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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
(WESTERN DIVISION)

15 ChromaDex, Inc.,
 16
 17 Plaintiff,
 18
 19 v.
 20 Elysium Health, Inc., and Mark Morris,
 21
 22 Defendants.

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

**CHROMADEx, INC.’S NOTICE OF
 MOTION AND MOTION FOR PARTIAL
 SUMMARY JUDGMENT AGAINST
 COUNTERCLAIMANT ELYSIUM
 HEALTH, INC.**

20 Elysium Health, Inc.,
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 22 Counterclaimant,
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 24 v.
 25 ChromaDex, Inc.,
 26
 27 Counter-Defendant.

Judge: Hon. Cormac J. Carney
 Courtroom: 7C
 Date: September 16, 2019
 Time: 1:30 PM

Trial Date: October 15, 2019
 Pretrial Conference: Sept. 18, 2019

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1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on September 16, 2019 at 1:30 PM in
3 Courtroom 7C of the Honorable Cormac J. Carney, located at 350 West 1st Street,
4 Los Angeles, California, Plaintiff and Counter-Defendant ChromaDex, Inc.
5 (“ChromaDex”) will and hereby does move the Court, under Federal Rule of Civil
6 Procedure 56 and related authority, for an order granting ChromaDex partial summary
7 judgment on certain of Defendant and Counterclaimant Elysium Health, Inc.’s
8 (“Elysium’s”) counterclaims, as detailed below. This is a motion for partial summary
9 judgment because it does not affect ChromaDex’s claims for relief against Elysium, nor
10 Elysium’s allegation in its First Counterclaim for Relief that ChromaDex breached
11 Section 3.1 of the NIAGEN Supply Agreement (“Supply Agreement”).

12 ChromaDex’s motion for partial summary judgment is made pursuant to Federal
13 Rule of Civil Procedure 56 on the grounds that the evidence is undisputed as to certain
14 required elements of Elysium’s counterclaims:

15 **First Counterclaim for Relief: Breach of Section 3.9 of the Supply**
16 **Agreement** (Dkt. 103, Elysium’s Third Amended Counterclaims (“TACC”) ¶¶ 154-
17 55)). Elysium counterclaims that ChromaDex breached Section 3.9 of the Supply
18 Agreement because the nicotinamide riboside (“NR”) it purchased from ChromaDex,
19 under the brand name NIAGEN®, contained a “Regulated Substance” (acetamide) in
20 levels that exceeded warning limits set by California’s Proposition 65. This
21 counterclaim fails for three independent reasons. First, the counterclaim fails for lack
22 of evidence because Elysium cannot prove that ChromaDex breached Section 3.9
23 because (a) NIAGEN does not contain acetamide in excess of the standards set by
24 California’s Proposition 65 and (b) ChromaDex was not aware of any information
25 concerning acetamide during the term of the Supply Agreement that potentially
26 impacted the quality or purity of NIAGEN. Second, the counterclaim is barred (a) by
27 California Commercial Code section 2607(3)(A) because Elysium failed to provide
28 ChromaDex with pre-suit notice of the claim and (b) by the limitation of liability

1 contained in Section 3.7 of the Supply Agreement because Elysium failed to make a
2 claim in writing within 30 days of receiving any NIAGEN. Third, the counterclaim fails
3 because Elysium has presented no “competent evidence from which a jury could fairly
4 estimate damages.” *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 808 (9th Cir. 1988)
5 (citation omitted); *see also* Cal. Civ. Code § 3301.

6 **First Counterclaim for Relief: Breach of Section 3.7 of the Supply**
7 **Agreement** (TACC ¶¶ 151-52). Elysium’s counterclaim that ChromaDex failed to
8 deliver NIAGEN manufactured in accordance with the U.S. Food and Drug
9 Administration (“FDA”) regulations for current good manufacturing practices
10 (“cGMPs”) for pharmaceutical products is barred (a) by California Commercial Code
11 section 2607(3)(A) because Elysium failed to provide ChromaDex with pre-suit notice
12 of the claim and (b) by the limitation of liability contained in Section 3.7 of the Supply
13 Agreement because Elysium failed to make a claim in writing within 30 days of
14 receiving any NIAGEN.

15 **First Counterclaim for Relief: Breach of Section 3.11.3 of the Supply**
16 **Agreement** (TACC ¶¶ 148-49). Elysium’s claim for damages that it lost profits because
17 ChromaDex allowed three customers to sell products containing NR and resveratrol
18 allegedly in violation of Section 3.11.3 of the Supply Agreement fails because neither
19 the occurrence nor the extent of Elysium’s proposed damages are reasonably certain,
20 and therefore its counterclaim that ChromaDex breached Section 3.11.3 of the Supply
21 Agreement fails. *Sargon Enters., Inc. v. Univ. of S. Cal.*, 55 Cal. 4th 747, 773-74 (2012).

22 **Second Counterclaim for Relief: Breach of the Implied Covenant of Good**
23 **Faith and Fair Dealing contained in the Supply Agreement** (TACC ¶¶ 157-61).
24 Elysium’s counterclaim for breach of the implied covenant of good faith and fair dealing
25 contained in the Supply Agreement fails because Elysium has never asserted that it
26 seeks damages arising from the counterclaim and has presented no “competent evidence
27 from which a jury could fairly estimate damages.” *McGlinchy*, 845 F.2d at 808, *see also*
28 Cal. Civ. Code § 3301.

1 **Third Counterclaim for Relief: Fraudulent Inducement – Trademark**
2 **License and Royalty Agreement** (TACC ¶¶ 162-69). Elysium’s counterclaim for
3 fraudulent inducement of the Trademark License and Royalty Agreement (“TLRA”)
4 fails because Elysium has no evidence that the alleged representation was made or, if it
5 was, that the representation was false at the time it was allegedly made.

6 **Fourth Counterclaim for Relief: Declaratory Judgment of Patent Misuse**
7 (TACC ¶¶ 170-81). Elysium’s patent misuse counterclaim fails because Elysium
8 cannot show by clear and convincing evidence that ChromaDex conditioned the supply
9 of NR on customers’ licensing of ChromaDex’s trademarks, as it is required to do in
10 order to prove a tying arrangement. *Preformed Line Prods. Co. v. Fanner Mfg. Co.*, 328
11 F.2d 265, 276 (6th Cir. 1964); *Universal Elecs., Inc. v. Universal Remote Control, Inc.*,
12 2014 WL 12587050, at *8 (C.D. Cal. Dec. 16, 2014).

13 **Fifth Counterclaim for Relief: Restitution for Unjust Enrichment** (TACC
14 ¶¶ 182-88). Elysium’s counterclaim for restitution for unjust enrichment fails because
15 it cannot prove that the TLRA is unenforceable due to patent misuse, as is required to
16 sustain a quasi-contract claim. *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d
17 1151, 1167 (9th Cir. 1996).

18 **Sixth Counterclaim for Relief: Breach of Section 4.1 of the Supply**
19 **Agreement** (Dkt. 118, Answer to Fourth Amended Complaint and Restated
20 Counterclaims (“RTACC”) ¶ 195). Elysium’s counterclaim for breach of contract
21 pursuant to Section 4.1 of the Supply Agreement fails because Elysium has no presented
22 no “competent evidence from which a jury could fairly estimate damages.” *McGlinchy*,
23 845 F.2d at 808; *see also* Cal. Civ. Code § 3301.

24 This motion is made following the conference of counsel pursuant to L.R. 7-3,
25 which took place on August 9, 2019. This motion is based on this Notice of Motion, the
26 accompanying Memorandum of Points and Authorities, the Statement of
27 Uncontroverted Facts and Conclusions of Law, the Declaration of Barrett J. Anderson
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1 and all of its Exhibits, the Declaration of Frank L. Jaksch Jr., all records and papers
2 on file in this action, and any evidence or oral argument offered at any hearing on
3 this motion.

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Dated: August 16, 2019

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