

EXHIBIT 2

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION
HONORABLE CORMAC J. CARNEY, U.S. DISTRICT JUDGE

CHROMADEx, INC.,)	
)	
Plaintiff,)	Certified Transcript
)	
vs.)	Case No.
)	8:16-cv-02277-CJC-DFM
ELYSIUM HEALTH, INC. AND MARK)	
MORRIS,)	
)	
Defendants.)	
)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
MOTION HEARING
MONDAY, JANUARY 13, 2020
1:59 P.M.
LOS ANGELES, CALIFORNIA

DEBBIE HINO-SPAAN, CSR 7953, CRR
FEDERAL OFFICIAL COURT REPORTER
350 WEST 1ST STREET, SUITE 4455
LOS ANGELES, CA 90012-4565
dhinospaan@yahoo.com

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APPEARANCES OF COUNSEL:

FOR THE PLAINTIFF:

COOLEY LLP
BY: MICHAEL A. ATTANASIO, ESQ.
4401 Eastgate Mall
San Diego, California 92121
858-550-6000
mattanasio@cooley.com

COOLEY LLP
BY: BARRETT J. ANDERSON, ESQ.
4401 Eastgate Mall
San Diego, California 92121
858-550-6000
banderson@cooley.com

FOR THE DEFENDANTS:

BAKER & HOSTETLER LLP
BY: JOSEPH N. SACCA, ESQ.
45 Rockefeller Plaza
New York, New York 10111
212-589-4200
jsacca@bakerlaw.com

BAKER & HOSTETLER LLP
BY: ELIZABETH M. TRECKLER, ATTORNEY AT LAW
11601 Wilshire Boulevard
Suite 1400
Los Angeles, California 90025-0509
310-820-8800
etreckler@bakerlaw.com

FOLEY HOAG LLP
BY: MARCO J. QUINA, ESQ.
155 Seaport Boulevard
Boston, Massachusetts 02210
617-832-3093
mquina@foleyhoag.com

ALSO PRESENT:

MARK FRIEDMAN, ChromaDex, Inc., general counsel

1 **LOS ANGELES, CALIFORNIA; MONDAY, JANUARY 13, 2020**

2 **1:59 P.M.**

3 - - -

4 THE COURTROOM DEPUTY: Calling Case

01:59PM 5 SACV 16-02277-CJC, *ChromaDex, Inc., versus Elysium Health, Inc.*

6 Counsel, please state your appearances.

7 MR. ATTANASIO: Good afternoon, Your Honor. Michael
8 Attanasio with Cooley LLP on behalf of Plaintiff ChromaDex.

9 THE COURT: Hello, sir.

02:00PM 10 MR. ATTANASIO: Good afternoon, Your Honor. With us
11 in the gallery is the general counsel of ChromaDex, Mr. Mark
12 Friedman.

13 MR. ANDERSON: And my name is Barrett Anderson, also
14 with Cooley, on behalf of ChromaDex.

02:00PM 15 THE COURT: Hello, sir.

16 MR. SACCA: Good afternoon, Your Honor. Joseph
17 Sacca of Baker & Hostetler for Elysium Health and Mark Morris.

18 THE COURT: Hello, Mr. Sacca.

19 MS. TRECKLER: And Elizabeth Treckler, also from
02:00PM 20 Baker & Hostetler as well.

21 THE COURT: Hello, ma'am.

22 MR. QUINA: Marco Quina from Foley Hoag, also for
23 Elysium.

24 THE COURT: Hello, sir.

02:00PM 25 Okay. Well, we got a lot to talk about. Here's how

1 I'd like to proceed. I have a bunch of questions for both
2 sides. I don't know how long it's going to take, but I have a
3 lot.

4 After I've asked all my questions of both sides,
02:01PM 5 then I think we'll take a break, and then I'll give each side
6 15 minutes to make any further arguments that they'd like. If
7 you'd like to reserve some time to respond to what the other
8 side says, just reserve, you know, five minutes of whatever you
9 want.

02:01PM 10 I think I'll ask my questions of ChromaDex first,
11 and then I'll ask pretty much similar questions of Elysium. So
12 if you could please kind of pay attention and think about the
13 questions that I'm asking so you can respond to them.

14 So who wants to field my questions? If you'd be
02:01PM 15 kind to approach the lectern, please.

16 MR. ATTANASIO: Yes, Your Honor. Mike Attanasio for
17 ChromaDex.

18 THE COURT: All right, Mr. Attanasio. I'm just
19 going to go through the areas as they came to me as I was
02:01PM 20 reviewing the motions and the Complaint and the counterclaims.
21 And I'd like to first talk about the resale profits.

22 As I understand it, ChromaDex is now going to seek
23 \$8.3 million in damages for resale profits. And I'd like you
24 to walk me through the evidence in the record to support that.
02:02PM 25 I understand the theory. The theory -- there's a

1 misappropriation theory and there's a promissory fraud theory.
2 The promissory fraud theory is pretty easy for me to
3 understand. I get that. But what I'd like to understand is
4 how you got to this \$8.3 million in the damages.

02:02PM 5 MR. ATTANASIO: Yes, Your Honor. If I may just
6 inquire -- well, I think I understand the question.

7 THE COURT: Well, I'll be more -- when -- okay, as I
8 understand it, your client sold ingredients, NR and PT, to
9 Elysium that you wouldn't have sold if you knew the true facts.
02:03PM 10 And you believe that Elysium got you to sell them these
11 ingredients at a very low price that they had no intention of
12 paying, so it's promissory fraud. So I get that.

13 But now I need to know, okay, how do you know that
14 they took those ingredients, made their Basis, and then sold it
02:03PM 15 to people? What evidence in the record do you have to support
16 that?

17 MR. ATTANASIO: There is undisputed evidence that at
18 the time of the sales by Elysium of the finished product, the
19 only ingredients that Elysium possessed were the ingredients it
02:03PM 20 had purchased from ChromaDex under the nefarious sequence of
21 events we described in our brief.

22 THE COURT: And that was June of 2016; correct?

23 MR. ATTANASIO: Yes, Your Honor, June 30th.

24 THE COURT: Okay. And so you're confident. Is that
02:04PM 25 because you have some evidence that suggests they didn't have

1 any supply on hand to sell, so what they sold from June 30th
2 until -- 2016 until when was the product or the ingredients
3 that your client sold to them?

02:04PM 4 MR. ATTANASIO: Yes. They stockpiled -- through
5 this scheme --

6 THE COURT: Okay.

7 MR. ATTANASIO: -- Elysium stockpiled NR --

8 THE COURT: Okay.

9 MR. ATTANASIO: -- produced it, manufactured its own
02:04PM 10 product, a pill, if you will, Your Honor --

11 THE COURT: Okay.

12 MR. ATTANASIO: -- and then had that stock on hand
13 to sell to the buying public for a period of time of over a
14 year.

02:04PM 15 THE COURT: So are we talking June 2017 is the time
16 period? What's the end period? June 30th, 2016, until when?

17 MR. ATTANASIO: I believe it goes a little over a
18 year, Your Honor. I don't have the exact date at my

19 fingertips. But this has been the subject of extensive
02:05PM 20 deposition testimony and expert work. We certainly can cabin
21 the time frame in which Elysium was selling this product for a
22 couple of reasons, Your Honor.

23 We also have a great amount of evidence about when
24 Elysium's replacement supplier came on board, a third company.

02:05PM 25 We know when they came on board, which is around this same

1 time. So as Elysium's stockpile of ChromaDex NR was dwindling,
2 we have e-mails, we have communications that show a concern at
3 Elysium about running out. So on a parallel track, along with
4 selling the ChromaDex-based product, Elysium is seeking an
02:05PM 5 alternative source.

6 And yes, we can track that timeline fairly
7 precisely. And what we know from that is that applying the
8 profit margin, applying the margin that Elysium records show
9 Elysium had on its product --

02:06PM 10 THE COURT: I'm stopping you not to be rude. That's
11 a series of other questions I have.

12 Before you get to that profit margin, and I believe
13 it's 51.7 percent, what -- does your expert have the sales
14 figures from Elysium? Is that what you're relying on.

02:06PM 15 MR. ATTANASIO: Yes. We have the -- I believe we
16 have the volume of sales by Elysium to extinguish the ChromaDex
17 supply.

18 THE COURT: And is that an attachment to the
19 expert's report? Is there anything in the record before me on
02:06PM 20 summary judgment with those sales figures, if you know?

21 MR. ATTANASIO: I'll get that answer, Your Honor,
22 before I get back up again.

23 THE COURT: Okay.

24 MR. ATTANASIO: I'm not going to guess at it right
02:06PM 25 now. I believe it is part of the expert analysis. But I will

1 have that confirmed for Your Honor before I stand up again.

2 THE COURT: Okay. So you're going to -- you're
3 saying we have business records, municipal business records
4 that shows this is how much Basis that Elysium sold that used
02:07PM 5 our ingredients that we sold them or were duped into selling
6 them?

7 MR. ATTANASIO: That's correct, Your Honor.

8 THE COURT: And those financials show, as I
9 understand it, \$16 million? It's going to show \$16 million in
02:07PM 10 revenue?

11 MR. ATTANASIO: Correct.

12 THE COURT: And you're going to give me the document
13 that shows that?

14 MR. ATTANASIO: Yes, we'll have --

02:07PM 15 THE COURT: Or documents, financial records?

16 MR. ATTANASIO: Yes, whatever records accumulate to
17 that. And then as Your Honor is suggesting, then you take the
18 profit margin against that.

19 THE COURT: All right. So now that gets us to the
02:07PM 20 profit, Mr. Attanasio. Tell me how you were able to calculate
21 a 51.7 percent profit margin.

22 MR. ATTANASIO: The profit margin was calculated by
23 the expert in large -- in one component, Your Honor, based on
24 Elysium's statement of its own margin, which we have from -- we
02:08PM 25 have information about that from documents produced in

1 litigation. But we also have information about that from
2 Elysium's own expert report in which it acknowledged the profit
3 margin that we're describing.

4 THE COURT: Could you add that to the list that
02:08PM 5 you're going to give me, that specific report or document to
6 support that profit rate?

7 MR. ATTANASIO: Yes, Your Honor.

8 THE COURT: Okay. I'm now ready to turn to another
9 subject if you are.

02:08PM 10 MR. ATTANASIO: I am, Your Honor.

11 THE COURT: Okay. As I understand it, you're also
12 seeking \$110,000 in damages for avoided costs. There was
13 certain information that Mr. Morris, I understand, gave to
14 Elysium that he shouldn't have given. And Elysium, by having
02:09PM 15 that information, they didn't have to spend the time, money,
16 and effort that ChromaDex did. So what I need to know is what
17 is in the record to support that ChromaDex spent \$110,000 on
18 generating that information or those documents?

19 MR. ATTANASIO: That's in the ChromaDex expert
02:09PM 20 report, Your Honor, from Mr. Gunderson.

21 THE COURT: Now, I looked at that, and I could be
22 wrong. That's why I'm asking you these questions. But when I
23 read it, Mr. Gunderson, he made some, I thought, statements
24 saying that ChromaDex didn't track that. And he knows that
02:09PM 25 they spent a lot of money, but you're going to have to figure

1 out -- someone's going to have to figure out what it is. Now,
2 I could be mischaracterizing it. It just didn't jump out at me
3 when I was going through the record. And I think you would
4 have to concede to me a voluminous record was submitted to me.
02:10PM 5 So I may have missed it.

6 But is there -- is there any documents, any
7 spreadsheets, any analysis that was done on what the hours were
8 that was taken to do it? Because I do have a note that I made
9 myself that Mr. Gunderson said the research and development
02:10PM 10 costs to create the information and technology associated with
11 these documents were not internally tracked by ChromaDex.

12 And then the 30(b)(6) witness said that he did not
13 know how much it cost ChromaDex to develop the NRC1 analytical
14 method, that it would take quite some time to prepare the data
02:11PM 15 around that, and that he did not know if ChromaDex had done
16 that work.

17 So that, I think, is the basis for my confusion is
18 what in the record before me shows that it cost ChromaDex
19 \$110,000 to produce those documents or that information.

02:11PM 20 MR. ATTANASIO: Yes, Your Honor. I have it cited
21 here as -- and I can pull it -- I can pull it momentarily. But
22 we had cited it and I have it cited in my notes as the
23 Gunderson -- Exhibit 101 at pages 1091 through 1092.

24 THE COURT: Can you pull that now?

02:11PM 25 MR. ATTANASIO: Yes. So Mr. Gunderson, Your Honor,

1 at pages 101 to -- excuse me, 1091 to 1092 of this exhibit, he
2 states "At this time, I have been asked to provide Elysium's
3 avoided costs for the" -- and then he lists three of the
4 documents, two of which Your Honor is questioning about now.

02:12PM 5 And he says:

6 "Accordingly, I have calculated Elysium's
7 avoided costs to total at least \$523,449,
8 Schedule 6. The total is comprised of costs
9 related to the pTeroPure GRAS, G-R-A-S, NRCL
02:12PM 10 analytical method, and the NR study data of
11 approximately 60,000, 50,000 and 413,449
12 respectively."

13 So it's the first two components that we're
14 interested in for today's purposes that the expert opined on on
02:13PM 15 those pages and in his Schedule 6.

16 THE COURT: And I'm not trying to be disrespectful
17 in any way to your expert, but he's just saying it cost that
18 much. I could say how much -- I could use those numbers too.
19 But what was his factual basis or analytical method that he
02:13PM 20 used to calculate those numbers is my question.

21 MR. ATTANASIO: Yes, Your Honor. He interviewed
22 ChromaDex personnel, and he says as much in his report. And he
23 reviewed ChromaDex internal documents, and he says as much in
24 his report.

02:13PM 25 THE COURT: He does.

1 MR. ATTANASIO: Yes, sir.

2 THE COURT: So it's an expert relying on hearsay or
3 admissible evidence if it's company's time records. And he's
4 saying, "I've reviewed those, and I" -- does he get really
02:13PM 5 specific as saying they spent this many hours on it?

6 MR. ATTANASIO: I wouldn't go that far, Your Honor.

7 THE COURT: Okay.

8 MR. ATTANASIO: It's -- I mean, he certainly -- and
9 I don't have -- I don't recall off the top of my head how
02:14PM 10 closely he was examined on this in his deposition, but
11 obviously, those are fair questions either in deposition or at
12 trial.

13 THE COURT: Okay. I'm ready to move on. Are you
14 ready?

02:14PM 15 MR. ATTANASIO: Yes, Your Honor.

16 THE COURT: Now I got \$600,000 in damages for a
17 price discount. Again, I understand the theory, the promissory
18 fraud misappropriation theory. But the question is how did --
19 first of all, how was that \$600,000 calculated? I assume
02:14PM 20 there's some sort of delta, X minus Y equals \$600,000, and
21 here's -- the top number is -- this is what we should have sold
22 it to them for, and this is what we sold it to them at, or is
23 it vice versa?

24 MR. ATTANASIO: It's we sold it to them at a
02:15PM 25 discounted price based on the subterfuge of our own employee

1 and Elysium, aided and abetted by Elysium, versus the price at
2 which it had been sold to them and would have been sold to
3 them.

4 THE COURT: And I think that number is a thousand
02:15PM 5 dollars a kilogram; correct?

6 MR. ATTANASIO: Correct, Your Honor.

7 THE COURT: So \$1,000 a kilogram. And then they
8 sold it at \$800 a kilogram. So that's a \$200 difference. And
9 then I guess I times that by whatever to equal 600,000?

02:15PM 10 MR. ATTANASIO: Correct. I think the math -- I
11 think it helps to have an expert run through it all, but I
12 believe that that approach is correct.

13 THE COURT: And did your expert -- was this
14 Mr. Gunderson again, did he do that? And if he did, could you
02:16PM 15 tell me where he did that?

16 MR. ATTANASIO: Yes, Your Honor. It's in
17 Mr. Gunderson's report at pages 1097 through 1099 essentially.
18 And he does run through -- I can recite some of the text to
19 Your Honor, but he does run through the math very much as we
02:16PM 20 just did together.

21 THE COURT: Okay. I can -- I don't need to take
22 your time up. I'll obviously go and look at that pronto after
23 the hearing.

24 Then let me ask then a question on the substantive
02:16PM 25 liability as far as the damages for this.

1 MR. ATTANASIO: Your Honor, just on that last --
2 just so I put it crisply in front of Your Honor and do that
3 favor.

4 THE COURT: Sure.

02:17PM 5 MR. ATTANASIO: At the bottom of page 1099, to this
6 last point, Mr. Gunderson takes the \$200 price per kilogram
7 discount that was unlawfully obtained and multiplies it by the
8 3,000 kilos of Niagen listed on the July 1st, 2016, invoice,
9 which is the invoice following the June 30th order. So \$200
02:17PM 10 times 3,000 gets us to the \$600,000, Your Honor. And that's at
11 the bottom of Exhibit 101, page 1099.

12 THE COURT: Got it. Thank you.

13 The question I have on the substantive liability, as
14 I understand it, Mr. Jaksch -- I hope I'm pronouncing his name
02:17PM 15 correctly. J-a-k-s-c-h, is that Jaksch?

16 MR. ATTANASIO: Correct, Your Honor.

17 THE COURT: He, in the conference call, when they
18 did the deal on June 30, 2016, I understand told Elysium's
19 people that they sold NR to Live Cell at \$800 per kilogram.
02:18PM 20 Why is that not a problem? In other words, he disclosed it
21 himself to them.

22 MR. ATTANASIO: I don't believe -- I believe the
23 record is mixed on that event. Let's start with that. I
24 believe that would be a triable issue for the jury as to what
02:18PM 25 precisely was said. I do believe that Mr. Jaksch's comment

1 about selling at 800 in that call to a customer was not a
2 specific reference to Live Cell.

3 THE COURT: It wasn't?

4 MR. ATTANASIO: Correct. Moreover, Your Honor, and
02:18PM 5 I would submit more importantly, that is on June -- that is at
6 the end of June, between June 28 and June 30th as this order is
7 being discussed, as early as May 29th, 2016, Mr. Morris, while
8 an employee of ChromaDex, texts Mr. Alminana, the Live Cell
9 information. That's at Exhibit 15 at page 25. Now, what's
02:19PM 10 important about that is that Mr. Morris's texts included not
11 just the price, the dates, the amounts, and historical data.
12 The second -- about Live Cell.

13 The second thing that's important to understand is
14 there will be trial testimony that Live Cell was the rival, was
02:19PM 15 the obsession of Elysium. I don't mean that in a pejorative
16 way. It was viewed as a key business competitor. It was
17 Elysium's white whale. That was the one they wanted to take
18 on.

19 And by getting that information from Mr. Morris at
02:19PM 20 that time, it squared up Elysium perfectly for what was to come
21 vis-à-vis its negotiation 30 days later, Your Honor, 30 days
22 later with Mr. Jaksch. Combine that with the revelation --
23 Your Honor may have a question about this, so I don't want to
24 trespass on that. But combined with the revelation by
02:20PM 25 Mr. Morris that shortly followed that the price to ChromaDex

1 was \$450 a kilogram, so now you have a buyer --

2 THE COURT: Well, you got it from your manufacturer,
3 you mean?

4 MR. ATTANASIO: Correct. Now you have a buyer,
02:20PM 5 Elysium, who knows what the price is, what the volume data is,
6 what the chronology is, the time frame of sales to a key rival,
7 \$800 a kilo. You have a buyer, Elysium, who knows ChromaDex's
8 cost of buying from its supplier company, the big company,
9 Grace, Your Honor. And so Elysium is now armed with very
02:21PM 10 significant inside baseball, inside intelligence from ChromaDex
11 that it should never have had.

12 Elysium will say, I suspect, among other things,
13 that that was part of Mr. Morris' job as a good sales rep.
14 There's a problem with that theory. The problem with that
02:21PM 15 theory is Mr. Alminana responding to the price information by
16 saying, "Amazing." Mr. Alminana responding to the price
17 information, the 450, by saying, "Good. Then our limit for our
18 bid, for our offer is 500." Mr. Alminana at Elysium responding
19 to these revelations by saying, more colorfully, this is on
02:21PM 20 May 29, when he gets the Live Cell information, "This is
21 between us, and you are the f'ing man." That's Exhibit 15 at
22 page 25 again.

23 So you have very clearly a scheme of conspiracy
24 between Morris on the one hand, the Elysium principals on the
02:22PM 25 other hand, excluding Mr. Morris' superiors, excluding his

1 bosses at ChromaDex, to undermine ChromaDex's negotiating
2 position. What we're left with in the trial, then, Your Honor,
3 is two trade secrets only. And I want to be very -- I hope
4 this is helpful. I want to be very clear about what we're
02:22PM 5 going to proceed on.

6 THE COURT: It is.

7 MR. ATTANASIO: We took -- we did two things.

8 Obviously we carefully and cautiously read Your Honor's order
9 and the -- I hesitate to call them signals -- the very direct
02:22PM 10 guidance we were being given. We also, like we would in any
11 trial, stepped back and said what do we really want to try to
12 the jury? What's going to resonate? What should we do?

13 The combination of those two things leaves us with,
14 as we say in our supplemental brief, I think, a very
02:22PM 15 streamlined case, a case that's responsive to Your Honor's
16 concerns in the October order.

17 So we propose to proceed on the damages theory, the
18 8.3 million that we talked about a moment ago, only on our
19 breach of fiduciary duty claim, which takes into account the
02:23PM 20 landscape of Mr. Morris' treachery, aided and abetted by
21 Elysium, and then the single two trade secrets about pricing
22 information, the crown jewels as to Live Cell, and the
23 wholesale price we were paying to our manufacturer, Grace
24 Chemical.

02:23PM 25 Only those two trade secrets, only as to the claim

1 for damages of 8.3 million arising directly -- direct
2 causation, a very -- Your Honor used the phrase "connect the
3 dots" -- very easy to connect the dots to Elysium's profit from
4 the scheme that involved, among other things, the two trade
02:23PM 5 secrets.

6 What we're not pursuing that I think gave Your Honor
7 concern and heartburn, we're not pursuing three categories of
8 damages or three damages theories. And I want to reiterate
9 this. It's in our brief, but it's not as clear as I should
02:24PM 10 have made it, so I want to say that now.

11 One, we are abandoning for purposes of trial the --
12 what I will call, Your Honor, the Elysium investor theory; that
13 is, Elysium was able to attract investors, investors made
14 decisions to invest based on Elysium's theft of trade secrets,
02:24PM 15 if you will. That's out.

16 Second, which I think Your Honor also called out
17 with some skepticism, the "Elysium was going out of business"
18 theory. But for the head start from the trade secret theft,
19 but for the quicker path, the shortcut to an alternative
02:25PM 20 supplier in short order, Elysium would have gone out of
21 business, and, therefore, their profits by staying in business
22 should all come to ChromaDex. Your Honor expressed skepticism
23 about those dots being connected. We have dropped that damages
24 theory.

02:25PM 25 And then, finally, the notion that -- I believe the

1 third one is Elysium's -- ChromaDex's lost profits, rather,
2 from what Elysium should have continued to buy from ChromaDex.
3 If Elysium had not stolen the trade secrets, Elysium would not
4 have gotten a shortcut to a new supplier, Elysium would have
02:25PM 5 continued to purchase from ChromaDex. Therefore, during that
6 period of time, they should have been buying from ChromaDex,
7 and we lost our profits -- ChromaDex lost its profits. That is
8 also off the table.

9 So we have -- we have very, you know,
02:25PM 10 respectfully -- and, as I said, I meant the word -- cautiously,
11 thoughtfully reviewed Your Honor order -- reviewed Your Honor's
12 order, thought about trial, thought about keeping it short,
13 crisp, and here we are.

14 And that's how we got to the 8.3 million. And
02:26PM 15 that's the only place, that 8.3 million with a very direct
16 causation to Elysium's profits for the product that was, we
17 say, stolen. That's the only place where the trade secrets
18 will come into play in this case.

19 THE COURT: I understand. And I appreciate that.

02:26PM 20 I have a few more questions about ChromaDex's
21 claims, and then I'll go to Elysium's claims that I want to ask
22 you about.

23 I don't know if this is separate and independent,
24 but I know there is claims in the Complaint that ChromaDex
02:27PM 25 brought against Mr. Morris that he supposedly gave to Elysium

1 that was in breach of the confidentiality agreements that he
2 signed. One was, I guess, this pricing information and the
3 manufacturing cost to ChromaDex. Is that the information that
4 you referred to here, or is there something else that violated
02:27PM 5 the confidentiality agreements?

6 MR. ATTANASIO: It's the pricing information, and
7 it's the -- it's also the documents that we referred to. One
8 or more of those documents were taken by Mr. Morris to his new
9 employer. And he did not have the right under the
02:27PM 10 confidentiality agreement by contract to take that. So those
11 are breach of contract claims that fold into the case as a
12 whole against Mr. Morris.

13 THE COURT: I understand the pricing. The other
14 documents are what? And what is -- compound question, but you
02:27PM 15 can handle it -- what is the other information? And then what
16 are the damages ChromaDex is seeking for those breaches of the
17 confidentiality agreement?

18 MR. ATTANASIO: In fairness, we've already -- this
19 is what we've covered. This is the avoided costs.

02:28PM 20 THE COURT: Got you. Okay. Then that answers it.

21 So it's that information. And so then it's the same
22 damages that you're talking about, the 8.3 million and the
23 110,000.

24 MR. ATTANASIO: Well, the 8.3 -- not the 8.3 million
02:28PM 25 on that, it's the 110,000. The 8.3 million is limited to the

1 breach of fiduciary duty claim, aiding and abetting by Elysium,
2 and the -- and the two trade secrets that I mentioned. Avoided
3 cost as to Mr. Morris is the -- as to breach of contract by
4 Mr. Morris is the 110,000. And then we have the -- and then we
02:29PM 5 have the compensation we're seeking to claw back from
6 Mr. Morris.

7 THE COURT: Right. And not to beat a dead horse,
8 but as I understood what you told me, the breaches of the
9 confidentiality agreement was giving the pricing information
02:29PM 10 and the avoided cost documents that we're talking about.

11 MR. ATTANASIO: That's correct.

12 THE COURT: So that's what I'm saying. So you're
13 saying the avoided cost documents, that would be the damages
14 for the breach of those. But the pricing information that he
02:29PM 15 supposedly wrongfully gave to ChromaDex, what damages are you
16 seeking for that?

17 MR. ATTANASIO: That rolls up -- that does roll up
18 into the 8.3 million, Your Honor.

19 THE COURT: Okay. So I -- then I am understanding.

02:29PM 20 Then the last question I have on ChromaDex's claims
21 is -- now I'm going back a little bit -- is there is the
22 provision in the parties' agreement about most favored nation
23 pricing. And how does that interact with ChromaDex's claims
24 against Elysium? Let me try to flesh out what I'm trying to
02:30PM 25 ask you about.

1 Under the agreement, Elysium is entitled to the best
2 price. And they certainly don't have to take ChromaDex's word
3 for it that they're getting the best price. I would say
4 there's implied in that provision a right that Elysium has to
02:30PM 5 know what are you selling the product for to others? So I
6 think the argument, and I'm not making it up here, Elysium is
7 saying we're entitled to know what Mr. Morris told us. What's
8 your response to that?

9 MR. ATTANASIO: Well, to a point. If Elysium were
02:31PM 10 entitled to that sort of information, then there would not have
11 been any need for the secretive texting and the reactions to
12 the texting by Elysium and by Mr. Morris behind Mr. Jaksch's
13 back, behind the back of other ChromaDex executives.

14 I believe that will be a hard-fought jury question;
02:31PM 15 that is, was there subterfuge and treachery going on, or was
16 this Mr. Morris doing his level best as a vice president for
17 sales, a marketing fellow, to create a good relationship with a
18 customer? That's going to be a jury question.

19 THE COURT: I can understand that. But let me ask
02:31PM 20 you this, then: What do you intend to present through your
21 witnesses or what are you anticipating presenting through your
22 witnesses on what obligations that ChromaDex had to Elysium to
23 make sure that they -- this provision of the parties' agreement
24 was being respected and honored, if you follow my question?

02:32PM 25 MR. ATTANASIO: I do, Your Honor. I do. And, in

1 fact, there's an incident in the case that will be, again, a
2 topic at trial, I'm confident, that is illustrative of that.
3 And that is that Mr. Jaksch, at one point, attempted to send
4 over to his Elysium counterpart, Mr. Alminana, I believe, a
02:32PM 5 spreadsheet that had pricing information that was blinded.
6 That was Mr. -- appeared to be Mr. Jaksch's intent. In fact,
7 he sent over a spreadsheet that had blinded information and
8 behind it had unblinded information. His deposition testimony
9 was he did that inadvertently in the course of this. It still
02:32PM 10 didn't have all of the information, much less the color that
11 Mr. Morris was feeding behind the scenes.

12 So I'm going to get to the bottom line of
13 Your Honor's question. Yes, there was a mechanism by which
14 ChromaDex could provide blinded or anonymous-style information
02:33PM 15 to Elysium that would say "Here's our range. Here's any
16 company that's buying as much -- that you're buying more than
17 who has these prices without listing the companies and listing
18 all of that detail." What they were getting behind the scenes
19 from Mr. Morris was far different.

02:33PM 20 THE COURT: Yeah. As I understand it, Mr. Morris
21 gave him what I think you had called, like, one-off sales. Let
22 me get it specifically so you can respond to it. There was
23 sales to Innovations For Health, Procter & Gamble. But you're
24 saying, I believe, that those sales don't count because they
02:34PM 25 were kind of, like, one-off sales.

1 MR. ATTANASIO: Correct.

2 THE COURT: So Live Cell was really the key customer
3 that -- would you have disclosed and did your client disclose
4 the price per kilogram for Live Cell?

02:35PM 5 MR. ATTANASIO: No, Your Honor. No. The testimony
6 will be that -- Mr. Jaksch has testified and will testify at
7 trial that he would never have disclosed to Elysium the quality
8 and quantity of information that Mr. Morris did. What I
9 foresee doing at trial is showing Mr. Jaksch, once properly
02:35PM 10 admitted, the text exchanges that Mr. Morris shared behind his
11 back and ask him simply two questions: Did you see these at
12 the time, and did Mr. Morris share them with you? And, two,
13 would you have disclosed this information to Elysium as part of
14 this negotiation? The answer to both questions, I submit to
02:35PM 15 the Court, will be an emphatic "no." And that's the heart of
16 our case.

17 Yes, there had to be some exchanges on a
18 professional confidential anonymous basis of pricing
19 information, but not what I would label the crown jewel-type
02:36PM 20 pricing information including our own price to our supplier.

21 THE COURT: And I know Elysium disagrees with you,
22 but I'm going to say that sure sounds like a jury question. I
23 can't say which side has the better side of the argument. It's
24 irrelevant. Okay.

02:36PM 25 I want to talk about Elysium's claims and your

1 motion against them. Obviously Elysium is going to respond to
2 these questions. And tell me if I'm mischaracterizing their
3 claims, and I look forward to that.

02:36PM 4 But as I understand it, there are counterclaims for
5 product safety, what I'll call, and CGMP, Good Manufacturing
6 Practices quality claims, that they're suing -- countersuing
7 ChromaDex for. And I just want to, I guess, get a good
8 understanding of what is in the record before me to support
9 those claims.

02:37PM 10 And the one piece of evidence that I was able to
11 identify in the record was an April 2017 PCI test results. Are
12 you aware of any other evidence that's come out in discovery or
13 in the case, and more precisely, in the record before me that
14 Elysium's relying on to support these product safety and CGMP
02:37PM 15 quality counterclaims against ChromaDex besides that?

16 MR. ATTANASIO: Your Honor, with the Court's
17 permission, my colleague, Mr. Anderson, and I had divvied up
18 the arguments. I'm handling -- defending against the Elysium
19 motion for summary judgment, and then we were going to switch
02:37PM 20 with respect to our claims.

21 THE COURT: Okay. Sure.

22 MR. ATTANASIO: Thank you.

23 THE COURT: Maybe you can find those documents for
24 me.

02:38PM 25 MR. ATTANASIO: I will right now, Your Honor.

1 MR. ANDERSON: Good afternoon, Your Honor.

2 THE COURT: All right.

3 MR. ANDERSON: Just before I proceed to your
4 question, I do want to note that we're discussing in some
02:38PM 5 specificity items of information that both sides have applied
6 to seal, and, therefore, after this we might work with the
7 other side on some sort of motion to seal. I just wanted to
8 put that on the record and make sure that you were aware of it.

9 THE COURT: I am aware of it, and I appreciate it.
02:38PM 10 And I think this might be a good time -- let me just give you
11 my response on this. We're now on -- I'm going to try to get
12 you to trial in the next few months. I don't know whether I'll
13 be successful, but I'm going to try hard to do that. You will
14 have a trial this year. You are now one of the oldest cases I
02:38PM 15 have on my civil docket, and it's a problem for me. So I've
16 got to get you to trial.

17 I deal with confidential sealed information all the
18 time. I deal with it, candidly, more often in criminal cases
19 than civil cases. In criminal cases, I have to deal with
02:39PM 20 national security. I've dealt with counterterrorism
21 investigations. And almost in every criminal case, when you're
22 going after a RICO conspiracy, drug conspiracy, you're dealing
23 with confidential informants.

24 But when it comes to trial, all that information is
02:39PM 25 public. And there's no way the lawyers can explain this to the

1 case where they have to -- can't mention who the parties are,
2 what the amounts are. So we're not talking about the
3 Complaint -- the Complaints, iterations, we're not talking
4 about the counterclaims, we're not talking about discovery.
02:39PM 5 We're now talking about trial.

6 And the summary judgment order is a dispositive
7 motion. So to keep stuff redacted from the order, it's a very
8 difficult showing. I'm being very candid with you. And I
9 don't know whether you appreciate this. You don't want me to
02:40PM 10 keep this sealed because it's going to be impossible to try
11 your case. There are so many steps you have to do to it.

12 I just had one espionage case dealing with our
13 nuclear submarines and the technology, quieting technology -- I
14 don't know if you remember the book and the movie, *Run Silent*,
02:40PM 15 *Run Deep* where you -- it was the exact technology that was used
16 to make it run quiet. It could not be picked up on sonar.

17 And, unfortunately, there was an individual from
18 China who was in this country for over 20 years, 25 years, and
19 he was funneling to China all our very important Naval secrets.
02:41PM 20 All of the information became public except this limited
21 information which this defendant knew. He was convicted. I
22 sentenced him to life in prison. It was affirmed by the
23 Circuit. So that's why I can tell you about it. But the only
24 thing that we kept confidential was that specific technology,
02:41PM 25 how to run silent and run deep.

1 So I'm giving you this little dialogue, which I'm
2 sure you don't appreciate, but is -- you can't -- you can't
3 keep this confidential in a trial. And it's even more
4 compelling here because the information, as I understand it, is
02:42PM 5 outdated at this point. So I don't know why you want to fight
6 hard, both sides, trying to keep it confidential, keep it
7 confidential under seal.

8 That means technically the jury doesn't even get to
9 know it. Or if they do get to know it, they have to have
02:42PM 10 documents and they can't hear testimony because it can't be on
11 the record. I have to close the proceedings from the public.
12 And this Circuit is pretty extreme about shutting down a
13 courtroom. A lot of judges have gotten into trouble. So I'm
14 not going to be able to do it is what I'm getting to say.

02:42PM 15 MR. ANDERSON: Yes, Your Honor.

16 THE COURT: So I don't know if this makes your feel
17 more comfortable talking about the names on a public -- you can
18 go ahead to move to have it redacted or kept under seal, but I
19 think you're wasting your time at this point.

02:42PM 20 MR. ANDERSON: Your Honor, I will say that from our
21 perspective, we completely agree. And as someone who would be
22 filling out all those forms, I really don't want to be doing
23 it.

24 Your Honor, I simply preserve the matter because
02:43PM 25 there is some indication, and we don't want to come to the

1 point where by discussing it publicly we've somehow waived the
2 trade secret protection over it. But we completely agree, and
3 we will not proceed beyond that. That's really the reason I
4 mentioned it.

02:43PM 5 THE COURT: All right. Enough said.

6 So my question was I'm trying to get what is in the
7 record before me, which I have to rule on, is the evidence
8 that's before me sufficient?

9 First question for you is, to your knowledge, what
02:43PM 10 is the information to support Elysium's claim -- claims,
11 counterclaims for product safety and CGMP? Is it limited to
12 just these April 2017 PCI test results or is there some other
13 evidence that you're aware of that they have?

14 MR. ANDERSON: We are aware of no other evidence
02:43PM 15 related to the acetamide claims.

16 THE COURT: Okay. Now, with respect to the PCI test
17 results, I assume you say that's not good enough. And if it's
18 not good enough, tell me specifically why. I don't want to be
19 accused that I'm making it up here.

02:44PM 20 MR. ANDERSON: Yes, Your Honor. Those test results
21 were done using what every party in this case -- every party to
22 have looked at those test method agrees was not a good test.
23 It was a test that returned false positives. Now, Elysium knew
24 that. Elysium's alternative suppliers, both of them, knew
02:44PM 25 that. And, in fact, their alternate suppliers developed a new

1 version of the method that resulted in lower levels of
2 acetamide.

3 Now, we hired an expert to actually go and look at
4 why that was. And she concluded that this test method is junk
02:44PM 5 science. Those test results cannot be relied upon. Elysium
6 knew that, and therefore, there's nothing in the record that's
7 reliable that a jury could find.

8 THE COURT: Okay. Now, Mr. Morris, he also, did he
9 not, say that those test results were not reliable?

02:45PM 10 MR. ANDERSON: He did say that.

11 THE COURT: Okay. Then let me switch subjects on
12 Elysium's counterclaims. You have the exclusivity claim,
13 breach of the exclusivity provision. And Dr. Cockburn, he
14 comes up with a significant amount of money, I should say a
02:45PM 15 range, \$68,355 to \$571,981. It's a pretty big range.

16 And as I understand his theory, it's a percentage of
17 the competing products that were sold by four other companies.
18 And the expert opines that he thinks Elysium would have been
19 able to capture a percentage of those sales. Tell me why you
02:46PM 20 think this is too speculative to go to the jury.

21 MR. ANDERSON: Yes, Your Honor. I will say from the
22 get-go I deposed Dr. Cockburn. I wanted to know how he got
23 that 10 percent, how he got that 90 percent. Where are these
24 numbers coming from? And all he was able to tell me is that
02:46PM 25 because he's an expert in this, that's where they came from.

1 So, Your Honor, putting that to the jury, there's no
2 way for us to have any ability of dialing that in, how did he
3 get to the 10 and the 90? It's basically saying pick your
4 poison. And, Your Honor, that's not reasonably certain which
02:46PM 5 is what the law requires. It asks them to speculate, to throw
6 a dart at the map. And with a range that wide and without any
7 methodology to get there, they just can't satisfy that
8 reasonable certainty. In fact, he used the word, Your Honor,
9 "wide bands of uncertainty." The doctor himself used that
02:47PM 10 word.

11 THE COURT: Okay. Well, I'm sure Elysium is going
12 to have something to say. And if you want to respond to it,
13 you can use some of your time to respond to it.

14 This is probably a question or questions more
02:47PM 15 appropriately for Elysium. But since I have you there,
16 Mr. Anderson, let me ask you about it. As I understand,
17 there's a counterclaim that Elysium says they were damaged by
18 ChromaDex's breach of Paragraph 4.1, which I think is a
19 confidentiality clause, telling its NR customers how to test
02:47PM 20 for Niagen.

21 And I -- I'm not understanding that claim, to be
22 perfectly frank. How are they -- first of all, I guess, was
23 there a breach by ChromaDex telling its NR customers how to
24 test for Niagen? Maybe there's even a threshold question. Did
02:48PM 25 ChromaDex tell its NR customers how to test for Niagen? Was

1 that a breach of the confidentiality Provision 4.1 of the
2 agreement? And if they did tell them and it was a breach, then
3 what are -- what is the evidence in the record to support that
4 they were damaged by that breach?

02:48PM 5 So I don't know if you disagree with all of those
6 premises of my question. But the first, I think, question in
7 this series was did they tell their NR customers how to test
8 for Niagen?

9 MR. ANDERSON: Your Honor, I think I can answer all
02:49PM 10 those questions pretty quickly actually.

11 THE COURT: Okay.

12 MR. ANDERSON: Just to clarify, this is the
13 counterclaim that was in the amended counterclaims that
14 Elysium -- it's not in their Third Amended Counterclaims? Is
02:49PM 15 that the one we're talking about?

16 THE COURT: Correct. Yes.

17 MR. ANDERSON: My understanding is that it may have
18 been Section 4.2, but I could be off on that. And I think that
19 specific provision deals with terms of the contract. My
02:49PM 20 understanding is that Elysium is not proceeding forward on that
21 counterclaim to trial. So I will let them address that. And
22 if that's not true, if I've mischaracterized that, I can
23 address it on my time.

24 THE COURT: Okay. All right. Well, that's all the
02:49PM 25 questions I have for you at this point. Like I say, what I

1 think would be the most efficient to proceed is let me talk to
2 Elysium for a while, and then we'll take a break, and then I'll
3 hear any further argument either side wants to hear.

4 MR. ANDERSON: Can I say one more thing, Your Honor?

02:49PM 5 THE COURT: Sure.

6 MR. ANDERSON: Just to make sure I set the record
7 straight, you did ask Mr. Attanasio on his time about breaches
8 of contract that Mr. Morris had personally. We did serve an
9 interrogatory on Elysium dealing with a variety of additional
02:50PM 10 information that Mr. Morris personally took with him under
11 those contracts. They've got that information. That wasn't
12 present -- it wasn't presented to you on summary judgment.

13 The only issue with confidentiality agreements with
14 Mr. Morris was consideration. That's why Your Honor doesn't
02:50PM 15 have that information in front of you. But there is additional
16 information beyond those two avoided cost documents that we
17 talked about. I just wanted to set the record straight on
18 that.

19 THE COURT: Right.

02:50PM 20 MR. ANDERSON: Yes.

21 THE COURT: And the consideration, candidly -- I
22 mean, I'll hear from Elysium -- I -- if he has confidential
23 information in his head or in documents, that's the
24 consideration, you know, to continue to abide by that.

02:51PM 25 MR. ANDERSON: Yes, Your Honor. We would agree with

1 that. But I just wanted to make sure you knew.

2 THE COURT: Okay. All right. We'll hear from
3 Elysium.

4 MR. SACCA: Good afternoon, Your Honor. Joe Sacca.

02:51PM 5 THE COURT: Mr. Sacca, okay. Which do you -- let's
6 start with ChromaDex's claims, and then we'll end with yours,
7 if you don't mind.

8 MR. SACCA: Of course.

9 THE COURT: Give me your criticisms -- let me try to
02:51PM 10 be more precise. Do you feel that the \$8.3 million in damages
11 for resale profits is an issue that should go to the jury? If
12 not, tell me why not.

13 MR. SACCA: No, Your Honor. Nothing to do with how
14 it was calculated, though we certainly might quibble with that.
02:51PM 15 But what that is is it's an attempt to extend the breach of
16 contract claim to a tort claim.

17 ChromaDex has a claim for Elysium's nonpayment for
18 the ingredients that were purchased through that June 30th
19 order. Elysium has counterclaims that ChromaDex overcharged
02:52PM 20 for that by virtue of its breach which it concealed of the MFM
21 provision of the agreement.

22 But the theory that I understand them to be
23 proceeding on now is that Elysium somehow was aided by
24 information from Mr. Morris to make that purchase. And the
02:52PM 25 record evidence refutes that.

1 What the record shows is that Mr. Jaksch, just like
2 Mr. Morris did, corresponded with Elysium about ChromaDex's
3 interactions with Live Cell. One thing Mr. Jaksch told Elysium
4 was that Live Cell was a problem customer and ChromaDex
02:52PM 5 intended to eliminate it going forward.

6 Another thing he told Elysium was that in 2015 Live
7 Cell bought about three times the volume that Elysium did. He
8 told Elysium that Live Cell's last significant order was placed
9 in the third quarter of 2015. He told Elysium that in 2016
02:53PM 10 Elysium was substantially ahead of Live Cell on volume.

11 All of that correspondence preceded the June 30
12 telephone call on which Elysium and ChromaDex agreed to the
13 order Elysium placed. And then, significantly, during that
14 phone call, and I think the evidence is clear on this and we've
02:53PM 15 cited it in our papers, Mr. Jaksch and Mr. Black, who was
16 ChromaDex's executive vice president of sales and marketing and
17 participated in the call, told Elysium that Live Cell was
18 purchasing for \$800 a kilogram.

19 Now, none of this can be divorced, I think, from the
02:53PM 20 most favored nation's pricing provision of the supply
21 agreement. Because ChromaDex's theory is that had Mr. Morris
22 not told Elysium the truth, that Live Cell was buying less
23 product than Elysium at lower prices, Elysium would have
24 blindly gone ahead and continued to pay \$1,000 a kilogram.

02:54PM 25 But that's not the reality. It wasn't just

1 Mr. Morris, but it was also Mr. Jaksch that told Elysium that
2 Live Cell, a lower-volume customer, was paying a lower price.
3 Elysium wouldn't, under those circumstances, have paid more
4 than Live Cell because its view at the time was that the
02:54PM 5 contract required ChromaDex to give them NR for \$800 a
6 kilogram, the same price as Live Cell.

7 It turns out, and we only learned this is discovery,
8 that there were other customers buying lower volumes at lower
9 prices. But what Elysium knew at the time, and that was the
02:54PM 10 whole focus of this conversation on June 30th is what was the
11 pricing that other ChromaDex customers were getting?

12 Another thing Mr. Jaksch told Elysium during that
13 call is what ChromaDex's margins were. That's oftentimes a
14 discussion between supplier and customer. Customer wants to
02:55PM 15 get a fair price; the supplier wants to get a fair return, so
16 it'll share. We're looking to make X. And Mr. Jaksch said is,
17 you know, we're looking for a margin of 50 percent on our
18 sales.

19 ChromaDex's own expert testified at his deposition
02:55PM 20 that Elysium knew what it was being charged, knew the margins
21 that ChromaDex was seeking, because Mr. Jaksch told him that,
22 and from there it's just math to get at the cost of the
23 product, which is the same thing that Mr. Morris is said to
24 have given ChromaDex.

02:55PM 25 So the fundamental problem with this theory that

1 ChromaDex is entitled to all of Elysium's profits from that
2 sale is that sale was the result of a fully informed, on both
3 sides, negotiation between the parties where ChromaDex had told
4 Elysium what Live Cell was doing and what it was paying. Both
02:56PM 5 sides knew that their contract had a most favored nations
6 pricing provision on it, and they agreed on that call to a sale
7 of 3,000 kilograms of NR at \$800 a kilogram.

8 THE COURT: Can you give me where in the record the
9 specific testimony -- I assume it's deposition testimony --
02:56PM 10 that Mr. Jaksch, what he told Elysium in that conference call?

11 MR. SACCA: Yes.

12 THE COURT: And while you're thinking of that, you
13 also mentioned that Elysium was told -- I don't know whether it
14 was by Mr. Jaksch or someone else -- what ChromaDex was paying
02:57PM 15 the manufacturer for the ingredients so that they could make a
16 profit. Where is that in the record?

17 MR. SACCA: That's in certainly Mr. Jaksch's
18 testimony.

19 THE COURT: Deposition testimony?

02:57PM 20 MR. SACCA: Yes. It's in Mr. Marcotulli's
21 deposition testimony. It's in Mr. Alminana's deposition
22 testimony. And I believe it's in -- I'm not sure if it's in
23 Mr. Black's deposition testimony.

24 But there are a series of e-mails that Mr. Jaksch
02:57PM 25 sent to Elysium where he talked -- at least two e-mails where

1 he talked about the relationship with Live Cell, and we have
2 cited those in our paper, and my colleague is looking for the
3 citations to those.

4 And then Mr. Jaksch testified about the conversation
02:57PM 5 on June 30th at which he told Elysium Live Cell's price was
6 \$800 a kilogram.

7 THE COURT: And where -- is it Mr. Jaksch or someone
8 else says, "Our profit margin is 50 percent"?

9 MR. SACCA: Yes. And also in Mr. Jaksch's
02:58PM 10 deposition testimony.

11 THE COURT: And that's in the record?

12 MR. SACCA: It's in the record before you.

13 THE COURT: Okay. So if I understand, then, what
14 you just told me, Mr. Sacca, you're not here to quibble with
02:58PM 15 the calculation of the 8.3 million; you're here to say there's
16 not sufficient evidence that there was any confidential, trade
17 secret, breach of fiduciary duty by Mr. Morris in supplying the
18 information to Elysium because Mr. Jaksch or other people at
19 ChromaDex already gave that information to Elysium?

02:59PM 20 MR. SACCA: Yes, Your Honor. Not to say that I
21 agree with that number, but the quibble about the number is not
22 the basis for summary judgment either way --

23 THE COURT: Okay.

24 MR. SACCA: -- in our estimation.

02:59PM 25 THE COURT: All right. You heard me ask a few

1 questions about the \$110,000 in damages for avoided costs.

2 MR. SACCA: Yes.

3 THE COURT: And I -- again, there was a lot to try
4 to look at to get ready for this hearing today. And I saw
02:59PM 5 Mr. Gunderson's statement that the costs were not tracked. I
6 read it. And where in the record I have the question is the
7 support for those costs. Are you aware of -- in the record
8 where there's testimony or business records?

9 MR. SACCA: All I'm aware of, Your Honor, is an
02:59PM 10 absence of evidence. We sought to inquire into this at the
11 30(b)(6) deposition of ChromaDex. It was a notice topic of the
12 deposition. A gentleman named Tom Varvaro, who had been
13 ChromaDex's chief financial officer, was the 30(b)(6) designee.

14 And in testimony that we cited in our papers, what
03:00PM 15 he said is he believed that ChromaDex's costs -- he was not
16 able to say what ChromaDex's costs for developing these
17 materials was. He thought an expert would have to do that if
18 it could be done but that he also believed ChromaDex did not
19 track the time spent by its employees in a manner that would
03:00PM 20 allow it to be done. That's the evidence that I'm aware of.

21 THE COURT: All right. The next item of damages
22 that I asked about were the \$600,000 in damages for a price
23 discount. And I assume, tell me if I'm wrong, that your
24 argument is going to be the same, that Mr. Jaksch or someone
03:00PM 25 else that you're going to give me the specific evidentiary

1 citations in the record already told Elysium the pricing for
2 Live Cell and what your profit -- what ChromaDex's profit
3 margin was?

03:01PM 4 MR. SACCA: Yes, Your Honor. The -- it wasn't a
5 discount. If that price was -- if what ChromaDex was telling
6 Elysium had been true, and it turns out it wasn't, but if what
7 ChromaDex was telling Elysium had been true, that price would
8 have been dictated by the contract. Elysium was actually
9 entitled to a lower price, but that didn't become clear until
03:01PM 10 discovery.

11 THE COURT: Okay. Next question or areas that I
12 asked was the information that Mr. Morris supposedly gave to
13 Elysium that was in breach of the confidentiality agreements.
14 And as I understand it now, the main focus is the pricing, the
03:02PM 15 manufacturing costs, which we've talked about, and then you had
16 the avoidance costs for those documents that ChromaDex
17 generated internally.

18 So what is your position on whether Mr. Morris
19 breached any confidentiality agreements with respect to that
03:02PM 20 information?

21 MR. SACCA: Your Honor, I think I'd have to parse
22 them out. With respect to Live Cell's transactions, I think
23 that was part of Mr. Morris' responsibility to tell Elysium if
24 it was or wasn't getting the price to which it was entitled.
03:03PM 25 It's the same sort of information Mr. Jaksch shared.

1 With respect to the NRCL analytical method and the
2 pTeroPure GRAS report, today was the first time I've heard from
3 ChromaDex that they allege a breach of contract by Mr. Morris
4 for providing that to Elysium. Maybe it's a distinction
03:03PM 5 without a difference.

6 But the way they've always pled that claim and
7 argued it is to argue that those documents were given to
8 Elysium by ChromaDex in the course of their business
9 relationship and that they were deemed confidential under the
03:03PM 10 supply agreement and that it was Elysium that breached the
11 supply agreement by disclosing those documents to others, not
12 Mr. Morris breaching an agreement by giving them to Elysium.

13 I would say, again, this has to be separated out
14 because a lot of the times that they complain that Elysium gave
03:04PM 15 that information to someone else, we would say it was clearly
16 contemplated and permitted by the supply agreement which
17 allowed Elysium to share confidential information with business
18 partners and people necessary to the process of doing what it
19 did, which is taking NR, encapsulating it, and selling it.

03:04PM 20 And a lot of the transmissions of the NRCL
21 analytical method that ChromaDex is complaining about came when
22 Elysium was selling ChromaDex's NR in its product and,
23 therefore, had to tell its encapsulators how to be able to test
24 for the presence of NR in the product, because the
03:04PM 25 encapsulators had to test for it before they could allow it to

1 be sold.

2 So I think really ChromaDex's complaint comes down
3 to the fact that Elysium shared the NRCL analytical method with
4 its alternative supplier and that it shared the GRAS report
03:05PM 5 with a company that was contemplated to do a new dietary
6 ingredient notification to FDA on Elysium's behalf. And we
7 cite this in our papers, discuss this in our papers.

8 But PCI, the alternative manufacturer, ended up
9 spending a significant amount of time and Elysium's money to
03:05PM 10 develop its own analytical method to test for the presence of
11 NR in the product it was manufacturing. And Elysium ultimately
12 didn't go forward with making an NDI submission to FDA.

13 So our answer on those is ChromaDex certainly can't
14 show any profitable use by Elysium of the information or damage
03:05PM 15 to itself.

16 THE COURT: Okay.

17 MR. SACCA: I think Your Honor's next questions to
18 Mr. Attanasio were about the MFN pricing and how that interacts
19 with ChromaDex's claims against Elysium, which I'm happy to
03:06PM 20 address.

21 THE COURT: You are correct. Let's deal with that.

22 The concern from ChromaDex obviously is that it's
23 speculation. As I understand it, it's a percentage of
24 competing products that --

03:06PM 25 MR. SACCA: Oh, I'm sorry. That's the exclusivity

1 breach. I was -- I was going to address first the MFN --

2 THE COURT: What's --

3 MR. SACCA: -- provision, but I'm happy to talk
4 about exclusivity first, if you'd rather.

03:06PM 5 THE COURT: No. Let's go to most favored nation.

6 MR. SACCA: Okay.

7 THE COURT: Give me a chance to get where that is.

8 MR. SACCA: I do think the MFN provision is vitally
9 important to this case because that's the genesis of the
03:07PM 10 dispute between ChromaDex and Elysium. It's what caused their
11 initial disagreement in the first place.

12 Mr. Attanasio agreed with you, as I understood what
13 he was saying, in concept that Elysium was entitled to
14 information that would allow it to validate whether ChromaDex
03:07PM 15 was compliant with the MFN provision, though he said that the
16 blinded spreadsheet Mr. Jaksch sent over to Elysium was a
17 mechanism for doing that.

18 I think it's important that Your Honor understand
19 that had Mr. Jaksch done what he intended to do, which is send
03:07PM 20 Elysium only the first part of that spreadsheet, the first tab
21 of the Excel spreadsheet, which had letters substituted for
22 customer names, he never would have told Elysium that Live Cell
23 was buying lower quantities at a lower price, because he
24 intended to leave that information out of the blinded
03:08PM 25 spreadsheet.

1 So the blinded spreadsheet itself was not certainly
2 a perfect mechanism for disclosure to Elysium of information
3 necessary to determine whether ChromaDex was compliant with the
4 MFN provision.

03:08PM 5 What was sufficient, at least in part, was the kind
6 of conversation that Elysium had with Mr. Morris and then,
7 again, with Mr. Jaksch about Live Cell, its purchasing volumes,
8 the price it was being charged. That sort of information was
9 what allowed Elysium to realize that it was entitled to a lower
03:08PM 10 price.

11 Like I said, it still wasn't complete. It wasn't
12 until discovery in this case that we learned the most complete
13 information including that ChromaDex was selling to a company
14 owned by one of its own directors for a price substantially
03:09PM 15 below what it was charging Elysium at much lower quantities.
16 But I think --

17 THE COURT: That's Live Cell; correct?

18 MR. SACCA: No. That's Healthspan. But I think --

19 THE COURT: Healthspan. Is that Innovations For
03:09PM 20 Health?

21 MR. SACCA: No.

22 THE COURT: That's a different one?

23 MR. SACCA: That's a different one as well.

24 THE COURT: Okay. Go ahead. I'm sorry.

03:09PM 25 MR. SACCA: There were multiple breaches of the MFN

1 provision, Healthspan being one of them but not the only one.

2 So I think, Your Honor, that's -- the MFN pricing
3 provision is inextricably tied in this case to the parties'
4 dispute because it was Elysium believing it wasn't getting the
03:10PM 5 price to which it was entitled that started their dispute in
6 the first place.

7 It was the June 30 order that arose out of the
8 beginning of that conversation between Elysium and ChromaDex
9 that is at the root of this case and at the core of, you know,
03:10PM 10 ChromaDex's new and narrowed claims for profits that Elysium it
11 says earned by selling the products it bought on June 30th.

12 But I think when the MFN provision's significance is
13 realized, it becomes clear that -- and the information the
14 parties exchanged in discussing that, it becomes clear that
03:11PM 15 this case is about Elysium's nonpayment for that order and, you
16 know, how much it owes ChromaDex for those products or
17 ChromaDex owes it once you properly calculate the applicable
18 prices under the pricing provision.

19 THE COURT: Okay.

03:11PM 20 MR. SACCA: So to then turn to Elysium's additional
21 counterclaims, Your Honor asked about the product safety
22 counterclaim and the CGMP counterclaim together. I would,
23 again, like to separate those because they are distinct in a
24 sense.

03:11PM 25 The product safety provision of the agreement is a

1 notice provision. It's not a warranty, but it's a provision
2 that put an affirmative duty on ChromaDex to alert Elysium
3 whether -- if it knew of anything that impacted the safety or
4 identity of the product it was selling.

03:12PM 5 And what the evidence there shows is that ChromaDex
6 did understand that acetamide was a byproduct of the
7 manufacturing process for NR. And there are documents that
8 show internal ChromaDex discussions about that.

9 There's evidence that ChromaDex did not test the NR
03:12PM 10 it sold to Elysium for acetamide. And then there's the
11 evidence Your Honor discussed earlier that PCI did test for
12 acetamide and found it in levels that exceeded California's
13 Proposition 65 safe harbor.

14 The CGMP provision is different. That was a
03:12PM 15 warranty that the NR ChromaDex sold to Elysium would be
16 manufactured in accordance with pharmaceutical Current Good
17 Manufacturing Practices, which is an FDA standard. And it's a
18 high standard. It's a rigorous standard.

19 And it was significant to Elysium. And there's
03:13PM 20 testimony in the record about this, because for a supplement
21 company to be pharmaceutical CGMP-compliant is a good thing.
22 Most supplement companies are not. There's a lower standard of
23 manufacture that applies to dietary supplements.

24 But ChromaDex represented in the contract that the
03:13PM 25 NR it was going to sell to Elysium would be pharmaceutical

1 CGMP-compliant. And it turns out that wasn't true from day one
2 of the contract and running through the time ChromaDex stopped
3 selling to Elysium. It never was pharmaceutical
4 CGMP-compliant.

03:13PM

5 And ChromaDex's own executives admitted that.
6 There's -- I don't think you'll hear from the other side of the
7 table that there's any dispute about whether ChromaDex was not
8 in compliance with that provision of the contract.

03:14PM

9 Turning, then, to the breach of exclusivity
10 damages --

11 THE COURT: You didn't -- what is the damages that
12 Elysium is seeking for those breaches, though, on quality and
13 safety?

03:14PM

14 MR. SACCA: Those are essentially the costs of
15 testing -- with respect to the acetamide, it's essentially the
16 cost of testing for acetamide. So they're not significant in
17 number though.

03:14PM

18 And with respect to the CGMP, it's the difference
19 between what ChromaDex could have charged Elysium for it had it
20 been truthful about the quality of the product it was selling.
21 So the delta between what it charged Elysium at times when it
22 was telling Elysium that it was selling a pharmaceutical CGMP
23 product and what it was charging other customers who it was
24 either silent with respect to the standards under which its
03:15PM 25 product was manufactured or truthful as to the standards under

1 which its product was manufactured.

2 THE COURT: Did Mr. Cockburn or some other
3 individual or expert --

4 MR. SACCA: It's in Dr. Cockburn's report.

03:15PM 5 THE COURT: Okay.

6 MR. SACCA: And then with respect --

7 THE COURT: And that's before me; right?

8 MR. SACCA: Yes.

9 With respect to the breach of exclusivity, the law
03:15PM 10 says that when the fact of damages is certain, some uncertainty
11 as to the amount of damages is tolerable, essentially because a
12 wrongdoer shouldn't be relieved of responsibility because
13 damages happen to be difficult to calculate.

14 I think here, the fact of damages is almost
03:16PM 15 self-evident. The exclusivity provision said that ChromaDex
16 wouldn't sell to or enable any customer to sell a combination
17 of NR and pterostilbene or any substantially similar products.

18 Because ChromaDex was, at the time, the sole
19 commercial supplier of NR, it had it fully within its control
03:16PM 20 whether any competitor or Elysium sold a competing product.
21 ChromaDex could stop it from doing so simply by not selling NR.
22 Yet it allowed competitors of Elysium to sell what we say were
23 competing products in the marketplace.

24 Dr. Cockburn's analysis proceeds from the assumption
03:17PM 25 that were those NR-containing products not in the marketplace,

1 Elysium selling a -- its own NR combination product would have
2 obtained some of those sales. He does not award 100 percent of
3 the sales to Elysium because he did consider factors like what
4 channel is in the market the competitors were selling into,
03:17PM 5 what the ratio of NR to pterostilbene or what we say is
6 competing Reveratrol were and the like. And that's where he
7 came up with his range of damages.

8 THE COURT: Okay. I think, then, that gets us to
9 the 4.1 -- or is it 4.2 of the agreement?

03:17PM 10 MR. SACCA: It's 4.2, Your Honor. And Mr. Anderson
11 was right. That is a claim we are no longer intending to
12 pursue at trial. The theory there was attached to the parties'
13 supply agreement or specifications for the NR that ChromaDex
14 would sell and the pterostilbene that ChromaDex would sell to
03:18PM 15 Elysium. And ChromaDex sued Elysium for violating the terms of
16 the agreement or violating the supply agreements by disclosing
17 to people the terms of the agreements by sharing those
18 specifications. We disputed that Elysium ever did that. But
19 our counterclaim was sort of just the exact inverse of that
03:18PM 20 claim.

21 ChromaDex also shared with people those same
22 specifications and attached them to SEC filings and
23 disseminated them widely. And the contract drew no distinction
24 between who could or couldn't share terms of the agreement. So
03:19PM 25 if Elysium was in violation by sharing terms of the agreement,

1 so was ChromaDex. ChromaDex abandoned its claim, so we stopped
2 pressing ours.

3 THE COURT: I think that is where I want to take a
4 break. Debbie must be about ready to drop. So give her 10 to
03:19PM 5 15 minutes, and then we'll pick up with any further argument.
6 And again, if you could keep it no longer than 15 minutes a
7 side. And if you want to reserve some time to rebut what the
8 other says, do so.

9 THE COURTROOM DEPUTY: All rise.
03:19PM 10 Court stands in recess.

11 **(Recess from 3:19 p.m. to 3:39 p.m.)**

12 THE COURT: Okay. Mr. Attanasio, do you want to
13 start first, sir?

14 MR. ATTANASIO: Thank you, Your Honor. We will
03:39PM 15 reserve five minutes, if that's agreeable with the Court.

16 THE COURT: It is.

17 MR. ATTANASIO: So I'm going to just cover
18 approximately, I believe, three points, Your Honor. The first
19 is I want to clarify something about the 110,000 in avoided
03:39PM 20 costs that we visited about earlier.

21 And I want to say that counsel was correct. Counsel
22 is correct; I misspoke. Those 110,000 of avoided costs are the
23 a breach -- are damages arising from a breach of contract
24 claim, not by Mr. Morris but by Elysium, and counsel accurately
03:39PM 25 characterized that.

1 The theory of the case is that Elysium had documents
2 to which it was contractually entitled initially and then used
3 those documents and disclosed them in ways that were
4 extra-contractual, that were outside of the contract. That
03:39PM 5 would be a hotly disputed factual issue, but it certainly is
6 one that I believe goes to the jury during trial.

7 Second, I promised to return, Your Honor, to the
8 question of the calculations of the \$8.3 million in damages.

9 THE COURT: Yes.

03:40PM 10 MR. ATTANASIO: Let me refer at the outset to the
11 critical document that informs us on that. It is Exhibit 64 to
12 our summary judgment papers. It is a tracker maintained by
13 Elysium. It is an actual Elysium corporate document in which
14 Elysium tracked by batch sales of its product, Basis, based on
03:40PM 15 the batches of ingredients that were in those products.

16 So Elysium would receive from ChromaDex pursuant to
17 the June 30th orders batches of products, batches of
18 ingredients. Elysium then could track those ChromaDex products
19 by batch number out into the stream of commerce. Our expert,
03:41PM 20 Mr. Gunderson, looked very carefully at those batch records,
21 and from those batch records was able to isolate the sales of
22 Elysium's Basis product that included ingredients from the
23 June 30th orders, the revenue from those sales, and then
24 applied the marginal profit calculation that he performed. So
03:41PM 25 that's sort of the math of it all, Your Honor.

1 That is covered in sum- -- in summary fashion in
2 Footnote 5 to our supplemental brief in response to
3 Your Honor's October order. And what that refers to is the
4 Schedule 5 and associated schedules in Mr. Gunderson's expert
03:41PM 5 report. One of those is included as Exhibit 107.

6 It includes Mr. Gunderson's calculation that the
7 revenue in question, as Your Honor had earlier said, confirming
8 that number was approximately \$16 million. And then applies
9 the profit margin, as I said earlier, that Elysium used in its
03:42PM 10 own internal documents which gets you to an approximately
11 51 percent profit margin. And there we are at \$8.3 million.

12 THE COURT: Okay. Do you know or -- off the top of
13 your head -- and this is probably unrelated, but you said one
14 of the most valuable pieces of confidential trade secret
03:42PM 15 information was the pricing and customers and quantities. Is
16 that set forth in a spreadsheet somewhere that's an exhibit
17 that was submitted to me?

18 MR. ATTANASIO: Yes, Your Honor. The bulk of that
19 information, the biggest amount of that information is
03:42PM 20 contained in something called the ingredient sales spreadsheet.
21 I'll get the exhibit number momentarily.

22 THE COURT: All right.

23 MR. ATTANASIO: Perhaps Mr. Anderson could find it
24 for me. That was submitted to the Court. That is something
03:43PM 25 that Mr. Morris took from ChromaDex near the end of his

1 employment with ChromaDex. The record is undisputed, I
2 believe, from Mr. Morris' deposition that he had the ingredient
3 sales spreadsheet saved on a thumb drive. He went and took that
4 thumb drive from his desk. He put it in a backpack. He walked
03:43PM 5 out of ChromaDex. He traveled from California to New York.

6 He got to New York. He went to work for Elysium.
7 He opened his backpack. He took the ingredient -- he took the
8 thumb drive out. And then the very next day, the day after he
9 started working for Elysium, that information, the ingredients
03:43PM 10 sales spreadsheet was where? It was on the computer hard drive
11 of none other than Mr. Eric Marcotulli, the chief executive
12 officer of Elysium.

13 Now, both Mr. Marcotulli and Mr. Alminana are going
14 to disclaim in front of the jury any knowledge of how it got
03:44PM 15 there or why it was there or what it was for. But I think
16 that's something the jury can evaluate along with other
17 evidence we have of the communications at Elysium. But that's
18 the answer to Your Honor's question.

19 THE COURT: And I appreciate that explanation. It
03:44PM 20 would be very helpful if you could give me the exhibit number.

21 MR. ATTANASIO: Your Honor, it's Exhibit 26.

22 THE COURT: To the original motion?

23 MR. ATTANASIO: Of our opposition, Your Honor.

24 THE COURT: Opposition.

03:44PM 25 MR. ATTANASIO: Finally, Your Honor, let me just

1 address what counsel characterized as a critical piece of the
2 case, which is the most favored nation clause. I'd like to
3 make a couple points about this. But the bottom-line point is
4 this is something that should go to the jury.

03:44PM 5 ChromaDex never violated the most favored nation
6 clause. We will prove that. We will go through all the prices
7 that are at issue, and we will show that under the terms of the
8 most favored nation clause, on its own terms, ChromaDex did not
9 violate it.

03:45PM 10 But just for today's purposes, here's why this is a
11 triable issue of material fact. The language -- we start with
12 the language of the MFN. The parties have gone back and forth
13 about what it means, but I don't believe -- I don't believe one
14 could say credibly that there's not any ambiguity in that
03:45PM 15 contractual clause, that there's not going to have to be
16 testimony about the clause and what it means for the jury to
17 decide.

18 Then there are three aspects of factual dispute that
19 one has to look at that will be contested beyond just the price
03:45PM 20 number. And those three facts are -- and we have abundant
21 evidence of this littering the record, and we certainly will at
22 trial: First, the measurement period. I say to Your Honor,
23 you have a most favored nation clause. I won't sell to anyone
24 at a higher price -- at a lower price, pardon me, than I sell
03:46PM 25 to you.

1 Well, the first question is when I say that, what
2 period of time are we talking about? Is it a quarterly look?
3 Is it an annual look? Or is it that any time I make one sale
4 one time to one customer for whatever reason, I have to then
03:46PM 5 sell to you at all times, for a quarter, for a year, forever at
6 a price lower than that? That's question one.

7 Question two is at what volumes are we talking
8 about? If I make a most favored nation promise on pricing to a
9 party, to a buyer, and that party buys ten kilograms, but I
03:46PM 10 sell to another party 500,000 kilograms, and for that volume I
11 give them a discount, which happens every day in business,
12 every day in sales, that is a live issue here.

13 That is a clause in the most favored nation section
14 of the agreement that talks about for companies buying the
03:47PM 15 highest volumes. And so that has to be sorted out between
16 Elysium on the one hand and all the other customers on the
17 other hand.

18 Third and finally, and this gets to one of the
19 companies that counsel mentioned, is there any other
03:47PM 20 consideration? I sell to another company for a lower price
21 than Elysium, but that company gives me equity or gives me
22 stock or gives me some other consideration in its company that
23 is tied somehow to the discounted price. I will sell to you
24 for \$500 a kilo a low price, but you have to give me X, Y, or
03:47PM 25 Z. What is that value and how do you calculate the two

1 together?

2 All of this has been hotly contested in discovery,
3 which is fair, but it needs to now be hotly contested in front
4 of the jury. I don't see any way this Court can unravel all of
03:48PM 5 those factual strands and come to a summary judgment conclusion
6 about most favored nation.

7 Finally, Your Honor, just on this bit about what
8 Mr. Jaksch disclosed or didn't disclose on the June 30th call,
9 I would simply point out that the disclosures made by
03:48PM 10 Mr. Morris on May 29th, 2016, went far beyond in quality and
11 scope of information the -- any disclosure made by Mr. Jaksch
12 about Live Cell and the price to Live Cell on June 30th.

13 Equally importantly, the fact that Mr. Alminana and
14 Elysium had that information for all that time gave them a
03:48PM 15 substantial leg up for purposes of negotiating during those 30
16 days and, indeed, during the last three days, June 28, June 29,
17 June 30th.

18 And just to give Your Honor some flavor, the two
19 things that counsel points to from the June 30th call are a
03:49PM 20 disclosure about Live Cell, \$800 a kilo, and a disclosure about
21 margin.

22 This is the text message from May 29 from Mr. Morris
23 to Mr. Alminana:

24 "Dan, Live Cell was at \$1400 until August 29,
03:49PM 25 '14, when we sold them 100 kilos at \$900. Then on

1 February 27, 2015, we sold them 300 kilos at \$800.

2 They have been there ever since, including orders
3 for 250 kilos on both April 28, '16, and 5/19/16."

4 That's ten days before this text. He's just given
03:50PM 5 them the price, the volume, and the date only ten days before,
6 plus all the other information, of a key competitor of Elysium
7 right before Elysium's principals, days before, are going to
8 negotiate with his boss, Mr. Jaksch. To compare that to the
9 last-minute disclosure on the final ultimate call on June 30th,
03:50PM 10 "Oh, okay. Yes, we had a sale of \$800 to Live Cell," is
11 completely a distortion of the record.

12 And then on the margin, all Mr. Jaksch said in his
13 depo -- deposition, Your Honor, was, quote:

14 "I think what I would have said is that we
03:50PM 15 would want to maintain a margin -- a minimum margin
16 of 50 percent. Not a margin of 50 percent, a
17 minimum margin of 50 percent."

18 Well, what that doesn't tell us anything about is
19 all of the sales of ChromaDex's NR to dozens of customers at,
03:51PM 20 as we've already been over, different prices. To have a
21 floating margin, a minimum of 50 percent, which leaves open the
22 possibility it could be 60, could be 70 and beyond, against a
23 complete mosaic of pricing across all customers -- not just
24 Elysium, he's not talking about Elysium here -- across all
03:51PM 25 customers really tells one nothing about what the supplier cost

1 is.

2 That -- for that, we need to rely on Mr. Alminana
3 who shares it with Mr. -- excuse me. We have to rely on
4 Mr. Morris, pardon me, who shares it with Mr. Alminana on
03:51PM 5 June 28, a critical day. He says, "I verified these guys paid
6 \$450 for this inventory." That's Exhibit 15 at page 43,
7 Your Honor.

8 Alminana responds, "What?" You know, "Thanks, but
9 I'm sure I'm going to get that from Frank." No, he doesn't
03:52PM 10 say, "Thanks, I'm sure I'm going to get that from Frank
11 Jaksch." He says, "Amazing." "Amazing." Exhibit 15 at
12 page 43, which is before Your Honor.

13 So this is some real -- I know Your Honor handles
14 many, many criminal cases over the years. This is some real
03:52PM 15 behind-the-scenes-conspiratorial conduct. This is not in
16 line -- this is not ancillary to the MFN clause. This is not
17 ancillary to a good faith discussion about margins. This is
18 subterfuge and scheming and conspiracy.

19 And all we need to know to know that is that every
03:52PM 20 time he was asked in deposition, Mr. Morris, whether he shared
21 any of this information with his superiors or anybody at
22 ChromaDex, the answer uniformly was no. Every time Mr. Jaksch
23 will be asked if he knew about this, the answer will be no.
24 And that's the case we want to try on the simplified basis I
03:53PM 25 shared with Your Honor. Thank you.

1 THE COURT: I appreciate your argument. Thank you.
2 Mr. Sacca?

3 MR. SACCA: Thank you, Your Honor. And I will try
4 to be as brief as Mr. Attanasio was or less, if I can.

03:53PM 5 I'd like to start first just by correcting the
6 record a little bit on the description of the ingredient sales
7 spreadsheet, and in particular, how it came to Elysium.

8 Mr. Morris did not testify that before he left
9 ChromaDex, he took a thumb drive and put it in his backpack and
03:54PM 10 left the company with it. What he explained in his testimony
11 is that he traveled frequently for his job at ChromaDex. He
12 was essentially a salesman.

13 He carried around a thumb drive that had various
14 documents on it that he would use in making presentations to
03:54PM 15 customers. And another document that was on the spreadsheet
16 was -- that was on the thumb drive was the ingredient sales
17 spreadsheet which he said he would update every time he made a
18 sale so he could update it in realtime.

19 That was something that he just left in his shoulder
03:54PM 20 bag. He said at his deposition that he didn't realize it was
21 there when he left the company. He just left the company, and
22 it was in the bag. It was, he said, an oversight.

23 The file did not show up next on Mr. Marcotulli's
24 hard drive either. The way Elysium worked at the time was --
03:55PM 25 it was a small company. They had a Dropbox account. I don't

1 know if Your Honor is familiar with what Dropbox is, but it's a
2 cloud-based storage system.

3 So Elysium had a Dropbox account. And because
4 Mr. Marcotulli was -- you know, founded the company with
03:55PM 5 Mr. Alminana when it was just the two of them, it was his
6 Dropbox account. So, you know, his name is on it. But it's
7 not that the file appeared on a hard drive sitting on
8 Mr. Marcotulli's desk as Mr. Attanasio seemed to imply.

9 The testimony at deposition was that no one at
03:55PM 10 Elysium actually saw the ingredient sales spreadsheet. And I
11 think a jury would find that persuasive because the ingredient
12 sales spreadsheet is what provides the clearest evidence in
13 this case of the MFN breach.

14 If Elysium had that document and knew they had it
03:56PM 15 and had looked at it, they wouldn't have spent months chasing
16 ChromaDex to give them information on sales so that they could
17 assess compliance with the MFN agreement. They would have done
18 what we did in our summary judgment breach. They would have
19 said, "Here are three sales that violated the MFN provision.
03:56PM 20 You owe us a refund."

21 In terms of the information that Mr. Morris gave
22 Elysium qualitatively against what Mr. Jaksch gave Elysium --
23 and I'm sorry, I owe Your Honor. Docket Number 244-1, which is
24 my declaration in support of our motion for summary judgment,
03:56PM 25 Exhibit 32, at pages 249 to 250, is Mr. Jaksch's testimony that

1 he told Elysium during the June 30 call that Live Cell
2 transacted at \$800.

3 What the record shows is in that phone call and in
4 e-mails that preceded it by days and, you know, a couple weeks
03:57PM 5 at the outside is Mr. Jaksch telling Elysium a lot of
6 information about Live Cell's purchases including when it had
7 made its last significant purchase and that it was behind
8 Elysium on volume in 2016, which is really all the information
9 Elysium needed to know to know that it was entitled to at least
03:57PM 10 the price of \$800 kilogram.

11 Mr. Attanasio quibbled, I guess, with my
12 characterization of what Mr. Jaksch said about the margin and
13 emphasized that Mr. Jaksch said it was a minimum margin that
14 ChromaDex was seeking to maintain of 50 percent. If that's
03:57PM 15 right, that information would be actually more harmful to
16 ChromaDex than what Mr. Morris told Elysium, which was
17 ChromaDex's price.

18 If Elysium was looking to ChromaDex's cost as a
19 means to negotiate a price and Mr. Jaksch said, "We're looking
03:58PM 20 for a minimum of 50 percent," and Mr. Attanasio posited it
21 could be 60 percent, it could be 70 percent, well, if it was 70
22 percent and ChromaDex was selling to Elysium for \$1,000 a
23 kilogram, that would mean they were paying \$300 a kilogram for
24 it, which would have pushed Elysium to argue for a lower price,
03:58PM 25 not motivated Elysium to agree to pay a higher price.

1 And the last thing I'd like to address is the MFN
2 provision. I think it's important to keep in mind that the
3 part of the MFN provision that's caused all the ruckus in this
4 case, which is the relative volume provision, was drafted by
03:59PM 5 ChromaDex. So if there's any ambiguity there, it has to be
6 construed against ChromaDex.

7 Mr. Attanasio said that one of the three questions
8 related to the MFN provision is what time period applies. The
9 MFN provision itself answers that question. It's at any time
03:59PM 10 during the term of the agreement a sale to a third party at a
11 lower price, that's the time period that applies.

12 What's interesting is that ChromaDex, although it
13 argues that that's not the right interpretation, can't provide
14 an interpretation of its own. We asked, I think, every
03:59PM 15 ChromaDex witness what the MFN provision means if it doesn't
16 mean what it says, which is that a sale at any time during the
17 agreement can trigger the MFN provision, and we got
18 consistently different answers. Some thought it was a calendar
19 year period. Some thought it was a trailing 12 months period.
04:00PM 20 Some thought it was a trailing 4 months period.

21 I would suggest if the author of the provision can't
22 come up with a valid explanation for what it means apart from
23 its plain language, it's the plain language that really does
24 control.

04:00PM 25 Mr. Attanasio said a second question that needs to

1 be considered is at what volume, and that that's a live issue
2 in this case. It's not really a live issue in this case,
3 certainly not with respect to the particular sales that are the
4 basis for our motion for summary judgment, which are the sales
04:00PM 5 to Innovations For Health and the sale to Procter & Gamble.

6 Both of those sales were just one kilogram each.
7 ChromaDex didn't sell to either of those parties again. So it
8 doesn't matter if you interpret the provision to mean what we
9 say it means, which is at any time during the agreement, or if
04:01PM 10 you interpret it to be a calendar 12-year (sic) period or a
11 trailing 12-month period or a trailing four-quarter period. By
12 any estimation, Elysium's sales were at a higher volume than
13 those two.

14 THE COURT: Does the supply agreement, Mr. Sacca,
04:01PM 15 indicate what the term was specifically?

16 MR. SACCA: Yes, the term was three years, I'm
17 sorry, subject to extension, to one-year extensions.

18 I think implicit in ChromaDex's argument that volume
19 is a live issue is the suggestion that, you know, only certain
04:02PM 20 sales should count, they argued in their papers that only sales
21 made under supply agreements or to customers with long-term
22 supply relationships count. But that's contrary to the plain
23 language of the agreement. The agreement talks about a sale to
24 any third party. A third party is defined expansively as
04:02PM 25 anybody other than ChromaDex or Elysium or one of their

1 affiliates.

2 If you are then to say that it only applies to
3 parties with a supply agreement, you would have to rewrite the
4 definition of "third party" in the agreement. And the law is
04:02PM 5 clear, it's not the Court's job to blue pencil agreements in
6 that respect.

7 Mr. Attanasio said, you know, another factor you'd
8 have to consider is whether any other consideration was paid to
9 ChromaDex. I think that's a reference to the Healthspan sale
04:02PM 10 that I mentioned earlier. There's evidence in the record,
11 ChromaDex's own CEO confirmed to his salesperson that the
12 Healthspan sale was at \$500 a kilogram.

13 But for purposes of the summary judgment motion,
14 that's irrelevant because we're not using that sale as a basis
04:03PM 15 for our motion for summary judgment. We're using only the
16 sales to Procter & Gamble and Innovations For Health. And
17 there's absolutely no record in the evidence that ChromaDex
18 received any consideration from either of those companies other
19 than the cash amounts they paid for the NR they bought.

04:03PM 20 So if Your Honor has no other questions --

21 THE COURT: No. You've been very thorough. Thank
22 you.

23 Mr. Attanasio, you wanted a quick rebuttal?

24 MR. ATTANASIO: I do. And I'll be very quick, in
04:03PM 25 fact. I'm going to make a comment about the MFN, and then I'm

1 going to, with the Court's permission, ask the Court a question
2 about another issue that we haven't touched upon yet.

3 So first on the MFN issue, Your Honor, I would -- I
4 sit and I listen, and I have great respect for Mr. Sacca as
04:04PM 5 opposing counsel, and I listen, and obviously I disagree with
6 much of what he says, and he disagrees with much of what I say.
7 But what I hear is a factual dispute.

8 I just -- what this is is a factual dispute that has
9 some nuance and some evidentiary arguments to be made. It is
04:04PM 10 not an issue where there is no triable issue of material fact.
11 And I will give the Court one example that should resolve that
12 question for today.

13 The most favored nation clause of the contract says,
14 in relation to assessing Elysium's entitlement to the benefit,
04:04PM 15 that is, Elysium's stature by volume purchasing, the following:
16 "Provided Elysium Health purchases equal volumes or higher
17 volumes than the third party." That does two things, that
18 language. It gets to the volume question first. Obviously
19 there has to be a factual record. There has to be a back and
04:05PM 20 forth with witnesses about which of these companies that
21 counsel's referring to is purchasing lower volumes or higher
22 volumes than Elysium in order for Elysium to be entitled to its
23 status as an MFN under that clause.

24 Second, and equally importantly, what does the
04:05PM 25 plural usage of "volumes" mean? If Mr. Sacca is correct that

1 Elysium could place one order and we compare that on a static
2 basis at a particular date to some other order, then how do we
3 get to a clause that reads with plurals, "provided Elysium
4 Health purchases equal volumes or higher volumes than the third
04:06PM 5 party"?

6 And ChromaDex's 30(b)(6) witness, Your Honor,
7 pointed to this language, pointed to other language in the
8 contract that routinely talks about cycles and annual period,
9 and said what this means is -- and Mr. Sacca just referred to
04:06PM 10 it -- what this means is you take a look at the purchases for
11 the 12-month period, either on an annual basis or, as counsel
12 said, on a trailing basis. Fine. That's the evidence that's
13 in the record.

14 And so the use of the phrase "equal volumes or
04:06PM 15 higher volumes" to me goes directly to the notion that you
16 don't just look at one order, you look at volumes over time.
17 And that's consistent and in sync with other clauses of the
18 same contract that don't speak to a snapshot in terms of
19 measuring the parties' obligations and performance but speak to
04:07PM 20 a longer period of time. So that is a contested issue.

21 Now my question. And Your Honor -- we've talked a
22 lot about Your Honor's October order that brought us back here.
23 Part 2 of that order really focused on the patent misuse
24 claim --

04:07PM 25 THE COURT: Yes.

1 MR. ATTANASIO: -- which the Court has not asked
2 either side questions about and we haven't argued, and I had a
3 query for the Court whether that is something we should discuss
4 or if the Court is prepared for us to submit on the papers
04:07PM 5 regarding patent issues.

6 THE COURT: The latter. I think I have a good
7 understanding. And that's also, as you know, going to be a
8 bench trial if it goes.

9 MR. ATTANASIO: Thank you.

04:07PM 10 THE COURT: Okay. Well, thank you. It's been very
11 helpful.

12 This is my plan: I'm going to try to get a decision
13 out no later than next week. If I can get it out this week, I
14 will. But I still have a lot of homework to do on it. Today
04:07PM 15 was very helpful in that regard, so I appreciate it.

16 I'm going to try to get you out to trial in the
17 summer. And I know that's vague because summer is -- what is
18 it? -- May, June and July. Are summer months June, July, and
19 August or May, June, July, and August?

04:08PM 20 MR. ATTANASIO: Depends on where you live.

21 MS. TRECKLER: They're in California, yeah.

22 THE COURT: Yeah. But, you know, it could be June,
23 July, or August is when I get you out. So I want to give you
24 the heads-up about that. But I will get a scheduling order out
04:08PM 25 for the trial and the pretrial and pretrial filings in

1 connection with my order on this or soon after it, so you know.

2 MR. ATTANASIO: Thank you, Your Honor.

3 THE COURT: Okay. Thank you.

4 THE COURTROOM DEPUTY: All rise.

04:09PM

5 **(Proceedings concluded at 4:09 p.m.)**

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