 • ChromaDex’s decision to withhold the information that the
23 manufacturing process for Niagen—the same process ChromaDex now
24 suggests Elysium knocked off—imbued ChromaDex’s NR with a
25 contaminant deemed hazardous under California law and subject to
26 strict regulation.

27 ¹ All capitalized terms shall have the same meaning ascribed to them as in
28 Elysium’s opening brief (“Br.”).

1 ChromaDex’s flurry of misdirection—paired with misrepresenting or outright
2 ignoring caselaw, such as authority from this Court expressly rejecting ChromaDex’s
3 positions in the apparent hopes this Court would simply forget its prior holdings—
4 cannot make up for the inadequacy of the FAC. First, ChromaDex’s resurrected
5 trade secret claims, premised on Elysium’s supposed possession of a document that
6 derives no economic value from confidentiality and that had no value to Elysium,
7 which was not a competitor of ChromaDex’s, fail. Next, ChromaDex’s claim for
8 conversion is entirely preempted and superseded by state and federal law, partially
9 foreclosed by the economic loss doctrine, and further inadequate because
10 ChromaDex pleads no manner in which it has sustained an injury in fact, in part
11 because it has no property rights in several of the allegedly converted documents that
12 could have been disturbed by Elysium’s purported use. And its new allegations in
13 support of its claims for breach of contract depend on allegations *consistent* with
14 contractual compliance and implausible interpretations of the contract at odds with
15 ChromaDex’s admissions of its own conduct. Accordingly, Elysium requests that
16 ChromaDex’s claims for conversion and misappropriation of trade secrets be
17 dismissed here, and its claims for breaches of the NR and PT Supply Agreements be
18 dismissed insofar as they are based on allegations relating to the pTeroPure GRAS
19 Report, the NR Study Data, and the NR Specifications.

20 **ARGUMENT**

21 **II. ChromaDex’s Trade Secret Claim Fails as a Matter of Law.**

22 **A. ChromaDex’s Conclusory Claim of Trade Secret Protection Fails**

23 ChromaDex’s effort to escape its pleading burden on its claims for trade secret
24 misappropriation fall flat. It belatedly attempts to remedy its deficient allegations
25 regarding whether the Ingredient Pricing Spreadsheet derives economic value from
26 confidentiality by arguing that a plaintiff “need only aver that the material is ‘not
27 generally known’ and ‘a competitor could use this information to market itself more
28

1 effectively” and that the FAC “plainly” meets that standard. (Opp. at 11 (citation
2 omitted).) The FAC contains no such language, however. ChromaDex purports to
3 quote the FAC as reading: “‘The Ingredient Sales Spreadsheet derives independent
4 economic value from not being generally known to the public,’ *because* it includes
5 ‘the detailed purchasing history of each ChromaDex customer, order forecasts, and
6 the prices, columns, and dates of each purchase.’” (Opp. at 11 (emphasis added).)
7 This non-sequitur, itself inadequate, doesn’t even appear in the FAC. ChromaDex in
8 its brief simply jams together its conclusory, standalone sentence that the Ingredient
9 Sales Spreadsheet “derives independent value from not being generally known to the
10 public” with a separate sentence alleging that portions of the Ingredient Sales
11 Spreadsheet are confidential. (See FAC ¶ 151.) Similarly, ChromaDex slyly
12 attempts to bolster its pleading by reframing the Ingredient Sales Spreadsheet as a
13 document reflecting “how ChromaDex structures its relationships with its customers,
14 as well as market trends and forecasts.” (Opp. at 11 (citing FAC ¶ 160).) Neither
15 the paragraph of the FAC its purports to cite, nor any other paragraph, states that the
16 Ingredient Sales Spreadsheet reflects “market trends” or any details of customer
17 relationships apart from purchase history. (See FAC ¶ 77.)

18 As the single authority cited by ChromaDex involving pleading standards on a
19 12(b)(6) motion makes clear, this sleight of hand is no substitute for *actual*
20 *allegations* demonstrating that the Ingredient Pricing Spreadsheet derives economic
21 value from its confidentiality. See *Nelson Bros. Prof’l Real Estate LLC v. Jaussi*,
22 2017 U.S. Dist. LEXIS 219769, at *13 (C.D. Cal. Mar. 23, 2017) (noting plaintiff
23 met burden by pleading that “a competitor could use [proprietary checklist] to
24 market itself more effectively” (citation omitted)); see also *Epicor Software Corp. v.*
25 *Alt. Tech. Sols., Inc.*, 2013 U.S. Dist. LEXIS 109278, at *13 (C.D. Cal. June 21,
26 2013) (Carney, J.) (dismissal of CUTSA claim where plaintiff had not “alleged
27 facts” to show that information qualified as trade secret); *Webpass Inc. v. Banth*,

28

1 2014 U.S. Dist. LEXIS 175102, at *10 (N.D. Cal. Dec. 18, 2014) (allegation that
2 customer lists and customer pricing and financial information has “significant
3 independent economic value by virtue of not being generally known to the public or
4 to Plaintiff’s competitors” insufficient to plead CUTSA claim).

5 **B. ChromaDex Pleads No Injury from Any Alleged Misappropriation.**

6 ChromaDex also completely fails to allege that it sustained injury from any
7 alleged trade secret misappropriation. Nor could it: The allegedly misappropriated
8 trade secrets relate to ChromaDex’s ingredient supply business (*see* FAC ¶ 77), and
9 ChromaDex does not and cannot allege that Elysium, its *customer*, was its
10 competitor in that business or in a position to take advantage of that information to
11 ChromaDex’s detriment. ChromaDex first misrepresents caselaw to suggest that a
12 “presumption” of harm provides it a loophole around its failure to plead injury. Not
13 so. As this Court has stated, the third element necessary to state a claim for trade
14 secret misappropriation in California is “resulting or threatened injury to the
15 plaintiff.” (*See* Br. at 23 (citing *Teva Pharm. USA, Inc. v. Health IQ, LLC*, 2013 WL
16 12134185, at *3 (C.D. Cal. July 2, 2013) (Carney, J.)).) Neither of the cases
17 ChromaDex cites rebuts this Court’s holding. In the first instance, both rely on a
18 presumption of “irreparable harm” in the preliminary injunction context and thus
19 offer little guidance on pleading standards.² *Cooper Interconnect, Inc. v. Glenair,*
20 *Inc.* moreover *rejected* that any presumption of injury exists and dismissed a claim
21 for trade secret misappropriation because the plaintiff failed to allege “facts to
22 support an inference of actual harm” or to show the defendant could use the
23 information to harm the plaintiff. *See* 2015 WL 13722129, at *4 (C.D. Cal. Feb. 3,

24 _____
25 ² *See Language Line Servs., Inc. v. Language Servs. Assocs., Inc.*, 944 F.
26 Supp. 2d 775, 782-84 (N.D. Cal. 2013). The court further made reference to a
27 “presumption” in declining to grant summary judgment on a claim where the court
28 had previously enjoined any use of the purportedly stolen information by the
competitor defendant. *Id.* Thus, the misappropriated information in that case at least
was usable by the defendant to compete against the plaintiff.

1 2015). So too here, where Elysium’s status as ChromaDex’s customer, not its
2 competitor, renders any presumption that it did (or even could) use the Ingredient
3 Sales Spreadsheet to harm ChromaDex entirely baseless.

4 ChromaDex attempts to invoke a non-existent presumption because its
5 allegations of injury are woefully inadequate. ChromaDex first misrepresents this
6 Court’s holding in *iBASEt v. Exacore, LLC* to suggest that ChromaDex has pled
7 injury in alleging that Elysium “improperly used the spreadsheet . . . by wrongfully
8 access[ing] the detailed purchasing histories of all of its closest competitors.” (Opp.
9 at 12.) What ChromaDex omits is that the language from this Court that it quotes
10 regarding a defendant’s alleged “access” to trade secret information related to
11 analysis of whether the plaintiff had sufficiently alleged *misappropriation*, the
12 second element of the tort, not *injury*. See *iBASEt v. Exacore, LLC*, 2014 U.S. Dist.
13 LEXIS 198804, at *6-7 (C.D. Cal. Mar. 24, 2014) (Carney, J.). In reality, none of
14 the cases cited by ChromaDex suggest that mere “access” to trade secret information
15 constitutes wrongful use, let alone use giving rise to injury, and each (apart from
16 *Language Line*, inapt as described above) features allegations supporting the
17 existence of *actual injury*. See *iBASEt v. Exacore, LLC*, 2014 U.S. Dist. LEXIS
18 198804, at *1 (defendants used misappropriated material to solicit plaintiff’s
19 customers); *Planned Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress*, 214 F.
20 Supp. 3d 808, 818 (N.D. Cal. 2016) (plaintiff alleged incurrence of millions of
21 dollars in costs), *aff’d*, 890 F.3d 828 (9th Cir. 2018); *AT&T Commc’ns v. Pac. Bell*,
22 1998 U.S. Dist. LEXIS 13459, at *3 (N.D. Cal. Aug. 26, 1998) (defendant used
23 purportedly misappropriated information to solicit customers).

24 ChromaDex attempts to remedy this defect by presenting in its opposition
25 brief an incoherent theory of damage completely untethered from the FAC. First,
26 ChromaDex contends that ChromaDex was “directly damaged by Elysium’s access”
27 to ingredient sales information because Elysium developed “its own alternative
28

1 sources of NR and pterostilbene,” whereas previously ChromaDex was the sole
2 commercial source and supplier of NR. (Opp. at 12-13.) ChromaDex thus appears
3 to suggest in muddled fashion either that (i) access to ChromaDex’s ingredient sales
4 information allowed Elysium to set up new supply chains—a complete *non-*
5 *sequitur*—or (ii) Elysium’s development of alternative sources allowed it to take
6 advantage of “inside knowledge of ChromaDex’s past sales and sales forecasts.”
7 (Opp. at 13.) But ChromaDex does not and cannot allege that Elysium has itself
8 become an ingredient supplier or that it and ChromaDex are competitors in
9 ingredient sales (*see* Br. at 24), rendering the only inferable advantage from access to
10 that sales information—solicitation of ChromaDex’s customers—implausible.

11 ChromaDex argues that its bare allegation that the Ingredient Sales
12 Spreadsheet gave Elysium an “undisclosed advantage . . . during contract
13 negotiations” suffices because Elysium “concedes” the existence of negotiations.
14 ChromaDex newly suggests that Elysium “leveraged its improper knowledge of
15 ChromaDex’s entire sales history and forecasts to anticipate ChromaDex’s
16 willingness to give it a lower price in exchange for a large order.” (Opp. at 13.) One
17 need look no further than the FAC to belie this argument. As ChromaDex alleges,
18 Elysium placed its final order, for which it purportedly convinced ChromaDex to
19 offer a “discounted” price in exchange for a sizeable order, on June 30, 2016. (FAC
20 ¶ 36.) ChromaDex also alleges that Elysium did not come into possession of the
21 Ingredient Sales Spreadsheet until July 18, 2016—*nearly three weeks later*. (*See id.*
22 ¶ 77.) ChromaDex does not explain how Elysium purportedly leveraged an
23 “undisclosed advantage” from the Ingredient Pricing Spreadsheet in a negotiation
24 that preceded its possession of the document by weeks,³ and its nonsensical
25 argument only highlights the gossamer nature of its claim of injury.

26 _____
27 ³ ChromaDex further alleges that Elysium refused to engage in negotiations
28 after the June 30 order (*see* FAC ¶45-49), undermining any inference of leverage.

1 ChromaDex next attempts to expand on its one-line contention that Elysium
2 was “unjustly enriched” by arguing that Elysium “learn[ed] what it previously did
3 not know.” (Opp. at 14.) This tautology—Elysium was enriched by previously-
4 unknown information because it had not known the information before—describes
5 any purported trade secret misappropriation and thus does not constitute the
6 necessary “factual allegation” in support of a claim of injury based on unjust
7 enrichment. *E & J. Gallo Winery v. Instituut Voor Landbouw-En Visserijonderzoek*,
8 2018 WL 2463869, at *8 n.4 (E.D. Cal. June 1, 2018). ChromaDex’s half-hearted
9 reference to injury from Elysium’s purported efforts to “scam ChromaDex products,
10 employees, and documents” (Opp. at 14), the subject of its claims for conversion and
11 breach of contract, is nothing more than an effort to escape its obligation to plead the
12 existence of injury relating to *this* claim. *See Teva Pharm. USA, Inc.*, 2013 WL
13 12134185, at *3. ChromaDex’s red-herring protest that “[t]he exact measure of
14 Elysium’s enrichment can only be learned through discovery” (Opp. at 14) does not
15 change that result; Elysium does not argue that ChromaDex has failed to allege the
16 “exact measure” of any unjust enrichment but that it fails to adequately allege the
17 existence of any unjust enrichment at all. (*See Br.* at 23-24.)⁴

18 Each of these defects, which ChromaDex belatedly and ineffectually attempts
19 to rehabilitate through its opposition brief, is not simply the product of sloppy
20 drafting. Rather, ChromaDex does not plead that the Ingredient Sales Spreadsheets
21 derives economic value from its confidentiality or that it offered value to Elysium
22 that Elysium could leverage to injure ChromaDex because it cannot: The

23

24 ⁴ ChromaDex makes a last-gasp effort at saving its trade secret claims by
25 referencing its demand for punitive damages. (*See Opp.* at 14.) A request for
26 punitive damages does not show that ChromaDex sustained any *injury*, however,
27 which ChromaDex’s own authority makes clear. *See Cooper Interconnect*, 2015 WL
28 13722129, at *3-4 (dismissing trade secret claims for failure to “provide[] facts to
support an inference of actual harm” but denying defendant’s motion to dismiss
request for punitive damages).

1 information set forth in the Ingredient Sales Spreadsheet represents a straightforward
2 compilation of business information of neither interest nor value to a party that did
3 no business with ChromaDex after acquiring that information and does not compete
4 for ChromaDex’s customers. Accordingly, dismissal is warranted here.

5 **III. ChromaDex’s Conversion Claim Is Preempted As a Matter of Law.**

6 In its moving brief, Elysium explained that ChromaDex’s claim for conversion
7 is completely superseded by the CUTSA and preempted by the Copyright Act. (Br.
8 at 7-11.) In attempting to escape this result, ChromaDex dedicates nearly a third of
9 its opposition brief to misdirection—pages of argument to show that it meets certain
10 narrow exceptions based on outdated or inapt caselaw and an irrelevant detour
11 through copyright law to establish ChromaDex’s purported ownership of the
12 allegedly converted documents. This effort cannot save its claims.

13 **A. Any Conversion Claim Is Preempted by the Copyright Act**

14 ChromaDex’s conversion claim is preempted by the Copyright Act, which
15 “broad[ly]” preempts “state-law claims which come within the subject matter of
16 copyright law and which protect rights equivalent to any of the exclusive rights
17 within the scope of federal copyright law.” *Jurisearch Holdings, LLC v. Lawriter,*
18 *LLC*, 2009 WL 10670588, at *5 (C.D. Cal. Apr. 13, 2009) (quoting *Firoozye v.*
19 *Earthlink Network*, 153 F. Supp. 2d 1115, 1122 (N.D. Cal. 2001)).⁵ ChromaDex

20 _____
21 ⁵ While Elysium does not assert Copyright Act preemption would apply to the
22 MFN Breach Spreadsheet (Br. at 11), purported conversion of the document plainly
23 falls within the scope of CUTSA preemption if deemed ChromaDex’s confidential
24 and proprietary information. (Br. at 8.) But ChromaDex does nothing to counter
25 Elysium’s showing that the MFN Breach Spreadsheet set forth information to which
26 Elysium was contractually entitled and thus is not property subject to a conversion
27 claim. (See Br. at 16-17.) ChromaDex simply claims that there is no provision
28 providing an entitlement to information (Opp. at 22 n.17), overlooking the MFN
Provision itself (see Br. at 16-17), and speciously argues that if “such a right actually
existed, Elysium would not have needed to surreptitiously obtain the information.”
(Opp. at 22.) Although pled only euphemistically in the FAC (see FAC ¶ 27-28),
ChromaDex does not allege that it refused to provide pricing information in response
to Elysium’s June 2016 request; rather, it gave that information (albeit in falsified
form) in clear recognition of Elysium’s contractual entitlement to it.

1 concedes that it alleges conversion of “copyrightable” information. Indeed, this is
2 the lynchpin of its misguided position that CUTSA does not supersede its claims.
3 (Opp. at 19-20.) ChromaDex nonetheless maintains that, because its claim for
4 conversion allegedly has two “extra elements”—improper acquisition and wrongful
5 use—it falls outside the scope of copyright preemption. ChromaDex’s position is
6 without merit, because it would mean that a claim for conversion could *never* be
7 preempted by the Copyright Act, as “conversion” *always* involves some allegation of
8 improper acquisition or use. *See Firoozye*, 153 F. Supp. 2d at 1130 (noting
9 conversion claims always have extra element because “they require a plaintiff to
10 prove that the defendant wrongfully obtained possession” but that this is not an extra
11 “element” sufficient to preclude copyright preemption).⁶ Instead, the “extra
12 element” must “qualitatively change the nature” of the tort claim to avoid
13 preemption. *Design Art, Inc. v. Nat’l Football League Props., Inc.*, 2000 WL
14 33151646, at *3 (S.D. Cal. Aug. 18, 2000) (Copyright Act preemption where
15 allegation that defendants “through fraud and deceit” engaged in conversion did not
16 “qualitatively change the nature of this conversion claim”).

17 ChromaDex searches for some inconsistency in Elysium’s assertions that the
18 conversion claim is grounded in: (1) copying, reproducing, or disseminating content,
19 and (2) improper use. (Opp. at 15.) But it is Elysium’s purported act of copying,
20 reproducing, and disseminating material that constitutes the misuse alleged by
21 ChromaDex. (*See Br.* at 9.) It is simply untrue that “wrongful[] use[]” of
22 information is sufficient to find a claim is not preempted by the Copyright Act (Opp.

23

24 ⁶ ChromaDex attempts to distinguish *Firoozye* on the invented basis that the
25 plaintiff sent the defendant materials “without contractual limitations.” (Opp. at 16
26 n.11.) As the remainder of the quoted sentence makes clear, the defendants in
27 *Firoozye* were permitted to use the software only “for their own evaluation,” but
28 exceeded those limits when they reproduced the software. 153 F. Supp. 2d at 1130.
Firoozye shows that, even where information is initially obtained properly, claims
grounded in the alleged use of that property beyond its intended limits are preempted
by the Copyright Act despite the “extra element” of wrongful use. *See id.*

28

1 at 16), as wrongful copying, reproduction, or dissemination are necessarily wrongful
2 “uses” that fall squarely within the Copyright Act’s preemptive scope. Consistent
3 with that, courts in this circuit routinely find claims to be preempted by the
4 Copyright Act even if there are allegations that the defendant improperly acquired or
5 improperly used the copyrightable content, such as through some wrongful access or
6 retention or breach of a confidentiality agreement. *See, e.g., Del Madera Props. v.*
7 *Rhodes & Gardner, Inc.*, 820 F.2d 973, 976 (9th Cir. 1987) (preemption of unfair
8 competition claim by Copyright Act where defendants allegedly “misappropriated”
9 documents for own use); *CD Law, Inc. v. LawWorks, Inc.*, 1994 WL 840929, at *2
10 (W.D. Wash. Dec. 21, 1994) (rejecting position that defendant’s “wrongful and
11 deceptive manner of acquiring and retaining” content and its “wrongful use . . . to
12 create a competing project” avoided copyright preemption). Thus, ChromaDex’s
13 “extra elements” are, as a matter of law, insufficient to avoid preemption.

14 The cases cited by ChromaDex are not to the contrary. In *G.S. Rasmussen &*
15 *Associates, Inc. v. Kalitta Flying Service, Inc.*, 958 F.2d 896, 904 (9th Cir. 1992), the
16 defendant allegedly misused a certificate the FAA had issued to the plaintiff on the
17 basis of designs it had submitted to the FAA. ChromaDex does not allege that
18 Elysium converted any government-issued certificate it procured in response to its
19 regulatory submissions, but rather that it converted ChromaDex’s submissions
20 themselves. (Opp. at 16-17.) *See Mktg. Info. Masters, Inc. v. Bd. of Trustees of Cal.*
21 *State Univ. Sys.*, 2008 WL 11339961, at *3 (S.D. Cal. Dec. 3, 2008) (distinguishing
22 *G.S. Rasmussen* on this basis and finding copyright preemption where the defendant
23 allegedly copied an economic impact study instead of independently writing its own,
24 and then reproduced it for its own use); *cf. Tethys Bioscience, Inc. v. Mintz, Levin,*
25 *Cohn, Ferris, Glovsky & Popeo, P.C.*, 2010 WL 2287474, at *8 (N.D. Cal. June 4,
26 2010) (allegation that defendant copied patent application and then filed the
27 duplicate with the patent office did not state a conversion claim). And, in *Gladstone*

28

1 v. *Hillel*, 250 Cal. Rptr. 372, 379 (Cal. Ct. App. 1988), the defendants
2 misappropriated physical property. In stark contrast, the Fourth Amended Complaint
3 alleges that Elysium “retyped,” “update[d],” “added slight and purely cosmetic
4 modifications [to],” and “took screenshots of” purported works of authorship. (*See*,
5 e.g., FAC ¶ 175, 187, 192, 225.) The Copyright Act squarely preempts these claims.
6 *See, e.g., Mktg. Info. Masters*, 2008 WL 11339961, at *3 (gravamen of claim was
7 using portions of plaintiff’s report for defendant’s own report)

8 **B. ChromaDex’s Conversion Claim Is Superseded by the CUTSA.**

9 The heart of ChromaDex’s rebuttal to CUTSA preemption is a contention that
10 the allegedly converted material does not constitute trade secrets. (Opp. at 17-19.)
11 However, while ChromaDex acknowledges that “[f]ederal courts in California have
12 taken different approaches when evaluating whether a cause of action based on
13 disclosure of confidential information that falls short of a “trade secret” escapes the
14 CUTSA’s preemptive reach” and deems the minority position “more persuasive,”
15 (*id.*), ChromaDex entirely omits that *this Court has repeatedly rejected the very*
16 *position it espouses here*. This Court “*emphatically reject[s]*” the proposition that
17 CUTSA does not preempt claims “based on the taking of information that, *although*
18 *not a trade secret, [is] nonetheless of value to the claimant.*” *Epicor Software*
19 *Corp. v. Alt. Tech. Sols., Inc.*, 2015 WL 12724073, at *3 (C.D. Cal. Apr. 2, 2015)
20 (Carney, J.) (emphasis added) (quoting *Mattel, Inc. v. MGA Entm’t, Inc.*, 782 F.
21 Supp. 2d 911, 986 (C.D. Cal. 2011)); *see also Teva Pharm. USA, Inc. v. Health IQ,*
22 *LLC*, 2013 WL 12132029, at *5 (C.D. Cal. Apr. 29, 2013) (Carney, J.) (CUTSA
23 supersedes “all claims premised on the wrongful taking and use of confidential
24 business and proprietary information, even if that information does not meet the
25 statutory definition of a trade secret”). This Court has further explained that CUTSA
26 preemption lies for claims alleging conversion of “information . . . of value,”
27 rendering ChromaDex’s attempts to disclaim the confidentiality of some of the
28

1 allegedly converted documents (Opp. at 18) fruitless. *Band Pro Film & Digital, Inc.*
2 *v. ARRI Inc.*, 2012 WL 12888099, at *3 (C.D. Cal. Oct. 10, 2012) (Carney, J.) (citing
3 *Silvaco Data Sys. v. Intel Corp.*, 109 Cal. Rptr. 3d 27, 53 n.22 (Cal. Ct. App. 2010)).
4 Because the FAC, by its very terms, alleges the wrongful acquisition or use of
5 information ChromaDex considers proprietary, confidential, or valuable,
6 ChromaDex pleads itself squarely within the reach of CUTSA supersession. (Br. at
7 9.) ChromaDex’s last-ditch argument that it requires discovery to ascertain “the
8 specific property right with which Elysium interfered” (Opp. at 19) is nothing more
9 than a transparent attempt to evade dismissal.

10 The caselaw on which ChromaDex purports to rely does not save it. Nearly
11 all of it predates *Silvaco*, on which this Court relied in *Band Pro Film & Digital*.
12 See, e.g., *Phoenix Techs. Ltd. v. DeviceVM*, 2009 WL 4723400 (N.D. Cal. Dec. 8,
13 2009); *First Advantage Background Servs. Corp. v. Private Eyes, Inc.*, 569 F. Supp.
14 2d 929 (N.D. Cal. 2008); cf. *Manchester v. Sivantos GMBH*, 2018 WL 587849, at *6
15 (C.D. Cal. Jan. 29, 2018) (relying on two cases pre-dating *Silvaco*). The only other
16 authorities cited by ChromaDex in support of an apparent split of authority are
17 inapposite because they did not involve a claim, like the one here, for conversion of
18 information. See *Leatt Corp. v. Innovative Safety Tech., LLC*, 2010 WL 2803947, at
19 *6 n.5 (S.D. Cal. July 15, 2010) (no claim for conversion); *Angelica Textile Servs.,*
20 *Inc. v. Park*, 163 Cal Rptr. 3d 192, 203 (Cal. Ct. App. 2013) (“tangible” material
21 proper subject of conversion claim).⁷

22 _____
23 ⁷ See also *Argo Grp. US, Inc. v. Prof’l Governmental Underwriters, Inc.*,
24 (DFMx), 2014 WL 12577144, at *3 (C.D. Cal. Jan. 6, 2014) (concluding that
25 *Angelica Textile* holds only that claims for conversion of tangible property are not
26 preempted). That allegedly stolen information is recorded in tangible form does not
27 save a claim from preemption, however. See, e.g., *Avago Techs. U.S. Inc. v.*
28 *Nanoprecision Prods., Inc.*, 2017 WL 412524, at *7 (N.D. Cal. Jan. 31, 2017)
 (“[N]JP may not evade CUTSA preemption simply by alleging that the confidential
 information at issue was written on a piece of paper . . . where there are no
 allegations suggesting that the tangible property . . . had any value apart from the
 confidential information disclosed in it.”).

1 Having supplied a rule about CUTSA supersession that this Court and others
2 have emphatically and repeatedly rejected, ChromaDex spends considerable time
3 analyzing its application. For example, ChromaDex contends that “because none of
4 the documents that Elysium converted are alleged to be trade secrets in the FAC,
5 they are not preempted.” (Opp. at 18.) Unsurprisingly, this is not the law. Claims
6 that allege misappropriation of valuable or proprietary information are superseded by
7 the CUTSA even if the plaintiff fails to state (or even *allege*) an overlapping claim
8 for trade secret misappropriation.⁸ In other words, artful pleading cannot avoid
9 CUTSA supersession, because, as this Court has observed, “[t]o allow claims based
10 on the misappropriation of information that does not rise to the level of a trade secret
11 would undermine the purpose of the UTSA by allowing plaintiffs to ‘alternatively
12 plead[] claims with less burdensome requirements of proof’” and eviscerate
13 CUTSA’s broad preclusive effect. *Band Pro Film & Digital*, 2012 WL 12888099, at
14 *3 (citation omitted).

15 ChromaDex’s attempt to invoke the CUTSA’s narrow savings clause in
16 arguing that its “property rights in the documents and information are grounded in
17 provisions of positive law other than trade secret law,” namely, copyright law and
18 California Civil Code § 655, fares no better. (Opp. at 19.) ChromaDex first argues
19 for application of the narrow savings clause because the allegedly converted material
20 was “copyrightable” (Opp. at 19-20), but cites no case law whatsoever in support of
21 its position, instead misdirecting this Court to cases simply determining what is
22 copyrightable subject matter. (See Opp. at 19-20.) ChromaDex ignores that courts,
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24

25
26 ⁸ See, e.g., *GeoData Sys. Mgmt., Inc. v. Am. Pac. Plastic Fabricators, Inc.*,
27 2016 WL 6601656, at *8 (C.D. Cal. July 25, 2016) (“GeoData’s careful omission of
28 any explicit reference to the misappropriation of trade secrets does not save the Ninth
Claim from CUTSA preemption.”).

1 including this Court, *routinely* find claims superseded by the CUTSA even though
2 the allegedly converted information falls within copyrightable subject matter.⁹

3 Finally, ChromaDex’s position that California Civil Code § 655 confers upon
4 ChromaDex an independent property right in the pTeroPure GRAS Report and NR
5 GRAS Dossier that is capable of being enforced through a conversion claim (Opp. at
6 20) misreads the statute. California Civil Code § 655 simply states that a property
7 interest may exist in rights “created or granted by statute.” Section 655 does not
8 itself purport to create any substantive rights, and while ChromaDex argues that it
9 had property rights in the documents based on a test set out in *caselaw*, the sole
10 “statute” it cites is “FDA regulations” that purportedly allow ChromaDex to rely on
11 the documents to market its products as “generally recognized as safe.” (Opp. at 21.)
12 Section 655 by its terms would therefore recognize, at best, a property right in the
13 ability to market products as GRAS, not the information in the documents or the
14 documents themselves, which are the subject of the conversion claim. Thus,
15 ChromaDex cannot invoke CUTSA’s narrow savings clause, and its conversion
16 claim is completely superseded and must be dismissed with prejudice.

17 **C. The Economic Loss Doctrine Bars ChromaDex’s Conversion Claim.**

18 Next, the scant two paragraphs that ChromaDex dedicates to the economic
19 loss doctrine do nothing to foreclose its application here. ChromaDex contends that
20 Elysium’s alleged “unlawful interference rights [*sic*] constitutes ‘harm above and
21 beyond a broken contractual promise’” that renders the economic loss doctrine
22 inapplicable (Opp. at 22) but cites no authority in support of the proposition, because
23 none supports its half-hearted attempt to distinguish its breach claim, premised on
24 the alleged disclosure of the NRCl Analytical Method, the NR Specifications, and
25

26 ⁹ See, e.g., *Argo Grp.*, 2014 WL 12577144, at **1, 3 (claim for conversion of
27 marketing and business plans superseded); *Band Pro Film & Digital*, 2012 WL
28 12888099, at **1, 3 (same).

1 the pTeroPure GRAS Report, and its conversion claim, premised on the manner in
2 which the documents were disclosed. (See FAC ¶ 172-228.) As this Court
3 recognized in rejecting ChromaDex’s previous claim on the basis of the economic
4 loss doctrine, the exceptions to the economic loss doctrine are narrow (ECF No. 44
5 at 10-12), and tort damages are available on contract claims only “when ‘the duty
6 that gives rise to tort liability is either completely independent of the contract or
7 arises from conduct which is both intentional and intended to harm.’” (*Id.* at 11
8 (quoting *Erlich v. Menezes*, 21 Cal. 4th 543, 552 (1999)).)¹⁰ ChromaDex identifies
9 no such independent duty nor any allegations of intentional and malicious conduct,
10 and its efforts to distinguish its allegations in support of breach from its allegations
11 in support of conversion cannot survive a plain reading of the FAC, which expressly
12 premises the claim for conversion on Elysium’s purported breach. (See FAC ¶¶ 174,
13 180-81, 215.) Application of the economic loss doctrine is thus appropriate here.

14 **D. ChromaDex Fails to Plead Injury from Any Alleged Conversion.**

15 ChromaDex’s final effort to save its conversion claim relies on a specious
16 misconstruction of Elysium’s argument that is in any event unsuccessful. “At the
17 pleading stage, Plaintiffs bear the burden of adequately alleging facts that, if proven,
18 would tend to show that they suffered a constitutionally recognized injury.”
19 *Opperman v. Path, Inc.*, 84 F. Supp. 3d 962, 990 (N.D. Cal. 2015) (dismissing
20 conversion claim for failure to allege injury). ChromaDex first invokes the

21 _____
22 ¹⁰ While the court in *Robinson Helicopter Co. v. Dana Corp.*, 34 Cal. 4th 979,
23 988 (2004) suggested that tort damages may be available for a breach of contract
24 where the “breach is accompanied by a traditional common law tort, such as fraud or
25 conversion,” subsequent authority has made clear that this exception applies where
26 the alleged wrongful taking does not “arise solely out of [the] contract and
27 commercial transaction,” not in situations where, as here, the same action alleged to
28 constitute a breach is also the conduct underlying the conversion claim. *Baggett v.*
Hewlett-Packard Co., 2009 U.S. Dist. LEXIS 95241, at *7-8 (C.D. Cal. Sept. 29,
2009); see also, e.g., *Steinberg v. Provident Funding Assocs., L.P.*, 2016 U.S. Dist.
LEXIS 80006, at *12 (N.D. Cal. June 17, 2016) (dismissing conversion claim where
“the underlying factual basis for the [contract and conversion] claims is the same”).

1 presumption set forth in California Civil Code § 3336 but cannot dispute the
2 authority cited by Elysium making clear that the statute describes a presumption as to
3 the *measure of damages* but does not relieve a plaintiff of its burden of establishing
4 the existence of actual *injury*. (See Br. at 12.) ChromaDex’s conflation of pleading
5 actual injury and presuming a measure of damages, which was expressly rejected in
6 *Opperman*, is misguided:

7 To recover in tort, the plaintiff must prove the fact of proximately
8 caused injury with reasonable certainty. When the fact of
9 proximately caused injury is proven sufficiently, the measure of
10 damages to be awarded need only be shown with the degree of
11 certainty that the circumstances of the case permit. But ***where
the fact of proximately caused injury is not proven with
reasonable certainty, the plaintiff cannot recover regardless of
how much evidence was introduced to show the measure of the
recovery sought by the plaintiff.***

12 *Lueter v. State of California*, 115 Cal. Rptr. 2d 68, 81 (Cal. Ct. App. 2002) (emphasis
13 added). None of the cases ChromaDex cites discuss a plaintiff’s obligation to allege
14 the existence of injury to survive a motion under Rule 12(b)(6) and each moreover
15 involve allegations (and evidence) of actual injury.¹¹

16 No such inference is possible from the FAC. In claiming that Elysium was
17 unjustly enriched (Opp. at 23), ChromaDex again focuses on a measure of damages
18 rather than the existence of injury. Although ChromaDex, in newfound recognition
19 of its need to plead actual injury, makes a feeble attempt to resuscitate its allegation
20 that it lost sales of Niagen that it otherwise would have made to Elysium by directing
21 the Court to construe allegations “liberally in ChromaDex’s favor” (Opp. at 23 n.18),

22 _____
23 ¹¹ See *Hrothgar Invs., Ltd. v. Houser*, 2015 U.S. Dist. LEXIS 134307, at *21
24 (N.D. Cal. Aug. 18, 2015) (conversion claim supported request for default judgment
25 where defendant had refused to return sum of money to plaintiff); *A & M Records,
26 Inc. v. Heilman*, 142 Cal. Rptr. 390, 394 (Cal. Ct. App. 1977) (affirming trial court
27 judgment on damages arising from conversion where defendant had admitted to
28 pirating and reselling plaintiff’s recordings “without making payments” to plaintiff);
Gladstone v. Hillel, 250 Cal. Rptr. 372, 376 (Cal. Ct. App. 1988) (modifying trial
court judgment on conversion claim where defendants “deprived [plaintiff] of a
livelihood” by refusing to return jeweler’s tools and molds and used molds to knock
off jewelry designs).

1 there is no way to do so here: ChromaDex’s contention that but for Elysium’s
2 alleged conversion it would have made additional sales to Elysium through February
3 2017, when the contract terminated, is utterly at odds with its simultaneous
4 allegation that Elysium ordered sufficient NR and pterostilbene in June 2016 to last it
5 until July of the following year. (*See Br. at 13 n.5.*)

6 ChromaDex also attempts to remedy its failure to plead forgone licensing or
7 royalty payments by claiming that ChromaDex’s regular distribution of materials to
8 its customers is in connection with purchase of ChromaDex ingredients, “not for
9 Elysium’s improper purpose of developing a competing supply of ingredients.”
10 (*Opp. at 24.*) This assertion has nothing at all to do, however, with ChromaDex’s
11 failure to allege the materials allegedly converted are capable of being licensed or
12 that it engages in such a practice so that injury in the form of lost fees is evident.
13 (*See Br. at 14; compare to, e.g., G.S. Rasmussen & Assocs., 958 F.2d at 899-906.*)

14 In attempting to distinguish the authority cited by Elysium making clear that
15 actual injury is an essential element of a claim for conversion by claiming that the
16 authorities concern “property rights, not damages,” ChromaDex studiously misses
17 the point. Insofar as the cases involve any consideration of property rights, that point
18 is subsidiary to a broader analysis of whether deprivation of the property resulted in
19 any actual injury to the plaintiff. Each case only emphasizes that a conversion claim
20 requires that the plaintiff suffer actual injury, which ChromaDex entirely fails to
21 allege here.¹² As such, its claim for conversion must be dismissed.

22 _____
23 ¹² *See Kasdan, Simonds, McIntyre, Epstein & Martin v. World Sav. & Loan*
24 *Ass’n (In re Emery)*, 317 F.3d 1064, 1071 (9th Cir. 2003) (because plaintiff had no
25 entitlement to property allegedly transferred, it “therefore suffered no injury” and
26 “[h]aving suffered no injury, [plaintiff] has failed to satisfy the third element
27 necessary for a conversion claim”); *Tyrone Pac. Int’l, Inc. v. MV Eurychili*, 658 F.2d
28 664, 667 (9th Cir. 1981) (affirming denial of claim for conversion where “[t]here
was no evidence that the value []declined ... neither was there evidence that
Tyrone’s inability to transfer [the property] caused it to lose an opportunity to sell”
and plaintiff thus “suffered no damages cognizable”); *Opperman*, 84 F. Supp. 3d at
990 (dismissal of conversion claim for failure to plead injury where plaintiffs had not

(cont’d)

1 **IV. ChromaDex’s New Breach Allegations Fail to State a Claim.**

2 ChromaDex’s new allegations in support of its claims for breach of contract
3 are also deficient. ChromaDex in its opposition brief doubles down on its contention
4 that Elysium disclosed the pTeroPure GRAS Report for a submission “for
5 ‘pterostilbene manufactured by an entity other than ChromaDex’” and newly
6 contends that “Elysium’s product did not, and does not, contain pTeroPure” (Opp. at
7 24) in arguing that Elysium’s alleged usage does not constitute a permitted
8 disclosure under the PT Supply Agreement. This argument cannot survive, however,
9 even a cursory review of the FAC, which plainly alleges that Elysium’s Basis
10 contained pTeroPure well into 2017 and that the alleged regulatory submission was
11 for Basis, not pterostilbene. (See Br. at 20 (citing FAC ¶¶ 106, 109) & FAC ¶ 19.)
12 ChromaDex now argues that Elysium breached the PT Supply Agreement “by failing
13 to provide ChromaDex ‘written notice’ of, and ‘sufficient opportunity to object’ to,
14 the disclosure” (Opp. at 24), yet ignores that no allegations of a failure to provide
15 notice appear anywhere in the FAC. See *In re A-Power Energy Generation Sys. Sec.*
16 *Litig.*, 2012 U.S. Dist. LEXIS 79417, at *39 n.16 (C.D. Cal. May 31, 2012) (plaintiff
17 may not amend complaint through opposition brief).

18 Next, with reference to its new allegations in support of its claim for breach of
19 the NR Supply Agreement, ChromaDex asserts that its subsequent disclosure of the
20 NR Study Data “does not eliminate the harm is sustained from Elysium’s breach”
21 (Opp. at 25) but cannot gainsay the plain language of the contract. Section 1.4 does
22 not state that ChromaDex’s public disclosure “eliminate[s] the harm it sustained
23 from Elysium’s breach” as ChromaDex suggests Elysium argues; rather, Section 1.4
24 circumscribes the definition of “Confidential Information” so that it simply does not

25 _____
(cont’d from previous page)
26 pled any interest that was “injured by [d]efendants’ copying”); *Low v. LinkedIn*
27 *Corp.*, 900 F. Supp. 2d 1010, 1031 (N.D. Cal. 2012) (dismissing conversion claim
for failure to “establish[] a necessary element” where plaintiffs had not shown
28 damage from another party’s access to their information).

1 include information that becomes publicly known. (*See* FAC Ex. A § 1.4.) The only
2 temporal restriction on the provision is that the information become publicly known
3 “subsequent to disclosure of such information by the disclosing party to the other
4 party”; ChromaDex’s urging of this Court to add an additional restriction—that the
5 exception applies only where the information becomes publicly known “subsequent
6 to disclosure” *and* prior to any usage by the receiving party, is not warranted. (*See*
7 Br. at 21 (citing *Freeman Inv. Mgmt. Co. v. Frank Russell Co.*, 2016 U.S. Dist.
8 LEXIS 136220, at *40 (S.D. Cal. Sept. 30, 2016) (dismissing claim for breach of
9 NDA where plaintiff’s public disclosure of information postdated alleged breach by
10 defendant), *aff’d*, 2019 U.S. App. LEXIS 18026 (9th Cir. July 2, 2018)).)

11 Finally, ChromaDex’s defense of its allegations relating to the NR
12 Specifications does not save them. As Elysium argues (Br. at 21-22), this Court need
13 not accept, in the FAC or the opposition brief, ChromaDex’s *ipse dixit* assertion that
14 the NR Specifications constitute a “term of the agreement under Section 1.12”
15 subject to non-disclosure obligations. (Opp. at 25.) ChromaDex’s admission of its
16 own frequent disclosure of the NR Specifications renders its argument that the NR
17 Specifications constitute a “term” of the agreement subject to non-disclosure
18 obligations completely implausible (Br. at 21-22); ChromaDex’s sole response to
19 this is an incoherent protestation that ChromaDex discloses the NR Specifications
20 “without identifying the NR Specifications as a term of its contract with Elysium.”
21 (Opp. at 25.) ChromaDex cannot have it both ways: If the NR Specifications are
22 deemed a term of the contract that is subject to Section 1.12’s *mutual* obligation of
23 non-disclosure, ChromaDex’s own repeated disclosures constitute a breach.
24 ChromaDex’s own conduct thus lays bare that its interpretation of the NR Supply
25 Agreement is manufactured for litigation and implausible.

26 The remainder of the NR Supply Agreement only undermines ChromaDex’s
27 already implausible interpretation: While ChromaDex claims that it “properly
28

1 provided its own product information to its customers” (Opp. at 25), the NR Supply
2 Agreement itself sets forth that the NR Specifications constitute the specifications to
3 which ChromaDex was *required* to manufacture Niagen for Elysium, and that its
4 failure to manufacture to those specifications would be grounds for Elysium to reject
5 a shipment of Niagen and insist on its replacement at ChromaDex’s expense. (See
6 FAC Ex. A § 3.6.) The NR Specifications, in other words, constitute *Elysium’s*
7 requirements for an acceptable product. ChromaDex’s claim now that Elysium was
8 obligated to keep its own product requirements confidential and that ChromaDex
9 was free to disclose those same requirements to other customers is entirely
10 incompatible with the relationship contemplated by the contract, ChromaDex’s
11 litigation-driven interpretation of Section 1.12 notwithstanding. Its new allegations
12 in support of breach are therefore insufficient.¹³

13 **V. The Timing of the Conference under Rule 7.3 Does Not Justify a Refusal**
14 **to Consider Elysium’s Motion on the Merits.**

15 Finally, ChromaDex’s attempt to avoid this Court’s assessment of Elysium’s
16 motion on its merits based on Local Rule 7-3 should be dismissed out of hand.
17 Elysium forthrightly noted in its notice of motion that the conference contemplated
18 by Rule 7-3, although requested the preceding week, had not taken place seven days
19 prior to filing as Rule 7-3 states. (Opp. at 9.) Elysium’s request to meet and confer
20 was made in good faith belief of its timeliness, and ChromaDex identifies no
21 prejudice from the delay in the conference—nor could it, given its role in
22 precipitating that delay. ChromaDex’s argument that this Court should deny
23 Elysium’s motion on the basis of the delayed meet and confer alone represents an
24 unjustified attempt to shield its complaint from motion practice.

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¹³ For the same reason, ChromaDex fails to plead ownership of the NR Specifications and its claim for conversion of them also fails. (See Br. at 17.)

1 As described in the accompanying declaration (“Powell Reply Decl.”),
2 Elysium requested a meet and confer on July 3, 2018, in belief that the request was
3 made timely. (*See id.* ¶ 4.) It was not until it followed up with ChromaDex on July
4 5, 2018, that it learned ChromaDex disagreed with Elysium’s method of calculating
5 the due date for Elysium’s response to the FAC and considered Elysium’s Rule 7-3
6 request on July 3, 2018, to be a day late. To avoid burdening the Court with motion
7 practice regarding a peripheral issue, Elysium prepared to file its motion on July 9,
8 2018, and repeatedly sought to hold the Rule 7-3 meet and confer with ChromaDex
9 as far in advance of its filing as possible, including an offer to meet and confer by
10 email as this Court deemed acceptable in *Masimo Corp. v. Mindray DS USA, Inc.*,
11 2013 U.S. Dist. LEXIS 198266 at *5 (C.D. Cal. Nov. 15, 2013) (Carney, J.). Thus,
12 Elysium’s conduct exhibits none of the bad faith gamesmanship or carelessness
13 characterizing the cases in which courts have found that a failure to comply with the
14 rule constitutes grounds for denial of the motion.¹⁴

15 Moreover, ChromaDex can claim no prejudice whatsoever arising out of the
16 delay in the parties’ meet and confer on the motion. First, Elysium’s request was
17 made only one day late under ChromaDex’s interpretation of the rules and timely
18 under Elysium’s reading of the rules. That the meet and confer did not take place
19 until the following week can be attributed to ChromaDex’s refusals to meet and
20 confer (a tactic it has previously employed for strategic purposes, *see* ECF No. 96-1
21 at ¶ 9-11) or to make itself available (Powell Reply Decl. ¶ 10), not any delay on the
22

23 ¹⁴ *See* Opp. at 9 (citing *Lopez v. Wells Fargo Bank, N.A.*, 2016 U.S. Dist.
24 LEXIS 144380, at *6 (C.D. Cal. Oct. 17, 2016)) (moving party claimed to have
25 made “one missed call” to opposing counsel “minutes” before filing); *Alcatel-Lucent*
26 *USA, Inc. v. Dugdale Commc’ns, Inc.*, 2009 U.S. Dist. LEXIS 100499, at *11 (C.D.
27 Cal. Oct. 13, 2009) (plaintiff first contacted defendant on same day of motion and
28 “waited until the last possible moment”); *compare to Interinsurance Exch. v.*
Electrolux Home Care Prods., 2014 U.S. Dist. LEXIS 194266, at *2 (C.D. Cal. Dec.
16, 2014) (Carney, J.) (granting motion to dismiss where “defendants attempted to
contact plaintiff telephonically” to meet Rule 7-3 requirements).

1 part of Elysium. Next, despite ChromaDex’s suggestion that Elysium was “utterly
2 silent” on its intent to move to dismiss the claim (Opp. at 9), ChromaDex can hardly
3 claim Elysium somehow lulled ChromaDex into believing it would not respond to
4 the FAC with a motion to dismiss and tellingly never claims that Elysium ever made
5 such a representation. Indeed, the declaration filed alongside the stipulation allowing
6 ChromaDex’s amendment stated that “the parties discussed what new discovery
7 would be required on the claims in the FAC *if it were to survive motion practice.*”
8 (ECF No. 107-3 ¶ 3.) ChromaDex filed this declaration on Elysium’s behalf without
9 contesting that such a discussion took place, and its claims now that Elysium
10 attempts to “litigate by surprise” thus ring hollow. (Powell Reply Decl. ¶ 5-6.)

11 Finally, ChromaDex identifies no manner in which its ability to respond to
12 Elysium’s motion was impaired by the one-day delay in Elysium’s request to meet
13 and confer, and its halfhearted argument that an earlier request would have allowed
14 the parties to “focus[] and clari[fy]” the dispute is inconsistent with its simultaneous
15 claim that “it has sufficiently pleaded its claims in the FAC.” (Opp. at 9-10.) The
16 vague assertion that “it may have been possible (with sufficient time) to moot some
17 of Elysium’s arguments through amended allegations” is contradicted by the
18 substance of the eventual meet and confer itself, wherein counsel for ChromaDex
19 simply stated that it disagreed with Elysium’s arguments for all issues outlined in
20 Elysium’s motion, save for its argument on the economic loss doctrine, for which
21 counsel said it had no response. (Powell Reply Decl. ¶ 11.) Courts interpreting Rule
22 7-3 have held that “striking an untimely motion filed in violation of Local Rule 7-3 is
23 inappropriate where the non-movant suffered no prejudice.” *Mikell v. Baxter*
24 *Healthcare Corp.*, 2014 U.S. Dist. LEXIS 197382, at *5 (C.D. Cal. Sept. 16, 2014)
25 (citing cases). In light of Elysium’s good faith attempts to conduct a timely
26 conference and the lack of prejudice accruing to ChromaDex by the delay, denial of
27 Elysium’s motion based on the delayed Rule 7-3 conference is not warranted here.

28

1 *See Atuatasi v. Securitas Sec. Servs. USA, Inc.*, 2018 U.S. Dist. LEXIS 95418, at *4
2 n.1 (C.D. Cal. June 6, 2018) (declining to dismiss motion for failure to meet and
3 confer per Rule 7-3 because of “the Court’s preference to resolve motions on the
4 merits”).

5 **VI. CONCLUSION**

6 For the foregoing reasons and for the reasons described in Elysium’s opening
7 submission, claims three, four, and five of ChromaDex’s Fourth Amended
8 Complaint and claims one and two insofar as they are based on disclosure of the
9 pTeroPure GRAS Report, the NR Study Data, and the NR Specifications should be
10 dismissed with prejudice for failure to state a claim pursuant to Rule 12(b)(6) of the
11 Federal Rules of Civil Procedure.¹⁵

12 DATED: July 23, 2018

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FOLEY HOAG LLP

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

Attorneys for Defendant and
Counterclaimant Elysium Health, Inc.

22 _____
23 ¹⁵ The plethora of pleading defects that mandate dismissal of ChromaDex’s
24 claims described above are not simply the result of inartful pleading but rather reflect
25 ChromaDex’s best efforts to transmute realities—that Elysium’s lack of competitor
26 status renders ChromaDex’s information largely useless, that ChromaDex’s blithe
27 disclosure and incorporation of third party materials into the documents it claims to
28 be its own undermines any misappropriation claim—into inapt claims. ChromaDex
has had four prior opportunities to craft a complaint relating to Elysium’s severing of
its ties from ChromaDex. Its one-line request here for amendment should be denied.
Perez v. Ocwen Loan Servicing LLC, 2011 WL 13224847, at *2 (C.D. Cal. May 25,
2011) (Carney, J.) (denying request to amend complaint for fourth time on grounds
of futility).