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11
12 **UNITED STATES DISTRICT COURT**
13 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
14 **(SOUTHERN DIVISION)**

15 ChromaDex, Inc.,

16 Plaintiff,

17 v.

18 Elysium Health, Inc.,

19 Defendant.

20
21 Elysium Health, Inc.,

22 Counterclaimant,

23 v.

24 ChromaDex, Inc.,

25 Counter-Defendant.

Case No. SACV 16-02277-CJC(DFMx)

**JOINT STIPULATION UNDER LOCAL RULE
37-2 REGARDING CHROMADEx, INC.'S
MOTION TO COMPEL FURTHER RESPONSES
FROM ELYSIUM HEALTH, INC.**

Date: November 14, 2017

Time: 10:00 a.m.

Judge: Hon. Douglas F.
McCormick

Courtroom: 6B

Discovery Cut-Off: June 14, 2018

Pretrial Conference: September 10, 2018

Trial: September 18, 2018

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1 Pursuant to Rule 37 of the Federal Rules of Civil Procedure and Central
2 District Local Rule 37-2, Plaintiff and Counter-Defendant ChromaDex, Inc.
3 ("ChromaDex"), and Defendant and Counterclaimant Elysium Health Inc.
4 ("Elysium") (collectively referred to herein as the "Parties"), submit the following
5 Joint Stipulation Regarding ChromaDex's Motion to Compel Responses to
6 Discovery. The parties have attempted unsuccessfully to resolve their disputes and
7 therefore seek the assistance of the Court.

8 **I. INTRODUCTORY STATEMENTS**

9 **A. ChromaDex's Introductory Statement**

10 ChromaDex filed its breach of contract complaint against Elysium, a former
11 customer, to recover almost \$3 million on unpaid invoices for two dietary
12 supplement products that Elysium ordered and received from ChromaDex, but then
13 refused to pay for: (1) NIAGEN, ChromaDex's trademarked and proprietary version
14 of nicotinamide riboside ("NR"); and (2) of pTeroPure, ChromaDex's trademarked
15 and proprietary version of pterostilbene. Despite refusing to pay for the two
16 ingredient products, Elysium nevertheless combined and sold them as Elysium's own
17 branded consumer health supplement called "Basis". Elysium breached both the
18 parties' NIAGEN Supply Agreement, effective February 3, 2014 (and terminated
19 February 2, 2017), and the parties' pTeroPure Supply Agreement, effective June 26,
20 2014 by failing to pay for the products it ordered and received.

21 Elysium has no defense for its failure to pay breaches, but alleges
22 counterclaims that it argues should offset the amounts it owes ChromaDex. Only
23 one of those counterclaims is relevant to this motion. Elysium alleges that
24 ChromaDex breached an "Exclusivity Provision" in the NIAGEN Supply Agreement
25 that states:

26 During the term, ChromaDex shall not, directly or indirectly, sell,
27 transfer or otherwise provide to any Third Party, or license or otherwise
28 enable any Third Party to make, any products containing both Niagen
and pTeroPure® (or any ingredients that are substantially similar

1 thereto) in combination, whether in the same delivery mechanism
2 (including tablet, capsule, melt or liquid form) or packaging or in
3 separate form or packaging but marketed together (collectively a
"Combined Product").

4 (Cieslak Decl., Ex. B at 3.) Elysium contends that ChromaDex breached this
5 provision by permitting third parties to sell Combined Products, including either
6 pterostilbene or an ingredient "substantially similar" to pterostilbene. (Cieslak Decl.,
7 Ex. C ¶ 116.) Elysium seeks damages comprised of lost profits on sales that it would
8 have made but for ChromaDex's alleged breach. (Cieslak Decl., Ex. D at 15.)

9 This discovery dispute exists because Elysium refuses to produce documents
10 in response to fourteen of ChromaDex's Document Requests, which are all highly
11 relevant to two issues on Elysium's counterclaim regarding the alleged breach of the
12 exclusivity clause: (1) whether other ingredients are, in fact, "substantially similar"
13 to pTeroPure; and (2) the data necessary to test Elysium's faulty lost profits
14 methodology and to calculate Elysium's alleged lost profits. Elysium refuses to
15 provide discovery on the facts regarding its own counterclaim.

16 For example, ChromaDex requests documents regarding Elysium's public
17 relations communications and strategic plans related to sales of Basis, which are
18 relevant because they memorialize Elysium's own views about whether certain
19 ingredients are "substantially similar" to pTeroPure. For example, Elysium contends
20 that the ingredient "resveratrol" is substantially similar to pTeroPure, but its own
21 internal and marketing communications suggest, and will prove, otherwise. These
22 documents are also relevant to show whether consumers who purchased other
23 allegedly Combined Products would have bought Elysium's Basis instead, i.e.,
24 whether Elysium actually lost sales to the other allegedly Combined Products, or
25 whether Elysium's counterclaim is unsubstantiated litigation hype. As a further
26 example, the information sought from Elysium regarding its supply chain, inventory,
27 and sales projections are directly relevant to assess whether Elysium even had the
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1 capacity to fill the orders that it alleges it lost, and at what cost, so that ChromaDex
2 can test Elysium's alleged lost profits assertions.

3 Elysium's objections and refusal to produce the documents based on
4 "relevance" is outrageous, and directly contrary to the clear precedent in the Ninth
5 Circuit. "Relevancy under Fed. R. Civ. P. 26 is liberally construed. To that end,
6 discovery is ordinarily allowed under the concept of relevancy unless the information
7 sought has no bearing on the claims and defenses of the parties. *Caballero v. Bodega*
8 *Latina Corp.*, No. 217CV00236JADVCF, 2017 WL 3174931, at *8 (D. Nev. July
9 25, 2017); *see also In re Toys R Us-Delaware, Inc. Fair & Accurate Credit*
10 *Transactions Act (FACTA) Litig.*, No. ML 08-1980 MMM FMOx, 2010 WL
11 4942645, at *1 (C.D. Cal. July 29, 2010) (citation omitted) (holding that requests are
12 proper "if there is any possibility that the information sought may be relevant to the
13 claim or defense of any party."). It is Elysium's burden to prove total irrelevance. *See*
14 *Keith H. v. Long Beach Unified Sch. Dist.*, 228 F.R.D. 652, 655–56 (C.D. Cal. 2005).
15 Elysium cannot meet this burden because courts routinely hold that the types of
16 documents requested here by ChromaDex are relevant in breach of contract actions,
17 and particularly to lost profits allegations. *See, e.g., Wm. T. Thompson Co. v. Gen.*
18 *Nutrition Corp.*, 593 F. Supp. 1443, 1445-46, 1451 (C.D. Cal. 1984) (holding clearly
19 that inventory and supply chain information is relevant to lost sales damages).
20 Accordingly, ChromaDex respectfully requests an order compelling Elysium to
21 produce the documents.

22 Pursuant to Civil Local Rule 37-1, ChromaDex conferred with Elysium on
23 October 5, 2017 and October 9, 2017, in a good-faith effort to resolve the disputes
24 between the parties regarding Elysium's refusal to produce documents in response to
25 certain of ChromaDex's Requests. This motion is based on the remaining disputes
26 between the parties. (Cieslak Decl. ¶ 4.) Therefore, pursuant to Rule 37(a) of the
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1 Federal Rules of Civil Procedure and Civil Local Rule 37-2, ChromaDex asks this
2 court to compel the prompt and complete production of the documents set out below.

3 **B. Elysium's Introductory Statement**

4 Elysium's claims here arise out of numerous bad acts by ChromaDex, which
5 include breaches of contract, breach of the duty of good faith and fair dealing, fraud,
6 and misuse by ChromaDex of the patents it had licensed. The claims relating to this
7 conduct arise out of the supply relationship between the parties whereby, pursuant to
8 a contract for the supply of nicotinamide riboside ("NR") and a contract for the
9 supply of pterostilbene, Elysium purchased from ChromaDex the NR and
10 pterostilbene that make up the two primary ingredients in its sole product, a
11 nutritional supplement called "Basis." In negotiating these contracts, Elysium
12 bargained for a most-favored-nations pricing provision and an exclusive supply
13 provision and corresponding obligation that ChromaDex restrict its customers,
14 distributors, and supply chain partners from selling products containing ingredients
15 "substantially similar" to those in Elysium's Basis (the "Exclusivity Provision").

16 After ChromaDex's attempt to fraudulently conceal its failure to comply with
17 its contractual obligations backfired, ChromaDex represented that it would remedy
18 its breaches by, among other methods, providing Elysium a credit or refund
19 representing the difference between the most-favored-nation pricing to which
20 Elysium had been entitled and the pricing that ChromaDex gave it instead.
21 Believing ChromaDex would be true to its word, Elysium placed orders for NR and
22 pterostilbene in June 2016, and sought fruitlessly over the following months to
23 obtain the information from ChromaDex necessary to calculate the promised credit,
24 to be offset against the June 2016 purchase orders.

25 Ultimately unwilling to work with Elysium in good faith to calculate the credit
26 or refund due, ChromaDex commenced this case, in which ChromaDex alleges that
27 Elysium breached its obligations to make payment under the supply agreements for
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1 its June 2016 orders. These contentions ignore Elysium's months of good faith
2 efforts to acquire the information necessary to calculate the amount due to
3 ChromaDex for those orders; Elysium, far from having "no defense for its failure to
4 pay breaches," in fact asserts numerous defenses, including several based on
5 ChromaDex's own misconduct. Elysium promptly counterclaimed for ChromaDex's
6 breaches of the pricing provision and Exclusivity Provision, fraud, and patent
7 misuse. It is ChromaDex's breach of the Exclusivity Provision and resulting
8 damages that underlie the parties' discovery dispute here.

9 Notably, ChromaDex has in its answer to interrogatories admitted to conduct
10 that violated the Exclusivity Provision. (*See* ChromaDex's Responses & Objections
11 to Elysium's First Set of Interrogatories, attached to the Declaration of Michael M.
12 Powell (the "Powell Declaration") as Exhibit A, at Response No. 6.) All that
13 remains with regard to this claim, therefore, is to determine the full extent of
14 ChromaDex's breach and the amount of harm it caused Elysium. Elysium thus does
15 not dispute that discovery into the "substantial similarity" between the ingredients in
16 Basis and the ingredients in the products whose sale was enabled by ChromaDex in
17 violation of Exclusivity Provision, or information relating to damages, would be
18 relevant. The issue giving rise to ChromaDex's motion to compel is, with limited
19 exception, not a dispute over the relevancy of the documents ChromaDex seeks but
20 instead over the method by which it proposes they be produced, *i.e.*, pursuant to
21 massively overbroad requests for production (the "Requests"). ChromaDex's
22 insistence that Elysium produce enormous volumes of documents responsive to these
23 sweeping requests simply because some small subset of those documents may
24 actually be relevant would impose a burden on Elysium that is far out of proportion
25 to the benefits of the exercise, particularly where relevant documents will already be

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1 produced in response to other existing Requests or can far more efficiently be
2 produced in response to more narrowed Requests.¹

3 Elysium, in propounding its own Requests for Production on ChromaDex
4 (Elysium's First Set of Requests for Production (the "Elysium Requests")), attached
5 to the Powell Declaration as Exhibit B), sought discovery on many of the same
6 topics as those underlying the disputed Requests but appropriately tailored them to
7 demand only the production of documents relevant to the parties' claims and
8 defenses. Counsel for ChromaDex has largely rejected suggestions from counsel for
9 Elysium that it do the same, and instead brings this motion to compel. Elysium
10 respectfully submits that the disputed Requests as drafted, for the reasons described
11 more specifically herein, impose an unjustified burden on Elysium that is
12 disproportionate to any value of the information responsive to these overbroad
13 Requests, and ChromaDex's motion to compel should therefore be denied. *See*
14 *Alexis v. Rogers*, No. 15cv691-CAB (BLM), 2017 WL 1073404, at *7 (S.D. Cal.
15 Mar. 21, 2017) (denying motion to compel supplemental production where
16 defendant, while seeking documents relating to matters "relevant to the instant
17 dispute," had "not attempt[ed] to limit the scope of their requests . . . to documents
18 that would actually establish" underlying issue).

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¹ ChromaDex's unjustified lack of precision in drafting is exemplified by its propounding of Requests in pairs demanding the production of, separately, "Documents" and "Communications" relating to the same subject. Counsel for ChromaDex acknowledged during the meet and confer process that it understood the definition of "documents" to subsume "communications" and had no explanation for the specious distinction it repeatedly drew in its Requests. (*See Powell Decl.* ¶ 6.) As a result, although ChromaDex states that Elysium has refused to produce documents in response to "fourteen" Requests, this number includes twelve paired Requests where one is entirely subsumed within the other.

1 **II. REQUESTS FOR PRODUCTION OF DOCUMENTS NOS. 42, 43, 44, 45, 47, 48, 49,**
2 **50, 54, 59, 60, 61, 76 AND 77.**

3 **A. Relevancy of Requests Nos. 42, 43, 47, 48, 49, 50, 59, 60, 61, 76, and**
4 **77.**

5 Elysium refuses to produce documents responsive to Request Nos. 42, 43, 47,
6 48, 49, 50, 55, 56, 59, 60, 61, 76, and 77 on relevancy and proportionality grounds.

7 The Requests and Responses are as follows:

8 **REQUEST FOR PRODUCTION NO. 42:**

9 *All Documents Concerning Your representations, implicit or explicit, to any*
10 *Person Concerning the supply chain for Your product Basis.*

11 **RESPONSE TO REQUEST FOR PRODUCTION NO. 42:**

12 *Elysium objects to this Request as overly broad and unduly burdensome, and*
13 *seeking information that is irrelevant to any claim or defense of any party, as the*
14 *supply chain for Basis bears no relationship to the contracts at issue in this action*
15 *(i.e., the NIAGEN Supply Agreement, the pTeroPure Supply Agreement, and the*
16 *Trademark License and Royalty Agreement); the claims for breach of the pTeroPure*
17 *Supply Agreement and the NIAGEN Agreement asserted by ChromaDex; the claims*
18 *for breach of the NIAGEN Supply Agreement and breach of the covenant of good*
19 *faith and fair dealing implied in the NIAGEN Supply Agreement, fraudulent*
20 *inducement relating to the Trademark License and Royalty Agreement, and patent*
21 *misuse asserted by Elysium; or any defenses. Elysium further objects to the Request*
22 *as seeking discovery that is disproportionate to the needs of the case. Elysium*
23 *additionally objects that the Request is vague and ambiguous with respect to the*
24 *meaning of "implicit or explicit" "representation" and "supply chain." Elysium will*
25 *not produce documents responsive to this Request.*

26 **REQUEST FOR PRODUCTION NO. 43:**

27 *All Communications Concerning Your representations, implicit or explicit, to*
28 *any Person Concerning the supply chain for Your product Basis.*

1 **RESPONSE TO REQUEST FOR PRODUCTION NO. 43:**

2 *Elysium objects to this Request on the grounds that it is cumulative and*
3 *duplicative of Request No. 42 and thus is unduly burdensome. Elysium further*
4 *objects to this Request as overly broad and unduly burdensome, and seeking*
5 *information that is irrelevant to any claim or defense of any party, as the supply*
6 *chain for Basis bears no relationship to the contracts at issue in this action (i.e., the*
7 *NIAGEN Supply Agreement, the pTeroPure Supply Agreement, and the Trademark*
8 *License and Royalty Agreement); the claims for breach of the pTeroPure Supply*
9 *Agreement and the NIAGEN Agreement asserted by ChromaDex; the claims for*
10 *breach of the NIAGEN Supply Agreement and breach of the covenant of good faith*
11 *and fair dealing implied in the NIAGEN Supply Agreement, fraudulent inducement*
12 *relating to the Trademark License and Royalty Agreement, and patent misuse*
13 *asserted by Elysium; or any defenses. Elysium further objects to the Request as*
14 *seeking discovery that is disproportionate to the needs of the case. Elysium*
15 *additionally objects that the Request is vague and ambiguous with respect to the*
16 *meaning of "implicit or explicit" "representation" and "supply chain." Elysium will*
17 *not produce documents responsive to this Request.*

18 **REQUEST FOR PRODUCTION NO. 47:**

19 *All Documents Concerning Your inventory of NR.*

20 **RESPONSE TO REQUEST FOR PRODUCTION NO. 47:**

21 *Elysium objects to this Request as overly broad and unduly burdensome, and*
22 *seeking information that is irrelevant to any claim or defense of any party, as*
23 *Elysium's inventory of NR bears no relationship to the contracts at issue in this*
24 *action (i.e., the NIAGEN Supply Agreement, the pTeroPure Supply Agreement, and*
25 *the Trademark License and Royalty Agreement); the claims for breach of the*
26 *pTeroPure Supply Agreement and the NIAGEN Agreement asserted by ChromaDex;*
27 *the claims for breach of the NIAGEN Supply Agreement and breach of the covenant*

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1 of good faith and fair dealing implied in the NIAGEN Supply Agreement, fraudulent
2 inducement relating to the Trademark License and Royalty Agreement, and patent
3 misuse asserted by Elysium; or any defenses. Elysium further objects to the Request
4 as seeking discovery that is disproportionate to the needs of the case. Elysium will
5 not produce documents responsive to this Request.

6 **REQUEST FOR PRODUCTION NO. 48:**

7 All Communications Concerning Your inventory of NR.

8 **RESPONSE TO REQUEST FOR PRODUCTION NO. 48:**

9 Elysium objects to this Request on the grounds that it is cumulative and
10 duplicative of Request No. 47 and thus is unduly burdensome. Elysium further
11 objects to this Request as overly broad and unduly burdensome, and seeking
12 information that is irrelevant to any claim or defense of any party, as Elysium's
13 inventory of NR bears no relationship to the contracts at issue in this action (i.e., the
14 NIAGEN Supply Agreement, the pTeroPure Supply Agreement, and the Trademark
15 License and Royalty Agreement); the claims for breach of the pTeroPure Supply
16 Agreement and the NIAGEN Agreement asserted by ChromaDex; the claims for
17 breach of the NIAGEN Supply Agreement and breach of the covenant of good faith
18 and fair dealing implied in the NIAGEN Supply Agreement, fraudulent inducement
19 relating to the Trademark License and Royalty Agreement, and patent misuse
20 asserted by Elysium; or any defenses. Elysium further objects to the Request as
21 seeking discovery that is disproportionate to the needs of the case. Elysium will not
22 produce documents responsive to this Request.

23 **REQUEST FOR PRODUCTION NO. 49:**

24 All Documents Concerning any efforts by You to obtain a supply of NR from
25 any Person(s) other than ChromaDex.

26 **RESPONSE TO REQUEST FOR PRODUCTION NO. 49:**

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1 *Elysium objects to this Request as overly broad and unduly burdensome, and*
2 *seeking information that is irrelevant to any claim or defense of any party, as any*
3 *efforts by Elysium to obtain NR from a party other than ChromaDex bear no*
4 *relationship to the contracts at issue in this action (i.e., the NIAGEN Supply*
5 *Agreement, the pTeroPure Supply Agreement, and the Trademark License and*
6 *Royalty Agreement); the claims for breach of the pTeroPure Supply Agreement and*
7 *the NIAGEN Agreement asserted by ChromaDex; the claims for breach of the*
8 *NIAGEN Supply Agreement and breach of the covenant of good faith and fair*
9 *dealing implied in the NIAGEN Supply Agreement, fraudulent inducement relating to*
10 *the Trademark License and Royalty Agreement, and patent misuse asserted by*
11 *Elysium; or any defenses. Elysium further objects to the Request as seeking*
12 *discovery that is disproportionate to the needs of the case. Elysium will not produce*
13 *documents responsive to this Request.*

14 **REQUEST FOR PRODUCTION NO. 50:**

15 *All Communications Concerning any efforts by You to obtain a supply of NR*
16 *from any Person(s) other than ChromaDex.*

17 **RESPONSE TO REQUEST FOR PRODUCTION NO. 50:**

18 *Elysium objects to this Request on the grounds that it is cumulative and*
19 *duplicative of Request No. 49 and thus is unduly burdensome. Elysium further*
20 *objects to this Request as overly broad and unduly burdensome, and seeking*
21 *information that is irrelevant to any claim or defense of any party, as any efforts by*
22 *Elysium to obtain NR from a party other than ChromaDex bear no relationship to*
23 *the contracts at issue in this action (i.e., the NIAGEN Supply Agreement, the*
24 *pTeroPure Supply Agreement, and the Trademark License and Royalty Agreement);*
25 *the claims for breach of the pTeroPure Supply Agreement and the NIAGEN*
26 *Agreement asserted by ChromaDex; the claims for breach of the NIAGEN Supply*
27 *Agreement and breach of the covenant of good faith and fair dealing implied in the*

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1 *NIAGEN Supply Agreement, fraudulent inducement relating to the Trademark*
2 *License and Royalty Agreement, and patent misuse asserted by Elysium; or any*
3 *defenses.*

4 *Elysium further objects to the Request as seeking discovery that is*
5 *disproportionate to the needs of the case. Elysium will not produce documents*
6 *responsive to this Request.*

7 **REQUEST FOR PRODUCTION NO. 59:**

8 *All Documents Concerning Your consideration of NR and/or pterostilbene not*
9 *sourced from ChromaDex for inclusion in Your product Basis.*

10 **RESPONSE TO REQUEST FOR PRODUCTION NO. 59:**

11 *Elysium objects to this Request as overly broad and unduly burdensome, and*
12 *seeking information that is irrelevant to any claim or defense of any party, as*
13 *Elysium's consideration of pterostilbene not sourced from ChromaDex for inclusion*
14 *in Basis, and its consideration of NR not sourced from ChromaDex after the*
15 *execution of the NIAGEN Supply Agreement bear no relationship to the contracts at*
16 *issue in this action (i.e., the NIAGEN Supply Agreement, the pTeroPure Supply*
17 *Agreement, and the Trademark License and Royalty Agreement); the claims for*
18 *breach of the pTeroPure Supply Agreement and the NIAGEN Agreement asserted by*
19 *ChromaDex; the claims for breach of the NIAGEN Supply Agreement and breach of*
20 *the covenant of good faith and fair dealing implied in the NIAGEN Supply*
21 *Agreement, fraudulent inducement relating to the Trademark License and Royalty*
22 *Agreement, and patent misuse asserted by Elysium; or any defenses. Elysium further*
23 *objects to the Request as seeking discovery that is disproportionate to the needs of*
24 *the case. Elysium will not produce documents responsive to this Request.*

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1 **REQUEST FOR PRODUCTION NO. 60:**

2 *All Communications Concerning Your consideration of NR and/or*
3 *pterostilbene not sourced from ChromaDex for inclusion in Your product Basis.*

4 **RESPONSE TO REQUEST FOR PRODUCTION NO. 60:**

5 *Elysium objects to this Request on the grounds that it is cumulative and duplicative*
6 *of Request No. 59 and thus is unduly burdensome. Elysium additionally further*
7 *objects to this Request as overly broad and unduly burdensome, and seeking*
8 *information that is irrelevant to any claim or defense of any party, as Elysium's*
9 *consideration of pterostilbene not sourced from ChromaDex for inclusion in Basis,*
10 *and its consideration of NR not sourced from ChromaDex after the execution of the*
11 *NIAGEN Supply Agreement bear no relationship to the contracts at issue in this*
12 *action (i.e., the NIAGEN Supply Agreement, the pTeroPure Supply Agreement, and*
13 *the Trademark License and Royalty Agreement); the claims for breach of the*
14 *pTeroPure Supply Agreement and the NIAGEN Agreement asserted by ChromaDex;*
15 *the claims for breach of the NIAGEN Supply Agreement and breach of the covenant*
16 *of good faith and fair dealing implied in the NIAGEN Supply Agreement, fraudulent*
17 *inducement relating to the Trademark License and Royalty Agreement, and patent*
18 *misuse asserted by Elysium; or any defenses. Elysium further objects to the Request*
19 *as seeking discovery that is disproportionate to the needs of the case. Elysium will*
20 *not produce documents responsive to this Request.*

21 **REQUEST FOR PRODUCTION NO. 61:**

22 *All Documents Concerning the supply chain for Your product Basis.*

23 **RESPONSE TO REQUEST FOR PRODUCTION NO. 61:**

24 *Elysium objects to this Request as overly broad and unduly burdensome, and*
25 *seeking information that is irrelevant to any claim or defense of any party, as the*
26 *supply chain for Basis bears no relationship to the contracts at issue in this action*
27 *(i.e., the NIAGEN Supply Agreement, the pTeroPure Supply Agreement, and the*
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1 Trademark License and Royalty Agreement); the claims for breach of the pTeroPure
2 Supply Agreement and the NIAGEN Agreement asserted by ChromaDex; the claims
3 for breach of the NIAGEN Supply Agreement and breach of the covenant of good
4 faith and fair dealing implied in the NIAGEN Supply Agreement, fraudulent
5 inducement relating to the Trademark License and Royalty Agreement, and patent
6 misuse asserted by Elysium; or any defenses. Elysium further objects to the Request
7 as seeking discovery that is disproportionate to the needs of the case. Elysium will
8 not produce documents responsive to this Request.

9 **1. ChromaDex's Contentions and Points of Authorities**

10 Elysium must produce documents responsive to these Requests because they
11 seek information relevant to the existence and calculation of Elysium damages, if
12 any, from ChromaDex's alleged breach of the Exclusivity Provision. The Federal
13 Rules give parties broad range to explore "any matter, not privileged, that is relevant
14 to the claim or defense of any party." *Survivor Media, Inc. v. Survivor Prods.*, 406
15 F.3d 625, 635 (9th Cir. 2005) (citing Fed. R. Civ. P. 26(b)(1)). Courts in this district
16 and elsewhere treat requests as proper "if there is any possibility that the information
17 sought may be relevant to the claim or defense of any party." *In re Toys R Us-*
18 *Delaware, Inc*, 2010 WL 4942645, at *1 (citation omitted). A "request for discovery
19 should be allowed unless it is clear that the information sought can have no possible
20 bearing on the claim or defense of a party." *Id.* Finally, "[t]he party who resists
21 discovery has the burden to show discovery should not be allowed, and has the
22 burden of clarifying, explaining, and supporting its objections." *Keith H*, 228 F.R.D.
23 at 655–56 (citing *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975)).

24 Elysium alleges that ChromaDex breached the Exclusivity Provision by failing
25 to prevent other customers from selling "Combined Products," i.e., products
26 containing NIAGEN and pTeroPure or an ingredient substantially similar to
27 pTeroPure. (Cieslak Decl. Ex. [SACC] ¶ 116.) As a remedy for that alleged breach
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1 Elysium asks for "compensatory damages arising out of ChromaDex's breach of
2 Section 3.11.3 of the NIAGEN Supply Agreement, encompassing the revenue from
3 lost sales that would have accrued to Elysium but for ChromaDex's breach of Section
4 3.11.3 of the NIAGEN Supply Agreement" (Cieslak Decl. Ex [Rog Responses]
5 at 15.)

6 In California, "[l]ost profits may be recoverable as damages for breach of a
7 contract. '[T]he general principle [is] that damages for the loss of prospective profits
8 are recoverable where the evidence makes reasonably certain their occurrence and
9 extent.'" *Sargon Enterprises, Inc. v. Univ. of S. Cal.*, 55 Cal. 4th 747, 773–74 (2012)
10 (citing *Grupe v. Glick*, 26 Cal. 2d 680, 693 (1945)). To calculate lost profits to an
11 established business, "[h]istorical data, such as past business volume, supply an
12 acceptable basis for ascertaining lost future profits." *Berge v. Int'l Harvester Co.*, 142
13 Cal. App. 3d 152, 162 (1983). "[W]here the operation of an unestablished business is
14 prevented or interrupted, . . . anticipated profits dependent upon future events are
15 allowed where their nature and occurrence can be shown by evidence of reasonable
16 reliability." *Grupe*, 26 Cal. 2d at 692–693. In either case, "recovery is limited to net
17 profits." *Berge*, 142 Cal. App. 3d at 161-62.

18 Requests 42, 43, 47, 48, 49, 50, 59, 60, 61, 76, and 77 seek information
19 relevant to ChromaDex's defense of Elysium's breach of contract claim. Elysium's
20 argument that it lost sales due to the competition from other allegedly "Combined
21 Products" is premised on the theories that (1) Elysium would have made additional
22 sales if those other "Combined Products" were not on the market and (2) that
23 Elysium had the ability to fill those additional orders. ChromaDex contests both
24 assertions and needs the requested information from Elysium to support its defenses.
25 *Greenwich S.F., LLC v. Wong*, 190 Cal. App. 4th 739, 766 (2010) (finding lost
26 profits claim too speculative where the plaintiff assumed, rather than proved, the
27 reasonable certainty of future predicate events upon which the damages depended).

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1 **a. Requests Nos. 42, 43 and 61**

2 These Requests seek information concerning the supply chain for Basis, which
3 ChromaDex needs to contest (or calculate) Elysium's alleged lost profits. The
4 information is relevant to Elysium's costs for producing Basis, the time necessary to
5 bring an increased supply to market, and the availability of all elements in the Basis
6 supply chain such as the inactive excipient ingredients that must also be included in
7 the product. This information is necessary to analyze whether Elysium could have
8 increased its sales and, if so, what the costs and net profits for those increased sales
9 would have been. Indeed, courts routinely consider similar supply chain information
10 in a lost profits analysis. *See, e.g., Cataphora Inc. v. Parker*, No. C09-5749 BZ, 2011
11 WL 6778792, at *3 (N.D. Cal. Dec. 27, 2011) (considering in lost profits analysis
12 plaintiff's "cost of utilities (i.e., office supplies and utilities, costs supported by
13 Plaintiff's financial statements); and equipment costs (i.e., the cost of servers Plaintiff
14 purchased to execute the contract, as evidenced by invoices)."); *Kids' Universe*, 95
15 Cal. App. 4th at 875 (considering in lost profits analysis plaintiff's "agreements with
16 numerous suppliers" regarding the shipment of products).

17 **b. Requests Nos. 49, 50, 59, and 60**

18 These Requests seek information regarding Elysium's consideration of and
19 efforts to obtain NR and pterostilbene from a supplier other than ChromaDex. This
20 information is relevant to whether Elysium would have been able to increase its
21 production of Basis in response to increased orders. After Elysium refused to pay for
22 the NR and pTeroPure it ordered and received from ChromaDex, ChromaDex
23 terminated its supply agreements with Elysium and shipped it no more product.

24 The requested information also relates to Elysium's costs for producing Basis
25 if it did procure a new supplier, including the time and expense necessary for
26 Elysium to bring a new supply to market in compliance with FDA and marketing
27 requirements. Again, courts have logically and consistently found such information
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1 to be relevant to their analysis of lost profits. *See Cataphora Inc.*, 2011 WL
2 6778792, at *3 (considering as part of the lost profits analysis "money [plaintiff]
3 expended to begin to perform anticipated work services"); *Grupe*, 26 Cal. 2d at 693–
4 94 (considering evidence of plaintiff's "sales expense and his profit on sales made,"
5 and noting that "trial court was required to make a finding as to the availability of a
6 reasonable substitute at the time in question").

7 **c. Requests Nos. 47 and 48**

8 These Requests seek information regarding Elysium's inventory of NR, one of
9 the two key ingredients in Basis. Inventory information is relevant to calculating lost
10 sales damages. In *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 593 F. Supp. 1443,
11 1451, 1455 (C.D. Cal. 1984), the court sanctioned the defendant for destroying
12 evidence it had reason to know was relevant to the litigation, which included a claim
13 by the defendant for lost sales. The relevant information the defendant destroyed
14 included "fiscal year-end inventory data, quarterly inventory data, biweekly
15 inventory data, biweekly store order demand data, and biweekly maximum allowable
16 inventory level data on a product-by-product basis," and other inventory and demand
17 data. *Id.* at 1445-46. These documents were found to be "relevant, at a minimum, to
18 [plaintiff's] defenses to [defendant's] allegations of damages" consisting of lost sales.
19 *Id.* at 1441. Here, the documents sought are relevant because ChromaDex requires
20 the information to analyze whether (or when) Elysium would have had to identify an
21 alternate supplier for NR, for which ChromaDex was at the time the sole authorized
22 commercial supplier in the United States. (Cieslak Decl. Ex. A ¶ 18.) If Elysium
23 lacked inventory, and was impaired in identifying a suitable alternative supplier, then
24 Elysium would also have been impaired in increasing its sales and making the
25 alleged lost profits that it claims in its counterclaim. Accordingly, the requested
26 supply documents are unquestionably highly relevant.

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1 **d. Requests Nos. 76 and 77²**

2 These Requests seek information regarding Elysium's strategic plans for Basis
3 and other health supplement products, including those containing NR and/or
4 pterostilbene. This information is relevant to whether Elysium would have been able
5 to convert consumers of other alleged Combined Products into Basis consumers if
6 those products were not being sold, and the extent of the sales it expected. Indeed,
7 this information will uniquely reveal Elysium's own assessments, admissions and
8 conclusions about its own market analysis, competitive pressures, and sales
9 projections. Other courts have predictably found similar strategic and other business
10 plans relevant to the existence and calculation of lost profits. For example, in *Kids'*
11 *Universe v. In2Labs*, a California court of appeal considered plaintiff's appeal of a
12 summary judgment decision in favor of defendants on a claim for lost profits. 95
13 Cal. App. 4th at 873–74. The case involved a claim for lost profits based on a delay
14 in the planned implementation of a new internet-based sales strategy by the plaintiff.
15 *Id.* at 875. In analyzing whether the plaintiff would have actually realized additional
16 sales from this strategy, the court recounted in detail the evidence presented
17 regarding the plaintiff's strategic marketing plans for the new website, including the
18 plaintiff's plans for the placement of online, radio, and TV advertisements. *Id.* Here,
19 Elysium's strategic plans will also be relevant to, at least, a determination of whether
20 it had any plans in place to realize additional sales based on the addition of the
21 Exclusivity Provision to the parties' agreement.

22 During meet and confer discussions, Elysium argued that all of these Requests
23 were irrelevant because ChromaDex's theory on how to calculate lost profits was
24 incorrect. (Cieslak Decl. ¶ 5.) However, Elysium's lost profits theory and
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26 ² These Requests are also relevant to the merits of Elysium's claim that products
27 containing resveratrol are "Combined Products" under the agreement. *See* Section
28 II.C.1.

1 methodology are both wrong under controlling law and it is, of course, not up to
2 Elysium to dictate what ChromaDex needs to defend against this claim. *In re*
3 *Citimortgage, Inc., Home Affordable Modification Program ("HAMP") Litig.*, No.
4 MDL 11-2274-DSF, 2012 WL 10450139, at *2 (C.D. Cal. June 7, 2012) (noting that
5 "it is not up to defendant to decide what plaintiffs need to pursue this action" and
6 determining that where contested requests are not "wholly irrelevant to the claims
7 and defenses," documents cannot be withheld solely on that basis). The relevancy of
8 the information ChromaDex seeks is well supported by case law from this district
9 and elsewhere determining how to assess entitlement to lost profits in California, and
10 how to calculate them.

11 ChromaDex respectfully requests an order compelling Elysium to produce
12 documents in response to Request Nos. 42, 43, 44, 47, 48, 49, 50, 59, 60, 61, 76, and
13 77.

14 2. Elysium's Contentions and Points of Authorities

15 ChromaDex's conception of Rule 26 ignores the import of the language it
16 quotes: It may seek through the discovery process "any matter, not privileged, that is
17 relevant to the claim or defense of any party." *Survivor Media, Inc. v. Survivor*
18 *Prods.*, 406 F.3d 625, 635 (9th Cir. 2005) (citing Fed. R. Civ. P. 26(b)(1)) (emphasis
19 added). Further, Rule 26 allows parties to obtain discovery that is relevant and
20 "proportional to the needs of the case, considering . . . whether the burden or expense
21 of the proposed discovery outweighs its likely benefit." Fed. R. Civ. Pr. 26(b)(1).
22 Multiple of ChromaDex's disputed Requests fail to satisfy either or both standards of
23 Rule 26: ChromaDex, misconstruing Elysium's claims and applicable authorities,
24 fails to establish the relevance of the documents and information it seeks, and even
25 where they broadly implicate relevant issues, fails to establish that the marginal
26 probative value of such documents, cumulative to documents Elysium has agreed to

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1 produce in response to other or more narrowed Requests, justifies the burden of their
2 production in addition to what Elysium has already agreed to produce.

3 **a. Requests Nos. 42, 43 and 61**

4 In describing Request Nos. 42, 43, and 61 as concerning the supply chain for
5 Basis only, ChromaDex seeks to elide the specific contours of its Requests, which
6 seek information plainly irrelevant to ChromaDex's extant claims. Through Request
7 Nos. 42 and 43, for example, ChromaDex does not seek documents and
8 communications "concerning the supply chain for Basis" but documents and
9 communications concerning "representations, implicit or explicit, to any Person"
10 concerning the supply chain for Basis. ChromaDex does not even attempt to explain
11 how documents and communications concerning Elysium's representations regarding
12 its supply chain, rather than simply concerning the supply chain itself, are relevant to
13 a lost profits analysis, its purported justification here. Indeed, even the authorities
14 ChromaDex cites make clear that it is a party's actual costs, not its "representations"
15 indirectly relating to those costs, that are relevant to a lost profits calculation. (See
16 August 15, 2017 Letter from J. Cieslak to J. Sacca et al., attached to the Powell
17 Declaration as Exhibit C, at 2 ("See, e.g., *Grupe v. Glick*, 26 Cal. 2d 680, 692 (1945)
18 (noting connection between 'the past volume of business and other provable data
19 relevant to the probably future sales' and 'damages for the loss of prospective');
20 *Berge v. Int'l Harvester Co.*, 142 Cal. App. 3d 152, 162 (1983) ('Historical data,
21 such as past business volume, supply an acceptable basis for ascertaining lost future
22 profits.').") These cases moreover involved the analysis of narrow and discrete
23 categories of information, distinguishable from the myriad documents responsive to
24 the broad Requests propounded by ChromaDex here. See *Cataphora Inc. v. Parker*,
25 No. C09-5749 BZ, 2011 WL 6778792, at *3 (N.D. Cal. Dec. 27, 2011) (cost of
26 labor, utilities, and equipment based on payroll records, financial statements, and
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1 invoices); *Kids' Universe v. In2Labs*, 95 Cal. App. 4th 870, 885 (2002) (existence of
2 supply agreements determined ability to make sales).

3 Although Request No. 61 does request documents more directly relating to the
4 supply chain for Basis, it, like the vast majority of ChromaDex's Requests, makes a
5 sweeping demand for "all" documents concerning the topic. Elysium, which sells a
6 single product combining just two active ingredients (*see* ChromaDex's Third
7 Amended Complaint ("TAC"), attached to the Powell Declaration as Exhibit D, at ¶¶
8 2, 17-18), proposed that it produce documents relating to its costs for those two
9 ingredients. In response to ChromaDex's proffered explanation that Request No. 61
10 sought documents necessary to calculate Elysium's profit margins for a lost profits
11 analysis, counsel for Elysium volunteered to produce information sufficient to show
12 its profit margin for Basis, explaining that it did not view, for example, every one of
13 its communications with the manufacturer of the cellulose capsules containing the
14 active ingredients at issue to be of sufficient relevance to justify the collection and
15 production of "all" such documents when specifically-extracted margin data would
16 convey the same information ChromaDex purportedly desired with far less burden to
17 Elysium. ChromaDex's Request No. 61 by its terms also covers, for example, every
18 contract, and draft of each of those contracts, between Elysium and the manufacturer
19 of the plastic tubs in which Basis is sold, the specifications and designs and draft
20 designs for the cardboard boxes in which those tubs are placed for shipping, and
21 every calendar invitation for a meeting between Elysium and its shipping service
22 representatives—topics all plainly irrelevant to the parties' dispute. Counsel for
23 ChromaDex declined this proposal to narrow its Request (*see* Powell Decl. ¶ 7),
24 despite the fact that it is not entitled to such a broad swath of discovery on even
25 relevant topics. *See Alexis*, No. 15cv691-CAB (BLM), 2017 WL 1073404, at *7.

26 ChromaDex's further suggestion that documents relating to Elysium's supply
27 chain are necessary to analyze "whether Elysium could have increased its sales" and
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1 earned the profits it lost as a result of ChromaDex's breaches relies on a
2 misconception of the assumptions applicable to a lost profits analysis, as described in
3 further detail below, *i.e.*, that Elysium must prove that it would have been able to
4 obtain an alternative supply for the two main ingredients of Basis, both of which
5 ChromaDex was contractually obligated to continue to deliver to Elysium. (*See infra*
6 II.A(2)(b) (describing lack of foundation for ChromaDex's theory of Elysium's
7 damages).)

8 The overbreadth of ChromaDex's Requests, in addition to creating an
9 unjustified burden, is especially concerning in light of the relevance of documents
10 responsive to those Requests to other, unrelated matters. Many documents relating
11 to Elysium's supply chain could be relevant to a separate claim that ChromaDex has
12 not yet brought but recently threatened to bring: a claim for patent infringement
13 stemming from Elysium's sourcing of ingredients for Basis from a source other than
14 ChromaDex. (*See* Elysium's Second Amended Counterclaims ("SACC"), attached
15 to the Powell Declaration as Exhibit E, at ¶ 141-142.) ChromaDex's apparent
16 attempt to use discovery in this litigation as a vehicle to satisfy its curiosity about
17 Elysium's source of NR, *i.e.*, to gain information for purposes unrelated to this action
18 as pled, renders its overbreadth all the more alarming and constitutes additional
19 reason that this Court should not countenance its efforts here and should deny the
20 motion to compel. *See Altman v. HO Sports Co.*, No. 1:09-CV-1000 AWI JLT, 2010
21 U.S. Dist. LEXIS 133280, at *6 (E.D. Cal. Dec. 2, 2010) (noting "not only was HOS
22 under no obligation to conduct discovery on unpled causes of action, but the federal
23 rules would prohibit such discovery"); *Lifeguard Licensing Corp. v. Kozak*, No.
24 15CIV8459LGSJCF, 2016 WL 3144049, at *3 (S.D.N.Y. May 23, 2016) (explaining
25 that "federal rules prohibit discovery on unpled claims" and collecting cases).

26 **b. Requests Nos. 49, 50, 59, and 60**

1 ChromaDex's explanation for Request Nos. 49, 50, 59, and 60 ignores
2 ChromaDex's binding judicial admission that at the relevant times it was the sole
3 commercial supplier of NR in the world, which Elysium does not dispute. (*See* TAC
4 ¶ 18; Elysium's Answer to ChromaDex's Third Amended Complaint, attached to the
5 Powell Declaration as Exhibit F, at ¶ 18.) In justifying its pursuit of documents and
6 communications relating to Elysium's purported efforts to locate another NR
7 supplier, ChromaDex improperly relies on an uncontested material fact that is not in
8 dispute and thus requires no discovery. *See Miramontes v. Mills*, No. CV 11-8603
9 MMM (SSx), 2015 WL 7566491, at *3 n.25 (C.D. Cal. Nov. 24, 2015) (finding that
10 "deliberate, clear, and unequivocal" allegation in amended complaint is fact
11 "withdrawn from issue"). The justification that ChromaDex offers further depends
12 upon a misrepresentation of the parties' claims: While ChromaDex suggests here
13 that it affirmatively "terminated its supply agreements with Elysium and shipped it
14 no more product," thus justifying inquiry into Elysium's costs and ability to locate
15 another supplier to make the foregone sales that ChromaDex asserts are the subject
16 of Elysium's lost profits claim, it has in fact pled the opposite. It alleges that the NR
17 Supply Agreement ran through its initial term and expired on February 2, 2017 (*see*
18 TAC ¶ 55)—the date ChromaDex proposes for the cut-off of production—and it
19 does not plead that the pTeroPure Supply Agreement, which includes a provision for
20 automatic renewal absent written notice by either party, has even terminated. (*See*
21 TAC ¶ 16.)

22 Both the NR Supply Agreement and the pTeroPure Supply Agreement
23 obligated ChromaDex to fill orders submitted by Elysium, as this Court has
24 previously found. (*See* Order Granting in Substantial Part Defendant's Motion to
25 Dismiss Claims and Granting in Part Plaintiff's Motion to Dismiss Counterclaims,
26 attached to the Powell Declaration as Exhibit G, at 11.) Elysium, in other words,
27 would have had no need to seek an alternative supplier and incur the additional costs

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1 that ChromaDex claims are the subject of Request Nos. 49, 50, 59, and 60, but would
2 have instead been entitled to continue to place orders with ChromaDex. Thus, any
3 efforts by Elysium to obtain another supplier through February 2, 2017, and related
4 costs, are irrelevant to a calculation of damages here; ChromaDex is not entitled to
5 presume its own breach of contract and saddle Elysium with additional costs
6 emanating from that breach in calculating the extent to which it was damaged. *See*
7 *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 871-72 (9th Cir. 2017)
8 (compensatory damages "return the plaintiff to the position he or she would have
9 occupied *had the harm not occurred*" (emphasis added) (citation omitted)).

10 **c. Requests Nos. 47 and 48**

11 As for Request Nos. 49, 50, 59, and 60, ChromaDex's explanation for Request
12 Nos. 47 and 48 regarding Elysium's NR inventory wrongly presumes that Elysium
13 would not have been entitled to continue to order NR from ChromaDex through the
14 term of the NR Supply Agreement. Even if Elysium had not been entitled to
15 replenish its NR inventory through orders submitted to ChromaDex, however, it has
16 not established that production of "all" documents and communications relating to
17 Elysium's inventory is justified. ChromaDex does not mention that the caselaw that
18 it cites in support of its proposition that inventory data is relevant to a lost profits
19 analysis involved specific allegations that the defendant retailer injured plaintiff by
20 purposefully maintaining inadequate inventory of the plaintiff's products, allegations
21 that render inventory records obviously relevant in that case but that are entirely
22 absent here. *See Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 593 F. Supp. 1443,
23 1444 (C.D. Cal. 1984). Further, even this caselaw did not establish that "all"
24 documents and communications relating to inventory were relevant, as ChromaDex
25 asserts here, but instead faulted the defendant for failing to preserve inventory data
26 and specific invoices. *See id.* at 1448-49. ChromaDex's own authority thus fails to
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1 establish that its overbroad Request is justified, even if it had established the
2 relevance of Elysium's NR inventory, which, as described above, it has not.

3 **d. Requests Nos. 76 and 77**

4 For Request Nos. 76 and 77, ChromaDex misstates Elysium's arguments in an
5 attempt to bolster its own claims of entitlement to documents and information
6 unrelated to either party's claims or defenses. Although counsel for Elysium did
7 explain in the course of the parties' meet and confer process that it disputed the
8 damages theory underlying ChromaDex's asserted justification for many of its
9 Requests, the heart of Elysium's objections is the overwhelming breadth of
10 ChromaDex's numerous Requests, which are not tailored to the justifications it lays
11 out here. As counsel for Elysium pointed out, ChromaDex's Request Nos. 76 and 77
12 as drafted would cover Elysium's "strategic plans" for products ranging from anti-
13 aging face cream to herbal supplements, products indisputably unrelated to the NR
14 nutritional supplement at issue. Although ChromaDex agreed to refine these and
15 similar Requests in tacit recognition of the outrageous overbreadth of its Requests as
16 drafted (*see* Powell Decl. ¶ 9) to instead relate to any market comprising "Basis
17 and/or ingestible dietary supplements that promote longevity, anti-aging, healthy
18 aging, cellular health, DNA repair, energy support, and/or metabolic support,
19 including, but not limited to, products containing NR, any NIAGEN Analog (as
20 defined by Elysium in its RFPs), pterostilbene, and/or any pTeroPure Analog (as
21 defined by Elysium in its RFPs)", ChromaDex's explanation here nonetheless fails to
22 establish that documents concerning Elysium's "strategic plans" will provide
23 information on damages that is not already provided by documents responsive to
24 other, undisputed Requests. ChromaDex claims that Elysium's strategic plans "will
25 uniquely reveal Elysium's own assessments, admissions and conclusions about its
26 own market analysis, competitive pressures, and sales projections." The information
27 in these documents is far from unique, however, as ChromaDex also requested, and
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1 Elysium agreed to produce, documents and communications concerning (i) "any
2 market research and/or market studies" relating to the refined product market (*see*
3 Request Nos. 70, 71); (ii) any "economic analysis" concerning the refined product
4 market (*see* Request Nos. 72, 73); and (iii) any "analysis of competition or
5 competitors" within the refined product market. (*See* Request Nos. 75, 76.) Elysium
6 has additionally offered to produce documents sufficient to show its sales
7 projections; ChromaDex has declined that proposal. ChromaDex therefore will have
8 (or would have had, but declined) access to documents concerning each of the areas
9 that it contends are "uniquely" described in documents concerning Elysium's
10 strategic plans.

11 Moreover, ChromaDex's assertion that production of documents concerning
12 Elysium's strategic plans is relevant to Elysium's claim for lost profits is not even
13 supported by the caselaw it cites: In *Kids' Universe v. In2Labs*, a California appellate
14 court took into account the plaintiff's strategic marketing plans in determining
15 whether a lost profits award was unreasonably speculative in the context of an
16 "unestablished" business, *i.e.*, an "unlaunched" retail website. 95 Cal. App. 4th at
17 883. The plaintiff's plans were thus relevant because they were probative of whether
18 its business was likely to have made a profit at all. *Id.* at 887. For established
19 businesses, in contrast, damages may be determined "from the *past volume of*
20 *business* and other provable data relevant to the probable future sales." *Id.* at 883
21 (emphasis added) (quoting *Grupe v. Glick*, 26 Cal. 2d 680, 692-93 (1945)). There is
22 no allegation that Elysium, at the time the Exclusivity Provision was negotiated, was
23 not an established business with past sales data from which its lost profits may be
24 calculated so that production of information regarding its strategic plans as a
25 substitute for this data is required. And, as Elysium has described above, the other
26 explanations offered by ChromaDex do not justify the burden of production of
27 documents over and above those Elysium has already agreed to produce.

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1 Moreover, Elysium has agreed to produce documents such as sales projections
2 despite ChromaDex's misinterpretation of its damages theory and misunderstanding
3 of the applicable authorities. As courts within the Ninth District have recognized,
4 "the value of exclusivity is difficult to quantify." *Learning Tech. Partners v. Univ. of*
5 *the Incarnate Word*, No. 14-cv-4322-PJH, 2015 WL 6602019, at *10 (N.D. Cal. Oct.
6 30, 2015). ChromaDex's argument that Elysium must undertake a standard lost
7 profits analysis (and that it is therefore entitled to a vast scope of related documents)
8 for its breach of the Exclusivity Provision ignores the special considerations inherent
9 in calculating damages from the breach of an exclusivity provision like the one
10 negotiated here. It is undisputed that at the relevant times, ChromaDex was the sole
11 commercial supplier of NR, and it agreed via the Exclusivity Provision that it would
12 not permit anyone to sell a product similar to Basis. Thus, any consumer that bought
13 a Combined Product, each of which was on the market only as a result of
14 ChromaDex's breach, necessarily would have purchased Basis in the absence of that
15 breach.

16 Lost profits analyses like those described by ChromaDex, which depends on
17 an estimation of the market share the plaintiff would have captured but for the
18 defendant's breach, are inapposite here since absent the breach, Elysium would have
19 captured the entire market. ChromaDex's attempts to deny Elysium the benefit of the
20 exclusivity for which it bargained are unavailing. *See id.* at *9-10 (rejecting
21 defendant's argument that payment of damages for breach of exclusivity provision
22 would place plaintiff in a "better position than it would have been in if the contract
23 had been fully performed" since plaintiff had negotiated exclusivity provision and
24 related discount clause that "work[ed] as a type of liquidated damages provision").
25 Accordingly, ChromaDex's request for the production of documents conveying
26 information irrelevant to a cognizable damages theory should be denied. *See*
27 *Millennium Mktg. Grp., Ltd. v. Simonton Bldg. Prod., Inc.*, No. 08-2198-JWL-DJW,

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1 2009 WL 2407723, at *13-14 (D. Kan. Aug. 4, 2009) (denying motion to compel on
2 requests seeking “business plans, strategic plans, projections, budgets, and/or annual
3 forecasts for or regarding” the agreement at issue) (“Merely because the requested
4 documents relate in some way to the License Agreement does not render them
5 relevant.”).

6 In any event, Elysium has agreed to produce numerous categories of
7 documents that provide the information underlying a standard lost profits analysis,
8 including Response Nos. 25-39, 53 (*see* Powell Decl. ¶ 10), and 68-69. ChromaDex
9 is not entitled to obligate Elysium to undertake the cost and burden of additional
10 discovery when it has not established the marginal relevance of the information
11 reflected in the documents sought that is not already reflected in the materials
12 Elysium has agreed to provide. *Sanofi-Aventis U.S. v. Genentech, Inc.*, No. CV 15-
13 5685-GW (AGRX), 2016 WL 7444676, at *1 (C.D. Cal. Mar. 30, 2016) (describing
14 denial of motions to compel production of documents "marginally relevant" and
15 cumulative of other discovery).

16 **B. Relevancy of Request No. 54.**

17 Elysium refuses to produce documents in response to Request No. 54. The
18 Request and Response are as follows:

19 ***REQUEST FOR PRODUCTION NO. 54:***

20 *All Documents Concerning any sales projections for Your product Basis.*

21 ***RESPONSE TO REQUEST FOR PRODUCTION NO. 54:***

22 *Elysium objects to this Request as overly broad and unduly burdensome, and*
23 *seeking information that is irrelevant to any claim or defense of any party, as sales*
24 *projections for Basis bear no relationship to the contracts at issue in this action (i.e.,*
25 *the NIAGEN Supply Agreement, the pTeroPure Supply Agreement, and the*
26 *Trademark License and Royalty Agreement); the claims for breach of the pTeroPure*
27 *Supply Agreement and the NIAGEN Agreement asserted by ChromaDex; the claims*

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1 for breach of the NIAGEN Supply Agreement and breach of the covenant of good
2 faith and fair dealing implied in the NIAGEN Supply Agreement, fraudulent
3 inducement relating to the Trademark License and Royalty Agreement, and patent
4 misuse asserted by Elysium; or any defenses. Elysium further objects to the Request
5 as seeking discovery that is disproportionate to the needs of the case. Elysium will
6 not produce documents responsive to this Request.

7 **1. ChromaDex's Contentions and Points of Authorities**

8 Request No. 54 is directly relevant to the calculation of Elysium's alleged
9 damages, if any, resulting from ChromaDex's purported breach of the Exclusivity
10 Provision. Elysium may not make a claim for damages but then refuse to give
11 discovery about that claim, as it now asserts. Indeed, Elysium seeks expectation
12 oriented lost profit damages, yet refuses to produce its documents that address its
13 internal and external communications about those commercial expectations.

14 Elysium's projected sales leading up to, and during, the "Exclusivity" period
15 are undeniably relevant to whether Elysium thought it would experience any
16 increased sales when the Exclusivity Provision went into effect on February 19,
17 2016, and whether those sales projections were adjusted when Elysium discovered
18 that other purported "Combined Products" were allegedly being sold in breach of the
19 Exclusivity Provision.

20 Courts in the Ninth Circuit regularly and routinely consider sales projections
21 in a lost profits analysis. *See, e.g., Nutri-Metics Int'l, Inc. v. Carrington Labs., Inc.*,
22 981 F.2d 1259, *12 (9th Cir. 1992) (noting the evidence supporting alleged lost
23 profits included the plaintiff's "future projections, and the bases for those
24 projections"); *Parlour Enterprises, Inc. v. Kirin Grp., Inc.*, 152 Cal. App. 4th 281,
25 290 (2007) (noting that "prelitigation projections are relevant and admissible" in lost
26 profits analysis); *Cataphora Inc.*, 2011 WL 6778792, at *2 (finding plaintiff's award
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1 of lost profits on its breach of contract claim "was supported by Plaintiff's expert's
2 damages analysis of projected profits").

3 During meet and confer discussions, Elysium indicated that it would be
4 willing to produce documents "sufficient to show" only sales projections for Basis, in
5 response to Request No. 54. (Cieslak Decl. ¶ 6.) But this offer was inadequate
6 because it omits discovery memorializing Elysium's discussions and communications
7 surrounding the projections themselves and the assumptions and bases underlying
8 the projections. Those additional documents are clearly relevant to whether the
9 projections are credible and what factors were considered by Elysium, such as
10 whether other external market conditions and/or competitors played a role in changes
11 to Elysium's projections, as opposed to the alleged "Combined Products" under the
12 Exclusivity Provision. ChromaDex should be able to assess whether such material
13 factors in this action were considered in Elysium's projections, rather than taking
14 Elysium's word that the projections and any diminution in sales were caused by the
15 alleged breach of the Exclusivity Provision.

16 Courts routinely hold that information beyond sales projections themselves is
17 highly relevant in a lost profits analysis. *See e.g., Nutri-Metics Int'l*, 981 F.2d at *12
18 (9th Cir. 1992) (noting the evidence supporting alleged lost profits included the
19 plaintiff's "future projections, and *the bases for those projections*" (emphasis
20 added)); *Master Replicas, Inc. v. Levitation Arts, Inc.*, No. CV 08-1846 (MLGX),
21 2009 WL 10670674, at *5 (C.D. Cal. May 13, 2009), *clarified on denial of*
22 *reconsideration*, 2009 WL 10673278 (C.D. Cal. June 18, 2009) (finding that to
23 establish lost profits, there must be "a substantial similarity between the *facts*
24 *forming the basis of the profit projections* and the business opportunity that was
25 destroyed" (emphasis added)).

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1 **2. Elysium's Contentions and Points of Authorities**

2 ChromaDex's description of Elysium's position on Request No. 54 misstates
3 both the nature of Elysium's theory of damages for breach of the Exclusivity
4 Provision and its position on this discovery. ChromaDex contends that projections
5 are relevant to "whether Elysium thought it would experience any increased sales
6 when the Exclusivity Provision went into effect on February 19, 2016, and whether
7 those sales projections were adjusted when Elysium discovered that other purported
8 'Combined Products' were allegedly being sold in breach of the Exclusivity
9 Provision," implicitly suggesting that Elysium's conception of its sales are probative
10 of the value of exclusivity itself (and thus, the value of which Elysium was deprived
11 by ChromaDex's breach). Similar to the explanation above regarding ChromaDex's
12 faulty proposition that Elysium must show that it would have made the sales of the
13 Combined Products sold in violation of the Exclusivity Provision, the parties need
14 not resort to extraneous factors like sales projections to derive the magnitude of the
15 injury that Elysium sustained. ChromaDex, which admits that it was at all relevant
16 times the sole commercial supplier of NR in the world, agreed with Elysium that it
17 would not facilitate other parties' manufacture and sale of Combined Products. Thus,
18 any sale to a consumer of a Combined Product not sold by Elysium represented a
19 sale that would not have occurred but for ChromaDex's breach.

20 This interpretation is further buttressed by the second prohibition of the
21 Exclusivity Provision, which ChromaDex ignores entirely, obligating ChromaDex to
22 "restrict . . . its customers and distributors and require similar restrictions throughout
23 the supply chain, from selling any Combined Product." (*See* Amendment to the NR
24 Supply Agreement, attached to the Powell Declaration as Exhibit H, at § 3.11.3.)
25 Elysium thus not only negotiated for an agreement that would prohibit ChromaDex
26 from enabling the sale of Combined Products, it bargained for and received the right
27 to ChromaDex's affirmative efforts to ensure that Elysium would be the sole seller of

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1 Combined Products. ChromaDex may not deny Elysium the value of that bargain by
2 claiming based on its sales projections that Elysium did not project additional sales
3 of Basis after implementation of the Exclusivity Provision or did not adjust its
4 projections after learning of ChromaDex's breach and thus was not injured by the
5 loss of the exclusivity for which it bargained. Such an interpretation would
6 effectively leave Elysium without remedy for ChromaDex's breach, contradicting a
7 fundamental principle of contract law. *See, e.g.*, Cal. Com. Code § 2719 cmt. 1
8 (West 2017) (Uniform Commercial Code Comment) ("However, it is of the very
9 essence of a sales contract that at least minimum adequate remedies be available.")
10 ChromaDex has thus failed to show that the production of sales projections at all
11 (which Elysium in fact consented to produce), let alone the production of all
12 documents and communications relating to them, is justified, and its motion to
13 compel the production of all related documents and communications should thus be
14 denied.

15 **C. Relevancy of Request Nos. 44, 45, 76, and 77.**

16 In response to Request Nos. 44, 45, 76, and 77, Elysium refused to produce
17 any documents. The Requests and Responses are as follows:

18 ***REQUEST FOR PRODUCTION NO. 44:***

19 *All Documents Concerning Your public relations activities related to NAD+,*
20 *NR, pterostilbene, and/or Your product Basis.*

21 ***RESPONSE TO REQUEST FOR PRODUCTION NO. 44:***

22 *Elysium objects to this Request as overly broad and unduly burdensome, and*
23 *seeking information that is irrelevant to any claim or defense of any party, as*
24 *Elysium's public relations activities related to NAD+, NR, pterostilbene, or Basis*
25 *bear no relationship to the contracts at issue in this action (i.e., the NIAGEN Supply*
26 *Agreement, the pTeroPure Supply Agreement, and the Trademark License and*
27 *Royalty Agreement); the claims for breach of the pTeroPure Supply Agreement and*
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1 *the NIAGEN Agreement asserted by ChromaDex; the claims for breach of the*
2 *"public relations activities." Elysium will not produce documents responsive to this*
3 *Request.*

4 **REQUEST FOR PRODUCTION NO. 45:**

5 *All Communications Concerning Your public relations activities related to*
6 *NAD+, NR, pterostilbene, and/or Your product Basis.*

7 **RESPONSE TO REQUEST FOR PRODUCTION NO. 45:**

8 *Elysium objects to this Request on the grounds that it is cumulative and*
9 *duplicative of Request No. 44 and thus is unduly burdensome. Elysium further*
10 *objects to this Request as overly broad and unduly burdensome, and seeking*
11 *information that is irrelevant to any claim or defense of any party, as Elysium's*
12 *public relations activities related to NAD+, NR, pterostilbene, or Basis bear no*
13 *relationship to the contracts at issue in this action (i.e., the NIAGEN Supply*
14 *Agreement, the pTeroPure Supply Agreement, and the Trademark License and*
15 *Royalty Agreement); the claims for breach of the pTeroPure Supply Agreement and*
16 *the NIAGEN Agreement asserted by ChromaDex; the claims for breach of the*
17 *NIAGEN Supply Agreement and breach of the covenant of good faith and fair*
18 *dealing implied in the NIAGEN Supply Agreement, fraudulent inducement relating to*
19 *the Trademark License and Royalty Agreement, and patent misuse asserted by*
20 *Elysium; or any defenses. Elysium further objects to the Request as seeking*
21 *discovery that is disproportionate to the needs of the case. Elysium additionally*
22 *objects that the Request is vague and ambiguous with respect to the meaning of*
23 *"public relations activities." Elysium will not produce documents responsive to this*
24 *Request.*

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1 **REQUEST FOR PRODUCTION NO. 76:**

2 *All Documents Concerning Your strategic plans Concerning health*
3 *supplement products and/or anti-aging products, including, but not limited to,*
4 *products containing NR and/or pterostilbene.*

5 **RESPONSE TO REQUEST FOR PRODUCTION NO. 76:**

6 *Elysium objects to this Request as overly broad and unduly burdensome, and*
7 *seeking information that is irrelevant to any claim or defense of any party, as*
8 *Elysium's strategic plans concerning health supplement products or anti-aging*
9 *products bear no relationship to the contracts at issue in this action (i.e., the*
10 *NIAGEN Supply Agreement, the pTeroPure Supply Agreement, and the Trademark*
11 *License and Royalty Agreement); the claims for breach of the pTeroPure Supply*
12 *Agreement and the NIAGEN Agreement asserted by ChromaDex; the claims for*
13 *breach of the NIAGEN Supply Agreement and breach of the covenant of good faith*
14 *and fair dealing implied in the NIAGEN Supply Agreement, fraudulent inducement*
15 *relating to the Trademark License and Royalty Agreement, and patent misuse*
16 *asserted by Elysium; or any defenses. Elysium further objects to the Request as*
17 *seeking discovery that is disproportionate to the needs of the case. Elysium will not*
18 *produce documents responsive to this Request.*

19 **REQUEST FOR PRODUCTION NO. 77:**

20 *All Communications Concerning Your strategic plans Concerning health*
21 *supplement products and/or anti-aging products, including, but not limited to,*
22 *products containing NR and/or pterostilbene.*

23 **RESPONSE TO REQUEST FOR PRODUCTION NO. 77:**

24 *Elysium objects to this Request on the grounds that it is cumulative and*
25 *duplicative of Request No. 76 and thus is unduly burdensome. Elysium further*
26 *objects to this Request as overly broad and unduly burdensome, and seeking*
27 *information that is irrelevant to any claim or defense of any party, as Elysium's*

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1 *strategic plans concerning health supplement products or anti-aging products bear*
2 *no relationship to the contracts at issue in this action (i.e., the NIAGEN Supply*
3 *Agreement, the pTeroPure Supply Agreement, and the Trademark License and*
4 *Royalty Agreement); the claims for breach of the pTeroPure Supply Agreement and*
5 *the NIAGEN Agreement asserted by ChromaDex; the claims for breach of the*
6 *NIAGEN Supply Agreement and breach of the covenant of good faith and fair*
7 *dealing implied in the NIAGEN Supply Agreement, fraudulent inducement relating to*
8 *the Trademark License and Royalty Agreement, and patent misuse asserted by*
9 *Elysium; or any defenses. Elysium further objects to the Request as seeking*
10 *discovery that is disproportionate to the needs of the case. Elysium will not produce*
11 *documents responsive to this Request.*

12 **1. ChromaDex's Contentions and Points of Authorities**

13 These Requests, which seek information about Elysium's public relations
14 activities and strategic plans, are highly and directly relevant to the merits of
15 Elysium's claim that products containing NIAGEN and ingredients other than
16 pterostilbene are "Combined Products" under the Exclusivity Provision, and that
17 ChromaDex breached the Exclusivity Provision.

18 Elysium alleges that the ingredient resveratrol is "substantially similar" to
19 pTeroPure, as that term is used in the Exclusivity Provision of the NIAGEN Supply
20 Agreement. (Cieslak Decl. Ex. C ¶ 16.) ChromaDex disputes that contention, and it
21 is a live, material, factual dispute between the parties. Discovery on what each party
22 has said about resveratrol and any other ingredient that Elysium contends is
23 "substantially similar" to pTeroPure is essential evidence.

24 Under Elysium's contention over whether resveratrol is substantially similar to
25 pTeroPure, Elysium's alleged damages for the alleged breach of the Exclusivity
26 Provision would increase, because of an expanded number of other Combined
27 Products at issue. That alone justifies the discovery. But, moreover, the validity of
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1 Elysium's urged construction of the term "substantially similar" is also relevant to its
2 claim for breach of the covenant of good faith and fair dealing, in which Elysium
3 alleges that ChromaDex "was not only enabling other customers to manufacture and
4 sell products that combined nicotinamide riboside and pterostilbene or *the*
5 *substantially similar ingredient resveratrol*, but was actively recommending to other
6 customers that they create such products" (*Id.* ¶ 17 (emphasis added).)
7 Accordingly, Elysium's communications, strategic marketing plans, public relations
8 materials and the documents sought in these requests are material to what Elysium
9 said publically about whether an ingredient like resveratrol is substantially similar to
10 pTeroPure. For example, Elysium's website states that pterostilbene is "[a] powerful
11 and bioavailable polyphenol *similar to resveratrol, but more bioavailable*."³ Even
12 Elysium recognizes that it has distinguished between the two products. Elysium's
13 statements go to the very heart of Elysium's counterclaims for breach of the
14 Exclusivity Provision and for breach of the implied covenant of good faith and fair
15 dealing. Elysium should not be permitted to make grandiose, but false, accusations
16 and then shield itself from having to produce the discovery that will prove the falsity
17 of its claims.

18 ChromaDex obviously disputes Elysium's contentions, and says that
19 pTeroPure and resveratrol are not "substantially similar" and that neither party ever
20 thought of the ingredients as "substantially similar." The Requests at issue here seek
21 information relevant to determining which party has the correct construction,
22 including Elysium's statements, admissions and views of the key differences between
23 pterostilbene and resveratrol, or any other ingredient.

24 Requests Nos. 44 and 45 ask for information regarding Elysium's public
25 relations statements and activity related to NR, pterostilbene, and/or Basis. This

26 _____
27 ³ See *Product*, ELYSIUM, <https://www.elysiumhealth.com/basis> (last visited October
28 12, 2017) (emphasis added).

1 information is highly relevant to how Elysium itself positioned its Basis product in
2 the market, whether and how Elysium distinguished its product from other products
3 in the market, including those containing resveratrol. For example, public marketing
4 and public relations communications (or drafts of such communications) saying that
5 Basis is superior to products containing resveratrol would be highly probative and
6 relevant to Elysium's current duplicitous claim in this lawsuit that products
7 containing resveratrol are "substantially similar" to Basis. They cannot be both, and
8 ChromaDex should be able to discover what Elysium has said on this topic.

9 Request Nos. 76 and 77⁴ seek information regarding Elysium's strategic plans
10 for Basis and other products in the anti-aging or health supplement market, including
11 but not limited to products containing NR and/or pterostilbene. During meet and
12 confer discussion, Elysium only agreed to produce market research and economic
13 analysis regarding products containing NR and/or pterostilbene because it is relevant
14 to the similarities and differences between pterostilbene and resveratrol, but not other
15 related documents like "strategic plans." (Cieslak Decl. ¶ 7.) Just as the research is
16 relevant, so are Elysium's decisions and plans based on that research. For example,
17 Elysium's strategic plans at the beginning of the relevant time period (in the middle
18 of 2013), when Elysium was just a start up, are likely to reveal why Elysium chose
19 pterostilbene for inclusion in Basis rather than resveratrol, particularly since
20 pterostilbene was much more expensive than resveratrol. As a further example,
21 Elysium's strategic plans from later in the relevant time period, when it was more of
22 an established business, will memorialize and disclose whether Elysium planned to
23 create new products with resveratrol, or only with pterostilbene. All of these
24 documents are relevant to the "Exclusivity Period" alleged breach, and the alleged
25 damages flowing therefrom, including whether Elysium itself thought that

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27 ⁴ These Requests are also relevant to the analysis of Elysium's alleged damages from
28 lost profits. *See* Section II.A.1.

1 resveratrol was "substantially similar" to pTeroPure, or whether that is a late, made
2 up, litigation contention.

3 During meet and confer discussions, Elysium also objected to Request Nos. 76
4 and 77 as overbroad, saying the products included in the Request could arguably
5 capture products such as eye cream. (Cieslak Decl. ¶ 8.) Based on that discussion,
6 ChromaDex narrowed the scope of products covered to "Basis and/or ingestible
7 dietary supplements that promote longevity, anti-aging, healthy aging, cellular
8 health, DNA repair, energy support, and/or metabolic support, including, but not
9 limited to, products containing NR, any NIAGEN Analog (as defined by Elysium in
10 its RFPs), pterostilbene, and/or any pTeroPure Analog (as defined by Elysium in its
11 RFPs)." (*Id.*) Notwithstanding ChromaDex's narrowing of its request, to exclude
12 products like "eye cream," Elysium still refuses to produce any documents in
13 response to this Request. (*Id.*)

14 During the meet and confer discussions, Elysium also based its refusal to
15 produce documents in response to Request Nos. 76 and 77, on the confidential nature
16 of such materials because the parties are competitors. (Cieslak Decl. ¶ 9.) This
17 position is ridiculous and of course without merit, since the Court entered the parties'
18 Stipulated Protective Order governing confidential information on August 8, 2017.
19 (Cieslak Decl., Ex. E.) The terms of the Protective Order include the right to
20 designate internal documents concerning trade secrets as "Highly Confidential –
21 Attorneys' Eyes Only." (*Id.* at 4.)

22 Accordingly, ChromaDex hereby moves the Court to compel Elysium to
23 produce documents in response to Request Nos. 44, 45, 76, and 77.

24 **2. Elysium's Contentions and Points of Authorities**

25 As above, ChromaDex's lengthy explanations of the purported relevance of the
26 documents covered by the disputed Requests ignores the heart of Elysium's
27 objections: ChromaDex has failed to tailor its sweeping Requests so that they request
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1 the production of the documents likely to contain information relevant to the parties'
2 claims and defenses, rather than documents containing that information plus
3 thousands of other documents containing information totally unrelated to the issues
4 in the litigation. Through Request Nos. 44 and 45, for example, ChromaDex seeks
5 documents and communications concerning Elysium's "public relations activities
6 related to NAD+, NR, pterostilbene, and/or Your product Basis." Elysium does not
7 disagree with ChromaDex's statement that the parties dispute the construction of
8 "substantially similar" in the Exclusivity Provision, nor that the construction of
9 "substantially similar" is relevant to multiple of its claims (though ChromaDex does
10 not, and cannot, offer any support for its repeated suggestion that comparisons by
11 Elysium between resveratrol and pterostilbene are evidence that Elysium considered
12 the two compounds different rather than evidence that it considered them to be
13 similar). Finally, Elysium does not disagree that public relations material discussing
14 the similarities or differences between NIAGEN and pTeroPure and other
15 compounds may potentially be relevant to the parties' understanding of "substantially
16 similar" as it is used in the Exclusivity Provision.

17 Where Elysium disagrees with ChromaDex is in the contention that Request
18 Nos. 44 and 45 impose a proportional and justified burden of production on Elysium.
19 Elysium manufactures a single product, Basis, which combines pterostilbene and NR
20 (which is converted to NAD+ after ingestion). (See TAC ¶¶ 12, 17.) Request Nos.
21 44 and 45 thus call for the production of documents and communications relating to
22 public relations activities concerning Elysium's entire business over three and a half
23 years, rather than documents on the topic that are specifically probative of the
24 "substantially similar" question. If ChromaDex's motion to compel production in
25 response to these Requests was granted, for example, Elysium would be forced to
26 collect and product documents such as draft press releases regarding scientific
27 research by one of Elysium's cofounders, a pioneer in the NR and anti-aging research
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1 community, communications with the journalists that have published articles on
2 Basis, and social media strategy documents describing Elysium's schedule for
3 Tweets and Facebook posts promoting Basis. Elysium would also be required to
4 collect and produce, by way of further example, all internal deliberations about
5 whether to hire a public relations firm, and, if so, which one; every piece of
6 correspondence Elysium had with any PR firm; and any bill Elysium ever received
7 from any PR firm. None of those documents have any conceivable relevance to this
8 litigation.

9 Elysium, which has sought discovery on the same issue from ChromaDex,
10 appropriately tailored the scope of its requests for similar material to documents
11 concerning (i) comparisons by ChromaDex of pterostilbene or NR to substantially
12 similar compounds and (ii) marketing of NIAGEN or pTeroPure with reference to
13 substantially similar compounds. (*See* Powell Decl. Ex. B, at Request Nos. 24-27.)
14 A similar construction for Request Nos. 44 and 45 would ensure the provision of
15 documents containing the information that ChromaDex purports to seek on Elysium's
16 internal views of these ingredients without obligating Elysium to produce the entirety
17 of the contents of its files on all of its public relations efforts.

18 Similarly, ChromaDex's Request Nos. 76 and 77 regarding Elysium's strategic
19 plans are overly broad, both for the reasons described above (*see supra* II.A(2)(d)),
20 and because ChromaDex's insistence that Elysium produce its strategic plans
21 represents a clumsy effort to obtain information that could more efficiently be
22 located and produced in response to a narrowed Request. ChromaDex's justification
23 for these Requests, that they will shed light, like Request Nos. 44 and 45, on
24 Elysium's internal views of whether resveratrol and pterostilbene are "substantially
25 similar," omits that documents concerning Elysium's "strategic plans" will likely
26 reflect a substantially larger proportion of information relating to, e.g., Elysium's
27 plans for marketing, manufacturing, research, investor relations, strategic
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1 partnerships, or even new products, topics that bear no relation to the issues
2 ChromaDex identifies as relevant. Instead, the information ChromaDex purports to
3 seek would be reflected on documents responsive to a Request like Elysium's
4 Request No. 24, for documents concerning any comparison of pTeroPure or
5 pterostilbene to a substantially similar compound. Rather than require Elysium to
6 assume the burden and cost of producing documents, only a small portion of which
7 relate to the issues at hand, ChromaDex must adhere to the standards of
8 proportionality embodied in Rule 26. Since it has offered no explanation that
9 justifies the broad scope of its Requests here, its motion to compel production in
10 response to them should be denied. *Mattel, Inc. v. MGA Entm't, Inc.*, No. CV 04-
11 9049 DOC (RNBX), 2011 WL 13128607, at *1 (C.D. Cal. Jan. 18, 2011) (denying
12 motion to compel a fully prepared 30(b)(6) witness where information was
13 "marginally relevant and cumulative").

14 **III. ATTORNEYS' FEES**

15 **A. ChromaDex's Contentions and Points of Authorities**

16 Federal Rule of Civil Procedure 37(a)(5) provides that if a motion to compel is
17 granted, "the court must, after giving an opportunity to be heard, require the party or
18 deponent whose conduct necessitated the motion, the party or attorney advising that
19 conduct, or both to pay the movant's reasonable expenses incurred in making the
20 motion, including attorney's fees," unless "the opposing party's nondisclosure,
21 response, or objection was substantially justified."

22 As explained in this brief, the relevance of the information sought by
23 ChromaDex's Requests goes to the essence of Elysium's counterclaims and is
24 indisputably well supported by case law. Clearly Elysium's refusal to produce the
25 information is not substantially justified. ChromaDex therefore requests that, should
26 its motion be granted, the Court award ChromaDex its expenses and attorneys' fees
27 incurred in bringing this motion.

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1 **B. Elysium's Contentions and Points of Authorities**

2 ChromaDex, even if its motion to compel is successful, which, for the reasons
3 described above, it should not be, would not be entitled to an award of attorney's fees
4 here. Federal Rule of Civil Procedure 37(a)(5)(A) proscribes an award of attorney's
5 fees if ". . . (ii) the opposing party's nondisclosure, response, or objection was
6 substantially justified; or (iii) other circumstances make an award of expenses
7 unjust." A party's objection to disclosure need not be successful to be "substantially
8 justified" and to warrant a denial of attorney's fees. *See, e.g., Cont'l Cas. Co. v. St.*
9 *Paul Surplus Lines Ins. Co.*, 265 F.R.D. 510, 531–32 (E.D. Cal. 2010) (granting
10 "majority of plaintiff's motion to compel" but denying award of sanctions because
11 "issues presented novel facts and new legal questions on which there has been little
12 published authority for guidance"); *Comprehensive Habilitation Servs., Inc. v.*
13 *Commerce Funding Corp.*, 240 F.R.D. 78, 87 (S.D.N.Y. 2006) (granting motion to
14 compel but denying simultaneous request for attorney's fees) ("[T]here was some
15 justification overall to support [Plaintiff]'s resistance of the discovery requests:
16 specifically, its argument as to relevance. Because that argument—although not
17 persuasive—could be characterized as a justification having 'substan[ce],' an award
18 of attorney's fees is not warranted.").

19 Here, Elysium's opposition to the requested discovery is substantially justified
20 because it raises issues "about which reasonable people could genuinely differ," 8B
21 Charles Alan Wright et al., *Federal Practice and Procedure* § 2288 (4th ed. 2017),
22 in particular ChromaDex's Requests relating to proprietary business information
23 about Elysium's supply chain that has no bearing on the claims and defenses still at
24 issue, and plainly overbroad requests that capture far more documents than are
25 reasonably necessary here. Elysium instead requests that, should this Court rule in
26 Elysium's favor, it award Elysium the expenses and attorney's fees it has incurred in
27 defending this baseless motion. *See Fed. R. Civ. Proc. 35(a)(5)(B); Wells Fargo*

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1 *Bank, N.A. v. LaSalle Bank Nat. Ass'n*, No. CIV-08-1125-C, 2010 WL 2594828, at
2 *6 (W.D. Okla. June 22, 2010) ("Both parties request that the Court award them
3 attorney's fees incurred in connection with the present motion. When a motion to
4 compel is denied, courts must, after notice and an opportunity to be heard, require
5 the movant to pay the opposing party's attorney's fees.").

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9 Dated: October 23, 2017

COOLEY LLP

10

By: /s/ Anthony M. Stiegler

11

Anthony M. Stiegler

12

Attorneys for Plaintiff ChromaDex, Inc.

13

*The filer, Anthony M. Stiegler, attests that the other
14 signatory listed, on whose behalf the filing is
15 submitted, concurs in the filing's content and has
authorized the filing.*

16 Dated: October 24, 2017

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP

17

18

By: /s/ Joseph N. Sacca

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JOSEPH N. SACCA

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Attorneys for Defendant and
Counterclaimant Elysium Health, Inc.

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