COOLEY LLP
MICHAEL ATTANASIO (151529)
(mattanasio@cooley.com)
BARRETT J. ANDERSON (318539)
(banderson@cooley.com)
CRAIG E. TENBROECK (287848)
(ctenbroeck@cooley.com)
JASMIN F. MOTLAGH (311639)
(jmotlagh@cooley.com)
DYLAN K. SCOTT (332796)
(dscott@cooley.com)
RACHAEL M. HELLER (335636)
(rheller@cooley.com)
4401 Eastgate Mall
San Diego, CA 92121-1909
Telephone: (858) 550-6000
Facsimile: (858) 550-6420

Attorneys for Plaintiff and Counter-Defendant ChromaDex, Inc.

Counsel continued on following page

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 REPLY IN SUPPORT OF ITS MOTION *IN LIMINE*

Judge:	Hon. Cormac J. Carney
Courtroom:	9B
Date:	September 13, 2021
Time:	3:00 PM
Trial:	September 21, 2021
Pretrial Conf.:	September 13, 2021

COVINGTON & BURLING LLP
MITCHELL A. KAMIN (202788)
(mkamin@cov.com)
1999 Avenue of the Stars, Suite 3500
Los Angeles, CA 90067-4643
Telephone: (424) 332-4800
Facsimile: (424) 332-4749

COVINGTON & BURLING LLP
PHILIP A. IRWIN (admitted *pro hac vice*)
(pirwin@cov.com)
620 Eighth Avenue
New York, NY 10018-1405
Telephone: (212) 841-1000

LTL ATTORNEYS LLP
JOE H. TUFFAHA (253723)
(joe.tuffaha@ltlattorneys.com)
PRASHANTH CHENNAKESAVAN (284022)
(prashanth.chennakesavan@ltlattorneys.com)
300 South Grand Avenue, 14th Floor
Los Angeles, CA 90071
Telephone: (213) 612-8900
Facsimile: (213) 612-3773

Attorneys for Plaintiff and Counter-Defendant ChromaDex, Inc.

I. INTRODUCTION

Defendants seek to put before the jury unproven allegations of a stock manipulation scheme that did not involve ChromaDex and is otherwise entirely unrelated to any claim or issue in this case. Unable to establish any relevance to support the mini trial they seek, Defendants offer the jury only conjecture and innuendo, laundered through the minds of Elysium's principals, CEO Eric Marcotulli and COO Daniel Alminana. The allegations of securities misconduct against Honig, Brauser, and Frost are far afield from this trial and Defendants' struggle to demonstrate otherwise—including by admitting that they do not care if the accusations against the three men are even true—merely highlights the clear dangers of wasted jury time, undue prejudice, and juror confusion presented by this evidence. The Court should hold Defendants to their original agreement and preclude them from referencing these matters in their opening statement or at trial unless they first obtain permission from the Court to do so.

II. ARGUMENT

A. The evidence is not relevant.

Defendants fail to show a direct connection between Honig, Brauser, or Frost and the June 30 Orders. Despite hundreds of thousands of documents exchanged by the parties in discovery and twenty-two fact witness depositions, Defendants do not offer even a single instance where the three individuals were involved in ChromaDex's ingredient pricing generally or the June 30 Orders specifically. There is no link.

Rather, the only theory that Defendants offer to support referencing the legal issues of Honig, Brauser, and Frost in their opening statement arises from the Court's observation that "questions [remain] as to what Elysium intended at the time it placed the June 30 orders." (Dkt. 413 at 34.) This newly invented theory rests entirely on the misplaced notion that Elysium's general "trust" of ChromaDex sheds light on Elysium's intent to pay on June 30. (Opp. at 1.) This theory makes no logical sense. Elysium was contractually obligated to pay for the ingredients it ordered and received, whether or not its executives "trusted" ChromaDex. The MFN Provision—which Defendants

deploy as the only contract-based argument for their refusal to pay, (Opp. at 9)—allowed only for a "refund or credits," and only in the event that Elysium "purchases equal volumes or higher volumes than" another NR customer. (Dkt. 413 at 25.) The MFN Provision did not permit Elysium to withhold payment for any reason. There is thus no rational connection between Elysium's purported "trust" of ChromaDex and its intent to pay on June 30. *See United States v. Olson*, 755 F. App'x 716, 717 (9th Cir. 2019) (affirming trial court's exclusion of allegations of unrelated misconduct because "Defendant failed to explain how those allegations would bolster his defense").

In any event, Defendants' novel theory is entirely unsupported by the record. The unproven accusations against Honig, Brauser, and Frost are irrelevant under Rules 401 and 402, and should not be presented to the jury unless Defendants can lay the proper foundation. *Brown v. Grinder*, 2019 WL 2337107, at *3 (E.D. Cal. June 3, 2019) (granting motion *in limine* because "Defendants' speculation does not warrant admission of this highly prejudicial evidence").

1. Allegations about Honig, Brauser, or Frost are not related to Elysium's intent at the time it placed the June 30 Orders.

If the accusations against Honig, Brauser, and Frost truly influenced Elysium's "trust" in ChromaDex with respect to the June 30 Orders, one would expect to see some contemporaneous Elysium document discussing it. This case involves tens of thousands of internal Elysium documents, emails, and text messages, which together provide a remarkable amount of detail into Marcotulli and Alminana's states of mind around the June 2016 time frame. Yet, tellingly, Defendants fail to identity a *single document* showing that Marcotulli or Alminana even so much as mentioned Honig, Brauser, or Frost (or the allegations against them) in connection with the negotiations over the June 30 Orders or Elysium's decision to place those orders and never pay for them.

But there is more. The lack of supporting evidence extends to Marcotulli and Alminana's deposition testimony. Even though both Elysium executives admit to lying under oath at their depositions, neither brought up Honig, Brauser, or Frost for any

reason. Defendants do not assert otherwise; rather, they suggest that Marcotulli and Alminana were not forthcoming about their intent for the June 30 Orders because they were not asked. (Opp. at 11.) That is simply wrong. The Elysium executives had numerous opportunities to mention Honig, Brauser, or Frost, but did not.

For example, counsel asked Alminana: "Did you intend to pay for the orders at the time that you placed them on June 30th?" (Ex. 7 at 243:11–12.)[1] Counsel also inquired "at the time that Elysium placed the June 30th orders, did you intend, in your mind . . . to place additional orders with ChromaDex in 2016?" (*Id.* at 245:24–246:2.) There are numerous other examples of questions to Alminana calling for him to identify his state of mind regarding Elysium's plans for the June 30 Orders. (*See e.g.*, *id.* at 160:20–21 (asking about Alminana's "mindset on May 29th" leading up to the June 30 Orders); 226:22–227:2 (asking Alminana to confirm if the "short sale attack" article about Honig, Brauser, and Frost "had nothing to do with" the June 30 Orders).) Even when Alminana brought up his "trust" of ChromaDex, he linked it solely to one person: ChromaDex's then-CEO, Frank Jaksch. (*See*, *e.g.*, *id.* at 183:23 ("We had trust issues with Frank.").) When counsel pressed him for more details of his supposed lack of "trust"—asking him "[w]as that it?" and "[c]an you think of any [other reasons?]" for Elysium's efforts to secure the June 30 Orders without paying for them, (*id.* at 251:23–253:16)—Alminana never once said the names Honig, Brauser, or Frost.

The same is true for Marcotulli. Counsel asked him about a pivotal phone call with ChromaDex about the June 30 Orders and Elysium's "plan after your call on June 30," and his responses were a nearly identical series of "I don't recall." (*See* Ex. 8 at 253:3–258:21.) Counsel inquired whether he remembered the June 30 Orders; he responded, "I don't recall the specifics of the order." (*Id.* at 259:2–6; *see also id.* at 259:7–260:2 (answering "I do not know" to different questions about the June 30 Orders).) Counsel queried why he waited until after Elysium received the last of the

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

ingredient shipments to (falsely) accuse ChromaDex of a contract breach; again, Marcotulli repeatedly answered "I don't recall." (*See id.* at 260:7–261:4.) And when counsel specifically asked – "Can you tell me any reason why Elysium would have waited until after it had received all the product from those orders in August to, then, demand a refund afterwards?" – Marcotulli, predictably by this point, answered "I don't know." (*Id.* at 261:5–9.)[2] Marcotulli never tied Elysium's plans for the June 30 Orders with the names Honig, Brauser, or Frost.

2. Elysium's other allegations do not demonstrate a connection.

Lacking any direct evidence of a link between the Honig/Brauser/Frost accusations and the June 30 Orders, Defendants instead point to five unrelated events to try to establish relevance. None of these events, all of which are irrelevant to this case in their own right, have anything to do with the purported stock manipulation scheme. The "alleged incidents" are either "remote in time, occurred after the events in the case, or had been recanted" and therefore have "limited probative value." *Wilson v. Longview School Dist.*, 775 F. App'x 277, 280 (9th Cir. 2019) (ruling trial court "did not abuse its discretion by excluding evidence of past allegations of misconduct involving" party). And because Defendants leave out crucial details about these five events, ChromaDex is obliged to correct the record.

First is Defendants' reference to a February 2015 meeting in Miami between Elysium's executives and certain investors in ChromaDex. (Opp. at 5–6.) There, Dr. Phillip Frost allegedly offered to buy Elysium for $15 million, an enormous sum considering that Elysium had launched its first product only a few months earlier. (*Id.* at 6.) Ignored in Defendants' story is the uncontested fact that *none of the attendees* at that meeting was a ChromaDex employee or otherwise authorized to speak for

[2] It is noteworthy that Marcotulli's repeated answers that he "did not recall" any details surrounding Elysium's plans for the June 30 Orders are the same as his repeated answers that he "did not recall" whether he "regularly bought and used cocaine during the period of . . . certain contract negotiations with ChromaDex" or "used cocaine before communicating with ChromaDex employees," which he has since admitted were all lies. (Dkt. 493 at 4–5. 7–8.)

ChromaDex. (*See, e.g.*, Ex. 9 at 85:24–86:1 ("Q: Did [Frost] have authority to make offers on behalf of ChromaDex like that? A: No.").) Defendants' aver that "Brauser and Honig bragged at the meeting about how all decisions at ChromaDex were made by them," (Opp. at 6), but even if true (and it is not), it has nothing to do with the June 30 Orders, which would not occur for another sixteen months. The best Defendants can offer—that the February 2015 meeting "planted seeds of distrust," (*Id.* at 9)—is far removed both factually and legally from Elysium's intent on June 30, 2016.[3]

Second on Defendants' list is a "blinded spreadsheet" sent by Jaksch to Elysium on June 13, 2016. (Opp. at 7.) The parties will no doubt vigorously dispute the import of this spreadsheet at trial. But Defendants provide no connection between that spreadsheet and the accusations against Honig, Brauser, or Frost. There is no link.

Third is an article posted on the Internet by Bleecker Street Research on June 20, 2016 that purported to detail the alleged stock manipulation scheme by Honig, Brauser, and Frost and speculated about their possible connections to ChromaDex, a report referred to by the parties as the "short sell attack" on ChromaDex. Defendants say that "Elysium executives will testify that they were alarmed and distressed by this report." (Opp. at 7.) But they fail to inform the Court that Bleecker Street removed the article only a few days after it was published because it admitted "***the statements were not supported and the premise of the article was allegedly factually inaccurate***." (Ex. 10 at 38 (emphasis added).) "Bleecker Street would like to apologize to ChromaDex, Pershing Gold, and Barry Honig for an allegedly misleading article and to immediately set the record straight for our readers who should not rely on certain aspects upon the withdrawn article or statements of the author therein." (*Id.*) Elysium's executives were well aware of that retraction and apology by June 29, one day before they placed the

[3] In a footnote, Defendants also mention that Rob Fried was at the meeting. (Opp. at 3 n.2.) Fried was neither on the ChromaDex board nor a ChromaDex executive in February 2015, as Defendants concede. (*Id.* at 5.) Regardless, Defendants do not explain how his presence at the meeting (which was well before the June 30 Orders) or ChromaDex's acquisition of Healthspan Research LLC (which was well after June 30) are relevant to this motion *in limine*. They are not.

June 30 Orders. (*See id.* at 37.) There is thus no rational connection between that retracted article and Elysium's intent on June 30.

Moreover, the notion that the false Bleecker Street article caused Elysium to lose "trust" in ChromaDex with respect to the June 30 Orders is directly contradicted by Elysium's internal documents discussing the short attack. On June 20—the same day the article was published—Marcotulli emailed his Elysium co-founders that "I think [ChromaDex] is going to crater" and "[w]e might be able to buy them or the patents." (Ex. 11 at 44.) He also mused to an Elysium investor: "I wonder if there is a play here to acquire some of their assets or patents" so that he could "own[] the IP and supply chain." (Ex. 12 at 47.) In stark contrast, no internal Elysium document discusses the short attack in connection with Elysium's "trust" of ChromaDex regarding the June 30 Orders. Elysium's only documented response was Marcotulli's unadulterated greed.

Fourth, Defendants point to certain alleged communications by Brauser with Elysium in December 2016. (Opp. at 8.) These occurred six months after Elysium placed the June 30 Orders and refused to pay for them, and thus are not related "to what Elysium intended at the time it placed the June 30 orders." (Dkt. 413 at 34.) In any event, Defendants learned during discovery that Brauser was not acting for ChromaDex when he reached out to Elysium. (Ex. 9 at 289:19–21 ("Q: Was Mr. Brauser authorized to negotiation on behalf of ChromaDex? A: No.").) There is no basis for allowing Defendants to reference allegations of a stock manipulation scheme involving Brauser simply because he sent unauthorized emails to Elysium in late 2016.[4]

Fifth, and finally, Defendants obliquely refer to William Smithburg, a former director of ChromaDex. (Opp. at 10.) This is yet more misdirection. Defendants offer no reason for Smithburg's departure from the board and provide no link between him

[4] Defendants' reference to an email in late 2016 suggesting that ChromaDex offer Honig, Brauser, and Frost the opportunity to invest in the Healthspan acquisition, (Opp. at 3 n.2), is also unconnected from any disputed issue in this case. Defendants do not suggest that any offer was actually made or completed, or even if it was how that would have affected Elysium's intent to pay for orders they placed six months prior.

and any aspect of Elysium's relationship with ChromaDex other than conjecture.

All of the above evidence is irrelevant to this case. But, most importantly, none of it demonstrates how any investigations and lawsuits into Honig, Brauser, and Frost are relevant to Elysium's intent on June 30. There is no link. The Court should preclude that evidence in opening statement and at trial, subject to Defendants seeking and obtaining permission outside the presence of the jury. *See, e.g., Zuegel v. Mountain View Police Dep't*, 2020 WL 6205079, at *5–6 (N.D. Cal. Oct. 22, 2020) (granting motion to exclude because party "has not presented evidence or a theory tying" proffered evidence to event in dispute).

B. The evidence is unfairly prejudicial.

Even if evidence of the alleged stock manipulation scheme by Honig, Brauser, and Frost was minimally probative to Elysium's intent on June 30, that evidence should be precluded under Rule 403 because it would unduly prejudice ChromaDex, confuse the issues before the jury, result in unwarranted mini trials, and waste trial time. Defendants admit that they will use the accusations against Honig, Brauser, and Frost to argue to the jury that "Elysium executives knew and believed at the time [that] they were dishonorable, disreputable, and disgraced men." (Opp. at 9.) That type of argument is at the core of what Rule 403 seeks to prevent. *See Hosseini v. Chowdry*, 953 F.2d 1387, at *3 (9th Cir. 1992) (holding "the district court here did not abuse its discretion in concluding that prejudice and confusion would be generated by innuendoes of collateral misconduct" (internal quotation marks omitted)).

Courts routinely exclude "evidence of [unrelated] lawsuits" that involve a party because it "presents dangers of unfair prejudice, confusion of the issues, and may mislead the jury." *Selger Holdings, LLC v. Miller*, 2016 WL 8839013, at *3 (C.D. Cal. Sept. 27, 2016). Here, the accusations against Honig, Brauser, and Frost—who were no more than passive investors in ChromaDex in June 2016 and who Defendants otherwise cannot link to the June 30 Orders—are even further removed than those against a party, and thus even more prejudicial. For example, the Bleecker Street short-

attack article was entirely de-published as false and misleading, and Marcotulli and Alminana knew about that retraction, before Elysium placed the June 30 Orders. (Ex. 10 at 37–38.) Defendants should not be permitted to offer testimony about debunked allegations in an article that Elysium's executives knew was baseless. The possibilities for jury confusion and unfair prejudice are manifold.

Defendants' argument that they be should be allowed to reference "public allegations [that] were known to Elysium executives and contributed to their distrustful state of mind," (Opp. at 3 n.3), precisely highlights the danger. Those "public allegations" include "a steady drumbeat of concerning articles about Frost, Honig, and Brauser's business practices," (Opp. at 6), which Defendants no doubt hope that jurors will find on their own. In effect, Defendants ask the Court to let them "waft an unwarranted innuendo into the jury box." *United States v. Davenport*, 753 F.2d 1460, 1463 (9th Cir. 1985). The undue prejudice of such evidence is not cured by filtering the accusations through the lips of Elysium's executives under the guise of their nebulous sense of "trust." These are unproven allegations of unrelated misconduct against uninvolved individuals all the same. Evidence like this could only be offered to persuade the jury not to "trust" ChromaDex for the same reasons that Defendants contend Elysium did not: through an alleged association with distasteful characters. That sort of prejudicial evidence should not be condoned. *See, e.g.*, *Ioane v. Spjute*, 2016 WL 4524752, at *3 (E.D. Cal. Sept. 29, 2016) (excluding evidence of "wholly unrelated" lawsuits because "[a]ny relevance is outweighed by the potential prejudice").

Such evidence should also be excluded because it invites a "a series of mini-trials concerning the prior events." *Holmes v. Miller*, 768 F. App'x 781, 783 (9th Cir. 2019) (affirming trial court exclusion of other-lawsuits evidence under Rule 403). Such mini trials would be particularly difficult and time consuming here, where the accusations against Honig, Brauser, or Frost are unrelated to this case and have never been proven, such that "the Court would have to conduct a mini trial as to the . . . allegations based solely on the pleadings." *Segler Holdings*, 2016 WL 8839013, at *3 n.4. Defendants

contend that no mini trial is necessary because they "do[] not seek to try to prove the truth of those allegations." (Opp. at 10.) That is absurd; if anything, their position makes the evidence even *more* prejudicial. If Defendants are allowed to present to the jury what they know are meritless allegations that they link to ChromaDex, ChromaDex will be forced to spend precious trial time refuting them. A mini trial on this irrelevant tangent would be unavoidable.

Of course, there is no question that Elysium's intent on June 30 will be hotly contested at trial. But it has nothing to do with Honig, Brauser, or Frost. For example, numerous documents reveal that Marcotulli and Alminana schemed with Mark Morris to obtain the June 30 Orders so that Elysium would have a nine-month stockpile of ingredients while developing an alternate supply of NR from a company called PCI Synthesis. (Dkt. 413 at 37.) Only a few weeks after Elysium received the last of the ingredient shipments, Alminana emailed Elysium's supply chain manager, Daniel Magida, that "[i]f the [investor] money comes in we can always figure out what we actually owe chromadex and then place another order with them" and Marcotulli agreed that "[w]e will either get pci up and running or order from cdxc/grace." (Ex. 13 at 50–51.) A few weeks later, Magida forecasted that, with the June 30 Order stockpile in hand, Elysium "should be covered thru Q1 [2017]" and asked "[i]s the next order thru Chromadex?" (Ex. 14 at 54.) Alminana responded that "[i]deally it would be PCI" and suggesting that "[w]e can place order with ChromaDex if we hit Code Red." (*Id.*) Based on these communications, there can be no mistaking Elysium's intent: do not pay ChromaDex for the June 30 Orders unless PCI failed to deliver NR by March 2017. Because of Morris's disloyalty to ChromaDex and willingness to share confidential ChromaDex information with PCI, Elysium did obtain its new supply of NR in time. (*See* Dkt. 413 at 37.) It is undisputed that Elysium has not paid ChromaDex to this day.

Defendants may try to challenge those facts at trial. But they are not allowed to do so by confusing the issues, wasting the jury's time, and prompting mini trials over irrelevant and unfairly prejudicial evidence about Honig, Brauser, and Frost. *Brown*,

2019 WL 2337107, at *3 (observing Rule 403 is designed to "exclud[e] matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect" (internal quotation marks omitted)). Defendants should be precluded from referencing or inquiring into these accusations unless they can "establish[] to the satisfaction of the court, outside the presence of the jury," that they "have a good faith belief in the misconduct" at issue. *Davenport*, 753 F.2d at 1463–64.[5]

C. Defendants' flip-flop should be rejected.

Lastly, Defendants' new counsel attempts to gaslight the Court by arguing that their prior counsel's written agreement does not say what it says. (Opp. at 12–14.) The difference is clear: Defendants' former counsel originally agreed not to reference *any* investigations or lawsuits into Honig, Brauser, or Frost, while Defendants' new counsel now seeks to reference allegations about the same irrelevant misconduct that were public before the lawsuit was filed. There is no basis to grant Defendants' request to reference these irrelevant and prejudicial matters in their opening statement, which is plainly part of a new and impermissible trial strategy to argue to the jury that ChromaDex is run by or associated with, as Marcotulli would say it, "legitimate criminals." (Ex. 1 at 4; *see also* Ex. 2 at 9; Ex. 3 at 13; Ex. 4 at 21.)

III. CONCLUSION

ChromaDex respectfully requests that the Court grant its motion and preclude Defendants from referencing or offering evidence related to any litigation or investigations involving Honig, Brauser, or Frost in their opening statement or at trial until and unless they seek leave from the Court outside the presence of the jury.

[5] Defendants contend that ChromaDex offered no "pertinent legal authority for its position." (Opp. at 10.) They must have overlooked the cases cited on pages 6 and 7, as well as footnote 5, of ChromaDex's opening memorandum. Regardless, ChromaDex provides yet more applicable authority in this reply.

Dated: August 30, 2021

COOLEY LLP
MICHAEL A. ATTANASIO (151529)
BARRETT J. ANDERSON (318539)
CRAIG E. TENBROECK (287848)
JASMIN F. MOTLAGH (311639)
DYLAN K. SCOTT (332796)
RACHAEL M. HELLER (335636)

/s/ Michael A. Attanasio
Michael A. Attanasio (151529)

Attorneys for Plaintiff and Counter-Defendant ChromaDex, Inc.