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10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

13 ChromaDex, Inc.,
14
15 Plaintiff,
16 v.
17 Elysium Health, Inc. and Mark Morris,
18
19 Defendants.

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
CONTENTIONS OF FACT AND
LAW [L.R. 16-4]**

Pre-Trial Conference: Sept. 13, 2021
Trial: Sept. 21, 2021

20 And Related Counter-Claims
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1 Defendant and Counterclaimant Elysium Health, Inc. (“Elysium”) and
2 Defendant Mark Morris (“Morris”) (collectively, “Defendants”) hereby submit,
3 pursuant to Local Rule 16-4, the following contentions of fact and law regarding
4 their claims and defenses in this matter.

5 **I. INTRODUCTION**

6 Elysium sells a direct-to-consumer (“DTC”) product called “Basis,” a dietary
7 supplement that supports cellular health by increasing and sustaining NAD+ levels
8 and activating sirtuins. Basis is comprised principally of two ingredients:
9 nicotinamide riboside (“NR”) and pterostilbene (“PT”). Under three different
10 agreements, from 2014 to 2016, Elysium purchased NR and PT from Plaintiff and
11 Counter-Defendant ChromaDex, Inc. (“ChromaDex”): the NIAGEN¹ Supply
12 Agreement, executed in February 2014 and amended in February 2016 (the
13 “Amendment”); the Trademark License and Royalty Agreement, executed in
14 February 2014 (“TLA”); and the pTeroPure² Supply Agreement, executed in June
15 2014. ChromaDex was the sole commercial supplier of NR, and was the exclusive
16 licensee of certain NR-related patents.

17 Over time, ChromaDex grew envious of Elysium’s success in the DTC
18 market, and it ultimately developed a strategy to, in the words of its then-CEO, “[b]e
19 our own Elysium.” In 2015, ChromaDex executed a NR supply agreement with a
20 company founded and owned by one of its directors called Healthspan Research,
21 LLC (“Healthspan”). Healthspan planned to sell a NR supplement in the DTC
22 market. ChromaDex’s agreement with Healthspan provided for ChromaDex to
23 supply Healthspan with a substantial amount of NR at no cost in exchange for a
24 small equity stake in Healthspan. From this initial foray, ChromaDex’s strategy
25 evolved to the point where it decided to acquire Healthspan outright as a platform
26

27 ¹ ChromaDex supplied NR under the tradename “NIAGEN.”

28 ² ChromaDex supplied PT under the tradename “pTeroPure.”

1 for it to sell NR in the DTC market. Another prong of this strategy called for
2 ChromaDex to eliminate its existing NR customers, including Elysium, from the
3 DTC market by ceasing sales of NR to them. Indeed, ChromaDex completed its
4 acquisition of Healthspan just a month after it effected a termination of its
5 agreement to supply Elysium with NR.

6 Elysium was unaware that ChromaDex was using it and ChromaDex's other
7 customers as a stalking horse to create the dietary supplement market for NR so that
8 ChromaDex could then introduce its own DTC product, cut off the ingredient supply
9 to its customers, and seize the market for itself. Even though ChromaDex was
10 keeping its intentions quiet, however, it was making its contempt for Elysium as a
11 long-term customer clear. The parties' relationship deteriorated over the course of
12 2016 after Elysium became aware that ChromaDex had breached the "Most Favored
13 Nation" pricing provision ("MFN Provision") of the parties' NIAGEN supply
14 agreement. ChromaDex first attempted to conceal its breach of the MFN Provision
15 by misrepresenting the price charged to other NIAGEN customers. Then, after
16 getting caught, ChromaDex refused to provide Elysium with the information
17 necessary to determine the amount of refund or credit it was owed by ChromaDex.
18 While that issue remained unresolved, Elysium learned that ChromaDex was in
19 violation of its agreement to give Elysium exclusivity over products containing NR
20 and PT or any substantially similar ingredients. Elysium also learned that
21 ChromaDex's CEO had defrauded it into executing the TLA, which required it to
22 pay royalties to ChromaDex and gave it access to ChromaDex trademarks it did not
23 want to, and never did, use, by falsely representing that it required every one of its
24 NIAGEN customers to sign a similar agreement.

25 The parties were unable to reach agreement on their disputes – in hindsight,
26 no surprise, since ChromaDex had determined to eliminate Elysium as a NIAGEN
27 customer as part of its plan to take the DTC market for itself – and this litigation
28 followed.

1 **II. PLAINTIFF’S CLAIMS**

2 **A. SUMMARY**

3 ChromaDex asserts eight claims for relief: (1) breach of contract by Elysium
4 (pTeroPure Supply Agreement); (2) breach of contract by Elysium (NIAGEN
5 Supply Agreement); (3) misappropriation of trade secrets under California’s
6 Uniform Trade Secrets Act (“CUTSA”) by Defendants; (4) violation of Federal
7 Defense of Trade Secrets Act (18 U.S.C. § 1836) by Defendants; (5) breach of
8 contract by Morris (“Receipt & Acknowledgment of Employee Handbook”); (6)
9 breach of contract by Morris (“Confidentiality and Non-Solicitation Agreement (For
10 New Employees)”); (7) breach of fiduciary duty by Morris; and (8) aiding and
11 abetting a breach of fiduciary duty by Elysium.

12 **B. Elements Required to Establish Plaintiff’s Claims Against Elysium**
13 **for Breach of Contract (pTeroPure Supply Agreement & NR**
14 **Supply Agreement) (Claims 1 & 2)**

15 Plaintiff ChromaDex must establish the following in order to recover
16 damages on these claims:

- 17 1. That Elysium breached the pTeroPure Supply Agreement by not paying
18 for its last order of pterostilbene (\$580,750);
- 19 2. That Elysium breached the NIAGEN Supply Agreement by not paying for
20 its last order of NR (\$2,402,600);
- 21 3. That ChromaDex suffered damages for each individual alleged breach
22 outlined above; and
- 23 4. That ChromaDex’s own breaches of the NIAGEN Supply Agreement did
24 not excuse Elysium’s alleged breaches.

25 Although ChromaDex’s draft pretrial filings appear to reflect that ChromaDex
26 believes that it may pursue claims against Elysium for breach of Section 15.1 of the
27 pTeroPure Supply Agreement and Section 4.1 of the NIAGEN Supply Agreement
28 based on Elysium’s alleged disclosure of the NRC1 Analytical Method and the

1 pTeroPure GRAS Report, those claims were dismissed by the Court in its summary
2 judgment decision and cannot be pursued at trial. (*See* ECF 413 at 24, 27, 34-40.)

3 1. Elysium’s Evidence in Opposition to Plaintiff’s Claims
4 for Breach of Contract (Claims 1 & 2)

5 The evidence will show that because of ChromaDex’s breach of the MFN
6 Provision of the NIAGEN Supply Agreement, discussed *infra* at Parts III.A and
7 IV.A, ChromaDex owes Elysium a large credit, potentially exceeding the combined
8 amount of the orders of PT and NR that it claims Elysium did not pay for.
9 Therefore, Elysium was excused from paying for the orders until trial, and the jury
10 must determine which party owes the other party money and in what amount.

11 The evidence will also show that ChromaDex’s conduct with respect to
12 Elysium was unconscionable and resulted in prejudice to Elysium, and thus
13 ChromaDex’s unclean hands preclude enforcement of its claims.

14 **C. Elements Required to Establish Plaintiff’s Claims Against**
15 **Defendants for Misappropriation of Trade Secrets Under**
16 **California’s Uniform Trade Secrets Act and Violation of Federal**
17 **Defense of Trade Secrets Act (18 U.S.C. § 1836) (Claims 3 & 4)**

18 Plaintiff must establish the following in order to recover damages for its
19 claims of trade secret misappropriation:

20 California’s Uniform Trade Secrets Act (“CUTSA”) and the Federal Defense
21 of Trade Secrets Act (“DTSA”) share the same elements and require that
22 ChromaDex prove that: (1) it owned a trade secret, (2) Elysium or Morris acquired,
23 disclosed, or used ChromaDex’s trade secret through improper means, and (3)
24 Elysium or Morris’s actions damaged ChromaDex. *Sci. of Skincare, LLC v.*
25 *Phytoceuticals, Inc.*, 2009 WL 2050042, at *5 (C.D. Cal. July 7, 2009); *Cedars*
26 *Sinai Med. Ctr. v. Quest Diagnostic Inc.*, 2018 WL 2558388, at *3 (C.D. Cal. Feb.
27 27, 2018) (“Because the pleading standards of Cedars–Sinai’s DTSA and CUTSA
28 claims are the same, the Court will analyze those two claims together.”); *Becton,*

1 *Dickinson & Co. v. Cytek Biosciences Inc.*, 2018 WL 2298500, at *2 (N.D. Cal.
2 May 21, 2018) (“The elements of a misappropriation of trade secrets claim under the
3 Defend Trade Secrets Act (“DTSA”) and California Uniform Trade Secrets Act
4 (“CUTSA”) are essentially the same.”).

5 *First*, for each trade secret allegedly misappropriated, ChromaDex must first
6 prove that the information in question is a trade secret. A trade secret is information
7 that “derives independent economic value, actual or potential, from not being
8 generally known to the public or to other persons who can obtain economic value
9 from its disclosure or use” and “is the subject of efforts that are reasonable under the
10 circumstances to maintain its secrecy.” *See* Cal. Civ. Code § 3426.1(d).

11 *Second*, ChromaDex must prove that Elysium or Morris acquired, disclosed,
12 or used that *specific* trade secret through improper means, and not simply that
13 Elysium or Morris was in possession of the trade secret. If Elysium or Morris were
14 merely in possession of one of ChromaDex’s trade secrets, that is not enough for
15 ChromaDex to succeed on a claim of misappropriation of trade secrets. *See S. Cal.*
16 *Inst. of Law v. TCS Educ. Sys.*, 2011 WL 1296602, at *7 (C.D. Cal. Apr. 5, 2011)
17 (holding that “[a]lleging mere possession of trade secrets is not enough” to state a
18 claim under CUTSA). “Misappropriation” means:

19 (1) Acquisition of a trade secret of another by a person who knows or has
20 reason to know that the trade secret was acquired by improper means;

21 or

22 (2) Disclosure or use of a trade secret of another without express or
23 implied consent by a person who:

24 (A) Used improper means to acquire knowledge of the trade secret;

25 or

26 (B) At the time of disclosure or use, knew or had reason to know that
27 his or her knowledge of the trade secret was:

28

- 1 (i) Derived from or through a person who had utilized improper
- 2 means to acquire it;
- 3 (ii) Acquired under circumstances giving rise to a duty to
- 4 maintain its secrecy or limit its use; or
- 5 (iii) Derived from or through a person who owed a duty to the
- 6 person seeking relief to maintain its secrecy or limit its use; or
- 7 (C) Before a material change of his or her position, knew or had
- 8 reason to know that it was a trade secret and that knowledge of it had
- 9 been acquired by accident or mistake.

10 Cal. Civ. Code § 3426.1. “Improper means” includes theft, bribery,
11 misrepresentation, breach or inducement of a breach of a duty to maintain secrecy,
12 or espionage through electronic or other means. *See* Cal. Civ. Code § 3426.1.

13 *Third*, ChromaDex must prove that Elysium or Morris’s actions damaged
14 ChromaDex. *Prunty v. Ark. Freightways, Inc.*, 16 F.3d 649, 652 (5th Cir. 1994).
15 (“[W]hen one of the prima facie elements of a claim is damages and the claimant
16 fails to introduce evidence of those damages, he or she commits a fatal error.”); *see*
17 *also Propulsion Techs., Inc. v. Attwood Corp.*, 369 F.3d 896, 905 (5th Cir. 2004)
18 (“the missing link for recovery of such damages remains: there is no evidence that
19 Attwood used trade secrets to generate those profits”).

20 1. Defendants’ Evidence in Opposition to Plaintiff’s Claims for
21 Misappropriation of Trade Secrets Under California’s Uniform
22 Trade Secret Act and Violations of Federal Defense of Trade
23 Secrets Act (18 U.S.C. § 1836) (Claims 3 & 4)

24 The evidence will show that ChromaDex cannot (1) prove that the
25 information it alleges were trade secrets were, in fact, trade secrets because it will be
26 unable to demonstrate that the information had independent economic value to
27 ChromaDex from not being generally known or that it took steps to maintain its
28 alleged secrets; (2) prove that Elysium or Morris acquired, disclosed, or used each

1 trade secret through improper means; and (3) prove that Elysium’s or Morris’s
2 actions damaged ChromaDex. In short, the evidence will show that ChromaDex
3 cannot prove any of the elements of a misappropriation of trade secrets claim let
4 alone all the elements needed, under either CUTSA or DTSA.

5 During the summary judgment proceedings, ChromaDex limited its trade
6 secret claim to two alleged trade secrets: (1) sales information regarding
7 ChromaDex’s customers, including a document ChromaDex called the Ingredient
8 Sales Spreadsheet (“ISS”), which tracked ChromaDex’s quarterly ingredient sales
9 by customer, amount, and price, among other information; and (2) the price
10 ChromaDex paid to obtain NR from its contract manufacturer, W.R. Grace.

11 *First*, the evidence will show that none of the information in these two
12 categories meets the definition of trade secrets, and that neither Elysium nor Morris
13 misappropriated the information in question. With respect to the first category, the
14 evidence will show that ChromaDex did not treat the price and volume of its
15 customers’ purchases as trade secrets because it did not take reasonable steps to
16 maintain their secrecy. For example, ChromaDex’s CEO freely shared with
17 Elysium information about the price and volume of NIAGEN purchases made by
18 another of its customers, and ChromaDex even sent Elysium copies of some of that
19 customer’s invoices. ChromaDex’s CEO also shared with a competitor of Elysium
20 detailed information about the volume of Elysium’s NR purchases. *See Cornwell v.*
21 *Belton*, 245 Fed. Appx. 592, 594 (9th Cir. 2007) (affirming district court’s denial of
22 plaintiff’s claim for trade secret misappropriation where plaintiff failed to make
23 reasonable efforts to maintain secrecy of purported trade secret). Moreover, by
24 agreeing to give Elysium “Most Favored Nation” pricing, ChromaDex necessarily
25 agreed that Elysium was entitled to know sales information regarding ChromaDex’s
26 other customers.

27 ChromaDex claims that possession of the ISS gave Elysium an unfair
28 advantage in its contract negotiations with ChromaDex for the orders on June 30,

1 2016. The evidence will show, however, that Elysium did not possess the ISS until
2 weeks later, when Morris joined Elysium in mid-July 2016. Elysium could not have
3 benefited during that negotiation from information it did not then have.

4 ChromaDex’s theory that Elysium was unjustly enriched by the possession of the
5 ISS is therefore “blatantly contradicted by the record.” *Scott v. Harris*, 550 U.S.
6 372, 380 (2007).

7 ChromaDex also claims that Elysium gained an advantage in the negotiations
8 for the June 30, 2016 orders because Morris disclosed to Elysium in May 2016 that
9 ChromaDex sold NR to a customer called Live Cell for an amount below Elysium’s
10 price, and the date and volume of Live Cell’s recent purchases. Testimony from
11 ChromaDex’s then-CFO will establish that it was part of Morris’s responsibilities at
12 ChromaDex to inform Elysium if it was entitled to a lower price per the MFN
13 provision, which is exactly what Morris did. The evidence will also show that
14 ChromaDex’s then-CEO did the same, telling Elysium that Live Cell paid less than
15 Elysium and was a lower volume purchaser than Elysium—the same information
16 Morris allegedly wrongfully conveyed. As a result, ChromaDex cannot premise its
17 claim on Morris’s alleged disclosure of information that: (1) he was authorized to
18 disclose to Elysium in the first place, and (2) Elysium was also receiving from
19 others at ChromaDex, both of which demonstrate that ChromaDex did not consider
20 Live Cell’s price and volume information to be a trade secret. Further, because the
21 information was provided by ChromaDex, ChromaDex cannot demonstrate that
22 either Elysium or Morris misappropriated the Live Cell information. Also, given
23 that ChromaDex’s CEO gave substantively the same information to Elysium as
24 Morris gave Elysium during the course of the negotiations over the June 30 orders,
25 it would be impossible to conclude that Elysium derived some benefit from the
26 information provided by Morris. The evidence will show that ChromaDex freely
27 shared with and among its customers information concerning other customer orders
28 and pricing.

1 With respect to the second category of asserted trade secrets, information
2 Morris provided to Elysium about the price ChromaDex paid its contract
3 manufacturer for NR, the evidence will also show that ChromaDex did not treat this
4 information as a trade secret and in fact freely provided it to Elysium.
5 ChromaDex's CEO told Elysium during negotiations over Elysium's final order for
6 NIAGEN the margin ChromaDex sought to maintain on its NIAGEN sales
7 (meaning that the information was not misappropriated), and the evidence will
8 demonstrate that this information was tantamount to a disclosure of the price
9 ChromaDex was paying to obtain NR from its manufacturer. Moreover,
10 ChromaDex cannot establish that Elysium used this purported trade secret to its
11 benefit or ChromaDex's detriment.

12 *Second*, ChromaDex cannot prove damages, the required third element of a
13 trade secrets claim. Elysium had an NR supply contract under which it had a right
14 to purchase NR. Elysium was entitled to Most Favored Nation pricing, and thus, at
15 a minimum, it was entitled to the pricing it was charged for the June 30 orders.
16 Moreover, the evidence will show that ChromaDex was highly motivated to accept
17 the June 30 orders and would have accepted them regardless of any alleged trade
18 secret misappropriation because ChromaDex had an excess inventory problem,
19 wanted to make a large sale at the end of the quarter, and was under pressure
20 because of a short sale attack on its publicly-traded stock.

21 *Third*, the evidence will show that ChromaDex's unconscionable violations of
22 the MFN provision and related misconduct, such as sending Elysium misleading
23 information in the form of a manipulated spreadsheet to conceal the fact that
24 ChromaDex was violating the MFN provision, would render it unfair for
25 ChromaDex to recover on its misappropriation claims under the doctrine of unclean
26 hands.

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1 **D. Elements Required to Establish Plaintiff’s Claims Against Morris**
2 **for Breach of Contract (“Receipt & Acknowledgment of Employee**
3 **Handbook,” (Claim 5) and “Confidentiality and Non-Solicitation**
4 **Agreement (For New Employees)” (Claim 6))**

5 Plaintiff ChromaDex must establish the following in order to recover
6 damages on these claims:

- 7 1. That the “Receipt & Acknowledgement of Employee Handbook” is a
8 valid contract;
- 9 2. That the “Confidentiality and Non-Solicitation Agreement (For New
10 Employees)” is a valid contract;
- 11 3. That Morris disclosed trade secrets, confidential, or proprietary
12 information in violation of those contracts; and
- 13 4. That ChromaDex was damaged by each disclosure.

- 14 1. Morris’s Evidence in Opposition to Plaintiff’s Claims for Breach
15 of Contract (“Receipt & Acknowledgement of Employee
16 Handbook,” (Claim 5) and “Confidentiality and Non-Solicitation
17 Agreement (for New Employees)” (Claim 6))

18 ChromaDex claims Morris breached these contracts when he disclosed
19 allegedly confidential information, as well as alleged trade secrets, to Elysium while
20 employed by ChromaDex. ChromaDex also claims Morris retained copies of some
21 of ChromaDex’s allegedly confidential information after he departed ChromaDex.
22 The evidence will show, however, that ChromaDex cannot prove that Morris
23 transmitted information that was either confidential or a trade secret. Testimony
24 from ChromaDex’s former CFO will show that it was part of Morris’s job
25 responsibilities to give to customers like Elysium information that ChromaDex now
26 alleges to be a trade secret or confidential, and therefore not a breach of his contract.
27 And, as discussed above, the evidence will also demonstrate that others at
28 ChromaDex, including its own CEO, freely provided to Elysium and to other of

1 ChromaDex’s customers information substantively identical to the types of
2 information ChromaDex now contends Morris provided to Elysium, demonstrating
3 that this information did not constitute trade secrets or confidential or proprietary
4 information. The evidence also shows that nobody at Elysium actually saw the ISS,
5 which is one of the principal trade secrets ChromaDex contends Morris disclosed.
6 Moreover, ChromaDex itself has failed to maintain the asserted confidentiality of
7 many of the documents in question, as much of the information ChromaDex claims
8 is confidential and proprietary has been publicly disclosed or otherwise widely
9 circulated by ChromaDex without restriction.

10 With respect to Claim Six, ChromaDex alleges that, in return for Morris
11 signing the Confidentiality and Non-Solicitation Agreement (for New Employees)
12 upon his departure from ChromaDex, it provided him with continued employment
13 and benefits, access to confidential information, and forbore certain actions. The
14 evidence will show that none of those allegations are true. By the time he signed
15 this agreement, Morris had already relinquished all access to ChromaDex systems,
16 including his computer, phone, and building key card. Immediately after executing
17 the agreement, Morris exited ChromaDex’s offices for the last time. ChromaDex
18 did not provide him with continued employment or benefits, access to confidential
19 information, or “forbear” any actions. Moreover, forbearance as consideration
20 requires a “meeting of the minds,” which did not happen here. *Blonder v. Gentile*,
21 149 Cal.App.2d 869, 875 (1957).

22 Additionally, ChromaDex violated the California Labor Code by threatening
23 to withhold Morris’s final paycheck—more than \$12,000—in order to coerce Morris
24 into signing the New Employee Agreement, rendering the contract void under
25 California Civil Code § 1608 and California Labor Code §§ 202(a), 203, and 206.

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1 **E. Elements Required to Establish Plaintiff’s Claim Against Morris**
2 **for Breach of Fiduciary Duty (Claim 7)**

3 Plaintiff ChromaDex must establish the following in order to recover
4 damages on this claim:

- 5 1. That Morris was a fiduciary to ChromaDex;
- 6 2. That Morris acted in a manner inconsistent with his fiduciary duties;
7 and
- 8 3. That ChromaDex was harmed by each alleged breach of fiduciary duty
9 by Morris.

10 Under California law, a plaintiff asserting breach of fiduciary duty must prove
11 the following elements: “(1) existence of a fiduciary duty; (2) breach of the
12 fiduciary duty; and (3) damages.” *Gutierrez v. Girardi*, 194 Cal. App. 4th 925, 932
13 (Cal. Ct. App. 2011).

14 1. Morris’s Evidence in Opposition to Plaintiff’s Claim for Breach
15 of Fiduciary Duty (Claim 7)

16 ChromaDex argues that Morris was an officer of ChromaDex and that he
17 purportedly breached his fiduciary duties to ChromaDex by allegedly (1)
18 manipulating ChromaDex to Elysium’s advantage during contract negotiations
19 between the parties, (2) lying to ChromaDex about his decision to work for Elysium,
20 (3) recruiting a ChromaDex employee to Elysium, (4) withholding information
21 about Elysium’s intent to stockpile NIAGEN and pTeroPure, withhold payments
22 from ChromaDex, and develop competing supplies of NR and pterostilbene, (5) not
23 telling ChromaDex he retained information upon his departure from the company;
24 and (6) withholding information about Elysium’s outreach to ChromaDex’s
25 contractual partners in an attempt to undermine ChromaDex’s relationships with
26 them. The evidence will show that Morris was not a fiduciary to ChromaDex.
27 Morris’s job responsibilities at ChromaDex were limited to interacting with its
28 customers and potential customers to increase sales. He had little autonomy or

1 managerial authority, and virtually no role in the company’s decision-making
2 processes. For example, Morris was not permitted to establish pricing with
3 customers and instead needed approval from his superiors.

4 Moreover, ChromaDex will be unable to prove its alleged breaches of
5 fiduciary duty even if Morris is a fiduciary. Morris’s supposed “manipulation” of
6 ChromaDex relates to the same conduct ChromaDex claims constitutes trade secret
7 misappropriation, *i.e.*, Morris providing the same information to Elysium regarding
8 ChromaDex’s sales to a customer that ChromaDex’s own CEO also gave to Elysium
9 during negotiations. This claim will fail for substantially the same reason as the
10 trade secret misappropriation claims. ChromaDex will not be able to prove that
11 Morris was obligated to tell it where he would work next after resigning from
12 ChromaDex, let alone that not doing so violated any “fiduciary” obligations or that
13 this “failure” caused it any harm. The evidence shows that Morris did not recruit the
14 ChromaDex employee in question on behalf of Elysium, and demonstrates further
15 that Morris was no longer even employed by ChromaDex at the time Elysium began
16 to recruit that employee. The evidence disproves that Elysium intended to stockpile
17 quantities of NIAGEN and pTeroPure at the time of its June 30th purchase orders,
18 and that it intended not to pay for those orders. There is thus no evidence that
19 Morris was aware of either non-existent intention. ChromaDex’s contention that
20 Morris did not advise it that he retained some ChromaDex information when he left
21 the company is undercut by the fact that Morris was unaware he had any
22 ChromaDex information, and is otherwise co-extensive with ChromaDex’s deficient
23 breach of contract claims against Morris. Moreover, ChromaDex will be unable to
24 prove that Elysium’s contact with any of its contractual partners caused ChromaDex
25 any harm at all; all of its contractual relationships are still in place. Finally, to the
26 extent ChromaDex’s fiduciary duty claim relies on ChromaDex’s alleged trade
27 secrets, it is preempted by CUTSA. *Anokiwave, Inc. v. Rebeiz*, 2018 WL 4407591,
28 at *4 (S.D. Ca. Sept. 17, 2018).

1 **F. Elements Required to Establish Plaintiff’s Claim Against Elysium**
2 **for Aiding and Abetting a Breach of Fiduciary Duty (Claim 8)**

3 Plaintiff ChromaDex must establish the following in order to recover
4 damages on this claim:

- 5 1. That Morris was a fiduciary of ChromaDex;
- 6 2. That Morris acted in a manner inconsistent with his fiduciary
7 duties;
- 8 3. That Elysium had actual knowledge of that breach of fiduciary
9 duty;
- 10 4. That Elysium rendered substantial assistance or encouragement to
11 Morris’s breach; and
- 12 5. That Elysium’s conduct was a substantial factor in causing harm to
13 ChromaDex.

14 Under California law, to make a claim for aiding and abetting a breach of
15 fiduciary duty, a plaintiff must show that (1) defendants knew the purported
16 fiduciary’s conduct constituted a breach of fiduciary duty; and (2) provided
17 “substantial assistance or encouragement” to the purported fiduciary to accomplish
18 the breach. *Estate of Migliaccio v. Midland Nat’l Life Ins. Co.*, 436 F. Supp. 2d
19 1095, 1107 (C.D. Cal. 2006) (quoting *In re Textainer P’ship Sec. Litig.*, 2005 WL
20 3801596, at *16 (N.D. Cal. Dec. 12, 2005).

21 1. Elysium’s Evidence in Opposition to Plaintiff’s Claim for Aiding
22 and Abetting a Breach of Fiduciary Duty (Claim 8)

23 As discussed above, the evidence will show that Morris was not a fiduciary of
24 ChromaDex, and that, even if he was, he did not breach any fiduciary duty.
25 Therefore, there can be no claim of “aiding and abetting” such a breach. The
26 evidence will also show that Elysium did not encourage Morris to breach any
27 alleged fiduciary duty, nor did it offer him employment in exchange for the receipt
28 of confidential and proprietary ChromaDex information. Moreover, to the extent

1 that this claim relies on ChromaDex’s alleged trade secrets, it is preempted by
2 CUTSA. *Anokiwave, Inc. v. Rebeiz*, 2018 WL 4407591, at *4 (S.D. Ca. Sept. 17,
3 2018). Finally, for the same reasons stated above, the evidence will show that
4 ChromaDex’s own misconduct was of such a prejudicial nature that it would be
5 unfair to allow ChromaDex to rely on its claims of breach of fiduciary duty, and
6 thus it should be barred from recovery on this claim under the doctrine of unclean
7 hands.

8 **III. DEFENDANTS’ COUNTERCLAIMS AND AFFIRMATIVE**
9 **DEFENSES**

10 As set forth in Elysium’s Third Amended Counterclaims (ECF No. 103) and
11 Answer to Fourth Amended Complaint and Restated Counterclaims (ECF No. 118),
12 Elysium has pleaded and is pursuing the following counterclaims against
13 ChromaDex in this matter:

14 Counterclaim 1: Breach of Contract Against ChromaDex (NR Supply
15 Agreement and Amendment)

16 Counterclaim 3: Fraudulent Inducement

17 Counterclaim 4: Patent Misuse

18 Counterclaim 5: Unjust Enrichment

19 The Court has issued an order bifurcating Elysium’s Counterclaim 4 (Patent
20 Misuse) and Counterclaim 5 (Unjust Enrichment) (collectively the “Patent Misuse
21 Claims”). (Dkt. 508.) The Patent Misuse Claims will be tried separately from all
22 other claims in this action. Elysium will address the Patent Misuse Claims in a
23 separate Memorandum of Contentions of Fact and Law to be filed in advance of the
24 trial on those claims.

25 As set forth in Elysium’s and Morris’s Answer to the Fifth Amended
26 Complaint and Elysium’s Restated Counterclaims (ECF No. 192), Defendants have
27 pleaded and are pursuing the following affirmative defenses to ChromaDex’s claims
28 in this matter:

1 Affirmative Defense 1: Contract Performance Excused by Breach

2 Affirmative Defense 2: Unclean Hands

3 Affirmative Defense 3: Information was Readily Ascertainable by Proper
4 Means

5 Affirmative Defense 4: Mitigation of Damages

6 Affirmative Defense 5: Offset

7 **A. Elements of Elysium’s Counterclaim for Breach of Contract**
8 **Against ChromaDex (NR Supply Agreement and Amendment)**
9 **(Counterclaim 1)**

10 Elysium will establish the following in order to prove that ChromaDex is
11 liable to Elysium for breaching the NR Supply Agreement and the Amendment
12 thereto:

- 13 1. That ChromaDex sold NIAGEN to other customers at lower
14 prices than the prices paid by Elysium, even though Elysium
15 purchased higher volumes than those customers, and ChromaDex
16 failed to provide Elysium with refunds or credits due; and
- 17 2. That Elysium was damaged as a result.

18 “[A] breach of contract is a failure, without legal excuse, to perform any
19 promise that forms the whole or part of a contract.” *Hosp. of Barstow, Inc. v.*
20 *California Nurses Ass’n*, 2013 WL 6095559, at *5 (C.D. Cal. Nov. 18, 2013).

21 **B. Elements of Elysium’s Counterclaim for Fraudulent Inducement**
22 **(License and Royalty Agreement) (Counterclaim 3)**

23 Elysium will establish the following in order to prove that Plaintiff is liable to
24 Elysium for fraudulent inducement:

- 25 1. That ChromaDex’s then-CEO told Elysium that all of
26 ChromaDex’s NIAGEN customers were required to execute
27 trademark license and royalty agreements;
- 28 2. That this representation was knowingly false when made;

- 1 3. That ChromaDex intended to defraud Elysium by forcing it to pay
- 2 royalties under an agreement to license trademarks it neither
- 3 wanted nor used;
- 4 4. Elysium justifiably relied on ChromaDex's representation; and
- 5 5. Elysium was damaged by paying ChromaDex royalties.

6 *Romero v. San Pedro Forklift, Inc.*, 2008 U.S. App. LEXIS 2607, at *7-8 n.2 (9th
7 Cir. Feb. 1, 2008) (claim for fraudulent inducement has the same elements as claim
8 for fraud under California law) (citing *Lazar v. Superior Court*, 909 P.2d 981, 984
9 (1996)); CACI Nos. 1900, 1901, 1902.

10 **C. Elements for Punitive Damages**

11 Elysium will establish the following in order to recover a punitive damages
12 award against ChromaDex:

- 13 1. ChromaDex committed fraudulent inducement;
- 14 2. ChromaDex acted with "oppression, fraud or malice;"
- 15 3. Elysium can establish ChromaDex's "oppression, fraud or malice"
16 by "clear and convincing evidence."

17 *See* Cal. Civ. Code § 3284(a).

18 **D. Elements of Elysium's Affirmative Defense for Contract**
19 **Performance Excused by Breach (Affirmative Defense 1)**

20 Elysium will establish the following in order to prove that any breach by
21 Elysium, to the extent there was a breach, was excused by ChromaDex's prior
22 breaches:

- 23 1. That ChromaDex materially breached the NIAGEN Supply
24 Agreement and Amendment;
- 25 2. That ChromaDex is therefore not entitled to recover from Elysium
26 for breach of the NIAGEN Supply Agreement or the pTeroPure
27 Supply Agreement.

28

1 *See Cross v. Itron, Inc.*, 890 F.2d 420 (9th Cir. 1989); *Plotnik v. Meihaus*, 208 Cal.
2 App. 4th 1590, 1602 (2012).

3 **E. Elements of Defendants’ Affirmative Defense for Unclean Hands**
4 **(Affirmative Defense 2)**

5 Defendants will establish the following in order to prove that, pursuant to the
6 doctrine of unclean hands, ChromaDex should be barred from claiming breach of
7 contract, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and
8 trade secret misappropriation:

- 9 1. That ChromaDex engaged in conduct that violates conscience, or
10 good faith, or other equitable standards of conduct that is sufficient
11 cause to invoke the doctrine of unclean hands; and
- 12 2. That ChromaDex’s misconduct relates directly to the transactions
13 concerning its claims, *i.e.*, the subject matter involved, and affects
14 the equitable relations between the litigants.

15 *See Kendall-Jackson Winery, Ltd. v. Superior Court*, 76 Cal. App. 4th 970, 979, 90
16 Cal. Rptr. 2d 743, 749 (1999), as modified on denial of reh’g (Jan. 3, 2000).

17 **F. Elements of Defendants’ Affirmative Defense that Information**
18 **Was Readily Obtainable by Proper Means (Affirmative Defense 3)**

19 Defendants will establish that the information ChromaDex claims was a trade
20 secret was readily obtainable by proper means at the time of the alleged acquisition,
21 use, or disclosure, and therefore Defendants did not misappropriate ChromaDex’s
22 trade secrets.

23 **G. Elements of Defendants’ Affirmative Defense for Mitigation of**
24 **Damages (Affirmative Defense 4)**

25 Defendants will establish the following in order to prove that, to the extent
26 ChromaDex is entitled to any damages, those damages should be mitigated:

- 27 1. ChromaDex failed to use reasonable efforts to mitigate damages; and
- 28 2. The amount by which damages would have been mitigation if

1 ChromaDex had used reasonable efforts to mitigate damages.

2 **H. Elements of Elysium’s Affirmative Defense of Offset (Affirmative**
3 **Defense 5)**

4 Elysium will establish that mutual demands are held by ChromaDex and
5 Elysium under such circumstances that the damages to Elysium should be applied
6 against any damages to ChromaDex, and only the balance recovered. *See* Cal. Code
7 Civ. Proc. § 431.70; *Plut v. Fireman’s Fund Ins. Co.*, 85 Cal. App. 4th 98, 107
8 (2001).

9 **IV. ELYSIUM’S COUNTERCLAIMS AND AFFIRMATIVE DEFENSES**
10 **ARE AMPLY SUPPORTED BY THE EVIDENCE IN THIS ACTION**

11 The following key evidence establishes the existence of each element of
12 Elysium’s counterclaims and affirmative defenses:

13 **A. Evidence Supporting Elysium’s Claim for Breach of Contract**
14 **(Counterclaim 1)**

15 The NIAGEN Supply Agreement contains the following provisions:

- 16 • Section 3.1 (“the MFN Provision”) states that if “at any time during the
17 Term, ChromaDex supplies Niagen (or a substantially similar product)
18 to a Third Party at a price that is lower than that at which Niagen is
19 supplied to Elysium Health under this Agreement, then the price of
20 Niagen supplied under this Agreement shall be revised to such Third
21 Party price with effect from the date of the applicable sale to such Third
22 Party and ChromaDex shall promptly provide Elysium Health with any
23 refund or credits thereby created; provided Elysium Health purchases
24 equal volumes or higher volumes than the Third Party.”

25 The evidence will show that ChromaDex breached the MFN Provision
26 multiple separate times, by selling NIAGEN to Elysium at a higher price than it sold
27 NIAGEN to a third party, even though Elysium had purchased a higher volume of
28 NIAGEN. The complete record of ChromaDex’s breaches of the MFN Provision is

1 explained and analyzed in detail in the expert report of Dr. Iain Cockburn, along
2 with the damages Elysium suffered as a result of the breaches of the MFN provision.

3 **B. Evidence Supporting Elysium’s Counterclaim for Fraudulent**
4 **Inducement (Counterclaim 3)**

5 Defendants will present evidence at trial that, during the negotiations that led
6 to the NIAGEN Supply Agreement, ChromaDex’s then-CEO falsely informed
7 Elysium that ChromaDex required all of its customers who purchased nicotinamide
8 riboside to sign trademark license and royalty agreements, and that Elysium relied
9 on this representation to execute a trademark license and royalty agreement that
10 obligated it to pay royalties to ChromaDex. The evidence also will show that
11 ChromaDex’s then-CEO’s statement was false; he later admitted in an email to
12 Elysium that at least one customer that purchased NIAGEN prior to and during the
13 course of Elysium and ChromaDex’s negotiations never signed a trademark license
14 and royalty agreement or paid royalties. Elysium was damaged by this fraud in the
15 amount of the royalties it paid to ChromaDex under the trademark and license
16 agreement it was fraudulently induced to sign.

17 **C. Evidence Supporting Elysium’s Claim for Punitive Damages**

18 With respect to Elysium’s claim for punitive damages, the evidence listed
19 above establishes the existence of each element required for recovering punitive
20 damages from ChromaDex. Elysium will also rely on ChromaDex’s financial
21 statements and other disclosures filed with the SEC in support of its claim for
22 punitive damages.

23 **D. Evidence Supporting Elysium’s Affirmative Defense of Contract**
24 **Performance Excused by Breach (Affirmative Defense 1)**

25 The evidence will show that ChromaDex breached the MFN Provision
26 multiple separate times, by selling NIAGEN to Elysium at a higher price than it sold
27 NIAGEN to a third party, even though Elysium had purchased a higher volume of
28 NIAGEN, as discussed in Section IV.A, *supra*. ChromaDex never issued Elysium a

1 refund or a credit for these overcharges as required by the MFN Provision. The
2 evidence will further show that ChromaDex breached its agreement to give Elysium
3 exclusivity over products containing NR and PT or any substantially similar
4 ingredients.

5 **E. Evidence Supporting Defendants’ Affirmative Defense of Unclean**
6 **Hands (Counterclaim 2)**

7 Defendants will present evidence at trial that ChromaDex intentionally
8 violated the MFN Provision of the NIAGEN Supply Agreement and then attempted
9 to conceal and misrepresent information relevant to these violations by providing
10 Elysium with a spreadsheet of pricing information that had been manipulated to
11 exclude pricing information demonstrating certain customers had received more
12 favorable pricing on NIAGEN. Defendants will also present evidence ChromaDex
13 knowingly sold both NIAGEN and ingredients similar to PT to other customers, in
14 violation of the exclusivity provision of the NIAGEN Supply Agreement. Finally,
15 Defendants will present evidence that ChromaDex fraudulently induced Elysium to
16 enter into the Trademark License and Royalty Agreement, by which ChromaDex
17 charged Elysium a royalty for a trademark Elysium never used or intended to use.
18 Defendants’ evidence will demonstrate that ChromaDex’s were unconscionable, and
19 allowing them to recover for their claims of breach of contract, trade secret
20 misappropriation, breach of the duty of loyalty, and aiding and abetting the breach
21 of the duty of loyalty would inequitably permit ChromaDex to further profit from its
22 misconduct at the expense of Defendants.

23 **F. Evidence Supporting Defendants’ Affirmative Defense that**
24 **Information Was Readily Obtainable by Proper Means**
25 **(Affirmative Defense 3)**

26 Defendants will introduce evidence that the information ChromaDex claims
27 constitute trade secrets was readily ascertainable by proper means at the time of the
28 alleged acquisition, use, or disclosure. For example, ChromaDex’s then-CEO freely

1 shared with Elysium information about the price and volume of NIAGEN purchases
2 made by another of its customers, and ChromaDex even sent Elysium copies of
3 some of that customer's invoices. ChromaDex's CEO also shared with a competitor
4 of Elysium detailed information about the volume of Elysium's NIAGEN purchases.
5 Moreover, by agreeing to give Elysium MFN pricing, ChromaDex necessarily
6 agreed that Elysium was entitled to know sales information regarding ChromaDex's
7 other customers. And in fact, ChromaDex's then-CEO provided Elysium with
8 information of the same nature that it now claims is the subject of its
9 misappropriation claims.

10 **G. Evidence Supporting Defendants' Affirmative Defense of**
11 **Mitigation of Damages (Affirmative Defense 4)**

12 Defendants will present evidence at trial concerning ChromaDex's failure to
13 use reasonable efforts to mitigate damages and the amount by which damages would
14 have been mitigated if ChromaDex had used such reasonable efforts.

15 **H. Evidence Supporting Elysium's Affirmative Defense for Offset**
16 **(Affirmative Defense 5)**

17 Elysium will present evidence at trial of damages to Elysium from
18 ChromaDex's breaches, and that, to the extent ChromaDex is awarded any damages
19 for breach of contract by Elysium, those damages should be applied against what
20 ChromaDex owes Elysium for its breaches.

21 **V. ANTICIPATED EVIDENTIARY ISSUES**

22 Defendants anticipate evidentiary issues relating to ChromaDex seeking to
23 introduce evidence concerning highly sensitive aspects of Elysium's CEO's
24 personal life that are irrelevant and highly prejudicial.

25 Defendants also anticipate that ChromaDex may seek to introduce evidence
26 related to its cost avoidance damages theory, on which the Court granted summary
27 judgment (*see* Dkt. 413 [Summary Judgment Order] at 24, 27, 34-40). Such
28 evidence is no longer relevant to any issue in this case, and its probative value is

1 substantially outweighed by a danger of unfair prejudice, confusing the issues,
2 misleading the jury, undue delay, and wasting time. ChromaDex’s cost avoidance
3 theory was based on Elysium’s alleged use of ChromaDex’s confidential
4 information to establish a new ingredient supply chain. Thus, efforts by
5 ChromaDex to introduce such evidence is problematic because it may sound to the
6 jury like evidence of trade secret misappropriation, but the only trade secrets at issue
7 in this case (*i.e.*, sales information regarding ChromaDex’s customers and the price
8 ChromaDex paid to W.R. Grace) have nothing to do with ChromaDex’s defunct
9 theory that Elysium used ChromaDex’s confidential information to establish a new
10 ingredient supply chain.

11 **VI. ISSUES OF LAW**

12 The Court has already ruled on all issues of law in the course of the motions
13 to dismiss and summary judgment proceedings. As noted, ChromaDex’s draft
14 pretrial filings reflect that ChromaDex believes that it may pursue claims against
15 Elysium for breach of Section 15.1 of the pTeroPure Supply Agreement and Section
16 4.1 of the NIAGEN Supply Agreement based on Elysium’s alleged disclosure of the
17 NRC1 Analytical Method and the pTeroPure GRAS Report. Those claims were
18 dismissed by the Court in its summary judgment decision and cannot be pursued at
19 trial. (*See* ECF 413 at 24, 27, 34-40.)

20 Defendants anticipate filing a motion for judgment as a matter of law under
21 FRCP 50(a) at the close of ChromaDex’s case-in-chief.

22 **VII. ISSUES TRIABLE TO A JURY AND TO THE COURT**

23 Other than the bifurcated Patent Misuse Claims, Defendants believe all claims
24 and counterclaims at issue in this litigation are properly tried to a jury.

25 Elysium has a right to a jury trial regarding its claim for punitive damages: “It
26 is established that suits for money damages, including punitive damages, are legal in
27 nature entailing the right to a jury trial, and that this right cannot be abridged even if
28 the damages are considered incidental to the equitable claims.” *Malone v. Norwest*

1 *Fin. Cal., Inc.*, 245 B.R. 389, 399 (E.D. Cal. 2000) (citing *Curtis v. Loether*, 415
2 U.S. 189, 196 n. 11 (1974)).

3 **VIII. BIFURCATION OF ISSUES**

4 As discussed, the Court has issued an order bifurcating Elysium’s
5 Counterclaim 4 (Patent Misuse) and Counterclaim 5 (Unjust Enrichment)
6 (collectively the “Patent Misuse Claims”). (Dkt. 508.)

7 **IX. ABANDONMENT OF ISSUES**

8 Certain of Elysium’s counterclaims were resolved on summary judgment.
9 Elysium has not abandoned any of its remaining counterclaims.

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Respectfully submitted,

**COHEN WILLIAMS LLP
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