

## **Exhibit 69**

**REDACTED VERSION OF DOCUMENT PROPOSED TO BE  
FILED UNDER SEAL**

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

CHROMADEx, INC.,	)	
	)	
Plaintiff,	)	
	)	Case No. SACV 16-02277-CJC(DFMx)
vs.	)	
	)	
ELYSIUM HEALTH, INC. and	)	
MARK MORRIS,	)	
	)	
Defendants.	)	
<hr/>		
ELYSIUM HEALTH, INC.,	)	
	)	
Counterclaimant,	)	
	)	
vs.	)	
	)	
CHROMADEx, INC.,	)	
	)	
Counter-Defendant.	)	
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HIGHLY CONFIDENTIAL  
DEPOSITION OF  
THOMAS E. WILHELM, Ph.D, ESQ.  
NEW YORK, NEW YORK  
JUNE 6, 2019

Reported by:  
VICTORIA RUSSO  
No. 19-79319

1 asked about?

2 A. In what's included here?

3 Q. In any of the pages, any of these 11  
4 pages.

5 A. I don't know that I asked specifically  
6 about any of these numbers.

7 Q. Dr. Wilhelm, do you know what  
8 nicotinamide riboside is?

9 A. I do.

10 Q. And it's referred to sometimes as NR?

11 A. It is.

12 Q. Is that an ingredient that Elysium  
13 puts in its product Basis?

14 A. Yes.

15 Q. Who manufactures NR for Elysium today?

16 A. Currently, [REDACTED]

17 Q. Has Elysium ever had any other sources  
18 of NR?

19 A. Yes.

20 Q. Is one of those [REDACTED]?

21 A. Yes.

22 Q. [REDACTED]?

23 A. I believe that's the name, yes.

24 Q. When did Elysium -- [REDACTED] last deliver a  
25 shipment of NR to Elysium?

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1 2016.

2 Q. Does Elysium have any of that NR from  
3 ChromaDex left in its inventory?

4 A. I believe there are some retained  
5 samples, yes.

6 Q. Other than retained samples, does  
7 Elysium have any of that Niagen left?

8 A. I don't believe so.

9 Q. And you understand Niagen to mean the  
10 ChromaDex NR; is that right?

11 A. Yes.

12 Q. Has Elysium sold all of the ChromaDex  
13 Niagen that it had in inventory?

14 A. I believe other than the retained  
15 samples, yes.

16 Q. Did Elysium decline to sell, for any  
17 reason, any of the ChromaDex Niagen that it  
18 received?

19 A. Not to my knowledge.

20 Q. So it didn't discard any of that  
21 Niagen?

22 A. I don't believe so.

23 Q. It put all of that Niagen into Basis  
24 and sold it to consumers?

25 A. Yes.

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1 Q. Did it sell that Basis made with  
2 ChromaDex Niagen at regular prices for Basis?

3 MR. SACCA: Object to the form of the  
4 question.

5 A. Yes.

6 Q. So it didn't discount any Basis that  
7 was made with ChromaDex Niagen for any reason?

8 A. There would have been various  
9 discounts applied for sales or to specific customers  
10 but --

11 Q. There were no discounts applied  
12 because Basis was made with ChromaDex Niagen?

13 A. Not to my knowledge, no.

14 Q. Would you agree that Elysium has made  
15 money from selling ChromaDex's Niagen?

16 MR. SACCA: Object to the form of the  
17 question.

18 A. We have made money by selling Basis.

19 Q. And you sold Basis that contains  
20 ChromaDex Niagen?

21 A. Yes.

22 Q. And you've made money from that?

23 A. Yes.

24 Q. And Elysium has profited from that?

25 MR. SACCA: Object to the form of the

1 question.

2 A. We made money from that.

3 MR. ANDERSON: I'd like to mark what,  
4 I believe, will be 235.

5 (Whereupon, Exhibit 235, Document  
6 Bates stamped ELY\_0070419-0070465, was marked for  
7 identification, as of this date.)

8 BY MR. ANDERSON:

9 Q. Dr. Wilhelm, do you recognize this  
10 document?

11 A. It appears to be the Board of  
12 Directors update packet for February 2018.

13 Q. And this is one of those packets, that  
14 I asked you about earlier, prepared before those  
15 board meetings?

16 A. Yes.

17 Q. And this was in February of 2018. So  
18 you were employed by Elysium at this time?

19 A. I was.

20

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1

[REDACTED]

9

Q. If you could go ahead and flip in, I'm referring to the numbers, on the lower right-hand corner of the document. Those are called Bates numbers, as you know.

13

[REDACTED]

1

This section contains approximately 25 lines of text that have been completely redacted with black bars. The redactions are horizontal bars of varying lengths, stacked vertically. The first line of redaction is positioned to the right of the number '1' in the left margin. The bars cover the entire width of the page content area.



1 MR. SACCA: Object to the form of the  
2 question.

3 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

14 MR. SACCA: Object to the form of the  
15 question. It's a hypothetical asking the  
16 witness to speculate.

17 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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1 that right?

2 A. Yes.

3 Q. If you look down in the middle of the  
4 page, there is a sentence that begins "after, once  
5 again, reviewing the Thorne deal"; do you see that  
6 sentence?

7 A. Yes.

8 Q. Mr. Marcotulli continues, "we feel we  
9 have made significant concessions related to equity  
10 and royalties to compensate for our perceived  
11 start-up risk"; do you see that sentence?

12 A. I do.

13 Q. Do you know what "start-up risk" is?

14 A. I believe so.

15 Q. What is it?

16 A. There is a risk with any business, not  
17 just a start-up but there is a risk that the  
18 business won't exist or won't continue to exist.

19 Q. Was that a concern that had been  
20 raised by ChromaDex in these early negotiations?

21 A. I believe so.

22 Q. Do you remember what, if anything,  
23 ChromaDex said about start-up risk to Elysium?

24 A. I believe there was -- I believe  
25 ChromaDex expressed some concern about the fact that

1 Elysium was a start-up and framed some of the  
2 negotiation as attempts on ChromaDex's part to try  
3 and mitigate some of that risk.

4 Q. So Mr. Marcotulli is saying here that  
5 the concessions related to equity and royalties were  
6 to compensate for perceived start-up risk; is that  
7 right?

8 A. That's what it says.

9 Q. The second sentence after that it  
10 says, "in order to reach a scale where these  
11 components represent large and profitable revenue  
12 streams, we feel the minimums should be realigned to  
13 offer flexibility in the early days"; do you see  
14 that?

15 A. Yes.

16 Q. Do -- first of all, what are minimums?

17 A. Based on this, I assume they're  
18 talking about minimum purchases.

19 Q. And that would be minimum purchases of  
20 NR?

21 A. It looks that way, yes.

22 Q. So is Elysium seeking flexibility  
23 through lower minimums; is that right?

24 A. I -- I can't conclude that based on  
25 what's here. He writes "realigned to offer

1 weren't using and had no desire to use the Niagen  
2 trademarks.

3 Q. So is it your position that Elysium  
4 bargained for, in exchange for paying royalties to  
5 ChromaDex, it had the right to brand its product  
6 without the Niagen mark?

7 MR. SACCA: Object to the form of the  
8 question.

9 A. I'm sorry. Can you ask that again?

10 Q. Yes.

11 When you mentioned trademark  
12 royalties, are you saying that Elysium agreed to pay  
13 royalties in exchange for the right to sell  
14 ChromaDex Niagen without the trademark Niagen?

15 A. I think we were required to do so.  
16 Eventually, we signed the agreement but we were  
17 required to do so in order to have access to NR from  
18 ChromaDex.

19 Q. So directing you back to my original  
20 question, let's look at this sentence again. "The  
21 only realistic solution we see is having EH retain  
22 the right to brand our NR product freely."

23 E -- Elysium Health is EH; is that  
24 right?

25 A. Yes.

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1 Q. And here Elysium is asking for the  
2 right to retain the right to brand your NR product  
3 freely; is that right?

4 MR. SACCA: Object to the form of the  
5 question.

6 A. Yes.

7 Q. So Elysium was asking for something  
8 from ChromaDex; is that right?

9 MR. SACCA: Object to the form of the  
10 question.

11 A. Yes.

12 Q. And in exchange for that right, what  
13 did Elysium give up?

14 MR. SACCA: Object to the form of the  
15 question.

16 A. In the negotiation, I don't know.

17 Q. You can't point to any specific thing  
18 that Elysium gave up in exchange for the right to  
19 brands its product freely?

20 A. No.

21 Q. Okay.

22 Previously marked is Exhibit 134.  
23 Dr. Wilhelm, this is an e-mail from Mr. Marcotulli  
24 to Mr. Jaksch and Mr. Prag on November 9, 2013; have  
25 you seen this document before?

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1 to make other products that would meet cGMP specs  
2 and the response we get back was that they didn't  
3 meet any.

4 Q. Was Brett Reynolds the one who said  
5 that?

6 A. I don't remember who said that.

7 Q. Who did you meet with when Elysium  
8 went to Grace?

9 A. It looks like we met with Brett  
10 Reynolds and Al Benenotti.

11 Q. Was it Al Benenotti that talked about  
12 the cGMP standards?

13 A. I don't remember.

14 Q. Could it have been anyone besides  
15 those two?

16 A. It could have but I don't remember who  
17 else was there from Grace.

18 Q. Now, after Elysium learned that, did  
19 Elysium take steps with respect to the Niagen it was  
20 selling?

21 MR. SACCA: Object to the form of the  
22 question.

23 A. What do you mean by "any steps"?

24 Q. Did Elysium recall any of the Basis  
25 that it was selling because it contained Niagen made

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1 under not, as you allege, under cGMPs?

2 A. No.

3 Q. Did Elysium consider a recall because

4 of that?

5 A. I think we considered a number of

6 options but at that point decided that it didn't

7 make business sense to do that.

8 Q. So we will talk about those things in

9 a second here but what options did Elysium consider

10 when it learned about Niagen cGMP manufacturing

11 standards?

12 A. I'm not sure that I can answer that

13 without relying on conversations with counsel.

14 Q. When you determined -- when you said

15 it didn't make business sense, why did it not make

16 business sense to take any steps as a result of that

17 information?

18 A. Well, I think there are a couple of

19 things. One is we then knew ChromaDex was not

20 capable of producing the cGMP material that they had

21 agreed to in the supply agreement.

22 So it's not like returning material to

23 ChromaDex would allow us to receive compliant

24 material in return. So our -- our only real option

25 was to not have any product to sell.

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1 Q. So Elysium may the choice to continue  
2 to sell the product that it had?

3 A. Yes.

4 Q. And it sold it at the same price that  
5 it always had?

6 A. Correct.

7 Q. Did Elysium believe that that product  
8 was safe for human consumption when it sold it?

9 A. Yes.

10 Q. Did Elysium incur any expenses as a  
11 result of learning that Niagen was not manufactured  
12 under pharmaceutical CGMPs?

13 MR. SACCA: Object to the form of the  
14 question.

15 A. Yes.

16 Q. What are those expenses?

17 A. I believe there were legal and  
18 consulting expenses in relation to that.

19 Q. Are those the only expenses that you  
20 can think of?

21 A. That's the -- those are the only  
22 things that come to mind.

23 Q. How much money in legal fees and  
24 consulting fees has Elysium spent on this issue?

25 A. I don't know for sure.



1           A.     I don't have a number in my head.  
2     Again, I think that's part of what the experts are  
3     looking at.

4           Q.     Just to be clear, did Elysium ever  
5     reject or return any Niagen from ChromaDex after  
6     learning about the cGMP status of the manufacturing  
7     of NR?

8           A.     I don't believe there were any  
9     shipments from ChromaDex after that point --

10          Q.     So on September --

11          A.     -- so we couldn't have rejected any.

12          Q.     This e-mail chain was in September of  
13     2016; is that right?

14          A.     Yes.

15          Q.     And just two months earlier, I think  
16     you testified earlier Elysium had received a  
17     shipment of NR from ChromaDex?

18          A.     Yes, I don't remember whether it was  
19     July or August but it was within that time frame.

20          Q.     Did Elysium still have any of that  
21     inventory of Niagen left?

22          A.     Yes.

23          Q.     Did it return any of that Niagen to  
24     ChromaDex when it learned of this information?

25          A.     No, but as I explained before, there

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1 wasn't really much point in doing that.

2 Q. Did it ever -- did Elysium ever put  
3 ChromaDex on notice in September of 2016 that it  
4 believed the NR it had received was defective?

5 A. In Oct -- in September, October of  
6 2016?

7 Q. Correct.

8 A. No, I don't think so.

9 Q. Do you know the first time that  
10 Elysium informed ChromaDex that it did not believe  
11 that the NR was manufactured under pharmaceutical  
12 cGMPs?

13 A. I don't.

14 Q. Was it later in 2016?

15 A. I don't remember.

16 Q. Was it 2017?

17 A. Again, I don't remember.

18 Q. Why did Elysium decide not to inform  
19 ChromaDex right away that it wasn't in compliance  
20 with cGMP standards?

21 MR. SACCA: I caution you to exclude  
22 any conversations with counsel.

23 A. Other than what I've already said, I  
24 don't think that I can say anymore.

25 Q. I just want to understand. Earlier

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1 you said that Elysium didn't want to return the  
2 product because it didn't believe ChromaDex was  
3 capable of manufacturing under cGMPs.

4 It seems to me Elysium's interest  
5 would be to make sure that ChromaDex could become  
6 capable but to do that, you would have to inform  
7 ChromaDex; is that true?

8 MR. SACCA: Object to the form of the  
9 question.

10 A. I have to believe that ChromaDex knew  
11 at the time, since we had the supply agreement in  
12 place under which ChromaDex agreed to produce 210,  
13 211 compliant material, that they knew already that  
14 they weren't actually doing that.

15 Q. All right.

16 Dr. Wilhelm, so Elysium continued to  
17 sell that product without informing ChromaDex; is  
18 that right?

19 A. Yes.

20 Q. Go ahead and turn your attention back  
21 to Exhibit 134 which is the -- it should have a  
22 yellow tag on it.

23 So this was the first version we were  
24 talking about or the first version of the  
25 partnership agreement circulated on November 9th; is

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1 A. It's in this draft, yes.

2 Q. So did you ever discuss with Mr.  
3 Jaksch what he meant when he said those sections  
4 will transfer over to the brand license agreement?

5 A. I don't know that we did. It seems  
6 fairly straightforward that those sections will be  
7 moved to the brand license agreement.

8 Q. Did you ever ask him what he meant by  
9 "brand license agreement"?

10 A. I don't think so.

11 Q. Did you ever ask why the license grant  
12 was no longer applicable to patents and only applied  
13 to brand?

14 A. I don't know that I can draw that  
15 conclusion from here.

16 Q. Do you understand brand license  
17 agreement to include ChromaDex's patents?

18 A. At the time we did understand that to  
19 include the patents, yes.

20 Q. You understood that the phrase "brand  
21 license agreement" would include patents?

22 A. Yes.

23 Q. Are you familiar with the call that  
24 took place on December 16, 2014?

25 A. I need more context.

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1 Q. Was there a call about this draft  
2 agreement following Mr. Jaksch's e-mail here?

3 A. I -- I don't remember if there was a  
4 call.

5 Q. You didn't discuss, during your  
6 preparations today, whether there was a call about  
7 this stage of the discussions on the supply  
8 agreement?

9 A. I don't remember anything about a  
10 call.

11 Q. Do you recall ever learning why  
12 Elysium understood that the agreement would be split  
13 into two?

14 A. Yes.

15 Q. Why?

16 A. It was presented to us to make the  
17 supply agreement more simple.

18 Q. Do you recall ever when or whether  
19 Elysium and ChromaDex agreed to remove equity from  
20 the agreement between them?

21 A. When we agreed to remove equity,  
22 without seeing more of the back and forth about  
23 this, I can't remember exactly. I know that it's  
24 not in the signed agreement.

25 MR. ANDERSON: Go ahead. We do need

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1           A.       Just looking at the second grouping in  
2 Exhibit 241, it's sales of greater than or equal to  
3 five million to less than 7,700,000 and in the new  
4 exhibit 242 it says "greater than, equal to five  
5 million and less than 7,500,000."

6           Q.       Can you identify any other changes?

7           A.       Other than the use of qualifying  
8 products instead of Niagen products, no.

9           Q.       Go ahead and look down at the next  
10 graph, the average per price kilogram of Niagen  
11 charged to Elysium Health.

12                    Compare the graph in Exhibit 241 with  
13 that in Exhibit 242. Do you see any changes to  
14 those numbers?

15           A.       Again, what I'm guessing are defined  
16 terms, no.

17           Q.       So the royalty provision, according to  
18 the December 20th version, was transferred over to  
19 this agreement without any changes except for the  
20 ones you just identified; is that right?

21           A.       I only looked at the two charts with  
22 numbers.

23           Q.       Okay.

24                    With those two charts in mind, those  
25 two charts, except for those changes, were

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1 identified the same; is that right?

2 A. Yes.

3 Q. Did Elysium request any changes to  
4 these royalty rates when they moved over into the  
5 trademark license and royalty agreement?

6 A. I don't believe so.

7 Q. Did ChromaDex -- did Elysium  
8 understand that this agreement would require to pay  
9 royalties as part of the supply of Niagen?

10 A. Yes.

11 Q. Do you know if this agreement requires  
12 Elysium to use the Niagen mark?

13 A. I do know.

14 Q. And does it?

15 A. No.

16 Q. Did Elysium ever use the Niagen  
17 trademark when selling Basis?

18 A. No.

19 Q. Did Elysium include patent numbers on  
20 its packaging?

21 A. Yes.

22 Q. And were those patent numbers licensed  
23 by ChromaDex?

24 A. They were a list of patents that  
25 ChromaDex required that we use.

1 right?

2 A. Yes.

3 Q. But it didn't when it received Niagen?

4 A. As I said, I believe we relied on the  
5 certificates of analysis from ChromaDex.

6 Q. That's a no, Elysium didn't test the  
7 batches of Niagen that it received?

8 A. No, not when we received them.

9 Q. What did Elysium do once it learned  
10 that Niagen might contain levels of acetamide in  
11 excess of Prop 65?

12 A. Well, as I was saying a minute ago, in  
13 the -- in the manufacturing of [REDACTED], we learned that  
14 the PCI material had unexpected levels of acetamide  
15 and at that point, [REDACTED] tested some of the retained  
16 amounts of Niagen that we had purchased from  
17 ChromaDex and discovered that it also contained  
18 acetamide at levels above what was allowable under  
19 Prop 65.

20 Q. So once it -- once it tested that  
21 Niagen, did Elysium file a claim for breach of  
22 warranty with ChromaDex?

23 A. Eventually.

24 Q. Did Elysium immediately notify  
25 ChromaDex that the Niagen that it had had levels of



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1 acetamide in it?

2 A. Not immediately, no.

3 Q. Did Elysium --

4 A. But I mean also, at that point we were  
5 months into active litigation with ChromaDex.

6 Q. So Elysium didn't inform ChromaDex of  
7 acetamide because it was in litigation?

8 A. I -- that was a factor.

9 Q. Okay.

10 Did Elysium continue to sell Basis  
11 that included Niagen to consumers?

12 A. Yes.

13 Q. So Elysium never returned any of the  
14 Niagen that it had from ChromaDex to ChromaDex?

15 A. Correct.

16 Q. Why did Elysium continue to sell Basis  
17 that incorporated Niagen?

18 A. Because it's the product that we had.

19 Q. Did Elysium believe that that Basis  
20 containing Niagen was safe for consumers to consume?

21 A. Yes.

22 Q. And Elysium sold all of the Niagen it  
23 had left in inventory even after discovering that  
24 there might be elevated levels of acetamide; is that  
25 right?

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1 A. Other than the retained samples, yes.

2 Q. Did Elysium ever adjust the price of  
3 Basis with Niagen in it after finding out that there  
4 may be elevated levels of acetamide?

5 A. No.

6 Q. Did Elysium ever incur any monetary  
7 losses as a result of Niagen allegedly containing  
8 heightened level of acetamide?

9 A. Yes.

10 Q. What monetary losses?

11 A. There was expense associated with  
12 testing. There was expense associated with  
13 adjusting supply chain and distribution and I think  
14 there was something else that I can't remember.

15 MR. ANDERSON: We can go off the  
16 record for a second.

17 THE VIDEOGRAPHER: The time is 5:30.  
18 Off the record.

19 (Whereupon, a brief recess was taken.)

20 THE VIDEOGRAPHER: The time is 5:31.  
21 Back on the record.

22 BY MR. ANDERSON:

23 Q. Before we went on break there, Dr.  
24 Wilhelm, you were saying that the expenses that  
25 Elysium incurred as a result of Niagen allegedly