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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

(SOUTHERN DIVISION)

ChromaDex, Inc.,

Plaintiff,

v.

Elysium Health, Inc., and Mark Morris

Defendants.

Elysium Health, Inc.,

Counterclaimant,

v.

ChromaDex, Inc.,

Counter-Defendant.

Case No. 8:16-cv-2277-CJC (DFMx)

CHROMADEX, INC.'S OPPOSITION TO ELYSIUM HEALTH INC.'S *EX PARTE* APPLICATION FOR ORDER CLARIFYING SUMMARY JUDGMENT RULING

Judge: Hon. Cormac J. Carney
Courtroom: 9B

Trial: September 21, 2021
Pretrial Conf.: September 13, 2021

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I. INTRODUCTION

Defendants' eleventh-hour *ex parte* application—timed to land just as the parties are finalizing their portions of the pretrial filing due tomorrow—is really a disguised and untimely motion *in limine*. The *ex parte* application seeks exclusion of evidence regarding a claim that the Court left intact in its summary judgment order. The Court should not entertain this request on an expedited basis, especially when the parties will appear in only eleven days at the pretrial conference. Further, there is no extra burden for Defendants to prepare for trial on this claim because the specific document that it challenges—the NRCl Analytical Method—is also relevant and admissible under other claims, including Defendant Mark Morris's breaches of his two confidentiality agreements with ChromaDex. The Court should deny the *ex parte* application and reserve judgment on this question until the pretrial conference, or until the testimony and evidence adduced at trial place the claim in its proper context.

II. ARGUMENT

A. There is no basis to proceed by *ex parte* application here.

"*Ex parte* applications call for emergency relief that is rarely justified." *Jaffe v. Zamora*, 2014 WL 5786233, at *1 (C.D. Cal. Oct. 29, 2014) (Carney, J.) (citing *Mission Power Eng'g Co. v. Cont'l Cas. Co.*, 883 F. Supp. 488, 490 (C.D. Cal. 1995)). Because an *ex parte* application is intended for emergency circumstances only, "[t]he moving party must show that it will be 'irreparably prejudiced if the underlying motion is heard according to regularly noticed motion procedures,' and that it is 'without fault in creating the crisis that requires ex parte relief, or that the crisis occurred as a result of excusable neglect.'" *Jaffe*, 2014 WL 5786233, at *1.

Here, Defendants' attempt to have the Court resolve this dispute by *ex parte* motion is unjustified and poorly timed. The Court has set a pretrial conference for September 3, 2021. (Dkt. 452.) That is in only eleven days. Based on the repeated interactions between the parties over the last weeks in preparation for trial, ChromaDex understood that this issue would be raised at the pretrial conference. (Dkt. 515-4, Ex. 5

at ECF 13.) ChromaDex had no indication that Defendants intended to proceed *ex parte* on this issue until this morning at 9:50 AM. (*Id.*)

It is worth noting that certain of Defendants' proposed trial arguments—at least as those arguments have been re-envisioned for trial by Defendants' new counsel and re-framed in their Memorandum of Contentions of Fact and Law, (Dkt. 510)—are entirely unsupported as a matter of law. That includes, for example, Defendants' remarkable effort to revive certain of Elysium's counterclaims that the Court unmistakably dismissed in its summary judgment order. (*Compare* Dkt. 413 at 14–19 (dismissing counterclaims premised on exclusivity provision) *with* Dkt. 510 at 21 ("The evidence will . . . show that ChromaDex breached its agreement to give Elysium exclusivity over products containing NR and PT or any substantially similar ingredients."). ChromaDex will argue those points in the statements accompanying the jury instructions and verdict form, and plans to raise them with the Court at the pretrial conference. There is no reason Defendants cannot do the same here.

Moreover, as even Defendants concede, ChromaDex's position on this issue has been clear since at least August 25, 2021, when the parties conferred about pretrial documents. (App. at 6.) Defendants then waited eight days to file this *ex parte* application. That delay alone demonstrates that Defendants are not "without fault in creating the crisis" it asserts necessitates the motion. *Jaffe*, 2014 WL 5786233, at *1. And the *ex parte* is further unjustified because the parties currently are in a sprint to finalize and file the pretrial documents necessary for the jury trial. Defendants' *ex parte* is precisely timed to interfere with ChromaDex's effort. It should be denied.

B. Elysium is not prejudiced because the NRCl Analytical Method is relevant and admissible for other reasons.

Defendants ask the Court to decide this issue so that their "counsel [can] focus on preparing to try the live issues in the case," (App. at 9), which suggests that Defendants believe that their *ex parte* concerns the admissibility of the NRCl Analytical Method in this case. That is incorrect, but that argument reveals that Defendants'

ex parte application is actually a belated attempt to file a motion *in limine* on that document. The deadline for such motions under this Court's rules and procedures was August 16, 2021, which has long passed.

In any event, Defendants are wrong that a ruling on their *ex parte* application would remove the NRCl Analytical Method as a "live issue[] in this case." (App. at 8.) The NRCl Analytical Method is relevant and admissible for myriad reasons beyond the breach of contract claim under Section 4.1 of the NIAGEN Supply Agreement.[1] For example, the NRCl Analytical Method will be relevant to ChromaDex's claims against Mark Morris for his breaches of two different confidentiality agreements.

There is no doubt the record supports that Morris surreptitiously took and used the document in violation of his contracts. He admitted both in his responses to written interrogatories and at his deposition that he covertly took a USB flash drive with him containing numerous ChromaDex documents, including the "ChromaDex analytical methods for nicotinamide riboside." (Ex. 1 at 55:23–25; *see also id.* at 55:23–57:4.)[2] Morris specifically testified that the "analytical method . . . . would have been something that I routinely carried with me." (*Id.* at 56:22–57:1.) The record also shows that Morris improperly used the NRCl Analytical Method after he started working for Elysium in violation of his confidentiality agreements. He conceded under oath that he "download[ed] the contents of the flash drive to Elysium's server." (*Id.* at 60:11–12; *see also id.* 59:16–61:2.)[3] Morris then *re-typed* ChromaDex's NRCl Analytical Method into a new document and fraudulently labeled it as "the property of Elysium Health and

[1] The order on summary judgment observed that "both parties have abandoned their claims for violation of Section 4.1 of the NR Supply Agreement," (Dkt. 413 at 24), but the parties both clarified at the summary judgment hearing that they were actually abandoning their mirror-image claims under Section 4.2 with respect to a different document: the NR Specifications that were attached to the agreement, (Dkt. 432 at 32:12–23; 49:8–11.) ChromaDex has never abandoned its claim under Section 4.1 with respect to the NRCl Analytical Method. (*See, e.g.*, Dkt. 515-4, Ex. 4 at ECF 9.)

[2] Cites to "Ex." refer to exhibits attached to the Declaration of Barrett J. Anderson.

[3] Morris also confessed that he "do[es]n't know where the flash drive is" anymore. (Ex. 1 at 64:12–19.)

contains proprietary and confidential information." (Ex. 2; *see also* Dkt. 413 at 37.) He then sent that stolen version to a third party, PCI Synthesis, a company that Elysium had hired and which used the document for Elysium's benefit to "develop[] the manufacturing process for NR." (Dkt. 413 at 36; *see also* Ex. 3.) All of those steps violated his confidentiality agreements, as ChromaDex intends to argue to the jury.

The NRCl Analytical Method is relevant for several more reasons. One is Morris's breach of his fiduciary duty to ChromaDex, including as alleged in the operative complaint that he disloyally "l[ied] regarding his return of all of ChromaDex trade secrets and confidential information before the termination of his employment with ChromaDex." (Dkt. 153, ¶ 240.) Another is the question of "what Elysium intended at the time it placed the June 30 Orders." (Dkt. 413 at 34.) Morris sent the re-typed version of the NRCl Analytical Method to PCI on August 2, 2016, (Ex. 3)—only about two weeks after he left ChromaDex—demonstrating that Elysium wasted no time in executing on its scheme to develop an alternative source of NR, a necessary component of its plan to never have to pay ChromaDex for the June 30 Orders. That document and the timing of Defendants' misuse of it are thus probative of Elysium's *intent* to never pay for the June 30 Orders, especially given that Elysium did not even wait for the ingredient shipments to arrive before moving forward with the scheme. To this day, Elysium still has not paid what it owes ChromaDex because it managed to obtain an alternative supply of NR, made possible in part by using the NRCl Analytical Method. (*See* Dkt. 413 at 36–37 (detailing evidence of Elysium's misuse).)

For those reasons, there is no basis to question the relevance or admissibility of the NRCl Analytical Method in this case. Of course, Defendants will be free to argue to the jury about the weight it should give that evidence, but they are not entitled to seek its exclusion under the guise of an *ex parte* application that is really an untimely motion *in limine*. Granting the application would achieve nothing for Defendants, who will be required to address this evidence regardless, and thus they fail to show any "irreparable prejudice." *Jaffe*, 2014 WL 5786233, at *1. The *ex parte* application should be denied.

C. The Court found that ChromaDex could proceed to a jury on its breach of contract claim against Elysium with respect to the NRCl Analytical Method.

Should the Court decide to address the merits of Defendants' *ex parte* application, it should find that the breach of contract claim under Section 4.1 of the NIAGEN Supply Agreement with respect to the NRCl Analytical Method is still intact. Notably absent from Defendants' *ex parte* application is the Court's express ruling that "ChromaDex points to sufficient evidence in the record that Elysium used [the NRCl Analytical Method] for purposes not contemplated by the contract." (Dkt. 413 at 40.) There are thus grounds to allow the jury to decide whether Elysium breached the agreement.

Defendants' sole argument is that this entire claim must be dismissed because the Court found that there was insufficient evidence to send ChromaDex' avoided costs claim to the jury. Not so. The Court's order states only that "ChromaDex may not seek avoided costs at trial." (Dkt. 413 at 40.) To further highlight the point, one need only glance at the final two pages of the Court's order. There, the Court ruled that it "**GRANTS** summary judgment in favor of ChromaDex on the following counterclaims of Elysium," and listed those that were outright dismissed (including Elysium's counterclaims premised on the exclusivity provision, which Elysium is now attempting to reanimate in different attire). (*Id.* at 47.) In obvious contrast, the Court only granted summary judgment on "ChromaDex's claim for $110,000 in avoided costs damages," while not stating that the entire claim was dismissed. (*Id.* at 48.) It was not.

As for damages, that is for the jury to decide. ChromaDex believes that the evidence will show that Elysium breached the NIAGEN Supply Agreement by disclosing the NRCl Analytical Method in furtherance of Defendants' overall plot to obtain the June 30 Orders on credit, fraudulently accuse ChromaDex of wrongdoing to get out of paying for those ingredients, and ultimately "destroy" ChromaDex. (*See, e.g.*, Dkt. 413 at 29–34.) The jury will be best positioned to evaluate the testimony and evidence presented at trial and decide if Elysium's misuse of that document was a

substantial factor in its unjust enrichment, or if ChromaDex is entitled to only nominal monetary damages. *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1168 (9th Cir. 2013) (holding issues of causation are "intensely factual" and should "typically be resolved by a jury").[4] In any event, the Court should reserve judgment on this issue until it has the opportunity to observe the trial unfold and view the issue in its full evidentiary context.

III. CONCLUSION

ChromaDex requests that the Court deny the *ex parte* application.

Dated: September 2, 2021

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[4] Defendants' cite to *Lambert v. Nutraceutical Corp.* is inapt; ChromaDex does not offer an "alternative damages model." 2015 WL 12655392, at *4 (C.D. Cal. June 24, 2015). And Defendants' suggestion that nominal damages are not available is incorrect. In the operative complaint, ChromaDex sought for this claim "monetary damages in an amount to be proved at trial." (Dkt. 153 at 48.) Nor does ChromaDex contradict itself here; the possibility of nominal damages only arises *after* the jury finds the evidence insufficient to support actual damages; under California law, "[w]hen a breach of duty has caused no appreciable detriment to the party affected, *he may yet* recover nominal damages." Cal. Civ. Code Section 3360 (emphasis added). It is thus well established in California that "[n]ominal damages are properly awarded" when, among other things, "there have been, real, actual injury and damages suffered by a plaintiff, [but] the extent of plaintiff's injury and damages cannot be determined *from the evidence presented*." *Avina v. Spurlock*, 28 Cal. App. 3d 1086, 1088 (Ct. App. 1972) (emphasis added); *see also In re Google Referrer Header Priv. Litig.*, 465 F. Supp. 3d 999, 1011 (N.D. Cal. 2020) ("[A] plaintiff who proves a 'breach of duty' (including breach of contract) but fails to show any 'appreciable detriment'—i.e., damages—nevertheless 'may ... recover' nominal damages." (internal quotation marks omitted)). On that basis, and in light of the testimony and evidence at trial, the jury can decide.