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**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

**(WESTERN DIVISION)**

ChromaDex, Inc.,

Plaintiff,

v.

Elysium Health, Inc. and Mark Morris,

Defendants.

Elysium Health, Inc.,

Counterclaimant,

v.

ChromaDex, Inc.,

Counter-Defendant.

Case No. SACV 16-02277-CJC(DFMx)

**CHROMADEX, INC.'S OPPOSITION TO ELYSIUM HEALTH, INC.'S AND MARK MORRIS'S MOTION TO DISMISS THE SIXTH, SEVENTH, AND EIGHTH CLAIMS OF CHROMADEX'S FIFTH AMENDED COMPLAINT**

**Date:** February 11, 2019
**Time:** 1:30 p.m.
**Courtroom:** 7C
**Judge:** Hon. Cormac J. Carney

Discovery Cut-Off: April 5, 2019
Pretrial Conference: July 1, 2019
Trial: July 9, 2019

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## I. INTRODUCTION

Defendants Elysium Health, Inc. ("Elysium") and Mark Morris (collectively, "Defendants") improperly seek dismissal of the sixth, seventh, and eighth claims of the Fifth Amended Complaint ("FAC"). Defendants' Motion to Dismiss ("the Motion") ignores controlling authority on pleading contract formation, contorts trade secret law beyond recognition, and misconstrues key factual allegations in the FAC. The Court should deny the Motion.

*First*, Defendants move to dismiss the sixth cause of action; namely, that Morris breached the confidentiality agreement (the "July Confidentiality Agreement") that he willingly signed before he left his job at Plaintiff ChromaDex, Inc. ("ChromaDex"), at the same time he was absconding with ChromaDex documents and information, and only days before he officially began working for Elysium. Defendants do not take issue with the contents of the contract or assert the FAC fails to allege Morris breached it, but instead narrowly argue only that "ChromaDex does not (and cannot) allege the requisite consideration." (Mot. at 1.) Defendants are wrong, for several reasons. Under California law, ChromaDex is not required to allege consideration for the July Confidentiality Agreement because the Court presumes consideration for a written agreement. Cal Civ. Code § 1614; *Henke v. Eureka Endowment Ass'n*, 100 Cal. 429, 432-33 (1893). Even if ChromaDex were required to allege consideration, it does: Morris had access to ChromaDex confidential information after he signed the contract and, based on his agreement that he would protect that information, ChromaDex took no further steps against Morris to ensure his fidelity. Lastly, even if consideration were not adequately alleged (and it is), Morris should be estopped from arguing his promises were "nothing but gratuitous," (Mot. at 1), because he knowingly and voluntarily signed the July Confidentiality Agreement under an affirmative duty to be truthful. ChromaDex relied on his promise to its detriment.

*Second*, Defendants move to dismiss ChromaDex's seventh and eighth causes of action, which allege that (1) Morris breached his fiduciary duty to ChromaDex by

acting as Elysium's agent and lying to ChromaDex while still an executive there and (2) Elysium aided and abetted Morris in his breach. Defendants do not contest that the FAC plausibly alleges that Morris had a fiduciary duty to ChromaDex and breached it. Defendants also appear to admit the sufficiency of the allegations that Elysium encouraged and directed Morris's misconduct. Defendants could hardly suggest otherwise, given these claims are based on smoking-gun admissions found in contemporaneous documents. Instead, Defendants suggest only one thin reed for dismissal: that the California Uniform Trade Secrets Act ("CUTSA") preempts the claims. Not so. Defendants' actions, as alleged in the FAC and described below, cover far more than merely the theft of ChromaDex documents. Document after document produced by Elysium in this case reveal Defendants' shocking efforts to undermine and destroy ChromaDex, efforts that in many instances were successful because of Morris's willingness to deceive and betray his employer. Because the breach of fiduciary duty and aiding and abetting claims arise from Defendants' egregious behavior, and not the theft of confidential documents, they are not preempted. The Court should decline Defendants' invitation to expand CUTSA preemption beyond the boundaries established by well-settled case law and by this Court in its decision granting in part and denying in part Elysium's previous motion to dismiss.

The Court should deny Defendants' Motion in its entirety.

## II. RELEVANT BACKGROUND

### A. The Parties.

ChromaDex develops and sells ingredients to customers in the "dietary supplement, food, beverage, skin care, and pharmaceutical markets." (FAC ¶ 13.) In the past, ChromaDex supplied Elysium with nicotinamide riboside ("NR") and pterostilbene, which are sold under the brand names "NIAGEN" and "pTeroPure," respectively. (*Id.* ¶ 2.) NR and pterostilbene are the two fundamental active ingredients in Elysium's only consumer product, Basis. (*Id.*) ChromaDex was the sole United States commercial supplier of NR, until Elysium developed an alternate source of NR

by stealing and misappropriating ChromaDex's proprietary information. (*Id.* ¶¶ 7, 35.) ChromaDex sued Elysium in December 2016 to recover approximately $3 million that Elysium owes for ingredients it ordered on June 30, 2016, ("the June 30 Purchase Orders"), ingredients which Elysium sold to consumers and from which it profited, but for which it has never paid ChromaDex. (*Id.* ¶¶ 86, 97.) Discovery in this case has revealed that Elysium's failure to honor its $3 million obligation was only part of its overarching plan to displace and destroy ChromaDex, all with the aim of controlling the market for NR. (*Id.* ¶ 48.)

Mark Morris, ChromaDex's former Vice President of Business Development, was instrumental to Elysium's plan. Morris began employment with ChromaDex in 2007 as a Technical Sales Representative. (*Id.* ¶ 16.) After a short break, Morris returned to ChromaDex on January 13, 2011, and was later promoted to the position of Director of Ingredient Sales. (*Id.*) On November 25, 2013, Morris was promoted to Vice President of Sales and Marketing and assumed a role in the management of ChromaDex, obligating him to act in ChromaDex's best interests as a fiduciary. (*Id.* ¶¶ 17, 18, 27.) For example, Morris "oversaw the duties of several employees, helped determine employee compensation, had input in other personnel decisions," and "had input in ChromaDex's strategic decisions regarding sales and marketing." (*Id.* ¶ 18.) Morris executed a confidentiality agreement with ChromaDex on February 26, 2016, as a requirement of his continued employment. (*Id.* ¶ 19, Ex. A.) Morris was further promoted in 2016 to Vice President of Business Development. (FAC ¶ 22.) Morris resigned his position at ChromaDex on July 15, 2016. (*Id.* ¶ 23.) Morris began his official employment at Elysium the very next day. (*Id.* ¶ 73.)

### B. Morris, Acting as Elysium's Agent, Enables Elysium to Steal $3 Million in Product from ChromaDex.

Elysium began recruiting Morris in April 2016 while he was still employed by ChromaDex. (*Id.* ¶ 38.) On May 29, 2016, Morris discussed his potential employment at Elysium with Dan Alminana, Elysium's COO, and (as revealed in discovery) Morris

texted Alminana confidential information about the price paid for NR by another ChromaDex customer that was also one of Elysium's competitors. (*Id.* ¶ 192.) That pricing information is a ChromaDex trade secret. (*Id.*)

Morris also pledged his loyalty to Elysium that day, violating all of his duties to ChromaDex. Specifically, Elysium made, and Morris later accepted, a "firm offer of employment to Morris in exchange for his commitment to act as Elysium's inside agent before he terminated his employment with ChromaDex." (*Id.* ¶ 42.) "With a ChromaDex insider in its pocket, Elysium saw an opportunity to execute on its long-held desire to take ChromaDex out of the equation, destroy the competition, and execute its campaign to own NR." (*Id.*)

As part of that strategy, "Elysium began planning to order a 12-month supply of NIAGEN and pTeroPure from ChromaDex" and called upon Morris to help. (*Id.* ¶¶ 47, 48.) Defendants agreed that Morris would ensure the success of Elysium's scheme "by abusing the trust ChromaDex's management and shareholders placed in him to manipulate ChromaDex into accepting the extraordinarily large purchase orders Elysium planned to place." (*Id.* ¶ 48.) On June 28, 2018, Elysium ordered NIAGEN and pTeroPure from ChromaDex in quantities "more than double the sum of all Elysium's prior orders combined" at "less than half the parties' agreed price" ("June 28 Purchase Orders"). (*Id.* ¶ 50.) "After Elysium again showed an unwillingness to engage with ChromaDex's senior management to discuss the June 28 Purchase Orders, Morris helped schedule a call between ChromaDex and Elysium" for June 30, 2016 (the "June 30 Call"). (*Id.* ¶¶ 53, 54.) On the June 30 Call, Eric Marcotulli, Elysium's CEO, and Alminana stated that the June 28 Purchase Orders were much larger than Elysium's previous orders because Elysium was ramping up its sales of Basis. (*Id.* ¶ 55.) They further represented that Elysium "intended to be a good business partner to ChromaDex" and that it expected to place "additional large orders" in the remaining months of 2016. (*Id.* ¶ 55.) Morris knew these statements were false, but remained silent. (*Id.* ¶ 58.) After the June 30 Call, Elysium resubmitted the orders in slightly

smaller quantities and with a discounted price for NIAGEN. (*Id.* ¶¶ 55-57.)

As revealed in discovery thus far, Morris—still a ChromaDex officer—encouraged ChromaDex's management to accept Elysium's orders despite knowing that doing so would harm ChromaDex in several ways. First, he knew that "Elysium did not intend to pay for the orders," but did not inform ChromaDex of that fact. (*Id.* ¶ 58.) Second, Morris was aware that Elysium's promise to place further large orders in the near future was false because he knew that Elysium expected the stockpile to last well into 2017; he said nothing to ChromaDex. (*Id.*) Third, Morris knew that Elysium intended to rely on its stockpile while finding an alternative manufacturer of NR to compete directly with ChromaDex, a fact that he did not disclose. (*Id.*) And because of Morris's intentional deceit, ChromaDex did not know that he was working on behalf of Elysium; ChromaDex thus wrongly believed that Morris was acting in good faith to close the sale of the June 30 Purchase Orders. (*Id.* ¶ 73.) "[I]n reliance on the representations [Elysium] made on the June 30 Call and Morris's omissions, ChromaDex accepted the June 30 Purchase Orders." (*Id.* ¶ 59.) To this day, Elysium has not paid for those shipments. (*Id.* ¶¶ 68-69.)

**C. Morris Lies to and Competes with ChromaDex While Still Employed.**

Between the time Morris transferred his loyalty to Elysium and his termination from ChromaDex on July 15, 2016, he further acted as Elysium's agent by competing with ChromaDex and by failing to inform ChromaDex of Elysium's competitive acts. First, he acted on Elysium's behalf to help recruit ChromaDex's Director of Scientific Affairs, Ryan Dellinger. (*Id.* ¶¶ 71, 125.) Dellinger quit on August 10, 2016, the very same day that Elysium notified ChromaDex it would not pay for the June 30 Purchase Orders. (*Id.* ¶¶ 124-25.) Second, Morris knew of "Elysium's plan to compete with ChromaDex in the manufacture of NR and synthetic pterostilbene" and, on Elysium's orders, kept that plan "secret from ChromaDex." (*Id.* ¶ 49.) "Morris knew that such competition would harm ChromaDex, which has certain patent rights to both ingredients," but failed to warn ChromaDex of the threat posed by that competition.

(*Id.*) Third, using his personal email account, Morris drafted and sent to "Elysium a list of manufacturers who could potentially produce NR for Elysium," an act that directly supported Elysium's efforts to compete with ChromaDex. (*Id.* ¶ 101.) Lastly, Morris knew that Elysium was conducting "outreach to ChromaDex's contractual partners in an effort to undermine ChromaDex," but failed to warn ChromaDex of the danger to its key business relationships. (*Id.* ¶ 240.)

**D. Morris Signs the July Confidentiality Agreement.**

Once Elysium was secure in its possession of large ingredient stockpiles, it directed Morris to quit and begin official employment at Elysium. (*Id.* ¶ 6.) The same day that Morris resigned, but before his termination was complete, he affirmed his commitment to safeguard ChromaDex's trade secrets and other confidential information by willingly signing the July Confidentiality Agreement, a document with which he was intimately familiar by virtue of his management position. (*Id.*, Ex. B.) Among other things, by signing the contract, Morris agreed that "the industry that [ChromaDex] competes in is extremely competitive, and that [ChromaDex] expends substantial monies and other resources to develop and maintain its technical information as well as its customer relationships," and that "it is the policy of [ChromaDex] to ensure that its operations, activities, technical information, financial condition, business affairs and customer information are kept confidential." (FAC Ex. B at 53.) For that reason, Morris committed himself to guard ChromaDex's trade secrets and confidential information, use it only in connection with his work at ChromaDex, not share it with any other person, and return it to ChromaDex at his termination. (*Id.* at 54-55.)

Morris also acknowledged that ChromaDex's confidentiality policies "are necessary and reasonable in scope and duration and are a material inducement to [ChromaDex] to enter into the employment relationship with" him, and agreed that "the foregoing recitals and the provisions" of the agreement constituted consideration, along with "other good and valuable consideration, the receipt and sufficiency of which

are mutually acknowledged." (*Id.* at 53.) Morris affirmed that "[i]ncluded in the mutual consideration acknowledged by the parties hereto, but without limitation, are an offer of employment with [ChromaDex] in an at-will employment relationship and Employee's exposure to [ChromaDex's] proprietary and confidential business information as its employee, and Employee's service to [ChromaDex], acting in good faith and in [ChromaDex's] best interests." (*Id.* at 54.) Morris also represented that he "knowingly and voluntarily enter[ed]" the agreement, "fully underst[ood] all its provisions and terms and [] had the opportunity (whether exercised or not) to consult with legal counsel regarding it." (*Id.* at 60.) After Morris executed the July Confidentiality Agreement, ChromaDex "provid[ed] Morris with employment and benefits." (FAC ¶ 226.)

On July 15, 2016, around the same time he signed the July Confidentiality Agreement, "Morris participated in an exit interview before terminating his employment with ChromaDex," at which Morris falsely represented that "he had returned all ChromaDex confidential information in his possession." (*Id.* ¶¶ 72, 74.) When asked what his future plans were, Morris lied in response by saying "that he did not know what his next steps would be," when in fact he was already working for Elysium as its agent inside ChromaDex and intended to begin official employment with Elysium immediately after he resigned. (*Id.* ¶ 73.) In reliance on Morris's oral representations, his affirmation of his contractual duties of confidentiality, and his duty as a fiduciary—and unaware of his egregious violations of all three—ChromaDex allowed Morris to leave without further investigation of his conduct over the previous two months. ChromaDex relied on his false representations, "in part because they were made by Morris as a departing ChromaDex manager, and did not take further action to protect its information." (*Id.* ¶ 26.)

**E. Morris's Final Acts of Deception.**

Unbeknownst to ChromaDex, Morris began work immediately at Elysium after he terminated his employment at ChromaDex. (*Id.* ¶ 70.) On his first day at Elysium,

Morris gave Elysium a "spreadsheet containing highly-valued ChromaDex trade secret information: the 'Ingredient Sales Spreadsheet.'" (*Id.* ¶ 103.) "The spreadsheet contains the detailed purchasing history of every customer who purchased any ingredient from ChromaDex—including customer names, prices, volumes, and dates of purchases." (*Id.*) It also "contains the detailed purchasing histories of all [of Elysium's] closest competitors; companies selling NR or chemically synthesized pterostilbene." (*Id.*) Morris retained several other confidential ChromaDex documents and used them for Elysium's purposes in breach of his contractual obligations to ChromaDex. (*Id.* ¶¶ 214-37.) He also helped Elysium use confidential ChromaDex documents it had received directly from ChromaDex in breach of Elysium's contractual obligations of confidentiality to ChromaDex. (*Id.* ¶¶ 155-66, 172-88.)

Elysium continued to conceal its employment of Morris even after he began work as Elysium's "Head of Scientific Technology." (*Id.* ¶¶ 106, 248.) Elysium believed it could ensure the success of its alternate supply of NR by keeping ChromaDex in the dark about its scheme. To that end, Marcotulli "affirmatively misrepresented [his] knowledge of Morris's departure from ChromaDex after Morris had begun employment with Elysium." (*Id.* ¶ 248.) Morris was later promoted by Elysium to Vice President of Research and Development. (*Id.* ¶ 106.)

**F. Defendants' Plot Is Slowly Revealed Through Discovery.**

On December 29, 2016, ChromaDex—yet unaware of the extent of Elysium's plot or Morris's involvement in it—filed suit to recover the $3 million Elysium refused to pay. (Dkt. 1.) In April 2018, after ChromaDex's repeated efforts to obtain proper discovery, Elysium finally produced evidence of Defendants' trade secret misappropriation. ChromaDex thereafter filed a Fourth Amended Complaint. (Dkt. 109.) After the filing of the Fourth Amended Complaint, the Court sustained ChromaDex's claims against Elysium for breach of confidentiality obligations and misappropriation of trade secrets and dismissed ChromaDex's claim for conversion as preempted by CUTSA. (Dkt. 115.)

In May 2019, seventeen months after ChromaDex initiated this action, Elysium produced "new information" concerning "actions taken by Elysium and Mark Morris." (Dkt. 152 at 2.) That information—which Elysium had improperly designated at the highest level of confidentiality so that only ChromaDex's counsel could view them—revealed for the first time the depths of Morris's deception of ChromaDex and his actions as Elysium's agent during his employment, as well as Elysium's direction and encouragement of Morris's misconduct. (*Id.*; *see also, e.g.*, FAC ¶¶ 1, 47-48, 103, 240.) After months of arduous discussions, Elysium finally re-designated the information so that ChromaDex could view the evidence and consider the import of Morris's bad acts and ill will. (*See* Dkt. 152 at 2, 4.)

ChromaDex thereafter prepared the FAC based on the newly designated information, adding Morris as a defendant and new claims against both Defendants. The Court granted ChromaDex's Motion for Leave to Amend on November 27, 2018. (*Id.*) ChromaDex filed the FAC the same day. (Dkt. 153.) The FAC includes five causes of action against Morris: misappropriation of trade secrets under CUTSA and the federal Defend Trade Secrets Act, (FAC ¶ 189-213); breaches of two different confidentiality agreements he executed with ChromaDex, (*id.* ¶¶ 214-37); and breach of fiduciary duty, (*id.* ¶¶ 238-43). The FAC also alleges that Elysium aided and abetted Morris's breach of fiduciary duty. (*Id.* ¶¶ 244-51).

## III. LEGAL STANDARD

On a motion to dismiss, "[a]ll allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). The Court should "construe the complaint liberally and [is] not bound by its formal language." *Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424, 1433 (9th Cir. 1995). A complaint need not "allege 'specific facts' beyond those necessary to state [a] claim and the grounds showing entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Further, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts

is improbable," *id.* at 556, and "should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief," *Sprewell*, 266 F.3d at 988.

## IV. ARGUMENT

### A. The Court Should Sustain ChromaDex's Claim Against Morris for Breach of the July Confidentiality Agreement.

Defendants' first argument is that the sixth cause of action—which alleges that Morris breached the July Confidentiality Agreement—should be dismissed.[1] A breach of contract claim under California law has four elements: "(1) existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." *San Joaquin Gen. Hosp. v. United Healthcare Ins. Co.*, 2017 WL 1093835, at *2 (E.D. Cal. Mar. 23, 2017). Here, Defendants do not assert that the FAC fails to allege ChromaDex's performance, Morris' breach, or damages. Under the first element, a contract exists "if the parties are capable of contracting, they manifest objective consent, the contract has a lawful object, and there is sufficient consideration." *Id.* Defendants do not contest that the FAC alleges Morris and ChromaDex were capable of contracting, they manifested consent, or that the July Confidentiality Agreement had a lawful objective.

Defendants advance only one position: that the July Confidentiality Agreement lacked consideration. (Mot. at 6.) Defendants are incorrect. When a contract exists as a written document, as it does here, sufficient consideration is presumed. Even without that presumption, the FAC sufficiently alleges consideration, the extent of which is a question of fact. In any event, the Court should estop Morris from disclaiming that a valid contract was formed, given that he knowingly and voluntarily signed the July Confidentiality Agreement under a duty of good faith and ChromaDex relied on his promises to its detriment.

[1] Defendants do not seek dismissal of the FAC's fifth cause of action against Morris for breach of a contract he signed on February 26, 2016. (FAC ¶¶ 214-22.)

**1. Consideration Is Presumed for the July Confidentiality Agreement.**

Under California law, "[a] written instrument is presumptive evidence of consideration." Cal Civ. Code § 1614. Where there is a formal written agreement, "[t]he necessity of pleading a consideration for [a] contract is obviated by the fact that it is in writing." *Henke*, 100 Cal. at 433; *see also Belletich v. Belletich*, 40 Cal. App. 2d 732, 735 (1940). A breach of contract claim therefore survives a motion to dismiss for lack of consideration where the plaintiff "sufficiently alleges the existence of a written instrument." *DenimXworks Inc. v. J.L.J., Inc.*, 2010 WL 11596164, at *4 (C.D. Cal. Mar. 4, 2010). The burden of showing a lack of consideration sufficient to support a written agreement lies with the party seeking to invalidate or avoid the agreement all the way through final judgment. Cal. Civ. Code § 1615. A party attempting to rebut the presumption of consideration in section 1614 must present evidence that an agreement lacks consideration. *Signature Fin., LLC v. McClung*, 2017 WL 6940652, at *10 (C.D. Cal. Oct. 6, 2017) (holding there was no genuine dispute of material fact where presumption applied and defendant presented no evidence regarding purported lack of consideration).

The FAC alleges the existence of a written agreement; specifically, it avers that on July 16, 2016, "before [Morris's] termination was completed, Morris and ChromaDex executed the [July Confidentiality Agreement]." (FAC ¶ 23.) The written agreement is attached to the FAC as Exhibit B, and Defendants admit that Morris "signed the document." (Mot. at 8.) Thus, because the FAC "sufficiently alleges the existence of a written instrument, namely, the [July Confidentiality Agreement], its breach of contract claim does not fail for lack of consideration." *DenimXworks Inc.*, 2010 WL 11596164, at *4. No further allegations regarding consideration are necessary to sustain this claim. *Id.*; *see also Ninespot, Inc. v. Jupai Holdings Ltd.*, 2018 WL 3626325, at *7 (D. Del. July 30, 2018) (applying California law and declining to dismiss breach of contract claim for lack of consideration).

Defendants ignore the presumption of consideration in section 1614 and cite no authority for the proposition that a Court may overrule that presumption on a motion to dismiss. Defendants' citation of *Patriot Scientific Corp. v. Korodi*, 504 F. Supp. 2d 952 (S.D. Cal. 2007), is unpersuasive. The Court in *Patriot* did not analyze or even mention the presumption in section 1614. Even if it had, *Patriot* would still be inapplicable because the plaintiff in that case sought to enforce a letter as opposed to a formal agreement. *Id.* at 960. "The term 'written instrument' as it appears in [section 1614], however, does not apply to letters, but only to more formal legal documents." *Michaelian v. State Comp. Ins. Fund*, 50 Cal. App. 4th 1093, 1112 (1996), *as modified* (1996). Unlike the letter in *Patriot*, the July Confidentiality Agreement is a formal legal document, and the presumption of consideration applies. (*See* FAC Ex. B.) The remaining cases Elysium cites are inapt because not one addresses the question of consideration on a motion to dismiss. (*See* Mot. at 8-9 (citing *Jara v. Suprema Meats, Inc.*, 121 Cal. App. 4th 1238 (2004) (post-judgment appeal); *Simmons v. Cal. Inst. of Tech.*, 34 Cal. 2d 264 (1949) (appeal from judgment of the Superior Court of Los Angeles); *Baron v. Quad Three Grp., Inc.*, 2013 WL 3822134, at *1 (Pa. Super. Ct. Jan. 22, 2013) (appeal from order granting motion for summary judgment).).

Defendants have not—and cannot on a motion to dismiss—offer evidence to rebut the presumption of consideration. The Court should thus uphold the claim against Morris for breach of the July Confidentiality Agreement.

**2. ChromaDex Adequately Alleges Consideration.**

Even in the absence of the presumption of consideration, the sixth cause of action is sufficiently pled. The FAC alleges that "ChromaDex fulfilled its obligations under the July Confidentiality Agreement by providing Morris with employment and benefits," (FAC ¶ 226), and further pleads that it provided Morris with at least two other types of consideration: (1) his continued access to ChromaDex confidential information after signing the contract and (2) permitting him to leave without further assurances or steps to ensure that he had returned the ChromaDex confidential

information he possessed.

*First*, the contract states that Morris was provided with "exposure to [ChromaDex's] proprietary and confidential business information as its employee." (*Id.* Ex. B at 54.) Morris signed the July Confidentiality Agreement before his employment with ChromaDex was terminated. (*Id.* ¶ 23 (alleging "***before*** [Morris's] termination was completed, Morris and ChromaDex executed" the July Confidentiality Agreement (emphasis added)).) As alleged, Morris had access to ChromaDex's confidential information between when he signed the contract and his termination. The length of time is immaterial at the motion-to-dismiss stage because the sufficiency of consideration is a question of fact. *Sharman v. Longo*, 249 Cal. App. 2d 948, 952 (1967) (holding "the issue of whether or not there is sufficient consideration to support a contract is a question of fact"); *San Diego City Firefighters, Local 145 v. Bd. of Admin. of San Diego City Emps. Ret. Sys.*, 206 Cal. App. 4th 594, 619 (2012) ("[A]ll the law requires for sufficient consideration is the proverbial 'peppercorn.'"). Even if Morris only had access for a short period, it was more than enough time for Morris to steal ChromaDex documents, which the FAC alleges he did. (FAC ¶ 102.)

Defendants do not argue that Morris's access to ChromaDex's confidential documents after he signed the contract is invalid consideration. Nor could they, given that the July Confidentiality Agreement expressly states that access to ChromaDex's confidential information is part of the consideration, "the receipt and sufficiency of which are mutually acknowledged." (*Id.* Ex. B at 53.) Further, given that Morris used his access to steal ChromaDex confidential documents and provide them to Elysium, it is illogical and disingenuous for Defendants to argue that such access is valueless. Defendants fare no better when they repeatedly and incorrectly suggest that Morris had already terminated his employment before he signed the July Confidentiality Agreement. (*See, e.g.*, Mot. at 1 ("Morris signed that document following his

resignation.")[2] Not true, as discussed above. The Court should discount Defendants' mischaracterization of the FAC because on a motion to dismiss "[a]ll allegations of material fact are taken as true." *Sprewell*, 266 F.3d at 988.

*Second*, ChromaDex alleges that, in return for Morris's promises to keep its information secret and return information within his possession, ChromaDex "did not take further action to protect its information." (FAC ¶ 26.) "Forbearance—the decision not to exercise a right or power—is sufficient consideration to support a contract." *Small v. Fritz Co.*, 30 Cal. 4th 167, 174 (2003); *1617 Westcliff LLC v. Wells Fargo Bank N.A.*, 686 Fed. App'x 411, 413 (9th Cir. 2017) (same). As Morris's employer, ChromaDex had the right and the power to conduct a more thorough investigation into the ChromaDex property and information in Morris's possession. Had Morris refused to execute the July Confidentiality Agreement, ChromaDex (as alleged) would have investigated and taken further action to ensure that he returned all of its confidential information. But Morris signed the contract willingly and assured ChromaDex that he would abide by it, and ChromaDex correspondingly declined to take additional steps to protect its information. The extent of ChromaDex's rights in this regard and the value of its forbearance to Morris are questions of fact and cannot undermine a breach-of-contract claim on a motion to dismiss. *Sharman*, 249 Cal. App. 2d at 952. For those reasons, ChromaDex has adequately alleged the existence of consideration.

**3. Morris Should Be Estopped from Arguing That the July Confidentiality Agreement Lacks Consideration.**

Apart from the presumption of consideration and the FAC's allegations of consideration, the law also forestalls Morris's attempt to contend that the July Confidentiality Agreement was invalid. Under California law, "[w]henever a party has,

[2] *See also* Mot. at 3 ("Following his resignation, ChromaDex on that day conducted an exit interview with Morris"), 5 ("document he signed after he had already resigned"), 7 ("the [July Confidentiality] Agreement was signed after Morris had already tendered his resignation"), 8 ("Having already resigned by the time he signed the document"), 9 ("Morris signed the document after he resigned"), 11 n.2 ("By the time ChromaDex conducted its exit interview with Morris, he had no duty to breach").

by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it." Cal. Evid. Code § 623; *Moore v. State Bd. of Control*, 112 Cal. App. 4th 371, 384 (2003) (same). "[A] party's silence . . . will work an estoppel if, under the circumstances, he has a duty to speak." *Headlands Reserve, LLC v. Ctr. for Nat. Lands Mgmt*, 523 F. Supp. 2d 1113, 1130 (C.D. Cal. 2007) (internal quotations omitted and alteration in the original); *Skulnick v. Roberts Express, Inc.*, 2 Cal. App. 4th 884, 891 (1992). A confidential fiduciary relationship gives rise to such a duty, and may form the basis for estoppel by silence. *Moore*, 112 Cal. App. 4th at 385; *Spray, Gould & Bowers v. Associated Int'l Ins. Co.*, 71 Cal. App. 4th 1260, 1268-69 (1999) ("Courts of equity apply in such cases the principles of natural justice, and whenever these require disclosure they raise the duty … to the extent necessary to the protection of the innocent party."). The party asserting estoppel has the burden of proving that the party to be estopped (1) had a duty to speak, (2) was aware of this duty, and (3) remained silent. *Headlands Reserve*, 523 F. Supp. 2d at 1130; *Levin v. Grecian*, 974 F. Supp. 2d 1114, 1133 (N.D. Ill. 2013).

The FAC avers that Morris owed a fiduciary duty to ChromaDex. (FAC ¶ 27.) Morris had an affirmative responsibility to be truthful with ChromaDex, including a duty to speak if he did not intend to be bound by the July Confidentiality Agreement. Despite that duty, Morris never told ChromaDex that he believed the July Confidentiality Agreement was invalid. (*See, e.g.*, *id.* ¶ 74.) Instead, Morris signed the contract and, at the same time, orally (but falsely) assured ChromaDex that he had returned its confidential information. (*Id.* ¶¶ 26, 74, 224.) As part of the contract, Morris affirmed that he "knowingly and voluntarily enter[ed]" it after an "opportunity (whether exercised or not) to consult with legal counsel regarding it." (*Id*. Ex. B at 60.) Those written terms, coupled with Morris's misleading representations, constitute his commitment to ChromaDex that he was executing a valid and enforceable contract. ChromaDex relied on his misrepresentations by declining to take further steps to

protect its valuable confidential information. (*Id.* ¶ 26.)

Morris's lies and omissions to ChromaDex evidence his bad faith. The Court should estop him from arguing that the contract is invalid, especially given that he was already Elysium's agent and actively working to harm ChromaDex. *Skulnick*, 2 Cal. App. 4th at 891; Cal. Evid. Code § 623. The Court should uphold ChromaDex's claim for breach of contract arising from the July Confidentiality Agreement.

### B. The Court Should Sustain ChromaDex's Claim That Morris Breached His Fiduciary Duty to ChromaDex.

Defendants also move to dismiss ChromaDex's claim that Morris breached his fiduciary duty, incorrectly arguing that it is preempted by CUTSA. CUTSA does not apply because the breach of fiduciary duty claim encompasses conduct far broader than, and accordingly different from, that which underlies a claim for the theft of documents and information. Specifically, the breach of fiduciary duty claim alleged against Morris is premised on his misconduct, lies, and acts as Elysium's agent while still employed by ChromaDex. The Court should reject Defendants' effort to conflate that claim with the claims against Defendants for their misappropriation of ChromaDex's trade secrets and theft of ChromaDex documents in violation of their contractual duties of confidentiality.

#### 1. The FAC Alleges a Breach of Fiduciary Duty Claim Based on Morris's Misconduct, Lies, and Acts as Elysium's Agent.

A fiduciary of a company has a broad duty to act, "not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it." *Glob. Med. Sols., Ltd. v. Simon*, 2013 WL 12065418, at *17 (C.D. Cal. Sept. 24, 2013) (internal quotations omitted) (quoting *Bancroft-Whitney Co. v. Glen*, 64 Cal. 2d 327, 345 (1966)); *see also GAB Bus. Servs., Inc. v. Lindsey & Newsom Claim Servs., Inc.*, 83 Cal. App. 4th 409, 420 (2000) (a fiduciary must "put forth his best efforts and advance the position of that

company in every way possible" (internal quotations omitted)), *disapproved of on other grounds by Reeves v. Hanlon*, 33 Cal. 4th 1140 (2004). Thus, a claim for breach of fiduciary duty can arise from any number of different acts that harm a company. For example, a corporate fiduciary has a duty to affirmatively disclose information to a company when "nondisclosure [is] harmful to the corporation." *Bancroft-Whitney*, 64 Cal. 2d at 347. A fiduciary also has "a duty not to compete with [its employer] while still employed by it." *Glob. Med. Sols.*, 2013 WL 12065418, at *18.

ChromaDex alleges that Morris deceived, lied, undermined, and competed with ChromaDex while still employed in an executive leadership position at the company. The numerous instances of his misconduct, from the time he pledged his unconditional loyalty to Elysium to his official resignation from ChromaDex, are more than sufficient to sustain a breach of fiduciary duty claim.

*First*, the FAC alleges that Morris breached his fiduciary duty "by abusing the trust ChromaDex's management and shareholders placed in him" with respect to Elysium's June 2016 "extraordinarily large purchase orders" for NIAGEN and pTeroPure. (FAC ¶ 48.) While Morris encouraged ChromaDex's management to accept the orders on terms favorable to Elysium, ChromaDex's management was ignorant to the fact that, on May 29, 2016, Morris had accepted a firm offer of employment from Elysium "in exchange for his commitment to act as Elysium's inside agent before he terminated his employment with ChromaDex." (*Id.* ¶ 42.) Morris failed to disclose his plans for employment at Elysium—a clear conflict of interest—and even lied to cover up the conflict during his exit interview with ChromaDex. (*Id.* ¶ 73.) Morris further lied about his compliance with company policies during his exit interview, such as the policy requiring he return all ChromaDex information in his possession. (*Id.* ¶ 24, 74.) Morris's deception aimed to persuade ChromaDex that he was leaving on good terms and conceal, for as long as possible, that he was working with Elysium to destroy ChromaDex. Morris's lies violated his duty to act in good faith and protect ChromaDex from harm. *See, e.g., AngioScore, Inc. v. TriReme Med., Inc.*, 2015 WL 4040388, at *20

(N.D. Cal. July 1, 2015) ("Instead of answering AngioScore's queries in good faith and with candor, Konstantino's answers were designed to put AngioScore 'off the trail of inquiry' and disabuse AngioScore of the notion that any fiduciary breach had occurred. The truth was sharply at odds with Konstantino's representations.").

*Second*, the FAC alleges that Morris knowingly encouraged ChromaDex to take action that he knew would harm it, specifically because Morris prompted ChromaDex to fulfill the June 2016 orders even though he knew that "Elysium did not intend to pay for [those] orders." (FAC ¶ 58). Morris also knew that ChromaDex would have trouble demanding payment from Elysium, compounding the harm ChromaDex suffered from his acts as Elysium's inside agent. (*Id.*) Morris was aware that Elysium never intended to place further orders with ChromaDex because Elysium expected that the stockpile it gained would "last for nine months" and it planned to "obtain[] an alternate source of NR" during that time. (*Id.*) Morris was duty-bound to disclose that information to ChromaDex. *Bancroft-Whitney*, 64 Cal. 2d at 347. "To date, Elysium has not paid any sum to ChromaDex for the product Morris's breaches of fiduciary duty enabled it to order, receive, and sell to consumers at a profit." (FAC ¶ 69.)

*Third*, the FAC contains allegations of additional conduct by Morris that violated his fiduciary obligation not to compete with ChromaDex. While a ChromaDex fiduciary, Morris directly competed with ChromaDex by helping Elysium recruit another senior ChromaDex employee, Ryan Dellinger. (*Id.* ¶ 71.) Morris also competed with ChromaDex while still a fiduciary by drafting and sending to Elysium "a list of manufacturers who could potentially produce NR for Elysium." (*Id.* ¶ 101.) ChromaDex was harmed because, among other things, it lost its longtime Director of Scientific Affairs with less than one day's notice to a rival where he is now exerting his efforts to compete with ChromaDex, (*id.* ¶ 125), and because it paid Morris even while he bolstered and worked for a company seeking to develop competing products, (*id.* ¶ 240). Morris's actions aided Elysium at ChromaDex's expense and constitute a breach of his fiduciary duty. *Glob. Med. Sols.*, 2013 WL 12065418, at *18.

*Fourth*, the FAC alleges that Morris failed to disclose his and Elysium's intent to compete with ChromaDex by "develop[ing] competing supplies of NR and pterostilbene." (FAC ¶ 240.) Morris knew that new manufacturers of these ingredients would harm ChromaDex, which has rights to "several patents over the production of NR and synthetic pterostilbene." (*Id.*) Morris also concealed from his employer his knowledge of Elysium's "outreach to ChromaDex's contractual partners in an effort to undermine ChromaDex." (*Id.*) Morris had an affirmative duty to disclose such critical information to ChromaDex. *Bancroft-Whitney*, 64 Cal. 2d at 347.

**2. A Breach of Fiduciary Duty Claim Is Not Preempted by CUTSA if Not Premised on the Theft of Documents or Information.**

Separate from the duty owed by a fiduciary is the legal obligation not to steal trade secrets. In California, CUTSA provides "the exclusive civil remedy" for conduct "based upon misappropriation of a trade secret." *Silvaco Data Sys. v. Intel Corp.*, 184 Cal. App. 4th 210, 237-38 (2010), *disapproved of on other grounds, Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310 (2011); *see also* Cal. Civ. Code § 3426.7(b). "CUTSA serves to preempt all claims premised on the wrongful taking and use of confidential business and proprietary information, even if that information does not meet the statutory definition of a trade secret." (Dkt. 115 at 7.) "[T]he determination of whether a claim is based on trade secret misappropriation is largely factual." *K.C. Multimedia, Inc. v. Bank of Am. Tech. & Operations, Inc.*, 171 Cal. App. 4th 939, 954 (2009). CUTSA does not displace tort claims, which, "although related to a trade secret misappropriation, are independent and based on facts distinct from the facts that support the misappropriation claim." *Angelica Textile Servs., Inc. v. Park*, 220 Cal App. 4th 495, 506 (2013). CUTSA also does not displace contract claims for the wrongful disclosure and use of trade secret or confidential information. Cal. Civ. Code § 3426.7(b). (*See* Dkt. 115 at 8 n.2.)

Applying these principles, a breach of fiduciary duty claim is not preempted by CUTSA when it is premised on alleged conduct broader and different from the taking

of confidential information. For example, in *Robert Half Int'l, Inc. v. Ainsworth*, the court examined five ways in which the plaintiff alleged the defendant breached her fiduciary duty. 68 F. Supp. 3d 1178, 1190 (S.D. Cal. 2014). Among the alleged violations of the duty were allegations that the defendant solicited employees to work for a competitor, failed to use her time and best efforts to advance the business, and organized a coordinated scheme to resign. The court ruled the claim not preempted by CUTSA because none of the breaches "allege[d] the taking or use of an alleged trade secret or confidential or proprietary information," and defendant's "fiduciary role [was not] based on its access to proprietary or confidential information." *Id.*

Other district courts have sustained breach of fiduciary duty claims under CUTSA even when those claims were alleged concurrently with a trade secret misappropriation claim. In *Hullinger v. Anand*, for example, the plaintiff alleged that the defendant had both misappropriated trade secrets and breached a fiduciary duty. 2015 WL 11072169, at *13 (C.D. Cal. Dec. 22, 2015). The court sustained the fiduciary duty claim because it ruled that the supporting allegations were "factually distinct from the alleged misappropriation of trade secrets claim." *Id.* Specifically, the plaintiff alleged "nineteen examples of wrongful conduct," including that the defendant lied for his own benefit and acted against the company's interests. *Id.* Because the court ruled that "[the breach of fiduciary duty] claim does not depend on the existence of a trade secret," the court sustained it. *Id. See also Hiossen, Inc. v. Kim*, 2016 WL 10987365, at *16 (C.D. Cal. Aug. 17, 2016) (holding breach of fiduciary duty claim was not superseded "[t]o the extent th[e] cause of action is instead premised on allegations that [defendant] failed to act in [plaintiff's] best interest"); *Henry Schein, Inc. v. Cook*, 2017 WL 783617, at *3 (N.D. Cal. Mar. 1, 2017) (finding "[t]he allegations in [plaintiff's] breach of fiduciary duty and duty of loyalty claim do not merely restate the same facts as the CUTSA claim" and denying motion to dismiss the claim). California state courts have also held that breach of fiduciary duty claims are not superseded by CUTSA. *See Angelica Textile Servs.*, 220 Cal. App. 4th at 508 (upholding breach of fiduciary duty

claim where it was based on defendant's "wrongful conduct in violating the noncompetition agreement and violating his duty of loyalty").

That authority provides necessary context for the primary case cited by Defendants: *Anokiwave, Inc. v. Rebeiz*, 2018 WL 4407591, at *4 (S.D. Cal. Sept. 17, 2018). There, the court found a breach of fiduciary duty claim preempted by CUTSA only because the defendant allegedly "used his position to receive certain information and then disclosed th[at] information to" a competitor. *Id.* *Anokiwave* stands for the unremarkable proposition that a breach of fiduciary duty claim is preempted only when it is based on the same allegations as those supporting a claim against that person for misappropriation of trade secret or confidential information.

**3. ChromaDex's Breach of Fiduciary Duty Claim Against Morris Is Not Preempted by CUTSA.**

CUTSA does not preempt the breach of fiduciary duty claim against Morris because the FAC alleges he committed far broader and different misconduct than simply theft of documents and information. Defendants attempt to collapse the fiduciary duty claim into a theft of documents claim because they seek to immunize Morris's wrongful conduct. But the fact that the FAC also alleges that Defendants misappropriated ChromaDex's trade secret information and stole documents in violation of certain specific contracts does not render the fiduciary duty claim preempted. CUTSA does not displace claims that, "although related to a trade secret misappropriation, are independent and based on facts distinct from the facts that support the misappropriation claim." *Angelica Textile Servs.*, 220 Cal. App. 4th at 506.

A simple exercise in logic demonstrates how the breach of fiduciary duty claim is different. Stealing trade secrets and confidential documents necessarily involves the flow of confidential information from ChromaDex to Morris and Elysium. In contrast, Morris's breach of fiduciary duty involves an opposite (if interrupted) flow of information: Elysium's orders and encouragement to harm ChromaDex flowed to Morris, after which Morris either acted on those orders or refused to disclose Elysium's

plans to ChromaDex despite his affirmative duty to do so. Morris was perfectly capable of both stealing ChromaDex documents and information for Elysium's benefit *and* breaching his fiduciary duty to ChromaDex, and the FAC alleges that he did both. Defendants may not conflate those separate strands of Morris's unlawful behavior simply to escape liability.

Defendants elide the distinction between breach of fiduciary duty and misappropriation of information. For example, Defendants contend that Morris concealing Defendants' intent to develop a competing supply of NR and pterostilbene is wholly dependent on the ChromaDex documents they stole. (Mot. at 10.) This is incorrect. Morris's lies and omissions do not arise from any stolen information because Defendants planned to develop a competing supply regardless of the ChromaDex documents they took; those documents were merely a "shortcut." (FAC ¶ 101.) ChromaDex was harmed because Morris had an affirmative duty to disclose any information he knew that would harm ChromaDex—such as his knowledge that Elysium planned to compete with ChromaDex and its efforts to infringe ChromaDex's patents—but he did not. The FAC's other allegations are also independent from Morris's theft of information because they arise from his wrongful ***conduct***, including Morris's efforts to persuade ChromaDex to accept the June 30 Purchase Orders; failure to tell ChromaDex that Elysium would not pay for the Orders, but instead planned to stockpile them; efforts to compete directly with ChromaDex while still employed there; lies about his concurrent work for and future job at Elysium; lies to cover up his exit from ChromaDex to avoid suspicion; recruitment of Dellinger; and concealment of Elysium's "outreach to ChromaDex's contractual partners in an effort to undermine ChromaDex." (FAC ¶ 240.) CUTSA does not preempt this claim. *Robert Half Int'l*, 68 F. Supp. 3d at 1190; *Angelica Textile Servs.*, 220 Cal. App. 4th at 506.

Defendants also ignore the difference between misappropriation of confidential information and the unlawful disclosure of such information. When a fiduciary causes harm to his company through the unauthorized disclosure of information, that act

"ha[s] a basis independent of any misappropriation of a trade secret." *Integral Dev. Corp. v. Tolat*, 675 F. App'x 700, 704 (9th Cir. 2017). Such a claim "does not require that the confidential information qualify as a 'trade secret.'" *Id.* And because it is based on the fiduciary's disloyalty to his company, and not on misappropriation, such a claim would not be preempted under CUTSA. *Angelica Textile Servs.*, 220 Cal. App. 4th at 506; *see also Silvaco*, 184 Cal. App. 4th at 236 (holding "the legal consequences of that act are not affected by the status of the information as a trade secret. Indeed it may not, and need not, *be* a trade secret" (emphasis in original)). Therefore, Morris's disclosure of ChromaDex confidential information to Elysium without authorization while he was still employed by ChromaDex is not preempted by CUTSA.

Defendants improperly seek to deploy this Court's order finding ChromaDex's prior conversion claim preempted to shield what discovery has revealed as a wide and varied array of misconduct committed by Morris. (Mot. at 9.) But the Court's decision, by its terms and reasoning, applied only to ChromaDex's claim that its former contractual partner Elysium stole and repurposed specific documents. (Dkt. 115.) The Court should decline Defendants' invitation to expand CUTSA preemption to immunize an individual fiduciary from responsibility for his perfidy.

### C. ChromaDex's Aiding and Abetting Breach of Fiduciary Duty Claim Stands with the Breach of Fiduciary Duty Claim.

Under California law, "[l]iability may [] be imposed on one who aids and abets the commission of an intentional tort if the person [1] knows the other's conduct constitutes a breach of duty and [2] gives substantial assistance or encouragement to the other to so act." *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 846 (1994). Here, the FAC adequately alleges aiding and abetting liability because it avers that "Elysium knew that Morris's acts in furtherance of Elysium's goals and to the detriment of ChromaDex breached Morris's fiduciary duty to ChromaDex." (FAC ¶ 246.) It also alleges that Elysium cheered and supported Morris's acts to harm ChromaDex, offered him employment "in exchange for his commitment to act as

Elysium's inside agent," persuaded him "to lie to ChromaDex about his plans for employment with Elysium," and itself lied to ChromaDex about "its knowledge of Morris's departure from ChromaDex after Morris had begun employment with Elysium." (*Id.* ¶¶ 42, 247).

The only argument offered by Elysium against this claim is that it "'rises and falls with' ChromaDex's breach of fiduciary duty claim against Morris." (Mot. at 12 (internal quotation marks omitted).) As explained above, the claim against Morris is not preempted by CUTSA, and therefore the Court should also sustain ChromaDex's aiding and abetting claim against Elysium.

## V. CONCLUSION

For the foregoing reasons, ChromaDex requests that the Court deny Defendants' Motion. In the event the Court grants any part of the Motion, ChromaDex requests leave to amend. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (holding "[l]eave to amend should be granted 'if it appears at all possible that the plaintiff can correct the defect'" (citation omitted and alteration in original)).

Dated: January 16, 2019

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