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11 **UNITED STATES DISTRICT COURT**  
12 **CENTRAL DISTRICT OF CALIFORNIA**  
13 **WESTERN DIVISION**

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

Case No.: 8:16-cv-02277-CJC-DFM  
[Assigned to the Hon. Cormac J. Carney]  
**ELYSIUM HEALTH, INC. AND  
MARK MORRIS'S REPLY  
SUPPLEMENTAL BRIEF  
PURSUANT TO OCTOBER 9, 2019  
ORDER ON MOTIONS FOR  
SUMMARY JUDGMENT**

19  
20 Elysium Health, Inc.,  
21 Counterclaimant,  
22 v.  
23 ChromaDex, Inc.,  
24 Counter-Defendant.

**Hearing**  
**Date: January 13, 2020**  
**Time: 1:30 p.m.**  
**Ctrm: 7C**

Trial: TBD

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28

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Page(s)**

I. CHROMADEX IGNORES THE COURT’S QUESTIONS AND ESSENTIALLY ABANDONS MOST OF ITS DAMAGES CLAIMS ..... 1

    A. ChromaDex’s New “Elysium Profits” Theory is Meritless..... 2

    B. Elysium’s “Avoided Costs” Are Not Recoverable ..... 6

        1. NRCI Analytical Method ..... 6

        2. pTeroPure GRAS Report ..... 7

    C. Elysium’s “Price Discount” Is Not Recoverable ..... 8

    D. Morris’s Compensation is Not Recoverable ..... 9

    E. “Alternative Damages” ..... 10

II. CHROMADEX IS NOT ENTITLED TO DISMISSAL AS A MATTER OF LAW OF ELYSIUM’S PATENT MISUSE CLAIM ..... 11

III. CONCLUSION ..... 15

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**TABLE OF AUTHORITIES**

**Page(s)**

**Cases**

*American Masters Lease v. Idanta*,  
225 Cal. App.4th 1451 (2014)..... 5

*Ansul Co. v. Uniroyal, Inc.*,  
306 F. Supp. 541 (S.D.N.Y. 1969), *aff'd in relevant part*, 448 F.2d  
872 (2nd Cir. 1971) ..... 14

*Aro Mfg. Co. v. Convertible Top Replacement Co.*,  
377 U.S. 476 (1964) ..... 12

*B.B. Chem. Co. v. Ellis*,  
314 U.S. 495 (1942) ..... 11, 12, 15

*County of San Bernardino v. Walsh*,  
158 Cal. App. 4th 533 (2007), *as modified* (Jan. 28, 2008)..... 9

*Edwards v. Arthur Andersen LLP*,  
44 Cal.4th 937 (2008)..... 9

*Gypsum Co. v. Nat’l Gypsum Co.*,  
352 U.S. 457 (1957) ..... 15

*Kimble v. Marvel Entm’t., LLC*,  
135 S. Ct. 2401 (2015) ..... 12, 13

*Koratron Co. v. Lion Unif., Inc.*,  
409 F. Supp. 1019 (N.D. Cal. 1976)..... 11

*Preformed Line Products Co. v. Fanner Mfg. Co.*,  
328 F.2d 265 (6th Cir. 1964)..... 14

*Princo Corp. v. Int’l Trade Comm’n*,  
616 F.3d 1318 (Fed. Cir. 2010) ..... 13

*Pyramid Techs., Inc. v. Hartford Casualty Insurance Company*,  
752 F.3d 807 (9th Cir. 2014)..... 7

*Rutherford v. Owens-Illinois, Inc.*,  
16 Cal. 4th 953 (1997)..... 9

1 *Saelzler v. Advanced Grp. 400,*  
2 25 Cal.4th 763 (Cal. 2001) ..... 2

3 *Sun Pac. Mktg. Co-op., Inc. v. DiMare Fresh, Inc.,*  
4 2011 WL 3568539, at \*11 (E.D. Cal. Aug. 15, 2011), *amended,*  
5 2012 WL 4482013 (E.D. Cal. Sept. 28, 2012), *and aff'd,* 592 F.  
6 App'x 564 (9th Cir. 2015)..... 5

7 *White Cap Co. v. Owns-Illinois Glass Co.,*  
8 203 F.2d 694 (6th Cir. 1953)..... 14

9 *Yanez v. Plummer,*  
10 221 Cal. App. 4th 180 (2013)..... 3, 8

11 *Yeager v. Bowlin,*  
12 693 F.3d 1076 (9th Cir. 2012)..... 4, 7

13 **Statutes**

14 35 U.S.C. § 271(d)(5) ..... 12

15 Cal. Com. Code § 1305..... 5

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1 ChromaDex, Inc. (“ChromaDex”) has not—and, as its brief makes clear—  
2 cannot establish the causal links required to prove its alleged damages, under either  
3 California or federal law.<sup>1</sup> In response to the Court’s October 9, 2019 Order  
4 (“October 9 Order”), ChromaDex functionally abandons the substantial majority of  
5 its damages claims, sidesteps both the questions the Court posed in its October 9  
6 Order and the facts and arguments laid out by Elysium Health, Inc. (“Elysium”) and  
7 Mark Morris (“Morris”) (together, “Defendants”) in their supplemental brief, and  
8 advances a new theory of damages in an effort to salvage some prospect of recovery  
9 on its claims. It even, bizarrely, seeks to bargain with the Court, halfheartedly  
10 offering to jettison its original damages theories if the Court permits it to proceed to  
11 a jury on its newly limited (but still baseless) ones. Even ChromaDex’s newly limited  
12 damages theories, however, suffer from fatal factual and legal flaws.

13 As for patent misuse, ChromaDex largely ignores the Court’s question about  
14 what remedies are available to Elysium. Instead, it takes the opportunity to rehash  
15 arguments directed to the underlying merits of Elysium’s misuse counterclaim.  
16 These arguments, most of which are not before the Court on ChromaDex’s motion  
17 for summary judgment, are meritless and raise issues of disputed fact.

18 **I. CHROMADDEX IGNORES THE COURT’S QUESTIONS AND**  
19 **ESSENTIALLY ABANDONS MOST OF ITS DAMAGES CLAIMS**

20 In its October 9 Order, the Court identified the four alleged trade secrets  
21 ChromaDex claimed were misappropriated and stated it was concerned about  
22 “causation – that is, how Elysium’s and Mark Morris’ alleged theft and misuse of  
23 alleged trade secrets and other confidential information allegedly caused such  
24 extensive harm.” (October 9 Order at 3.) The Court’s “serious concern[] that  
25 ChromaDex’s damages are overstated” (*id.*) is well-founded, as ChromaDex’s  
26 effective abandonment of tens of millions of dollars of frivolous and extortionate  
27

28 <sup>1</sup> All references to “ChromaDex Br.” are to the November 18, 2019 Supplemental  
Brief filed by ChromaDex (ECF No. 379-00).

1 damages claims makes clear (with the sole exception of those relating to the contract  
2 dispute that the Court properly identified as the heart of the issues for the jury).

3 **A. ChromaDex’s New “Elysium Profits” Theory is Meritless**

4 As this Court has recognized, this is largely a contract dispute: the purported  
5 harm about which ChromaDex complains is Elysium’s alleged failure to pay for the  
6 ingredients it received from the June 30 Orders. ChromaDex’s attempt to claim tort  
7 damages based on this conduct is futile and should be rejected. Unable to defend its  
8 claim for *all* of Elysium’s profits under its previously proffered trade secret theories,  
9 ChromaDex now narrows its damages claim to Elysium’s purported profits relating  
10 to the ingredients purchased through the June 30 Orders (a decrease of approximately  
11 [REDACTED]). ChromaDex now argues a jury could find that Elysium’s “scheming  
12 with Morris and/or Defendants’ misappropriation of ChromaDex’s trade secrets were  
13 substantial factors . . . in enabling Elysium’s ingredient theft (and the profits  
14 therefrom).” (ChromaDex Br. at 4.) That purported “theft,” of course, is a reference  
15 to what the Court has identified as the core legal issue in this case—the parties’  
16 competing claims for breach of the NR Supply Agreement that will resolve whether  
17 Elysium owes anything at all for the June 30 Orders. This is not “theft” but a garden-  
18 variety breach of contract dispute. ChromaDex’s attempt to hitch its tort claims to  
19 Elysium’s alleged breach of contract only exacerbates the causation failure that  
20 animated the Court’s concern that ChromaDex was overstating its damages. “A  
21 showing of causation requires the Plaintiff to establish that it is ‘more probable than  
22 not’ that the defendant’s wrongful acts caused the injury.” *Saelzler v. Advanced Grp.*  
23 *400*, 25 Cal.4th 763, 776 (Cal. 2001). “[W]hen the matter remains one of pure  
24 speculation or conjecture, or the probabilities are at best evenly balanced, it becomes  
25 the duty of the court to direct a verdict for the defendant.” *Id.* at 775–776.

26 Under its new theory, ChromaDex still fails to show any harm caused by any  
27 alleged trade secret theft, because it cannot show any causal link between any  
28 allegedly misappropriated trade secret and the June 30 Orders, Elysium’s alleged

1 failure to pay, or Elysium’s profits from those ingredients. Nor does ChromaDex  
2 point to any evidence linking Elysium’s alleged breach of its obligation to pay for  
3 the June 30 Orders to any alleged assistance or encouragement of any breach by  
4 Morris of his fiduciary duty to ChromaDex. Instead, ChromaDex appears to argue  
5 either that Elysium would not have placed or that ChromaDex would not have  
6 fulfilled the June 30 Orders but for Elysium’s supposed improper knowledge of the  
7 price at which ChromaDex acquired NR “and/or” Morris’s failure to warn  
8 ChromaDex that Elysium “planned to stiff ChromaDex on the bill.” (ChromaDex  
9 Br. at 5.) As a threshold matter, and as discussed in Elysium’s opening supplemental  
10 brief, there is no evidence that Elysium obtained the price ChromaDex paid its  
11 supplier improperly, since ChromaDex’s expert concedes that this information could  
12 be determined from the margin information that ChromaDex’s then-CEO, Frank  
13 Jaksch, indisputably provided Elysium. (Defendants’ Br. at 7-8.) *Yanez v. Plummer*,  
14 221 Cal. App. 4th 180, 187 (2013) (“[C]onduct is not a substantial factor in causing  
15 harm if the same harm would have occurred without that conduct.”). Moreover, there  
16 is absolutely no evidence that Elysium used any knowledge of ChromaDex’s cost (or  
17 any other trade secret) to negotiate the price for the June 30 Orders.<sup>2</sup>

18 The record is similarly devoid of evidence that Morris’s alleged breach of his  
19 fiduciary obligations to ChromaDex—much less any alleged assistance or  
20 encouragement by Elysium to such breach—caused either the June 30 Orders or their  
21 nonpayment. ChromaDex now claims “[i]t was far from certain . . . that ChromaDex  
22 would have accepted the June 30 Orders in the ordinary course” and paints a narrative  
23 in which ChromaDex “debated” whether to take Elysium’s orders but Morris “pushed  
24 to accept them” until “[i]n the end, ChromaDex reluctantly agreed.” (ChromaDex  
25

26 <sup>2</sup> As laid out in Defendants’ supplemental brief (“Defendants’ Br.”), and *supra* at 8,  
27 the evidence shows that ChromaDex disclosed to Elysium that it was charging  
28 another, lower volume customer \$800/kg for NR, and that based on this disclosure,  
and as per the MFN Provision of the NR Supply Agreement, the parties agreed to the  
identical price of \$800/kg for the June 30 Order. (Defendants’ Br. at 14-15).  
ChromaDex does not dispute this evidence in its brief, because it cannot.



1 Br. at 5.) ChromaDex submits a declaration by Jaksch in which he claims, among  
2 other things, that ChromaDex accepted the June 30 Orders only “after lengthy  
3 internal discussions” about them and “because ChromaDex was committed to a long-  
4 term relationship with Elysium.” (Jaksch Decl. at ¶10.)<sup>3</sup>

5 ChromaDex’s newly minted narrative is unavailing, however, because a party  
6 cannot create an issue of fact on summary judgment by submitting an affidavit  
7 contradicting the party’s prior deposition testimony. *Yeager v. Bowlin*, 693 F.3d  
8 1076, 1080 (9th Cir. 2012). ChromaDex’s newest assertions are inconsistent with  
9 the record evidence, including Jaksch’s own deposition testimony. Jaksch testified  
10 at his deposition that *on the June 30 call* with Elysium that resulted in the June 30  
11 Orders, ChromaDex and Elysium reached “the agreement that we would agree to sell  
12 the at \$800 a kilo for [NR] and move forward.” (Ex. 1 at 242:9-10.)<sup>4</sup> The deposition  
13 testimony of the only other ChromaDex participant on that call, ChromaDex’s then-  
14 Vice President of Sales and Marketing, Will Black, confirms that ChromaDex agreed  
15 to accept Elysium’s June 30 Orders during the parties’ phone call *on that day*, and  
16 not following any purported subsequent “lengthy internal discussions” involving  
17 Morris. As Black testified about that call, “how it ended was an agreement on volume  
18 and price for that second quarter—that second quarter order.” (Ex. 2 at 117:12-14.)  
19 Whatever internal debates may have occurred at ChromaDex before then, the  
20 deposition testimony of Jaksch and Black is unequivocal that ChromaDex’s decision  
21 to accept the June 30 Orders came during their call with Elysium on that date when  
22 the parties agreed to the price and volume for the Orders, and ChromaDex cannot  
23 seek to alter the factual record at this stage.<sup>5</sup>

24 \_\_\_\_\_  
25 <sup>3</sup> All references to “Jaksch Decl.” refer to the Declaration of Frank L. Jaksch, Jr. in  
support of ChromaDex’s Supplemental Brief (ECF No. 379-2).

26 <sup>4</sup> Unless otherwise stated, all references to Exhibit(s) herein refer to exhibits attached  
27 to the November 27, 2019 Declaration of Joseph N. Sacca in Support of Elysium  
Health, Inc’s and Mark Morris’s Reply Supplemental Brief Pursuant to October 9,  
2019 Order on Motion for Summary Judgment (“Sacca Declaration”).

28 <sup>5</sup> The record similarly belies that ChromaDex fulfilled the June 30 Orders because of  
any “commit[ment] to a long-term relationship with Elysium.” At this time,

1 As for Morris’s conduct, the only relevant thing he is alleged to have done is  
2 having “known” that that Elysium did not plan to pay for the product and fail to warn  
3 ChromaDex. First, this argument again simply ignores the record evidence, and has  
4 *nothing* to do with any alleged trade secrets or confidential information. ChromaDex  
5 was fully aware at the time it accepted the June 30 Orders that Elysium believed  
6 ChromaDex to be in breach of the MFN Provision of the NR Supply Agreement. As  
7 Jaksch testified, ChromaDex and Elysium on their June 30 phone call “agreed to  
8 disagree on that point” and “basically said, look, we’re going to have to deal with  
9 this at a different time.” (Ex. 1 at 242:4-5, 243:2-3.) This was a sale of goods under  
10 the UCC and governed by the supply agreements, and now ChromaDex is improperly  
11 attempting to obtain lost profits and more than the benefit of the bargain. *Sun Pac.*  
12 *Mktg. Co-op., Inc. v. DiMare Fresh, Inc.*, 2011 WL 3568539, at \*11 (E.D. Cal. Aug.  
13 15, 2011), *amended*, 2012 WL 4482013 (E.D. Cal. Sept. 28, 2012), *and aff’d*, 592 F.  
14 App’x 564 (9th Cir. 2015) (“the aggrieved party may be put in as good a position as  
15 if the other party had fully performed”) (quoting Cal. Com. Code § 1305).

16 Second, because Elysium had no fiduciary duty to ChromaDex, it can be liable  
17 only if it “substantially assisted or encouraged” Morris in breaching some duty that  
18 Morris owed to ChromaDex, and this assistance must have been a “substantial factor  
19 in causing the harm suffered” by ChromaDex. *American Masters Lease v. Idanta*,  
20 225 Cal. App.4<sup>th</sup> 1451, 1476 (2014). Here, the harm ChromaDex alleges is that  
21 Elysium failed to pay for the June 30 Orders, the terms of which were negotiated and  
22 agreed in a phone call between Jaksch, Black, and Elysium in which Morris did not  
23 participate. ChromaDex’s claim rests on an alleged obligation owed by Elysium, not  
24 Morris, that arose independent from any alleged conduct by Morris. ChromaDex  
25 cites no authority, and we are aware of none, for the proposition that a party can be  
26 liable for aiding and abetting its own alleged harmful conduct.

27  
28 ChromaDex had already launched its own direct-to-consumer NR product as part of  
its plan to eliminate Elysium as a customer. (Defendants’ Br. at 11.)

1           **B. Elysium’s “Avoided Costs” Are Not Recoverable**

2           When faced with the Court’s order to substantiate its alleged approximately  
3 \$525,000 in “avoided costs,” ChromaDex has jettisoned the largest part of that claim  
4 and cut its claimed damages claim to \$110,000, focusing solely on two documents:  
5 the NRCI Analytical Method, and the pTeroPure GRAS Report, abandoning its other  
6 theories. (ChromaDex Br. at 7.) ChromaDex also now expressly acknowledges that  
7 neither of these documents are “trade secrets,” and that it seeks recovery on a breach  
8 of contract theory. (*Id.*)

9                   **1. NRCI Analytical Method**

10           Despite its throwaway footnote to the contrary (ChromaDex Br. at 8 n.11),  
11 ChromaDex offers no actual evidence to counter the dispositive fact that the NRCI  
12 Analytical Method is *not confidential* under the terms of the NR Supply Agreement,  
13 as it was available online (ECF No. 342-01 at 9; Defendants’ Br. at 16). Even if the  
14 NRCI Analytical Method were confidential, the “logical inference” based on the  
15 evidence is that Elysium would have sent ChromaDex’s analytical method to the  
16 vendors in question in October and November 2016 for the purpose of testing  
17 *ChromaDex’s* NR, which Elysium was using at the time. (Ex. 3 at 63:21-23.) Indeed,  
18 the NR Supply Agreement permitted the disclosure of “Confidential Information” to  
19 “[a]ffiliates, directors, officers, employees, consultants, clinical investigators,  
20 contractors, agents, or permitted assignees, to the extent such disclosure is reasonably  
21 necessary in connection with such party’s activities as authorized by this  
22 Agreement.” (ECF No. 153-03 § 4.1 at 67.) ChromaDex does not and cannot argue  
23 that such standard testing, or the encapsulating of NR, have any relation to Elysium’s  
24 alternative source of NR, or are related to the development of a new manufacturing  
25 process for NR. Therefore, there is no basis for ChromaDex’s alleged “logical  
26 inference” that Elysium needed the method during “a critical window and was  
27 unjustly enriched by exploiting it.” (ChromaDex Br. at 9.)

28           Elysium did not “avoid[] costs” by separately sending the NRCI Analytical

1 Method to [REDACTED], as the [REDACTED] witness testified that [REDACTED] “[e]nded up spending a lot of  
2 time to modify the method or come up with their own method.” (Ex. 4 at 46:22-23.)  
3 Finally, ChromaDex cannot use Erickson’s affidavit to support the costs it alleged it  
4 incurred to develop the NRCI Analytical Method (Erickson Decl.)<sup>6</sup>, as its own former  
5 CFO and Rule 30(b)(6) witness previously testified that the amount ChromaDex  
6 spent on developing the method could only be calculated by an expert and that the  
7 expert would need to include the time each employee spent on developing the  
8 method, which ChromaDex did not track. (Ex. 5 at 316:5-23, 217:3-321:3.) *Yeager*,  
9 693 F.3d at 1080 (“a party cannot create an issue of fact by an affidavit contradicting  
10 [its] prior deposition testimony”).

## 11 2. pTeroPure GRAS Report

12 ChromaDex’s arguments here fare no better. Once again, ChromaDex makes  
13 no effort to separate out disclosures that were permitted and expected by ChromaDex,  
14 since Elysium was still using ChromaDex ingredients at the time, and later  
15 disclosures it contends Elysium impermissibly made.<sup>7</sup> This omission is particularly  
16 egregious, since ChromaDex is now asserting that it is entitled to Elysium’s profits  
17 from selling Basis made with ChromaDex’s ingredients during the same time period  
18 as many of the disclosures of which it complains. Nor does ChromaDex have any  
19 evidence on how the disclosures benefited Elysium, or that Elysium derived some  
20 benefit from making pTeroPure GRAS Report disclosures at issue. ChromaDex has

21 \_\_\_\_\_  
22 <sup>6</sup> All references to “Erickson Decl.” refer to the Declaration of Aron Erickson in  
support of ChromaDex’s Supplemental Brief (ECF No. 379-1).

23 <sup>7</sup> The case upon which ChromaDex relies, *Pyramid Techs., Inc. v. Hartford Casualty*  
24 *Insurance Company*, is simply inapplicable. 752 F.3d 807, 820 (9<sup>th</sup> Cir. 2014). In  
25 that case, the causation theory in question was the “efficient proximate cause,” which  
26 is the preferred method for determining insurance disputes involving multiple risks.  
The court noted that under the “efficient proximate cause” doctrine, the question of  
27 which event was the efficient proximate cause is a factual question for the jury to  
28 decide. With respect to damages, the court noted that it was undisputed that at least  
some of the inventory in question was visibly corroded, tarnished, or discolored, that  
the appropriate measure of damages was “the diminution of market value,” and it  
was for a jury to decide how much of the inventory was damaged. It has nothing to  
do with determining the alleged unjust enrichment obtained by Elysium through its  
alleged disclosure of the pTeroPure GRAS Report.

1 put forth no legal theory, and no factual basis, on which to determine any alleged  
2 damages or to dispute that Elysium paid for its own report.

3 **C. Elysium’s “Price Discount” Is Not Recoverable**

4 ChromaDex acknowledges that its “price discount” theory is premised on  
5 claims of breach of fiduciary duty and aiding and abetting that breach, not trade secret  
6 misappropriation. (ChromaDex Br. at 10.) ChromaDex’s primary argument seems  
7 to be that Elysium discovered that ChromaDex was in breach of the MFN Provision  
8 of the parties’ NR Supply Agreement, and demanded the price that it was  
9 contractually owed. That is simply not a basis for *ChromaDex* to claim unjust  
10 enrichment damages. (Defendants’ Br. at 13-14.)

11 Moreover, it is undisputed that Jaksch disclosed much of this same information  
12 to Elysium during the course of the parties’ negotiations, including during the June  
13 30 call on which the agreement as to price was reached.<sup>8</sup> As explained in Defendants’  
14 prior briefing, the factual record demonstrates that Jaksch and Black disclosed to  
15 Elysium—prior to and during the June 30 call that resulted in agreement on the price  
16 and volume of the June 30 Orders—that ChromaDex was charging another customer  
17 \$800/kg for NR, and that Elysium was ordering a larger volume of NR than this other  
18 customer. (ECF No. 244-04; ECF No. 244-05; ECF No. 244-01 at 249:17-250:3;  
19 ECF No. 249-07; ECF No. 249-06 at 255:17-258:5). As it was therefore entitled to  
20 do under the NR Supply Agreement, Elysium demanded the same \$800/kg price.  
21 There simply was no “price discount” obtained by Elysium; it obtained the price it  
22 was entitled to at the time, based on the state of information it had. Because Jaksch  
23 provided substantively the same information Morris is alleged to have given Elysium,  
24 ChromaDex cannot prove causation. There is no evidence that ChromaDex agreed  
25 to the pricing in question because of any of *Morris’s* actions. *Yanez*, 221 Cal. App.  
26 4th at 187.

27  
28 <sup>8</sup> ChromaDex also considered it to be part of Morris’s job duties to keep Elysium informed of the correct pricing it was supposed to receive. (ECF No. 235-10.)

1           **D. Morris’s Compensation is Not Recoverable**

2           ChromaDex now seeks a portion of Morris’s compensation while at  
3 ChromaDex (\$77,000) and apparently all of Morris’s compensation for a substantial  
4 portion of his time at Elysium, on a theory of breach of fiduciary duty, or possibly on  
5 a theory of breach of contract, but not on a theory of misappropriation of trade secrets.  
6 (ChromaDex Br. at 11, 12 n.12.) Putting aside whether ChromaDex can prove a  
7 breach of fiduciary duty or contract (which it cannot), ChromaDex offers no support  
8 for its novel legal theory that it is entitled to the disgorgement of a “disloyal” former  
9 employee’s salary from the employee’s subsequent employer. Instead, ChromaDex  
10 improperly characterizes Morris’s compensation while employed by Elysium as a  
11 “bribe” or “secret profit.” (ChromaDex Br. at 12.)

12           ChromaDex’s theory is not supported by its cases. *Cf. Rutherford v. Owens-*  
13 *Illinois, Inc.*, 16 Cal. 4th 953 (1997) (unjust enrichment case concerning asbestos and  
14 causation; does not address salary from subsequent employer); *County of San*  
15 *Bernardino v. Walsh*, 158 Cal. App. 4th 533, 543, (2007), *as modified* (Jan. 28, 2008)  
16 (county officials receiving bribes *while employed by the county* were therefore  
17 making “secret profit”); *see also Edwards v. Arthur Andersen LLP*, 44 Cal.4th 937,  
18 946 (2008) (“The law [on restrictive employment covenants] protects Californians  
19 and ensures that every citizen shall retain the right to pursue any lawful employment  
20 and enterprise of their choice . . . It protects the important legal right of persons to  
21 engage in businesses and occupations of their choosing”) (citations and internal  
22 quotation marks omitted). Morris, however, was not compensated by Elysium while  
23 he was still employed by ChromaDex, he conducted no “transactions” from which  
24 he profited, his employment compensation cannot be fairly characterized as a “secret  
25 profit,” and the ultimate source of his employment compensation certainly was not  
26 ChromaDex. He received his employment compensation from Elysium *after* he  
27 ceased to be a fiduciary to ChromaDex (if he ever was), and ChromaDex has no  
28 entitlement to it.

1           **E. “Alternative Damages”**

2           ChromaDex states that it “does not presently intend to pursue at trial (but  
3 could)” its claims for Elysium’s profits or its lost profits. (ChromaDex Br. at 2.) It  
4 appears to offer a *quid pro quo* to the Court: It will not raise those damages claims  
5 “[i]f the Court finds that the [newly limited] damages may go to the jury.”  
6 (ChromaDex Br. at 13.) The Court’s Order to ChromaDex to support its claims for  
7 those damages with evidence and legal theory is not a negotiation. If ChromaDex  
8 cannot substantiate these claims, as ChromaDex acknowledges by essentially  
9 abandoning them, they cannot and should not proceed to a jury.

10           Regardless, ChromaDex’s “alternative damages” are baseless. As to  
11 Elysium’s profits, ChromaDex fails to address the utter lack of evidence that Elysium  
12 used any ChromaDex trade secret to obtain financing or to manufacture its alternate  
13 source of NR. (ChromaDex Br. at 13-18.) As explained in Defendants’ opening  
14 supplemental brief, the information on which ChromaDex alleges Elysium partially  
15 relied to raise financing—the inventory of another ChromaDex customer—*was not*  
16 *a trade secret*, as that information came directly from the customer in question.  
17 (Defendants’ Br. at 8.) With respect to ChromaDex’s allegations regarding  
18 alternative salts and Elysium’s new source of NR, Defendants have already explained  
19 why that theory fails—the salt used by ChromaDex was not a trade secret.  
20 (Defendants’ Br. at 9-10.) And, of course, ChromaDex still fails to cite a single piece  
21 of evidence showing that any investor relied on any alleged trade secret when making  
22 the decision to invest. As to ChromaDex’s “lost profits,” ChromaDex appears to  
23 abandon its expert’s claim of \$25.5 million, and now seeks \$7.6 million allegedly  
24 based on Elysium’s minimum purchase obligations (ChromaDex Br. at 18-19).  
25 Elysium, however, met the 2016 minimum purchase requirement under the NR  
26 Supply Agreement (ECF No. 153-4 at 751 ECF Nos. 235-07, 243-06, 243-07, 244-  
27 03), and thereafter ChromaDex made the decision to eliminate Elysium as a customer  
28 and terminated the contract (and thus precluded Elysium from making additional

1 purchases). (Defendants’ Br. at 11.)

2 **II. CHROMADEx IS NOT ENTITLED TO DISMISSAL AS A MATTER**  
3 **OF LAW OF ELYSIUM’S PATENT MISUSE CLAIM**

4 ChromaDex concedes that it bears the burden of showing that it has purged its  
5 patent misuse. (ChromaDex Br. at 23.) This means ChromaDex must prove that the  
6 misuse has been fully abandoned and that the effects of the misuse have been fully  
7 dissipated. *B.B. Chem. Co. v. Ellis*, 314 U.S. 495, 498 (1942). As shown in Elysium’s  
8 opening supplemental brief, ample evidence demonstrates that ChromaDex continues  
9 to exploit and profit from the effects of its misuse.

10 This Court’s order directed the parties to brief the narrow question of what  
11 remedies are available to Elysium in light of ChromaDex’s allegation that it has  
12 purged the misuse. (October 9 Order.) ChromaDex’s opposition largely ignores that  
13 question and instead rehashes its arguments as to the merits of the underlying misuse  
14 claim.<sup>9</sup> ChromaDex does not deny that Elysium continues to assert the insufficiency  
15 of ChromaDex’s alleged purge.

16 ChromaDex’s only argument directed to the question posed by the Court is to  
17 insist, as a matter of law, that its patent misuse has been purged on the ground that  
18 ChromaDex “terminated the challenged provisions nearly two-and-a-half years ago.”  
19 (ChromaDex Br. at 24.)<sup>10</sup> But a party asserting purge cannot “simply take[] refuge in  
20 the general tendency of time to heal old wounds.” *Koratron Co. v. Lion Unif., Inc.*,

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22 <sup>9</sup> There is no basis to ChromaDex’s complaint that the mere existence of the patent  
23 misuse claim results in an “indefinite delay” and “a daily running fine... on  
24 ChromaDex.” This Court will schedule a bench trial on patent misuse in January,  
25 hardly an indefinite delay. As for the “running fine,” should ChromaDex prevail on  
26 patent misuse here and prove in Delaware that its patents are valid and infringed, it  
27 will be entitled to damages. Notably, ChromaDex waited for nearly a year to bring  
28 its infringement claim in Delaware after assuring this Court it had no intention of  
suing for infringement and it did not seek preliminary injunctive relief.

<sup>10</sup> In a footnote, ChromaDex states that it “does not concede that the patent misuse  
doctrine allows for a stand-alone declaratory judgment claim.” (ChromaDex Br. at  
21.) But this Court already rejected that argument. (ECF No. 44 at 16-18.) Any  
doubt on that score has been removed now that ChromaDex has sued Elysium for  
infringement.



1 409 F. Supp. 1019, 1028 (N.D. Cal. 1976). ChromaDex’s bald assertion that all effects  
2 of the misuse have dissipated cannot be accepted as true on summary judgment, when  
3 Elysium has presented expert testimony and documentary evidence showing the many  
4 ways in which ChromaDex continues to exploit the NIAGEN® mark after having  
5 strengthened it unlawfully through patent misuse. Conceding the existence of factual  
6 disputes as to the sufficiency of its alleged purge, ChromaDex did not even move for  
7 summary judgment on this issue.

8 ChromaDex’s remaining arguments go to the merits, rather than to remedy, and  
9 are equally unavailing. ChromaDex again argues that there could be no tie due to a  
10 purported lack of evidence that the tie was “coerced.” As Elysium demonstrated in  
11 its opposition to ChromaDex’s summary judgment motion, this argument fails. (*See*  
12 *ECF No. 296 at 9-14.*) Under the case law, there is no requirement to prove that a tie  
13 was “coerced” where, as here, the tie is expressly set forth in a contract. *Id.* at 10-11.  
14 In addition, even if proof of coercion were needed, there is ample evidence to raise an  
15 issue of fact as to whether ChromaDex used its patent and market power to coerce  
16 customers’ agreement to the trademark use requirement. (*Id.* at 11-14.)<sup>11</sup>

17 ChromaDex’s next argument—that there were no anticompetitive effects from  
18 its misuse—is premised on the fallacious claim that this is what patent misuse seeks  
19 to prevent. However, the Supreme Court long-ago explained that the “patent  
20 monopoly is not enlarged by reason of the fact that” the challenged conduct was a  
21 “preference[]” of customers or “convenient” to the patentee. *B.B. Chem. Co.*, 314  
22 U.S. at 498. More recently, the Supreme Court reaffirmed that “[t]he patent laws—  
23 unlike the Sherman Act—***do not aim to maximize competition . . .***” *Kimble v. Marvel*  
24 *Entm’t., LLC*, 135 S. Ct. 2401, 2413 (2015) (emphasis added). Rather, the patent

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26 <sup>11</sup> ChromaDex argues that because the “sale of NR exhausted all rights in the patent”  
27 there was no license and no misuse. (ChromaDex Br. at 22.) This is nonsense. “[I]t  
28 is fundamental that sale of a patented article by the patentee . . . carries with it an  
implied license.” *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476,  
484 (1964). In any event, “condition[ing] . . . the sale of the patented product” is a  
form of misuse. 35 U.S.C. § 271(d)(5).

1 misuse doctrine is designed to ensure that “all patents, and all benefits from them,  
2 must end.” *Id.* at 2413. In *Kimble*, Marvel agreed to pay a 3% royalty, with no end  
3 date, for a license to Kimble’s patent, thus imposing a burden on post-expiration use  
4 of the patent. *Id.* at 2406. Kimble argued that this was economically efficient and  
5 procompetitive. The Supreme Court declined Kimble’s invitation to balance benefits  
6 and harms to competition to justify this extension of patent rights into the post-  
7 expiration period. *Id.* at 2413 and 2408-09. In particular, the Court rejected the use  
8 of an antitrust “rule of reason” analysis that balances pro- and anti-competitive effects,  
9 explaining that this would result in an “elaborate inquiry [that] produces notoriously  
10 high litigation costs and unpredictable results.” *Id.* at 2411. Instead, it held that  
11 because “patent (not antitrust) policy” proscribes attempts to extend the scope of a  
12 patent, the parties’ agreement was unenforceable as patent misuse, “utterly regardless  
13 of a demonstrable effect on competition.” *Id.* 2413.

14 ChromaDex’s argument that proof of anticompetitive effect is required to  
15 establish patent misuse thus is contrary to controlling Supreme Court precedent.<sup>12</sup> For  
16 similar reasons, ChromaDex’s unsupported assertion that harm from the misuse must  
17 be to “consumers (as opposed to competitors)” also is incorrect. There is nothing in  
18 patent misuse doctrine that limits its application to improper extensions of patent  
19 rights directly affecting consumers. Indeed, in *Kimble*, Marvel (a division of Disney  
20 responsible for mega-blockbuster movies like *The Avengers*) was relieved from  
21 contractual obligations it owed to an individual inventor because of his patent misuse.  
22 The relevant inquiry is the effect of the challenged conduct on expanding rights  
23 beyond the scope of the patent. Here, the evidence shows that ChromaDex unlawfully  
24 expanded its patent monopoly through NR supply agreements that required customers  
25 to invest in the NIAGEN trademark, allowing ChromaDex to exploit the added value  
26

27 <sup>12</sup> ChromaDex’s reliance on *Princo Corp. v. Int’l Trade Comm’n*, 616 F.3d 1318,  
28 1328 (Fed. Cir. 2010) is misplaced. *Princo* predated the Supreme Court’s *Kimble*  
decision, and *Princo*’s dicta referencing anticompetitive effect is no longer good law  
after *Kimble*.

1 of the mark not only today but into the future, even after its NR patents expire or are  
2 found invalid. *Cf. Ansul Co. v. Uniroyal, Inc.*, 306 F. Supp. 541, 560 (S.D.N.Y. 1969)  
3 (no purgation where patentee “continue[d] to reap the harvest of” its misuse), *aff’d in*  
4 *relevant part*, 448 F.2d 872 (2nd Cir. 1971).

5 ChromaDex did not seek summary judgment on anticompetitive effects, and for  
6 good reason. Even if proof of anticompetitive effect were required, there are disputed  
7 issues of fact. Elysium’s evidence shows that ChromaDex’s coupling of its patent and  
8 trademark rights allowed it to use patent rights to strengthen the NIAGEN brand and  
9 increase the distinctiveness of its product, at the expense of healthy competition.  
10 Indeed, ChromaDex recognized it caused its customers to make a “substantial  
11 investment” in the NIAGEN brand.<sup>13</sup> (SAMF ¶ 29.)<sup>14</sup> As explained by Elysium’s  
12 expert economist, Dr. Iain Cockburn, this decreased brand competition among NR  
13 products sold to consumers and reduced consumer choice. (SAMF ¶¶ 23-28;  
14 Cockburn Rpt. ¶ 139.) In fact, ChromaDex’s own documents recognize that its  
15 “NIAGEN ingredient TM strategy strengthens the overall NR business...” because it  
16 “[p]rovides differentiation for CDX [ChromaDex] if/when NR competition arrives.”  
17 (SAMF ¶ 28.) ChromaDex’s continuing conduct, including statements on its website  
18 that customers should “Look for ‘NIAGEN®’ on the label” to determine if an NR  
19 product is “authentic, safe, & effective” (SAMF ¶ 35) amply demonstrates that  
20 anticompetitive effects persist.

21 ChromaDex also is incorrect to suggest that for it to overcome patent misuse, it  
22 need only purge the anticompetitive effects of its misuse. Purgation requires that *all*

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24 <sup>13</sup> ChromaDex’s reliance on *White Cap Co. v. Owns-Illinois Glass Co.* is misplaced  
25 because in that case there was no evidence that the objectionable provision affected  
26 the behavior of the patentee’s customers. 203 F.2d 694, 698 (6<sup>th</sup> Cir. 1953). Similarly  
27 unhelpful to ChromaDex is *Preformed Line Products Co. v. Fanner Mfg. Co.* in  
28 which the court explained that discontinuance of the challenged practice is “only a  
part of the requirement for a purge” and whether and when dissipation occurred was  
an issue of fact for the trial court. 328 F.2d 265, 279 (6<sup>th</sup> Cir. 1964).

<sup>14</sup> References to “SAMF” refer to Elysium’s Statement of Additional Material Facts  
previously filed as part of ECF No. 318-16. References to “Cockburn Rpt.” are to the  
expert report of Dr. Iain M. Cockburn, filed as ECF No. 318-15.

1 consequences of the misuse be dissipated, not just the anticompetitive ones. *See B.B.*  
2 *Chem. Co.*, 314 U.S. at 498.<sup>15</sup> Simply put, a patentee cannot enjoy the fruits of its  
3 misuse, such as a strengthened market or financial position, and still enforce its patent.

4 ChromaDex argues that because misuse does not permanently render a patent  
5 unenforceable, Elysium is not entitled to declaratory relief. This is a straw man.  
6 Elysium is seeking a declaration that ChromaDex’s patent rights are *presently*  
7 unenforceable and that the misuse has not yet been purged. Elysium is not seeking a  
8 declaration that declares the patents are permanently unenforceable, even if, for  
9 example, ChromaDex were to abandon the use of its NIAGEN trademark.  
10 ChromaDex’s arguments seek to divert the Court’s attention from the relief Elysium  
11 actually seeks. On the question raised by the Court—whether ChromaDex’s patent  
12 misuse has been purged as of today—there are issues of fact that must be tried.

13 Finally, with respect to restitution, ChromaDex does not dispute that Elysium  
14 is entitled to such relief. ChromaDex likewise does not deny that it has not repaid  
15 any of the royalties Elysium was wrongfully forced to pay to it. Accordingly, as this  
16 Court already has found, Elysium is entitled to seek restitution under governing Ninth  
17 Circuit law. (ECF No. 73 at 8-9.) Indeed, the fact that ChromaDex has not repaid  
18 Elysium by itself is enough for the Court to conclude that ChromaDex’s alleged  
19 purge has not occurred and that the patents are, and remain, unenforceable.

### 20 **III. CONCLUSION**

21 For the foregoing reasons, the Court should grant Elysium’s motion for  
22 summary judgment with respect to ChromaDex’s trade secret claims and schedule  
23 trial on Elysium’s patent misuse counterclaim.

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26 <sup>15</sup> ChromaDex’s reliance on *Gypsum Co. v. Nat’l Gypsum Co.*, 352 U.S. 457, 465  
27 (1957) is misplaced. Contrary to ChromaDex’s parenthetical, the word  
28 “anticompetitive” is found nowhere in that case. In any event the *Gypsum* court  
reversed summary judgment of no purgation, finding that the issue “involves  
essentially a question of fact.” *Id.* That scarcely supports ChromaDex’s argument  
that this Court should decide purgation as a matter of law.

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Respectfully submitted,

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