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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION - SANTA ANA

CHROMADEx, INC.,)	Case No. SACV 16-2277-CJC (DFMx)
)	
Plaintiff,)	Santa Ana, California
)	Tuesday, November 13, 2018
v.)	11:09 A.M. to 12:06 P.M.
)	
ELYSIUM HEALTH, INC.,)	
)	
Defendant.)	
)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DOUGLAS F. MCCORMICK
UNITED STATES MAGISTRATE JUDGE.

Appearances:	See Page 2
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Court Reporter:	Recorded; CourtSmart
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1 SANTA ANA, CALIFORNIA, TUESDAY, NOVEMBER 13, 2018, 11:09 A.M.

2 (Call to Order of the Court.)

3 THE CLERK: Calling SACV 16-2277. It's
4 *ChromaDex, Inc. v. Elysium Health, Inc.*

5 Counsel, your appearances, please.

6 MICHAEL A. ATTANASIO: Good morning, Your Honor.
7 Mike Attanasio and Barrett Anderson on behalf of Plaintiff
8 and Counter-Defendant ChromaDex, Inc.

9 THE COURT: Good morning, Mr. Anderson.

10 Good morning, Mr. Attanasio.

11 JOSEPH N. SACCA: Good morning, Your Honor.

12 Joseph Sacca and Elizabeth Treckler for Elysium.

13 THE COURT: Good morning, Mr. Sacca.

14 Good morning, Ms. Treckler. Did I -- I tried to
15 put an "s" in there. There's no "s."

16 ELIZABETH M. TRECKLER: No "s."

17 THE COURT: Okay. I don't know why I did that.

18 Let's talk a little bit about what's at issue. I
19 think I've roughly categorized them into two big batches, the
20 first being what I'll call the "non-ingredient sales
21 spreadsheet" document, and the second being -- is there some
22 easier acronym than "CGMP"? It doesn't roll off the tongue.

23 MR. ATTANASIO: I just learned what it meant. No.
24 I'm kidding, Your Honor. I'm afraid there's not an easier
25 one.

1 THE COURT: That's all right. I can live with it
2 -- the CGMP dispute that is sort of category B.

3 I'm reminded why I don't do my law in motion on
4 Mondays, despite the fact that this is a Tuesday and
5 yesterday was a holiday so -- or at least it was for us.
6 Seventy-two hours ago that I prepared -- more than that now
7 -- and I'm all -- looking at all this stuff, and it's all
8 like, you know, Greek down here -- all these notes that I
9 have. So I apologize if I muddle up some of the scientific
10 or technical terms.

11 In reviewing the first category, it seems to me
12 that the overarching issue is whether we should be conducting
13 discovery into these other allegedly misappropriated
14 documents. It's Elysium's position that only the ingredients
15 sales spreadsheet is a trade secret, and therefore only it is
16 relevant. ChromaDex contends that the other documents that
17 were allegedly misappropriated are relevant. And I looked at
18 the elements of trade secret misappropriation, which were
19 identified for me by the parties in the joint stipulation,
20 and I see that we need to determine whether the document was
21 acquired by improper means.

22 So it seems to me as a threshold issue is if A --
23 document A is a trade secret and document B -- let's make it
24 simple. We'll just talk about one document -- document B is
25 not, how is evidence that someone took document B relevant to

1 whether document A was acquired by improper means, and I
2 think that's really what we need to discuss.

3 I was surprised -- looking in the cases cited, I
4 don't see a case that's really on point, and I'm going to ask
5 the Elysium folks to help me with that because I didn't think
6 the cases they cited were all that helpful. Maybe I'm
7 missing them and -- but that's, I think, the thing that we
8 should talk about first with respect to category A.

9 I think my concern from the Elysium standpoint,
10 Mr. Sacca and Ms. Treckler, is you've taken kind of a little
11 bit of a maximalist position and we really -- you really
12 haven't discussed with me or talked to me about sort of
13 document -- or RFP by RFP, and I guess, if you lose on this
14 threshold issue, I don't know -- quite know how to go through
15 these RFPs on a request-by-request basis.

16 So with those three or four concerns identified,
17 Mr. Attanasio, I think you're the moving the party. Do you
18 want to talk for a few minutes about my initial thoughts, and
19 we'll go from there? We'll hear from Mr. Sacca, obviously,
20 or Mr. Treckler.

21 MR. SACCA: Your Honor, there is just one threshold
22 issue --

23 THE COURT: Yeah.

24 MR. SACCA: -- that we had wanted to bring to the
25 Court's attention --

1 THE COURT: I'd -- absolutely.

2 MR. SACCA: -- last week, but ChromaDex declined to
3 call the Court with us, and we didn't want to have an
4 ex parte contact.

5 While the parties were putting together the joint
6 stipulation, ChromaDex came to us to start a meet-and-confer
7 process on filing a Fifth Amended Complaint. So we have
8 talked with them about that. We've agreed not to oppose it.
9 They filed their motion last week to bring --

10 THE COURT: You know, if they filed it last week,
11 they file -- I saw a reference to that in the joint
12 stipulation. If they filed it, they filed it after I
13 checked.

14 When -- you guys filed it late last week?

15 MR. ATTANASIO: Friday.

16 THE COURT: Okay. So, look. It makes me look
17 great. It's like I was preparing earlier in the week.

18 MR. SACCA: The court has not yet ruled on it --

19 THE COURT: Okay.

20 MR. SACCA: -- but, in candid, Your Honor, we have
21 told ChromaDex that, if it gets filed and depending on what
22 happens with it, we do anticipate that we will likely amend
23 some of our responses to the discovery requests and --

24 THE COURT: Remind me how the -- because, candidly,
25 when I saw that and then, when I looked, and that had not yet

1 been filed, I didn't exert a lot more mental energy on it.

2 So tell me how the --

3 MR. SACCA: The Fifth Amended Complaint --

4 THE COURT: -- Fifth Amended Complaint would alter
5 the landscape.

6 MR. SACCA: -- attempts to bring back in the guise
7 of different claims -- breach of contract claims, breach of
8 fiduciary claims, and claims against a new defendant --
9 allegations relating to many of the documents that were the
10 subject of the conversion claim that the court dismissed with
11 prejudice.

12 THE COURT: Okay.

13 MR. SACCA: So we did tell ChromaDex that we
14 anticipated, if the -- if leave to file the Fifth Amended
15 Complaint is granted, we anticipated that we would amend our
16 discovery responses. We suggested --

17 THE COURT: When's the discovery cutoff in the
18 case?

19 MR. SACCA: If the court grants our application, it
20 will be March.

21 THE COURT: There's a lot of moving parts here.

22 MR. SACCA: There are.

23 THE COURT: All right. You guys maybe -- maybe
24 what we need to do is move you. We have an opening. We
25 could move you into a special category of cases that get my

1 full and complete attention on a very regular basis for the
2 next few weeks so that we get -- we are sure that we get all
3 of this smoked out and done in a manner that is not held up
4 by the niceties, by which I mean, you know, niceties required
5 by Local Rule 37.

6 MR. ATTANASIO: Right.

7 MR. SACCA: Well, Your Honor, the reason I'm
8 raising this is we just -- we felt, in fairness to
9 Your Honor, before you spend a lot of time on this, you
10 should know, at least, there's a chance that we are going to
11 amend the responses -- a significant number of the responses
12 that are the subject of this pending application.

13 THE COURT: Can I ask a different question of you
14 now that I have --

15 MR. SACCA: Yes.

16 THE COURT: -- have you on your feet?

17 One of the issues for me was that -- I had a little
18 bit of hard time in this category determining whether there's
19 documents that have actually been withheld and in which
20 categories there -- those documents exist. I think at one
21 point you tell me, you know, "We've searched for these
22 documents because these claims were in the case, and we
23 collected everything we found after a reasonable search, and
24 this dispute is really about what happens if we discover
25 tomorrow that there are some additional documents we didn't

1 discover that would be implicated by some of these thrown-out
2 claims."

3 MR. SACCA: There are a small number of document
4 requests where we believe we've produced everything we have
5 found. There are others where we have not yet done the full
6 type of search and review that we would do if we were going
7 to respond to them because the claims in the case were not
8 there -- the conversion claim was not in the case for very
9 long.

10 THE COURT: Okay. And I think that -- part of my
11 problem is I'm not -- you know, this happens when you have
12 one for, you know, 15 different RFPs that are sort of --
13 correctly, I think, by the parties, you try to deal with them
14 in a set of categories rather than taking them in a one-by-
15 one basis.

16 So I'm talking out loud now. I think that that --
17 I'm not clear on which of those RFPs we've collected
18 everything and which we haven't.

19 MR. SACCA: I think, Your Honor, it's -- if my
20 recollection is correct, it's 2 of the requests for
21 production --

22 THE COURT: Is it the -- did the -- I think it's
23 the 2 Morris ones, but I'm not a hundred percent sure.

24 MR. SACCA: I believe so.

25 THE COURT: Okay. Let me just make a note and say

1 -- confirm that.

2 Okay. Mr. Attanasio, I'm going to turn it back
3 over to you now, and my comments of a few minutes ago are
4 probably been forgotten, but go ahead.

5 MR. ATTANASIO: I remember them, Your Honor.

6 THE COURT: Okay. Go ahead.

7 MR. ATTANASIO: Let me begin, though, just to
8 respond briefly to what counsel said about recent events.

9 It is indeed true we have proposed a Fifth Amended
10 Complaint. Elysium has stipulated to its filing. We await
11 final confirmation from the court that it will be filed.

12 Counsel is also correct that he approached us about
13 the fact that the filing of the Fifth Amended Complaint may
14 change the landscape of discovery, and our position was
15 simply "Please tell us what specific RFPs are mooted by the
16 filing of the Fifth Amended Complaint, and we will jointly
17 author a letter to the Court advising the Court that those
18 are off the table." That request was not acceptable to
19 Elysium's counsel, and so we believed, after the passage of
20 time and with deadlines looming as they are, as the Court
21 points out, it would be in everybody's best interest to get
22 in front of Your Honor and hash some of these things out for
23 case-management efficiency.

24 THE COURT: Okay.

25 MR. ATTANASIO: So here we are today.

1 THE COURT: Well, let -- I agree with that. I'm
2 not sure that to the extent -- I'm not sure to the extent
3 Elysium wants to change its position on some of these
4 15 RFPs I should look that gift horse in the mouth. I should
5 probably take it, and we should probably talk about a
6 mechanism for how to make that work.

7 MR. ATTANASIO: Fair enough.

8 THE COURT: Okay.

9 MR. ATTANASIO: And I certainly don't believe in
10 looking gift horses in the mouth either. However, it's been
11 a long slog, and I'm not at all impugning counsel. It's been
12 a --

13 THE COURT: It's always a long slog when you --

14 MR. ATTANASIO: It's been --

15 THE COURT: -- come to see me.

16 MR. ATTANASIO: You bet.

17 THE COURT: That's the nature of -- no one ever
18 comes to me and says, you know, "This is really easy and" --
19 it just doesn't happen.

20 MR. ATTANASIO: But we have knocked out quite a
21 few, you know, options for Your Honor to resolve by
22 ourselves.

23 THE COURT: I get that.

24 MR. ATTANASIO: This is what's left.

25 THE COURT: I appreciate it.

1 MR. ATTANASIO: So, Your Honor, let me begin, then,
2 with the Court's comments that set this in motion this
3 morning.

4 Court correctly frames the issue. Elysium's
5 position is that "Look. You have one document -- one
6 document that is the foundation for a trade secret claim."
7 It's the third cause of action and the fourth cause of action
8 under state law and federal law in the current amended
9 complaint. "Because that's the only trade secret claim you
10 have, your ability to discover information from Elysium is
11 cabined by documents and material that relate directly to
12 that single document."

13 Now, I might add that that single document that's
14 referred to throughout the papers, the ingredient sales
15 spreadsheet, is, one might say, the "crown jewels" of
16 ChromaDex's business. It is a spreadsheet that goes on for
17 dozens and dozens of pages showing every sale, every price --

18 THE COURT: And presumably the reason it's the
19 "crown jewel" is -- I mean, presumably it's -- one of the
20 reasons we know it's the "crown jewel" is that you are able
21 to demonstrate that it was protected sufficiently to be a
22 trade secret?

23 MR. ATTANASIO: Correct.

24 THE COURT: As opposed to -- I presume the reason
25 these other things aren't in your trade secret claims, or at

1 least haven't been, is that there may be issues with that.

2 MR. ATTANASIO: Correct.

3 What we have is a second set -- I'm going to
4 categorize these by three sets.

5 THE COURT: Okay.

6 MR. ATTANASIO: We have the trade secret claim
7 around the spreadsheet that I just covered and Your Honor
8 just commented on.

9 We have four documents that form the basis of
10 breaches of the two contracts between the parties, which
11 carried with them confidentiality clauses, which we allege
12 Elysium breached in the handling of those four documents. So
13 those are breach of contract claims.

14 Then we have the third category, which Your Honor
15 has focused on so far, which fit in neither of the other two
16 categories but are information that is material to
17 ChromaDex's business that was both misappropriated or misused
18 by Elysium.

19 For instance, to the Court's last question, some of
20 those documents are documents that were not publicly
21 protected -- excuse me -- were not confidentially protected
22 documents, in fact, were made available to third parties from
23 time to time. That class of documents was taken by these
24 former employees of ChromaDex. They walked them across the
25 street to Elysium, began work at Elysium, and then took those

1 documents, changed their headings, changed the title, and
2 effectively plagiarized them to use them for the benefit of
3 Elysium with investors and with regulators.

4 So is that document protectable as a trade secret?
5 No. But what I would suggest is the right approach here,
6 Your Honor, is to think about the true standard under
7 Rule 26, the liberal standard that still applies even after
8 the revisions in 2015, and to think about the ability of
9 ChromaDex to tell the full story of what happened when these
10 two former employees left ChromaDex and went to Elysium.

11 There is no case -- as Your Honor has already
12 pointed out, there is no case, there is no authority that
13 would eviscerate Rule 26 and say to a plaintiff, "If you
14 bring a trade secret claim on this document or that document,
15 you are not permitted to discover what else the absconders of
16 the trade secret did: what else they took, what they said
17 about it, and what they did with it," and --

18 THE COURT: I -- no. I -- there's a common sense
19 appeal to both your arguments, and I'll identify it, and then
20 you can both tell me how right the respective common sense
21 appeals.

22 Your -- from your standpoint, the common sense
23 appeal is, if my trade secret misappropriater is
24 misappropriating several things and he throws them in his
25 briefcase before he, as you stated, you know, walks these

1 things "across the street" -- I'm not sure if you mean
2 literally or figuratively --

3 MR. ATTANASIO: Figuratively.

4 THE COURT: Probably could be --

5 MR. ATTANASIO: Figuratively.

6 THE COURT: Could be either, but I'm not going to
7 assume that. The fact that he puts, you know, the trade
8 secret, document A, in there along with B, C, D, and E, the
9 fact that he chose B, C, D, and E, and what they were, and
10 et cetera and so forth, may shed light on his purpose for
11 putting document A in there, and I think that does make some
12 common sense.

13 On the flipside, from Elysium's standpoint, you
14 know, the fact that those claims, at least currently, aren't
15 in the case, there's a common sense appeal to, you know,
16 claims aren't in the case, shouldn't have discovery taken
17 because, you know, we have only limited resources and we
18 should only be taking discovery in sort of live claims.

19 Now, that landscape may be shifting a little bit,
20 which makes me a little uncomfortable. I'm also a little bit
21 uncomfortable with the notion that those claims, while no
22 longer in the case, are of the same -- they're the same type
23 or same character, and there are some purpose issues here,
24 and maybe not intent but there are issues of what's proper
25 and improper, and I think that's where I'm not quite

1 convinced by their position.

2 MR. ATTANASIO: I do agree with those points, and I
3 appreciate the observation about Elysium's standpoint. Let
4 me address it this way, if I may: Elysium makes great --
5 puts great emphasis on the fact that these conversion claims
6 around that third category of documents, the ones that are
7 sort of orphans -- they don't go into the trade secret
8 bucket, they don't go into the breach of contract bucket --
9 they were dismissed on the court's ruling on the conversion
10 claims.

11 Well, that's -- and they cite -- Elysium cites a
12 case, *GMAC Real Estate*, to say, if a claim is dismissed, no
13 discovery may follow, but what's left out of that is the
14 second clause of the court's ruling in *GMAC*, and all of these
15 cases, which is rather self-evident. If a claim is dismissed
16 and there are no other grounds for relevance, then and only
17 then would a party be precluded from pursuing discovery about
18 it.

19 And, here, as the Court just pointed out with its
20 hypothetical, these claims are -- these documents, this
21 conduct is inextricably intertwined with both the breach of
22 contract misappropriation and the trade secret
23 misappropriation. The Court's -- this notion of a briefcase,
24 I think, is dead on. Mr. Morris, Mr. Dellinger, the
25 absconders with the information, they didn't go to that

1 briefcase, Your Honor, and say, "Well, here's one. That's a
2 trade secret. Here's six others. They're not. We'll take
3 those too. No legal liability there." It's not how it
4 happened, and we're entitled to know what happened, what was
5 done with those documents, and what was said about those
6 documents, all of which will shed light on both the trade
7 secret and the breach of contract claims.

8 And one final point that just struck me as we were
9 talking, Your Honor, my somewhat -- my literally -- my
10 figurative comment about walking across the street and
11 Your Honor's comments in response raise an important issue,
12 actually, which is we don't know how Elysium got the trade
13 secret document. What we do know is Morris took it. Then
14 what we know is it shows up on Elysium's server.

15 Now, we can all remember examples of circumstantial
16 evidence that we argue to a jury and understand how this
17 might have followed, but we don't have the forensic
18 information to know how Mr. Morris, when he worked at
19 ChromaDex, actually smuggled that or provided that to
20 Elysium, and looking at the whole picture here of the
21 48 hours in question -- or so -- when Mr. Morris made his
22 move and took all of this information will shed great light
23 on the claims that are at issue and are therefore relevant.

24 They are also relevant, Your Honor, to -- well, let
25 me back up and say this: I think part of the fallacy of

1 Elysium's argument, including when they point out the
2 elements of trade secret -- a trade secret misappropriation
3 claim, is that to be relevant under Rule 26, the information
4 must tie to an element. That is not the law. In fact,
5 Rule 26 specifically provides that the material does not even
6 have to be admissible to be relevant for purposes of
7 discovery.

8 So I think a lot -- reading Elysium's brief, a lot
9 of what I read, Your Honor, are trial arguments, they're
10 motion in limine arguments, they're Rule 404(b) arguments or
11 403 arguments. They are not discovery arguments. And the
12 standard here is so much more broad, as we all know, I won't
13 belabor that point, but for purposes of finding out what
14 happened, telling the whole story, showing the pattern and
15 practice that was at issue here in taking ChromaDex material
16 and then misusing it in various ways, the motive and intent
17 of Mr. Morris -- not an element of the offense. Counsel's
18 going to tell us motive and intent are not elements. He's
19 right. They can be relevant, however, to what happened
20 between the parties and what Mr. Morris did.

21 They're certainly admissible -- and the *Mattel* case
22 is instructive on this. Certainly, the full picture is
23 admissible to the question of punitive damages should we get
24 there, and for punitive damages, what *Mattel* says is -- not
25 from this district -- not only is the particularized trade

1 secret misappropriation conduct relevant but all of the
2 unethical conduct, all of the shady, sharp-elbowed conduct
3 around it, is also relevant, and that's at pinpoint cite
4 801 F.Supp 954 to -56. It doesn't -- *Mattel* is very clear
5 that the -- what's relevant for punitive damages' purposes is
6 not only what the bad defendant did in relation to the trade
7 secret but all of the conduct around it.

8 Finally, Your Honor, if -- on this point -- if the
9 conduct of Mr. Morris is at issue in this case, which it is,
10 if his credibility is at issue in this case, which it will
11 be, and if impeachment of Mr. Morris is to happen, which it
12 will, all of this is relevant to that, and, again, the
13 standard is broad enough and the law is clear to sweep in
14 those considerations as well when it comes to a particular
15 actor in this drama. We are entitled to show what he did, we
16 are entitled to show what he took, and we are entitled to
17 show what he said about it in relation to the documents he
18 walked out with, and there is no case that says "No, no, no.
19 If you have a trade secret claim based on document X alone or
20 document X and document Y alone, your discovery is cabined
21 and limited to those two issues."

22 In terms of Elysium's arguments, I've touched on
23 them except to show -- except to say two last things about
24 Elysium's position on this.

25 The first is Elysium makes much of its claim that

1 the requests are disproportionate to the needs of the case.
2 We disagree with that as strongly as possible. In fact, if
3 anything, if Your Honor -- as Your Honor has carefully
4 reviewed these, Your Honor sees that these are actually
5 targeted requests. These are "Tell us all the documents" --
6 or "Give us all the documents you have about this document
7 bearing Bates No." 1234, and there's four of those. "Give us
8 all the documents you have about your conduct with relation
9 to" this other document specifically called out. These are
10 very targeted requests. These are actually the antithesis of
11 a fishing expedition. Why? Because we're pretty far down
12 the line in discovery. We're now narrowing down to the core
13 issues of the case.

14 In any event, the burden, under Rule 26 and under
15 the case law, is on Elysium to prove this disproportionality
16 argument. With all respect, Elysium doesn't even really try.
17 They make sweeping statements about disproportionality, but
18 there's nothing in a declaration, there's no forensic
19 information, and, Your Honor, as we point out in the joint
20 stipulation, we have given Elysium search terms and said
21 "Search these, and we'll be fine." That's -- as Your Honor
22 is well aware, that's how it's done in the modern age. We've
23 narrowed this down to the specific things we really want,
24 these are not sweeping, global requests, we've given Elysium
25 search terms for what we really want them to look for, and at

1 this stage of the case, I suspect it would be actually pretty
2 easy for Elysium to do what we're asking the Court to order.

3 Finally, Elysium, from time to time in its portion
4 of the brief, claims that what this is about is really one
5 competitor trying to get confidential business information
6 from another competitor. Well, first of all, in this case,
7 both sides have gone to great lengths to exchange information
8 that is confidential business information. We've given it to
9 Elysium. Elysium has given it to us. But there is in place
10 a protective order -- very rigorous, agreed to by the parties
11 -- and both parties have liberally taken advantage of the
12 protective order's provisions allowing for designation of
13 confidential material or even "attorneys' eyes only"
14 material. And so that's really a red herring, this notion
15 that we're trying to look under the hood and get information.
16 Both sides -- that's been part of this case from the
17 beginning, which is why we have a very good protective order
18 from the Court.

19 So that -- those are my comments, really, about
20 what Your Honor described as the first bucket. A lot of them
21 apply to the second bucket as well. I can pause there, or I
22 can go on to the --

23 THE COURT: No. Let's pause there. I think --

24 MR. ATTANASIO: Fair enough.

25 THE COURT: I think my command of the two buckets

1 is only good enough to -- is not facile enough to let me go
2 bouncing back and forth.

3 MR. ATTANASIO: Fair enough.

4 THE COURT: Let me ask Mr. Sacca to comment on my
5 questions or your comments, and we'll go from there.

6 MR. SACCA: Sure, Your Honor, and I think a little
7 context that maybe wasn't so readily apparent from the joint
8 stipulation because of its volume is, I think, in order here.

9 Elysium --

10 THE COURT: It was only 115 pages. If I need more
11 context, next time please warn me in advance.

12 MR. SACCA: Elysium and ChromaDex, at the time of
13 the events at issue in this case, were not competitors. It
14 turns out --

15 THE COURT: Well, I understood that.

16 MR. SACCA: We've learned through discovery
17 ChromaDex was positioning itself to be Elysium's competitor
18 and, in fact, favoring a company founded by one of its
19 directors to enable that company to compete with Elysium, but
20 at the time they weren't competitors. So to the extent this
21 spreadsheet as described as ChromaDex's "crown jewel,"
22 whatever truth that might have in the context of ChromaDex's
23 business as an ingredients' supplier, it has really nothing
24 to do with this case. Elysium wasn't an ingredients'
25 supplier. To the extent ChromaDex was selling different

1 ingredients other than the ones Elysium was buying from it --
2 irrelevant. Elysium just didn't care about that.

3 What Elysium cared about was whether ChromaDex was
4 complying with their contract, and in large part that
5 involved pricing. ChromaDex had promised Elysium that it
6 would get the best price for nicotinamide riboside that
7 ChromaDex gave to any customer buying equal or lesser
8 volumes, and it turns out ChromaDex wasn't complying with
9 that agreement. The spreadsheet helped inform Elysium of
10 that, but what Your Honor doesn't know is that ChromaDex's
11 own CEO, a couple weeks before Elysium supposedly obtained
12 this "crown jewel," sent Elysium two spreadsheets that gave
13 it all of the details of its contracts for the sale of
14 nicotinamide riboside to all of its customers -- or at least
15 so he claimed. It turned out he left a couple out. So this
16 kind of information was freely shared with Elysium by others
17 at ChromaDex, not just Mr. Morris.

18 And this has been a theme that's run throughout
19 this case. ChromaDex has tried on a number of occasions to
20 assert trade secret misappropriation claims. The first time
21 it did it, Judge Carney dismissed the claim without
22 prejudice. They re-pleaded. We called their lawyers up,
23 after they did, because it turns out the document that was
24 this -- the linchpin of their claim at that time that they
25 said Elysium had misappropriated had, in fact, been sent to

1 Elysium by ChromaDex's CEO. So, when we told them that, they
2 withdrew the claim, and then this represents the latest
3 effort to plead a trade secret claim.

4 But it goes to a fundamental point, Your Honor,
5 which is that allowing them to seek discovery beyond the
6 trade secret they've alleged really substantially expands the
7 scope of discovery in this case because of what ChromaDex was
8 doing. ChromaDex was using its customers like Elysium to
9 build the market for nicotinamide riboside, after which, it
10 turns out, we've learned in discovery, it planned to cut them
11 all off and push its own retail product. But what that meant
12 was ChromaDex was freely sharing the results of its clinical
13 trials, its technical information, with its customers because
14 it was using them to build a market.

15 So not only if ChromaDex is going to be permitted
16 to pursue a claim that there was some -- or to pursue a
17 theory -- they don't have a claim -- that there was some
18 pattern and practice of misappropriation of documents like
19 these -- not only does that mean they would take discovery
20 from Elysium about these matters, but we then, in turn, have
21 to take discovery from them. We have to figure out what
22 ChromaDex did with every one of these documents, where the
23 information in it came from, how the documents came to be put
24 together at ChromaDex, who else ChromaDex shared them with,
25 how they publicized them, because no doubt they were doing

1 that.

2 And for documents that don't relate to a live
3 claim, that is a very significant expansion of the case, and
4 that's our fundamental objection here. ChromaDex didn't
5 plead these as relevant to the trade secret claim. They pled
6 them as subject of a conversion claim, and that claim was
7 dismissed by the court, and we do cite cases -- *GMAC, Vendaro*
8 [sic] *v. Price* -- that talk about discovery not being
9 permissible into dismissed claims, and that's really the
10 fundamental issue here.

11 THE COURT: *Vendavo v. Price*?

12 MR. SACCA: *Vendavo v. Price*. We cited it, and I
13 probably lost the page.

14 THE COURT: That's --

15 MR. SACCA: I think it's on page 89 of the joint
16 stip.

17 THE COURT: -- one of most misleading citations
18 I've received in five years.

19 MR. SACCA: I apologize for that, Your Honor, but I
20 think the fundamental point is --

21 THE COURT: Let me just -- I mean, I don't want to
22 belabor it, but, I mean, that was a *forum non conveniens*
23 case.

24 MR. SACCA: Right.

25 THE COURT: And the trade secrets claim goes out

1 on those grounds --

2 MR. SACCA: Right.

3 THE COURT: -- making that claim -- and, you know,
4 there's going to stay patent claims and copyright claims, and
5 the court says (Reading) An order granting the motion to
6 dismiss the trade secrets claims on forums non conveniens
7 grounds would moot the need for discovery of the trade
8 secrets claims.

9 And you cite it, and it's a nice proposition, but
10 you leave out "on forum non conveniens grounds."

11 MR. SACCA: Well, Your Honor, here -- but there was
12 a dismissal of the conversion claim on preemption grounds.
13 It's still a dismissal of the claim that's the important
14 part. I don't know that it makes -- I would suggest to
15 Your Honor I don't think that is a misleading cite. I mean,
16 the basis for the dismissal isn't as important as the
17 dismissal. Here, it was a dismissal on preemption grounds,
18 that the conversion claim was preempted by California's
19 Trade Secret Act.

20 But the fundamental fact remains. The claim has
21 been dismissed with prejudice. There is no conversion claim
22 left in this case. These documents were pled that were
23 alleged to be converted documents. So the only claim that
24 they were pledged to have specific reference to has been
25 dismissed, it's not in the case anymore, and that's why we

1 cited the court's decision in *Vendavo*. I mean, there the
2 dismissal was on forum non grounds but the -- I think the
3 point holds true that, when a claim is no longer in a case,
4 discovery into the claim shouldn't be permitted.

5 THE COURT: Okay.

6 MR. SACCA: So I think, Your Honor, that really is
7 the fundamental point here. Trade secret misappropriation
8 doesn't require a pattern and practice. They don't allege a
9 pattern and practice of trade secret misappropriation. You
10 know, they repeat over and over in their papers that they are
11 claiming a pattern and practice of misappropriation of
12 confidential material, but that's not a claim in the case,
13 and Rule 26 does limit discovery to the claims and defenses
14 in the action. There's a trade secret misappropriation
15 claim. We've produced documents responsive to it. There was
16 a conversion claim. We've said we won't produce documents
17 responsive to that, and the reason is that's an unwarranted
18 expansion of discovery, in our view.

19 THE COURT: Okay. Let's turn, then, to the second
20 category -- well, first, let me -- let's back up.

21 If the Fifth Amended Complaint is ordered filed,
22 you've indicated there would be at least some nuancing of
23 Elysium's position. Is that fair? Some modification?

24 MR. SACCA: There would be a medication. I --

25 THE COURT: Okay.

1 MR. SACCA: I'm hesitating only in "nuancing" --

2 THE COURT: I didn't --

3 MR. SACCA: -- sounds --

4 THE COURT: "Nuancing" sounds pejorative. I didn't
5 mean it to sound that way.

6 MR. SACCA: No. There -- we would likely change
7 our position on many of these requests.

8 THE COURT: Okay. And I think that we should let
9 that process play out. There's not a hearing date.

10 You've submitted a stipulation with a proposed
11 Fifth Amended Complaint; is that correct, Mr. Attanasio?

12 MR. ATTANASIO: That's correct, Your Honor.

13 THE COURT: Okay. So I would think that would
14 occur relatively quickly.

15 MR. ATTANASIO: I would as well, Your Honor.

16 THE COURT: All right. Should we -- and I would
17 think -- sounds like, Mr. Sacca, you've already thought about
18 some of this?

19 MR. SACCA: Yes. And, Your Honor, I'm sorry. I
20 don't know if it makes a difference, but Ms. Treckler is
21 pointing out to me that it technically is a notice of
22 unopposed motion. So there is a hearing date associated with
23 it.

24 THE COURT: Oh, there is. Okay. Well, we could --
25 is it Judge Carney, Ms. --

1 THE CLERK: Yes, Your Honor.

2 THE COURT: Okay. We could probably nudge things
3 along.

4 MR. ATTANASIO: We've been down this path before --
5 both sides -- and typically Judge Carney has issued an order
6 in advance of the hearing date.

7 THE COURT: Okay.

8 MR. SACCA: Yeah. I don't mean to represent that
9 we think --

10 THE COURT: Right.

11 MR. SACCA: -- he's going to wait until the hearing
12 date.

13 THE COURT: Right. I don't think he's going to
14 wait either, but we could also nudge that along.

15 Would it be, I think, in good order for us to -- or
16 I guess, a correct approach for us to reconvene -- and we can
17 do it telephonically -- in, like, two weeks or so,
18 understanding we have at least one of those weeks that's
19 probably a little bit disrupted, and see where we stand and
20 so that, if there's going to be a change in Elysium's
21 position with respect to some of these RFPs, I know what it
22 is?

23 MR. SACCA: I think that's fine, Your Honor.

24 MR. ATTANASIO: That would be fine, and, again, we
25 know what the Fifth Amended Complaint says. I -- we don't

1 need to do this with the Court's presence --

2 THE COURT: Correct.

3 MR. ATTANASIO: -- but I'm more than happy with
4 counsel -- and we've asked to tell us which ones come off the
5 table with some particularity.

6 THE COURT: Well, and they can -- they may still be
7 working through that a little bit and -- but if we can -- I
8 think we should get that wrapped up here in a couple weeks.

9 So let's -- as far as this first bucket goes, let's
10 defer what we're going to do on that and find a time, maybe
11 not on the 26th or 27th, but maybe on the 28th.

12 Ms. Boehme, what are we doing on the 28th?

13 Anything exciting?

14 THE CLERK: (Indecipherable.)

15 THE COURT: How about on the 29th?

16 THE CLERK: (Inaudible.)

17 THE COURT: Okay. How about on November 29th, and
18 I can -- again, I'm happy to do it telephonically, Mr. Sacca.
19 I know you're -- you're out from New York; right?

20 MR. SACCA: Yes, Your Honor.

21 THE COURT: That's quite -- we don't need you to
22 come back from New York.

23 And so maybe something telephonically in the
24 morning, Ms. Boehme? 9:30?

25 THE CLERK: Yes, Your Honor. 9:30 is --

1 THE COURT: Would that be okay?

2 MR. ATTANASIO: That would be fine, Your Honor.

3 THE COURT: 9:30?

4 MR. SACCA: Yes.

5 THE COURT: Okay. We'll set up a telephone call
6 for 9:30 in the morning, and you guys can update me on where
7 that is.

8 All right. Putting -- if we put those at least on
9 the backburner for now, let me then talk about -- or ask you
10 to talk to me a little bit about the CGMP requirements, and I
11 think my principal concern there for ChromaDex is how these
12 other ingredients are going to help me or help the parties
13 understand -- I can't say the "NR" product the way Mr. Sacca
14 does. I just -- I'm not going to try. I can say things like
15 "methyldian-" -- I can't even say that anymore. I used to be
16 able to say MDMA off the top of my head, and I can't even do
17 that anymore. I'm going to have to call it "NR." So
18 anything other than -- why anything other than NR is going to
19 shed light on these CGMP issues.

20 MR. ATTANASIO: Well, there's two answers to that
21 -- two parts to the answer, Your Honor.

22 The first is Elysium makes a major argument around
23 and puts at issue in the case its production of a product,
24 and I'll quote from paragraph 69 of its counterclaims, and
25 its efforts, quote, "to exceed applicable standards and

1 ensure superior product quality," close quote. At paragraph
2 71 it again puts this concept in play. If the NR -- and I'll
3 use the same abbreviation as Your Honor. If the NR sold was
4 not at pharma level, Elysium's business, quote, "could be
5 irreparably damaged," close quote.

6 Both of those comments go to a higher level of,
7 from Elysium's standpoint, "We are a company very focused on
8 purity and quality," and so on. They also go, however, to
9 the legal requirement of damages, and, in fact, Elysium uses
10 the word -- We would be "irreparably damaged" -- in paragraph
11 71 of its counterclaims. So what you have, then, is in play
12 this bigger claim and this damages theory that your sale of
13 allegedly tainted NR to us undermines those principals and
14 caused us damage.

15 If, in fact, their alternative source of supply,
16 their use of other ingredients in their retail product
17 "suffer" -- and I use that in quotes -- "suffer" from the
18 same problems -- that is to say, lack of purity, lack of
19 quality, the presence of Acetamide, and so on -- the failure
20 to comply with the CGMP standard for pharma products, instead
21 it's food products that ChromaDex provided to Elysium -- if
22 that's their thesis of the case, which it is, then the fact
23 that they're using other ingredients, the fact that their
24 alternative suppliers are providing NR that suffers from
25 those same things is directly relevant to those claims on

1 their face, and then, probably even more importantly,
2 absolutely relevant to Elysium's damages theories, damages
3 claims.

4 So on that basis, that information is highly
5 relevant, Your Honor, because, if there are other ingredients
6 that go into the product they sell have Acetamide or cause
7 the presence of Acetamide when combined or are bought and
8 then sold at the food level of CGMP, then that shows that
9 their damages claim, frankly, cannot be sustained and would
10 be -- obviously, one could imagine immediately cross-
11 examining Elysium's expert on damages on these very points if
12 we had the information.

13 So that's the short answer to that question,
14 Your Honor. Shouldn't say "short." That's the middling
15 answer to that question, Your Honor.

16 THE COURT: All right. That was helpful. I think
17 that it shook some of the dust out of my analysis of those
18 RFPs from last week and helped -- my notes, unfortunately,
19 devolved into a number of acronyms -- NR, CGMP, and Niagen
20 and something called a "GRAS" and "NDW," and I'm, like, going
21 back through them this morning, going, "Well, those all meant
22 something to me last Wednesday." Now they mean much less.

23 MR. ATTANASIO: Once upon a time, when I worked for
24 the government, Your Honor -- I've said to the team on this
25 case, this case has more acronyms than a government case.

1 THE COURT: Yeah. It's got quite a few.

2 Okay. That's helpful to put all this back into
3 context for me. Can I ask Mr. Sacca to comment on your
4 comments?

5 MR. ATTANASIO: Sure.

6 THE COURT: All right.

7 MR. SACCA: Yes, Your Honor, and at the risk of
8 confusing things more, I do believe it's important to make
9 clear that these are two separate issues. They have
10 similarities in how they affect discovery, but they're two
11 separate issues. One is CGMP, which is an acronym for
12 "current good manufacturing practices," and that's --

13 THE COURT: I -- so --

14 MR. SACCA: -- an FDA standard certification for
15 manufacturing facilities and --

16 THE COURT: The other is Acetamide.

17 MR. SACCA: The other is Acetamide, yes.

18 THE COURT: Uh-huh.

19 MR. SACCA: And so with respect to CGMP, there's an
20 express representation made by ChromaDex in its supply
21 agreement with Elysium that the nicotinamide riboside
22 ChromaDex was selling Elysium was manufactured in accordance
23 with CGMP applicable to pharmaceuticals. That's the most
24 rigorous standard. That was not true at the time they made
25 that representation. It wasn't true throughout the life of

1 the parties' agreement. And you'll notice ChromaDex doesn't
2 dispute that. Right. So what they're trying to do is argue
3 around it. "Well, maybe Elysium didn't care that we promised
4 them something that we didn't deliver" is the crux of the
5 argument.

6 But it's a relatively discrete issue, right,
7 whether ChromaDex complied with CGMP or not. Then saying,
8 you know, "We need discovery into what Elysium has done with
9 other suppliers, what contracts it has with other
10 manufacturers" is all, you know -- picture, Your Honor, if
11 you bought a car, and it turns out that the car had some
12 latent defect you were unaware of, and you sued the
13 manufacturer, and the manufacturer says, "Well, I want to
14 learn about the five cars you've bought subsequently because
15 I want to see if those people cheated you in the same way,"
16 you know, "I did." I think you would logically resist that.
17 You'd say, you know, "My arrangements with subsequent
18 contracts has nothing to do with the contract you and I
19 signed, has nothing to do with whether you delivered to me
20 what you promised me," and that's the substance of the CGMP
21 claim.

22 Acetamide is a little different. There's another
23 provision of the supply agreement between Elysium and
24 ChromaDex where ChromaDex was obligated to tell Elysium if it
25 knew or should have known of issues with product quality or

1 purity, and it turns out, Elysium discovered after the fact,
2 that the NR ChromaDex sold it contained something called
3 "Acetamide." It's an industrial solvent and something called
4 a "plasticizer." It's apparently the kind of stuff that they
5 use in cars to make your dashboard soft. And it contained
6 Acetamide in levels above that permissible by California's
7 Proposition 65.

8 So that is something that ChromaDex was obligated
9 to inform Elysium at the time it sold Elysium its NR, and the
10 allegation that we make is that the NR ChromaDex sold -- and
11 Your Honor referenced Niagen. Niagen is just ChromaDex's
12 trade name for nicotinamide riboside -- that the Niagen
13 ChromaDex sold contained Acetamide in excess of Prop 65
14 limits and ChromaDex didn't tell Elysium about it. That's
15 the allegation we make.

16 We don't allege that Acetamide was present in
17 Elysium's own product, right, but ChromaDex, because it's
18 seeking to expand discovery, justifies its request to defend
19 against an allegation we don't make. They say, "We need
20 discovery into this to see if the Acetamide present in
21 Elysium's product basis came from some other source from" --
22 "than our Niagen," but we haven't alleged that basis was
23 present -- that Acetamide was present in basis. We allege it
24 was present in Niagen, and we've given ChromaDex our testing
25 of Niagen. We say we found it in excess of Prop -- Acetamide

1 in excess of Prop 65 limits in products sold by ChromaDex's
2 customers, and we've given that testing information. So what
3 we haven't given is the testing information for our current
4 product because that's not at issue in the case. We've made
5 no allegations about our current product.

6 And here, Your Honor, is where the fact that the
7 parties are currently competitors in the space for NR is
8 important. Mr. Attanasio referenced that there is a
9 protective order in place between the parties, and it does
10 have an "attorneys' eyes only" provision in it. However,
11 when we have produced information related to Acetamide,
12 ChromaDex has continually come to us to challenge our
13 designation of that information as "attorneys' eyes only."
14 They want it to be designated simply "confidential," which
15 means their business people can get it, and one of the
16 reasons they've given us for that is they say they have in-
17 house laboratory facilities. So they don't think they need
18 to go outside to find a lab to do testing of all this
19 material. They want to do it in-house. Well, that would
20 allow their in-house people full access to Elysium's current
21 product, which is a problem, a competitive problem, which is
22 part of the reason we have pushed back on not giving them
23 information about allegations that aren't in the case.

24 THE COURT: Okay. This has been helpful. Let me
25 go back through my notes.

1 And, Mr. Attanasio, you want to add something? Go
2 ahead.

3 MR. ATTANASIO: Only if the Court -- very quickly.

4 THE COURT: We're fine.

5 MR. ATTANASIO: Okay. I don't want to lose sight
6 of something here, which is there's also a waiver provision
7 in play that the Court has in front of it, which is
8 Section 3.7 of the relevant agreement has a waiver provision
9 that, if Elysium does not come forth with any -- not with any
10 claim within 30 days of receiving the product, NR, those
11 claims are waived. That will be heavily litigated at trial.

12 Our point is simply that with a lot of these
13 documents that are at issue, they will show beyond any
14 question that Elysium knew that it was a food CGMP, that
15 Elysium knew that there were Acetamide -- Acetamide was
16 present, and so what we're after is the documents behind
17 that, communications about those facts, communications about
18 those disclosures, to therefore be able to litigate -- and
19 Elysium will certainly contest it -- that there was a waiver.
20 That's the first point.

21 The second point is to take counsel's car analogy,
22 but, I would suggest, put it in a more relevant framework,
23 which is to say if a person, part of whose business was
24 driving a car -- say, an Uber driver -- bought a car and, as
25 part of that contract, expected to have and was told he would

1 have a navigation system of a certain kind, and that
2 navigation system had some bells and whistles. He bought the
3 car, took possession of the car, and it turned out he was
4 dissatisfied with the navigation system, it didn't have the
5 two bells and whistles that he thought, and he then claimed
6 that he was damaged by the failure of the supplier to provide
7 a navigation system with the specified bells and whistles.

8 He claimed damages from that that were monetary
9 based on lost business in the future. Discovery revealed,
10 evidence showed that his next car that he immediately bought
11 thereafter, being dissatisfied with the first one, that he
12 used in that business, and the car after that and the car
13 after that had the same navigation system about which he
14 complained -- that is to say, it didn't have the bells and
15 whistles that he had contracted for -- and behind that was
16 the ability by the defense to show no damages. He had the
17 same system all along with each car, his ridership, his
18 revenue because of that was unchanged.

19 That's really what we're after here in terms of the
20 claim about -- the dispute about damages is to say, if the
21 product you are buying -- if the replacement product you were
22 buying, if the other ingredients you were buying have the
23 same features as what ChromaDex sold you and you continue on
24 your merry way in your business without change using a
25 product with the same features, then you were not damaged.

1 Simple as that.

2 Thank you, Your Honor.

3 THE COURT: Okay.

4 MR. SACCA: Your Honor, if I could just briefly
5 respond to this --

6 THE COURT: You can. Go ahead.

7 MR. SACCA: -- constructive notice point because it
8 --

9 THE COURT: The what point?

10 MR. SACCA: The constructive notice point.

11 THE COURT: Go ahead.

12 MR. SACCA: There are two documents at issue, and I
13 apologize for adding more acronyms. One is something called
14 a "New Dietary Ingredient Notification" that ChromaDex
15 submitted to FDA, and one is -- that's an "NDIN" -- and one
16 is a --

17 THE COURT: I have --

18 MR. SACCA: -- a "generally recognized as safe"
19 submission, a "GRAS" submission, and those are the documents
20 that ChromaDex is arguing put Elysium on constructive notice
21 of ChromaDex's breach. Each one is hundreds-of-pages long.
22 They're highly technical documents. The GRAS submission
23 actually disclaims the presence of Acetamide in the product.
24 So I don't know how that possibly would put Elysium on the
25 notice -- on constructive notice of the presence of Acetamide

1 in the product.

2 But more to the point, ChromaDex has asked Elysium
3 for documents that discuss the CGMP status of the Niagen
4 ChromaDex was supplying and that discuss the presence of
5 Acetamide in the Niagen ChromaDex sold to Elysium. So to the
6 extent documents indicate whether Elysium was aware of these
7 issues or not, we've already said we'll give them to them.
8 Right. By definition, the documents they're seeking now are
9 documents that might relate to the NDIN submission or the
10 GRAS submission but don't discuss CMGP [sic] or Acetamide.
11 Right. So these documents, by definition, given what we've
12 already agreed to produce, would include documents that only
13 don't talk about whether ChromaDex was CGMP compliant,
14 whether ChromaDex's product had Acetamide in it or not, and
15 that's why we've resisted production on this constructive
16 notice ground.

17 THE COURT: Understood. Okay.

18 Let me see what we can do to get you guys an order
19 before the end of the week on this category B, and then we'll
20 come back and talk about -- and, by the way, I -- my notes
21 called them "category B" and "category A." I don't think
22 I've actually said that out loud yet. So that's what I'm
23 talking about is the CGMP and Acetamide-related requests.
24 I'll try to get an order for that out, and then we'll take up
25 the other misappropriated documents request on the 29th,

1 presumably after we have some smoke cleared from Judge Carney
2 as to the Fifth Amended Complaint and Mr. Sacca and
3
4 Mr. Attanasio have had a chance to discuss whether Elysium is
5 going to withdraw its -- or modify its position with respect
6 to some of these RFPs. Okay? All right. And we'll go from
7 there.

8 Thank you, both.

9 MR. ATTANASIO: Thank you, Your Honor.

10 MR. SACCA: Thank you, Your Honor.

11 MS. TRECKLER: Thank you, Your Honor.

12 THE CLERK: This court's now in recess.

13 (Proceedings adjourned at 12:06 P.M.)

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CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Julie Messa
Julie Messa, CET**D-403
Transcriber

December 19, 2018
Date