COOLEY LLP
MICHAEL ATTANASIO (151529)
(mattanasio@cooley.com)
BARRETT J. ANDERSON (318539)
(banderson@cooley.com)
CRAIG E. TENBROECK (287848)
(ctenbroeck@cooley.com)
JASMIN F. MOTLAGH (311639)
(jmotlagh@cooley.com)
DYLAN K. SCOTT (332796)
(dscott@cooley.com)
RACHAEL M. HELLER (335636)
(rheller@cooley.com)
4401 Eastgate Mall
San Diego, CA 92121-1909
Telephone: (858) 550-6000
Facsimile: (858) 550-6420

Attorneys for Plaintiff and Counter-Defendant ChromaDex, Inc.

Counsel continued on following page

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

(SOUTHERN DIVISION)

ChromaDex, Inc.,

Plaintiff,

v.

Elysium Health, Inc., and Mark Morris

Defendants.

Elysium Health, Inc.,

Counterclaimant,

v.

ChromaDex, Inc.,

Counter-Defendant.

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

CHROMADEX, INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION *IN LIMINE*

Judge:	Hon. Cormac J. Carney
Courtroom:	9B
Date:	September 13, 2021
Time:	3:00 PM
Trial:	Sept. 21, 2021
Pretrial Conf.:	Sept. 13, 2021

COVINGTON & BURLING LLP
MITCHELL A. KAMIN (202788)
(mkamin@cov.com)
1999 Avenue of the Stars, Suite 3500
Los Angeles, CA 90067-4643
Telephone: (424) 332-4800
Facsimile: (424) 332-4749

COVINGTON & BURLING LLP
PHILIP A. IRWIN (admitted *pro hac vice*)
(pirwin@cov.com)
620 Eighth Avenue
New York, NY 10018-1405
Telephone: (212) 841-1000

LTL ATTORNEYS LLP
JOE H. TUFFAHA (253723)
(joe.tuffaha@ltlattorneys.com)
PRASHANTH CHENNAKESAVAN (284022)
(prashanth.chennakesavan@ltlattorneys.com)
300 South Grand Avenue, 14th Floor
Los Angeles, CA 90071
Telephone: (213) 612-8900
Facsimile: (213) 612-3773

Attorneys for Plaintiff and Counter-Defendant ChromaDex, Inc.

Plaintiff and Counter-Defendant ChromaDex, Inc. is compelled to file a single motion *in limine* to protect against the use of irrelevant and unduly prejudicial information in opening statement by Defendant and Counterclaimant Elysium Health, Inc. and Defendant Mark Morris. The information in question involves unrelated legal issues, lawsuits, and government investigations concerning three individuals: Barry Honig, Michael Brauser, and Phillip Frost. These matters have nothing to do with ChromaDex or with this dispute. Defendants should be precluded from mentioning those matters in opening statement or introducing any related evidence at trial until and unless they obtain permission from the Court outside the presence of the jury.

ChromaDex understands the Court's preference against motions *in limine*, but is compelled to file this single motion because Defendants would not agree to refrain from mentioning the disputed material in opening statement. That Defendants will not agree to this straightforward request on such a remote matter gives up their game; Defendants aim to cause irreparable prejudice to ChromaDex from the outset of the trial by linking ChromaDex to irrelevant but allegedly unsavory characters.

Prior to the previous trial date in October 2019, ChromaDex moved to exclude the same evidence. (Dkt. 263-1 at 1–4; Dkt. 331 at 1–3.) In response, Defendants' prior counsel agreed, and represented to the Court, that "Elysium does not intend to introduce evidence at trial concerning" this issue, "unless and until ChromaDex opens the door to it doing so." (Dkt. 291 at 1.) Defendants' current counsel now seeks to undo that agreement. For all these reasons, ChromaDex submits this non-boilerplate motion precisely targeted at this one significant trial issue.

I. RELEVANT BACKGROUND

Honig, Brauser, and Frost are or were passive investors in ChromaDex. Further, Honig and Brauser were on the board of directors of ChromaDex for a brief stint that ended when they resigned on February 25, 2015. (Ex. 5 at 24.)[1] Frost is a distant

[1] Cites to "Ex." refer to exhibits attached to the Declaration of Barrett J. Anderson.

relative of ChromaDex's current CEO, Rob Fried. In late 2018, well after Honig and Brauser had resigned from the ChromaDex board, the U.S. Securities & Exchange Commission ("SEC") accused Honig, Brauser, Frost, and others of participating in a "pump-and-dump" penny stock fraud scheme orchestrated by Honig involving companies other than ChromaDex. Specifically, the SEC claimed that they manipulated stock prices in three microcap companies, then dumped their shares for a profit, leaving other investors holding the bag.[2] The alleged scheme did ***not*** involve ChromaDex or its stock, and Defendants have not produced any evidence to the contrary.

Given Frost's high profile as a billionaire and former chairman of a large international drug company (Teva Pharmaceutical Industries Ltd.), the SEC enforcement action was widely publicized in sources such as *Barron's*, the *Financial Times*, and the *Wall Street Journal*. The SEC's action also spawned numerous investor lawsuits and a criminal investigation by the U.S. Department of Justice ("DOJ"). At this time, Honig, Brauser, and Frost have all entered into settlements with the SEC without admitting or denying wrongdoing.[3]

Prior to the trial set for this case in October 2019, ChromaDex moved to exclude evidence or argument related to any litigation and investigations involving Honig, Brauser, or Frost as irrelevant and unduly prejudicial under Federal Rules of Evidence 401, 402, and 403. (Dkt. 263-1 at 1–4.) Defendants' opposition did not dispute that these matters would be inadmissible and represented that:

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[2] *See* U.S. Securities & Exchange Commission, SEC Charges Microcap Fraudsters for Roles in Lucrative Market Manipulation Schemes (Sept. 7, 2018), https://www.sec.gov/news/press-release/2018-182.

[3] *See* U.S. Securities & Exchange Commission, Barry Honig and Three Other Defendants Settle with SEC in Market Manipulation Case (July 12, 2019), https://www.sec.gov/litigation/litreleases/2019/lr24529.htm; U.S. Securities & Exchange Commission, SEC Settles with Multiple Defendants in Market Manipulation Case and Amends Complaint as to Thirteen Remaining Defendants (Mar. 22, 2019), https://www.sec.gov/litigation/litreleases/2019/lr24431.htm; U.S. Securities & Exchange Commission, Additional Key South Florida-Based Microcap Fraudsters Settle with SEC in Multi-Defendant Litigation (Mar. 11, 2020), https://www.sec.gov/litigation/litreleases/2020/lr24765.htm.

> Elysium does not intend to introduce evidence at trial concerning Honig's, Brauser's or Frost's history of being investigated and sued by the Securities and Exchange Commission or any other regulator or shareholder unless and until ChromaDex opens the door to it doing so.

(Dkt. 291 at 1.) ChromaDex's reply acknowledged Defendants' position. (Dkt. 331.) The Court later denied both parties' motions *in limine* without prejudice when it postponed the trial date. (Dkt. 369.)

Fast forward to today. As the parties communicate in advance of the trial set for September 21, 2021, Defendants' new counsel informed ChromaDex that Defendants would only agree not to reference litigation or investigations *by the SEC* involving Honig, Brauser, and Frost that *became public after ChromaDex filed this action*—which was on December 29, 2016, (Dkt. 1)—and that they would not attempt to offer evidence or elicit testimony regarding the same unless they first obtained leave from the Court outside the presence of the jury. (Ex. 6 at 32.) However, Defendants informed ChromaDex that they would *not* agree to the same arrangement with respect to any litigation or investigations into the three individuals that were initiated by entities other than the SEC or that were public prior to December 29, 2016. (*Id.* at 31–32.)

II. ARGUMENT

ChromaDex moves for an order precluding Defendants from referencing or offering evidence about any litigation or investigations of any nature involving Honig, Brauser, and Frost. ChromaDex also requests that the Court preclude reference or evidence related to the same matters, such as the claim that ChromaDex is "run and backed by legitimate criminals," a pejorative label used by Elysium's CEO Eric Marcotulli when communicating with third parties to try to link the alleged conduct of Honig, Brauser, and Frost to ChromaDex's management. (Ex. 1 at 4; *see also* Ex. 2 at 9; Ex. 3 at 13; Ex. 4 at 21.) This evidence is irrelevant and unfairly prejudicial under Federal Rules of Evidence 401, 402, and 403.

Defendants apparently intend to tell the jury about these matters in their opening statement. ChromaDex requests that the Court preclude such references, as well as preclude any related evidence or testimony during trial unless and until Defendants establish an appropriate evidentiary foundation and seek and obtain (outside the presence of the jury) leave of the Court to broach this issue.

A. The evidence is not relevant.

The litigation and investigations involving Honig, Brauser, and Frost are irrelevant because they are entirely unrelated to the dispute between Elysium and ChromaDex. For one thing, it is uncontested that the SEC did not allege that these individuals took any action, illegal or not, in connection with ChromaDex or its stock. *See* Complaint, *SEC v. Honig et al.*, No. 1:18-cv-08175 (No. 1) (S.D.N.Y. Sept. 9, 2018). Defendants have produced no evidence to the contrary.

Moreover, none of the alleged conduct by these three individuals has any connection to the claims and issues in this case, which do not involve securities, let alone allegations of stock manipulation. Elysium's Third Amended Counterclaims ("TACC") makes no allegations concerning Honig or Frost, and includes only one allegation that suggests Brauser—who Elysium admits "has, to Elysium's knowledge, no position within ChromaDex"—made some phone calls to Elysium or its investors in December 2016. (Dkt. 103, TACC ¶ 119.) ChromaDex anticipates that these alleged phone calls will not be relevant to the case and intends to object at trial when Defendants attempt to elicit testimony or offer evidence about them.[4] However, for purposes of this motion, it is undisputed that those calls did not involve alleged stock manipulation.

[4] For example, Defendants do not argue that Brauser was involved in the discussions between the parties prior to December 2016, when he allegedly made the calls. By that time, he was no longer on the ChromaDex board and was not acting, or authorized to act, for ChromaDex. And the events surrounding the June 30, 2016 ingredient orders that form the core of the dispute between Elysium and ChromaDex had occurred months and even years before the alleged calls. (*See, e.g.*, Dkt. 103, TACC ¶¶ 46, 82 (alleging contract negotiations between ChromaDex and Elysium began in 2013 and Elysium placed its last orders of ingredients from ChromaDex on June 30, 2016).)

Tellingly, no party intends to call Honig, Brauser, or Frost as trial witnesses. Their alleged stock manipulation is simply not part of this case.

Because there is no fact "of consequence" that Defendants could show to be "more or less probable" by referencing any litigation or investigations that may involve these three individuals, any such references are irrelevant under Rules 401 and 402.

B. The evidence is unfairly prejudicial.

References to the litigation or investigations involving Honig, Brauser, and Frost would also be substantially more prejudicial than probative under Rule 403. The unfair prejudice of this evidence is obvious: jurors hearing about the litigation or investigations, especially by government agencies like the SEC and DOJ, will be led to believe that ChromaDex's management, at worst, engages in fraud like that alleged against Honig, Brauser, and Frost or, at best, associates with allegedly unsavory individuals. Any reference to those matters would thus present a substantial risk that the jury could find that ChromaDex's evidence, witnesses, and arguments are unworthy of belief or otherwise unfairly punish ChromaDex during the trial "on an improper basis." Fed. R. Evid. 403 advisory committee's note to 1972 amendment (noting exclusion is proper when evidence has "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one"); *see also*, *e.g.*, *Jinro Am. Inc. v. Secure Invs., Inc.*, 266 F.3d 993, 1004 (9th Cir. 2001), *opinion amended on denial of reh'g*, 272 F.3d 1289 (9th Cir. 2001) (holding testimony suggesting prevalence of corruption and fraud in Korean business community was "far more prejudicial than probative and should have been excluded under Rule 403").

The inference that Defendants seek to exploit—suggesting that ChromaDex is managed by "criminals"—is unfair because it is not based on fact. No member of ChromaDex's management who ever interacted or negotiated with Elysium in the relevant time period for the claims in this case has been implicated in any criminal investigation, let alone convicted of a crime. And none of the litigation or investigations involving Honig, Brauser, and Frost have anything to do with ChromaDex. Defendants

should not be allowed to paint ChromaDex as an unsavory organization based solely on the unrelated legal issues experienced by these three individuals. Any "evidence regarding such unrelated incidents would appear to be designed solely to inflame the passions of the jury, and as such, it is inadmissible under Rules 401 and 403." *Martin v. Cty. of Barstow*, 2015 WL 12743591, at *3 (C.D. Cal. Nov. 5, 2015) (excluding evidence because it was unduly prejudicial and lacked "any credible probative value, even as it concerns proof of intent, motive, opportunity, or plan").[5]

C. Defendants' flip-flop should be rejected.

Defendants originally agreed not to reference or attempt to introduce evidence concerning any litigation or investigations involving Honig, Brauser, or Frost—regardless of whether initiated by the SEC or another entity and regardless of when they became public—unless ChromaDex opened the door. (Dkt. 291 at 1.) They should be held to that agreement.

Defendants seek to undo that arrangement because, as they argue, "[w]hat Elysium knew about these individuals acutely influenced the company's decision-making and needs to be presented to the jury to explain Elysium's actions." (Ex. 6 at 31.) This newly invented position does not make logical sense. As the Court explained in its order on summary judgment, the only question for the jury related to Elysium's intent is "what Elysium intended at the time it placed the June 30 orders." (Dkt. 413 at 34.) If the jury finds that Elysium "never planned to pay for the June 30 orders," and that "Morris knew of that plan" but "pushed ChromaDex to accept [them]," then Elysium would be liable in the amount of the unjustly earned resale profits it obtained from those orders. (*Id.* at 33–34.) Litigation or investigations involving Honig, Brauser, and Frost are not relevant to Elysium's intent on the critical question as framed by the Court. For example, even if Elysium knew about an alleged stock

[5] Further, Defendants should not be permitted to refer to these unrelated matters because it risks "giv[ing] rise to time-consuming tangents about [their] merits." *Marez v. Bassett*, 2011 WL 13213813, at *3 (C.D. Cal. Oct. 3, 2011).

manipulation scheme by the three individuals, how would that effect whether or not Elysium plotted to order large amounts of ingredients and never pay ChromaDex for them? The issues are miles apart.

Rather than demonstrate a direct connection with the June 30 orders, Defendants instead propose that Elysium's knowledge of the litigation or investigations involving the three individuals could support that "Elysium did not trust ChromaDex" in the parties' dealings. (Ex. 6 at 29.) But an argument that Elysium broadly did not "trust" ChromaDex—even if relevant to Elysium's intent regarding the June 30 orders, which is not at all clear—does not require that Defendants specifically reference the unrelated alleged conduct of Honig, Brauser, or Frost in their opening statement or at trial. Allowing Defendants to do so would be unduly prejudicial. *See Martinez v. Davis*, 2011 WL 13213962, at *4 (C.D. Cal. Mar. 17, 2011) (excluding evidence of unrelated prior incident because it "involved different" individuals, and "some general fear caused" by incident "sheds no light on whether Defendants" did specific alleged act); *Optional Cap., Inc. v. Kyung Joon Kim*, 2007 WL 9653243, at *2–3 (C.D. Cal. Dec. 18,2007) (granting motions to exclude evidence of criminal charges against party).

In any event, Defendants' new theory is not supported by any facts developed in discovery throughout the long history of this case. For example, Defendants have pointed to no contemporaneous documents showing that the allegations of a stock manipulation scheme by the three individuals factored into Elysium's plans for the June 30 orders. Moreover, neither Elysium's CEO Marcotulli nor Elysium's COO, Daniel Alminana—both of whom admitted to lying under oath at their depositions, (Dkt. 493 at 2)—uttered the names Honig, Brauser, or Frost *even once* at those depositions. And despite being questioned extensively about the June 30 orders, neither so much as suggested that the alleged stock manipulation scheme altered Elysium's "trust" of ChromaDex with respect to the June 30 orders or the parties' related contractual obligations. Defendants' novel and unsupported *post hoc* justification, created to bolster a new trial strategy, should be rejected.

The lack of logical relevance or factual basis demonstrates that Defendants' plan to reference the alleged conduct of Honig, Brauser, and Frost is nothing more than an attempt to tie ChromaDex to these individuals in the hope that a juror will recognize (or research) them, and thus infect the jury with the false notion that ChromaDex is run by or associated with "criminals." That is exactly what Rule 403 is meant to prevent.

III. CONCLUSION

ChromaDex respectfully requests that the Court grant its motion and preclude Defendants from referencing or offering evidence related to any litigation or investigations involving Honig, Brauser, or Frost in their opening statement or at trial until and unless they seek leave from the Court outside the presence of the jury.

Dated: August 16, 2021

COOLEY LLP
MICHAEL A. ATTANASIO (151529)
BARRETT J. ANDERSON (318539)
CRAIG E. TENBROECK (287848)
JASMIN F. MOTLAGH (311639)
DYLAN K. SCOTT (332796)
RACHAEL M. HELLER (335636)

/s/ Michael A. Attanasio
Michael A. Attanasio (151529)

Attorneys for Plaintiff and Counter-Defendant ChromaDex, Inc.