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

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

Case No. 8:16-cv-02277-CJC-DFM  
**ELYSIUM HEALTH, INC. AND  
MARK MORRIS'S OPPOSITION  
TO CHROMADDEX, INC.'S  
MOTION *IN LIMINE***

Date: September 13, 2021  
Time: 3:00 P.M.

17 And Related Counter-Claims  
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**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

I. PRELIMINARY STATEMENT..... 1

II. RELEVANT FACTS .....5

    A. Phillip Frost, Barry Honig, and Michael Brauser .....5

    B. The “Most Favored Nation” Pricing Dispute and Other Concerns Leading Up to the June 30 Orders.....6

III. ARGUMENT .....9

    A. The Evidence of Allegations of and Investigations into Frost, Honig, and Brauser’s Fraudulent Conduct Known to Elysium Executives at the Time of the June 30 Purchase Orders is Relevant to Show Elysium’s State of Mind .....9

    B. ChromaDex Failed to Take Discovery on the Impact of the Fraud Allegations Surrounding Frost, Honig, and Brauser..... 11

    C. ChromaDex Mischaracterizes the Prior Agreement Regarding this Issue..... 12

IV. CONCLUSION..... 13

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

**TABLE OF AUTHORITIES**

Page(s)

CASES

*Jinro Am. Inc. v. Secure Invs., Inc.*,  
266 F.3d 993 (9th Cir. 2001) .....10

1 **I. PRELIMINARY STATEMENT**

2 ChromaDex’s motion *in limine* to preclude any mention of litigation or  
3 investigations concerning Phillip Frost, Barry Honig, and Michael Brauser seeks to  
4 prevent Elysium from presenting its full defense on a core issue in this case: why  
5 Elysium has not yet paid for the June 30 orders. ChromaDex claims that Elysium  
6 never intended to pay for the orders and that it plotted to steal ChromaDex’s  
7 ingredients. That is not true. Elysium intended to pay for the orders, less what  
8 ChromaDex owed Elysium for ChromaDex’s breaches of the “Most Favored  
9 Nation” (“MFN”) pricing provision in the parties’ NR Supply Agreement.

10 As ChromaDex’s CEO at the time, Frank Jaksch, testified, Elysium and  
11 ChromaDex “agreed to disagree” on June 30, 2016 about whether money was due to  
12 Elysium under the MFN provision. (Williams Decl., Exh. 1 at 242:4-5.) The parties  
13 agreed on the June 30 orders, but they did not resolve the MFN dispute. As Jaksch  
14 testified, “so we basically said, look, we’re going to have to deal with this at a  
15 different time.... we agreed to kick that down the road and try to resolve it at a later  
16 date.” (*Id.* at 243:1-3, 243:8-9.)

17 The evidence at trial will show that after the June 30 orders, ChromaDex  
18 never provided accurate and sufficient information on what money was due to  
19 Elysium under the MFN provision, and before the MFN breaches were resolved,  
20 ChromaDex filed suit. As Elysium’s COO Dan Alminana testified at deposition, in  
21 order to resolve the MFN issue, Elysium wanted more information and  
22 documentation on ChromaDex’s pricing to other customers. (Williams Decl., Exh.  
23 2 at 243:11-245:1.) Mr. Alminana also testified repeatedly that Elysium did not  
24 trust ChromaDex. (*See, e.g., id.* at 160:20 – 161:10, 183:23, 252:20-24.) And  
25 among the reasons Elysium did not trust ChromaDex were: (1) Elysium’s own  
26 dealings, starting in 2015, with Frost (ChromaDex’s largest shareholder at the time),  
27 Honig (a ChromaDex shareholder and former co-chairman of the board), and  
28 Brauser (a ChromaDex shareholder and the other former co-chairman of the board);

1 (2) Frost, Honig, and Brauser’s apparent involvement, control, and influence over  
2 ChromaDex; and (3) the troubling and sometimes surreal information that Elysium  
3 and its principals learned about these three men from readily-available public  
4 sources at the time, including simple Google searches that revealed well-publicized  
5 allegations of fraud surrounding all three individuals.<sup>1</sup>

6 A federal jury will resolve the factual disputes between these parties.  
7 Accordingly, Elysium must be allowed to explain the factors contributing to its  
8 executives’ state of mind in order to rebut ChromaDex’s baseless claim that Elysium  
9 never intended to pay for the June 30 orders. If ChromaDex doubts that Elysium’s  
10 executives were actually aware of, or concerned about, the allegations surrounding  
11 Frost, Honig, and Brauser, it will have an opportunity to cross-examine them. And  
12 ChromaDex can argue to the jury that – notwithstanding Elysium’s well-  
13 documented interactions with these three men and the unfolding narrative  
14 surrounding their alleged criminal and civil liabilities in multiple jurisdictions – the  
15 Elysium executives should not be believed. But it will be the jury that determines  
16 whether Elysium never intended to pay for the June 30 orders, as ChromaDex  
17 alleges, or whether Elysium simply withheld payment as it sought to discern  
18 whether ChromaDex was, in good faith, honoring its MFN pricing obligation.

19 The Court should reject ChromaDex’s specious argument that this motion  
20 should be granted because Elysium did not raise Frost, Honig, and Brauser in  
21 discovery. First, ChromaDex ignores the fact that Elysium vigorously sought its  
22 own discovery about the roles and involvement of Frost, Honig, and Brauser at  
23 ChromaDex, and their dubious backgrounds. Second, Elysium answered the  
24 questions ChromaDex asked in discovery, but ChromaDex studiously and  
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26 <sup>1</sup> Elysium’s distrust turned out to be well-founded. The allegations of fraud against  
27 Frost, Honig, and Brauser ultimately made their way into formal SEC complaints,  
28 and discovery in this case bolstered the concern that Frost, Honig, and Brauser were  
the men behind the curtain running ChromaDex.

1 strategically avoided the subject of these three men. To be sure, Elysium’s Chief  
2 Scientist, Leonard Guarente, testified that after Honig and Brauser had resigned  
3 from the ChromaDex board in early 2015, they nonetheless appeared at and hijacked  
4 a meeting in Miami between executives from Elysium and Frost. (Williams Decl.,  
5 Exh. 3 at 172:10-175:23, 317:18-318:15.) The evidence in this case will show that  
6 during the meeting in Miami, Frost offered to have ChromaDex acquire Elysium  
7 and then merge the two companies.<sup>2</sup> That Frost, Honig, and Brauser were so scantily  
8 discussed during certain depositions is not the product of sandbagging or surprise;  
9 rather, it is the result of ChromaDex’s strategy (or hope) that the trial would carry on  
10 without them.<sup>3</sup>

11 Finally, ChromaDex somehow contends that Elysium has flip-flopped and  
12 reneged on a deal to not mention the Frost, Honig, and Brauser litigation and

13 \_\_\_\_\_  
14 <sup>2</sup> It is undisputed that the meeting in Miami was arranged by Rob Fried, who within  
15 months after the meeting joined the ChromaDex board and formed Healthspan  
16 Research LLC (“Healthspan”), a direct competitor of Elysium in the direct-to-  
17 consumer market. Fried is currently the CEO of ChromaDex. In late 2016, when  
18 ChromaDex was negotiating to acquire Healthspan from Fried, a ChromaDex board  
19 member warned ChromaDex’s then-CEO Frank Jaksch that “we cannot go into this  
20 deal without him speaking to Frost personally and making sure it will not cause a  
21 blow-up by him, Brauser and Honig. We do not want to have another issue like the  
22 many we’ve had before. And, of course, Rob [Fried] will have to offer all of them  
23 the opportunity to invest in the Healthspan sub.” (Williams Decl., Exh. 4.) This is  
24 all clear evidence not only that Frost, Brauser, and Honig were deeply involved in  
25 ChromaDex, but also that Brauser and Honig continued to exert influence over both  
26 ChromaDex and the market for NR even after stepping down from the ChromaDex  
27 board.

28 <sup>3</sup> ChromaDex’s suggestion that this evidence should not come in since Frost, Honig,  
and Brauser are not on Elysium’s witness list reflects a fundamental  
misunderstanding of the issue. It is not that Elysium wants to have a mini-trial on  
the truth of the allegations that were swirling around these three men before the  
filing of this lawsuit (and later confirmed as more-probable-than-not by federal  
authorities), but rather that those public allegations were known to Elysium  
executives and contributed to their distrustful state of mind while Elysium was  
waiting for ChromaDex to make good on its MFN obligations.

1 investigations. There was no such deal. The only deal, which is reflected in the  
2 briefing on ChromaDex’s prior motion *in limine* No. 1, filed two years ago (Dkt.  
3 263), which the Court denied without prejudice (Dkt. 369 at 10), was that Elysium  
4 would not refer to the 2018 SEC investigations or litigation, which do not bear on  
5 Elysium’s state of mind regarding why Elysium did not pay for the June 30 orders.  
6 Elysium explained then – as it proposed in the meet and confer proceedings prior to  
7 the filing of the current motion – that it “does not intend to introduce evidence at  
8 trial concerning Honig’s, Brauser’s, or Frost’s history of being investigated and sued  
9 by the Securities and Exchange Commission or any other regulator or shareholder  
10 unless and until ChromaDex opens the door to it doing so.” (Dkt. 290-1 at 4; *see*  
11 *also* Dkt. 507-8 at 5 [Aug. 13, 2021 email from Elysium’s counsel to ChromaDex’s  
12 counsel offering not to refer in opening statements, or after without a sidebar with  
13 counsel, to “any SEC investigations that became public after ChromaDex filed its  
14 lawsuit against Elysium in December 2016.”]) That was Elysium’s prior position in  
15 2019, and it remains its position today.

16 This Court has already found that a central issue in this trial – pertinent to  
17 both liability and damages – is whether Elysium intended to pay for the ingredients  
18 it received from ChromaDex under the June 30 orders. (*See, e.g.*, Dkt. 413 [MSJ  
19 Order] at 33-34.) ChromaDex claims that that, “contrary to [Elysium’s principals’]  
20 promises, [they] never intended to pay.” (Dkt. 384 [ChromaDex’s MSJ Supp. Brief]  
21 at 14.) ChromaDex calls this Elysium’s “plot to cheat and steal” and claims, on that  
22 basis, that it is entitled to Elysium’s resale profits. (Dkt. 153 [Fifth Amended  
23 Compl.] at ¶ 61.) In the face of those serious – and unsupported – allegations,  
24 Elysium, through the testimony of its executives, must be permitted to fully present  
25 its then-existing state of mind and intent. The fact that it was well-known that Frost,  
26 Honig, and Brauser were being accused of fraudulent and deceitful conduct was  
27 naturally and logically on the minds of Elysium executives (and ChromaDex  
28 executives, too) and informs part of the reason Elysium did not trust ChromaDex to



1 make good on the MFN refund after the orders. ChromaDex’s attempt to re-write  
2 and sanitize history runs afoul of the rules of evidence and of fairness and must be  
3 rejected.

4 **II. RELEVANT FACTS**

5 **A. Phillip Frost, Barry Honig, and Michael Brauser**

6 During the relevant period of this case, Dr. Phillip Frost was the Chairman  
7 and CEO of Opko Health, Inc. (“Opko”) and a significant investor in ChromaDex  
8 since mid-2010, when he became the company’s largest shareholder at the time.  
9 (Williams Decl., Exh. 1 at 30:13-18.) Barry Honig and Michael Brauser invested in  
10 that 2010 Frost-led financing of ChromaDex. (*Id.* at 30:13-25.) For most of this  
11 litigation, Frost has owned more than five percent of ChromaDex’s outstanding  
12 shares (*see, e.g., id.*, Exh. 5), and current ChromaDex director Steven Rubin was  
13 both a senior officer of Opko and a member of the Frost Group, LLC, Dr. Frost’s  
14 private investment group, during the relevant time. In connection with the  
15 Frost/Brauser/Honig investment in ChromaDex, their group was allocated three  
16 seats on ChromaDex’s board of directors, and Brauser and Honig assumed the role  
17 of co-chairmen of the board, positions they held from October 2011 to February  
18 2015. (*See id.*, Exh. 1 at 35:23-36:6; Exhs. 6, 7.)

19 ChromaDex’s current CEO, Rob Fried, is, as ChromaDex acknowledges, a  
20 relative of Dr. Frost. In July 2015, Fried became a director of ChromaDex,  
21 replacing another Frost designee. (Williams Decl., Exh. 1 at 37:9-11; Exh. 8 at  
22 64:1-6.) Prior to that time, and before he had any official position at ChromaDex,  
23 Fried sought “to form a connection” with Elysium’s Chief Scientist, Leonard  
24 Guarente, by reaching out and introducing himself as a “member of The Frost  
25 Group, an investment group in Miami led by Dr. Phil Frost, the Chairman of Teva  
26 and CEO of Opko.” (*Id.*, Exh. 9 at ELY\_0118884.) Shortly thereafter, in early  
27 2015, Fried brokered a meeting between Frost and Elysium’s founders in Miami,  
28 Florida. (*Id.*, Exh. 8 at 15:25-17:23.) Also present at this meeting were Rubin, as

1 well as Brauser and Honig, who had recently resigned as directors of ChromaDex.  
2 (*Id.* at 16:15-22, 17:2-10.) At this meeting, Frost proposed an acquisition of  
3 Elysium. (*Id.* at 18:16-19:2.) Elysium declined Frost’s proposal. (*Id.* at 22:5-6.)

4 The testimony at trial will establish that, notwithstanding their resignations,  
5 Brauser and Honig bragged at the meeting about how all decisions at ChromaDex  
6 were made by them. Further, during the meeting, Brauser even called Frank Jaksch  
7 to reprimand him about not sending him Elysium’s product and to belittle him in  
8 demonstration of Brauser and Honig’s authority over him. The Elysium executives  
9 took note. Leading up to and following the Miami meeting, there was a steady  
10 drumbeat of concerning articles about Frost, Honig, and Brauser’s business  
11 practices. (*See, e.g.*, Williams Decl., Exh. 10 at 33 [Lakewood Capital  
12 Management, *Opko Health: The Placebo Effect*, December 2013] [“Dr. Frost has a  
13 disturbingly large number of connections to what we believe are two serial stock  
14 promoters that have each been the subject of multiple lawsuits, Barry Honig and  
15 Michael Brauser. . . . Many of these companies have cost investors a significant  
16 amount of money and both individuals have been the subject of extensive  
17 litigation.”].) Elysium executives will testify that they saw such articles at the time  
18 and were troubled by what they learned. Specifically, the Elysium executives  
19 learned that Frost, Honig, and Brauser were repeatedly accused of deceptive and  
20 fraudulent business practices and their integrity was in question. Significantly,  
21 some of those reports noted their involvement with ChromaDex.

22 ***B. The “Most Favored Nation” Pricing Dispute and Other Concerns***  
23 ***Leading Up to the June 30 Orders***

24 On May 29, 2016, Elysium’s COO, Dan Alminana, sent an email to Frank  
25 Jaksch, requesting sales and price data for NR that ChromaDex had sold to other  
26 customers since Elysium began purchasing the ingredient to ensure ChromaDex’s  
27 compliance with the MFN provision in the NR Supply Agreement. On June 7,  
28 2016, ChromaDex announced that William Smithburg, the former Chairman and

1 CEO of Quaker Oats, had joined the ChromaDex board of directors. Elysium  
2 executives will testify that this was a welcome development. Smithburg was viewed  
3 as a legitimate and credible director.

4 On June 13, 2016, more than two weeks following Alminana's May 29 email,  
5 Jaksch provided Elysium with bogus pricing information. Specifically, Jaksch  
6 provided ostensibly "a blinded summary of supply agreements for NR," which  
7 contained ingredient prices per kilogram, along with royalty and equity  
8 arrangements, if any. This spreadsheet purported to show that Elysium was  
9 receiving the best price per kilogram of NR. Jaksch did not realize, however, that  
10 the file he sent to Elysium included separate sheets showing the actual sales data,  
11 revealing that ChromaDex had arrangements in place that allowed for lower NR  
12 pricing (at lower quantities than Elysium had been ordering).

13 On June 20, 2016, Elysium's trust in ChromaDex took yet another hit.  
14 Smithburg resigned from the board only two weeks after joining it. That same day,  
15 on June 20, 2016, Bleeker Street Research published a report that included the  
16 following:

17 Newly unsealed federal court documents describe the detailed  
18 involvement of Barry Honig in an imploded stock fraud called YesDTC.  
19 Convicted fraudsters reveal the use of hidden ownership, undisclosed stock  
20 sales, installed puppet CEOs and false press releases for paid stock  
21 promotions. Honig has a consistent and visible history of running abject  
22 stock promotions which implode in the end.

23 (Williams Decl., Exh. 11 [Bleeker Street Research, *Pershing Gold And ChromaDex*  
24 *Exposed: These Barry Honig Names Could Fall 70-80% (Or More)*, June 20,  
25 2016].) ChromaDex filed a response to the Honig/ChromaDex/Pershing Gold report  
26 with the SEC on June 24, 2016. Elysium executives will testify that they were  
27 alarmed and distressed by this report. ChromaDex also was alarmed and distressed  
28 by the report, and Jaksch sent an email to Alminana saying as much.

1           Despite Elysium’s concerns and distrust, Elysium had no choice but to place  
2 the June 30 orders from its single-source supplier. The parties agreed on pricing for  
3 those orders, but as Jaksch testified, Elysium and ChromaDex “agreed to disagree”  
4 about whether money was due to Elysium under the MFN provision and left that  
5 issue to be resolved on a later date. On that basis, Elysium, now suffused with  
6 distrust about ChromaDex’s integrity and its management, placed the June 30 orders  
7 and received the product it needed to maintain its operation and continue to support  
8 investor interest and commitments.

9           In the ensuing months, the pricing discussions continued. And so did the  
10 concerns about ChromaDex’s management. Elysium remained committed to  
11 gaining transparency into pricing and also remained concerned that Jaksch had little  
12 power to deliver that transparency and, significantly, that the men behind the curtain  
13 were unscrupulous fraudsters. Their fears continued to be confirmed.

14           In late 2016, as the relationship between Elysium and ChromaDex continued  
15 to deteriorate, Brauser – despite supposedly having no official role with ChromaDex  
16 – injected himself into the dispute with the full knowledge and acquiescence of  
17 Jaksch, who was then still ChromaDex’s CEO. On December 7, 2016, Brauser  
18 emailed Alminana, writing: “I will be handling the matter between elysium [sic] and  
19 chromadex [sic]. I believe it is in your best interest to speak with me. I take our  
20 issue exceptionally serious [sic] And will be relentless until resolved.” (Williams  
21 Decl., Exh. 12.) Jaksch was copied on this message. In another December 2016  
22 email to Jaksch, copied to Honig, Brauser stated “[t]he attorney for Elysium called  
23 me and we spoke. I need to be on the same page as you.” (*Id.*, Exh. 13.) Brauser  
24 subsequently emailed an Elysium investor stating that he “represent[ed] the sole  
25 supplier to Elysium, ChromaDex,” which he called “my company,” and claimed that  
26 if he did not hear back, “we will be forced to take all available remedies under the  
27 law.” (*Id.*, Exh. 14.) Brauser copied Jaksch on that message as well. Weeks later,  
28 at the end of 2016, after ChromaDex failed to provide accurate and sufficient

1 information on what money was due to Elysium under the MFN provision, and  
2 before the MFN breaches were resolved, ChromaDex filed this lawsuit.

3 In 2018, the SEC named Frost, Honig, and Brauser, among other defendants,  
4 in a complaint in the United States District Court for the Southern District of New  
5 York alleging their participation in a wide-ranging “pump-and-dump” scheme  
6 lasting from 2010 through 2018. (Williams Decl. Exh. 15.) All three settled with  
7 the SEC.

### 8 **III. ARGUMENT**

#### 9 ***A. The Evidence of Allegations of and Investigations into Frost, Honig, 10 and Brauser’s Fraudulent Conduct Known to Elysium Executives at 11 the Time of the June 30 Purchase Orders is Relevant to Show 12 Elysium’s State of Mind***

13 ChromaDex’s motion *in limine* seeks to rewrite and sanitize the past, inviting  
14 a one-sided fiction to be presented to the jury. Elysium executives Eric Marcotulli  
15 and Dan Alminana will testify that, at the time of the June 30 orders, they distrusted  
16 ChromaDex, did not believe that Elysium was receiving pricing consistent with the  
17 MFN pricing provision, and did not know how much they were owed as a credit. A  
18 significant contributing factor to that distrust was the fact that Frost, Honig, and  
19 Brauser seemed to be in control of ChromaDex and that, based on what Elysium  
20 executives knew and believed at the time, they were dishonorable, disreputable, and  
21 disgraced men.

22 ChromaDex tries to argue that Frost, Honig, and Brauser played no role in the  
23 dispute between it and Elysium. As shown above, that is not true. Specifically,

- 24 • Frost, Brauser, and Honig were participants at the 2015 Miami meeting  
25 in which they proposed that ChromaDex acquire Elysium, a proposal  
26 Elysium rejected. That failed acquisition is important in this case  
27 because it reflects ChromaDex’s plan to force Elysium out of the  
28 market by any means, part of which was for ChromaDex to ultimately  
“[b]e our own Elysium.” Frost, Honig, and Brauser’s conduct and  
comments during that meeting undermined ChromaDex’s CEO, Frank  
Jaksch, and planted seeds of distrust.

- 1 • ChromaDex’s dishonest conduct regarding the MFN pricing in June  
2 2016 – e.g., the false blinded spreadsheet – occurred against a backdrop  
3 of tumult regarding ChromaDex’s board. Smithburg joined and almost  
4 immediately resigned on the same day as a negative news story  
5 appeared about Honig. Although ChromaDex sought to quell the  
6 uproar at the time, Elysium executives’ thinking and view of  
7 ChromaDex was adversely affected during this time.
- 8 • Brauser injected himself into the discussions between Elysium and  
9 ChromaDex in late 2016 concerning their disputes by communicating  
10 with Elysium’s counsel on ChromaDex’s behalf, harassing Elysium  
11 shareholders, and attempting to bully its COO. This pre-litigation  
12 conduct, purportedly undertaken on ChromaDex’s behalf, reinforced to  
13 Elysium that ChromaDex’s executives were not in control of the  
14 company.

15 ChromaDex offers no pertinent legal authority for its position. It cites to  
16 *Jinro Am. Inc. v. Secure Invs., Inc.*, 266 F.3d 993, 1004 (9th Cir. 2001), *opinion*  
17 *amended on denial of reh’g*, 272 F.3d 1289 (9th Cir. 2001), for the proposition that  
18 evidence suggesting the prevalence of corruption and fraud in the Korean business  
19 community was “far more prejudicial than probative and should have been excluded  
20 under Rule 403.” But *Jinro* has no bearing whatsoever here. *Jinro* was about the  
21 use of a cultural expert to testify that fraud was commonplace in the Korean  
22 business community. The Ninth Circuit held that, not only was that line of  
23 testimony not a proper subject for expert testimony, but also it was “so tinged with  
24 ethnic bias and stereotyping that it should have been excluded under Rule 403’s  
25 balancing test.” *Id.* at 1004-05. None of those concerns are present here.

26 Moreover, ChromaDex’s argument that allowing Elysium’s executives to  
27 testify regarding the role that the fraud allegations surrounding Frost, Honig, and  
28 Brauser had on their state of mind will risk “giv[ing] rise to time-consuming  
tangents about [their] merits,” completely misses the point. Elysium does not seek  
to try to prove the truth of those allegations – and for that reason whether Frost,  
Honig, or Brauser testify in this trial makes no difference to Elysium. Elysium  
simply seeks to adduce its own executives’ testimony regarding how Frost, Honig,  
and Brauser’s role in ChromaDex impacted their state of mind and intent in  
withholding payment for the June 30 orders pending resolution of the credit due to

1 Elysium under the MFN provision. While the allegations against Frost, Honig, and  
2 Brauser appeared to have been well-founded based on the SEC’s ultimate lawsuits  
3 against them, Elysium will not – unless ChromaDex opens the door – adduce  
4 testimony or evidence regarding the SEC or shareholder investigations or litigation  
5 following the filing of ChromaDex’s lawsuit against Elysium.

6 ***B. ChromaDex Failed to Take Discovery on the Impact of the Fraud***  
7 ***Allegations Surrounding Frost, Honig, and Brauser***

8 ChromaDex suggests that Elysium executives failed to testify during  
9 discovery to the impact that the fraud allegations surrounding Frost, Honig, and  
10 Brauser had on their state of mind or intent in the lead-up to, during, and following  
11 the June 30 orders and should, it follows, be precluded from testifying to that now.  
12 (Motion at 7.) Yet ChromaDex does not identify a single question put to an Elysium  
13 executive in discovery that it claims should have called for testimony on this  
14 subject. (*See id.*) Specifically, ChromaDex does not point to any questions asked  
15 during discovery as to whether Elysium executives trusted ChromaDex to provide  
16 the agreed upon MFN pricing or the necessary transparency to audit that pricing.

17 But in fact, Elysium’s distrust of ChromaDex was repeatedly mentioned in  
18 discovery. Not only did Elysium’s Chief Scientist, Leonard Guarente, testify that  
19 Frost, Honig, and Brauser’s conduct during the Miami meeting raised concerns  
20 about who was in charge at ChromaDex and whether those in charge could be  
21 trusted (Williams Decl., Exh. 3 at 172:10-175:23, 317:18-318:15), but Dan  
22 Alminana also repeatedly testified during his deposition to his lack of trust in  
23 ChromaDex regarding MFN pricing and his concerns about ChromaDex’s lack of  
24 honesty (*id.*, Exh. 2 at 160:20-161:10, 183:23, 252:20-24).<sup>4</sup> In fact, Alminana  
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27 <sup>4</sup> During the depositions, ChromaDex counsel spent a significant amount of time  
28 asking about salacious, but irrelevant, personal text messages but failed entirely to  
close the loop regarding why Elysium executives did not trust ChromaDex.

1 testified that, during the June 2016 discussions about the MFN pricing, he thought  
2 Mark Morris was “being the only honest person at ChromaDex.” (*Id.* at 176:21-23.)

3 It would have been easy – and obvious – to ask Elysium executives to explain  
4 all the reasons that they did not trust ChromaDex. But ChromaDex didn’t. It would  
5 have been easy and obvious to ask Elysium executives to explain what role, if any,  
6 Frost, Honig, and Brauser had in their state of mind regarding payment of the June  
7 30 orders while the MFN credit remained unresolved, not to mention the exclusivity  
8 breach. But again, ChromaDex didn’t. The fact is that ChromaDex most likely  
9 strategically avoided bringing up Frost, Honig, and Brauser in the hope that the  
10 company would be able to avoid having to discuss them and the increasingly  
11 ubiquitous allegations regarding their fraudulent conduct.

12 ChromaDex can cross-examine Elysium executives regarding whether the  
13 Frost, Honig, and Brauser allegations genuinely and sincerely impacted their state of  
14 mind and, as this Court has already held, the jury will decide the answer to that  
15 question.

16 ***C. ChromaDex Mischaracterizes the Prior Agreement Regarding this***  
17 ***Issue***

18 In its motion *in limine*, counsel for ChromaDex states that “Defendants’ prior  
19 counsel agreed, and represented to the Court, that ‘Elysium does not intend to  
20 introduce evidence at trial concerning’ *this issue*, “unless and until ChromaDex  
21 opens the door to it doing so.” (Motion at 1 [emphasis added].) ChromaDex’s  
22 counsel’s argument mischaracterizes Elysium’s prior position, which is not different  
23 from its current position.

24 As stated previously in its 2019 Opposition to ChromaDex’s prior attempt to  
25 re-write (if not erase) Frost, Honig, and Brauser from the lead-up to this case,  
26 Elysium will not adduce testimony that in 2018, Frost, Honig, and Brauser were  
27 sued by the SEC in a civil enforcement action, were the subject of a formal SEC  
28 investigation, or bring up any shareholder suits that were filed following the filing of



1 ChromaDex’s lawsuit against Elysium, unless ChromaDex opens the door. (Dkt.  
2 290-1 at 4 [“Elysium does not intend to introduce evidence at trial concerning  
3 Honig’s, Brauser’s, or Frost’s history of being investigated and sued by the  
4 Securities and Exchange Commission or any other regulator or shareholder unless  
5 and until ChromaDex opens the door to it doing so.”].) Elysium’s position never  
6 included an agreement to avoid explaining what Elysium had learned about Frost,  
7 Honig, and Brauser in the lead-up to this lawsuit and the impact that information  
8 had on Elysium executives’ decision not to pay the June 30 orders until the MFN  
9 credit was resolved. In fact, Elysium’s prior opposition explained that Frost, Honig,  
10 and Brauser were “more than mere ‘passive investors’”, that “[e]ach had significant  
11 influence over ChromaDex during the time period relevant to this case,” and that  
12 “each had direct involvement in the events of importance to this dispute.” (Dkt.  
13 290-1 at 4.) Elysium’s prior opposition then went on to discuss the tone and tenor  
14 of the 2015 Miami meeting in which ChromaDex attempted to acquire Elysium,  
15 Honig and Brauser’s participation in that Miami meeting despite having resigned  
16 from the board immediately prior to the meeting, Frost’s prior involvement in Opko,  
17 and Brauser’s continued involvement in ChromaDex, including his threats to  
18 Elysium investors, with the apparent acquiescence of ChromaDex’s CEO Jaksch  
19 despite Brauser not having any official role in ChromaDex’s management.

20 Elysium has not reneged on any supposed deal to forgo referring to Honig,  
21 Brauser, and Frost’s impact on its executive’s state of mind in not paying the June  
22 30 orders until the MFN credit was resolved. Rather, ChromaDex distorts  
23 Elysium’s prior position in furtherance of its continued efforts to sanitize Frost,  
24 Honig, and Brauser’s corrosive involvement in its company and in this case.

#### 25 **IV. CONCLUSION**

26 ChromaDex has made the issue of whether Elysium intended to pay for the  
27 product it received from ChromaDex under the June 30 orders a lynchpin of its case  
28 and its claim to extraordinary damages. Elysium’s decision not to pay for those

1 orders until the MFN credit was resolved was acutely informed and influenced by  
2 the roles that Phillip Frost, Barry Honig, and Michael Brauser played in the lead-up  
3 to this lawsuit. Testimony and evidence about how these men affected Elysium’s  
4 state of mind is plainly relevant and highly probative. ChromaDex’s motion *in*  
5 *limine* must be denied.

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Dated: August 23, 2021

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