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

13 ChromaDex, Inc.,
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15 Plaintiff,
16 v.
17 Elysium Health, Inc. and Mark Morris,
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19 Defendants.
20
21 And Related Counter-Claims
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23
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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

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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”).¹ (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.”].)² 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 ¹ 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 ² 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.³ *See, e.g.,*
24

25 ³ 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.)⁴ 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
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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.

⁴ 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.)⁵

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.⁶ But the disclosure of the NRCI Analytical Method, which is used to
14

15 ⁵ 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 ⁶ 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.

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8 Dated: September 2, 2021

Respectfully submitted,

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