

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION

12	)	
13	)	<b>Case No.: SACV 16-02277-CJC(DFMx)</b>
14	)	
15	)	<b>ORDER REGARDING MOTIONS</b>
16	)	<b>FOR SUMMARY JUDGMENT,</b>
17	)	<b>MOTIONS IN LIMINE, AND TRIAL</b>
18	)	
19	)	
20	)	
21	)	<b>ELYSIUM HEALTH, INC.,</b>
22	)	<b>Counterclaimant,</b>
23	)	<b>v.</b>
24	)	<b>CHROMADEx, INC.,</b>
25	)	<b>Counter-Defendant.</b>
26	)	
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1 Plaintiff ChromaDex, Inc. (“ChromaDex”) filed this case against Defendant  
2 Elysium Health, Inc. (“Elysium”) on December 29, 2016. (Dkt. 1.) The operative  
3 pleadings are now ChromaDex’s Fifth Amended Complaint against Elysium and Mark  
4 Morris (Dkt. 153, filed November 27, 2018, hereinafter “FAC”), and Elysium’s and Mark  
5 Morris’ Third Amended Counterclaims (Dkt. 103, filed March 30, 2018, hereinafter  
6 “TACC”). There is one additional counterclaim in Elysium’s Answer to the Fourth  
7 Amended Complaint and Restated Counterclaims (Dkt. 118, filed August 9, 2018).  
8 Pending before the court are motions for summary judgment filed by both parties (Dkts.  
9 230, 233), with a hearing currently set for October 15, 2019, and motions in limine filed  
10 by both parties (Dkts. 262–66), with a hearing currently set for October 17, 2019. Trial is  
11 currently set for October 22, 2019.

## 12 13 **I. Summary Judgment and Supplemental Briefing**

14  
15 The parties’ motions for summary judgment raise significant legal issues, the  
16 resolution of which will substantially alter the scope and duration of trial. Proceeding  
17 with summary judgment and trial, however, requires the Court to understand at least two  
18 issues better: (1) how Elysium’s and Mark Morris’ alleged theft of confidential and trade  
19 secret information *caused* the numerous categories of damages ChromaDex seeks; and  
20 (2) what recovery Elysium may now seek on its patent misuse counterclaim. The Court  
21 requests the parties’ help through supplemental briefing on these issues, as described in  
22 more detail in Section I.C. below.

### 23 24 **A. ChromaDex’s Damages – Causation**

25  
26 The heart and soul of this case is the breach of a sales contract. The alleged  
27 damages under that sales contract are under \$3 million. Nevertheless, with the claims in  
28 this case ballooning over the years—to add claims of trade secret misappropriation,

1 breach of confidentiality agreements, and breach of fiduciary duty—the damages have  
2 also ballooned such that ChromaDex now seeks over \$60 million. The Court is seriously  
3 concerned that ChromaDex’s damages are overstated.

4  
5 The Court’s main concern centers on causation—that is, how Elysium’s and Mark  
6 Morris’ alleged theft and misuse of alleged trade secrets and other confidential  
7 information allegedly caused such extensive harm. The trade secrets at issue are:

- 8 • ChromaDex sales information, including the Ingredient Sales Spreadsheet,  
9 with customer names, prices, volumes, and dates of sales by order and by  
10 customer
- 11 • the per-kilogram purchase price ChromaDex paid its supplier,
- 12 • ChromaDex research and development (“R&D”) regarding different salts for  
13 use in manufacturing NR, and
- 14 • ChromaDex R&D work with Genomatica.

15 (Dkt. 249-10 [Expert Report of Lance E. Gunderson, hereinafter “Gunderson Rep.”] at  
16 Schedule 15.) Quite frankly, the Court is struggling to connect the dots between  
17 Elysium’s possession of these alleged trade secrets and the tens of millions of dollars that  
18 damages that ChromaDex now contends it is entitled to recover.

19  
20 Under both California and federal law, a complainant may recover damages for  
21 (a) actual loss and (b) unjust enrichment *caused by* misappropriation. Cal. Civ. Code  
22 § 3426.3; 18 U.S.C. § 1836(b)(3)(B)(i)(I). Damages are caused by trade secret theft if the  
23 trade secret theft was a “substantial factor” in causing the damages. *BladeRoom Grp.*  
24 *Ltd. v. Emerson Elec. Co.*, 331 F. Supp. 3d 977, 987 (N.D. Cal. 2018). The “substantial  
25 factor” standard “generally produces the same results as does the ‘but for’ rule of  
26 causation,” but it also reaches beyond it to “address other situations, such as those  
27 involving independent or concurrent causes in fact.” *Rutherford v. Owens-Illinois, Inc.*,  
28 941 P.2d 1203, 1214 (Cal. 1997), *as modified on denial of reh'g* (Oct. 22, 1997). Causal

1 chains may have more than one link, but those links must be “not hypothetical or  
2 tenuous,” and remain plausible. *Nat’l Audubon Soc’y, Inc. v. Davis*, 307 F.3d 835, 849  
3 (9th Cir.), *opinion amended on denial of reh’g*, 312 F.3d 416 (9th Cir. 2002).

4  
5 **1. Elysium’s Profits (\$31,643,692)**

6  
7 Perhaps most concerning to the Court is ChromaDex’s theory for obtaining  
8 Elysium’s profits. The theory appears to be that if Elysium had not obtained  
9 ChromaDex’s trade secrets, it would have gone out of business. (ChromaDex Opp. to  
10 Elysium’s MSJ at 16, 21.) Instead, because Elysium had ChromaDex’s trade secret  
11 information, Elysium was able to (a) give that information to potential investors, and  
12 secure additional investment that helped Elysium stay afloat, and (b) get a new supply of  
13 NR—both of which allowed Elysium to stay in business. (*Id.*; Gunderson Rep. at 45.)

14  
15 There are, however, huge leaps in this causal chain the Court is not sure  
16 ChromaDex can prove. For the investor theory, ChromaDex would have to show, at a  
17 minimum, that (1) it had a trade secret, (2) which Defendants obtained improperly and  
18 (3) gave to investors, (4) that the trade secret information was a substantial factor in the  
19 investors’ decision to invest and (5) that the decision to invest was a substantial factor in  
20 Elysium being able to stay in business. For the alternative supply theory, ChromaDex  
21 would have to show, at a minimum, that (1) it had a trade secret, (2) which Defendants  
22 obtained improperly and (3) used to develop an alternative supply (4) that it would not  
23 have found without the specific trade secret information, or that the trade secret  
24 information was a substantial factor in finding the supply, and (5) Elysium would not  
25 have been able to stay in business without that specific alternative supply.

26  
27 The Court, as gatekeeper, needs more assurance that there is sufficient evidence for  
28 each of these links in the causal chain to ask a jury to spend time considering whether to

1 give ChromaDex the tens of millions of dollars in damages it seeks, and if so, how much.  
2 For example, what specific evidence is there to show that a specific ChromaDex trade  
3 secret was a substantial factor in an investors' decision to invest? What specific evidence  
4 shows that those investments were a substantial factor in Elysium not going under? What  
5 specific trade secret was a substantial factor in Elysium being able to develop an  
6 alternative supply, and how? Is there any evidence that tends to undercut any link in this  
7 chain? And what is the case or legal authority that supports ChromaDex's claim that it  
8 can recover such profits under such a hypothetical theory of damages with so many  
9 assumptions?

## 10 11 **2. ChromaDex's Lost Profits (\$25,549,320)**

12  
13 Similarly concerning is ChromaDex's desire to ask the jury for \$25.5 million in its  
14 own lost profits. ChromaDex's theory for recovering those profits appears to be that if  
15 Elysium had not obtained ChromaDex's trade secret information, it would have bought  
16 much more NR from ChromaDex. (Gunderson Rep. at 104 [calculating what Elysium  
17 would have bought based on (a) projected ingredients purchases and (b) Minimum  
18 Purchase Commitments].)

19  
20 Again, the Court needs more before it can feel comfortable submitting this request  
21 to the jury. What specific evidence shows that a specific ChromaDex trade secret was a  
22 substantial factor in Elysium's decision to stop ordering? What specific evidence shows  
23 Elysium would have made these purchases if it did not have the trade secrets? What  
24 evidence supports the notion that Elysium would not have been able to find an alternative  
25 supplier absent the trade secrets during the entire time period for which ChromaDex  
26 seeks lost profits? Is there any evidence that tends to undercut any link in this chain?  
27 And what is the case or legal authority that supports ChromaDex's claim that it can  
28

1 recover such profits under such a hypothetical theory of damages with so many  
2 assumptions?

### 3 4 **3. Mark Morris' Compensation (\$684,781)**

5  
6 The Court is not clear on what basis ChromaDex seeks Mark Morris'  
7 compensation, or why that compensation is a valid remedy. The theory seems to be  
8 unjust enrichment from his alleged breach of contract and fiduciary duty. (*See*  
9 Gunderson Rep. at 119–20.) But is there any evidence, for example, that Mr. Morris'  
10 work for ChromaDex was a complete loss or waste of time? And what is the case or  
11 legal authority that supports ChromaDex's claim that it is entitled to recover Mr. Morris'  
12 compensation? The Court must understand this requested remedy better before it can ask  
13 a jury to spend time considering it.

### 14 15 **4. ChromaDex's Price Discount (\$600,000)**

16  
17 ChromaDex's theory for recovering the price discount it offered Elysium appears  
18 to be that if Elysium had not obtained ChromaDex's trade secret information, Elysium  
19 would not have been able to successfully negotiate the discounted price with ChromaDex  
20 that it did. (*See* FAC ¶¶ 51, 55.)

21  
22 Again, the Court needs more. What specific evidence shows that Elysium could  
23 not have found out through information or strategy other than ChromaDex trade secrets  
24 that ChromaDex might give it a more favorable rate, or that the trade secrets were a  
25 substantial factor in ChromaDex giving Elysium the discounted price? What specific  
26 evidence is there that Elysium would not have otherwise negotiated a discounted price,  
27 even absent new information? And what is the case or legal authority that supports  
28 ChromaDex's claim that it can recover this price discount?

1  
2 **5. Elysium’s Avoided Costs and Accelerated Entry (\$523,449)**

3  
4 ChromaDex’s theory for recovering avoided R&D costs appears to be that if  
5 Elysium had not obtained ChromaDex’s trade secret information, it would have had to  
6 spend a lot more money on R&D. (Gunderson Rep. at 92–94.) ChromaDex’s position  
7 seems to be that since ChromaDex did all the work for Elysium, Elysium (and  
8 presumably its alternative supplier) did not have to spend that money, and Elysium also  
9 was able to enter the market with its alternative supplier sooner. (*Id.* at 93.) Mr.  
10 Gunderson calculates Elysium’s avoided costs for three sources of allegedly confidential  
11 information: the (1) pTeroPure GRAS Report; (2) NRCI Analytical Method; and (3) NR  
12 Study Data. (*Id.* at 95.)

13  
14 The Court needs more help. What specific evidence is there to show Elysium  
15 would have spent this amount? What specific evidence is there to show Elysium would  
16 have studied to learn this particular information? What specific evidence shows the trade  
17 secrets were a substantial factor in Elysium not having to spend this money? Is there any  
18 evidence tending to negate any links in this causal chain? And what is the case or legal  
19 authority that supports ChromaDex’s claim that it can recover these avoided costs?

20  
21 **6. ChromaDex’s Out-of-Pocket Financing Expenses (\$237,921)**

22  
23 Finally, ChromaDex seeks \$237,921 in “out-of-pocket financing expenses”  
24 because “ChromaDex had to establish a revolving line of credit . . . to ensure that it had  
25 access to sufficient cash to fund its operations as a result of Elysium failing to pay.”  
26 (Gunderson Rep. at 115.) In general, of course, a party to a contract cannot be held liable  
27 for consequential damages that are not foreseeable at the time the contract is executed.  
28 *See Hadley v. Baxendale*, 156 Eng. Rep. 145, 151 (Ex. 1854); *In re Transact, Inc.*, 2014

1 WL 3888230, at \*22 (C.D. Cal. Aug. 6, 2014). Without information indicating that these  
2 damages are recoverable under this standard, the Court will not send this request to a  
3 jury.

4  
5 **B. Patent Misuse / Unjust Enrichment**

6  
7 Elysium counterclaims that ChromaDex conditions customers' ability to purchase  
8 NR on their agreement to license ChromaDex's trademarks, and that this royalty  
9 requirement constitutes patent misuse. (TACC ¶¶ 170–81.) Elysium seeks a declaratory  
10 judgment that ChromaDex's patent rights are unenforceable due to ChromaDex's patent  
11 misuse, a declaration that ChromaDex has not purged its misuse and has not dissipated  
12 the effects of the misuse, restitution for its injuries, and ChromaDex's unjust enrichment  
13 as a result of the misuse. (*Id.* ¶ 24.)

14  
15 Since the TACC were filed, ChromaDex terminated any provisions requiring  
16 customers to use ChromaDex's trademarks, and refunded or (in Elysium's case)  
17 covenanted to refund any royalties its customers paid ("the Purge"). (FAC ¶¶ 145–48;  
18 Dkt. 263 at 8.) ChromaDex made clear that the Purge was "not an admission of any  
19 wrongdoing," but rather was "intended to prophylactically and completely eliminate  
20 issues in this and any other dispute related to ChromaDex's patents by purging any and  
21 all allegedly unlawful conduct with respect to all allegations by Elysium of patent  
22 misuse." (FAC ¶ 149.) The parties do not address the Purge in their summary judgment  
23 briefing. The Court has questions regarding what relief, if any, Elysium now seeks and  
24 can seek on that claim.

25  
26 In response to ChromaDex's motion in limine to preclude introduction of evidence  
27 regarding the Purge, Elysium does not argue that the Purge was insufficient or otherwise  
28 improper. (*See* Dkt. 291 at 11–12.) It appears, then, that certain of Elysium's requested



1 damages on this claim may be unrecoverable. For example, what restitution does  
2 Elysium seek beyond what ChromaDex has promised to pay at the end of the case? (*See*  
3 TACC ¶ 24.) What unjust enrichment has ChromaDex obtained beyond that which it has  
4 already paid or promised to repay? (*See id.*) Why is a declaration that ChromaDex has  
5 not purged its misuse and has not dissipated the effects of the misuse appropriate? (*See*  
6 *id.*)

### 7 8 **C. Supplemental Briefs**

9  
10 The Court **ORDERS** the parties to submit supplemental briefs on what specific  
11 evidence shows (or disproves) that Elysium's and Mark Morris' trade secret theft and use  
12 caused:

- 13 ○ Elysium to stay in business such that ChromaDex may recover about \$30  
14 million in Elysium's profits,
- 15 ○ Elysium to stop ordering from ChromaDex such that ChromaDex may  
16 recover about \$25.5 million in alleged lost profits,
- 17 ○ Injury justifying recovery of Mark Morris' about \$685,000 compensation,
- 18 ○ Elysium to secure a price discount such that ChromaDex may recover the  
19 alleged \$600,000 value of that discount, and
- 20 ○ Elysium to avoid R&D costs such that ChromaDex should recover about  
21 \$525,000 in avoided costs.

22 The parties' briefs should direct the Court to specific testimony and exhibits  
23 proving or undermining each link in the causal chain, with reference to the specific  
24 applicable trade secrets. The briefs should also address the theory on which  
25 ChromaDex's financing expenses resulting from Elysium's failure to pay are or are not  
26 recoverable. Finally, the briefs should provide the case or legal authority that supports or  
27 negates ChromaDex's claim that it is entitled to recover any and all of these categories of  
28 damages.

1  
2 The Court also **ORDERS** the parties to submit supplemental briefs on what  
3 recovery is still available and sought on Elysium's patent misuse claim given the Purge,  
4 and under what authority.

5  
6 Elysium shall file an opening supplemental brief, not to exceed 25 pages,  
7 addressing all of these issues by October 30, 2019.

8 ChromaDex shall file an opposing supplemental brief, not to exceed 25 pages, by  
9 November 18, 2019.

10 Elysium shall file a reply supplemental brief, not to exceed 15 pages, by November  
11 27, 2019.

12 The Court **CONTINUES** the hearing on the motions for summary judgment (Dkts.  
13 230, 233) from October 15, 2019 to January 13, 2019.

14  
15 **II. Motions in Limine**

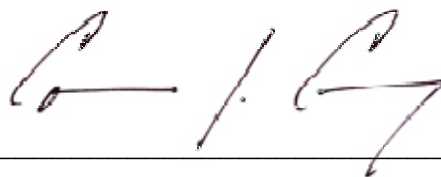
16  
17 Many of the issues that may be resolved on summary judgment overlap with the  
18 issues in the parties' motions in limine, such that ruling on summary judgment may  
19 obviate the need to rule on certain motions in limine. Some of the motions in limine may  
20 require full *Daubert* hearings, further underscoring the need to be judicious.

21  
22 Given the substantial overlap and the efficiency of addressing summary judgment  
23 motions first, the Court hereby **DENIES WITHOUT PREJUDICE** the parties' motions  
24 in limine, including *Daubert* motions (Dkts. 262–266), and the corresponding  
25 applications to seal (Dkts. 267, 268, 283, 289, 303, 343). The Court will set a new  
26 deadline for motions in limine after it rules on the summary judgment motions.

1       **III. Trial**

2  
3           For the reasons explained in this order, it is clear that this case is not sufficiently  
4 ready for the imminent trial. In the interest of the efficient administration of justice, and  
5 of avoiding unnecessary burden and hardship on the parties, the Court, and most  
6 importantly, the jurors, the Court hereby **VACATES** the October 22, 2019 trial date. The  
7 Court will reschedule trial after it rules on the summary judgment motions. Of course,  
8 the parties are strongly encouraged to settle this case, which the Court views as a  
9 straightforward breach of contract action and not a complicated, multimillion-dollar tort,  
10 unfair competition, and antitrust one.

11  
12  
13 DATED:     October 9, 2019



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CORMAC J. CARNEY  
UNITED STATES DISTRICT JUDGE