

1 Marc S. Williams (Bar No. 198913)
Email: mwilliams@cohen-williams.com
2 Reuven L. Cohen (Bar No. 231915)
Email: rcohen@cohen-williams.com
3 Brittany L. Lane (Bar No. 323440)
Email: blane@cohen-williams.com
4 **COHEN WILLIAM LLP**
724 South Spring Street, 9th Floor
5 Los Angeles, CA 90014
Telephone: (213) 232-5160
6 Facsimile: (213) 232-5167

7 Attorneys for Defendant and Counter-Claimant
Elysium Health, Inc. and Defendant Mark Morris

8 *Counsel continued on following page*
9

10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA – SOUTHERN DIVISION**

13 ChromaDex, Inc.,
14
15 Plaintiff,
16 v.
17 Elysium Health, Inc. and Mark Morris,
18
19 Defendants.

20 And Related Counter-Claims
21
22

Case No. 8:16-cv-02277-CJC-DFM
[Assigned to the Hon. Cormac J. Carney]
DEFENDANT AND COUNTERCLAIMANT ELYSIUM HEALTH, INC.’S AND DEFENDANT MARK MORRIS’S OPPOSITION TO CHROMADEx, INC.’S MOTION FOR PREJUDGMENT INTEREST
[Filed concurrently with Declaration of Brittany L. Lane]
Courtroom: 9B
Date: February 14, 2022
Time: 1:30 p.m.

23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Roberta A. Kaplan (*pro hac vice*)
rkaplan@kaplanhecker.com
John C. Quinn (*pro hac vice*)
Email: jqinn@kaplanhecker.com
KAPLAN HECKER & FINK LLP
350 Fifth Avenue, Suite 7110
New York, NY 10118
Telephone: (212) 763-0883

Donald R. Ware (*pro hac vice*)
dware@foleyhoag.com
Marco J. Quina (*pro hac vice*)
mquina@foleyhoag.com
Rachel L. Davidson (*pro hac vice*)
rdavidson@foleyhoag.com
FOLEY HOAG LLP
155 Seaport Blvd.
Boston, MA 02210
Telephone: (617) 832-1000

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES..... 1

I. INTRODUCTION 1

II. STATEMENT OF RELEVANT FACTS..... 2

 A. The MFN Provision..... 2

 B. Pre-Litigation Disputes Regarding the MFN 3

 C. Litigation and Trial..... 5

 D. Jury Verdict 6

III. ARGUMENT 7

 A. ChromaDex Is Not Entitled to Any Prejudgment Interest. 7

 B. If the Court Determines that ChromaDex Is Entitled to Prejudgment Interest, Such Interest Should Be Calculated on the Balance Remaining After Elysium’s Damages Are Offset. 11

 1. \$625,000 in MFN Damages 12

 (a) Unliquidated counterclaims must be offset prior to the calculation of prejudgment interest. 13

 (b) The MFN damages do not need to be tied to a date certain, but if they did, it is clear that date would be no later than June 30, 2016. 15

 2. \$250,000 in Fraudulent Inducement Damages 18

 3. Even If the Court Does Not Believe the Fraudulent Inducement Damages Should Offset ChromaDex’s Damages, the Court Should Offset \$250,000 Pursuant to ChromaDex’s Judicial Covenants 21

 C. Calculation of Prejudgment Interest..... 24

IV. CONCLUSION 25

TABLE OF AUTHORITIES

Cases

1

2 **Cases**

3 *Berg v. Pulte Home Corp.*,

4 67 Cal. App. 5th 277 (2021)..... 10

5 *Burgermeister Brewing Corp. v. Bowman*,

6 227 Cal. App. 2d 274 (1964)..... 11, 13, 17

7 *Cardet v. Burlison*,

8 2008 WL 5235871 (Cal. Ct. App. Dec. 17, 2008) 10

9 *Chesapeake Indus., Inc. v. Togova Enterprises, Inc.*,

10 149 Cal. App. 3d 901(1983)..... 7, 9

11 *City of Brentwood v. Dep’t of Fin.*,

12 54 Cal. App. 5th 418 (2020)..... 19

13 *Conderback, Inc. v. Standard Oil Co. of Cal., W. Operations*,

14 239 Cal. App. 2d 664 (1966)..... 10

15 *Craig Milhouse v. Travelers Com. Ins. Co.*,

16 2014 WL 12707309 (C.D. Cal. Jan. 2, 2014) 7

17 *Duale v. Mercedes-Benz USA, LLC*,

18 148 Cal. App. 4th 718 (2007)..... 7, 8

19 *Esgro Central, Inc. v. General Ins. Co.*,

20 20 Cal. App. 3d 1054 (1971)..... 8

21 *Great W. Drywall, Inc. v. Roel Constr. Co.*,

22 166 Cal. App. 4th 761 (2008)..... 14, 20

23 *Hansen v. Covell*,

24 218 Cal. 622 (1933)..... passim

25 *Haskell Corp. v. ConocoPhillips Co.*,

26 2012 WL 845398 (Cal. Ct. App. Mar. 14, 2012)..... 15

27 *Hewlett-Packard v. Oracle Corp.*,

28 65 Cal. App. 5th 506 (2021)..... 18

Highlands Ins. Co. v. Cont’l Cas. Co.,

64 F.3d 514 (9th Cir. 1995)..... 24

1 *Kransco v. Am. Empire Surplus Lines Ins. Co.*,
2 23 Cal. 4th 390 (2000).....21

3 *Lumens Co. v. GoEco Led LLC*,
4 2018 WL 11356419 (C.D. Cal Feb. 6, 2018)..... 13, 14

5 *Milhouse v. Travelers Com. Ins. Co.*,
6 641 F. App’x 714 (9th Cir. 2016) 8

7 *Mitsui Sumitomo Ins. Co. v. Singh*,
8 2007 WL 969541 (Cal. Ct. App. Apr. 3, 2007) 10

9 *Pub. Employees’ Ret. Sys. v. Winston*,
10 209 Cal. App. 3d 205 (1989)..... 17

11 *Union Pac. R.R. Co. v. Santa Fe Pac. Pipelines, Inc.*,
12 231 Cal. App. 4th 134 (2014)..... 18

13 *Watson Bowman Acme Corp. v. RGW Constr., Inc.*,
14 2 Cal. App. 5th 279 (2016)..... 11, 13, 16

14 **Statutes**

15 Cal. Civ. Code § 3278(a) 1, 7

16
17
18
19
20
21
22
23
24
25
26
27
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff and Counter-Defendant ChromaDex, Inc. (“ChromaDex”) is not
4 entitled to prejudgment interest on the damages it was awarded for its breach of
5 contract claims against Defendant and Counterclaimant Elysium Health, Inc.
6 (“Elysium”). ChromaDex seeks to recover prejudgment interest on \$2,983,350—the
7 amount invoiced for ingredients Elysium ordered on June 30, 2016 (“June 30
8 Orders”). However, the amount due on the June 30 Orders was never *certain* until
9 the verdict in this case, and therefore interest is not allowed under California Civil
10 Code section 3278(a).

11 As the jury found, Elysium was entitled to a credit for ChromaDex’s violation
12 of the most-favored nation (“MFN”) provision in the parties’ supply agreement. But
13 Elysium did not know the amount of the credit, and thus could not calculate the net
14 amount owed, if any, for the June 30 Orders, until the jury’s verdict. Elysium
15 repeatedly requested information from ChromaDex so it could attempt this
16 calculation, such as individual purchase order data, but ChromaDex repeatedly
17 denied Elysium’s requests and then filed this lawsuit. Through the verdict, Elysium
18 learned for the first time that it was owed \$625,000 under the MFN. To award
19 prejudgment interest in this scenario would violate the legal and equitable principles
20 requiring a defendant to pay only those amounts it knows are due, and would reward
21 ChromaDex for its strategy of intentionally concealing and withholding information
22 that could have clarified for Elysium how much it owed ChromaDex without the
23 need for this five-year litigation.

24 While Elysium strongly believes that ChromaDex cannot meet the certainty
25 requirement necessary to award prejudgment interest, if the Court nonetheless
26 determines that interest is appropriate, the MFN damages must be offset against
27 ChromaDex’s damages award *prior to* the calculation of prejudgment interest, as
28 required by California law. So too must the \$250,000 in royalty refunds that the

1 jury awarded Elysium on its fraudulent inducement claim, which is consistent not
2 only with the law but also with ChromaDex’s repeated representations to the Court
3 that it would offset this amount, plus interest, against any damages determined to be
4 owed by Elysium in this case.

5 An award of prejudgment interest of the kind ChromaDex seeks—on the full
6 amount of the invoices for the June 30 Orders, with no offsets for amounts already
7 paid to ChromaDex but belonging to Elysium—would run contrary to the law and
8 provide an inequitable result. ChromaDex will have had the benefit of \$875,000
9 that Elysium had already paid ChromaDex before the June 30 Orders were even due,
10 but to which ChromaDex had no right, and yet ChromaDex would also be receiving
11 interest *from Elysium* on those very payments.

12 For these reasons, the Court should deny ChromaDex’s Motion. However, if
13 the Court is inclined to grant ChromaDex some prejudgment interest, prior to
14 calculating interest, the Court must, at a minimum, offset ChromaDex’s damages
15 award with the \$875,000 awarded to Elysium.

16 **II. STATEMENT OF RELEVANT FACTS**

17 **A. *The MFN Provision***

18 In February 2014, Elysium and ChromaDex entered into a supply agreement
19 for NR, which ChromaDex sold under the name “Niagen.” (*See* Lane Decl., Exh. A
20 [Trial Exh. 1, Niagen Supply Agreement].) As part of that agreement, ChromaDex
21 agreed that Elysium would be entitled to ChromaDex’s lowest price for Niagen, also
22 known as MFN pricing. Specifically, the MFN provision stated:

23 If . . . ChromaDex supplie[d] Niagen . . . to a Third Party at a price
24 that is lower than that at which Niagen is supplied to Elysium Health
25 under this Agreement, then the price of Niagen supplied under this
26 Agreement *shall be revised* to such Third Party price *with effect from*
27 *the date of the applicable sale to such Third Party* and ChromaDex
28 shall *promptly* provide Elysium Health with any refund or credits

1 thereby created; provided Elysium Health purchases equal volumes or
2 higher volumes than the Third Party.
3 (*Id.* at 3, Section 3.1.) Thus, if ChromaDex supplied Niagen to a third-party at a
4 lower price than it gave Elysium, that lower price would become the effective price
5 for all Elysium orders of equal or greater volumes that Elysium placed on or after
6 the date of the sale to the third-party. ChromaDex was required to “promptly”
7 provide Elysium with a refund or credit for any orders it had placed at the higher
8 price when it should have been receiving a lower price.

9 ***B. Pre-Litigation Disputes Regarding the MFN***

10 Despite ChromaDex’s efforts to conceal that it had been charging other
11 customers less than Elysium in violation of the MFN provision, Elysium discovered
12 in June 2016 that ChromaDex had been doing just that. As early as May 2016,
13 Elysium began seeking information from ChromaDex on its compliance with the
14 MFN provision. In response, ChromaDex’s then-CEO, Frank Jaksch, sent Elysium
15 a deceptive, “blinded” spreadsheet that purported to anonymize customer
16 information and made it appear as if Elysium was receiving ChromaDex’s best
17 pricing. (*See* Lane Decl., Exh. B at 1, 5 [Trial Exh. 535: email from F. Jaksch
18 attaching “blinded” spreadsheet showing that Elysium was paying \$1,000/kg, and no
19 other customer was paying less].) However, Mr. Jaksch accidentally included two
20 additional tabs that contained more detailed customer information and demonstrated
21 that Elysium was not, in fact, receiving ChromaDex’s best price for Niagen. (*See*
22 Lane Decl., Exh. B at 8 [spreadsheet entry indicating “Living Cell” was purchasing
23 Niagen at \$900/kg when Elysium was paying \$1,000/kg]; Lane Decl., Exh. C at 1
24 [Trial Exh. 79: email chain wherein F. Jaksch admits that third-party had received
25 better pricing as indicated in additional tabs].)

26 Elysium continued to express its concerns that ChromaDex was not honoring
27 the MFN provision and that Elysium had insufficient information to assess the
28 amount of a refund or credit that ChromaDex owed. (*See, e.g.*, Lane Decl., Exh. D

1 at 4 [Trial Exh. 83: June 29, 2016 email from D. Alminana asking: “How long has
2 Elysium deserved a lower price on NR and/or ptero? We don’t know. You haven’t
3 told us.”], 5 [noting “it will take significant discovery and diligence to determine the
4 details of all NR agreements and purchase orders to date”].) But Elysium agreed to
5 move forward with the June 30 Orders with the express understanding that the
6 violation of the MFN, and any resulting credit or refund, would be discussed at a
7 later date. (*See* Lane Decl., Exh. E at 28:12-18 [Excerpt of F. Jaksch trial testimony:
8 Q. And on that call you agreed to \$800 for the June 30th order, correct? A. Yes. Q.
9 But on that call there was no resolution of the prior MFN violation. You and
10 Elysium had agreed to disagree and revisit that issue later; isn’t that right? A. That’s
11 correct.”].)

12 For months after the June 30 Orders were placed, Elysium sought information
13 from ChromaDex as to how much Elysium was owed under the MFN provision, as
14 this information was critical to assessing whether Elysium owed anything for the
15 June 30 Orders. (*See, e.g.*, Lane Decl., Exh. F at 1 [Trial Exh. 136: Aug. 30, 2016
16 Email from D. Alminana offering to have “independent and mutually agreed upon”
17 experts review the contract and sales information and stating: “It is clear that we
18 need to look at all individual orders/prices and compare each of those to our
19 individual orders/prices. . . . Until CDXC is transparent about the extent of the
20 breach, we have zero insight into how much Elysium owes Chromadex or, as is a
21 legitimate likelihood, how much Chromadex owes Elysium. Your team was notified
22 of this breach almost two months ago and, as required in our agreement, must
23 PROMPTLY provide Elysium with a refund or a credit. . . . This clearly has not
24 been done and therefore ChromaDex has created this outstanding receivable on their
25 own due to not only the breach, but the lack of action taken to remedy.”].)

26 In late 2016, Elysium had a call with Frank Jaksch and Steve Block, a
27 ChromaDex board member, during which Elysium again asked for information and
28 transparency. (Lane Decl., Exh. G at 111:10-19 [Excerpt of E. Marcotulli trial

1 testimony].) In response, ChromaDex told Elysium to audit them. (*Id.*) But when
2 Elysium sent a formal audit request, ChromaDex ignored it and instead notified
3 Elysium that it would not renew its supply agreement. (Lane Decl., Exh. H at
4 37:20-38:10 [Excerpt of D. Alminana trial testimony].) Soon after, ChromaDex
5 initiated this action.

6 ***C. Litigation and Trial***

7 On December 29, 2016, ChromaDex filed the Complaint alleging that
8 Elysium had breached the supply agreements by failing to pay for the June 30
9 Orders. (*See generally* Dkt. 1 [Complaint].) From the outset of this litigation,
10 Elysium unequivocally contested the amount ChromaDex claimed it was owed for
11 the purchase orders. (*See* Dkt. 11 [Elysium’s Answer and Counterclaims] at 6 (¶15:
12 denying ChromaDex’s claim that Elysium owed \$2,983,350 for the purchase
13 orders); *see also id.* at 15 (Fourth Affirmative Defense: noting that Elysium’s
14 performance was excused by ChromaDex’s breaches and that any damages
15 ChromaDex would otherwise be owed should be offset in whole or in part).) As
16 Elysium had been explaining to ChromaDex for months in the lead-up to
17 ChromaDex’s initiation of this action, Elysium believed it was entitled to an MFN
18 credit or refund, but it did not know the amount of the credit or refund. And
19 Elysium’s right to an MFN refund, and in what amount, were the central issues at
20 trial. (*See* Lane Decl., Exh. I at 42:15 [Excerpt of Defendants’ Opening Argument
21 Transcript: “The MFN is why we’re here.”]; Lane Decl., Exh. J at 39:19-24
22 [Excerpts of Defendants’ Closing Argument Transcript: “ChromaDex violated the
23 MFN and whether ChromaDex owes Elysium a refund, and if so, for how much.
24 Those are the key questions that you have to decide, and I think most of everything
25 kind of flows from that because it explains kind of everything in this case.”].)

26 As the evidence demonstrated at trial, before Elysium could determine how
27 much—if anything—it owed ChromaDex for the June 30 Orders, Elysium needed to
28 know how much ChromaDex owed Elysium in credits for violating the MFN. (*See*

1 Lane Decl., Exh. G at 110:11-22 [Excerpts of E. Marcotulli Trial Testimony: “Q.
2 Okay. And by the way, before we get to the lawsuit, you were having conversations
3 with ChromaDex, asking them to show you the numbers; is that fair? A. Yes. Q.
4 To show you what other customers were purchasing NR for so that you could figure
5 out how long what you thought MFN violations were going on; is that right? A.
6 Yes. Q. Okay. So that was to be able to figure out whether you should pay them,
7 whether they should pay you, or maybe it’s a tie. Is that fair? A. That’s right.”],
8 113:11-15 [“Q. Why haven’t you paid? A. Because we don’t know how much
9 money were [sic] owed. Q. Do you believe that it’s possible that they owe you more
10 than the price of the June 30th order? A. Yes.”].) But because ChromaDex
11 provided Elysium the information it needed to calculate the MFN credit, this was a
12 question that could not be decided outside of court and which ultimately was
13 presented to the jury to decide. (See Lane Decl., Exh. J at 40:18-22 [Excerpts of
14 Defendants’ Closing Argument: “Elysium did not pay for the June 30th order
15 because Elysium knew that ChromaDex had been violating the MFN clause. But
16 Elysium did not know the extent of the violation, and ChromaDex had lied about the
17 violation with spreadsheet-gate and it would not come clean.”], 50:25 – 51:3 [“Then
18 look at the June 30th order. They want \$2.9 million for that order, and we intend to
19 pay for it, but first we need our MFN credit. So let’s get our credit on the June 30th
20 order, too, at the same time.”].)

21 ***D. Jury Verdict***

22 On September 27, 2021, following four days of trial, the jury rendered a
23 verdict that validated Elysium’s concerns. While the jury awarded ChromaDex
24 \$2,983,350 for the June 30 Orders, the jury also found that ChromaDex owed
25 Elysium \$625,000 under the MFN provision. (Dkt. 570 [Verdict Form].)

26 The jury further found that ChromaDex had fraudulently induced Elysium to
27 enter into a trademark license and royalty agreement pursuant to which it charged
28 Elysium royalties for any products Elysium sold that contained Niagen. (*Id.*) The

1 jury awarded Elysium \$250,000 in damages, as well as \$1,025,000 in punitive
2 damages against ChromaDex for acting with malice, fraud, or oppression in its
3 dealings with Elysium. (*Id.*)¹

4 **III. ARGUMENT**

5 **A. *ChromaDex Is Not Entitled to Any Prejudgment Interest.***

6 California Civil Code section 3287(a) permits a litigant to recover
7 prejudgment interest only where the damages are “certain, or capable of being made
8 certain by calculation.” Cal. Civ. Code § 3287(a). When determining certainty,
9 courts “focus on the *defendant’s* knowledge about the amount of the plaintiff’s
10 claim.” *Chesapeake Indus., Inc. v. Togova Enterprises, Inc.*, 149 Cal. App. 3d 901,
11 907 (1983). The test is “whether *defendant* actually know[s] the amount owed or
12 from reasonably available information could the defendant have computed that
13 amount.” *Duale v. Mercedes-Benz USA, LLC*, 148 Cal. App. 4th 718, 729 (2007)
14 (alterations in original) (internal quotation marks and citations omitted). “Only if
15 one of those two conditions is met should the court award prejudgment interest.”
16 *Chesapeake*, 149 Cal. App. 3d at 907. “The fact the plaintiff or some omniscient
17 third party knew or could calculate the amount is not sufficient.” *Id.* In practice,
18 this means that “[p]re-judgment interest is not authorized . . . where the amount of
19 damage, as opposed to only the determination of liability, depends upon a judicial
20 determination based upon conflicting evidence and is not ascertainable from truthful
21 data supplied by the claimant to his debtor.” *Craig Milhouse v. Travelers Com. Ins.*
22 *Co.*, No. SACV1001730CJCANX, 2014 WL 12707309, at *1 (C.D. Cal. Jan. 2,
23 2014) (Carney, J.) (citing *Esgro Central, Inc. v. General Ins. Co.*, 20 Cal. App. 3d

24 _____
25 ¹ The jury also awarded ChromaDex \$17,307.69 for a breach of contract claim
26 against Defendant Mark Morris, while rejecting a second breach of contract claim
27 against Mr. Morris. (Dkt. 570.) The jury also rejected ChromaDex’s claims for
28 trade secret misappropriation, breach of fiduciary duty, and aiding and abetting
breach of fiduciary duty, as well as ChromaDex’s requests for punitive damages,
finding in Elysium and Mr. Morris’s favor on all such claims. (*Id.*)

1 1054, 1062 (1971)), *aff'd sub nom. Milhouse v. Travelers Com. Ins. Co.*, 641 F.
2 App'x 714 (9th Cir. 2016); *see also Duale*, 148 Cal. App. 4th at 729 (holding
3 “where the amount of damages cannot be resolved except by verdict or judgment,
4 prejudgment interest is not appropriate” and upholding trial court’s determination
5 that damages were not certain and prejudgment interest was not appropriate where
6 facts relevant to determination of damages award were contested).

7 Here, Elysium neither knew the amount it actually owed ChromaDex nor
8 could Elysium calculate the amount from the information ChromaDex made
9 available to it. In fact, the amount of damages was exactly what the jury was asked
10 to determine in this case. Elysium did not contest its liability by denying that it
11 placed the June 30 Orders or claiming it never received the product. Instead, since
12 before ChromaDex even initiated this litigation, Elysium has contested that it owed
13 ChromaDex the invoiced amount for the June 30 Orders because Elysium
14 believed—and the jury agreed—that it was entitled to a credit on those orders for
15 ChromaDex’s MFN violations. (*See, e.g., Lane Decl., Exh. F at 1 [Aug. 30, 2016*
16 *Email from D. Alminana to ChromaDex: “It is clear that we need to look at all*
17 *individual orders/prices and compare each of those to our individual orders/prices. .*
18 *. . we have zero insight into how much Elysium owes Chromadex or, as is a*
19 *legitimate likelihood, how much Chromadex owes Elysium. Your team was*
20 *notified of this breach almost two months ago and, as required in our agreement,*
21 *must PROMPTLY provide Elysium with a refund or a credit. . . . This clearly has*
22 *not been done and therefore ChromaDex has created this outstanding receivable on*
23 *their own due to not only the breach, but the lack of action taken to remedy.’.]*.)

24 The MFN provision was the provision governing pricing in the Niagen
25 Supply Agreement. (*See generally Lane Decl., Exh. A.*) It directly controlled the
26 price Elysium was supposed to pay, and it mandated a prompt credit against orders
27 when Elysium overpaid. The only way to calculate the net price of the June 30
28 Orders was to know what ChromaDex owed Elysium under the MFN provision.

1 Thus, the MFN calculation is a necessary component of ChromaDex’s damages. *Cf.*
2 *Chesapeake*, 149 Cal. App. 3d at 913–14 (“Indeed by the terms of section 14 of the
3 lease once Togova relet the premises it was only entitled to the net deficiencies not
4 the hypothetical gross amount of rent Chesapeake otherwise might have owed.
5 Chesapeake would only owe a net sum each month and that net sum would change
6 monthly depending on the various expenditures Togova was compelled or chose to
7 make during that period. The fact it is possible to determine with some certainty
8 one figure which is but a single *element* in the mathematical calculations involved in
9 deriving a claim does not necessarily render the claim itself either certain or
10 calculable. Therefore, we decline to apply the rule in [*Hansen v. Covell*, 218 Cal.
11 622 (1933)] which allows prejudgment interest where the original liquidated sum is
12 subject to reduction by an unliquidated counterclaim.”); *see also Hansen v. Covell*,
13 218 Cal. at 631 (noting that the fact that certain cases ruled unliquidated claims
14 should offset prejudgment interest was “not to be construed as interfering with the
15 application in a proper case of any general rule that where the liquidated demand is
16 subject to reduction by virtue of an unliquidated claim the balance due is deemed to
17 be an unliquidated sum upon which interest is not recoverable”).

18 At trial, issues concerning the amount of damages Elysium owed ChromaDex
19 were hotly contested, including (i) whether Elysium was owed a credit or refund
20 under the MFN; (ii) which third-party orders triggered that credit or refund; and (iii)
21 how much of a credit or refund ChromaDex owed Elysium. ChromaDex does not
22 disagree that these issues were disputed and that Elysium was unable to calculate the
23 MFN credit that should have applied to the June 30 Orders. In fact, ChromaDex
24 goes to great lengths to emphasize the uncertainty surrounding the MFN credit
25 calculation in its Motion. (*See* Motion at 4-5 [also acknowledging law that
26 “[d]amages are unliquidated when ‘the amounts turn on disputed facts’ and, “[i]n
27 contrast, damages are liquidated ‘where there is essentially *no dispute* between the
28 parties *concerning the basis of computation of damages*” (emphasis added)].)

1 Without the jury, neither party was able to accurately calculate the net amount
2 Elysium owed ChromaDex for the June 30 Orders.

3 When the jury awarded Elysium \$625,000 in damages for ChromaDex’s
4 violation of the MFN provision, the jury necessarily found that Elysium was entitled
5 to a \$625,000 credit against any amount owed on the June 30 Order. This is true
6 regardless of which order(s) the jury’s verdict pertained to. It was undisputed at
7 trial that the June 30 Orders were Elysium’s last orders for ChromaDex ingredients.
8 So either the jury believed Elysium was already owed the \$625,000 credit at the
9 time it placed those orders, or the jury believed the June 30 Niagen price should
10 have been \$625,000 cheaper. But until the jury reached its verdict, neither side
11 knew what the actual price of the June 30 Orders was, and thus prejudgment interest
12 should be denied. *Cf. Berg v. Pulte Home Corp.*, 67 Cal. App. 5th 277, 294 (2021)
13 (finding denial of prejudgment interest appropriate where defendants “could not
14 review the invoices” to calculate amounts owed “[u]ntil the jury determined the
15 allocation of the contract damages owed by each of the defendants”); *see also*
16 *Cardet v. Burlison*, No. B198625, 2008 WL 5235871, at *13 (Cal. Ct. App. Dec. 17,
17 2008) (finding plaintiff was not entitled to prejudgment interest in amount of default
18 judgment where defendants disputed “the amount actually owed,” “presented
19 evidence and argued that the amount sought by [plaintiff] was subject to a host of
20 offsets [and] was barred by her unclean hands,” and “the jury had to determine
21 which offsets and defenses were valid and what amount, if any, defendants owed.”);
22 *Mitsui Sumitomo Ins. Co. v. Singh*, No. B185314, 2007 WL 969541, at *6 (Cal. Ct.
23 App. Apr. 3, 2007) (holding that, where trial court determined bill of lading limited
24 damages to \$100,000, damages were uncertain until trial court made its ruling, and
25 prejudgment interest was improper); *Conderback, Inc. v. Standard Oil Co. of Cal.,*
26 *W. Operations*, 239 Cal. App. 2d 664, (1966) (denying prejudgment interest where
27 price determination required “application of a pricing formula and negotiations
28 between the parties,” and plaintiff, who was in possession pricing formula, failed to

1 accurately calculate amount).

2 ***B. If the Court Determines that ChromaDex Is Entitled to Prejudgment***
3 ***Interest, Such Interest Should Be Calculated on the Balance***
4 ***Remaining After Elysium’s Damages Are Offset.***

5 Under black letter California law, a plaintiff may recover interest on an
6 amount due only after deducting any offsetting amounts that the plaintiff owes the
7 defendant, even if the offsetting amounts were unliquidated until the jury’s verdict.
8 For this reason, if the Court determines that ChromaDex is entitled to interest on the
9 amount due for the June 30 Orders, the Court should only award interest on the net
10 amount due after deducting the amounts that the jury awarded Elysium.

11 “[W]here the amount of a demand is sufficiently certain to justify the
12 allowance of interest thereon, the existence of a set-off, counterclaim, or cross claim
13 which is unliquidated will not prevent the recovery of interest *on the balance of the*
14 *demand* found due from the time it became due.” *Watson Bowman Acme Corp. v.*
15 *RGW Constr., Inc.*, 2 Cal. App. 5th 279, 295 (2016) (citation omitted) (emphasis
16 added). “The phrase ‘the balance of the demand’ means the liquidated sum *minus*
17 *the offset.*” *Id.* (citing *Burgermeister Brewing Corp. v. Bowman*, 227 Cal. App. 2d
18 274, 285 (1964)) (emphasis added). “Thus, prejudgment interest is calculated on the
19 *net* amount owed and, therefore, the defendant is not required to pay interest on the
20 portion of the debt rightfully withheld.” *Id.* (emphasis in original). “The rationale
21 for this rule is that the plaintiff was never entitled to payment of more than the net
22 amount and, therefore, was damaged only by the withholding of the net amount.”
23 *Id.*; *see also Hansen v. Covell*, 218 Cal. 622, 630–31 (1933) (noting that “on the
24 theory that the [plaintiff] is entitled to interest only on such amount of the use of
25 which he has been deprived during the period of default, the court may properly
26 allow interest *only on the balance found to be due after deduction of such offsets*
27 *and payments*” because “to that extent only has the plaintiff been damaged”
28 (emphasis added)).

1 Here, the jury found that ChromaDex was not entitled to \$625,000 that it had
2 charged Elysium in violation of the MFN provision, nor was ChromaDex entitled to
3 the \$250,000 in royalties it collected from Elysium pursuant to a fraudulently-
4 induced contract. Thus, ChromaDex is only entitled to collect prejudgment interest
5 on the net amount it is due on the June 30 Orders after these amounts are offset.²
6 Otherwise, ChromaDex would be receiving a windfall that rewards its misdeeds.

7 Additionally, with respect to the \$250,000 awarded to Elysium on its
8 fraudulent inducement claim, ChromaDex's prior representations to Elysium and
9 this Court should be binding. ChromaDex repeatedly assured this Court that it was
10 going to refund the royalties it charged Elysium, and that the refund (with interest)
11 should offset any damages assessed against Elysium, including for nonpayment of
12 the June 30 Orders. While ChromaDex now seeks to back out of those promises,
13 Elysium respectfully requests that ChromaDex be required to honor the judicial
14 covenants it previously made.

15 **1. \$625,000 in MFN Damages**

16 ChromaDex argues that the \$625,000 that the jury awarded Elysium for
17 ChromaDex's breach of the MFN provision should not be offset against its own
18 damages for two reasons. First, ChromaDex claims that unliquidated counterclaims
19 "may only be offset after ChromaDex's prejudgment interest is calculated and
20 awarded." (Motion at 4.) But ChromaDex's position completely ignores well-
21 settled California law mandating that unliquidated counterclaims be offset prior to
22 the calculation of prejudgment interest. Second, ChromaDex claims there is no date
23 certain on which the MFN award came due, and so the offset should not apply until
24 the date of final judgment. Here, ChromaDex misunderstands and mischaracterizes

25
26 _____
27 ² Defendants believe that prejudgment interest should not start to run until the jury's
28 verdict, and thus an offset of the \$1,025,000 in punitive damages that the jury
awarded is also required. See Section III.C, *infra*.

1 the law. There is no requirement under California law that unliquidated damages be
2 offset only if there is a date certain that they became due. But even if there were,
3 the evidence is clear that Elysium was owed a refund, credit, or lower price no later
4 than June 30, 2016, rendering ChromaDex’s point moot.³

5 (a) ***Unliquidated counterclaims must be offset prior to the***
6 ***calculation of prejudgment interest.***

7 First, it is well-established, under California law, that unliquidated
8 counterclaims are offset *prior* to the assessment of prejudgment interest. *See, e.g.,*
9 *Watson Bowman Acme Corp.*, 2 Cal. App. 5th at 295 (finding that plaintiff’s
10 prejudgment interest calculation “must be based on the *net amount owed* under the
11 contract” where defendant had successful cross-claim for delivery of defective
12 goods); *Burgermeister*, 227 Cal. App. 2d at 285 (“It is settled that when a plaintiff
13 sues for a liquidated sum and the defendant establishes an offsetting claim based
14 upon defective workmanship or defective performance of the same contract by the
15 plaintiff, the amount of the former is to be offset against the latter as of the due date
16 of the original debt and only the balance bears interest.”); *Hansen*, 218 Cal. at 630-
17 31 (“[O]n the theory that the [plaintiff] is entitled to interest only on such amount of
18 the use of which he has been deprived during the period of default, ***the court may***
19 ***properly allow interest only on the balance found to be due after deduction of***
20 ***such offsets*** and payments.” (emphasis added)).

21 The only cases that ChromaDex cites in support of the opposite conclusion
22 are easily distinguishable. For example, in *Lumens Co. v. GoEco Led LLC*, the
23 defendant had filed a counterclaim to recover a commission pursuant to a
24 memorandum of understanding (“MOU”). No. SACV1401286CJCDFMX, 2018
25

26 _____
27 ³ To the extent the Court determines the MFN damages should not be offset prior to
28 the calculation of prejudgment interest, the Court should at least award Elysium
prejudgment interest on its MFN damages claim.

1 WL 11356419 (C.D. Cal. Feb. 6, 2018) *aff'd*, 807 F. App'x 612 (9th Cir. 2020). In
2 *Lumens*, The MOU ended on June 9, 2015, but defendant filed its counterclaim on
3 October 17, 2014. *Id.* at *2. The Court noted that there was no evidence the
4 commission was due until the end of the MOU, *id.*, and thus defendant's claim was
5 unliquidated at the time of filing. *Cf. Hansen*, 218 Cal. at 629 (noting that
6 California adopted rule that prejudgment interest is properly allowed on balance of
7 any liquidated demand *after reducing demand by unliquidated counterclaim*, but
8 where "the claim for deduction could not be said to be demandable at the time when
9 the original liquidated claim became due," interest may be calculated on demand
10 prior to any offset).

11 Here, however, the evidence at trial demonstrated that Elysium was owed an
12 MFN refund or credit by no later than June 30, 2016, the date on which it placed the
13 orders at issue and the last date on which Elysium purchased anything from
14 ChromaDex—and thus the last date that the MFN refund or credit could have
15 possibly been triggered. Accordingly, the MFN refund or credit was "demandable"
16 at the time ChromaDex filed this lawsuit, the *Lumens* decision is inapposite, and the
17 general rule in California that unliquidated counterclaims should be offset prior to
18 the calculation of any prejudgment interest should apply.

19 Notably, ChromaDex also cites to the following language from *Lumens*,
20 quoting *Great W. Drywall, Inc. v. Roel Constr. Co.*, 166 Cal. App. 4th 761, 768
21 (2008): "an award of unliquidated damages to a cross-complainant is a setoff against
22 prejudgment interest awarded a plaintiff for liquidated damages" and "[unliquidated
23 counterclaims] are given treatment as discounts, not as payments made at the time . .
24 . the debt is due." (Motion at 4.) But ChromaDex ignores that the *Great W.*
25 *Drywall* court further explained in the following sentences of its opinion that "[a]s
26 the court explained in *Hansen* . . . , such an offset is allowed 'on the theory that the
27 contractor is entitled to interest *only on such amount of the use of which he has been*
28 *deprived during the period of default.*' '[T]he court may properly allow interest

1 *only on the balance found to be due after deduction of such offsets*’ because ‘to that
2 extent only has the plaintiff been damaged.’” 166 Cal. App. 4th at 768 (emphasis
3 added). The jury’s verdict confirmed that ChromaDex was not deprived of at least
4 \$625,000, and thus that amount should be deducted as an offset prior to the interest
5 calculation.

6 Finally, ChromaDex cites *Haskell Corp. v. ConocoPhillips Co.* in support of
7 its position that Elysium’s damages should not be offset until after the calculation of
8 prejudgment interest. This citation is misleading. The court in *Haskell* specifically
9 cites the general rule that Elysium advocates for here: “[w]hen a party is entitled to
10 prejudgment interest on liquidated damages but those damages are to be reduced by
11 offset of damages on an unliquidated claim, prejudgment interest is awarded on the
12 balance of the liquidated claim after deduction of the unliquidated setoff.” *Haskell*
13 *Corp. v. ConocoPhillips Co.*, No. A124446, 2012 WL 845398, at *22 (Cal. Ct. App.
14 Mar. 14, 2012). And while the court ultimately upheld the trial court’s decision to
15 award damages to both ConocoPhillips’ liquidated breach of contract claims and
16 Haskell’s unliquidated breach of contract claims prior to offsetting the claims
17 against each other, it also emphasized that certain factors existed that supported such
18 a departure from the rule. For instance, the court emphasized that the unliquidated
19 damages exceeded the liquidated damages, and that the damages awards arose out of
20 different contracts and thus were not as “fully intertwined.” Here, there is no basis
21 for any departure from what is well-established law.

22 (b) *The MFN damages do not need to be tied to a date*
23 *certain, but if they did, it is clear that date would be no*
24 *later than June 30, 2016.*

25 Second, there is no requirement that the MFN damages be tied to a certain
26 date in order to offset the damages awarded to ChromaDex. Even if that were a
27 requirement, the record is clear that ChromaDex’s contractual obligation to
28 promptly refund or credit Elysium for its MFN violations was triggered no later than

1 June 30, 2016. Given the last orders Elysium placed with ChromaDex were the
2 June 30 Orders, the jury’s verdict necessarily means either (i) that ChromaDex
3 overcharged Elysium for orders placed and paid for before June 30, 2016, and thus
4 ChromaDex owed Elysium a credit for the overcharge; or (2) that ChromaDex
5 overcharged Elysium for the June 30 Orders themselves and was not entitled to the
6 full purchase price on those orders. Those are the only options. To adopt
7 ChromaDex’s position would reward ChromaDex for dragging its feet in fulfilling
8 its contractual obligations under the MFN provision and withholding any refund or
9 credit from Elysium, resulting in a windfall to ChromaDex in the form of interest on
10 a sum it was never entitled to and actually owed Elysium.

11 Regardless, it is clear from looking at the cases that ChromaDex cites in
12 support of this second argument that ChromaDex misconstrues the law and there is
13 no need to determine a date certain.

14 ChromaDex first cites to *Watson* for the proposition that a prejudgment
15 interest calculation “must take into account the timing and amount” of any offsetting
16 payments. (Motion at 5-6.) ChromaDex’s reliance on this case is misplaced. The
17 *Watson* court was not discussing damages awarded pursuant to a counterclaim; it
18 was discussing two actual payments that the defendant had made towards the
19 plaintiff’s claim. In fact, the *Watson* court determined that prejudgment interest
20 should only be awarded “on the *net amount owed* under the contract,” and that the
21 amount the jury awarded the defendant on its cross-claim must be deducted from the
22 amount awarded to plaintiff prior to calculating interest. *Id.* at 292, 295 (emphasis
23 in original). But in addition to the offset, the court instructed that the prejudgment
24 interest calculation “must take into account the timing and the amount of RGW’s
25 two payments.” *Id.* at 295.

26 Applying the same logic to the present case, the Court should deduct the
27 MFN damages from ChromaDex’s breach of contract damages prior to calculating
28 any prejudgment interest. Elysium does not claim that it made any payments on the

1 June 30 Orders (and any payments Elysium made on prior orders were made before
2 June 30, 2016). Thus, there is no need to further deduct any payments, nor is there a
3 need to determine the timing and amount of such payments.⁴

4 ChromaDex also cites *Hansen* in support of its position. Specifically,
5 ChromaDex notes that the court held that “interest is properly allowed on the
6 balance found to be due *from the time it became due.*” (Motion at 6 [citing *Hansen*,
7 218 Cal. at 629 (emphasis added by ChromaDex)].) However, the “it” in that
8 sentence refers to the “balance” of the liquidated claim. This is consistent with the
9 court’s ultimate determination that the plaintiff was only entitled to interest “on the
10 balance” of its liquidated claims “after deduction of the amounts found to be due to
11 the defendant,” including for defective workmanship which had no apparent date
12 certain attached to it. *See Hansen*, 218 Cal. at 631; *see also id.* at 631-32 (noting
13 that if result of controlling authorities is to essentially award interest on unliquidated
14 sums, “that fact must be taken as the established result, rather than as constituting
15 any cogent or compelling reason why the authorities should not be followed”).

16 _____
17 ⁴ ChromaDex similarly misconstrues *Pub. Employees’ Ret. Sys. v. Winston*, 209 Cal.
18 App. 3d 205, 210–11 (1989), in an attempt to support its position. (*See* Motion at 6
19 [stringing together various phrases and claiming court ruled that “the timing of the
20 offset” can be “critical” because “the total sum bears interest” up to the date the
21 offsetting payment would be due].) The cross-claim in that case was a rent
22 abatement claim, which the Court specifically deducted from plaintiff’s damages
23 prior to calculating any interest. *See Pub. Employees’ Ret. Sys.*, 209 Cal. App. 3d at
24 210 (“PERS was entitled to the amount of rent owing from February through April
25 27 (the date of the \$8,000 payment), less the \$4,185 rent abatement credit, with
26 interest accrued on the net liquidated amount owing (i.e., unpaid rent less rent
27 abatement credit) under [*Burgermeister*, 227 Cal. App. 2d 274] (when a plaintiff
28 sues for a liquidated sum and the defendant establishes an offsetting claim based
upon defective performance of the same contract by the plaintiff, the amount of the
former is to be offset against the latter as of the due date of the original debt, and
only the balance bears interest).”). However, the Court also found that the
defendant was entitled to have his security deposit returned on a certain date and
that the deposit should essentially be treated as if a separate payment had been made
on that date. *Id.*

1 Therefore, the cited language has no bearing on the timing of the offsets, which even
2 the *Hansen* court held should be prior to the prejudgment interest calculation.

3 The remaining cases ChromaDex cites—*Hewlett-Packard v. Oracle Corp.*, 65
4 Cal. App. 5th 506, 576 (2021) and *Union Pac. R.R. Co. v. Santa Fe Pac. Pipelines,*
5 *Inc.*, 231 Cal. App. 4th 134, 203 (2014)—do not address the issue of offsetting
6 unliquidated claims prior to calculating prejudgment interest. Instead, they address
7 whether prejudgment interest should be awarded in the first instance. Thus, they
8 bear no relation to the argument at issue.

9 Finally, ChromaDex erroneously argues that the “plain language” of the MFN
10 provision precludes any offset of damages awarded to Elysium for ChromaDex’s
11 MFN violations prior to the date of final judgment. (Motion at 6.) Without citing
12 any support for its position, ChromaDex claims that “by definition, a ‘refund or
13 credit’ for a payment could only be provided after that payment,” and thus Elysium
14 has to pay ChromaDex before it can realize its refund or credit. (*Id.*) But contrary
15 to ChromaDex’s baseless and self-serving assertions, the plain language definition
16 of “credit” includes “a deduction from an amount otherwise due.” Merriam-
17 Webster, Dictionary, <https://www.merriam-webster.com/dictionary/credit> (last
18 visited Jan. 21, 2022). Thus, the language of the contract explicitly calling for a
19 “prompt[]” credit requires that the \$625,000 be deducted from any amount
20 otherwise due to ChromaDex *before* Elysium would be required to pay.

21 For the foregoing reasons, should the Court determine that ChromaDex is
22 entitled to any amount of prejudgment interest, it should deduct the MFN damages
23 prior to calculating such interest.

24 **2. \$250,000 in Fraudulent Inducement Damages**

25 ChromaDex argues that Elysium’s damages for ChromaDex’s fraudulent
26 inducement should not offset any prejudgment interest award because (i) the award
27 involved a different contract, and (ii) the fraudulent inducement claim is a tort
28

1 claim—not a contract claim.⁵

2 First, while the trademark license and royalty agreement was a separate
3 document from the supply agreement, both documents comprised the same
4 contractual agreement. *See City of Brentwood v. Dep’t of Fin.*, 54 Cal. App. 5th
5 418, 433 (2020) (“Civil Code section provides that ‘[s]everal contracts relating to
6 the same matters, between the same parties, and made as parts of substantially one
7 transaction, are to be taken together.’ . . . Whether a document is incorporated into
8 the contract depends on the parties’ intent as it existed at the time of contracting.
9 For the terms of another document to be incorporated into the document executed by
10 the parties *the reference must be clear and unequivocal . . .*” (internal quotation
11 marks and citations omitted.)). This is evidenced by the contractual language of
12 both the Niagen supply agreement and the trademark license and royalty agreement,
13 which explicitly state both documents taken together contain the “entire agreement”
14 of the parties. (Lane Decl., Exh. A at 9 [Niagen Supply Agreement: “7.5 Entire
15 Agreement. This Agreement *and the Trademark License and Royalty Agreement*
16 entered into between the parties as of the Effective Date contains the entire
17 understanding of the parties with respect to the subject matter hereof.” (emphasis
18 added)]; Lane Decl., Exh. K at 8 [Trial Exh. 22, Trademark License and Royalty
19

20 ⁵ ChromaDex also tries to characterize the offset as an improper request for
21 prejudgment interest. But this is not a request for prejudgment interest, it is an
22 offset contemplated by California law to prevent ChromaDex from recouping
23 interest on amounts it is not owed. The court in *Hansen* addressed this argument.
24 There, plaintiffs complained the application of offset principles and authorities
25 essentially resulted in an award of interest on the unliquidated, offsetting claims in
26 contravention of California Civil Code section 3287. The court ruled that, “if the
27 result of the authorities deemed controlling is to cause the modification of the
28 general test or the exception to the general rule as to what constitutes a liquidated
sum to be applied to the deductible offsets involved, that fact must obviously be
taken as the established result, rather than as constituting any cogent or compelling
reason why the authorities should not be followed.” *Cf. Hansen*, 218 Cal. at 631–
32.

1 Agreement: “15.9 Entire Agreement: This Agreement *along with* the Brand Usage
2 Guidelines and *the Supply Agreement* constitutes the entire agreement between the
3 parties concerning the subject matter hereof” (emphasis added)].). But for
4 some reason, as part of its fraudulent scheme, ChromaDex had told Elysium that
5 they “couldn’t do it in one document, it needed to be broken into two.” (Lane Decl.,
6 Exh. H at 47:24 – 48:2 [Excerpt of D. Alminana trial testimony].) Then-CEO Mr.
7 Jaksch told Elysium: “This is just what we do. This is standard. Everyone signs
8 this. And if you want access to NR, you have to sign it too.” (*Id.* at 48:3-5).⁶
9 ChromaDex’s attempts to use the existence of two separate documents to avoid an
10 offset, while unsurprising, should be rejected.

11 Second, ChromaDex’s argument that tort claims cannot offset prejudgment
12 interest awards on contract claims completely ignores the case law. In the only case
13 to address the issue head-on, the court ruled:

14 In any event, we conclude that even if the court intended to award
15 damages for negligence as opposed to breach of contract, Roel is
16 entitled to a setoff of its entire award. . . . Both parties had claims
17 against each other under the subcontract, thus setoff serves the
18 interests of justice and the purposes of the prejudgment interest
19 statute. Another ruling would elevate form over substance.

20 *Great W. Drywall, Inc. v. Roel Constr. Co.*, 166 Cal. App. 4th 761, 770 (2008).

21 Similarly, to decline to offset the fraudulent inducement damages against any
22 prejudgment interest award would elevate form over substance. Prior to June 30,
23 2016, ChromaDex improperly obtained \$250,000 from Elysium in royalty payments
24 that Elysium made pursuant to what it believed were its contractual obligations with
25

26 _____
27 ⁶ As Elysium later learned, this was completely untrue. (*See* Exh. H at 49:20 – 50:3
28 [noting that “blinded” spreadsheet sent to Elysium proved that not all customers
were required to pay royalties].)

1 respect to the Niagen it purchased. But those contractual obligations were obtained
2 by ChromaDex through fraud. Denying Elysium an offset of these damages would
3 not only allow ChromaDex to improperly collect interest on an extra \$250,000 of
4 which it was not being deprived, it would also allow ChromaDex to collect interest
5 on its fraud.⁷

6 **3. Even If the Court Does Not Believe the Fraudulent**
7 **Inducement Damages Should Offset ChromaDex’s Damages,**
8 **the Court Should Offset \$250,000 Pursuant to ChromaDex’s**
9 **Judicial Covenants**

10 After repeatedly representing to this Court for years that ChromaDex would
11 credit the royalty payments made by Elysium, including interest, against any
12 damages it recovered in this case, ChromaDex now attempts to go back on its word
13 in an effort to squeeze additional money out of Elysium.⁸ It is this kind of behavior
14 that undoubtedly led the jury to award punitive damages against ChromaDex.

15 At trial, Elysium sought damages of \$250,000 for royalties that it had paid to
16 ChromaDex as a result of ChromaDex’s fraudulent inducement. The jury awarded
17 Elysium the \$250,000. Prior to trial, ChromaDex judicially covenanted to refund
18 Elysium’s royalty payments and to offset those payments, and interest thereon,
19

20 _____
21 ⁷ ChromaDex cites to an insurance case in support of the proposition that “[t]ort and
22 contract liabilities are as different as ‘apples and oranges.’” (Motion at 7 [citing
23 *Kransco v. Am. Empire Surplus Lines Ins. Co.*, 23 Cal. 4th 390, 403 (2000), *as*
24 *modified* (July 26, 2000)]. But prejudgment interest was not at issue in *Kransco*.

25 ⁸ This is not the first time ChromaDex has made representations about its position
26 on an issue and then, when it felt it was advantageous to do so, about-faced and
27 taken a different and conflicting position. (See Dkt. 515-1 [Defendants’
28 Memorandum of Points and Authorities in Support of *Ex Parte* Application for
Order Clarifying Summary Judgment Ruling: detailing the inconsistencies between
the position ChromaDex took as to damages during summary judgment proceedings
and the position it was attempting to take to keep a claim that had been disposed of
during those proceedings alive].)

1 against any damages assessed against Elysium. But now, ChromaDex
2 disingenuously distances itself from these covenants.

3 For example, ChromaDex made the following representations:

- 4 • “ChromaDex is further refunding and/or crediting any and all past
5 royalties paid by all customers pursuant to all ‘royalty-bearing
6 trademark licenses.’ *ChromaDex represents to the Court that it will
7 provide a credit to Elysium for all past royalties against the damages
8 owed by Elysium in this case, including for the failure to pay for
9 product purchased.*” (Dkt. 45 [Second Amended Complaint (“SAC”)]
10 at ¶ 93 (emphasis added); Dkt. 48 [Third Amended Complaint] at ¶ 64
11 (emphasis added); Dkt. 153 [Fifth Amended Complaint] at ¶ 148
12 (emphasis added); *see also* Dkt. 67 [ChromaDex’s Memorandum of
13 Points and Authorities in Support of Motion to Dismiss Elysium’s
14 Fourth and Fifth Counterclaims and/or Strike Patent Misuse Allegations
15 Related to Elysium’s Fifth Counterclaim] at 4-5 (recognizing
16 ChromaDex’s statement in SAC was “binding”).)
- 17 • ChromaDex “bound itself to credit Elysium for all past royalties paid
18 against damages owed to ChromaDex for Elysium’s non-payment of
19 product.” (Dkt. 67 at 5.)
- 20 • “However, ChromaDex has already covenanted to ‘provide a credit
21 to Elysium for *all past royalties* against the damages owed by
22 Elysium in this case.” (Dkt. 67 at 17 (emphasis in original).)
- 23 • “In this situation, ChromaDex’s statements to the Court have created a
24 *lasting and binding obligation to refund the much smaller royalty
25 amount, as an offset or credit to the damages for which Elysium is
26 liable* in this collection case.” (Dkt. 67 at 17 (emphasis added).)
- 27 • “ChromaDex hereby represents to the Court and to Elysium that
28 *interest should be included* when calculating the credit due to

1 Elysium for past royalties in the Court’s ultimate judgment”
2 (Dkt. 67 at 18 (emphasis added).)

3 ChromaDex now claims the royalty refund should not act as a credit against
4 damages owed by Elysium (Motion at 7-8), despite explicitly and repeatedly stating
5 the opposite previously. ChromaDex also argues that an offset of these damages
6 prior to a final judgment would improperly grant Elysium prejudgment interest on
7 those damages (Motion at 8), but ChromaDex had previously stated that “interest
8 should be included when calculating the credit due to Elysium for past royalties”
9 (Dkt. 67 at 18). Finally, ChromaDex attempts to recant its promises by dropping a
10 footnote in its Motion that claims the promises were only in relation to Elysium’s
11 patent misuse claim, and because Elysium’s counterclaim “was not part of the jury
12 trial, . . . any credit related to that counterclaim should thus not be applied as an
13 offset to reduce the damages (and prejudgment interest) that ChromaDex was
14 awarded by the jury.” (Motion at 8-9, n.4.) Such an argument makes a mockery of
15 ChromaDex’s previous representations to this Court. (*See, e.g.*, Dkt. 67 at 17
16 (“However, ChromaDex has already covenanted to ‘provide a credit to Elysium
17 for *all past royalties* against the damages owed by Elysium in this case.”
18 (emphasis in original)); *id.* (“In this situation, ChromaDex’s statements to the Court
19 have created a lasting and binding obligation to refund the much smaller royalty
20 amount, as an offset or credit to the damages for which Elysium is liable in this
21 collection case.”).) It also makes little sense because the royalty refund ChromaDex
22 covenanted to provide relates to the very same royalty payments upon which the
23 jury based its damages award.

24 Thus, even if the Court decides not to offset the damages awarded by the jury
25 on Elysium’s fraudulent inducement claim, the Court should hold ChromaDex to its
26 commitment and credit Elysium \$250,000 against ChromaDex’s damages prior to
27 applying prejudgment interest.

28

1 **C. *Calculation of Prejudgment Interest***

2 Again, Elysium maintains that ChromaDex is not entitled to any prejudgment
3 interest. However, if the Court determines that prejudgment interest is appropriate,
4 prejudgment interest should only “run[] from the date when the damages are of a
5 nature to be certain or capable of being made certain by calculation and when the
6 *exact sum due to the plaintiff is made known to the defendant.*” *Highlands Ins. Co.*
7 *v. Cont'l Cas. Co.*, 64 F.3d 514, 521 (9th Cir. 1995) (emphasis added). Here, the
8 date where the exact sum due to the plaintiff was made known to the defendant was
9 September 27, 2021—the date the jury reached a verdict. (*See* Dkt. 570.)

10 As of September 27, 2021, Elysium also had liquidated claims against
11 ChromaDex totaling \$1,900,000. (*Id.*) Therefore, the equitable principle motivating
12 offsets—that a claimant should only recover interest on amounts it was deprived of
13 using—requires that the Court offset the \$1,900,000 prior to calculating interest.
14 Assuming judgment is entered on February 14, 2022 (*see* Dkt. Dkt. 579 at ¶ 4 (Dec.
15 27, 2021 Order: “The Court will direct entry of a final judgment on those claims and
16 counterclaims [tried to the jury] on or after February 14, 2022.”), the resulting
17 interest award would equal \$41,850.21 (*see* Lane Decl., Schedules 1A – 1C), and
18 net damages awarded to ChromaDex would amount to \$1,142,507.90 (*see id.*,
19 Schedule 1D). Should the Court find this calculation appropriate but enter judgment
20 after February 14, 2022, it should add \$296.81 to the prejudgment interest for each
21 day after February 14, 2022 that passes before judgment. (*See id.*, Schedule 1E.)

22 However, ChromaDex argues that, if the Court determines prejudgment
23 interest is appropriate, the interest period should begin on the various dates that
24 portions of the invoiced amounts became due. Elysium was issued three invoices
25 for the June 30 Orders: (1) a July 1, 2016 invoice for Niagen in the amount of
26 \$2,402,600; (2) a July 1, 2016 invoice for pTeroPure in the amount of \$400,750; and
27 (3) an August 9, 2016 invoice for pTeroPure in the amount of \$180,000. (*See* Dkt.
28

1 580-4 at 54, 56-57 [invoices].) Each invoice had payment terms of 30% after 30
2 days, and 70% after 60 days. (*Id.*)

3 If the Court agrees that the prejudgment interest period should commence on
4 these dates, the MFN damages of \$625,000 and the fraudulent inducement damages
5 of \$250,000 should be offset against the first invoices to come due.⁹ This results in
6 a total prejudgment interest award of \$1,150,123.48, assuming judgment is entered
7 on February 14, 2022 (*see* Lane Decl., Schedules 2A – 2E), and a net judgment to
8 ChromaDex in the amount of \$2,250,781.17 (*see id.*, Schedule 2F). Should the
9 Court find this calculation appropriate but enter judgment after February 14, 2022, it
10 should add \$577.63 to the prejudgment interest for each day after February 14,
11 2022, that passes before judgment. (*See id.*, Schedule 2G.)¹⁰

12 **IV. CONCLUSION**

13 For the foregoing reasons, Elysium respectfully request that the Court deny
14 ChromaDex’s Motion for Prejudgment Interest. To the extent the Court grants
15 ChromaDex’s Motion, Elysium respectfully requests that the Court offset the non-
16 punitive damages awarded to Elysium prior to calculating prejudgment interest.

17
18 Dated: January 24, 2022

Respectfully submitted,

19 **COHEN WILLIAMS LLP**

20
21 By: /s/ Brittany L. Lane

22 Brittany L. Lane
23 Attorneys for Defendant and Counter-
24 Claimant Elysium Health, Inc. and
25 Defendant Mark Morris

26 ¹⁰ Similar to ChromaDex’s counsel, following the Court’s resolution of the Motion,
27 Defendants’ counsel is willing and ready to meet and confer with ChromaDex’s
28 counsel and jointly submit a proposed judgment resolving all claims and
counterclaims tried to the jury, as well as the issue of prejudgment interest.