

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 Lane (Bar No. 323440)  
Email: blane@cohen-williams.com  
4 **COHEN WILLIAM LLP**  
724 South Spring Street, 9<sup>th</sup> 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 Plaintiff,

15 v.

16 Elysium Health, Inc. and Mark Morris,

17 Defendants.  
18  
19

20 And Related Counter-Claims  
21  
22  
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Case No. 8:16-cv-02277-CJC-DFM

[Assigned to the Hon. Cormac J. Carney]

**ELYSIUM HEALTH, INC.’S AND  
MARK MORRIS’S  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
EX PARTE APPLICATION FOR  
ORDER CLARIFYING SUMMARY  
JUDGMENT RULING**

Pre-Trial Conference: Sept. 13, 2021

Trial: Sept. 21, 2021

1 Roberta A. Kaplan (*pro hac vice*)  
rkaplan@kaplanhecker.com  
2 John C. Quinn (*pro hac vice*)  
3 Email: jqinn@kaplanhecker.com  
KAPLAN HECKER & FINK LLP  
4 350 Fifth Avenue, Suite 7110  
5 New York, NY 10118  
Telephone: (212) 763-0883  
6

7 Donald R. Ware (*pro hac vice*)  
dware@foleyhoag.com  
8 Marco J. Quina (*pro hac vice*)  
9 mquina@foleyhoag.com  
10 Rachel L. Davidson (*pro hac vice*)  
rdavidson@foleyhoag.com  
11 FOLEY HOAG LLP  
155 Seaport Blvd.  
12 Boston, MA 02210  
13 Telephone: (617) 832-1000  
14  
15  
16  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In its Fifth Amended Complaint, ChromaDex asserted a claim that Elysium  
4 violated Section 4.1 of the Niagen Supply Agreement by disclosing “the method  
5 ChromaDex developed for analyzing the concentration of NR chloride by high-  
6 performance liquid chromatography” to Elysium’s “alternative manufacturer of  
7 NR.” (ECF 153 ¶¶ 114, 173-175.) Elysium moved for summary judgment on this  
8 claim, arguing that ChromaDex was unable to establish damages caused by the  
9 alleged violation. (ECF 230 ¶ 3.) The Court agreed and granted summary judgment  
10 to Elysium. (ECF 413 at 34-40.)

11 Nevertheless, after the deadline for filing motions *in limine* passed,  
12 ChromaDex somehow asserted that this claim remained in the case. (Williams  
13 Decl., ¶¶4-8; ECF 512 [ChromaDex’s Memo. of Contentions] at 8:21 – 9:2.)  
14 Defendants’ counsel met and conferred with ChromaDex’s counsel and pointed out  
15 where in the Court’s summary judgment order the Court precluded their  
16 presentation of this claim to the jury, but ChromaDex has refused to concede the  
17 issue. Remarkably, ChromaDex now argues that it can seek Elysium’s profits from  
18 its sale of Basis, as well as nominal damages, on this claim despite ChromaDex’s  
19 repeated and unequivocal representations to this Court that: (1) the *only* damages it  
20 sought on the Section 4.1 claim were disgorgement of the costs Elysium allegedly  
21 avoided by its breach – damages the Court expressly rejected at summary judgment,  
22 and (2) ChromaDex sought Elysium’s profits based *solely* on its claims for trade  
23 secret misappropriation and aiding and abetting a breach of fiduciary duty.  
24 ChromaDex’s continued, improper insistence on presenting the Section 4.1 claim to  
25 the jury is interfering with Defendants’ ability to prepare for trial, by multiplying the  
26 claims and evidence in issue. Consequently, Defendants respectfully request an  
27 order clarifying to ChromaDex that the Court denied this claim in its summary  
28 judgment order.

1 **II. ARGUMENT**

2 **A. At Summary Judgment, ChromaDex’s Only Damages Theory on the**  
3 **NRCl Analytical Method Was Its “Avoided Cost” Theory.**

4 In its Fifth Amended Complaint, ChromaDex asserted two claims based on  
5 alleged breaches of the Niagen Supply Agreement. Specifically, in its Second  
6 Claim for Relief, ChromaDex alleged that Elysium (1) breached the agreement by  
7 failing to pay for the June 30, 2016 orders, and (2) breached Section 4.1 of the  
8 agreement by disclosing a document describing a method ChromaDex had  
9 developed to detect the concentration of NR (the “NRCl Analytical Method” or “NR  
10 Analytical Method”).<sup>1</sup> (ECF 153 ¶¶ 167-175.)

11 On August 16, 2019, Elysium moved for partial summary judgment on the  
12 second claim, arguing that ChromaDex could not establish causation or damages  
13 with respect to the alleged breach of Section 4.1. (ECF 230 ¶ 3.) After the parties  
14 fully briefed the motion, the Court stated that it was “seriously concerned that  
15 ChromaDex’s damages are overstated” and ordered supplemental briefing. (ECF  
16 369 at 3:2-3, 10.)

17 In its supplemental brief, ChromaDex scaled back its unsupportable damages  
18 claims, and it sought to spell out with greater precision the damages it planned to  
19 seek at trial and the breaches supporting those damages. (ECF 379 at 2 [stating that  
20 ChromaDex “only intends to request a subset of readily provable damages from the  
21 jury,” and that its briefing would “explain its theory of causation with respect to  
22 each category of damages.”].)<sup>2</sup> ChromaDex set forth four categories of damages it  
23 intended to seek, including, as relevant here, (1) Elysium’s profits of \$8.3 million  
24

25 <sup>1</sup> ChromaDex also alleged that Elysium’s disclosure of other documents breached  
26 Section 4.1, but those claims have been abandoned. (See ECF 379 at 7:14, n.9;  
Williams Decl., Exh. 4; ECF 413 at 34:23-26.)

27 <sup>2</sup> ChromaDex’s supplemental brief was filed in redacted form at ECF 379. The  
28 unredacted version is ECF 385-1.

1 from selling Basis with ingredients obtained from the June 30 orders, and (2) the  
2 costs Elysium allegedly avoided by breaching the confidentiality provisions of its  
3 supply agreements. (*Id.* at 4-10.)

4 The supplemental brief made clear that the “avoided cost” theory was  
5 ChromaDex’s *only* theory of damages with respect to disclosure of the NRCI  
6 Analytical Method. ChromaDex stated that the avoided cost theory was  
7 “straightforward,” explaining that “[i]nstead of complying with [its confidentiality]  
8 obligations, Elysium exploited two documents for its own benefit, disclosing them  
9 to others. These documents are: (1) the NRCI Analytical Method and (2) the  
10 pTeroPure GRAS Report.” (*Id.* at 7.) In contrast, ChromaDex claimed that its  
11 “resale profits” of \$8.3 million theory of damages was supported by Elysium’s  
12 alleged aiding-and-abetting of Morris’s breaches of his fiduciary duties and by its  
13 alleged misappropriation of trade secrets, specifically information about customer  
14 purchases from ChromaDex and information about the price ChromaDex paid to its  
15 manufacturer, W.R. Grace. (*See id.* at 4-5.)

16 ChromaDex confirmed this understanding of its case, repeatedly and  
17 unequivocally, at the January 13, 2020 hearing on the parties’ summary judgment  
18 motions. ChromaDex’s counsel made the following representations to the Court at  
19 that hearing:

- 20 • “[MR. ATTANASIO:] So we propose to proceed on the damages theory, the  
21 8.3 million that we talked about a moment ago, only on our breach of  
22 fiduciary duty claim, which takes into account the landscape of Mr. Morris’  
23 treachery, aided and abetted by Elysium, and then the single two trade secrets  
24 about pricing information, the crown jewels as to Live Cell, and the wholesale  
25 price we were paying to our manufacturer, Grace Chemical.” (Williams  
26 Decl., Exh. 1 [Hearing Tr. ] at 17:17-25.)
- 27 • “THE COURT: I understand the pricing. The other documents are what?  
28 And what is – compound question, but you can handle it – what is the other

1 information? And then what are the damages ChromaDex is seeking for  
2 those breaches of the confidentiality agreement?

3 MR. ATTANASIO: In fairness, we've already – this is what we've covered.  
4 This is the avoided costs.

5 THE COURT: Got you. Okay. Then that answers it. So it's that information.  
6 And so then it's the same damages that you're talking about, the 8.3 million  
7 and the 110,000.

8 MR. ATTANASIO: Well, the 8.3 – not the 8.3 million on that, it's the  
9 110,000. The 8.3 million is limited to the breach of fiduciary duty claim,  
10 aiding and abetting by Elysium, and the – and the two trade secrets that I  
11 mentioned. Avoided cost as to Mr. Morris is the – as to breach of contract by  
12 Mr. Morris is the 110,000. And then we have the – and then we have the  
13 compensation we're seeking to claw back from Mr. Morris.” (*Id.* at 20:13 –  
14 21:6). [Counsel subsequently clarified that he misspoke and that, consistent  
15 with ChromaDex's brief, the avoided costs “are damages arising from a  
16 breach of contract claim, not by Mr. Morris but by Elysium.” (*Id.* at 50:21-  
17 25).]

18 In sum, following the hearing, it was plain that the avoided cost theory was  
19 ChromaDex's *only* damages theory with respect to the NRCI Analytical Method and  
20 that ChromaDex sought Elysium's profits based *solely* on the trade secret and aiding  
21 and abetting a breach of fiduciary duty claims. In the Court's January 16, 2020  
22 order, the Court likewise confirmed this understanding of ChromaDex's claims.

23 In its ruling, the Court noted that “Elysium argues that ChromaDex's  
24 damages evidence is so insufficient that the Court should grant summary judgment  
25 on all of its claims, except insofar as they allege failure to pay for the June 30  
26 orders. The Court first addresses whether ChromaDex may seek each category of  
27 damages it seeks, and then addresses Elysium's arguments that ChromaDex has  
28 failed to sufficiently apportion damages by trade secret or by claim.” (ECF 413 at

1 27:3-7.) The Court then reflected that “ChromaDex significantly narrowed the  
2 Elysium profits it seeks. Now, it seeks to recover only \$8.3 million in ‘profits  
3 Elysium made from ingredients it stole from ChromaDex with Morris’ help’ under  
4 two theories: one for ‘disgorgement of illicit profits as a remedy for both aiding-  
5 and-abetting breach of fiduciary duty and misappropriation of trade secrets,’ and one  
6 based on promissory fraud. (ChromaDex Supp. at 4–6.)” (ECF 413 at 29:1-6.)

7 The Court next noted that “ChromaDex contends that Elysium breached  
8 obligations to keep two ChromaDex documents – the NRCI Analytical Method and  
9 the pTeroPure GRAS (which stands for “Generally Recognized as Safe”) Report –  
10 confidential by disclosing them to others and thereby saved money on development.  
11 (ChromaDex Supp. at 7.)” (ECF 413 at 34:23-26.) The Court then stated that, for  
12 this claim of breach of confidentiality against Elysium, “ChromaDex seeks  
13 \$110,000, which it states is the amount it spent developing the two documents, on  
14 the theory that by exploiting these documents, Elysium saved money on  
15 development, and was unjustly enriched. (ChromaDex Supp. at 7.)” (ECF 413 at  
16 35:1-3.) The Court held, however, that there was “insufficient evidence supporting  
17 ChromaDex’s claim” for avoided cost damages and that, therefore, “summary  
18 judgment is appropriate on this claim.” (*Id.* at 37:24-25; *see also id.* at 24:25-27  
19 [“For the following reasons, the Court **GRANTS** Elysium’s and Mark Morris’  
20 motion for summary judgment as to ChromaDex’s claim for \$110,000 in avoided  
21 costs....”].) This holding, and ChromaDex’s decision to proceed with its Section  
22 4.1 breach of contract claim based solely on the avoided cost theory at summary  
23 judgment precludes ChromaDex from proceeding with this claim at trial.<sup>3</sup> *See, e.g.,*  
24

25 <sup>3</sup> In similar fashion, the Court granted summary judgment in favor of ChromaDex  
26 on Elysium’s First Counterclaim: Breach of Section 3.11.3 of the pTeroPure Supply  
27 Agreement (Exclusivity), and Second Counterclaim: Breach of the Implied  
28 Covenant of Good Faith and Fair Dealing. ChromaDex argued that “summary  
judgment is appropriate on both claims because Elysium’s evidence of damages for

1 *Lambert v. Nutraceutical Corp.*, No. Civ. 1305942, 2015 WL 12655392, at \*4 (C.D.  
2 Cal. June 24, 2015) (holding that “Plaintiff’s failure to explicitly raise this newly  
3 proposed alternative damages model arguments in his opposition papers or oral  
4 argument amount to a waiver of this argument” and collecting cases).

5 ***B. ChromaDex Contradicts its Previous Representations to the Court.***

6 ChromaDex is now proceeding as though none of this happened. In its  
7 Memorandum of Contentions, ChromaDex identified the NRCl Analytical Method  
8 as “key evidence” it would use to support its claim for breach of the Niagen Supply  
9 Agreement. (ECF 512 at 8-9.)<sup>4</sup> This was surprising, given the course of the  
10 summary judgment proceedings, and Defendants immediately objected and  
11 indicated that they would raise this issue at the parties’ previously scheduled meet-  
12 and-confer on August 25, 2021. (Williams Decl., ¶¶4-8, Exh. 2.) During the meet-  
13 and-confer, Defendants’ counsel explained that the Court’s summary judgment  
14 order precluded ChromaDex from proceeding on its claim with respect to breach of  
15 Section 4.1. On August 26, 2021, Defendants detailed their position in writing and  
16 sought to confirm that ChromaDex intended to seek resale profits or nominal  
17 damages for Elysium’s alleged breach of Section 4.1, notwithstanding ChromaDex’s  
18 multiple representations to the Court that it was solely seeking avoided costs  
19 damages on this claim and the Court’s ruling granting summary judgment on that  
20

21  
22 \_\_\_\_\_  
23 the claims is unsupported and speculative.” (ECF 413 at 14:19-21.) The Court  
24 agreed and granted summary judgment in favor of ChromaDex on those claims  
25 because “Dr. Cockburn’s testimony – Elysium’s only evidence of damages on its  
26 claim for breach of the exclusivity provision – is insufficient evidence to show lost  
27 profits with reasonable certainty.” (*Id.* at 19:1-3.) Somehow ChromaDex believes  
28 that lack of damages precludes Elysium’s contract claims but not its own.

<sup>4</sup> The parties exchanged drafts of their pre-trial filings on August 20, 2021, and the Memorandum of Contentions was filed on August 23, 2021 – days after the August 16, 2021 deadline for filing motions *in limine*.

1 damages theory. (Williams Decl., Ex. 3.) ChromaDex confirmed its position the  
2 same day. (Williams Decl., Ex. 4.)<sup>5</sup>

3 ChromaDex’s position should be rejected. As an initial matter, it flies in the  
4 face of ChromaDex’s clear, repeated representations to the Court that its *only* theory  
5 of damages with respect to the NRCI Analytical Method was the avoided costs  
6 theory that the Court dismissed at summary judgment.

7 In addition, ChromaDex’s assertion that it can seek resale profits for the  
8 alleged disclosure of the NRCI Analytical Method is entirely inconsistent with its  
9 theory of causation on those damages. ChromaDex posits that Elysium’s alleged  
10 aiding of Morris’s fiduciary duty breaches and its alleged misappropriation of trade  
11 secrets somehow caused ChromaDex to sell ingredients to Elysium and that  
12 ChromaDex is entitled to Elysium’s profits from the sale of Basis containing those  
13 ingredients.<sup>6</sup> But the disclosure of the NRCI Analytical Method, which is used to  
14

15 <sup>5</sup> ChromaDex’s position seems to be that because, in one part of its opinion, the  
16 Court stated that “ChromaDex may not seek avoided costs at trial” and because, at  
17 the end of its order, the Court did not expressly dismiss the Section 4.1 claim, the  
18 Court “inten[ded] to leave the claim intact.” (Williams Decl., Ex. 4.) As an initial  
19 matter, ChromaDex ignores that the Court *also* stated that “summary judgment is  
20 appropriate *on this claim* because there is insufficient evidence supporting  
21 ChromaDex’s claim for \$110,000 in damages.” (ECF 413 at 37 [emphasis added].)  
More importantly, ChromaDex is missing the forest for the trees. The Court’s order  
22 focused on “avoided costs” because *that was the only theory of damages that*  
23 *ChromaDex pursued.*

24 <sup>6</sup> *See, e.g.*, ECF 413 at 30:2-6 (“ChromaDex argues that a reasonable jury could  
25 infer that the misappropriation was a substantial factor in Elysium’s unjust  
26 enrichment from the resale because without the misappropriation, ChromaDex  
27 would not have accepted the June 30 orders, and Elysium would not have made the  
28 sales. ([ECF 379] at 4, 6.)”); ECF 413 at 33:26 – 34:6 (“ChromaDex’s second  
theory for recovering Elysium’s resale profits is this: Elysium never planned to pay  
for the June 30 orders, instead intending to accuse ChromaDex of contractual  
breaches to get out of those payments. Morris knew of that plan. Nevertheless,  
Morris pushed ChromaDex to accept the terms of the June 30 orders, including the  
\$2,983,350 purchase price. ChromaDex accepted the orders because it did not know

1 test the concentration of NR in a product, has no plausible connection to  
2 ChromaDex’s decision to sell ingredients to Elysium on June 30, 2016.

3 Finally, ChromaDex should not be permitted to proceed on a nominal  
4 damages theory – a theory it never raised in opposition to Elysium’s motion for  
5 partial summary judgment. *See Lambert*, 2015 WL 12655392 at \*4. There is a  
6 significant question as to whether nominal damages are available for a breach of  
7 contract claim under California law. *See Ruiz v. Gap, Inc.*, 380 F. App’x 689, 692  
8 (9th Cir. 2010) (“[U]nder California law, a breach of contract claim requires a  
9 showing of appreciable and actual damage.”) (internal quotation marks omitted). In  
10 any event, the first hint that ChromaDex intended to seek nominal damages with  
11 respect to the NRCI Analytical Method claim was one month before trial. (Williams  
12 Decl., ¶¶4-8.)

13 ***C. ChromaDex’s Improper About-Face Significantly Prejudices***  
14 ***Defendants.***

15 Permitting ChromaDex to try a claim that this Court rejected at summary  
16 judgment will plainly prejudice Defendants and improperly burden the jury and the  
17 Court. Indeed, the likely effect of ChromaDex being permitted to proceed on a  
18 claim involving disclosure of the NRCI Analytical Method will be to confuse the  
19 jury on ChromaDex’s trade secret claims, which ChromaDex expressly has limited  
20 to: “(1) sales information and (2) the price paid to Grace.” (ECF 413 at 43:14-16.)  
21 Furthermore, ChromaDex’s position that it may present its claim for disclosure of  
22 the NRCI Analytical Method has already, and is continuing to, prejudice  
23 Defendants, by forcing Defendants’ counsel to divert their limited time and  
24 resources away from preparing to try the live issues in this case. Defendants require  
25 \_\_\_\_\_  
26 of that plan, and Morris pushed ChromaDex to accept. ChromaDex argues that a  
27 reasonable jury could infer that Elysium’s scheming with Morris was a substantial  
28 factor in Elysium’s unjust enrichment. (ChromaDex Mot. at 4–6.)”).

1 immediate relief to end ChromaDex’s gamesmanship and to permit Defendants’  
2 counsel to focus on preparing to try the live issues in the case.

3 **III. CONCLUSION**

4 For the foregoing reasons, Defendants respectfully request an order clarifying  
5 that the Court’s summary judgment order precludes ChromaDex from presenting its  
6 claim for breach of Section 4.1 of the Niagen Supply Agreement at trial.

7

8 Dated: September 2, 2021

Respectfully submitted,

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**COHEN WILLIAMS LLP  
KAPLAN HECKER & FINK LLP**

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Bv: /s/ Marc S. Williams  
Marc S. Williams  
Attorneys for Defendant and Counter-  
Claimant Elysium Health, Inc. and  
Defendant Mark Morris

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