COOLEY LLP
MICHAEL ATTANASIO (151529)
(mattanasio@cooley.com)
BARRETT J. ANDERSON (318539)
(banderson@cooley.com)
CRAIG E. TENBROECK (287848)
(ctenbroeck@cooley.com)
SOPHIA M. RIOS (305801)
(srios@cooley.com)
JAYME B. STATEN (317034)
(jstaten@cooley.com)
4401 Eastgate Mall
San Diego, CA 92121-1909
Telephone: (858) 550-6000
Facsimile: (858) 550-6420

*Attorneys for Plaintiff and Counter-Defendant ChromaDex, Inc.*

*Counsel continued on following page*

**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-2277-CJC (DFMx)

**CHROMADEX, INC.'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTIONS *IN LIMINE* (NOS. 1–3)**

Judge: Hon. Cormac J. Carney
Courtroom: 7C
Date: Sept. 18, 2019
Time: 9:00 AM

Pretrial Conference: Sept. 18, 2019
Trial: October 15, 2019

COVINGTON & BURLING LLP
MITCHELL A. KAMIN (202788)
(mkamin@cov.com)
1999 Avenue of the Stars, Suite 3500
Los Angeles, CA 90067-4643
Telephone: (424) 332-4800
Facsimile: (424) 332-4749

COVINGTON & BURLING LLP
PHILIP A. IRWIN (*admitted Pro Hac Vice*)
(pirwin@cov.com)
620 Eighth Avenue
New York, NY 10018-1405
Telephone: (212) 841-1000

*Attorneys for Plaintiff and Counter-Defendant ChromaDex, Inc.*

Plaintiff and Counter-Defendant ChromaDex, Inc. ("ChromaDex") respectfully submits the following Reply to the Opposition to ChromaDex's Motions *in Limine* (Nos. 1–3) filed by Defendants Elysium Health, Inc. ("Elysium") and Mark Morris (collectively, "Defendants").

## I. MOTION *IN LIMINE* NO. 1 TO EXCLUDE EVIDENCE AND ARGUMENT RELATING TO LITIGATION OR INVESTIGATIONS INVOLVING BARRY HONIG, MICHAEL BRAUSER, AND PHILLIP FROST

Defendants do not oppose ChromaDex's proposed order to preclude them from referencing to the jury any litigation or investigations involving Barry Honig, Michael Brauser, or Phillip Frost. Nor do the Defendants oppose preclusion of argument contending that ChromaDex is associated with "criminals," as falsely suggested by Elysium CEO Eric Marcotulli in self-serving communications to various third parties. (Dkt. 291 ("Opp.") at 6 & n.1.) The Court should thus grant Motion *in Limine* No. 1.

While Defendants do not oppose Motion *in Limine* No. 1, they still take five pages of their Opposition brief to explain how they intend to argue to the jury that Honig, Brauser, and Frost were supposedly involved with ChromaDex. (Opp. at 1–6.) ChromaDex does not seek to enlarge the scope of its Motion *in Limine* No. 1 in this brief, but given those convoluted and unsupported assertions by Defendants, ChromaDex reserves the right to object at trial to Defendants introducing evidence or arguing to the jury any other aspect of ChromaDex's past relationships with Honig, Brauser, or Frost. Based on Defendants' brief, mentioning their names would serve no relevant purpose and would also be unfairly prejudicial to ChromaDex.

Defendants fail to explain how the past involvement of these individuals in ChromaDex is relevant to the claims and defenses in this case. For example, Defendants do not explain what evidence in the record shows that, in early 2015, Robert Fried—who was *not* a ChromaDex board member at the time—was acting for ChromaDex when he allegedly "brokered" a meeting between Frost and Elysium's founders, nor do Defendants contend that Frost was acting for ChromaDex when he offered $15 million

to purchase Elysium at that meeting. (Opp. at 2.) And Elysium's suggestion that the early 2015 meeting "reflects ChromaDex's plan to force Elysium out of the market by any means," (*id.* at 5), is nonsensical; there was no such plan, and offering to purchase Elysium for a large sum of money when it had no revenues or track record in the supplement space is hardly "forcing" it from the market. Nor does that proposal by Frost have any established link to negotiations that occurred over a year-and-a-half later for ChromaDex's acquisition of a third company, Healthspan Research, LLC ("Healthspan"), after ChromaDex decided to redirect its focus due in large part to the financial distress it was suffering due to Elysium's misdeeds. Most importantly, none of this is connected to any issue the jury will be asked to decide in this case.

Next, Defendants also contend that, because ChromaDex in 2016 considered reaching out to Honig and Brauser—still major investors in the company at that time—regarding the ChromaDex-Healthspan negotiations, it somehow shows that they "continued to exert influence over both ChromaDex and the market for NR even after stepping down from the ChromaDex board." (Opp. at 3.) But what is the relevance? Defendants do not say. Nor do they connect that supposed "influence" to any particular fact of consequence. Further, Defendants do not explain how Brauser's phone calls in late 2016, (Opp. at 5)—whether authorized by ChromaDex or not (and they were not)—affect any issue in the case. In short, based on Defendants' proposed use of this evidence (as outlined in their brief), the Honig-Brauser-Frost history is irrelevant to any issue to be tried. This alone would be sufficient ground to preclude specific mention of their names to the jury under Federal Rule of Evidence 402.

For those reasons, Defendants' desire to say the names "Honig, Brauser, and Frost" at trial is apparently nothing more than an attempt to tie ChromaDex to these three individuals in the hope that a juror will recognize (or research) them. (*See, e.g.*, Dkt. 263-1 ("Mot.") at 2 (noting the SEC investigation involving Honig, Brauser, and Frost was "widely publicized in sources such as *Barron's*, the *Financial Times*, and the *Wall Street Journal*" and "spawned numerous investor lawsuits and a criminal

investigation").) Consequently, even if those three names are somehow minimally relevant, Rule 403 would bar evidence about them being offered to the jury because of its very low probative value combined with the high risk of prejudice should the jury recognize or learn about their unrelated legal issues involving unrelated companies. ChromaDex intends to assert these objections (and any others that may apply) at trial if and when Defendants stray into irrelevant or unduly prejudicial territory.

At this time, given Defendants' non-opposition, ChromaDex requests that the Court grant Motion *in Limine* No. 1.

## II. MOTION *IN LIMINE* NO. 2 TO BAR CHARACTERIZATION OF OR REFERENCE TO AN ALLEGEDLY "FRAUDULENT" SPREADSHEET

Defendants offer two reasons they believe the Court should deny Motion *in Limine* No. 2. Neither is persuasive.

*First*, Defendants mistakenly argue that there is "sufficient evidence to show that the [June 13] Spreadsheet was intended to mislead Elysium." (Opp. at 6.) But the only evidence Defendants cite shows that Jaksch was transparent with Elysium about what the Spreadsheet contained, and what it did not. Jaksch told Elysium that he was "not sure how much [he was] going to be able to share about other NR customer relationship[s]." (Ex. 8 at 111.)[1] Elysium thus cannot argue that Jaksch misled Elysium into believing that he would provide the detailed purchasing history that it requested, or that Elysium had any right to *expect* that information from him. And when Jaksch sent the Spreadsheet, he explicitly identified it as containing "a blinded summary of supply agreements for NR" and that those "deal terms vary substantially depending on" different factors. (Ex. 6 at 29.) Further, the Spreadsheet itself is named "NR Supply Agreements Summary for Elysium 06.13.2016." (Ex. 6 at 33–43.) Contrary to Defendants' bare statement, there was nothing "hid[den]" and nothing "omitt[ed]" from

[1] All citations to "Ex." refer to those Exhibits attached to the Declaration of Barrett J. Anderson in Support of ChromaDex's Motions in *Limine* (Nos. 1–3). (Dkt. 263-3.)

that Spreadsheet. (Opp. at 7.)[2] It was exactly what Jaksch said it was, and this fact alone precludes attachment of the prejudicial adjective "fraudulent." Defendants offer no evidence whatsoever that Jaksch sent the Spreadsheet with the *intent* to deceive Elysium. Far from an attempt to "sterilize" Defendants' case, as they contend, (Opp. at 9 (citing *Johnson v. Gen. Mills Inc.*, 2012 WL 13015023, at *1 (C.D. Cal. May 7, 2012) (Carney, J.)), ChromaDex seeks only to prevent them from arguing that the Spreadsheet was dishonest before establishing a proper evidentiary foundation and requesting leave of the Court.

That is especially true in this case, where Elysium has alleged a counterclaim for fraudulent inducement against ChromaDex arising from a call on December 16, 2013, between Jaksch and Elysium's cofounders. (TACC ¶ 52.) But that call is entirely unconnected to Elysium's arguments about the Spreadsheet, which Jaksch sent to the same Elysium co-founders over two-and-a-half years later, on July 13, 2016. Defendants have never pled a fraud cause of action regarding the Spreadsheet, and their opening statement would be an inopportune and unfair time to seek to prejudice ChromaDex by attaching a label to it. And permitting Defendants to call the Spreadsheet "fraudulent" before the jury, without first showing a proper evidentiary basis, is unfairly prejudicial because it would confuse and mislead jurors about what it is Elysium is actually claiming.

*Second*, Defendants contend that the relief ChromaDex seeks is too broad. (Opp. at 11.) Not so. Despite Defendants' feigned confusion, it is not difficult to determine what terms are similar to fraudulent. Defendants used several other examples in their counterclaims, (*see* Mot. at 5 ("manipulated")), and again in their Opposition

[2] Defendants' argument that specific transactions with Healthspan, Innovations 4 Health, and Proctor & Gamble were not recorded on the Spreadsheet, (Opp. at 8–9), is both irrelevant and reveals their fundamental misunderstanding of this Motion *in Limine*. The Spreadsheet, as Jaksch told Elysium, reflected only *contract terms* and thus would *never* have contained specific transactions; that is the very reason why Defendants' theory of fraud is nonsense. (Mot. at 5–6.)

brief, (*see* Opp. at 8, ("mislead[ing]"), 9 ("dishonest")).[3] But, more importantly, it is not too much to ask Defendants to simply not characterize the Spreadsheet at all—as in, simply discuss what the Spreadsheet contained and what it did not—until they have laid the proper foundation. *Sec. & Exch. Comm'n v. Goldstone*, 2016 WL 4507454, at *12–13 (D.N.M. July 20, 2016).[4]

For those reasons, and the reasons in ChromaDex's opening brief, (Mot. at 4–7), the Court should grant Motion *in Limine* No. 2.

## III. MOTION *IN LIMINE* NO. 3 TO PRECLUDE EVIDENCE OR ARGUMENT TO THE JURY RELATING TO TERMINATION OF CERTAIN CONTRACT TERMS WITH, AND ITS REFUND OF ROYALTY PAYMENTS TO, SOME OF ITS CUSTOMERS

Elysium does not oppose ChromaDex's proposed order to preclude Defendants from presenting evidence or argument to the jury concerning (1) termination of certain provisions in several of its NR supply agreements regarding use of its trademark, NIAGEN®, and (2) its refund or promise to refund royalties to those of its customers that paid them. (Opp. at 11–12.) The Court should grant Motion *in Limine* No. 3.

## IV. CONCLUSION

For the foregoing reasons, ChromaDex respectfully requests that the Court grant its three motions *in limine*.

[3] Defendants cite to *Allen v. Hylands Inc.*, 2015 WL 12720304, at *9 (C.D. Cal. Aug. 20, 2015), to support their request that the Court deny the Motion *in Limine* No. 2 in its entirety, (Opp. at 11). But *Allen* actually granted a motion *in limine* to exclude pejorative terms such as "snake oil salesman," "charlatans," and "con artists," and only declined to prohibit "similar derogatory terms . . . "without prejudice to more specific objections at trial." *Id.* Unlike in *Allen*, Defendants can readily discern the scope of the proposed exclusionary order and may simply describe the Spreadsheet without characterizing it by argument.

[4] Defendants' attempt to narrowly read *Goldstone* on its facts should be rejected. (Opp. at 10.) Here, just like in *Goldstone*, "[a]rgument does not belong in opening statements" and "prejudicial or improper comments do not belong in the opening statement." 2016 WL 4507454, at *13.

Dated: September 4, 2019

COOLEY LLP
MICHAEL A. ATTANASIO (151529)
BARRETT J. ANDERSON (318539)
CRAIG E. TENBROECK (287848)
SOPHIA M. RIOS (305801)
JAYME B. STATEN (317034)

*/s/ Michael A. Attanasio*
Michael A. Attanasio (151529)

*Attorneys for Plaintiff and Counter-Defendant ChromaDex, Inc.*