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10 **UNITED STATES DISTRICT COURT**  
 11 **CENTRAL DISTRICT OF CALIFORNIA**  
 12 **(SOUTHERN DIVISION)**

14 ChromaDex, Inc.,

15 Plaintiff,

16 v.

17 Elysium Health, Inc.,

18 Defendant.

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Elysium Health, Inc.,

20 Counterclaimant,

21 v.

22 ChromaDex, Inc.,

23 Counter-Defendant.  
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Case No. SACV 16-02277-CJC(DFMx)

**CHROMADEx, INC.’S SUPPLEMENTAL  
 BRIEF IN SUPPORT OF ITS MOTION TO  
 COMPEL PRODUCTION OF DOCUMENTS  
 FROM DEFENDANT ELYSIUM HEALTH,  
 INC.**

Date: December 13, 2017

Time: 8:30 a.m.

Judge: Hon. Douglas F.  
 McCormick

Courtroom: 6B

Discovery Cut-Off: June 14, 2018

Pretrial Conference: September 10, 2018

Trial: September 18, 2018

1 Elysium refuses to produce its documents evidencing its alternative sources of  
2 Nicotinamide Riboside (“NR”), which are at the core of Elysium’s counterclaims and  
3 ChromaDex’s (“CMDX”) defenses. This single overarching dispute remains at issue  
4 across CMDX’s Document Request Nos. 42, 43, 47, 48, 49, 50, 59, 60, 61, 76, and 77.  
5 The documents evidencing the source(s), volumes, quality, and availability of NR  
6 sourced from parties other than ChromaDex, and Elysium’s plans and communications  
7 about them, are crucial evidence to CMDX’s defenses against Elysium’s claims for  
8 breach of contract, implied covenant and patent misuse, and CMDX’s unclean hands  
9 defense. Elysium’s proposed stipulations, which CMDX reject because it wants and  
10 needs the actual facts to fully present its case to the jury, concede the relevance of this  
11 discovery and evidence Elysium’s efforts to suppress evidence it does not like. Without  
12 the requested documents ChromaDex would be defending against Elysium’s claims with  
13 its hands tied behind its back.

#### 14 **I. FACTUAL AND PARTIAL PROCEDURAL HISTORY**

15 Elysium and CMDX signed their NR Supply Agreement on February 3, 2014  
16 (“Supply Agreement”). The Supply Agreement gave Elysium the right to purchase NR at  
17 a “Most Favored Nations” (“MFN”) price if Elysium became CMDX’s largest volume  
18 purchaser of NR. CMDX sued Elysium for non-payment and Elysium counterclaims for  
19 breach of the MFN clause. In February 2016 the parties amended the Supply Agreement  
20 granting Elysium an exclusivity right to purchase NR and sell it combined with  
21 pTeroPure, which is another ingredient sold by CMDX, or any “substantially similar”  
22 ingredients (the “Exclusivity” clause). Elysium also counterclaims for breach of the  
23 Exclusivity clause and asserts a lost profits remedy. In 2014 Elysium’s purchases were  
24 few and they increased only moderately in 2015. But on June 28, 2016, Elysium placed a  
25 huge purchase order for more than double all the NR it had ever ordered, but at half the  
26 parties’ agreed upon contract price. CMDX rejected the PO and the parties discussed the  
27 order on June 30, 2016, during which Elysium said that it would (1) exhaust the  
28 requested immense volume in a few months, (2) order much more in Q3 and Q4 2016,

1 and (3) immediately pay for the June 30 order if it was shipped. CMDX acquiesced,  
2 invoiced Elysium for the \$2.98M purchase price, and shipped all the requested NR on  
3 July 1, 2016 and all the requested pTeroPure by August 9, 2016. One day later Elysium  
4 announced that it would not pay anything for either PO unless CMDX further conceded  
5 to a substantial price reduction. Elysium has never paid for the product that it received.  
6 To add insult to injury, Elysium poached two of CMDX's senior level employees at the  
7 same time, one of whom was in charge of the Elysium relationship and the other who was  
8 in charge of CMDX's scientific research on NR. In retrospect CMDX has reason to  
9 believe that Elysium was already negotiating with, or secured, other potential suppliers of  
10 NR when it signed the NR Supply Agreement, or at least by June 30, 2016 when Elysium  
11 placed its order for double the NR it had ever purchased. Elysium was stockpiling NR  
12 from CMDX to last for a year or more, rather than the fiscal quarter that it represented,  
13 and did so with the intent never to pay for the NR and to cause ChromaDex financial  
14 stress. In fact, one Elysium founder admitted that Elysium intended to weaken CMDX so  
15 it could buy the company.

16 **II. THE ALTERNATIVE NR SOURCE DOCUMENTS ARE DIRECTLY AND**  
17 **CRUCIALLY RELEVANT TO ALL OF CHROMADDEX'S DEFENSES.**

18 **A. CHROMADDEX'S DEFENSE TO ELYSIUM'S PATENT MISUSE COUNTERCLAIM.**

19 On Nov. 29, 2017 Judge Carney issued an order denying CMDX's motion to  
20 dismiss Elysium's patent misuse counterclaim. (ECF 73.) Elysium alleges that CMDX  
21 unlawfully tied the right to purchase NR—for which CMDX is the licensee of several  
22 patents from Dartmouth University—to the obligation to also sign a Trademark License  
23 & Royalty Agreement in violation of the Sherman Antitrust Act. (Cieslak Decl. 1 Ex. C  
24 (“SACC”) ¶ 134.) To prevail on such a tying claim Elysium must prove that “the patent  
25 owner has market power in the relevant market for the patent or patented product on  
26 which the license or sale is conditioned.” 35 U.S.C. § 271(d)(5). Market power is  
27 evaluated over time, including up to the present in this case where market conditions  
28 continue to change with the introduction of new suppliers. *See e.g., United States v. Syufy*

1 *Enters.*, 903 F.2d 659, 665–66 (9th Cir. 1990); *In re Air Passenger Computer*  
2 *Reservations Sys. Antitrust Litig.*, 694 F. Supp. 1443, 1460 (C.D. Cal. 1988), *aff'd sub*  
3 *nom. Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991). Whether  
4 CMDX had, and has, market power for the supply of NR is, therefore, fundamentally  
5 relevant and Elysium’s documents concerning alternative sources of NR directly bear on  
6 that issue. Elysium further alleges that CMDX had other impermissible tying  
7 arrangements for NR with third parties and Elysium seeks discovery about them through  
8 the present day, and seeks to hold CMDX’s patents unenforceable based on them. (SACC  
9 ¶¶39-40.)<sup>1</sup> If Elysium fails to show that CMD had market power, it must show that  
10 CMDX’s actions had an “anticompetitive” effect. *Princo Corp. v. Int’l Trade Comm’n*,  
11 616 F.3d 1318, 1334 (Fed. Cir. 2010). Elysium’s efforts to find an alternative source of  
12 NR will evidence competitors in the market for the supply of NR and whether CMDX’s  
13 actions had any anticompetitive effect. CMDX’s Requests Nos. 59 & 60 seek  
14 Documents and Communications about the availability and substitutability of NR from  
15 alternative sources. Further, the “ease of entry” into a relevant market is a critical factor  
16 in the market power analysis. *Syufy Enters.*, 903 F.2d at 666–67. Here, the ease of  
17 Elysium’s entry into the NR market will be evident from Elysium’s inquiries and  
18 communications about supplementing its supply chain with a new source of NR and at  
19 what costs. Requests Nos. 42, 43, & 61 address these points. Requests Nos. 47 & 48  
20 address the time required by Elysium to obtain an acceptable alternative source of NR,  
21 compliant with applicable safety and quality standards. Requests Nos. 47, 48, 76 & 77

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24 <sup>1</sup> In meet and confer discussions, Elysium has taken the position in regard to its own  
25 requests that it is entitled to discover all CMDX’s licensing and royalty “schemes” in  
26 place with its NR customers and it has several broad requests aimed at discovering these  
27 agreements and negotiation of these agreements *to the present*. See e.g., Powell Decl. Ex.  
28 B (“Elysium’s RFPs”), No. 44 (“All Documents Concerning any agreements currently in  
effect or previously in effect between You and any purchaser of NR relating to the  
payment of royalties by that purchaser.”). See also Elysium’s RFP Nos. 45, 46, 47, 48,  
49, 50, 51, and 52.

1 relate to Elysium’s strategic plans for market expansion and penetration, with what  
2 products and as sourced from whom. Requests Nos. 49 & 50 relate to Elysium’s efforts to  
3 obtain those sources.

4 **B. CHROMADDEX’S DEFENSE TO ELYSIUM’S ALLEGED LOST PROFITS.**

5 Elysium claims lost profits for CMDX’s alleged breach of the Exclusivity clause.  
6 Elysium will have to prove with reasonable certainty that it would have made the sales it  
7 allegedly lost due to CMDX’s alleged breach, yet refuses to produce its NR alternative  
8 source documents which will evidence the availability, cost and the quality of the most  
9 essential ingredient in Elysium’s product—NR. Requests Nos. 42, 43, 47, 48, 49, 50, 61,  
10 76, & 77 seek communications about Elysium’s supply chain, Elysium’s efforts to obtain  
11 an alternative source of NR, when the alternative NR sources could have been available,  
12 and Elysium’s strategic plans for the procurement of NR.

13 **C. CHROMADDEX’S UNCLEAN HANDS DEFENSE TO ELYSIUM’S BREACH OF**  
14 **CONTRACT AND IMPLIED COVENANT CLAIMS.**

15 Elysium sues CMDX for breach of the MFN clause, breach of the Exclusivity  
16 clause and breach of the implied covenant of good faith and fair dealing with respect to  
17 the NR Supply Agreement. CMDX asserts an unclean hands defense to all three.  
18 Elysium’s alternative NR source documents will evidence Elysium’s conduct, intentions,  
19 and whether Elysium’s statements on June 30, 2016 were made in good faith. As one  
20 example, CMDX should be able to discover whether Elysium was already negotiating  
21 for, or had secured, an alternative source of NR when Elysium signed the Supply  
22 Agreement, when it subsequently demanded exclusivity in February 2016, and/or when it  
23 placed its June 30, 2016 order for NR to create a charade case for receiving the MFN  
24 pricing. Further, the efforts expended by Elysium to persuade third parties to  
25 manufacture NR when it was known that CMDX was the exclusive licensee of patents  
26 relating to the manufacturing process are relevant to Elysium’s unclean hands. With  
27 regard to the Exclusivity clause, did Elysium have the intention to bait CMDX with  
28 promises of greater Q2 and Q3 2016 orders, but then throw CMDX under the bus by

1 causing it to terminate existing supply relationships with third parties? Requests Nos. 42,  
2 43, 47, 48, 49, 50, 59, 60, 61, 76 & 77 ask for the relevant facts.

3 **D. THE SUBSTANTIAL SIMILARITY OF THE ASSERTED “NIAGEN” ANALOGS**

4 Elysium claims that “Combined Products” under the Exclusivity clause include  
5 ingredients that are “substantially similar” to NIAGEN, which is CMDX’s brand name  
6 for NR. (*See e.g.*, Elysium’s RFPs at 2 (defining “Combined Product” to include  
7 NIAGEN Analogs), 3 (defining “NIAGEN Analog”), & Nos. 26, 27, 29, & 33.) CMDX  
8 is entitled to discover the facts about what Elysium admits is “substantially similar” to  
9 NIAGEN and NR. Requests Nos. 49, 50, 76 & 77 address facts about whether Elysium  
10 considered any “NIAGEN Analog” to be “substantially similar” to NR, or whether  
11 Elysium insisted on obtaining actual NR instead of something “substantially similar.”  
12 Requests Nos. 59 & 60 will yield the facts about whether Elysium considered alternative  
13 source NRs to be substantially similar to NIAGEN in composition, safety, and  
14 effectiveness, and why any sources were rejected.

15 **E. ELYSIUM’S SUBSTANTIAL CONTRACT PERFORMANCE**

16 CMDX asserts that Elysium failed to “substantially perform” as a defense to all of  
17 Elysium’s breach of contract counterclaims. “Substantial performance” requires “that  
18 there be no willful departure from the terms of the contract.” *Thomas Haverty Co. v.*  
19 *Jones*, 185 Cal. 285, 289 (1921); 1 Witkin, Summary 11th Contracts § 843 (2017));  
20 *Murray’s Iron Works, Inc. v. Boyce*, 158 Cal. App. 4th 1279, 1291 (2008). The disputed  
21 documents will evidence whether Elysium willfully breached the Supply Agreement  
22 when it refused to pay for the June 30 order, because it had alternative sources lined up or  
23 had sources available for after it projected to exhaust CMDX’s NR. Did Elysium make a  
24 calculated to decision to refuse to pay and/or to cause ChromaDex financial distress?  
25 Elysium’s strategic plans for procurement (Nos. 76 & 77), communications about its  
26 inventory (Nos. 47 & 48) and supply chain (Nos. 42, 43, & 61), and efforts to obtain an  
27 alternative source (Nos. 49 & 50), are all relevant to these questions.

28 Respectfully submitted.

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Dated: December 4, 2017

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