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13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**
15 **(SOUTHERN DIVISION)**

16 ChromaDex, Inc.,
17 Plaintiff,
18 v.
19 Elysium Health, Inc. and Mark Morris,
20 Defendants.

21 Elysium Health, Inc.,
22 Counterclaimant,
23 v.
24 ChromaDex, Inc.,
25 Counter-Defendant.
26

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

**CHROMADEx, INC.'S MEMORANDUM
OF CONTENTIONS OF FACT AND LAW**

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

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

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1 Pursuant to Local Rule 16-4 of the United States District Court for the Central
2 District of California, Plaintiff and Counter-Defendant ChromaDex, Inc. respectfully
3 submits its Memorandum of Contentions of Fact and Law.

4 **I. INTRODUCTION**

5 ChromaDex discovers, acquires, develops, and commercializes patented and
6 proprietary ingredient technologies in the nutritional supplement industry. Its portfolio
7 of patented ingredient technologies includes, among other things, a groundbreaking
8 nutraceutical ingredient known as nicotinamide riboside, or “NR.” In 2012,
9 ChromaDex licensed key NR patents from Dartmouth College and, after investing years
10 and tens of millions of dollars, was the first company to successfully commercialize
11 NR. In 2013, ChromaDex began selling small amounts of NR under the brand name
12 NIAGEN, and in 2014, started to supply NR in commercial quantities to companies
13 marketing direct-to-consumer (“DTC”) products.

14 One of those DTC companies was Elysium, a Manhattan-based startup founded
15 by a venture capitalist (Eric Marcottuli) and a stockbroker (Dan Alminana). Elysium
16 first approached ChromaDex in 2013 seeking to purchase commercial quantities of NR
17 and another ingredient, pterostilbene (“PT”) in order to market a dietary supplement it
18 later named “Basis.” The parties ultimately entered into two supply agreements,
19 making ChromaDex Elysium’s sole supplier of these two fundamental active
20 ingredients in the only commercially viable product ever developed by Elysium—Basis.
21 Elysium first sold Basis to consumers in 2015 and continues to sell it today.

22 On June 30, 2016, Elysium ordered from ChromaDex uncharacteristically large
23 shipments of NR and PT, totaling approximately \$2.9 million (the “June 30 Orders”).
24 The June 30 Orders were over three times larger than any of Elysium’s previous orders.
25 Despite having received (and resold) all \$2.9 million worth of inventory it ordered,
26 Elysium did not, and to this day never has, paid ChromaDex for the June 30 Orders. As
27 will be established at trial, Elysium never intended to pay for these orders, and instead
28 envisioned them as the final blow in its long campaign to drive ChromaDex out of

1 business so it could seize the NR space for its own economic interests—all motivated
2 by outright greed. Elysium sold Basis containing the ingredients it stole from
3 ChromaDex and profited to the tune of \$8.3 million, all while investing the money it
4 owed to ChromaDex into developing its own alternative sources of NR and PT.

5 ChromaDex filed this lawsuit in December 2016 to recover what it is owed for
6 the June 30 Orders. However, ChromaDex soon amended its claims as it learned
7 through discovery the full extent of Elysium’s wrongdoing. What this Court recognized
8 as a straightforward breach of contract case ultimately revealed a wide-ranging scheme
9 between Elysium and ChromaDex’s then-executive, Mark Morris, to “destroy”
10 ChromaDex so they could, in their own words, “get rid of the scumbags holding this
11 magnificent technology” (NR). This scheme included Morris’s blatant breaches of his
12 fiduciary duties and Elysium’s eager aiding and abetting of those breaches, the theft of
13 NR and PT from ChromaDex through brazen breach of contract, the disclosure and
14 misuse of confidential and proprietary information in violation of trade secret laws,
15 Morris’s breaches of his contractual confidentiality obligations to ChromaDex,
16 admitted perjury by Elysium’s principals, and other acts of deception and disloyalty that
17 enabled Elysium and Morris to execute their plot. And so, with the benefit of discovery,
18 we proceed to trial on a breach of contract case and several additional claims.

19 Elysium responded with counterclaims for breach of contract, fraudulent
20 inducement, declaratory judgment of patent misuse, and restitution for unjust
21 enrichment. Several of those counterclaims were dismissed by the Court following
22 ChromaDex’s motion for partial summary judgment. (Dkt. 413 at 47–48.) And the
23 Court recently granted the parties’ stipulation to bifurcate the patent misuse and unjust
24 enrichment counterclaims to be tried separately to the Court at a later bench trial.
25 (Dkt. 508.) This Memorandum addresses only the claims, counterclaims and
26 affirmative defenses to be heard by the jury.

1 **II. SUMMARY STATEMENT OF CHROMADDEX’S CLAIMS**

2 ChromaDex brings the following claims against Elysium and Morris pursuant to
3 California and federal law:

- 4 1. Elysium breached the PT Supply Agreement;
- 5 2. Elysium breached the NR Supply Agreement;
- 6 3. Elysium and Morris violated the California Uniform Trade Secrets Act
7 (“CUTSA”) (Cal. Civ. Code § 3426, *et seq.*);
- 8 4. Elysium and Morris violated the Federal Defend Trade Secrets Act
9 (“DTSA”) (18 U.S.C. § 1836, as amended);
- 10 5. Morris breached the February Confidentiality Agreement;
- 11 6. Morris breached the July Confidentiality Agreement;
- 12 7. Morris breached his fiduciary duty; and
- 13 8. Elysium aided and abetted Morris’s breach of fiduciary duty.

14 **III. ELEMENTS REQUIRED TO ESTABLISH CHROMADDEX’S CLAIMS**

15 **Elements of Breach of Contract: PT Supply Agreement (Elysium):**

- 16 1. ChromaDex and Elysium entered into a contract (the PT Supply
17 Agreement);
- 18 2. ChromaDex did all, or substantially all, of the significant things that the
19 contract required it to do;
- 20 3. Elysium failed to do something the contract required it to do;
- 21 4. ChromaDex was harmed or Elysium was unjustly enriched; and
- 22 5. Elysium’s breach of contract was a substantial factor in causing
23 ChromaDex’s harm or Elysium’s unjust enrichment.

24 [*Authority: Judicial Council of California, Civil Jury Instructions 303; see Toyo Tire &*
25 *Rubber Co. v. Doublestar Dong Feng Tyre Co.*, 2018 WL 1895696, at *6 (C.D. Cal.
26 Apr. 12, 2018) (Carney, J.); *Foster Poultry Farms, Inc. v. SunTrust Bank*, 377 F. App’x
27 665, 669 (9th Cir. 2010) (“We hold that, under California law, a defendant’s unjust
28 enrichment can satisfy the damages’ element of a breach of contract claim, such that

1 disgorgement is a proper remedy.”); *Ajaxo Inc. v. E*Trade Grp. Inc.*, 135 Cal. App. 4th
2 21, 54–58 (2005) (disgorgement appropriate where defendant was unjustly enriched by
3 breaching a non-disclosure agreement); *Young v. Wideawake Death Row Entm’t, LLC*,
4 2011 WL 13371881, at *2 (C.D. Cal. May 16, 2011) (“In some circumstances,
5 California courts have permitted disgorgement of improperly obtained profits as a
6 remedy for breach of contract.”).]

7 **Elements of Breach of Contract Claim: NR Supply Agreement (Elysium):**

- 8 1. ChromaDex and Elysium entered into a contract (the NR Supply
9 Agreement);
- 10 2. ChromaDex did all, or substantially all, of the significant things that the
11 contract required it to do;
- 12 3. Elysium failed to do something the contract required it to do;
- 13 4. ChromaDex was harmed or Elysium was unjustly enriched; and
- 14 5. Elysium’s breach of contract was a substantial factor in causing
15 ChromaDex’s harm or Elysium’s unjust enrichment.

16 [Authority: Judicial Council of California, Civil Jury Instructions 303; *Toyo Tire &*
17 *Rubber Co.*, 2018 WL 1895696, at *6; *Foster Poultry Farms, Inc.*, 377 F. App’x at 669
18 (“We hold that, under California law, a defendant’s unjust enrichment can satisfy the
19 damages’ element of a breach of contract claim, such that disgorgement is a proper
20 remedy.”); *Ajaxo Inc.*, 135 Cal. App. 4th at 54–58 (disgorgement appropriate where
21 defendant was unjustly enriched by breaching a non-disclosure agreement); *Young*,
22 2011 WL 13371881, at *2 (“In some circumstances, California courts have permitted
23 disgorgement of improperly obtained profits as a remedy for breach of contract.”).]

24 **Elements of Breach of Contract: February Confidentiality Agreement**
25 **(Morris):**

- 26 1. ChromaDex and Morris entered into a contract (the February
27 Confidentiality Agreement);

- 1 2. ChromaDex did all, or substantially all, of the significant things that the
- 2 contract required it to do;
- 3 3. Morris failed to do something the contract required him to do;
- 4 4. ChromaDex was harmed or Morris was unjustly enriched; and
- 5 5. Morris’s breach of contract was a substantial factor in causing
- 6 ChromaDex’s harm or Morris’s unjust enrichment.

7 [Authority: Judicial Council of California, Civil Jury Instructions 303; *Toyo Tire &*
8 *Rubber Co*, 2018 WL 1895696, at *6; *Foster Poultry Farms, Inc.*, 377 F. App’x at 669
9 (“We hold that, under California law, a defendant’s unjust enrichment can satisfy the
10 damages’ element of a breach of contract claim, such that disgorgement is a proper
11 remedy.”); *Ajaxo Inc. v. E*Trade Grp. Inc.*, 135 Cal. App. 4th 21, 54–58 (2005)
12 (disgorgement appropriate where defendant was unjustly enriched by breaching a
13 non-disclosure agreement); *Young*, 2011 WL 13371881, at *2 (“In some circumstances,
14 California courts have permitted disgorgement of improperly obtained profits as a
15 remedy for breach of contract.”).]

16 **Elements of Breach of Contract: July Confidentiality Agreement (Morris):**

- 17 1. ChromaDex and Morris entered into a contract (the July Confidentiality
- 18 Agreement);
- 19 2. ChromaDex did all, or substantially all, of the significant things that the
- 20 contract required it to do;
- 21 3. Morris failed to do something the contract required him to do;
- 22 4. ChromaDex was harmed or Morris was unjustly enriched; and
- 23 5. Morris’s breach of contract was a substantial factor in causing
- 24 ChromaDex’s harm or Morris’s unjust enrichment.

25 [Authority: Judicial Council of California, Civil Jury Instructions 303; *Toyo Tire &*
26 *Rubber Co*, 2018 WL 1895696, at *6; *Foster Poultry Farms, Inc.*, 377 F. App’x at 669
27 (“We hold that, under California law, a defendant’s unjust enrichment can satisfy the
28 damages’ element of a breach of contract claim, such that disgorgement is a proper

1 remedy.”); *Ajaxo Inc. v. E*Trade Grp. Inc.*, 135 Cal. App. 4th 21, 54–58 (2005)
2 (disgorgement appropriate where defendant was unjustly enriched by breaching a
3 non-disclosure agreement); *Young*, 2011 WL 13371881, at *2 (“In some circumstances,
4 California courts have permitted disgorgement of improperly obtained profits as a
5 remedy for breach of contract.”).]

6 **Elements of Misappropriation of Trade Secrets under CUTSA (Morris and**
7 **Elysium):**

- 8 1. ChromaDex owned one or more trade secrets;
- 9 2. The trade secret was a trade secret at the time of the misappropriation;
- 10 3. Elysium and/or Morris improperly acquired, used, or disclosed the alleged
11 trade secret;
- 12 4. ChromaDex was harmed or Elysium and/or Morris were unjustly enriched;
13 and
- 14 5. Elysium and/or Morris’s acquisition, use, or disclosure was a substantial
15 factor in causing ChromaDex’s harm or Elysium and/or Morris to be
16 unjustly enriched.

17 [Authority: Judicial Council of California, Civil Jury Instructions 4401; Cal. Civ. Code
18 § 3426.1.]

19 **Elements of Misappropriation of Trade Secrets under DTSA (Morris and**
20 **Elysium):**

- 21 1. ChromaDex owns one or more trade secrets;
- 22 2. The information was a trade secret at the time of the misappropriation;
- 23 3. The trade secret(s) is related to a product or service used in, or intended
24 for use in, interstate or foreign commerce;
- 25 4. Elysium and/or Morris improperly acquired, used, or disclosed the alleged
26 trade secret(s);
- 27 5. ChromaDex was harmed or Elysium and/or Morris were unjustly enriched;
28 and

1 6. Elysium’s and/or Morris’s acquisition, use or disclosure was a substantial
2 factor in causing ChromaDex’s harm or Elysium and/or Morris to be
3 unjustly enriched.

4 [*Authority*: 18 U.S.C. § 1839; Pattern Civ. Jury Instr. 11th Cir. 11.1 (2020) (modified);
5 *Auto. Data Sols., Inc. v. Directed Elecs. Canada, Inc.* 2018 WL 4742289, at *3 (C.D.
6 Cal. Aug. 15, 2018) (“The elements of misappropriation under the DTSA are similar to
7 those under the CUTSA.”); *Veronica Foods Co. v. Ecklin*, 2017 WL 2806706, at *12
8 (N.D. Cal. June 29, 2017) (noting the definitions of “trade secret,” “misappropriation”
9 and “improper use” in CUTSA are “substantially identical to the definitions of those
10 terms in the DTSA”).]

11 **Elements of Breach of Fiduciary Duty (Morris):**

- 12 1. Morris was ChromaDex’s corporate officer;
- 13 2. Morris knowingly acted against ChromaDex’s interests, or in favor of
14 Elysium’s interests, with respect to ChromaDex’s ingredients business;
- 15 3. ChromaDex did not give informed consent to Morris’s conduct;
- 16 4. Elysium was harmed or Morris was unjustly enriched; and
- 17 5. Morris’s breach of fiduciary duty was a substantial factor in causing
18 ChromaDex’s harm or Morris to be unjustly enriched.

19 [*Authority*: Judicial Council of California, Civil Jury Instructions 4102 (modified);
20 *County of San Bernardino v. Walsh*, 158 Cal. App. 4th 533, 543 (2007) (“Disgorgement
21 of profits is particularly applicable in cases dealing with breach of a fiduciary duty, and
22 is a logical extension of the principle that . . . fiduciaries cannot profit by a breach of
23 their duty. Where a person profits from transactions conducted by him as a fiduciary,
24 the proper measure of damages is full disgorgement of any secret profit made by the
25 fiduciary regardless of whether the principal suffers any damage.”)]

26 **Elements of Aiding and Abetting Breach of Fiduciary Duty (Elysium):**

- 27 1. Elysium knew that Morris was breaching or was going to breach his
28 fiduciary duty to ChromaDex;

1 2. Elysium gave substantial assistance or encouragement to Morris;

2 3. Elysium’s conduct was a substantial factor in causing ChromaDex to be
3 harmed or it to be unjustly enriched.

4 [*Authority*: Judicial Council of California, Civil Jury Instructions 3610 (modified); *Am.*
5 *Master Lease LLC v. Idanta Partners, Ltd.*, 225 Cal. App. 4th 1451, 1482–83 (2014)
6 (“Disgorgement based on unjust enrichment is an appropriate remedy for aiding and
7 abetting a breach of fiduciary duty.”).]

8 **IV. KEY EVIDENCE IN SUPPORT OF CHROMADEx’S CLAIMS**

9 **A. Key Evidence In Support of ChromaDex’s Claims for Breach of the**
10 **PT and NR Supply Agreements (Elysium)**

11 It is uncontested that ChromaDex and Elysium entered into two valid and
12 enforceable supply agreements, the PT Supply Agreement and the NR Supply
13 Agreement. There is no dispute that Elysium breached both agreements. Specifically,
14 on June 30, 2016, Elysium ordered 3,000 kilograms of NR and 580 kilograms of PT.
15 ChromaDex filled the order and delivered the product to Elysium’s contract
16 manufacturer on July 1, 2016 and August 9, 2016. ChromaDex provided Elysium with
17 three invoices for the shipments on July 1, 2016 and August 9, 2016. The total amount
18 ChromaDex invoiced Elysium for the June 30 Orders is \$2,983,350. Elysium refused
19 to pay, and has never paid, for the inventory it received from ChromaDex. Elysium
20 owes this amount plus statutory interest, and on this claim it has no viable defense.

21 Further, the supply agreements contained provisions obligating Elysium to keep
22 confidential information that it received from ChromaDex and only disclose it in
23 connection with its activities “as expressly authorized by [the] Agreement.”
24 ChromaDex provided Elysium several key documents related to NR and PT—including
25 an analytical method for testing the purity of NR (the “NR Analytical Method”), a
26 necessary step in the NR manufacturing process—and Elysium disclosed those
27 documents to third parties in its efforts to set up a competing source of both ingredients.

28

1 That use was not in connection with the supply agreements and not authorized by
2 ChromaDex, which was entirely unaware of Elysium’s plan.

3 **B. Key Evidence in Support of ChromaDex’s Claims for Breach of**
4 **Fiduciary Duty (Morris) and Aiding and Abetting Breach of Fiduciary**
5 **Duty (Elysium)**

6 ChromaDex will rely on documents and testimony to show that Morris, an
7 executive of ChromaDex with managerial responsibilities, breached his fiduciary duty
8 to ChromaDex and was substantially encouraged and assisted by Elysium.

9 In spring of 2016, Morris was ChromaDex’s Vice President of Business
10 Development and the primary account manager for Elysium. Morris participated in
11 management and exercised some discretionary authority. In March 2016, Elysium,
12 through Marcotulli and Alminana, began recruiting Morris for an executive position at
13 Elysium. But this was not a standard recruiting process. From the beginning, Morris
14 made clear that he was eager to breach his fiduciary duties to his employer—
15 ChromaDex—texting Marcotulli and Alminana on March 12, 2016, that he would “run
16 to New York right now.” Morris and Elysium even entered into a Non-Disclosure
17 Agreement while Morris was still employed by ChromaDex. Elysium seized on
18 Morris’s excitement and saw an opportunity to use Morris to prosecute its “all out war”
19 on ChromaDex. But despite Morris’s clearly stated desire to begin working at Elysium,
20 Elysium directed Morris to stay at ChromaDex to act as Elysium’s inside agent. Morris
21 willingly and eagerly shifted to his secret, personal email and personal cell phone
22 number in order to feed Marcotulli and Alminana ChromaDex’s trade secrets and
23 confidential information. Through a series of brazen and conspiratorial
24 communications, he guided Elysium to induce ChromaDex to accept the June 30 Orders
25 at a price that he, Marcotulli, and Alminana engineered.

26 Examples of Morris’s misconduct include: (1) acting as Elysium’s agent to
27 manipulate ChromaDex into fulfilling the June 30 Orders and giving Elysium an
28 unwarranted discount; (2) withholding information about Elysium’s intent to stockpile
NR and PT without paying ChromaDex so that it had money and time to develop

1 competing supplies of NR and PT, which it did with Morris’s help; (3) lying to
2 ChromaDex about his plan to work for Elysium and develop a competing supply of NR
3 and PT; (4) working for Elysium while still employed by ChromaDex; (5) lying about
4 returning ChromaDex trade secrets and confidential information; and (6) helping
5 Elysium to undermine ChromaDex with third parties.

6 Morris’s breach is best illustrated in an email chain in which he declares his
7 **“unconditional loyalty”** to Elysium’s leaders while still employed by ChromaDex.
8 And there is ample additional evidence of Morris’s misconduct and Elysium’s aiding
9 and abetting. On May 29, 2016, Morris signaled to Elysium that he was ready to leave
10 ChromaDex. Marcotulli and Alminana promptly arranged a phone call with Morris that
11 very same day. Almost immediately after the call, Morris texted Alminana a detailed
12 recital of the purchasing history of Live Cell (a direct competitor of Elysium’s),
13 including dates, volumes, and prices of its NR orders. ChromaDex secures that
14 trade-secret information in a confidential Excel file—the “Ingredient Sales
15 Spreadsheet,” to which Morris had access—which is updated to track the history of *all*
16 ingredient purchases, as well as internal sales forecasts, for *all* ChromaDex ingredient
17 customers. Elysium recognized the enormous value of receiving the crown jewels of
18 ChromaDex’s sales history. Elysium will surely debate the point, but the
19 contemporaneous response by Alminana says it all: “This is between us and you are the
20 F’n man!!” Approximately 20 minutes after receiving the Live Cell purchase history
21 from Morris, Alminana requested the exact same information from then-ChromaDex
22 CEO, Frank Jaksch, under the false flag of a “fast-paced due diligence process with a
23 massive silicon valley VC.”¹

24 This, of course, was all a ruse and part of Elysium’s scheme to steal a huge
25 amount of ingredients to serve as a bridge while Morris—still employed by
26 ChromaDex—helped Elysium find a new source of ingredients and fed Elysium more

27 ¹ As we anticipate trial testimony on these subjects, one may reasonably pause to
28 consider the fact that Messrs. Marcotulli and Alminana have both admitted, in their
December 2020 declarations, to having committed perjury during their depositions.

1 of ChromaDex’s confidential information. Morris was instrumental to this plot and
2 Elysium encouraged Morris’s insider perfidy. Elysium made sure to keep Morris in
3 place until it obtained the information it needed. On June 21, 2016, Morris texted
4 Alminana asking if he could email him some thoughts on ChromaDex’s patents. Just a
5 few hours later, Morris tipped his greedy hand in response to Alminana raising the
6 possibility of Morris starting his employment with Elysium sooner:

7 “YES! PLEASE! My options are obviously out of the money now so I do
8 not have to wait. I could give my notice as soon as tomorrow --- Seriously,
9 it is up to you two. With everything that is going on – I can spin joining
10 Elysium as the best thing for ChromaDex. Rather than a strain, I honestly
11 believe they will come to the conclusion that it is for the best. Of course,
we will make their worst nightmares come true!”

12 Alminana responded that he and Marcotulli would call Morris the following day. In
13 Alminana’s words, with Morris’s help, it was Elysium’s “Time to take control of
14 everything!” Morris promptly responded, “Absolutely! Time to change the world and
15 get rid of the scumbags holding this magnificent technology.”

16 Despite Morris’s representation that he could give his notice to ChromaDex as
17 soon as June 22, 2016, he stayed at ChromaDex for several more weeks to (1) help
18 Elysium develop a “game changing” new patent strategy to steal ChromaDex’s valuable
19 licenses to key NR patents; and (2) provide ChromaDex’s confidential information to
20 his future employer. There is no need to mince words—Morris was a corrupted spy, as
21 proved beyond any doubt during his videotaped deposition.² While still drawing a
22 ChromaDex paycheck, Morris conducted for Elysium an analysis of the Dartmouth NR
23 patent claims, which he emailed to Elysium on June 22, 2016. On June 23, 2016, Morris
24 then emailed Marcotulli and Alminana confidential information about ChromaDex’s
25 research and development efforts related to the manufacture of NR, including how much
26 it paid to which entity for a feasibility study, when the study would be completed, what
27

28 ² ChromaDex will liberally use portions of Morris’s deposition as affirmative proof in its case-in-chief and for impeachment when Morris testifies.

1 ingredients ChromaDex was considering, the additional cost it would take for
2 commercialization, and what ChromaDex’s cost of production would ultimately be.

3 The following day, Morris revealed to Elysium a closely-held ChromaDex trade
4 secret: the price that it paid per kilogram for NR to its exclusive contract manufacturer,
5 W.R. Grace & Co. (“Grace”). Armed with this insider information, Alminana instructed
6 Elysium’s then-Supply Chain Manager, Daniel Magida, to prepare an analysis and
7 forecast for use in Elysium’s planned negotiations with ChromaDex. Magida also
8 calculated the size of the ingredient order that Elysium would need to last for a year
9 while it put in place an alternative supply for NR. Morris could hardly contain his glee
10 about the forthcoming plan, texting Alminana: “I can’t wait for you to lob in that
11 purchase order to add to their stress :).”

12 On June 28, 2016, Elysium placed large orders for NR and PT and demanded a
13 price—\$400 per kilogram—that was far below the price Elysium and all other
14 customers were paying, but right around the same amount that Elysium knew (because
15 of Morris) that ChromaDex paid its manufacturer to make NR. Straight from a Cold
16 War espionage script, Morris texted Alminana right after the orders were placed—“If I
17 call from this phone – Don’t answer – It will be Frank sitting in the room and forcing
18 me to make the call.” He immediately followed that with another text stating, “Damn
19 right!!! Feel the pain Frank!!!,” referring to the then-CEO of his employer, ChromaDex.
20 ChromaDex declined to fulfill the orders because of the price. Elysium then engaged
21 in bad-faith negotiations with ChromaDex using unlawfully obtained insider
22 information and trade secrets supplied by Morris to ultimately obtain the ingredients on
23 credit and at a \$600,000 price discount. During the negotiations, Morris continued to
24 provide confidential information to Alminana, including the price that ChromaDex was
25 considering offering to Elysium (so Elysium had an upper hand in the talks), how much
26 ChromaDex paid for the NR ingredient inventory (so Elysium could exert maximum
27 leverage), and the stability data for NR (to confirm that the large orders would last for
28 as long as Elysium required).

1 Morris did not warn his current employer, ChromaDex, about Elysium’s plan to
2 get the ingredients without paying and then ditch ChromaDex forever. Instead, Morris
3 facilitated the plan by encouraging ChromaDex to accept Elysium’s orders at a
4 discounted price. On a phone call on June 30, 2016, Elysium—to make the deal more
5 attractive—fraudulently promised to purchase equally large quantities of ingredients
6 later in 2016 if ChromaDex would fulfill its large orders at the discounted price. Based
7 in part on Morris’s recommendation, and on Elysium’s lies, ChromaDex agreed. That
8 same day, Elysium placed the June 30 Orders totaling \$2.98 million. ChromaDex
9 would not have agreed to the June 30 Orders if it had known the scope of Morris’s
10 betrayal and Elysium’s scheme to destroy ChromaDex and take control of NR forever.

11 Contrary to their promises, Marcotulli and Alminana never intended to pay for
12 the June 30 Orders and never intended to order ingredients from ChromaDex again.
13 ChromaDex was in the dark about this scheme, but Morris knew. On July 1, 2016, the
14 day ChromaDex began shipping the ingredients, Morris and Alminana discussed
15 Elysium’s plan to accuse ChromaDex of contractual breaches “the second our
16 ingredients are at Tischon” (Elysium’s contract manufacturer). Morris told Alminana
17 to “make sure I am out of here first. . . . I want to destroy them!”

18 Once the June 30 Orders were placed, Elysium finally permitted Morris to leave
19 ChromaDex. On July 7, 2016, Morris admitted to Marcotulli and Alminana that his
20 “unconditional loyalty” was to them (not ChromaDex), as it had been for months
21 leading up the June 30 Orders, but expressed a desire to be “truthful” in his resignation
22 and to describe to ChromaDex his “endless enthusiasm for what lies ahead with
23 Elysium.” But after speaking with Marcotulli and Alminana on a telephone call the
24 following evening, Morris changed his tune and represented on July 9, 2016 that he
25 “definitely ha[d] a different viewpoint on how to leave.” Morris even thanked
26 Elysium’s leaders for persuading him to lie to ChromaDex one more time about the
27 reasons for his departure and to remain silent about his future with Elysium. Morris
28 gave notice to ChromaDex on July 12, 2016. He lied to his colleagues at ChromaDex

1 about why he was resigning and continued to work as a senior executive at ChromaDex
2 until July 15.

3 On July 14, the day before he left, Morris sent Marcotulli and Alminana an email
4 from his personal email account recommending manufacturers who could provide
5 Elysium a new (and infringing) source of NR, including the very company that Elysium
6 uses today: AMPAC Fine Chemicals. Morris also attached a document called the NR
7 GRAS (“Generally Recognized As Safe”) Dossier, intended by ChromaDex for
8 submission to the U.S. Food and Drug Administration. Morris was still a ChromaDex
9 employ when he sent that that information to Elysium.

10 In February 2016, Morris signed a confidentiality agreement in which he
11 promised to “protect [ChromaDex’s] information by safeguarding it,” to keep it “strictly
12 confidential” “[e]ven after my employment with the Company has terminated,” and to
13 not “duplicate[] or remove[] [it] from the Company.” Additionally, on July 15, 2016—
14 right before he left employment—he again freely signed another confidentiality
15 agreement in which he promised to keep ChromaDex’s confidential information in
16 confidence and return or destroy all ChromaDex documents and information in his
17 possession. However, Morris signed that agreement knowing that it was a lie: he had
18 no intention of returning ChromaDex’s trade secrets and confidential information
19 because they were his ticket to a job at Elysium. Morris admitted at his deposition that
20 he left on his final day with a flash drive containing ChromaDex documents and
21 information, including among other things the Ingredient Sales Spreadsheet. Morris
22 also admits that at some time during his first few weeks of employment with Elysium,
23 he downloaded the Ingredient Sales Spreadsheet from the flash drive to his computer at
24 Elysium, where Elysium’s own files show it was saved under Marcotulli’s name.

25 ChromaDex delivered the final shipment of the June 30 Orders to Elysium on
26 August 10, 2016. The very same day, Alminana accused ChromaDex of breaching
27 provisions of the NR Supply Agreement, and began a campaign of gaslighting and
28 confusion to keep ChromaDex unaware of Elysium’s efforts to destroy ChromaDex,

1 including by attempting to seize ChromaDex’s exclusive licenses to the Dartmouth NR
2 patents, purchase directly from ChromaDex’s exclusive manufacturer (Grace), and set
3 up a competing supply of NR. To date, Elysium has not paid ChromaDex anything for
4 the June 30 Orders and has made \$8.3 million in profits from selling the stolen
5 ingredients.

6 **C. Key Evidence In Support of ChromaDex’s Claims for**
7 **Misappropriation of Trade Secrets under CUTSA and the DTSA**
8 **(Elysium and Morris)**

9 ChromaDex will rely on documents and testimony to show that Elysium and
10 Morris harmed ChromaDex and were unjustly enriched by misappropriating
11 ChromaDex’s trade secrets in violation of the California Uniform Trade Secret Act
12 (“CUTSA”), codified at Cal. Civ. Code § 3426, *et seq.*, and the Federal Defend Trade
13 Secrets Act (“DTSA”), codified at 18 U.S.C. § 1836, *et seq.* There are two primary
14 categories of trade secrets at issue: (1) ChromaDex’s ingredient sales information,
15 including customer purchasing histories and customers’ relative market positions (such
16 as ChromaDex’s “Ingredient Sales Spreadsheet”); and (2) the price ChromaDex paid to
17 obtain NR from its manufacturer, Grace.

18 **Ingredient Sales Information.** Defendants misappropriated
19 ChromaDex’s ingredient sales information. On May 29, 2016, Morris texted Alminana,
20 without ChromaDex’s consent, the pricing and purchasing history of ChromaDex’s
21 ingredient customer, and one of Elysium’s perceived competitors, Live Cell. The
22 information Morris provided included the dates, volumes, and prices at which
23 ChromaDex sold product to Live Cell, which is highly confidential and which Morris
24 was not authorized to disclose to Elysium. Morris later provided even more information
25 about Live Cell’s sales, as shown by a spreadsheet saved to Elysium’s computers that
26 same day containing more details of Live Cell’s purchases. Alminana knew that this
27 information came from or through Morris and that Morris had a duty to ChromaDex to
28 keep the information secret. Indeed, Alminana responded to Morris, “This is between
us and you are the F’n man!!” Elysium used that information, without ChromaDex’s

1 consent, to secure the June 30 Orders, to get them at a substantial discount (\$600,000),
2 and to obtain the ingredients on credit.

3 The Live Cell sales information was kept on ChromaDex's Ingredient Sales
4 Spreadsheet, which contains the detailed purchasing history of every ChromaDex
5 ingredient customer since 2012. The spreadsheet included the names of ChromaDex's
6 customers, the ingredient(s) they purchased, quantities purchased, and price paid,
7 among other things. Morris later disclosed this full spreadsheet to Elysium without
8 ChromaDex's consent.

9 ChromaDex's ingredient sales information is kept confidential because it is vital
10 to ChromaDex' ability to maintain a competitive advantage in the ingredient market.
11 For example, if ChromaDex's customers were able to learn the detailed ordering history
12 of other customers, they could use that information for their advantage and against
13 ChromaDex's interests, just as Elysium did in the negotiations over the June 30 Orders.
14 Further, customers learning the others customers' ordering information could also use
15 it to forecast their competitors' market plans and gain an unfair competitive advantage.
16 ChromaDex's ingredient sales information contains detailed data that cannot be gleaned
17 from public sources, such as the prices, volumes, and dates of each customer's
18 purchases. For those reasons, ChromaDex never shared the information in the
19 Ingredient Sales Spreadsheet outside of the company, except on the rare occasion such
20 disclosure was necessary to financial professionals retained by ChromaDex.

21 ChromaDex made and continues to make efforts reasonable under the
22 circumstances to maintain the secrecy of the ingredient sales information. These efforts
23 include limiting access to this information to select ChromaDex employees and
24 requiring employees to enter employment and confidentiality agreements restricting
25 their use and disclosure of "secret processes, inventions, custom and supplier lists and
26 other trade secrets." Yet the Ingredient Sales Spreadsheet was saved to Elysium's
27 servers on July 18, 2016—Morris's first day of work at Elysium. The Ingredient Sales
28 Spreadsheet was produced in discovery by Elysium from Marcotulli's files. And Morris

1 testified at his deposition that he took a flash drive of information with him when he
2 left ChromaDex and downloaded it to his Elysium computer.

3 **Manufacturing Cost.** Defendants misappropriated the price ChromaDex
4 pays to its NR contract manufacturer, Grace. Sometime in late June 2016, Morris
5 verbally disclosed and then later “verified” by text message to Alminana the price that
6 ChromaDex pays to Grace for its supply of NR. Documents produced in discovery as
7 well as deposition testimony show that Elysium used that price point to plot its
8 fraudulent efforts to obtain the June 30 Orders at a discount and on credit so that it could
9 develop an independent source of ingredients, all while continuing to profit from the
10 ingredients it stole from ChromaDex.

11 The price ChromaDex pays Grace for ChromaDex’s supply of NR is valuable
12 non-public information because a customer or competitor who is able to learn it could
13 use it as leverage against ChromaDex during negotiations for ingredient orders, which
14 is exactly how Elysium used it. ChromaDex made, and continues to make, reasonable
15 efforts to protect the secrecy of this information. ChromaDex’s efforts to maintain the
16 secrecy of this information include limiting access to this information to select
17 ChromaDex employees and members of management and requiring employees to enter
18 employment and confidentiality agreements restricting their use and disclosure of trade
19 secrets and other confidential and proprietary information.

20 **D. Key Evidence in Support of ChromaDex’s Claims for Breach of the**
21 **February and July Confidentiality Agreements (Morris)**

22 ChromaDex and Morris entered into two agreements: the February
23 Confidentiality Agreement and the July Confidentiality Agreement. Morris signed the
24 February Confidentiality Agreement on February 26, 2016, and the July Confidentiality
25 Agreement on July 15, 2016. Both agreements obligated him to keep ChromaDex’s
26 trade secrets and confidential and proprietary information within the company (both
27 during and after his employment) and to return or destroy any ChromaDex information
28

1 upon leaving the company. Morris breached both agreements repeatedly, as shown by
2 his text messages and emails with Elysium.

3 While employed by ChromaDex, Morris fed documents and information to
4 Elysium via his personal email and cell phone. For instance, while still employed by
5 ChromaDex, Morris secretly sent Elysium the following information: (1) a detailed
6 recital of Elysium's competitor Live Cell's NR purchasing history, including dates,
7 volumes, and prices; (2) information about ChromaDex's research and development
8 efforts related to the manufacture of NR, including how much it paid to which entity
9 for a feasibility study, when the study would be completed, what ingredients
10 ChromaDex was considering, the additional cost it would take for commercialization,
11 and what ChromaDex's cost of production would ultimately be; and (3) the price that
12 ChromaDex paid for NR to its exclusive contract manufacturer, Grace. That is only the
13 tip of the iceberg of what he shared. Morris's communications show that he viewed his
14 final days at ChromaDex as a going out of business sale, where everything must go (to
15 Elysium).

16 As discussed in sections IV(B) and (C), on July 15, 2016, the same day that
17 Morris resigned, but before his termination was complete, he affirmed his commitment
18 to safeguard ChromaDex's trade secrets and other confidential and proprietary
19 information by willingly signing the July Confidentiality Agreement. Like the February
20 Confidentiality Agreement, this Agreement obligated Morris to keep ChromaDex's
21 trade secrets and confidential and proprietary information within the company,
22 including after his employment, and to return or destroy any ChromaDex information
23 upon leaving the company. On July 15, 2016, around the same time he signed the July
24 Confidentiality Agreement, Morris participated in an exit interview before terminating
25 his employment. At this interview, Morris falsely represented that he had returned all
26 ChromaDex information in his possession. Morris also lied that he did not know what
27 his next steps would be after leaving ChromaDex.

28

1 Unbeknownst to ChromaDex, Morris walked out of ChromaDex with a flash
2 drive containing ChromaDex information and documents. Morris admitted at his
3 deposition that he left ChromaDex with this flash drive and that he downloaded the
4 “Ingredient Sales Spreadsheet” from the flash drive onto Elysium’s computers rather
5 than return it to ChromaDex or destroy it. Morris has since conveniently “lost” that
6 flash drive, although he admitted that it likely contained other ChromaDex documents
7 and information. Morris likewise admitted that he deleted personal emails and text
8 messages that are relevant to the case. He also provided ChromaDex’s confidential and
9 proprietary documents—including the NR Analytical Method—to Elysium’s NR
10 manufacturer to speed that entity’s production of NR for Elysium and provided sales
11 information to Elysium to support its effort to persuade ChromaDex’s contract
12 manufacturer, Grace, to sell NR directly to Elysium.

13 **V. SUMMARY STATEMENT OF ELYSIUM’S COUNTERCLAIMS AND**
14 **AFFIRMATIVE DEFENSES**

15 Elysium brings the following counterclaims against ChromaDex:

- 16 1. ChromaDex breached the NR Supply Agreement.
- 17 2. ChromaDex fraudulently induced Elysium to enter into the Trademark
18 License and Royalty Agreement.

19 Elysium asserts the following affirmative defenses against ChromaDex:

- 20 1. **Affirmative Defense No. 1:** ChromaDex’s claims are barred, in whole or
21 in part, because ChromaDex materially breached one or more of the
22 Agreements. Accordingly, Elysium’s obligations under the Agreements
23 were excused in whole or in part and the damages to which ChromaDex
24 would otherwise be entitled, if any, are offset in whole or in part.
- 25 2. **Affirmative Defense No. 2:** ChromaDex’s claims are barred in whole or
26 in part by the doctrine of unclean hands.
- 27 3. **Affirmative Defense No. 3:** Information was readily ascertainable by
28 proper means.

1 4. **Affirmative Defense No. 4:** ChromaDex’s claims are barred in whole or
2 in part by ChromaDex’s failure to mitigate.

3 5. **Affirmative Defense No. 5:** ChromaDex’s claims are barred in whole or
4 in part by the doctrine of setoff.

5 **VI. ELEMENTS REQUIRED TO ESTABLISH ELYSIUM’S**
6 **COUNTERCLAIMS AND AFFIRMATIVE DEFENSES**

7 **Elements of Breach of Contract – NR Supply Agreement:**

- 8 1. ChromaDex and Elysium entered into a contract (the NR Supply
9 Agreement);
- 10 2. Elysium did all, or substantially all of the significant things that the
11 contract required it to do;
- 12 3. ChromaDex failed to do something the contract required it to do;
- 13 4. Elysium was harmed; and
- 14 5. ChromaDex’s breach of contract was a substantial factor in causing
15 Elysium’s harm.

16 [*Authority:* Judicial Council of California, Civil Jury Instructions 303; *Toyo Tire &*
17 *Rubber Co.*, 2018 WL 1895696, at *6.]

18 **Elements of Fraudulent Inducement:**

- 19 1. ChromaDex, through its CEO, represented to Elysium that a fact was true;
- 20 2. ChromaDex’s representation was false;
- 21 3. ChromaDex knew that the representation was false when made, or that the
22 representation was made recklessly and without regard for its truth;
- 23 4. ChromaDex intended that Elysium rely on the representation;
- 24 5. Elysium reasonably relied on the representation;
- 25 6. Elysium was harmed; and
- 26 7. Elysium’s reliance on ChromaDex’s representation was a substantial
27 factor in causing Elysium’s harm.
- 28

1 [Authority: Judicial Council of California, Civil Jury Instructions 1900; *Lazar v.*
2 *Superior Court*, 12 Cal. 4th 631, 638 (1996).]

3 **Elements (offered by Elysium) of Affirmative Defense for Contract**
4 **Performance Excused by Breach:**³

- 5 1. That ChromaDex materially breached the NIAGEN Supply Agreement
6 and Amendment;
- 7 2. That ChromaDex is therefore not entitled to recover from Elysium for
8 breach of the NIAGEN Supply Agreement or the pTeroPure Supply
9 Agreement.

10 [Authority: *Cross v. Itron, Inc.*, 890 F.2d 420 (9th Cir. 1989); *Plotnik v. Meihaus*,
11 208 Cal. App. 4th 1590, 1602 (2012)]

12 **Elements of Affirmative Defense for Unclean Hands:**

- 13 1. That Elysium engaged in conduct that violates conscience, or good faith,
14 or other equitable standards of conduct that is sufficient cause to invoke
15 the doctrine of unclean hands; and
- 16 2. That Elysium’s misconduct relates directly to the transactions concerning
17 its counterclaims, i.e., the very subject matter involved and affect the
18 equitable relations between the litigants

19 [Authority: *Kendall-Jackson Winery, Ltd. v. Superior Court*, 76 Cal. App. 4th 970, 979,
20 90 Cal. Rptr. 2d 743, 749 (1999), *as modified on denial of reh'g* (Jan. 3, 2000).]

21 **Elements of Affirmative Defense for Information was Readily Ascertainable**
22 **by Proper Means:**

- 23 1. That ChromaDex’s trade secrets were readily ascertainable by proper
24 means at the time of the alleged use, disclosure or acquisition.

25
26 ³ ChromaDex maintains that this is not a recognized or proper “affirmative defense.”
27 Rather, Elysium attempts to repackage as an “affirmative defense” an element of an
28 ordinary contract claim; namely, that ChromaDex prove its substantial performance or
excuse from performance of the NIAGEN Supply Agreement. This “affirmative
defense” is duplicative and unnecessary, and would confuse the jury if presented to
them. The Court should not allow it.

1 [Authority: Judicial Council of California, Civil Jury Instructions 4420.]

2 **Elements of Affirmative Defense for Mitigation of Damages:**

- 3 1. That, to the extent the jury finds that ChromaDex is entitled to damages,
4 ChromaDex failed to use reasonable efforts to mitigate those damages;
5 2. The amount by which damages would have been mitigated.

6 [Authority: Model Civil Jury Instructions for the Ninth Circuit 5.3 (modified).]

7 **Elements of Affirmative Defense for Offset:**

- 8 1. That any money judgment to ChromaDex should be applied against any
9 money judgment to Elysium and only the balance recovered.

10 [Authority: Code of Civil Procedure § 431.70]

11 **VII. KEY EVIDENCE IN OPPOSITION TO ELYSIUM’S COUNTERCLAIMS
12 AND AFFIRMATIVE DEFENSES**

13 ChromaDex will present the following key evidence in opposition to Elysium’s
14 asserted counterclaims and affirmative defenses.

15 **A. Key Evidence in Opposition to Elysium’s Counterclaim for Breach of
16 the NR Supply Agreement**

17 Elysium asserts a counterclaim for breach of Section 3.1 of the NR Supply
18 Agreement—the MFN Provision. The MFN Provision states, in relevant part:

19 If, at any time during the Term, ChromaDex supplies Niagen (or a
20 substantially similar product) to a Third Party at a price that is lower than
21 that at which Niagen is supplied to Elysium Health under this Agreement,
22 then the price of Niagen supplied under this Agreement shall be revised to
23 such Third Party price with effect from the date of the applicable sale to
such Third Party and ChromaDex shall promptly provide Elysium Health
with any refund or credits thereby created; provided Elysium Health
purchases equal volumes or higher volumes than the Third Party.

24 ChromaDex’s key evidence in opposition to this counterclaim arises from the
25 provision’s clear language on two distinct points. First, the MFN Provision is triggered
26 only “provided Elysium Health purchases equal volumes or higher volumes than the
27 Third Party.” Thus, any analysis of pricing under the MFN Provision requires an
28 analysis of Elysium’s purchasing history as compared to a Third Party’s. The word

1 “volumes” is plural; thus, a single order is not sufficient to trigger MFN pricing. Rather,
2 before receiving MFN pricing, Elysium would have to have purchased more NR than a
3 Third Party on an annual or twelve-month trailing basis. ChromaDex’s history of sales
4 to its other high-volume customers supports this point.

5 There is no support for Elysium’s position that a single order of greater size than
6 a single lower-priced order by any customer, regardless of whether that customer had a
7 supply agreement, triggers an obligation by ChromaDex to refund to Elysium the
8 difference between that price and the prices that Elysium paid on every order Elysium
9 had ever placed back to the beginning of the parties’ relationship. In contrast,
10 ChromaDex’s supply agreement with another of its customers—Healthspan Research
11 LLC—included an MFN Provision that specifically applied “retroactive to the date that
12 Seller first either sold or offered to sell the Product on more favorable terms.”
13 Elysium’s agreement contains no similar language. Elysium and ChromaDex
14 negotiated the NR Supply Agreement in an arm’s length negotiation, and Elysium
15 cannot now read into the MFN Provision new terms that it did not obtain in that
16 negotiation.

17 Second, by its own terms the MFN Provision only applies when “ChromaDex
18 *supplies* NIAGEN”—i.e., when it is sold to a Third Party with which ChromaDex has
19 a supply agreement. Elysium suggests that orders for *one kilogram* from two different
20 companies to which ChromaDex shipped samples of NR triggered MFN pricing. But
21 these samples hardly qualify as “supplying” NR. Thus, those orders did not trigger the
22 MFN Provision.

23 ChromaDex’s internal communications, as well as those with Elysium, also show
24 that any breach of the MFN Provision, to the extent one occurred, was in good faith,
25 and that ChromaDex performed all or substantially all of the significant things required
26 by the contract. Namely, ChromaDex delivered all the NR ordered by Elysium.
27 Elysium therefore received what the NR Supply Agreement called for—the supply of
28

1 NR. And because Elysium retained and re-sold the product received from ChromaDex,
2 any award of damages would now cause Elysium to be unjustly enriched.

3 Finally, Elysium engaged in inequitable conduct with respect to the MFN
4 Provision, such that it has unclean hands and should be barred from recovery. Prior to
5 the June 30 Order, Elysium wrongfully obtained from Morris the detailed purchasing
6 history for Live Cell—which is ChromaDex’s trade secret information—and used it
7 both in negotiating against ChromaDex and to calculate the amount of NR it would need
8 to order under its (incorrect) interpretation of the MFN Provision to qualify for MFN
9 pricing. Therefore, Elysium obtained ChromaDex’s trade secret through improper
10 means (Morris’s theft) and improperly used this information to submit the June 30
11 Orders, and subsequently claim breach of the MFN Provision. Through this plot,
12 Elysium never intended to pay for June 30 Orders, and instead intended to “drop” an
13 email alleging breach the moment the June 30 Orders were in the hands of its contract
14 manufacturer, which is exactly what it did. Elysium should not be rewarded for its
15 misconduct by obtaining recovery on a claim it created and pursued in bad faith.

16 **B. Key Evidence in Opposition to Elysium’s Counterclaim for**
17 **Fraudulent Inducement**

18 Elysium initially alleged in its operative counterclaim that “[o]n
19 December 16, 2013, on a phone call between Jaksch, Marcotulli and Alminana, Jaksch
20 falsely represented that all of ChromaDex’s customers who signed purchase agreements
21 to obtain nicotinamide riboside were also required to sign separate trademark license
22 and royalty agreements, whether they wanted to or intended to use ChromaDex marks
23 or not.” That claim is in reference to the Trademark License and Royalty Agreement
24 (“TLRA”) between the parties, which among other things obligated Elysium to pay
25 royalties for its supply of NR.

26 This claim fails for myriad reasons: (1) Mr. Jaksch never made the alleged
27 statement; (2) even if he had, it was not false at the time it was made; (3) even if it was,
28 Mr. Jaksch did not believe it was false when he made it; (4) Elysium did not reasonably

1 rely on that statement to sign the contract with ChromaDex; (5) even if it had, Elysium
2 was not harmed by any statement because it obtained a supply of NR and was not
3 required to use a ChromaDex trademark on its product, which is what it sought; and
4 (6) even if it had been harmed, its reliance was not a substantial factor in causing that
5 harm.

6 There is no evidence—email, text message, or document—contemporaneous
7 with the December 16 call that shows that Mr. Jaksch made the alleged statement or
8 that Elysium relied on it specifically to execute the TRLA. Mr. Jaksch will testify that
9 he did not make that statement. Neither Elysium’s CEO nor its COO—who both admit
10 to lying under oath at their depositions—testified at those depositions that he made that
11 exact statement during the negotiation of the TLRA. And Elysium’s 30(b)(6) witness
12 testified that he “[d]idn’t remember anything” about a call on December 16, 2013. For
13 those reasons, Elysium will be unable to prove the statement was made, that Mr. Jaksch
14 believed it was false, or that Elysium reasonably relied on it when signing the TRLA.

15 Second, even if Mr. Jaksch made that representation—and he did not—, it was
16 true. Documents produced by ChromaDex in discovery show that at the time of
17 December 16, 2013, ChromaDex had only one executed supply agreement in effect at
18 the time: with Thorne Research LLC (“Thorne”). Like Elysium, Thorne both paid
19 royalties and signed a trademark license agreement. As such, there was no false
20 statement of fact.

21 Elysium shepherded this claim through a motion to dismiss under Federal Rule
22 of Civil Procedure 9(b) by emphasizing that the statement was exactly as it alleged.
23 Then, realizing that no evidence existed to support it, Elysium attempted to amend and
24 broaden the statement to argue that an issue of fact exists. Specifically, Elysium now
25 argues that Mr. Jaksch represented that ChromaDex’s requirement applied to “all NR
26 customers” regardless of whether they had supply agreements. This expanded
27 allegations also fails. The only two Elysium witnesses on the December 13 call who
28 could even claim Mr. Jaksch said anything of the sort—Alminana and Marcotulli—

1 “lied under oath” at their depositions, and thus their testimony on this point is not
2 credible. (Dkt. No. 493.)

3 What is more, even if Mr. Jaksch made either statement and it was false, he did
4 not make the statement with fraudulent intent or intend for Elysium to rely on it, and
5 Elysium did not rely on it. No evidence exists that he intended to defraud Elysium or
6 intended Elysium to rely on the statement to its detriment. And the trail of negotiations
7 between the parties shows that Elysium continued to negotiate royalties beyond
8 December 16, 2013, such that it did not feel beholden to Mr. Jaksch’s alleged comment
9 that it must pay royalties for the supply of NR. Moreover, it was unreasonable for
10 Elysium to rely on this one statement—to the extent it was made and was false—without
11 any further clarification, follow-up, or memorialization of the alleged representation, as
12 shown by the lack of contemporaneous documents on this point. Nor was Elysium
13 harmed by the representation, because it sought and received a supply of NR as a result
14 of the agreement and was granted the right not to use ChromaDex’s trademark.

15 **C. Key Evidence in Opposition to Elysium’s Contract Performance**
16 **Excused by Breach Affirmative Defense**

17 As an initial matter, ChromaDex maintains that this is not a recognized or proper
18 affirmative defense. Rather, Elysium attempts to repackage as an “affirmative defense”
19 an element of an ordinary contract claim; namely, that ChromaDex prove its substantial
20 performance or excuse from performance of the NIAGEN Supply Agreement. That is
21 not proper and the Court should not allow it. In any event, Elysium’s claim that it was
22 excused from paying for the \$2.9 million worth of ingredients it ordered, and
23 ChromaDex provided, under the NR and PT Supply Agreements will fail because
24 ChromaDex did not breach the NR Supply Agreement. As discussed above in detail in
25 section VII(A), the plain language of the MFN Provision makes clear that (1) the MFN
26 Provision is also triggered only “provided Elysium Health purchases equal volumes or
27 higher volumes than the Third Party” and (2) it only applies when “ChromaDex *supplies*
28 NIAGEN”—i.e., when it is sold to a Third Party with which ChromaDex has a supply

1 agreement. Neither of these two prerequisites were satisfied and, therefore, ChromaDex
2 did not breach the NR Supply Agreement. What is more, even if the NR Supply
3 Agreement was breached—which it was not—Elysium would not be excused from
4 performing its obligations under the PT Supply Agreement.

5 **D. Key Evidence in Opposition to Elysium’s Unclean Hands Affirmative**
6 **Defense**

7 ChromaDex will rely on documents and testimony that establish it did not engage
8 in any conduct that violates conscience, good faith, or other equitable standards in
9 connection with its transactions with Elysium. As discussed in section VII(A),
10 ChromaDex did not breach the MFN provision in the NR Supply Agreement.
11 Recognizing as much, Elysium claims that “ChromaDex breached key *provisions* of
12 that contractual relationship,” as “evidence” of ChromaDex’s alleged unclean hands.
13 Of course, as Elysium is well aware, with the exception of the MFN claim, the Court
14 dismissed on summary judgment all of Elysium’s claims for breach of contract.
15 Therefore, any evidence of these alleged “breaches” is irrelevant, unfairly prejudicial,
16 and otherwise inadmissible.

17 What is more, Elysium itself engaged in inequitable conduct with respect to the
18 MFN Provision. Prior to placing the June 30 Order, Elysium wrongfully obtained
19 from Morris the detailed purchasing history for Live Cell—which is ChromaDex’s trade
20 secret information—and used it to calculate the exact volume it would need under its
21 interpretation of the MFN Provision to qualify for MFN pricing. Therefore, Elysium
22 obtained ChromaDex’s trade secret through improper means (Morris’s theft) and
23 improperly used this information to submit the June 30 Orders, and subsequently claim
24 breach of the MFN Provision. Elysium also improperly obtained the full purchasing
25 history of ChromaDex’s NR business when Morris unlawfully took the Ingredient Sales
26 Spreadsheet to Elysium and Marcotulli downloaded it on his computer. This
27 misconduct should not be rewarded by allowing Elysium to profit handsomely from the
28 June 30 Orders without paying a cent of what it owes to ChromaDex.

1 Moreover, as set forth in detail in section VII(B), ChromaDex did not
2 fraudulently induce Elysium into any contractual relationship. Further, and contrary to
3 Elysium’s assertions, ChromaDex did not attempt to conceal and misrepresent
4 information relevant to the MFN provision. The spreadsheet provided to Elysium on
5 June 13 contained exactly what ChromaDex said it would contain—a summary of terms
6 of supply agreements for NR.

7 **E. Key Evidence in Opposition to Elysium’s Information Was Readily**
8 **Ascertainable by Proper Means Affirmative Defense**

9 ChromaDex will rely on documents and testimony to show that its trade secrets
10 could not be obtained, discovered, developed, or compiled without significant
11 difficulty, effort, or expense, and that ChromaDex took reasonable efforts to keep its
12 trade secrets and confidential and proprietary information secure. Elysium’s lack of
13 affirmative evidence supports the fact that ChromaDex’s trade secrets were not
14 reasonably ascertainable by proper means. Further, the fact that Elysium improperly
15 acquired ChromaDex’s trade secrets from a ChromaDex officer—Morris—who was not
16 authorized to share them establishes that this information was not reasonably
17 ascertainable by proper means.

18 **F. Key Evidence in Opposition to Elysium’s Mitigation of Damages**
19 **Affirmative Defense**

20 At no point in this litigation has Elysium explained, or produced evidence
21 showing, how ChromaDex allegedly failed to mitigate its damages for Elysium’s breach
22 of the NR and PT Supply Agreements.

23 The documents and testimony in this action make clear that Elysium and Morris
24 engaged in a multi-month scheme to steal and use ChromaDex’s confidential and trade
25 secret information to harm ChromaDex and unjustly enrich Elysium and Morris.
26 ChromaDex was not aware that Elysium, through one of ChromaDex’s vice presidents
27 and corporate officers—Morris—was stealing value information from ChromaDex that
28 it would then use to swindle ChromaDex into entering into the June 30 Orders and then

1 create an alternative source of NR and PT. Put simply, ChromaDex was unaware that
2 Elysium and Morris were attempting to “destroy” ChromaDex behind its back, and thus
3 could not possibly have mitigated any damages arising from that plot.

4 Therefore, when Elysium first breached both Supply Agreements by failing to
5 pay, ChromaDex was unaware that Elysium never intended to pay. In any event,
6 ChromaDex will rely on documents and testimony showing that it took reasonable steps
7 to mitigate the damages caused by Elysium’s failure to pay for the \$2.9 million worth
8 of inventory that it stole.

9 **G. Key Evidence in Opposition to Elysium’s Offset Affirmative Defense**

10 ChromaDex will rely on documents and testimony to show that Elysium is not
11 entitled to any offset because ChromaDex did not breach the NR Supply Agreement
12 and did not fraudulently induce Elysium to enter into the Trademark License and
13 Royalty Agreement.

14 **VIII. SUMMARY STATEMENT OF CHROMADDEX’S AFFIRMATIVE**
15 **DEFENSES**

16 ChromaDex presently intends to assert the following affirmative defenses at trial:

- 17 **1. Unclean Hands:** Elysium’s counterclaims are barred by the doctrine of
18 unclean hands.
- 19 **2. Unjust Enrichment:** The counterclaims are barred because Elysium
20 would be unjustly enriched by any recovery against ChromaDex.
- 21 **3. Substantial Performance:** Elysium’s breach of contract claim fails
22 because ChromaDex did all, or substantially all, of the significant things
23 that the contract required it to do or was excused from having to do those
24 things.
- 25 **4. Offset:** ChromaDex seeks to offset any damages owed to Elysium, if any,
26 by the amount Elysium owes to ChromaDex.

1 **IX. ELEMENTS REQUIRED TO ESTABLISH CHROMADEx'S**
2 **AFFIRMATIVE DEFENSES**

3 **Elements of Unclean Hands:**

- 4 1. That Elysium engaged in conduct that violates conscience, or good faith,
5 or other equitable standards of conduct that is sufficient cause to invoke
6 the doctrine of unclean hands; and
- 7 2. That Elysium's misconduct relates directly to the transactions concerning
8 its counterclaims, i.e., the very subject matter involved and affect the
9 equitable relations between the litigants.

10 [*Authority: Kendall-Jackson Winery, Ltd.*, 76 Cal. App. 4th at 979.]

11 **Elements of Unjust Enrichment:**

- 12 1. That any award to Elysium would permit Elysium to unjustly enrich itself
13 at the expense of ChromaDex;
- 14 2. That it is just and equitable that Elysium should be required to make
15 restitution for property or benefits received, retained, or appropriated; and
- 16 3. That such action involves no violation or frustration of law or opposition
17 to public policy, either directly or indirectly.

18 [*Authority: Walsh*, 158 Cal. App. 4th at 542 (citing *Dinosaur Development, Inc. v.*
19 *White*, 216 Cal. App. 3d 1310, 1315 (1989)).]

20 **Elements of Substantial Performance:**

- 21 1. That ChromaDex made a good faith effort to comply with the NIAGEN
22 Supply Agreement; and
- 23 2. That Elysium received essentially what the NIAGEN Supply Agreement
24 called for, because ChromaDex's failures, if any, were so trivial or
25 unimportant that they could have been easily fixed or paid for.

26 [*Authority: Judicial Council of California, Civil Jury Instructions 312.*]

1 **Elements of Offset:**

- 2 1. That any money judgment to Elysium should be applied against any money
3 judgment to ChromaDex and only the balance recovered.

4 [*Authority:* Code of Civil Procedure § 431.70.]

5 **X. KEY EVIDENCE IN SUPPORT OF CHROMADDEX’S AFFIRMATIVE**
6 **DEFENSES**

7 ChromaDex will present the following key evidence in support of its affirmative
8 defenses.

9 **A. Key Evidence in Support of ChromaDex’s Affirmative Defense –**
10 **Unclean Hands**

11 ChromaDex will rely on documents and testimony to show that Elysium engaged
12 in conduct that violates conscience, or good faith, or other equitable standards of
13 conduct. That conduct is described in detail above. It includes, among other things,
14 evidence that Elysium: (1) aided and abetted Morris’s breach of fiduciary duty to
15 ChromaDex; (2) solicited ChromaDex’s confidential and trade secret information from
16 Morris; (3) planned to “destroy” ChromaDex; (4) used ChromaDex’s confidential
17 information and trade secrets that it improperly obtained from Morris to negotiate with
18 ChromaDex in bad faith and ultimately obtain the June 30 Orders at a \$600,000 discount
19 and on credit; (5) made fraudulent statements to ChromaDex regarding its intentions to
20 pay for the June 30 Orders and continue ordering ingredients from ChromaDex in the
21 future; (6) attempted to interfere with and destroy ChromaDex’s relationship with
22 Dartmouth, including by making false representations about ChromaDex, so that
23 ChromaDex could steal the patents from ChromaDex; and (7) attempted to interfere
24 with and destroy ChromaDex’s relationship with Grace, including by making false
25 representations about ChromaDex. Elysium’s conduct related directly to the
26 transactions concerning its counterclaims.

1 **B. Key Evidence in Support of ChromaDex’s Affirmative Defense – Unjust Enrichment**

2
3 ChromaDex will rely on documents and testimony to show that any award to
4 Elysium would unjustly enrich Elysium at ChromaDex’s expense. Specifically,
5 Elysium ordered and received large shipments of ingredients from ChromaDex at an
6 unfairly obtained discount and on credit, profited millions of dollars from those orders,
7 and even benefitted under the TRLA by labeling its product with the patent numbers of
8 the NR patents that ChromaDex licensed. Elysium would be unjustly enriched, and
9 ChromaDex would be harmed, if Elysium retained those profits and benefits without
10 being required to pay.

11 **C. Key Evidence in Support of ChromaDex’s Affirmative Defense – Substantial Performance**

12
13 ChromaDex will rely on documents and testimony to show ChromaDex made a
14 good faith effort to comply with the NIAGEN Supply Agreement. Specifically,
15 ChromaDex provided Elysium with all NIAGEN it ordered under the NIAGEN Supply
16 Agreement. Elysium sold the NIAGEN for a full profit, around \$8.3 million from its
17 product sales. Therefore, ChromaDex substantially performed its obligations under the
18 NIAGEN Supply Agreement and any alleged failure was so trivial or unimportant that
19 it could have been easily fixed or paid for.

20 **D. Key Evidence in Support of ChromaDex’s Affirmative Defense – Offset**

21
22 ChromaDex will rely on evidence regarding the amounts of any money
23 judgments in this case in support of its defense that any money judgment to Elysium
24 should be applied against any money judgment to ChromaDex and only the balance
25 recovered.

26
27
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1 **XI. ANTICIPATED EVIDENTIARY ISSUES**

2 In addition to any disputes regarding the admissibility or relevance of specific
3 testimony or exhibits that the parties may raise, the parties have raised the evidentiary
4 issues below.

5 ChromaDex previously sought to exclude certain opinions of Dr. Cockburn
6 regarding Elysium’s damages. (See Dkt. 262-1.) ChromaDex also filed three motions
7 *in limine* (Dkt. 263-1), which the Court denied without prejudice, (Dkt. 369 at 10).
8 Defendants previously sought to exclude (1) evidence and argument related to the
9 personal conduct of Elysium personnel, (Dkt. 264); and (2) certain opinions of
10 Lance Gunderson’s methodology for analyzing trade secret misappropriation damages,
11 (Dkt. 265). The Court denied these motions without prejudice. (Dkt. 369 at 10.) The
12 Court later issued a ruling related to the personal conduct of Elysium principals, holding
13 that “some text messages and some of Marcotulli and Alminana’s testimony about the
14 text messages will be admissible at trial” in order for ChromaDex to “show the jury that
15 Marcotulli and Alminana lied under oath.” (Dkt. 493 at 10–11.)

16 Given the Court’s previous rulings, and disfavor towards motions *in limine*,
17 (see Dkt. 431), the parties met and conferred on August 11, 2021 to try and resolve these
18 evidentiary issues. Of note, Defendants would not agree to refrain from mentioning
19 information about unrelated legal issues, lawsuits, and government investigations
20 concerning three nonparties: Barry Honig, Michael Brauser, and Phillip Frost.
21 Accordingly, ChromaDex was compelled to file a single motion *in limine* requesting
22 that Defendants be precluded from mentioning those matters in opening statement or
23 introducing any related evidence at trial until and unless they obtain permission from
24 the Court outside the presence of the jury. (Dkt. 507-1.) ChromaDex does not presently
25 intend on filing any other motions *in limine* and will seek to resolve other evidentiary
26 issues as they may arise at trial.

1 **XII. ISSUES OF LAW**

2 ChromaDex identifies the following issue of law that is in dispute:

3 **Interpretation of “Fiduciary.”** Elysium and Morris have taken the position that
4 Morris, as a Vice President of ChromaDex, was not a fiduciary because he was not a
5 “C-Suite” executive. ChromaDex asserts that as an officer with managerial
6 responsibilities, Morris was a ChromaDex fiduciary. *GAB Bus. Servs., Inc. v. Lindsey*
7 *& Newsome Claim Servs., Inc.*, 83 Cal. App. 4th 409, 420–21 (2000), *disapproved of*
8 *on other grounds by Reeves v. Hanlon*, 33 Cal. 4th 1140 (2004), (“[A]n officer who
9 participates in management of the corporation, exercising some discretionary authority,
10 is a fiduciary of the corporation as a matter of law.”).

11 **XIII. BIFURCATION OF ISSUES**

12 On August 13, 2021, the parties submitted a joint stipulation to bifurcate
13 Elysium’s equitable counterclaims for patent misuse and unjust enrichment for a later
14 bench trial. (Dkt. 505.) On August 17, 2021, the Court ordered that Elysium’s patent
15 misuse and unjust enrichment counterclaims be bifurcated from the jury trial and
16 separately tried to the Court in a later bench trial. (Dkt. 508.) The parties were further
17 ordered to conduct their Local Civil Rule 16-2 conference related to the bifurcated
18 counterclaims the week of October 4, 2021. (*Id.*)

19 ChromaDex is aware of no other issue requiring bifurcation in this case.

20 **XIV. JURY TRIAL**

21 Other than bifurcation of the equitable counterclaims to be tried at a separate
22 bench trial, all issues in this case are to be tried to a jury. Both parties’ operative
23 complaints filed in this case demand a jury trial.

24 **XV. ATTORNEYS’ FEES**

25 ChromaDex prays for the recovery of attorneys’ fees in this case. ChromaDex
26 seeks attorneys’ fees in connection with its trade secret misappropriation claim under
27 CUTSA, pursuant to California Civil Code § 3426.4. ChromaDex also seeks attorneys’
28 fees related to its claim that Morris breached the July Confidentiality Agreement,

1 pursuant to Section 7 of that contract, which reads in relevant part: “Should any court
2 of competent jurisdiction adjudge that Employee has breached any of the provisions as
3 contained in this Agreement, CHROMADEx shall have a right to collect, in addition
4 to any monetary damages awarded it, all of its reasonable attorneys’ fees and costs for
5 having to enforce this Agreement.”⁴

6 Elysium has no prayer for attorneys’ fees in connection with its jury claims.

7 **XVI. ABANDONMENT OF ISSUES**

8 ChromaDex abandons the following affirmative defenses: No. 1 (standing),
9 No. 2. (failure to state a claim), No. 3 (consent/ratification), No. 4 (no loss),
10 No. 5 (acquiescence), No. 8 (waiver by conduct), No. 9 (waiver under Section 3.7),
11 No. 10 (mutual mistake), No. 13 (good faith), and No. 17 (statute of limitations).

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13

14 Dated: August 23, 2021

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ChromaDex, Inc.*

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28 ⁴ While the Local Rules do not specifically require it as part of the Memorandum, ChromaDex also seeks punitive damages in this case.