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11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**
13 **(SOUTHERN DIVISION)**

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

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

**CHROMADEx, INC.’S MEMORANDUM
IN SUPPORT OF ITS MOTION FOR
PREJUDGMENT INTEREST**

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

Judge: Hon. Cormac J. Carney
Courtroom: 9B
Date: February 14, 2022
Time: 1:30 p.m.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On September 27, 2021, following trial in this matter, a jury awarded Plaintiff
4 and Counter-Defendant ChromaDex, Inc. damages in the amount of \$2,983,350.00 on
5 its breach-of-contract claims against Defendant and Counterclaimant Elysium Health,
6 Inc. ChromaDex files this motion to obtain the legally mandated prejudgment interest
7 on those damages in the amount of \$1,634,949.48 and provide the Court assistance in
8 calculating the final net judgment due to ChromaDex in the amount of \$2,735,607.17.

9 **II. ARGUMENT**

10 **A. California law mandates an award of prejudgment interest on the**
11 **breach-of-contract damages awarded to ChromaDex against Elysium.**

12 California law entitles ChromaDex to prejudgment interest on the breach-of-
13 contract damages awarded by the jury against Elysium. In diversity actions like this
14 one, state law determines the applicability and rate of prejudgment interest. *Northrop*
15 *Corp. v. Triad Int’l Mktg. S.A.*, 842 F.2d 1154, 1155 (9th Cir. 1988). California law
16 governing awards of prejudgment interest provides that:

17 A person who is entitled to recover damages certain, or capable of being
18 made certain by calculation, and the right to recover which is vested in the
19 person upon a particular day, is entitled also to recover interest thereon
from that day. . . .

20 Cal. Civ. Code § 3287(a). Under Section 3287(a), “the trial court has no discretion—it
21 must award prejudgment interest from the first day there exists both a breach and a
22 liquidated claim.” *Lumens Co., Ltd. v. GoEco Led LLC*, 2018 WL 11356419, at *1
23 (C.D. Cal. Feb. 6, 2018) (Carney, J.) (quoting *Thompson v. Asimos*, 6 Cal. App. 5th
24 970, 991 (2016)); see also *Safeway Stores, Inc. v. Nat’l Union Fire Ins. Co. of*
25 *Pittsburgh, Pa.*, 64 F.3d 1282, 1291 (9th Cir. 1995) (ruling “[p]rejudgment interest *must*
26 be granted as a matter of right if damages are certain or ascertainable” (quoting *E. L.*
27 *White, Inc. v. City of Huntington Beach*, 138 Cal. App. 3d 366, 377 (Ct. App. 1982)).

1 ChromaDex is entitled to prejudgment interest under Section 3287(a) because
2 (1) the damages amount awarded by the jury of the \$2,983,350.00 is “certain, or capable
3 of being made certain by calculation,” and (2) ChromaDex’s “right to recover” those
4 damages “vested . . . upon a particular day.”

5 *First*, ChromaDex’s damages are certain and ascertainable. The precise amount
6 of \$2,983,350.00 in the jury’s verdict, (Dkt. 570 (“Verdict Form”) at 2), is the exact
7 amount owed by Elysium for the unpaid sales invoices for the ingredient orders it placed
8 on June 30, 2016 under the two supply agreements between ChromaDex and Elysium.
9 Elysium admitted that exact amount in its answer to the complaint. (Dkt. 192,
10 Elysium’s Answer to the Fifth Amended Complaint ¶ 63 (admitting “[t]he total amount
11 ChromaDex invoiced Elysium for the Past Due Invoices is \$2,983,350”) & ¶ 68
12 (admitting “Elysium has not paid what ChromaDex has demanded”).) Further, the
13 unpaid sales invoices were admitted into evidence at trial without objection in
14 Exhibit 24. (Declaration of Barrett J. Anderson (“Anderson Decl.”) ¶ 3 & Ex. 24.) The
15 NIAGEN sales invoice dated July 1, 2016 from ChromaDex to Elysium demonstrates
16 that Elysium owes \$2,402,600.00 for the NIAGEN ingredients ordered and received
17 under the NIAGEN Supply Agreement. (Anderson Decl., Ex. 24 at 54.) Elysium
18 similarly owes payment for the pTeroPure ingredients that it ordered and received under
19 the pTeroPure Supply Agreement in the amounts of \$400,750.00 (shown by an invoice
20 dated July 1, 2016) and \$180,000.00 (shown by an invoice dated August 9, 2016).
21 (*Id.* at 56, 57.) Those are certain and ascertainable amounts by any measure.

22 *Second*, ChromaDex’s breach-of-contract damages vested on particular dates.
23 Pinpointing the dates on which Elysium breached its contracts with ChromaDex, and
24 thus the dates from which prejudgment interest began to accrue, is possible based on
25 uncontroverted evidence admitted at trial. Each unpaid sales invoice states under the
26 heading “Payment Terms” that the terms of payment were “30% Net30 70% Net60.”
27 (Anderson Decl., Ex. 24 at 54, 56, 57.) Under those terms, Elysium owed payment on
28 30% of the total for each invoice 30 days after the date of that invoice, and owed

1 payment on the remaining 70% of the total for each invoice 60 days after the invoice
2 date. (Declaration of Lance Gunderson (“Gunderson Decl.”) ¶ 4.) For the invoices for
3 the NIAGEN and pTeroPure ingredients dated July 1, 2016, Elysium owed payment on
4 30% of the total by July 31 and the remaining 70% by August 30. (Gunderson Decl.,
5 Schedules 2A–2E.) And for the pTeroPure ingredient invoice dated August 9, 2016,
6 Elysium owed 30% of the total by September 8 and the remaining 70% by October 8.
7 (*Id.*) Those specific and uncontroverted dates in the record satisfy Section 3287(a).

8 Given the foregoing, Section 3287(a) mandates that ChromaDex receive
9 prejudgment interest here. The calculation of that interest is straightforward.
10 “Prejudgment interest runs from the date when the damages are of a nature to be certain
11 or capable of being made certain by calculation and when the exact sum due to the
12 plaintiff is made known to the defendant.” *Highlands Ins. Co. v. Continental Casualty*
13 *Co.*, 64 F.3d 514, 521 (9th Cir. 1995). California law sets the applicable interest rate at
14 “10 percent per annum after a breach.” Cal. Civ. Code § 3289(b). Applying those
15 principles here, and assuming that the Court enters final judgment on February 14, 2022,
16 the total amount of prejudgment interest owed to ChromaDex on the breach-of-contract
17 damages against Elysium is **\$1,634,949.48**. (Gunderson Decl. ¶¶ 4–6.)¹

18 ChromaDex respectfully requests that the Court add that amount of prejudgment
19 interest to the September 27, 2021 jury award of \$2,983,350.00, for a total damages
20 award to ChromaDex on the breach-of-contract claims for which the jury found Elysium
21 liable of **\$4,618,299.48**. (Gunderson Decl. ¶ 6.)

22 **B. Any offset for Elysium’s damages should be applied after**
23 **ChromaDex’s prejudgment interest is calculated and awarded.**

24 Elysium apparently intends to seek an offset for the damages awarded to it by the
25 jury in order to reduce the amount that it owes to ChromaDex for its breaches of
26

27 ¹ Should the Court enter judgment before February 14, 2022, it should subtract \$817.36
28 for each day prior to that date. (Gunderson Decl. ¶ 8.) Should the Court enter judgment
after February 14, it should add \$817.36 for each day after that date. (*Id.*)

1 contract. However, no such offset should be applied until after ChromaDex’s legally
2 mandated prejudgment interest is calculated and awarded.

3 **1. The MFN award.**

4 The damages that Elysium was awarded on its counterclaim under the Most-
5 Favored-Nation (“MFN”) provision of the NIAGEN Supply Agreement should not be
6 deducted from ChromaDex’s damages prior to the date of final judgment (and thereby
7 reduce the interest-bearing principal supporting ChromaDex’s prejudgment interest
8 award) for two reasons: (1) the MFN award is unliquidated and may only be offset after
9 ChromaDex’s prejudgment interest is calculated and awarded; and (2) in any event,
10 there is no certain date in the record on which the MFN award would have become due,
11 leaving entry of the final judgment as the date when any offset would apply.

12 *First*, Elysium’s MFN damages are unliquidated. In cases like this one involving
13 breach-of-contract contract claims for unpaid invoices for “products that [the defendant]
14 ordered but for which it failed to pay,” a defendant’s unliquidated counterclaim
15 damages are offset from a plaintiff’s liquidated damages for the unpaid invoices only
16 “*after* prejudgment interest is applied.” *Lumens*, 2018 WL 11365419, at *2 (emphasis
17 added). That is because “an award of unliquidated damages to a cross-complainant is
18 a setoff against prejudgment interest awarded a plaintiff for liquidated damages.” *Id.*
19 (quoting *Great W. Drywall, Inc. v. Roel Const. Co.*, 166 Cal. App. 4th 761, 768 (2008)).
20 Unliquidated damages thus “are given treatment as discounts, not as payments made at
21 the time . . . the debt is due.” *Id.* (internal quotation marks omitted); *see also Haskell*
22 *Corp. v. ConocoPhillips Co.*, 2012 WL 845398, at *23 (Cal. App. Mar. 14, 2021)
23 (holding “trial court properly awarded prejudgment interest to ConocoPhillips before
24 offsetting its award against Haskell’s damages”).

25 Damages are unliquidated when “the amounts turn on disputed facts.” *Lumens*,
26 2018 WL 11356419, at *1 (quoting *Thompson*, 6 Cal. App. 5th at 992). In contrast,
27 damages are liquidated “where there is essentially no dispute between the parties
28 concerning the basis of computation of damages.” *Duale v. Mercedes-Benz USA, LLC*,

1 148 Cal. App. 4th 718, 729 (2007). The MFN award is unliquidated because
2 ChromaDex and Elysium heavily disputed both before and at trial the amount of any
3 damages owed under the MFN provision.

4 Before trial, Elysium moved for summary judgment for liability on the MFN
5 counterclaim, but at the same time it “d[id] not seek summary judgment on the *amount*
6 of damages.” (Dkt. 413, Court’s Order on Summary Judgment, at 26 (emphasis
7 added).) By not doing so, Elysium conceded that the amount was a factual dispute
8 proper for jury resolution. At trial, both parties presented evidence and argument for
9 several different MFN damages numbers. ChromaDex presented evidence and expert
10 opinion, and argued to the jury, that either no MFN refund was due or, at most, \$300,000
11 was appropriate. (*See, e.g.*, Anderson Decl., Ex. A at 27:3–5 (fact testimony that
12 ChromaDex “didn’t think [an MFN refund] was due”); Ex. B at 56:5–16 (ChromaDex
13 expert testifying that “[he] didn’t feel like there was any damage from the MFN”); *id.*
14 at 56:17–57:16 (same expert opinion that the “maximum possible rebate from MFN”
15 was “\$300,000”); Ex. C at 13:16–17 (ChromaDex attorney argument that “Elysium was
16 not entitled to most favored nation pricing in 2015 or 2016”).) Elysium also presented
17 multiple possible MFN damages numbers to the jury. (*See, e.g.*, Anderson Decl., Ex. C
18 at 59:14–15 (Elysium attorney argument that “for us, it’s either you’re going to do
19 \$1,744,000, or you’re going to do \$3,394,000”).) Given this record, there can be no
20 doubt that the MFN award turned on disputed facts. Notably, the MFN amount
21 ultimately awarded by the jury—\$625,000, (Verdict Form at 10)—was not a number
22 that was presented or argued to the jury by either ChromaDex or Elysium. It is not tied
23 to any specific purchase order or invoice, and it otherwise does not appear anywhere in
24 the trial record. The jury simply selected it out of the blue. The MFN award is thus
25 plainly unliquidated and should be offset only after ChromaDex’s legally mandated
26 prejudgment interest is calculated and applied. *Lumens*, 2018 WL 11356419, at *2.

27 *Second*, even if the MFN award could be offset before ChromaDex’s
28 prejudgment interest is calculated and awarded, any such calculation “must take into

1 account the timing and amount” of any offsetting payments. *Watson Bowman Acme*
2 *Corp. v. RGW Constr., Inc.*, 2 Cal. App. 5th 279, 295 (2016); *see also Hansen v. Covell*,
3 218 Cal. 622, 629 (1933) (holding “interest is properly allowed on the balance found to
4 be due *from the time it became due*” (emphasis added)); *c.f. Pub. Employees’ Ret. Sys.*
5 *v. Winston*, 209 Cal. App. 3d 205, 210–11 (Ct. App. 1989) (ruling in rent case “the
6 timing of the offset” can be “critical” because “the total sum bears interest” up to the
7 date the offsetting payment would be due).

8 Here, the earliest ascertainable date on which the MFN award would be due is
9 the date of the Court’s entry of final judgment. No other particular date exists in the
10 record. The verdict does not specify a date on which ChromaDex was obligated to pay
11 a refund or credit for the MFN counterclaim. Given that the parties hotly disputed the
12 calculation and amount of the MFN award, there is no uncontroverted record evidence
13 establishing a particular date, or showing that ChromaDex was on notice on any certain
14 date, that it owed \$625,000 in an MFN refund or credit. *See, e.g., Hewlett-Packard v.*
15 *Oracle Corp.*, 65 Cal. App. 5th 506, 576 (2021) (“[I]t is unreasonable to expect a
16 defendant to pay a debt before he or she becomes aware of it or is able to compute its
17 amount.”); *Union Pac. R.R. Co. v. Santa Fe Pac. Pipelines, Inc.*, 231 Cal. App. 4th 134,
18 203 (2014) (ruling that “a party cannot pay the amount due until it is determined what
19 that amount was”). Furthermore, the MFN provision itself does not require payment by
20 a specific or ascertainable date; rather, it simply states that “any refund or credits” were
21 to be “promptly provide[d].” (Dkt. 559 (“Jury Instructions”) at 23.) Lacking a date in
22 the record on which to apply any MFN offset, the date of final judgment is appropriate.

23 Additionally, under the plain language of the MFN provision, ChromaDex was
24 not required to provide an MFN refund or credit on the June 30 orders until *after*
25 Elysium paid because, by definition, a “refund or credit” for a payment could only be
26 provided *after* that payment.² Elysium has not paid for the June 30 orders and will not

27 _____
28 ² Elysium’s counsel explained the MFN provision to the jury in his opening statement
by comparing it to the “refund type things that you get at Best Buy when, if you buy a

1 until it satisfies the judgment, so no MFN refund or credit is yet due. That precludes an
2 MFN award offset until the date of final judgment.

3 **2. Elysium’s other damages.**

4 Any offset for the damages that Elysium was awarded for its counterclaim for
5 fraudulent inducement, and the punitive damages arising from that counterclaim, should
6 also be applied after the Court awards prejudgment interest to ChromaDex. Only when
7 “a claim and counterclaim [are] made pursuant to the *same* contract” can the
8 counterclaim damages reduce the interest-bearing principal of the original claim
9 damages. *Haskell*, 2012 WL 845398, at *23. Here, Elysium’s fraudulent inducement
10 counterclaim does not arise from the performance of the contracts that underlie
11 ChromaDex’s damages: the NIAGEN and pTeroPure Supply Agreements. Rather, they
12 stem from a tort associated with an entirely different transaction: the Trademark Royalty
13 and License Agreement. (See Jury Instructions at 53, 58 (Nos. 49 & 54); Verdict Form
14 at 10 (Sections II.B & II.C).) Thus, any offset for these damages should be applied only
15 after ChromaDex’s prejudgment interest is calculated and awarded.

16 Additionally, the Court should not offset damages from a tort against those of a
17 contract. Tort and contract liabilities are as different as “apples and oranges.” *Kransco*
18 *v. Am. Empire Surplus Lines Ins. Co.*, 23 Cal. 4th 390, 403 (2000) (adopting in insurance
19 context the principle that “the insurer’s tort cannot be offset comparatively by the
20 insured’s contract breach” because they are “differing legal concepts” (cleaned up));
21 *see also Great W. Drywall*, 166 Cal. App. 4th at 770 & n.3 (avoiding question of
22 whether contract damages may be offset by tort damages because party “pleaded both
23 tort and contract claims arising from the same defective performance of the
24 subcontract”). Elysium’s fraudulent inducement counterclaim sounded only in tort; it
25 should not reduce the principal supporting the prejudgment interest for ChromaDex’s

26 _____
27 TV at Best Buy and you see that someone else gets the better price down the road, you
28 are actually entitled to a refund from Best Buy.” (Anderson Decl., Ex. D at 46:8–11.)
Applying that example, as Elysium asked the jury to do, no money would be due back
to Elysium until after it paid for the ingredients it received and resold for a profit.

1 breach-of-contract claims. An offset before the date of final judgment is thus
2 inappropriate. *Haskell*, 2012 WL 845398, at *23.

3 Moreover, applying an offset for these distinct and unrelated counterclaim
4 damages prior to the date of final judgment is improper because it would, in effect, grant
5 Elysium prejudgment interest on its tort damages without a specific jury finding. That
6 would contravene California Civil Code Section 3288, which states that “[i]n an action
7 for the breach of an obligation not arising from contract, and in every case of oppression,
8 fraud, or malice, interest may be given, *in the discretion of the jury.*” Cal. Civ. Code
9 § 3288 (emphasis added); *see also Michelson v. Hamada*, 29 Cal. App. 4th 1566, 1587
10 (1994) (“When the jury is the trier of fact, it is the jury which is vested with discretion
11 to award prejudgment interest under section 3288.”). Section 3288 governs the
12 fraudulent inducement counterclaim because it is a tort cause of action that involves
13 “fraud,” and the punitive damages award rests entirely on that counterclaim. (*See* Jury
14 Instructions at 31, 58 (Nos. 28 & 54); Verdict Form at 10 (Section III.C.)) Elysium did
15 not request a jury finding for prejudgment interest and the jury did not make one.
16 Prejudgment interest is thus unavailable on these counterclaims, and Elysium should
17 not be allowed to obtain it surreptitiously by way of an offset. *See Stein v. Southern*
18 *Cal. Edison Co.*, 7 Cal. App. 4th 565 (1992) (finding it improper for a trial court to
19 entertain post-trial request for prejudgment interest under Section 3288 where party did
20 not seek interest from jury).³

21 For those reasons, the Court should only offset the fraudulent inducement and
22 punitive damages awards from the amount owed to ChromaDex as of the date of final
23 judgment, after ChromaDex’s prejudgment interest has been calculated and awarded.⁴

24 ³ Moreover, punitive damages may not be offset prior to the date of final judgment
25 because, by reducing the interest-bearing principal on ChromaDex’s prejudgment
26 interest, it would result in an unjustified windfall to Elysium. “[P]rejudgment interest
27 traditionally has been considered part of the compensation due plaintiff,” *Lumens*, 2018
28 WL 11356419, at *2 (internal quotation marks omitted), while in contrast punitive
damages “are not intended to make [a party] whole by compensating for a loss
suffered,” *Lakin v. Watkins Assoc. Indus.*, 6 Cal. 4th 644, 664 (1993).

⁴ ChromaDex acknowledges that, in an effort to purge the conduct that Elysium alleged

