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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-02277-CJC-DFM

[Assigned to the Hon. Cormac J. Carney]

ELYSIUM HEALTH, INC.'S AND MARK MORRIS'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO DISMISS THE SIXTH, SEVENTH, AND EIGHTH CLAIMS OF THE FIFTH AMENDED COMPLAINT

Date: February 11, 2019
Time: 1:30 p.m.
Crtm: 9B

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

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REPLY MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

When pressed to show where in its Fifth Amended Complaint ("FAC") it alleges consideration supporting the New Hire Agreement, Plaintiff ChromaDex, Inc. ("ChromaDex") first points to the presumption of consideration the California Code affords written instruments. That presumption does nothing for ChromaDex here because, according to the California Supreme Court, the presumption is inapplicable when the face of the FAC shows a lack of consideration.

ChromaDex's fallback position is that "employment and benefits" and access to confidential information were what Defendant Mark Morris ("Morris") bargained for *on the day he resigned*. Setting aside the lunacy of that position, ChromaDex could not have provided "employment and benefits" as consideration for the New Hire Agreement because, on that day, Morris was an employee independent of the contract he signed on his way out the door and thus was already entitled to "employment and benefits," and already enjoyed access to ChromaDex's purportedly confidential information, and thus could not have bargained for that, either.

Falling further back still, ChromaDex invokes forbearance and estoppel. But ChromaDex does not and cannot allege that Morris bargained for ChromaDex's forbearance from anything, nor that ChromaDex committed to such forbearance, nor even that ChromaDex had a legal right vis-à-vis Morris to forbear from exercising. Nor do ChromaDex's allegations establish the requisite duty needed to sustain its estoppel argument. Rather, the allegations refute it, showing that Morris had already resigned and thus was no longer a fiduciary. And even if he were a fiduciary when he purportedly signed the document, ChromaDex's estoppel argument still fails, because ChromaDex does not allege that Morris believed the document to be invalid when he is alleged to have signed it. The New Hire Agreement thus lacks consideration, and ChromaDex's Sixth Claim for Relief should be dismissed with prejudice.

ChromaDex's fiduciary duty claims should be dismissed as well. In its brief, ChromaDex insists that Morris breached his purported fiduciary duty independent of any alleged misappropriation, disclosure, or use of ChromaDex's claimed confidential information. The FAC however, tells a different story. The same allegations ChromaDex points to in an effort to establish the fiduciary duty claim's independence from trade secret misappropriation are strewn with references to purported confidential information and the alleged misappropriation, disclosure, and use of such information, thereby betraying the obvious: that ChromaDex's fiduciary duty claim against Morris merely restates its core complaint that Morris and defendant Elysium Health, Inc. ("Elysium") purportedly stole its confidential information and used it to compete with ChromaDex. Because California courts give broad effect to CUTSA preemption, and because multiple courts in California have found preemption on facts strikingly similar to those alleged here, the fiduciary duty claims are preempted and should likewise be dismissed with prejudice.[1]

II. ARGUMENT

A. ChromaDex's Contract Claim Fails for Lack of Consideration.

1. Dismissal is Appropriate Where the FAC Affirmatively Establishes Lack of Consideration.

ChromaDex cites no case standing for the proposition that California Civil Code Section 1614 prohibits a court from recognizing a manifest lack of consideration on the face of the FAC. Despite this, it asks this Court to ignore the

[1] The allegations in the complaint show that the New Hire Agreement lacked consideration and that the fiduciary duty claim is preempted. ChromaDex implicitly acknowledges these deficiencies when it makes argument in its brief based on assertions not contained in the complaint, compulsively overreaching its actual allegations to craft a strident narrative of Morris's purported efforts to take ChromaDex down from the inside. Elysium takes the allegations of the complaint as true for purposes of this motion to dismiss, as it must, but looks forward to the day when the fantastical stories in ChromaDex's one-sided screed are held up against reality.

allegations in the FAC affirmatively establishing the absence of consideration supporting the New Hire Agreement, and instead to sustain its Sixth Claim for Relief based on Section 1614's recitation that "[a] written instrument is presumptive evidence of a consideration." But the California Supreme Court long ago recognized that the presumption of consideration afforded a written instrument does not thereby blind the Court to what is apparent from the face of the complaint: "where a want of consideration for the execution of the instrument is apparent from the averments of the complaint, the fact may be taken advantage of by demurrer . . . " *McCarty v. Beach*, 10 Cal. 461, 464 (Cal. 1858). *See also In re Marriage of Flagg-Malek*, No. A133231, 2012 WL 6675007, at *7 (Cal. Ct. App. Dec. 24, 2012), *as modified on denial of reh'g* (Jan. 15, 2013) ("Thus the presumption created by section 1614 is compatible with another longstanding principle: that when a litigant includes allegations that foreclose the asserted claim, it has pleaded itself out of court. As we have discussed, Malek alleged in his own verified complaint that the promised $105,000 was in exchange for … past work, which is, as a matter of law, inadequate consideration.").

California courts routinely grant motions to dismiss breach of contract claims based on written agreements when consideration appears lacking on the face of the complaint. *Roman v. Vericrest Fin., Inc.*, No. CV-131399, 2013 WL 12142960, at *3 (C.D. Cal. Dec. 3, 2013) ("The lack of valid consideration continues to be a basis for dismissal of the breach of contract cause of action based on the purported loan modification."); *Graybill v. Wells Fargo Bank, N.A.*, No. C 12-05802 LB, 2013 WL 978245, at *15 (N.D. Cal. Mar. 12, 2013) (dismissing contract claim because "nothing in the FAC supports a plausible inference that Plaintiffs provided any consideration."); *Odimbur v. Wells Fargo Bank*, No. CV 11-04581, 2012 WL 680057 DDP (JEMx), at *4 (C.D. Cal. Mar. 1, 2012) (granting motion to dismiss because written forbearance agreement lacked consideration); *Simmons v. Wachovia Bank, N.A.*, No. CV-085316, 2008 WL 11337733, at *3 (C.D. Cal. Dec. 17, 2008) (on a

motion to dismiss, dismissing contract claim because "[a] commitment to perform a preexisting contractual obligation is not consideration for a new contract."). Because the allegations in the FAC affirmatively show that the New Hire Agreement is unsupported by consideration, ChromaDex has "pled itself out of court" and cannot protect its breach of contract claim from dismissal merely by pointing to the statutory presumption found in section 1614. *See Weisbuch v. Cty. of Los Angeles*, 119 F.3d 778, 783 n.1 (9th Cir. 1997) ("Whether the case can be dismissed on the pleadings depends on what the pleadings say. A plaintiff may plead herself out of court . . . If the pleadings establish facts compelling a decision one way, that is as good as if depositions and other expensively obtained evidence on summary judgment establishes the identical facts.") (internal bracket and citation omitted).

2. The New Hire Agreement Lacks Consideration

The FAC alleges that Morris resigned from ChromaDex and then, on his way out the door, ChromaDex gave Morris a ChromaDex contract to sign that expressly stated it was "For New Employees." FAC Ex. B, ECF No. 153-2 at 2. The document purported to create an employment relationship between Morris and ChromaDex even though Morris had already unilaterally ended that relationship. FAC at ¶¶ 23, 70, ECF No. 153. These simple and uncontroverted allegations plainly show the New Hire Agreement was unsupported by any bargained-for exchange. After all, Morris had just resigned from ChromaDex, and certainly was not seeking employment there – and thus the New Hire Agreement lacked consideration.

a. *ChromaDex Provided Neither "Employment" Nor "Benefits" as Consideration.*

In the FAC, ChromaDex claims that it "fulfilled its obligations" under the New Hire Agreement "by providing Morris with employment and benefits." ECF No. 153 ¶ 226. Because it further alleges that Morris's employment at ChromaDex ceased on the day he signed the document, ChromaDex is left to argue that it provided Morris with, at most, one day of "employment and benefits" as consideration supporting the

New Hire Agreement. But Morris was already an employee on that day and thus ChromaDex was already bound to provide him with "employment and benefits" on that day, and so cannot now point to its compliance with that pre-existing duty as evidence of consideration to support the New Hire Agreement. Cal. Lab. Code § 2927 ("An employee who is not employed for a specified term and who quits the service of his employer is entitled to compensation for services rendered up to the time of such quitting."); *Burner v. American Bar Quartz Mining Co.*, 76 Cal. App. 774 (1926) (a promise "to perform a legal obligation which [one] is already under legal obligation to perform is without consideration."). The allegations in the FAC plainly show that Morris received no benefit from the New Hire Agreement, which is therefore lacking in consideration.

b. *ChromaDex's New Argument that it Purportedly Provided Morris with Access to Confidential Information as Consideration Does Not Save Its Claim.*

ChromaDex claims in its brief—*but does not allege in the FAC*—that "Morris had access to ChromaDex's confidential information between when he signed the contract and his termination." Pl.'s Resp. Br. at 13, ECF No. 177 at 1. ChromaDex cites to paragraphs 23 and 102 of the FAC in support of the claim in its brief that it provided Morris with post-resignation access to purported confidential information—but neither paragraph actually makes that allegation. *Id.* "In determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss." *Schneider v. Ca. Dep't of Corr.*, 151 F.3d 1194, n. 1 (9th Cir. 1998) (citation omitted). ChromaDex is therefore bound by its pleadings in the FAC. It is precluded from now advancing a new theory that after Morris had resigned he received continued access to purportedly confidential information as consideration for the New Hire Agreement. Of course, ChromaDex was free to allege that it provided an employee with unfettered access to its purported trade secret and confidential information subsequent to that employee's resignation, but that

allegation would seriously undermine its trade secret misappropriation claims in this litigation. So it should come as no surprise that ChromaDex's allegations on the point are found only in its brief and not in its complaint. ECF No. 115 at 8 (to qualify as a trade secret, the information must be "'the subject of efforts that are reasonable under the circumstances to maintain its secrecy.'" (quoting Cal. Civ. Code § 3426.1(d)).

Even if ChromaDex had alleged that Morris enjoyed access to its purportedly confidential information after he resigned, consideration would still be lacking. Morris already had access to confidential information and so, at most, any "short period of time" benefits under the New Hire Agreement merely overlapped with benefits he already enjoyed, and precluding such access from being the benefit of the bargain Morris might have sought. FAC at ¶ 200, ECF No. 153. The FAC alleges nothing new that Morris received in connection with the New Hire Agreement that he did not already have or was not already legally entitled to.

3. ChromaDex's Forbearance Theory Fails.

ChromaDex's forbearance argument fails because in California "[t]he act or forbearance must be something bargained for in exchange for the offeror's promise . . ." *Bradshaw v. Catlett*, No. CV 04-4117 CAS (SSx), 2006 WL 8436644, at *6 (C.D. Cal. July 27, 2006), *aff'd*, 274 F. App'x 533 (9th Cir. 2008). Here, there is no allegation, nor even a plausible inference, that the bargained-for exchange Morris sought was ChromaDex's unilateral and discretionary decision to "decline[] to take additional steps to protect its information." Pl.'s Resp. Br., ECF No. 177 at14. *See Zhang Xudong v. Flecke*, No. CV-17-2876, 2017 WL 4179872, at *10 (C.D. Cal. Sept. 18, 2017) ("[t]he mere forbearance . . . without agreement to forbear, or the mere act of forbearance if not given for the promise does not constitute a consideration."). ChromaDex neither articulates what it refrained from doing nor explains what "steps" it could have taken—ChromaDex certainly lacked the right to frisk Morris as he departed, or to demand access to his personal email or phone. The

conclusory nature alone of the rights allegedly forborne dooms the argument.

Second, the theory of consideration fails because it leaves performance at ChromaDex's discretion and is thus illusory. *Steiner v. Thexton*, 48 Cal. 4th 411, 423 (2010) ("where consideration for an agreement consists of an exchange of promises, that one party's promise is illusory generally means there is no consideration."); *Automatic Vending Co. v. Wisdom*, 182 Cal. App. 2d 354, 357, (1960) ("An agreement that provides that the price to be paid, or other performance to be rendered, shall be left to the will and discretion of one of the parties is not enforceable."). Because the New Hire Agreement does not bind ChromaDex to any promise to forbear from exercising a legal right, ChromaDex's performance of any forbearance was, at best, entirely at its own discretion and thus illusory.

Third, the forbearance theory is refuted by the language of the New Hire Agreement itself. Rather than *commit* ChromaDex to forbearing from "tak[ing] additional steps to protect its information," the New Hire Agreement instead *grants* ChromaDex the right to do so. FAC Ex. B at 2, ECF No. 153-2 at 2. ("Upon the demand of the company, at any time or upon the termination of employment under any circumstances, Employee shall promptly tender any and all items . . . provided by the Company . . . "). What is more, the document's "Entire Agreement" clause bars reliance on any terms not expressed therein. *Id.* at 8. Because the document grants ChromaDex the very right that it claims Morris sought ChromaDex's forbearance from exercising, such forbearance was not part of the bargained-for exchange and thus does not provide the requisite consideration. *See Tiffany & Co. v. Spreckels*, 202 Cal. 778, 790 (1927) ("The fact that it did forbear to sue without any agreement of forbearance does not constitute a consideration.").

4. ChromaDex's Estoppel Theory Does Not Compensate for the Lack of Consideration Here.

ChromaDex's estoppel argument – that Morris should have professed his belief in the invalidity of the document – fails because ChromaDex does not allege

in the FACthat Morris in fact believed the New Hire Agreement to be invalid when he signed the document. Morris's failure to disclose something he is not even alleged to have known is no basis for estoppel. *Headlands Reserve, LLC v. Ctr. for Nat. Lands Mgmt.*, 523 F. Supp. 2d 1113, 1130 (C.D. Cal. 2007) ("The doctrine of 'estoppel by silence' is not easily invoked."); *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 97 n.5 (9th Cir. 1970) (equitable estoppel requires a showing of "unconscientious or inequitable behavior."). Nor does Morris's purported intent not to be bound have anything to do with whether the contract is supported by consideration in the first instance. ChromaDex provided a contract *it drafted* to Morris after he had resigned, purporting to hire him when in fact, as is clear from the FAC, both parties to the agreement knew that fundamental premise to be false. Under these circumstances, where ChromaDex had Morris sign a document that gave no benefit to Morris and was a sham to begin with, it can hardly be said that Morris's challenge to the contract's validity is "intolerably unfair," as is required to sustain ChromaDex's estoppel argument. *City of Hollister v. Monterey Ins. Co.*, 165 Cal. App. 4th 455, 486 (2008), *as modified on denial of reh'g* (Aug. 28, 2008).

Even if ChromaDex alleged that Morris believed in the contract's invalidity, by the time he purportedly signed the document he had already resigned and thus lacked any fiduciary duty toward ChromaDex (if he in fact ever owed any fiduciary duty in the first instance, which he disputes). The law in California is clear that "the fiduciary relationship between a corporation and an officer or director terminates when the person ceases to act as such because of resignation or removal." *In re Scarff*, No. 03-54723 ASW, 2010 WL 4052917, at *6 (Bankr. N.D. Cal. Oct. 14, 2010) (quoting William E. Knepper & Dan A. Bailey, *Liability of Corporate Officers and Directors* § 1.07[1] (7th ed.2007)). *See also SMC Networks Inc. v. Hitron Techs. Inc.*, No. SACV121293JLSRNBX, 2013 WL 12119662, at *6 (C.D. Cal. Nov. 13, 2013 (noting that an officer's fiduciary duties cease upon resignation). Because ChromaDex's estoppel argument requires that Morris be a fiduciary at the time he

signed the contract, Br. at 15, ECF No. 177 ("[t]he party asserting estoppel has the burden of proving that the party to be estopped (1) had a duty to speak …") and because Morris had already resigned by the time he signed the document, he had no duties and the estoppel argument fails.

The New Hire Agreement's language, together with the allegations in the FAC, show that that the Agreement lacks consideration, thus obviating section 1614. Because the New Hire Agreement lacks consideration, and because he doctrines of forbearance and estoppel have no application here, the New Hire Agreement is unenforceable and ChromaDex's Sixth Claim for Relief should be dismissed with prejudice.

B. The Fiduciary Duty Claim Is Preempted.

1. The Allegations of Breach All Turn on Alleged Misappropriation or Use of Purported Confidential Information.

ChromaDex's fiduciary duty claim is simply a regurgitation of its trade secret misappropriation claim and its dismissed-with-prejudice conversion claim, and is therefore preempted. The allegations ChromaDex points to as purportedly establishing liability unrelated to the misappropriation, use, or disclosure of confidential information merely illustrate how deeply entwined the two claims are, and thus that the fiduciary duty claim is preempted.

ChromaDex in its FAC is unable to describe the alleged breaches other than in terms of theft of trade secrets or confidential information—a sure sign that the two claims are based on the same nucleus of operative fact. In its opposition to Elysium's Motion to Dismiss the FAC, ChromaDex claims that Morris's alleged "lies and omissions do not arise from any stolen information," Br. at 22, ECF No. 177, but in the FAC contends that the alleged statements were lies because he "already intended to disclose ChromaDex's confidential and trade secret information to Elysium after his departure and had likely already saved confidential ChromaDex documents for the purpose of conveying those documents to Elysium." FAC ¶ 74, ECF No. 153.

ChromaDex claims that Morris's alleged "failure to tell ChromaDex that Elysium would not pay for the [o]rders" and instead "planned to stockpile them," Br. at 22, ECF No. 177, is also independent, but in the FAC asserts that the omissions are merely aspects of the alleged "scheme to harm ChromaDex by wrongfully giving Elysium information to inform its strategy." FAC ¶ 48, ECF No. 153. ChromaDex further argues that the alleged recruitment of Dellinger is unrelated to trade secrets or confidential information, Br. at 22, ECF No. 177, but in the FAC alleges that by purportedly recruiting Dellinger, Morris and Dellinger were together able to "[take] several ChromaDex documents with them to Elysium … and assist[] Elysium in its misappropriation of ChromaDex's trade secret information and other proprietary information and documents." FAC ¶ 7, ECF No. 153.

The extreme overlap between ChromaDex's fiduciary duty claim and its trade secret allegations is indisputable and conclusively establishes that the claim is preempted. *Compare* Br. at 22, ECF No. 177 (referencing "Morris's efforts to persuade ChromaDex to accept the June 30 Purchase Orders") *with* FAC ¶ 205, ECF No. 153 (describing how "Elysium's acquisition of the spreadsheet … gave Elysium an undisclosed upper-hand" in purchase order negotiations); *compare* Br. at 22, ECF No. 177 (referencing "efforts to compete directly with ChromaDex while still employed there") *with* FAC ¶ 197, ECF No. 153 ("Once it was in Elysium's possession, the Ingredient Sales Spreadsheet provided Elysium with a substantial business advantage against it competitors."); *compare* Br. at 22, ECF No. 177 (referencing "concealment of Elysium's outreach to ChromaDex's contractual partners") *with* FAC ¶ 49, ECF No. 153 (Elysium and Morris agreed "to use ChromaDex's confidential and proprietary documents to help Elysium bring its alternate sources of ingredients to market before it exhausted the stockpile of NR and pterostilbene it planned to obtain from ChromaDex.").

Each purported breach of fiduciary duty that ChromaDex claims to be independent of its claims for the purported misappropriation of trade secrets or

confidential information is, on the face of the FAC, merely a component of ChromaDex's core contention that Elysium and Morris took ChromaDex's confidential information and used it to compete with ChromaDex. Indeed, ChromaDex's fiduciary duty claim actually "incorporate[s] the same factual allegations regarding" its trade secret misappropriation claim, another sure sign of preemption-triggering overlap. *SunPower Corp. v. SolarCity Corp.*, No. 12-CV-00694-LHK, 2012 WL 6160472, at *13 (N.D. Cal. Dec. 11, 2012). Because "the conduct at the heart of this claim is the asserted disclosure of" ChromaDex's purported confidential material, ChromaDex's breach of fiduciary duty claim is preempted. *K.C. Multimedia, Inc. v. Bank of Am. Tech. & Operations, Inc.*, 171 Cal. App. 4th 939, 960 (2009).

2. Claims Arising from Alleged Schemes to Steal Confidential Information and to Use it to Compete are Routinely Dismissed as Preempted.

Courts in California have repeatedly dismissed on preemption grounds common law claims arising from alleged schemes to steal and exploit a competitor's confidential information. In *Hullinger v. Anand*, the plaintiff sued under California Unfair Competition Law, arguing that the defendants had stolen their confidential information and had used that information to promote the defendants' competing company. No. CV 1507185SJPPJWX, 2015 WL 11072169 at *19 (C.D. Cal. Dec. 22, 2015). The plaintiffs argued that the claim was not preempted because the defendants had not simply stolen trade secrets but had tampered with plaintiffs' computer network and had "redirected resources, customers, and investors to" defendants' company. *Id.*at *20. The court found the claim preempted, reasoning that "Plaintiffs' argument that Defendants redirected resources, customers, and investors are based on the same nucleus of facts as their trade secret claim." *Id. See also Farhang v. Indian Inst. of Tech., Kharagpur*, No. C-08-02658RMW, 2010 WL 2228936, at *11 (N.D. Ca. June 1, 2010) (holding breach of fiduciary claim alleging use of plaintiff's "business resources, business guidance, staff, and time to further a

project for their own benefit" to be preempted under CUTSA); *Chang v. Biosuccess Biotech Co.*, 76 F. Supp. 3d 1022, 1041 (C.D. Cal. 2014) (dismissing as preempted breach of fiduciary duty and other common law claims that "alleged that the Chang Parties misappropriated documents from Biosuccess and provided them to a competitor, deleted information from Biosuccess computers without authorization, attempted to induce Han to leave Biosuccess, and took steps to establish a competing business by exploiting its intellectual property."); *K.C. Multimedia*, 171 Cal. App. 4th at 960-61 (dismissing as preempted claim for interference with contract alleging that defendant induced and encouraged competitor's employee to steal competitor's trade secrets and come to work for defendant).

ChromaDex's main authority, *Robert Half Intern., Inc. v. Ainsworth*, 68 F. Supp. 3d 1178 (S.D. Cal. 2014), is inapposite. There, none of the breach of fiduciary duty claims involved taking or use of confidential or proprietary information, nor were the defendants' alleged fiduciary roles "based on [their] access to proprietary or confidential information." *Id.* at 1190, 1193. Here, however, Morris's alleged fiduciary role arises in part from his access to confidential information (FAC ¶ 18, ECF No. 153 (alleging fiduciary duty arising from Morris's participation in "strategic decisions regarding sales and marketing")) and his alleged breaches all involve "the taking or use of an alleged trade secret or confidential or proprietary information" to some degree. *Robert Half Intern., Inc.*, 68 F. Supp. 3d at 1190,93.

Here, as in *Hullinger*, *Farhang*, *Chang*, and *K.C. Multimedia*, "the conduct at the heart of" ChromaDex's claim is that Morris purportedly stole ChromaDex's confidential information, lied about the alleged misappropriation and use of the confidential information, and then used that information to help a competitor. Consistent with the holdings in *Hullinger*, *Farhang*, *Chang*, and *K.C. Multimedia*, ChromaDex's claim for breach of fiduciary duty is founded on its core complaint of Morris's purported misappropriation and misuse of purported confidential information and is thus preempted.

3. CUTSA Preempts Claims Based Not Just on Misappropriation of Confidential Information, But on Disclosure As Well.

There is no distinction between "misappropriation" and "disclosure" of confidential information under CUTSA because *"misappropriation" is defined to include "disclosure."* Cal. Civ. Code § 3426.1(b)(2) (emphasis added). The statute's clear text – not to mention the holdings of *Hullinger*, *Farhang*, *Chang*, and *K.C. Multimedia*, which dismiss as preempted claims based not just on taking but on acts of disclosure as well – renders ChromaDex's assertion of a "difference between misappropriation of confidential information and the unlawful disclosure of such information" frivolous. Br. at 22, ECF No. 177.

ChromaDex gets it exactly wrong when it argues that a claim "based on the fiduciary's disloyalty to his company, and not on misappropriation … would not be preempted under CUTSA." Br. at 23, ECF No. 177. That argument runs contrary to the core principle of CUTSA preemption, which is that a claim based on wrongful taking or use of confidential information is preempted, regardless of how the claim is packaged. ChromaDex offers what it calls an "exercise in logic" by positing a grand unified theory of the directionality of acts of misappropriation vis-à-vis those in breach of fiduciary duties. Br. at 21-22, ECF No. 177. The exercise is unhelpful. CUTSA preemption turns on the facts underpinning the respective claims, not on some invented meta-analysis of the directional "flow of confidential information." Pl.'s Resp. Br. at 13, ECF No. 177 at 21. Nor is the "exercise in logic" even consistent with the FAC: for instance, in support of its trade secret claim, ChromaDex alleges that Elysium induced Morris to take confidential information and that Elysium used trade secret information when it approached ChromaDex in purchase order negotiations. Those arrows point the wrong way, puncturing ChromaDex's thought experiment.

In ChromaDex's view, if an act of misappropriation is simultaneously a breach of one's duty of loyalty, the act is actionable under both theories. That is not the law.

Rather, "CUTSA serves to preempt all claims premised on the wrongful taking and use of confidential business and proprietary information, even if that information does not meet the statutory definition of a trade secret." ECF No. 115 at 7. Indeed, even if aspects of the fiduciary duty claim are unrelated to the core aspect of trade secret misappropriation, that sprinkling of facts cannot save from preemption a claim whose core complaint sounds in misappropriation or use of confidential information: "Although a displacement provision contained in the Model Uniform Trade Secrets Act ("MUTSA") may allow plaintiffs in other jurisdictions to maintain separate causes of action where a claim for relief includes other factual allegations in addition to misuse or misappropriation of trade secrets, 'California has rejected that particular provision of the uniform act in favor of an entirely different one.'" *Valvoline Instant Oil Change Franchising, Inc. v. RFG Oil, Inc.*, No. 12-CV-2079-GPC-KSC, 2013 WL 4027858, at *7 (S.D. Cal. Aug. 5, 2013) (quoting *K.C. Multimedia*, 171 Cal. App. 4th at 956–59). *See also Farhang*, 2010 WL 2228936 (N.D. Ca. June 1, 2010). Though there appear to be none, to the extent that ChromaDex has added facts to its fiduciary duty claim that are unrelated to its theory that Elysium and Morris stole ChromaDex's confidential information, used it to compete with ChromaDex, and lied to cover their tracks, the claim is still preempted.

C. Leave to Amend ChromaDex's Complaint for the Sixth Time Should Be Denied.

Without even a bare description of how it would propose to amend, and without having raised the prospect of amendment during the parties' Local Civil Rule 7-3 pre-motion conference during which the parties discussed the grounds for this motion, ChromaDex in its opposition brief seeks leave to file a *sixth* amended complaint "[i]n the event the Court grants any part of" Elysium's motion to dismiss. Br. at 24, ECF No. 177. Absent any description of the requested amendment, neither Elysium nor the Court can begin to evaluate the propriety of the request under Ninth Circuit case law. *California v. Neville Chem. Co.*, 213 F. Supp. 2d 1142, 1144-45

(C.D. Cal. 2002) ("denial [of leave to amend] is proper if the amendment would be futile, if there has been any undue delay, bad faith or dilatory motive on the part of the movant, or if allowing the amendment would result in undue prejudice to the opposing party . . . A proposed amendment is futile if the new claim could be defeated by a motion to dismiss or a motion for summary judgment."). And ChromaDex's failure even to raise the issue of amendment during the parties' Rule 7-3 pre-motion conference should preclude it from requesting that, should the Court rule adversely to ChromaDex on the issues the parties discussed during that conference, it be given leave to amend. Especially in light of ChromaDex's multiple opportunities to plead its claims, and because ChromaDex has failed to suggest even in conclusory fashion the nature of any proposed amendment, the request should be denied and the claims dismissed with prejudice.

III. CONCLUSION

Because an affirmative lack of consideration appears on the face of the FAC, ChromaDex's Sixth Claim for Relief for Morris's alleged breach of the New Hire Agreement should be dismissed with prejudice. And because ChromaDex's claims for breach of fiduciary duty hinge upon its core theory that Morris and Elysium misappropriated and used its confidential information, those claims too should be dismissed with prejudice.

Respectfully submitted,

Dated: January 25, 2019

BAKER & HOSTETLER LLP

By: */s/ Joseph N. Sacca*
JOSEPH N. SACCA

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