

1 COOLEY LLP
 ANTHONY M. STIEGLER (State Bar No. 126414)
 2 (astiegler@cooley.com)
 EAMONN GARDNER (State Bar No. 310834)
 3 (egardner@cooley.com)
 JON F. CIESLAK (State Bar No. 268951)
 4 (jcieslak@cooley.com)
 SOPHIA M. RIOS (State Bar No. 305801)
 5 (srios@cooley.com)
 4401 Eastgate Mall
 6 San Diego, CA 92121
 Telephone: (858) 550-6000
 7 Facsimile: (858) 550-6420

8 *Attorneys for Plaintiff and Counter-Defendant*
 9 *ChromaDex, Inc*

10 *Counsel continued on next page*

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 REPORT REGARDING
 PARTIES' RULE 26(F) CONFERENCE**

Judge: Hon. Cormac J. Carney

Magistrate Judge: Hon. Douglas F.
 McCormick

TAC Filed: June 7, 2017

FACC Filed: March 6, 2017

- 1 PETER B. MORRISON (State Bar No. 230148)
peter.morrison@skadden.com
- 2 JULIA M. NAHIGIAN (State Bar No. 307508)
julia.nahigian@skadden.com
- 3 SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
300 South Grand Avenue, Suite 3400
- 4 Los Angeles, California 90071-3144
Telephone: (213) 687-5000
- 5 Facsimile: (213) 687-5600

- 6 JOSEPH N. SACCA (admitted *pro hac vice*)
joseph.sacca@skadden.com
- 7 BRADLEY E. HONIGMAN (admitted *pro hac vice*)
bradley.honigman@skadden.com
- 8 SPENCER A. GOTTLIEB (admitted *pro hac vice*)
spencer.gottlieb@skadden.com
- 9 SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
- 10 New York, New York 10036
Telephone: (212) 735-3000
- 11 Facsimile: (212) 735-2000

- 12 DONALD R. WARE (admitted *pro hac vice*)
dware@foleyhoag.com
- 13 MARCO J. QUINA (admitted *pro hac vice*)
mquina@foleyhoag.com
- 14 FOLEY HOAG LLP
155 Seaport Boulevard
- 15 Boston, MA 02210
Telephone: (617) 832-1000
- 16 Facsimile: (617) 832-7000

- 17 *Attorneys for Defendant and Counterclaimant*
Elysium Health, Inc.

18
19
20
21
22
23
24
25
26
27
28

1 Pursuant to Federal Rule of Civil Procedure 26(f), Central District Local Rule
2 26-1, and the Court’s order (ECF 50), Plaintiff and Counter-Defendant ChromaDex,
3 Inc. (“ChromaDex”), and Defendant and Counterclaimant Elysium Health Inc.
4 (“Elysium”) (collectively referred to herein as the “Parties”), by and through their
5 respective counsel of record, hereby provide this Supplemental Joint Report
6 regarding the conference held pursuant to Rule 26(f) of the Federal Rules of Civil
7 Procedure and Local Rule 26-1. The original telephonic conference was held on
8 March 14, 2017, resulting in a Joint Report filed on March 28, 2017. A
9 supplemental telephonic conference was held on August 10, 2017.

10 **I. STATEMENT OF THE CASE**

11 **A. ChromaDex’s Statement**

12 ChromaDex is the only United States authorized commercial supplier of
13 nicotinamide riboside (“NR”), a vitamin B₃ metabolite covered by ChromaDex’s
14 patent estate and sold under the brand name NIAGEN. In 2013 Elysium, a start-up
15 at the time with no product and limited resources, approached ChromaDex about
16 obtaining a supply of NIAGEN. The parties negotiated a supply agreement through
17 the end of 2013 and into 2014, and in February 2014 entered (1) a NIAGEN Supply
18 Agreement and (2) a Trademark License and Royalty Agreement, which contained
19 guidelines for the optional use of ChromaDex’s trademarks and an independent
20 royalty obligation on sales of products containing NIAGEN. In June 2014, the
21 parties entered a third agreement governing ChromaDex’s supply of pterostilbene to
22 Elysium. Pterostilbene is another health supplement ingredient supplied by
23 ChromaDex under the name pTeroPure. Pursuant to the NR Supply and
24 Pterostilbene Supply Agreements, ChromaDex supplied Elysium with NIAGEN and
25 pTeroPure, and Elysium combines the two ingredients and sells them to consumers
26 in its sole product “Basis.”

27 The parties’ arrangement was unremarkable until 2016. In the second quarter
28 of 2016, however, claimed growth in Elysium’s sales and corresponding purchases

1 of NIAGEN caused the parties to question whether a most favored nation pricing
2 provision in the NIAGEN Supply Agreement then applied to Elysium's orders.
3 ChromaDex discussed the issue with Elysium and believed it had been resolved
4 amicably. It became clear that was not the case when, on June 28, 2016, Elysium,
5 without any sort of prior notice, submitted purchase orders for more than *double* the
6 amount of product than all of Elysium's past orders combined, at *less than half* the
7 parties' agreed price.

8 ChromaDex initiated a discussion with Elysium concerning its orders. On a
9 June 30, 2016 phone call, Elysium's principals made several false statements to
10 ChromaDex with the intent of (1) inducing ChromaDex to fill the unreasonably
11 disproportionate orders (2) at a price materially lower than the parties agreed-upon
12 price, and (3) to never pay for the product in order to exploit the financial pressure
13 such nonpayment would cause in any dispute between the two companies.
14 Nonetheless, relying on Elysium's representations, ChromaDex filled the
15 extraordinarily large orders and discounted the price of NIAGEN.

16 The day after the last product shipped, Elysium made clear its intent not to pay
17 until ChromaDex acquiesced to Elysium's demands regarding alleged breaches of
18 the NIAGEN Supply Agreement. Indeed, Elysium's plan to harm ChromaDex soon
19 became apparent because, *on the same day*, Ryan Dellinger, ChromaDex's Director
20 of Scientific Affairs, resigned *effective immediately*. ChromaDex later learned that
21 Mr. Dellinger went to work for Elysium—joining Mark Morris, ChromaDex's
22 former Vice President of Business Development, who had also abruptly resigned less
23 than a month earlier.

24 After ChromaDex made several unsuccessful efforts to resolve the parties'
25 dispute, and after Elysium's management team refused to engage in discussion or
26 dialogue, ChromaDex gave notice to Elysium that it would terminate the parties'
27 NIAGEN Supply Agreement and Trademark License Agreement effective February
28 2, 2017. While Elysium claims that it attempted to resolve these disputes, that is

1 false, and in fact, the truth is that Elysium’s management team evaded ChromaDex’s
2 overtures in the course of refusing to constructively engage with ChromaDex.

3 ChromaDex then filed its Complaint against Elysium in December 2016 for
4 breach of contract and fraud, seeking recovery of over \$3 million that Elysium owed
5 for the NIAGEN and pTeroPure that it received from ChromaDex. ChromaDex has
6 fully complied with and performed its contractual obligations to Elysium, but
7 Elysium still refuses to pay a penny for the product it ordered and received.

8 ChromaDex later supplemented its allegations with a trade secret
9 misappropriation claim in a First Amended Complaint. In response, Elysium filed a
10 Counterclaim and then a First Amended Counterclaim that essentially disputes the
11 amount owed to ChromaDex under the contracts and adds claims for fraud, unfair
12 competition, and patent misuse. After the Court ruled on competing motions to
13 dismiss and subsequent amendments to the pleadings, ChromaDex maintains two
14 breach of contract claims against Elysium. Elysium maintains claims for breach of
15 contract, fraud, and declaratory judgment of patent misuse.

16 ChromaDex denies all of Elysium’s claims. ChromaDex complied with its
17 obligations under the NIAGEN Supply Agreement. ChromaDex made no false
18 statements when negotiating the Trademark License and Royalty Agreement, and
19 Elysium could not have reasonably relied on any of ChromaDex’s statements when
20 negotiating the agreement at arm’s length. Further, ChromaDex committed no patent
21 misuse, which claim is now moot in any case because ChromaDex has withdrawn its
22 claim to enforce the Trademark License and Royalty Agreement. ChromaDex’s
23 partial motion for judgment on the pleadings regarding Elysium’s claim for
24 declaratory judgment of patent misuse is currently pending before the Court.

25 **B. Elysium’s Statement**

26 Elysium sells the groundbreaking proprietary dietary supplement, Basis, which
27 combines nicotinamide riboside (or “NR”) and pterostilbene (or “PT”) with other
28 ingredients. To obtain a supply of NR and PT for use in Basis, Elysium contracted

1 with ChromaDex. The Parties' contracts are memorialized in, among other things,
2 an NR Supply Agreement, dated February 3, 2014 and amended on February 19,
3 2016 (as amended, the "NR Supply Agreement") and a Trademark License and
4 Royalty Agreement, dated February 3, 2014 (the "License and Royalty Agreement").

5 ChromaDex has breached its obligations to Elysium in numerous respects.
6 For example, under the NR Supply Agreement, ChromaDex covenanted not to sell
7 NR to other customers buying the same or lesser quantities for a price less than it
8 was selling NR to Elysium (the "MFN Provision"). In a June 2016 email sent in an
9 effort to deceive Elysium into believing ChromaDex was complying with the MFN
10 Provision, ChromaDex's CEO inadvertently disclosed to Elysium that in fact
11 ChromaDex was selling NR to other customers for less than Elysium had been
12 paying, in breach of the MFN Provision. Elysium submitted purchase orders for NR
13 and PT on June 30, 2016 (the "June 30 Purchase Orders"), with the understanding
14 that ChromaDex would promptly issue a refund or credit to Elysium on account of
15 ChromaDex's breach of the MFN Provision. ChromaDex, however, steadfastly
16 refused to provide Elysium with the information necessary to determine the scope
17 and extent of ChromaDex's breaches of the MFN provision and therefore determine
18 the amount ChromaDex owed Elysium as compensation for the breaches, eventually
19 instructing Elysium to conduct an audit, and then ignoring Elysium's request to do
20 just that. Elysium's efforts to resolve this dispute amicably – which included
21 multiple conversations with ChromaDex officers and directors – were hampered by
22 ChromaDex's refusal to provide to Elysium the information necessary to calculate
23 the amount due to Elysium for ChromaDex's breaches of the MFN Provision. These
24 efforts were further frustrated by ChromaDex's eventual shutdown of the lines of
25 communication and direction to a former ChromaDex director to harass Elysium and
26 one of its investors through a series of hostile and threatening calls.

27 In addition to ChromaDex's violation of the MFN Provision, Elysium
28 discovered in the course of the discussions described above another breach of the NR

1 Supply Agreement. The NR Supply Agreement prohibited ChromaDex from selling,
2 or licensing or enabling any third party to manufacture or sell, a product containing a
3 combination of NR and PT or any ingredient substantially similar to them (the
4 “Exclusivity Provision”). Only after submitting the June 30 Purchase Orders did
5 Elysium learn that ChromaDex was also breaching the Exclusivity Provision by (1)
6 enabling other customers to manufacture and sell products that combined NR and PT
7 or the substantially similar ingredient resveratrol, and (2) recommending to other
8 customers that they create such products to compete with Basis.

9 Elysium’s damages resulting from ChromaDex’s breaches of the MFN and
10 Exclusivity Provisions remain to be determined. Elysium believes discovery will
11 identify additional breaches by ChromaDex of the agreements between them.

12 Elysium also discovered in the course of the parties' discussions of
13 ChromaDex's breach of the MFN Provision that certain of ChromaDex's
14 representations regarding the License and Royalty Agreement had been false when
15 made: ChromaDex induced Elysium to sign the License and Royalty Agreement by
16 misrepresenting that all ChromaDex customers who signed purchase agreements to
17 obtain NR were also required to sign separate trademark license and royalty
18 agreements, whether they wanted to or intended to use ChromaDex marks or not. As
19 a result of this misconduct, ChromaDex deceived Elysium into paying royalties to
20 ChromaDex on Elysium product sales. This fraud entitles Elysium to rescission of
21 the License and Royalty Agreement or damages. And, by conditioning its execution
22 of the NR Supply Agreement on Elysium’s execution of a trademark license (even
23 though Elysium had no interest in licensing ChromaDex’s trademarks), ChromaDex
24 exploited its NR patents and market power in the market for supply of NR, engaging
25 in patent misuse.

26 ChromaDex initiated this action on December 29, 2016 with a Complaint
27 against Elysium alleging breach of contract and fraudulent deceit (ECF 1). On
28 January 25, 2017, Elysium answered the Complaint and filed Counterclaims alleging

1 breach of contract, fraudulent inducement relating to the License and Royalty
2 Agreement, and unlawful and unfair business practices, and seeking a declaratory
3 judgment of patent misuse (ECF 27).

4 ChromaDex filed a First Amended Complaint on February 15, 2017, adding
5 federal and state law claims against Elysium for misappropriation of trade secrets
6 relating to Elysium's alleged recruitment and hiring of two former ChromaDex
7 employees, Mark Morris and Ryan Dellinger (ECF 26). Elysium filed First
8 Amended Counterclaims on March 6, 2017 (ECF 31). The parties separately moved
9 to dismiss each other's non-contract claims, and in its May 10, 2017 Order, the Court
10 dismissed ChromaDex's fraud claim with prejudice and dismissed ChromaDex's
11 trade secrets claims subject to a right to amend within fourteen days (ECF 44). The
12 Court dismissed Elysium's claim for unfair business practices but allowed its fraud
13 and patent misuse claims to remain (ECF 44).

14 On May 24, 2017, ChromaDex answered the First Amended Counterclaims
15 and purported to purge its patent misuse by representing to the Court that it would
16 not enforce the License and Royalty Agreement against Elysium (or any similar
17 agreement against any other party), promptly refund other parties for previously paid
18 royalties and grant Elysium a "credit" against any judgment ChromaDex might
19 someday obtain in this action for royalties previously paid by Elysium under the
20 License and Royalty Agreement. ChromaDex has offered no evidence that it ever
21 did refund any royalties to any party, and it has not paid any refund to Elysium.
22 ChromaDex nonetheless filed a Motion for Partial Judgment on the Pleadings on
23 August 14, 2016, asking for the second time that this Court dismiss Elysium's claim
24 for patent misuse (ECF 56-1).

25 On the same day it answered the First Amended Counterclaims, ChromaDex
26 also amended its trade secret claims in a Second Amended Complaint (ECF 45). As
27 contemplated by the Court's rules, Elysium notified ChromaDex that it intended to
28 once again move to dismiss the trade secrets claims and invited ChromaDex to meet

1 and confer concerning that intended motion. As counsel to Elysium explained to
2 counsel for ChromaDex during the meet and confer process, documentary evidence
3 demonstrated numerous of ChromaDex's key trade secret allegations to be
4 indisputably false.

5 For example, ChromaDex had alleged that Elysium had engaged in trade
6 secret misappropriation when a ChromaDex employee who later came to work for
7 Elysium had emailed to one of Elysium's founders in April 2015 a clinical trial study
8 report, which ChromaDex alleged to contain "highly sensitive and confidential trade
9 secret information" and to have never been previously disclosed to a third party in
10 whole or outside of a confidentiality obligation. Counsel for Elysium provided to
11 counsel for ChromaDex an email from ChromaDex's own CEO sending the very
12 same purportedly confidential, never-disclosed document to Elysium four months
13 prior to Elysium's supposed "misappropriation" of the document. In the face of this
14 (and other) incontrovertible evidence of the falsity of its allegations, ChromaDex
15 subsequently requested that it be allowed to withdraw its trade secrets claims before
16 Elysium filed its motion to dismiss, which Elysium agreed to in a stipulation filed on
17 June 7, 2017 (ECF 47). ChromaDex attached to that stipulation a Third Amended
18 Complaint, which excised the trade secrets claims (ECF 48). Elysium answered the
19 Third Amended Complaint on June 21, 2017 (ECF 51).

20 **II. RULE 26(F)(3) DISCOVERY PLAN**

21 **A. Rule 26(f)(3)(A) – Initial Disclosures**

22 The Parties exchanged initial disclosures on March 28, 2017.

23 **B. Rule 26(f)(3)(B) – Subjects, Completion Date, and Phasing of**
24 **Discovery**

25 **1. Phasing of Discovery**

26 The parties propose that fact and expert discovery be phased as indicated in
27 Section IV.

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

2. Subjects of Discovery

a. ChromaDex’s Statement

ChromaDex anticipates conducting discovery on at least the following subjects:

- Elysium’s breaches of contracts, including the NIAGEN Supply Agreement and the pTeroPure Supply Agreement, as alleged in the Third Amended Complaint.
- Elysium’s failure to pay outstanding ChromaDex invoices.
- Elysium’s representations to third parties regarding its balance sheet in connection with its failure to pay outstanding ChromaDex invoices.
- Elysium’s sales of products containing NIAGEN and/or pTeroPure.
- Elysium’s unclean hands regarding its performance of the NIAGEN Supply Agreement and pTeroPure Supply Agreement as alleged in the Third Amended Complaint.
- Elysium’s representations to ChromaDex regarding their June 2016 orders, and the facts underlying them.
- Elysium’s representations to ChromaDex regarding Elysium’s plans for ramping up sales in 2016 and the facts underlying those representations.
- Elysium’s communications with ChromaDex employees.
- The damages caused by Elysium’s breaches and violations of law on all claims.
- Evidence in support of ChromaDex’s defenses to Elysium’s counterclaims with respect to at least the alleged “MFN Provision” claim, the alleged “Exclusivity Provision” claim and Elysium’s alleged fraud claim, all of which ChromaDex denies.
- The alleged damages that Elysium seeks on its claims.

b. Elysium’s Statement

Elysium anticipates conducting discovery on the following subjects:

- The Parties’ negotiations of their contracts, including the NR Supply Agreement and Trademark License and Royalty Agreement.
- ChromaDex’s fraudulent inducement of the Trademark License and Royalty Agreement, as alleged in the First Amended Counterclaims.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- ChromaDex’s breaches of the NR Supply Agreement, including but not limited to the MFN Provision and Exclusivity Provision as alleged in the First Amended Counterclaims.
- The terms of ChromaDex’s sales of NR or PT to Elysium or any third-party customer for all sales pre-dating the last such sale to Elysium, including without limitation the extent to which such customers pay royalties to ChromaDex.
- The similarity between PT and other substantially similar ingredients, including resveratrol, including without limitation any statements or materials prepared or used by ChromaDex referring to the relationship between PT and resveratrol.
- The similarity between NR and other substantially similar ingredients, including without limitation any statements or materials prepared or used by ChromaDex referring to the relationship between NR and such substantially similar ingredients.
- ChromaDex’s enablement or encouragement of third parties to create products containing both NR and PT or substantially similar ingredients.
- ChromaDex’s encouragement of any third party to create or market a product to compete with Elysium’s Basis.
- ChromaDex’s market power in the market for supply of NR in the United States and worldwide.
- ChromaDex’s tying of its patent rights to a trademark license with anticompetitive effects, as alleged in the First Amended Counterclaims.
- The Fraudulent Spreadsheet, as defined and alleged in the First Amended Counterclaims.
- Documents sufficient to calculate the amount of the credit owed to Elysium as a consequence of ChromaDex’s breach of the MFN Provision, as alleged in the First Amended Complaint.
- Communications between and among ChromaDex management, board members and Elysium about the Parties’ relationship.
- The damages caused by ChromaDex’s contractual breaches and violations of law on all claims.

3. Completion Date of Discovery

See Section IV for the Parties’ estimate for the completion of discovery.

1 **C. Rule 26(f)(3)(C) – Electronic Discovery**

2 The Parties agree to produce and receive document productions as TIFF files
3 with metadata in load files, with native files as appropriate (*e.g.* Excel, PowerPoint).
4 The Parties are attempting to negotiate the stipulated ESI protocol discussed below.

5 **D. Rule 26(f)(3)(D) – Claims of Privilege**

6 The Parties included a Federal Rule of Evidence section 502(d) provision in
7 the stipulated protective order discussed below.

8 **E. Rule 26(f)(3)(E) – Changes to Limitations of Discovery**

9 The Parties do not presently anticipate any changes to limitations of discovery.

10 **F. Rule 26(f)(3)(F) –Other Orders**

11 **1. Service:** The parties agree that service may be effected through
12 electronic means. This statement constitutes the written consent requirement set forth
13 in Fed. R. Civ. P. 5(b)(2)(E).

14 **2. Stipulated Protective Order:** The Court entered the parties’ stipulated
15 Protective Order on August 8, 2017. (ECF 55.)

16 **3. Stipulated ESI Protocol:** The parties agree that the entry of an ESI
17 Protocol that will govern the format of and methods for the production of
18 electronically stored information is appropriate in this case. The parties have
19 reached an agreement on several topics but are still negotiating terms concerning the
20 collection, review, and production of text messages, instant messages, and personal
21 e-mail accounts. The parties will submit an ESI Protocol to the Court for entry in
22 this case as soon as possible.

23 **4. ChromaDex filed a Partial Motion for Judgment on the Pleadings**
24 **regarding Elysium’s claim for declaratory judgment of patent misuse on August 14,**
25 **2017 based on the absence of an existing case or controversy. The hearing date for**
26 **this motion is set for October 2, 2017.**

27 **5. Summary Judgment Motions:** Both Parties anticipate filing affirmative
28 motions for summary judgment according to the schedules proposed in Section IV.

1 **III. REQUIREMENTS OF LOCAL RULE 26-1**

2 Pursuant to L.R. 26-1 governing the conference of parties and this report, the
3 Parties state the following:

4 **A. Complex Cases [L.R. 26-1(a)]**

5 The Parties do not contend that this action will require compliance with the
6 procedures of the Manual for Complex Litigation.

7 **B. Motion Schedule [L.R. 26-1(b)]**

8 See Section IV for the Parties' proposed motion schedule.

9 **C. ADR [L.R. 26-1(c)]**

10 The Parties believe that this case is best suited for private mediation (ADR
11 Procedure No. 3 per L.R. 16-15). ChromaDex has offered to promptly mediate this
12 case. Elysium has indicated that mediation is premature in its view.

13 **D. Trial Estimate [L.R. 26-1(d)]**

14 The Parties estimate that the time required for trial will be 5–10 court days
15 including voir dire, opening statements, and closing arguments.

16 **E. Additional Parties [L.R. 26-1(e)]**

17 The Parties do not presently anticipate joining additional parties.

18 **F. Expert Witnesses [L.R. 26-1(f)]**

19 See Section IV for the Parties' proposed dates for expert discovery.
20
21
22
23
24
25
26
27
28

1 **IV. DEADLINES PROPOSED BY THE PARTIES**

2 The Parties propose the following schedule:

Event	Date
Initial Disclosures Exchanged	March 28, 2017
Scheduling Order Issued	September 1, 2017 or such other date as determined by the Court
Case Management Conference	To be determined by the Court
Fact Discovery Closes	March 16, 2018 or such other date as ordered by the Court
Expert Discovery Begins	At the close of fact discovery
Rule 26(a)(2) Expert Disclosures & Reports Due	April 13, 2018
Expert Rebuttal Reports Due	June 1, 2018
Expert Discovery Closes	July 6, 2018
Deadline for Dispositive Motions	August 3, 2018
Trial	September 18, 2018

13
14
15 Dated: August 25, 2017

COOLEY LLP

16 By: /s/ Anthony M. Stiegler
17 ANTHONY M. STIEGLER
18 Attorneys for Plaintiff ChromaDex, Inc.

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

22 Dated: August 25, 2017

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP

24 By: /s/ Joseph N. Sacca
25 JOSEPH N. SACCA
26 Attorneys for Defendant and
27 Counterclaimant Elysium Health, Inc.