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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ChromaDex, Inc.,

Plaintiff,

v.

Elysium Health, Inc. and Mark Morris,

Defendants.

Elysium Health, Inc.,

Counterclaimant,

v.

ChromaDex, Inc.,

Counter-Defendant.

Case No.: 8:16-cv-02277-CJC-DFM
[Assigned to the Hon. Cormac J. Carney]

ELYSIUM HEALTH, INC.'S AND MARK MORRIS'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO CHROMADEX, INC'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Hearing
Date: September 16, 2019
Time: 1:30 p.m.
Ctrm: 7C

Pre-Trial Conference: September 18, 2019
Trial: October 15, 2019

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Discovery in this action has confirmed what Elysium[1] had long suspected: that the parties' relationship was based on deception by ChromaDex. Far from being a good faith business partner to Elysium, ChromaDex engaged in persistent misconduct. ChromaDex unlawfully leveraged the patents it licensed to extract additional payments from Elysium and others. It fraudulently induced Elysium to enter into contracts by making misrepresentations. It breached multiple provisions of the parties' agreement: ChromaDex did not give Elysium the pricing to which it was entitled under their contract; it never manufactured Elysium's NR to the standards to which it expressly agreed in the contract; it ignored evidence of impurity in its product; and it failed to warn Elysium of the presence of acetamide in the product, as it was required to do. ChromaDex has even brought a claim against Elysium for disclosing publicly available information even though ChromaDex disclosed the same information to other customers to gain sales. Now faced with liability for multiple breaches of the parties' contract, fraud, abuse of patent protection, and other misconduct, ChromaDex seeks to reduce its reckoning by asking this Court to resolve disputed issues of fact in ChromaDex's favor. The motion should be denied.

First, ChromaDex is not entitled to summary judgment on Elysium's patent misuse counterclaim based on its invented distinction between "forced" and "voluntary" extensions of patent rights, nor on its faulty premise that "coercion" is a necessary element of the claim. Discovery has shown the extent of ChromaDex's patent misuse and has established disputed issues of material fact that can only be resolved at trial. For the same reasons, Elysium's unjust enrichment counterclaim cannot be dismissed.

[1] Capitalized terms not otherwise defined herein shall have the meaning assigned to them in Elysium's memorandum of points and authorities in support of its motion for partial summary judgment. (ECF No. 230-01.)

Second, ChromaDex is not entitled to summary judgment on Elysium's fraudulent inducement claim. Elysium's CEO and COO both testified that ChromaDex's then-CEO represented to them in contract negotiations that all of ChromaDex's NR customers were required to pay royalties and to execute a licensing and royalty agreement. Discovery has shown that ChromaDex's then-CEO lied. Despite his self-serving denial that he made this representation, this disputed issue of material fact cannot be resolved on summary judgment.

Third, ChromaDex is not entitled to summary judgment on Elysium's claims for breach of the Product Purity and cGMP Provisions based on its notice arguments. Neither of the proffered notice provisions are relevant to the Product Purity claim, which is based on ChromaDex's failure to warn Elysium of the impurity in the product rather than the product itself. Even if the provisions were relevant, ChromaDex got all the notice to which it was entitled. On learning of ChromaDex's breach of the MFN and Exclusivity Provisions, Elysium immediately reached out to ChromaDex to try to reach a resolution of the parties' disputes under the contract, which satisfied any applicable notice requirement under the California Commercial Code. And because the NR Supply Agreement, including the notice provision, had already terminated when Elysium discovered the Product Purity breach, that contract could not require notice in any event. As to its breach of the cGMP provision, ChromaDex was well aware of its breach, and in fact was not capable of complying. Because notice would have been futile, as ChromaDex was unable to remedy the breach, Elysium is equitably excused from any notice requirement.

Fourth, ChromaDex is not entitled to summary judgment for its violation of the Purity Provision based on its own testing. Evidence in the record shows that ChromaDex sold Elysium NR with levels of acetamide above the No Significant Risk Levels established by California's Proposition 65. ChromaDex's expert never addressed this evidence, which comes from third-party testing conducted in Spring 2017 of product ChromaDex sold to Elysium, but ignored it and instead commented

on other testing, including testing performed in-house at ChromaDex in late June of this year. At most, this creates an issue of fact, and ChromaDex's improper request that this Court make findings on this disputed issue should be rejected out of hand.

Last, ChromaDex's various arguments against Elysium's showing of damages fail. Elysium's expert presented a nuanced analysis of the harm to Elysium from ChromaDex's breaches, and ChromaDex does not challenge his methodology or analysis but essentially complains that his conclusions are too speculative. Not so. The expert's analysis amply supports his opinions, and the correctness of those opinions is a matter for the jury.

II. COUNTER-STATEMENT OF FACTS

A. ChromaDex Conditioned Supply of NR on Customers' Use of, or Purchase of a License to Use, the NIAGEN® Trademark.

ChromaDex is the exclusive licensee of various NR-related patents. ChromaDex has market power in a market for the supply of NR. (SAMF ¶ 1).[2] Indeed, ChromaDex has touted that "Niagen™ is the first and only commercially available brand of NR… ChromaDex believes its patent rights create a significant and meaningful barrier to entry for would-be competitors in the NR market." (SAMF ¶ 2). Referencing its NR patent rights, ChromaDex has told investors that it is "in the enviable position of 'gatekeeper' to the entire NAD+ precursor category." (SAMF ¶ 6). ChromaDex CEO Frank Jaksch explained that "ChromaDex does control the NR market and will for quite some time," having "created [a] multilayered fort around NR, protecting our controlling position in the market." (SAMF ¶ 8).

ChromaDex used its market and patent power to condition the supply of NR on use of, or purchase of a license to use, ChromaDex's NIAGEN® trademark.

[2] Citations to "CMF" refer to Defendants' Responses to ChromaDex's Alleged Uncontroverted Facts and Evidence and citations to "SAMF" refer to Elysium's Statement of Additional Material Facts," within the contemporaneously filed Local Rule 56-2 Statement of Genuine Disputes of Material Fact. Unless otherwise stated, all references to Exhibit(s) herein refer to exhibits attached to the concurrently filed Sacca Declaration.

(SAMF ¶ 39). ChromaDex's very first NR supply agreement provided that "Buyer agrees to use the Product trademark NIAGEN." (SAMF ¶ 12). Numerous NR supply agreements with other purchasers similarly conditioned supply of NR on the purchaser's use of ChromaDex's trademark when it sold the purchaser's product, stating that "Buyer shall use the Product trademark NIAGEN…." (SAMF ¶ 13). Elysium was required to pay substantial royalties for a license to use the NIAGEN® mark, which Elysium did not want to do, but was told by ChromaDex it must take such a license. (SAMF ¶ 18).

ChromaDex's conduct minimized brand competition among NR products sold to consumers. (SAMF ¶ 24-25). ChromaDex recognized that it had caused its customers to make a "substantial investment… with respect to the use of the brand name NIAGEN." (SAMF ¶ 29). ChromaDex's trademark use requirement had the purpose and effect of leveraging ChromaDex's NR patent rights in order to strengthen ChromaDex's NIAGEN trademark, increasing barriers to entry and foreclosing competition more effectively and durably than could ChromaDex's patent rights alone. (CMF ¶ 52). As ChromaDex recognized, its "NIAGEN ingredient TM strategy strengthens the overall NR business…." because it "[p]rovides differentiation for CDX [ChromaDex] if/when NR competition arrives." (SAMF ¶ 28).

Indeed, after forcing NR customers to invest substantially in the NIAGEN® mark and grow its intrinsic value by conditioning supply of NR on the customers' use of the mark, ChromaDex abruptly cut off supply to those customers and commenced its own sales of NIAGEN® directly to consumers. (SAMF ¶ 29). Based on the strength of the NIAGEN® brand, ChromaDex was able to supplant its direct-to-consumer licensees in 2017 by terminating their supply agreements and catapulting itself to become a major direct-to-consumer seller of a product that it now markets as TRU NIAGEN®. (SAMF ¶ 32-34). Capitalizing on its patent misuse and unearned commercial advantage, ChromaDex to this day tells customers to "Look

for 'Niagen®' on the label" to determine if an NR product is "authentic, safe, & effective." (SAMF ¶ 35).

B. ChromaDex Disregarded its Obligations under the NR Supply Agreement.

The NR Supply Agreement contains multiple important covenants at issue in this case, all of which ChromaDex breached: (1) the MFN Provision entitled Elysium to pricing on NR that was at least as favorable as that at which ChromaDex supplied NR to any other purchaser, provided Elysium purchased equal or higher volumes than the other purchaser (ECF No. 239-6 § 3.1); (2) the Exclusivity Provision prohibited ChromaDex from enabling any third party to manufacture or sell a product containing both NR and either PT or any substantially similar ingredients (ECF No. 239-10 § 3.11.3); (3) the cGMP Provision obligated ChromaDex to sell to Elysium NR manufactured in accordance with good manufacturing practices as set forth in Parts 210 and 211 of Title 21 of the United States Code of Federal Regulations ("Pharmaceutical cGMPs") and with other applicable laws and regulations in the United States (ECF No. 239-6 § 3.7); and (4) the Product Purity Provision required ChromaDex to inform Elysium in writing of any information of which it became aware that concerned or that could potentially impact the safety, identity, strength, quality or purity of the NR it was selling to Elysium. (ECF No. 239-6 § 3.9).

ChromaDex breached each one of these provisions. It breached the MFN Provision by repeatedly failing to give Elysium the lower third party prices to which it was entitled and then by refusing to give Elysium a credit or refund to account for the overcharges. (L.R. 56-1 ¶¶ 32-60, ECF No. 231-00). It breached the Exclusivity Provision by permitting four of its customers to sell NR in combination with resveratrol, an ingredient that is substantially similar to pterostilbene. (SAMF ¶¶45, 52, 53, 54). It breached the cGMP Provision from Elysium's first shipment of NR to its last, as ChromaDex's contract manufacturer never manufactured NR pursuant to Pharmaceutical cGMPs, nor was it ever able to do so. (CMF ¶ 60, Ex. 2). And

ChromaDex breached the Product Purity Provision when it failed to inform Elysium of elevated levels of acetamide, an industrial solvent, in its NR. (SAMF ¶¶ 56- 59; CMF ¶ 58).

Elysium's first breach discovery related to the MFN Provision. On June 29, 2016, after weeks of correspondence and discussions concerning ChromaDex's apparent lack of compliance with the MFN Provision, Elysium's COO Dan Alminana emailed Jaksch to state unambiguously and clearly that Elysium had discovered it had been overpaying for NR under the terms of the NR Supply Agreement, and demanded information from ChromaDex to determine the amount of refund or credit to which it was entitled. (ECF No. 244-04). In August of that year, Elysium told ChromaDex it was in breach of the Exclusivity Provision. (SAMF ¶ 53). And then in September of that year, Elysium learned of the failure of ChromaDex's contract manufacturer to make NR pursuant to Pharmaceutical cGMPs. (CMF ¶ 68). Elysium sought for months to negotiate with ChromaDex but the parties were unable to resolve their disputes, and ChromaDex terminated the NR Supply Agreement effective February of 2017. (CMF ¶ 61). Months later, after the contract had been terminated, Elysium learned of ChromaDex's breach of the Product Purity Provision when a third party tested samples from the NR lots ChromaDex sold to Elysium and found levels of acetamide that exceeded the thresholds set by California's Proposition 65. (SAMF ¶ 60).

C. ChromaDex Made Fraudulent Misrepresentations to Elysium in Negotiations.

During the negotiations that led to the NR Supply Agreement, Jaksch falsely told Elysium that ChromaDex required all of its customers who purchased NR to sign trademark license and royalty agreements. Elysium CEO Eric Marcotulli testified that "we were told that all customers pay a royalty and that was their way of doing business, given their ownership of the NR supply chain." (CMF ¶ 11, Ex. 12). And Alminana testified to the same effect: "We were told that everyone has to sign this.

Everyone pays a royalty. This is the standard royalty." (CMF ¶ 11, Ex. 13). Jaksch himself later admitted in an email to Elysium that Live Cell, an NR customer prior to and during the course of Elysium and ChromaDex's negotiations, never signed a trademark license and royalty agreement or paid royalties. (CMF ¶ 11).

III. LEGAL STANDARD

"Summary judgment is appropriate only if, taking the evidence and all reasonable inferences in the light most favorable to the non-moving party, there are no genuine issues of material fact, and the movant is entitled to judgment as a matter of law." *Tauscher v. Phoenix Bd. of Realtors, Inc.*, 931 F.3d 959, 962 (9th Cir. 2019). On a motion for summary judgment, "[t]he court must not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial." *Crane v. Conoco, Inc.*, 41 F.3d 547, 549 (9th Cir. 1994). Summary judgment is inappropriate "if reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict in the nonmoving party's favor." *Shokri v. Boeing Co.*, No. 18-35434, 2019 WL 2775566, at *1 (9th Cir. July 2, 2019).

IV. ARGUMENT

A. ChromaDex is Not Entitled to Summary Judgment on Elysium's Patent Misuse Counterclaim.

ChromaDex's motion on Elysium's patent misuse counterclaim is premised on three errors. ***First,*** ChromaDex ignores that the doctrine of patent misuse proscribes extension of patent rights, regardless of whether the extension of rights was "forced" or "voluntary." ***Second,*** while patent misuse does not require proof of an antitrust violation, even in antitrust tying, coercion is not a required element; rather, it serves as an alternative means to prove a tying arrangement in the absence of an express contract. Here, such contracts exist. ***Lastly,*** even if proof of coercion were required – and it is not – material disputes of fact preclude summary judgment.[3]

[3] For the same reasons, ChromaDex's challenge to Elysium's unjust enrichment counterclaim fails. *See* ChromaDex Memo at 15.

1. Asserted voluntariness of the challenged conduct is not a defense to patent misuse.

The doctrine of patent misuse exists to protect the public against patentees abusing their patent rights to extend the subject matter or temporal scope of their patent beyond its grant, regardless of whether the patentee has found a compliant licensee. *E.g. Scott Paper Co. v. Marcalus Mfg. Co.*, 326 U.S. 249, 256 (1945) ("[A]ny attempted reservation or continuation in the patentee or those claiming under him of the patent monopoly, after the patent expires, whatever the legal device employed, runs counter to the policy and purpose of the patent laws…"); *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488, 492 (1942) (public policy "forbids the use of the patent to secure an exclusive right or limited monopoly not granted by the Patent Office and which it is contrary to public policy to grant"). As the Supreme Court explained most recently in *Kimble v. Marvel Entm't, LLC*, "This Court has carefully guarded [the patent law's] cut-off date… [and] the patent laws' subject-matter limits…." 135 S. Ct. 2401, 2407 (2015). *Accord Meehan v. PPG Indus.*, 802 F.2d 881, 883 (7th Cir. 1986) ("[T]he courts are ever watchful of the possibility that patent monopolies will overstep their bounds"). This vigilance extends equally to attempts to use trademarks as a means to extend the scope of patent rights. As the Supreme Court emphasized in *Scott Paper*, "the patentee may not exclude the public from participating in [the] goodwill" that has been "built up in the patented article or product through the enjoyment of his patent monopoly" by "resorting to the trademark law…." 326 U.S. at 256.

For these reasons, patent law does not excuse misuse because a licensee accedes to the patent holder's conduct. It is the public that is harmed by misuse, regardless of the harm to any particular licensee. *Scott Paper*, 326 U.S. at 255-56. *See B.B. Chem. Co. v. Ellis*, 314 U.S. 495, 498 (1942). The Supreme Court recently reaffirmed this basic principle in *Kimble*. *Kimble* involved a form of patent misuse where a patentee and licensee agree to the continuing payment of royalties for post-

expiration use of a patent, effectively extending the patent term. *See Brulotte v. Thys Co.*, 379 U.S. 29 (1964). In *Kimble*, Marvel ***voluntarily*** agreed to pay a 3% royalty for Kimble's patent without an end date. *Id.* at 2406. Kimble argued this was an economically efficient arrangement. Nevertheless, the Court struck it down. The Court rejected Kimble's argument that the Court should engage in a "practice specific analysis" that balanced benefits and harms to the parties and to competition. *Id.* at 2413 and 2408-09. Instead, the Court held that "all patents, and all benefits from them, must end" even if the conduct was arguably desired by or beneficial to the parties. The Court recognized that this "rule, like others making contract provisions unenforceable" when they expand the scope of a patent, "prevents some parties from entering into deals they desire." *Id.* at 2408.[4] Nevertheless, "patent (not antitrust) policy gave rise to the Court's conclusion that post-patent royalty contracts are unenforceable—utterly regardless of a demonstrable effect on competition." *Id.* at 2413. ChromaDex's arguments that misuse is excused by licensees' acquiescence to contractual terms cannot be squared with *Kimble*. They must be rejected.

2. Coercion is not a required element of proving a tie.

ChromaDex is wrong in arguing that proof of coercion is required for patent misuse. Even under antitrust law, coercion is not a required element of a tie. *E.g. Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123, 1131 (6th Cir. 1981) ("The Supreme Court has defined the elements of an illegal tie-in and has not suggested that coercion is such an element."); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 450 (3rd Cir. 1977) (coercion is not "a separate legal element of proof" in a tying case). Indeed, it is hornbook law that "A tying agreement is not defeated by evidence that a buyer would have purchased the defendant's tied product anyway." 10 Areeda & Hovenkamp,

[4] ChromaDex's reliance on *Engel Industries, Inc. v. Lockformer Co.*, 96 F.3d 1398, 1408 (Fed. Cir. 1996) and *Valmont Indus., Inc. v. Yuma Mfg. Co.*, 296 F. Supp. 1291 (D. Colo. 1969) is misplaced. Those cases predate, and cannot overrule, the Supreme Court's *Kimble* decision. In any event, they both involved a specific type of conduct called a total sales royalty in which, for convenience, the parties calculate a royalty based on sales of all products, even potentially unpatented ones. This case has nothing to do with the legality of a total sales royalty calculation.

ANTITRUST LAW at ¶ 1753c (4th ed. 2018). In fact, a tie can be proven merely by a contractual provision conditioning the sale of one product on the purchase of another. As this Court has explained, "When the tie is a term of the… agreement, the plaintiff does not need to show that he was coerced, coercion is implied." *Krehl v. Baskin-Robbins Ice Cream Co.*, 78 F.R.D. 108, 118 (C.D. Cal. 1978). *Accord Bell*, 660 F.2d at 1131 ("Where the tie-in is clear on the face of the contract… there is no need to inquire into coercion."); *Bogosian*, 561 F.2d at 450 ("[O]nce a plaintiff proves that a defendant has conditioned the sale of one product upon the purchase of another there is no requirement that he prove that his purchase was coerced…."); *George Lussier Enters. v. Subaru of New Eng., Inc.*, 2001 U.S. Dist. LEXIS 12054, * 27 (D.N.H. Aug. 3, 2001) ("One way… to prove conditioning is to point to an express contractual tie…"). As the Supreme Court has explained, "By conditioning his sale of one [product] on the purchase of another, a seller coerces…" *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 605 (1953).

ChromaDex concedes, as it must, that the evidence includes written contracts in which, as a condition of supplying NR, ChromaDex expressly required that "Buyer shall use the Product trademark NIAGEN." (CMF ¶ 13). Under the caselaw, that is sufficient evidence to defeat summary judgment here.

ChromaDex's argument that proof of coercion is required mistakenly confuses situations where there is no express agreement creating the tie. In those cases, coercion provides an alternative form of proof. As this Court has explained, coercion is a "second method of showing the tie, in the absence of an express agreement." *Krehl*, 79 F.R.D. at 118, 119 (holding that "the existence of this tie is shown without recourse to proof of coercion" because the tie "appears in the… agreement"). *Accord Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1180 (1st Cir. 1994) ("In the absence of an explicit tying agreement, conditioning may be inferred from evidence indicating that the supplier has actually coerced the purchase…."); *Begosian*, 561 F.2d at 450 (coercive business practice may be used as proof in

absence of an express contractual condition); *Waldo v. North Am. Van Lines*, 669 F. Supp. 722, 727 (W.D. Pa. 1987) ("Proof of a tying arrangement can be established ***either*** by reference to an express contractual provision or by showing that the plaintiff was coerced…"). ChromaDex's caselaw is not to the contrary. For example, in *Beal Corp. Liquidating Tr. v. Valleylab, Inc.*, there was no evidence of any contract, only a "speculative conclusion that a tacit agreement exists." 927 F. Supp. 1350, 1368 (D. Colo. 1996). Similarly, in *Valmont Indus., Inc. v. Yuma Mfg. Co.*, there was no contractual "requirement, either express or implied, for the purchase of any unpatented goods." 296 F. Supp. 1291, 1296 (D. Colo. 1969).

3. Material disputes of fact exist regarding coercion.

Lastly, material facts permit a reasonable inference that ChromaDex's licensees in fact were coerced into agreeing to use, or licensing, the NIAGEN® mark even if coercion were an element of a patent misuse or tying claim.

To begin, the evidence supports a conclusion that a market for supply of NR exists. Elysium's expert economist, Dr. Cockburn, provides detailed opinions supporting this. (Cockburn Exhibit A at ¶¶ 48-80[5]). ChromaDex itself has stated publicly that "ChromaDex believes ***its patent rights create a significant and meaningful barrier to entry*** for would-be competitors ***in the NR market***." (SAMF ¶ 2). Similarly, in a May 2016 investor presentation, ChromaDex, citing its NR patents, touted that it was "in the enviable position of 'gatekeeper' to the entire NAD+ precursor category." (SAMF ¶ 6). ChromaDex and others have recognized the unique characteristics of NR that make other products, including even other NAD+ precursors, inadequate substitutes. (CMF ¶ 37). *See Fortner Enters. v. United States*

[5] "Cockburn Exhibit A" refers to the June 21, 2019 Expert Report of Dr. Iain M. Cockburn, attached to the Declaration of Dr. Iain M. Cockburn filed concurrently with Elysium's and Morris's Opposition to ChromaDex's Motion for Summary Judgment, Ex. A; see also Exhibit 1 attached to the Declaration of Craig E. TenBroeck in Support of ChromaDex's Daubert Motions to Exclude Certain Opinions of Dr. Iain Cockburn. (ECF No.262-3).

Steel Corp., 394 U.S. 495, 505 (1969) ("[E]conomic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.").

The evidence, including expert testimony, also supports a conclusion that ChromaDex had market power in the NR supply market. (SAMF ¶ 38). ChromaDex does not and cannot dispute that it was the sole supplier of NR during the relevant time. (SAMF ¶ 3). As ChromaDex repeatedly touted, "ChromaDex's NIAGEN™ is the 1st and Only Commercially Available Nicotinamide Riboside." (SAMF ¶ 2). *See also* (SAMF ¶ 8 ("ChromaDex does control the NR market.")). A showing of market power, by itself, can raise a reasonable inference that a tie was forced. As the Supreme Court explained in *Jefferson Parish Hosp. v. Hyde*, market power is evidence that a seller was able "to force customers to purchase a second, unwanted product in order to obtain the tying product." 466 U.S. 2, 17-18 (1984).

Evidence also supports that ChromaDex wielded its patent power to preserve its role as a "gatekeeper" to the NR market. (SAMF ¶ 2, 6). As noted, it touted its patent rights in its press releases. (SAMF ¶ 2). And, the evidence shows, ChromaDex was not shy about threatening those who did not bend to its will. ChromaDex's motion includes the self-serving declaration of its former CEO, Frank Jaksch, to suggest that licensees acted entirely voluntarily. What ChromaDex omits is that at the same time, Mr. Jaksch was busy sending threatening emails to potential licensees. (SAMF ¶ 9). As an example, he wrote in response to one inquiry from a potential customer: "I can assure you that ChromaDex has the patents necessary to enforce our rights. Anyone else that tries to sell NR will receive a lawsuit… Even if there was a cost effective stable supply [other than ChromaDex]… we will go after the company here in the US including the material in their product." (*Id.*).

Against this backdrop, the record shows that numerous ChromaDex licensees, representing a substantial portion of NR products sold to consumers, were ***required*** to use the NIAGEN® mark as a condition to receiving their supply of NR. (SAMF ¶ 11). ChromaDex's own expert calculates that almost a quarter of all NR sold over a

five-year period was subject to mandatory trademark use. *Id.* ChromaDex's argument that some, but not all, customers were required to use the mark is irrelevant. The Supreme Court, in reversing a grant of summary judgment, stated that tying "results whenever the seller can exert some power over some of the buyers in the market, even if his power is not complete over them and over all other buyers in the market. In fact, complete dominance throughout the market, the concept that the District Court apparently had in mind, would never exist even under a pure monopoly." *Fortner*, 394 U.S. at 503.

In addition, evidence shows that Mr. Jaksch told Elysium that all customers were required to pay a trademark royalty. (SAMF ¶ 11). A factfinder can reasonably infer that Mr. Jaksch made similar representations to others in order likewise to procure their agreement to use the NIAGEN® mark.[6]

The evidence taken together—ChromaDex's NR patents and market power, the uniqueness of NR, ChromaDex's public and private threats of patent enforcement, the existence of customer contracts requiring use of ChromaDex's mark, and Mr. Jaksch's statements to Elysium—easily supports a reasonable inference, which this Court must credit on summary judgment, that the ties between

[6] ChromaDex misleadingly tries to separate Elysium's obligation to pay royalties from the trademark license, even though both appear in the same written agreement. ChromaDex concedes that it required Elysium "to split [the deal] into two separate agreements," and that the royalty obligation be part of the trademark license. (ECF No. 238-5 at 190). By its very title, the "Trademark License and Royalty Agreement," ties the royalty to the trademark license. The trademark license was expressly granted "subject to the requirements specified in this Agreement," (preamble) one of which was that Elysium "shall pay to ChromaDex" royalties on net sales of Elysium's products. (ECF No. 239-7 § 9.2). The supply agreement and trademark license are two distinct, separately executed, instruments, each specifying its own terms. Indeed, the trademark license ***defines*** the supply agreement as a separate instrument. *Id.* at 291. The integration clauses do not merge the two agreements into one; on the contrary, they merely confirm that together the two instruments contain the entirety of the parties' contemporaneous understandings as to the subject matter and supersede all prior agreements and understandings. (ECF No. 239-6 at 287; ECF No. 239-7 at 297). *See Pankow Constr. Co. v. Advance Mortg. Corp.*, 618 F.2d 611, 616 (9th Cir. 1980) (rejecting argument that two "integrated" agreements were a single contract, and observing that "joint execution would require the court to construe the two agreements in light of one another; it would not merge them into a single written contract").

ChromaDex's supply of NR and its customers' use or licensing of ChromaDex's NIAGEN® trademark were coerced. For all these reasons, the Court should deny ChromaDex's motion for partial summary judgment on Elysium's patent misuse counterclaim.

B. Elysium Has Presented Evidence of Fraudulent Inducement.

In its counterclaim for fraudulent inducement, Elysium alleges that, during the negotiations that led to the NR Supply Agreement, Jaksch falsely stated that ChromaDex "required all of its customers who purchased nicotinamide riboside to sign trademark license and royalty agreements." (ECF No. 103 ¶ 165). This contention was borne out in discovery. Marcotulli testified that "we were told that all customers pay a royalty and that was their way of doing business, given their ownership of the NR supply chain." (CMF ¶ 11, Ex. 12). Alminana testified to the same effect: "We were told that everyone has to sign this. Everyone pays a royalty. This is the standard royalty." (CMF ¶ 11, Ex. 13). ChromaDex's attempt to ignore this testimony and claim there is an "utter dearth of evidence…that Jaksch made the specific alleged statement" has no merit. The statement is also indisputably false: Jaksch later admitted in an email to Elysium that Live Cell, an NR customer at that time, never signed a trademark license and royalty agreement or paid royalties. (CMF ¶ 11).

To be sure, Jaksch now disputes the account of what he told Elysium. (ECF No. 240-2, p. 903 at 134:23-25 (Ex. 72).) But this can do no more than create a disputed question of material fact as to whether the misrepresentation was made; it does not warrant entry of summary judgment for ChromaDex.

Perhaps cognizant of this, ChromaDex seeks to recast Elysium's allegation to be that Jaksch represented only that all customers *who signed a supply agreement* were required to sign a license and royalty agreement. (ECF No. 233-01 at 24-25). That, of course, is not what Elysium alleges or what the evidence shows. Jaksch represented more broadly that this requirement applied to *all NR customers*, with or

without supply agreements. (CMF ¶ 11). Regardless, even if Jaksch had limited his representation to supply agreement customers, that too would have been false. ChromaDex asserts that its only other customer that was party to a supply agreement during the relevant period in 2013 was Thorne Research Inc., which had also executed a trademark and royalty agreement. The record shows, however, that two other customers, HPN and Doctor's Best, were parties to NR supply agreements in 2013 *but not parties to trademark and royalty agreements.* (CMF ¶ 6). Even as improperly recharacterized by ChromaDex, Jaksch's representation was false. ChromaDex cannot obtain summary judgment by simply disregarding evidence it does not like.

C. ChromaDex's Statutory and Contract-Based Notice Arguments Fail.

1. The NR Supply Agreement's notice provision does not bar either Elysium's Product Purity claim or its cGMP claim.

ChromaDex argues that two of Elysium's claims are barred by section 3.7 of the NR Supply Agreement, which states that Elysium will notify ChromaDex of any claims it has "WITH RESPECT TO THE NIAGEN SOLD HEREUNDER" within 30 days from the date of receipt. (ECF No. 239-6 § 3.7). ChromaDex is wrong.

As to Elysium's Product Purity claim, the notice provision is simply irrelevant, for two reasons. *First*, that claim is based not on the levels of acetamide in the NR ChromaDex sold to Elysium, but rather on ChromaDex's failure meet the obligation imposed by the Product Purity Provision to inform Elysium of the levels of acetamide in its product. (ECF No. 103 ¶¶ 154-55). Because the gravamen of the claim is ChromaDex's failure to inform, as opposed to the nature of the goods themselves, the claim is not "WITH RESPECT TO THE NIAGEN" and thus is not subject to the notice provision. (*Id.*). And *second*, Elysium only learned of ChromaDex's failure to inform in late April of 2017, more than two months after ChromaDex had terminated the NR Supply Agreement. (CMF ¶ 60). Per section 5.3 of the NR Supply Agreement (ECF No. 239-6 § 5.3), the notice provision on which ChromaDex relies (*id* § 3.7)

did not survive termination, and thus Elysium was no longer bound by it when it first learned of ChromaDex's failure to inform. The Supply Agreement's language is consistent with California statutory and common law. *See* Cal. Com. Code § 2106(3) ("On 'termination' all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives."); *Herbert Warren & Assocs., Inc. v. Ramada Inns, Inc.*, 935 F.2d 274, 274 n.1 (9th Cir. 1991) (upon termination, "all obligations which are still executory on both sides are discharged but prior accrued rights remain and are enforceable.").

ChromaDex's invocation of the notice provision as a bar to Elysium's claim for breach of the cGMP Provision also fails under equitable principles. "California law allows for equitable excusal of contractual conditions causing forfeiture in certain circumstances, including circumstances making performance futile." *Gueyffier v. Ann Summers, Ltd.*, 43 Cal. 4th 1179, 1186 (Cal. 2008) (affirming arbitrator's determination that plaintiff was excused from giving notice of breach and opportunity to cure because "notice of [the] breaches would have been an idle act").

Here, ChromaDex was the sole commercial supplier of NR, and its contract manufacturer did not *and could not* make NR to the pharmaceutical cGMP standards agreed to in the NR Supply Agreement. (CMF ¶ 60). Notice to ChromaDex that it had failed to do what it was incapable of doing and thus could not cure through replacement product would have accomplished nothing. And the other option—return the product for a refund—was no option at all. ChromaDex was the sole commercial supplier of NR and *all* of the NR it sold to Elysium was defective; Elysium's remedy for ChromaDex's breach of warranty cannot be the loss of all saleable product. Because "[t]he law neither does nor requires idle acts," Cal. Civ. Code § 3532, Elysium's failure to provide notice of the cGMP Provision breach under the NR Supply Agreement is equitably excused under *Gueyffier* and does not warrant summary judgment. *See In re Raiton*, 139 B.R. 931, 935 (B.A.P. 9th Cir. 1992) ("It

is well-established that, in cases involving notice, the law does not require a useless act.").

This principal is enshrined in the California Commercial Code, which provides that parties are not bound to a contractual limitation on remedy when it "fails of its essential purpose." *See* Cal. Com. Code § 2719(2) ("Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this code."). Under the circumstances here, compliance with the notice provision and acceptance of the exclusive remedies of refund or replacement under the limited warranty provision was either impossible or would have deprived Elysium of the opportunity to sell what at the time was its only product, thus denying Elysium the "substantial value of its bargain" under the NR Supply Agreement. Cal. Com. Code § 2719 (Uniform Commercial Code Cmnt 1) ("where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this article."). *See also Arias/Root Eng'g v. Cincinnati Milacron Mktg. Co.*, 945 F.2d 408 at *6 (9th Cir. 1991) ("We conclude that under certain circumstances a refund remedy could fail of its essential purpose."). Accordingly, the limited warranty fails of its essential purpose and Elysium is entitled to pursue the full range of remedies otherwise available to it under the UCC.

2. California Commercial Code § 2607 does not bar Elysium's claims under the Product Purity and cGMP Provisions.

Section 2607(3)(A) of the California Commercial Code provides that after accepting goods, a "buyer must, within a reasonable time after he or she discovers or should have discovered any breach, notify the seller of breach or be barred by any remedy." For the reasons discussed above, this statute is irrelevant to Elysium's Product Purity claim, which relates not to the nature of the goods sold but rather to ChromaDex's failure to provide a required notice to Elysium.

As to Elysium's cGMP claim, ChromaDex received all the notice to which it was entitled. Contrary to ChromaDex's apparent position, the buyer need not set forth each and every ground for breach. Instead, "[t]he content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer…." Cal. Com. Code § 2607 (Uniform Commercial Code Cmnt 4). Therefore, as long as the notice "informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation," the notification suffices. *Id.*

It is undisputed that no later than June 29, 2016, Elysium "notif[ied] the seller of breach." On that date, Alminana emailed Jaksch to state Elysium's position that ChromaDex had overcharged Elysium on previous orders in violation of the NR Supply Agreement's MFN Provision, writing: "How long has Elysium deserved a lower price on NR and/or ptero? We don't know. You haven't told us. Will this require a much longer term process and conversation? Yes, quite likely, involving third parties." Later that day, Jaksch responded: "I agree that we need to clear the air a [sic.] discuss all of this." (ECF No. 244-04 at 3-5). And in August 2016, Elysium pointed out that ChromaDex was in breach of the Exclusivity Provision of the contract. (CMF ¶ 44).

These notices more than amply demonstrated to ChromaDex that the transactions at issue were "troublesome and must be watched," and triggered the process of attempted "settlement through negotiation" concerning ChromaDex's sale of NR to Elysium under the NR Supply Agreement. (*Id.*). Nothing more is required under Section 2607. *See Tasion Commc'ns, Inc. v. Ubiquiti Networks, Inc.*, 2014 WL 2916472, at *10 (N.D. Cal. June 26, 2014) (holding that mere oral statement that product was "bad" satisfied § 2607, despite failure to further specify actual defects with product); Cal. Civ. Prac. Bus. Litig. § 40:60 ("The notice need not be a claim

for damages or threatened litigation, nor need it include a clear statement of all the objections the buyer will rely on.").

As ChromaDex itself points out, Elysium did not discover the breach of the cGMP Provision until more than two months after Elysium had indisputably notified ChromaDex of breach. The fact that Elysium continued to discover more breaches by ChromaDex, including after the parties were in litigation, hardly entitles ChromaDex to summary judgment. Particularly telling is ChromaDex's assertion that Elysium should be penalized for failure to provide "*pre-suit* notice" of its intent to bring counterclaims based on its discovery that ChromaDex's product included statutorily significant levels of acetamide. (ECF No. 233-01 at 19, emphasis in original). As ChromaDex acknowledges, Elysium received the first test results in April 2017—after the litigation between the parties was already underway. Because ChromaDex was on notice of breach, and Elysium was not subsequently required to provide notice of each and every additional breach,[7] ChromaDex's reliance on Section 2607 is misplaced, and its motion should be denied.[8]

D. Disputed Issues of Material Fact Exist on Elysium's Claim that ChromaDex Violated the Product Purity Provision of the NR Supply Agreement.

ChromaDex argues that Elysium cannot prove that the Niagen-branded NR it purchased from ChromaDex contained elevated levels of acetamide. To reach this flawed conclusion, ChromaDex asks this Court to discredit Elysium's evidence

[7] Even if the Court determines that Section 2607 applies to Elyisum's claim under the Product Purity Provision, that claim is likewise not barred for the same reasons.

[8] ChromaDex miscites *Birchwood of Los Angeles, Inc. v. Indopco, Inc.*, 67 F.3d 305, 1995 WL 572865 (9th Cir. 1995) for the proposition that Elysium's use of the NR it purchased from ChromaDex bars Elysium's claims as a matter of law. (ECF No. 233-01 at 19-20). *Birchwood* neither establishes nor articulates such a rule, and instead shows the opposite, holding that the breach of warranty question "was properly submitted to the jury." *Birchwood*, 1995 WL 572865, at *3. It also miscites several cases for the proposition that "waiting fifteen and nine months to provide notice of counterclaims is unreasonable as a matter of law." These cases interpret Section 2607 and have nothing to do with the timing for filing counterclaims.

showing the opposite, which it cannot do on summary judgment. *Crane v. Conoco, Inc.*, 41 F.3d 547, 549 (9th Cir. 1994) ("[t]he court must not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial.").

In the Spring of 2017, an independent third party tested for Elysium the Niagen it had purchased from ChromaDex and found levels of acetamide in excess of the No Significant Risk Levels set by California's Proposition 65. (SAMF ¶ 60). ChromaDex's expert witness on the issue of acetamide testing, Dr. Carla Kagel, never addressed this testing in her expert report. (ECF No. 240-03, Ex. 1). Instead, Kagel commented only on testing: (1) done in November 2017 by a different third-party for Elysium on finished products sold by purchasers of Niagen, and (2) purportedly performed in-house at ChromaDex in September of 2018 on lots of Niagen ChromaDex had sold to those purchasers, which were lots *other than those sold to Elysium*. (ECF No. 240-03; CMF ¶ 61). The probative value of these tests is demonstrably lower than that of Elysium's initial Spring 2017 testing, which was conducted by a third party, was conducted closer in time to the manufacture and sale by ChromaDex of the NR at issue, and was applied to the NR actually sold to Elysium.

In an attempt to repair some of the glaring deficiencies in her opinion, Kagel submitted an entirely new "supplemental" report on the deadline for rebuttal expert reports. In that report, Kagel parroted purported results of new testing ChromaDex conducted in-house in late June 2019 on the lots of Niagen it had sold to Elysium years earlier. (ECF No. 240-04). While this report at last cited to testing of the relevant product, however untimely and dubious that testing might be, it still failed to address the Spring 2017 third-party testing to the contrary. Thus, Kagel's untimely

"supplemental" report at most raises a disputed issue of material fact as to whether the Niagen Elysium purchased contained elevated levels of acetamide.[9]

ChromaDex also argues that even if its Niagen was tainted with acetamide, it was ignorant of that fact and thus cannot be held liable for its failure to inform Elysium. The evidence, however, shows that by 2016 ChromaDex was aware that acetamide is a potential byproduct of NR manufacture, and nonetheless deliberately chose not to test for it. Specifically, ChromaDex submitted a document to the United States Food and Drug Administration ("FDA") in March 2016 purporting to establish the safety of its Niagen. In this document, ChromaDex indicated that acetamide is a potential byproduct of Niagen manufacture, included specifications for acceptable levels of acetamide in Niagen, and provided the results of acetamide testing on the lots of Niagen on which its FDA submission was based. (ECF No. 246-08, at 16-17).

Notwithstanding its awareness that acetamide was a manufacturing byproduct, ChromaDex elected *not* to test for the presence of acetamide in the lots of Niagen from which it sold to Elysium. (Moreno Ex. 3). Like any contractual obligation, the requirement that ChromaDex warn Elysium of any information that could potentially impact the quality or purity of Niagen includes the obligation to be reasonably informed about its product. *See, e.g.*, *Letizia v. Facebook Inc.*, 267 F. Supp. 3d 1235, 1253 (N.D. Cal. 2017) (recognizing implied covenant of good faith and fair dealing, including contractual duties of reasonableness, under California law). And even ChromaDex does not suggest that it would be entitled to deliberately avoid confirming any such information. (ECF No. 233-01 at 16-17). ChromaDex's lack of

[9] Elysium has moved to preclude Kagel's "supplemental" report because it is based on testing ChromaDex could have performed at any time, and that therefore could have been a subject of the report Kagel proffered on the deadline for the exchange of expert reports. ChromaDex's decision to delay its testing until after that deadline, and then to further delay Kagel's "supplementation" of her report to the deadline for submission of rebuttal expert reports, prejudiced Elysium substantially, including by precluding it from any opportunity to have an expert review and rebut Kagel's "supplemental" opinion. (ECF No. 226 at 5-6). As discussed above, however, even if the Court considers Kagel's "supplemental" report, it does no more than create an issue of material fact.

inquiry under the circumstances, and its resulting liability for failure to notify Elysium of the presence of acetamide in the Niagen it sold, are classic questions of fact to be resolved at trial. *See Creager v. Yoshimoto*, 2007 WL 2938168 at *3 (N.D. Ca. Oct. 9, 2007) (disputed facts regarding whether Defendants acted in bad faith in allegedly frustrating the purpose of the contract prevented summary judgment); *Hicks v. E.T. Legg & Assocs.*, 89 Cal. App. 4th 496, 508-09 (2001) (whether there is a breach of the implied covenant of good faith and fair dealing is a question of fact unless there is only one possible inference from the evidence).

Finally, ChromaDex's argument that the breach did not cause damages likewise fails. Elysium was damaged because of the costs it incurred to uncover the information ChromaDex wrongfully failed to provide, including through the costs of the third-party testing Elysium had to commission. (Exs.103-104).

E. Elysium Was Damaged by ChromaDex's Breach of the Exclusivity Provision and the Implied Covenant of Good Faith and Fair Dealing.

ChromaDex claims that Elysium cannot prove damages resulting from ChromaDex's violation of the Exclusivity Provision, arguing that Elysium's expert's opinions on lost sales is "speculative" and that, regardless, Elysium lacked the "capacity" to make those lost sales and thus cannot claim them as damages. ChromaDex is wrong on both counts. The fact that ChromaDex damaged Elysium by breaching the Exclusivity Provision is certain. In February 2016, ChromaDex granted Elysium exclusivity over products that combine NR and PT or substantially similar products, such as resveratrol[10] (ECF No. 153-04 ¶ 4), meaning that Elysium would capture the entire market for such products. But ChromaDex violated that agreement and enabled other customers to compete with Elysium. (56-2 ¶¶ 3-4). This competition cost Elysium some portion of the market it would have had but for the breach; the only question is the size of that portion.

[10] To be sure, ChromaDex disputes that resveratrol is substantially similar to PT, which only leaves an issue of material fact to be decided at trial.

Elysium's expert Dr. Iain Cockburn analyzed sales of third-party combined products in breach of the Exclusivity Provision between the date of the exclusivity grant and the termination of the NR Supply Agreement (CDX Ex. 77 ¶ 181) and estimated the portion of those sales that Elysium would have captured if, as provided for under the contract, it had been the only seller. Dr. Cockburn conservatively eliminated sales of one product, Thorne Extra Nutrients, concluding the ratio of NR to resveratrol in the product rendered it too dissimilar from Elysium's own product Basis. As to each of the remaining three combined products, Dr. Cockburn considered a number of factors specific to each, such as marketing channel, price, dosage, and ratio of NR to resveratrol relative to Elysium's product Basis. Dr. Cockburn concluded that but for the breach, Elysium would have captured between 10% and 90% of sales of a product called Mitoboost, between 10% and 75% of sales of a product called "Optimized Resveratrol with NR", and as much as 11.25% of sales of a product called ResveraCel. (CDX Ex. 77 ¶¶ 182-190, & Ex. 5 thereto).

ChromaDex does not address the methodology underlying Dr. Cockburn's lost profits conclusion. Instead, it claims that the report is too speculative simply because it presents a range of damages. But the California Supreme Court has recognized that "[t]he lost profits inquiry is always speculative to some degree." *Sargon Enters., Inc. v. Univ. of S. California*, 55 Cal. 4th 747, 775 (2012). *See also Orozco v. WPV San Jose, LLC*, 36 Cal. App. 5th 375, 399-401 (2019) (affirming jury award based on expert's "approximation" of damages). It is well established that where, as here, "the fact of damages is certain, the amount of damages need not be calculated with absolute certainty," and an "approximation" of damages is permissible as long as the analysis provides "some reasonable basis of computation of damages." *Sargon*, 55 Cal. 4th at 774. As discussed, the fact of damages is demonstrated by the existence of competing product sales. Dr. Cockburn's analysis provides ample basis for a jury award within the range he presents, based on his extensive factual and methodological analysis. *See id.; Corning Optical Commc'ns Wireless Ltd. v. Solid,*

Inc., 2015 WL 5655192, at *1 (N.D. Cal. Sept. 24, 2015) (rejecting challenge to expert's use of "reference range" for a "hypothetical royalty rate": defendants failed to show that the expert's opinions were "methodologically unreliable, as opposed to simply not credible or even just plain wrong").

ChromaDex's second argument, that "[a]fter Elysium ended its relationship with ChromaDex" it lacked capacity to make the lost sales it identifies as damages, fares no better. The damages period here runs from February 2016, the beginning of the exclusivity period, to the beginning of February 2017, when ChromaDex (not Elysium) terminated the agreement. Until February 2017, ChromaDex was under an obligation to sell NR to Elysium and Elysium had the discretion to place orders to ChromaDex for as much NR as it required. (Ex. 45). Indeed, ChromaDex itself seeks lost profits for purchases it contends Elysium would have made but for the disputes between the parties. (ECF No. 245-05 at 543-46). To the extent ChromaDex's assertion is that Elysium had a limited supply of NR December 2016, when it recognized it would need to find a new source of supply, and February 2017, when the parties' NR Supply Agreement terminated, that affected its capacity to sell its product during that brief window and therefore limits damages for this two-month period, it has again at best raised a dispute of fact. This question, along with whether any such action was caused by ChromaDex's breaches of the contract and thus cannot provide ChromaDex a defense to liability, is one for the jury. Cal. Civ. Code § 3517 ("No one can take advantage of his own wrong."); *Adv. Micro Devices, Inc. v. Intel Corp.*, 9 Cal. 4th 362, 387 (Cal. 1994) (*en banc*) (breaching party may not seek to benefit from the "noncompetitive posture [it] had imposed partly through its deliberate breach of contract").

ChromaDex also argues that Elysium lacks evidence of damages caused by ChromaDex's breach of the implied covenant of good faith and fair dealing. But the crux of Elysium's claim is that ChromaDex wrongfully encouraged and assisted other of its customers to sell combined products in violation of Elysium's exclusivity

rights. Elysium's damages on this claim are therefore the same as its damages for ChromaDex's breach of the Exclusivity Provision of the NR Supply Agreement and are amply set forth in the Expert Report of Dr. Iain Cockburn. (ECF No. 232-21 ¶¶ 182-190).[11]

Finally, ChromaDex argues that Elysium shows no damages in connection with is counterclaim for breach of section 4.2 of the NR Supply Agreement. That counterclaim, which arises from ChromaDex's disclosure of the NR Specifications attached to the NR Supply Agreement, mirrors ChromaDex's claim that disclosure of these same specifications by Elysium breached the parties' agreement not to disclose the "terms" of the NR Supply Agreement. (ECF No. 153 ¶¶ 116-118). To the extent disclosing the specifications is a breach of Section 4.2, as ChromaDex alleges, it is uncontested that ChromaDex committed this breach when on multiple occasions it disclosed the NR Specifications to other ChromaDex customers. (CMF ¶ 55). In addition to these disclosures, however, ChromaDex has taken the further step of making this information publicly available by attaching it to certain of its SEC filings. (ChromaDex Corporation 10Q For the Quarterly Period Ended April 2, 2016, at https://tinyurl.com/y3ng8nfd). By making this information public, ChromaDex has mooted the question of damages for its disclosure, not just for the alleged disclosures by ChromaDex but for alleged disclosures by Elysium. To the extent summary judgment on this claim is appropriate, it is appropriate as to the claim by each party.

V. CONCLUSION

For the foregoing reasons, ChromaDex's motion should be denied.

[11] While the harm Elysium suffered is the same for the two claims, the gravamen of the claims differs. The breach of contract claim asserts that ChromaDex "enabled third parties, including its other customers, to create" combined products in violation of the Exclusivity Provision (ECF No. 103 ¶ 149), whereas the claim for ChromaDex's breach of the implied covenant of good faith and fair dealing is based on ChromaDex's affirmative acts encouraging and enabling third parties to sell a combined product. *See Digerati Holdings, LLC v. Young Money Entertainment LLC*, 194 Cal. App. 4th 873, 885 (2011) (noting that gravamen of implied covenant claim differed from contract claim because it focused on defendant's acts encouraging third party to undertake acts that defeat the purpose of the contract).

Respectfully submitted,

Dated: August 28, 2019

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