MICHAEL R. MATTHIAS, Bar No. 057728
mmathias@bakerlaw.com
ELIZABETH M. TRECKLER, Bar No. 282432
etreckler@bakerlaw.com
BAKER & HOSTETLER LLP
11601 Wilshire Boulevard, Suite 1400
Los Angeles, California 90025-0509
Telephone: (310) 820-8800
Facsimile: (310) 820-8859

JOSEPH N. SACCA, (admitted *pro hac vice*)
jsacca@bakerlaw.com
BAKER & HOSTETLER LLP
45 Rockefeller Plaza
New York, New York 10111-0100
Telephone: (212) 589-4290
Facsimile: (212) 589-4201

Counsel continued on following page

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ChromaDex, Inc.,

Plaintiff,

v.

Elysium Health, Inc. and Mark Morris,

Defendants.

Elysium Health, Inc.,

Counterclaimant,

v.

ChromaDex, Inc.,

Counter-Defendant.

Case No.: 8:16-cv-02277-CJC (DFM)

Judge: Hon. Cormac J. Carney

ELYSIUM HEALTH, INC.'S AND MARK MORRIS'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO DISMISS THE SIXTH, SEVENTH, AND EIGHTH CLAIMS OF THE FIFTH AMENDED COMPLAINT

Date: February 11, 2019
Time: 1:30 p.m.
Crtm: 9B

DONALD R. WARE (admitted *pro hac vice*)
dware@foleyhoag.com
MARCO J. QUINA (admitted *pro hac vice*)
mquina@foleyhoag.com
JULIA HUSTON (admitted *pro hac vice*)
jhuston@foleyhoag.com
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, Massachusetts 02210
Telephone: (617) 832-1000
Facsimile: (617) 832-7000

Attorneys for Defendant and Counterclaimant
ELYSIUM HEALTH, INC.
Attorneys for Defendant
MARK MORRIS

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

In now the fifth iteration of its complaint in this action, ChromaDex, Inc. ("ChromaDex") for the first time asserts claims against its former employee Mark Morris ("Morris"), alleging that he breached contractual and fiduciary duties owed to ChromaDex. In its Sixth Claim for Relief, ChromaDex alleges that Morris violated confidentiality obligations imposed by the "Confidentiality and Non-Solicitation Agreement (For New Employees)" (the "New Employee Agreement") he signed on his last day at ChromaDex. (ECF No. 153-2.) This contract claim fails because ChromaDex never provided consideration in connection with the New Employee Agreement it now seeks to enforce. Morris signed that document following his resignation on his last day at ChromaDex, leaving ChromaDex unable to allege that he bargained for continued employment or any of the other purported consideration recited in the document. ChromaDex's attempt to saddle Morris with confidentiality obligations on his way out the door got it nothing but gratuitous – and thus unenforceable – promises. Because ChromaDex does not (and cannot) allege the requisite consideration supporting the New Employee Agreement, no contract was formed and its Sixth Claim for Relief should be dismissed.

ChromaDex's Seventh Claim for Relief alleging breach of fiduciary duty fares no better. As with the conversion claim this Court dismissed with prejudice in its July 26, 2018 Order on the grounds that it was preempted by the California Uniform Trade Secrets Act ("CUTSA"), the fiduciary duty claim is premised on allegations that Morris wrongfully retained, used and disclosed ChromaDex's purportedly confidential and proprietary information. ChromaDex's Seventh Claim for Relief therefore is also preempted by CUTSA and should be dismissed. And because the primary claim against Morris is preempted, ChromaDex's Eighth Claim for Relief, that Elysium Health, Inc. ("Elysium") aided and abetted Morris's alleged breach of fiduciary duty, likewise fails.

II. STATEMENT OF FACTS

A. The Parties

Defendant Elysium is a company "that utilizes science and technology to create consumer health products." (Fifth Amended Complaint, ECF No. 153 ("FAC") ¶ 14.)[1] Defendant Mark Morris is Elysium's Vice President of Research and Development. (*Id.* ¶ 15.) Prior to joining Elysium, Morris worked at Plaintiff ChromaDex, a company that markets "ingredient technologies in the dietary supplement, food, beverage, skin care, and pharmaceutical markets." (*Id.* ¶¶ 13, 15.)

B. ChromaDex Was Elysium's Supplier of Key Ingredients for "Basis," Elysium's Sole Product.

The relationship between ChromaDex and Elysium reaches back to 2014 and arises out of their common interest in the commercialization of nicotinamide riboside ("NR"). ChromaDex was the sole commercial supplier of NR in the United States during the course of the parties' contractual relationship. (*Id.* ¶¶ 2, 33-35.) NR is a principal ingredient in Elysium's sole product, a supplement called Basis that also features pterostilbene. (*Id.*) From 2014 to 2016, Elysium incorporated NR and pterostilbene supplied by ChromaDex into Basis. (*Id.*) The NR supply agreement between the parties dated February 3, 2014, and amended on February 19, 2016 (as amended, the "NR Supply Agreement") states that "ChromaDex shall sell and deliver, and Elysium Health shall purchase from ChromaDex, such Niagen as Elysium Health orders from time to time." (ECF No. 153-3 § 3.) The NR Supply Agreement includes a "most favored nations" pricing provision, which obligates ChromaDex to provide Elysium with a refund or credit if ChromaDex sells Niagen "to a Third Party at a price that is lower than that at which Niagen is supplied to Elysium Health." (the "MFN Provision") (ECF No. 153-3 § 3.1.)

[1] This Statement of Facts is drawn from the allegations in the Fifth Amended Complaint, which are taken as true on a motion to dismiss.

C. ChromaDex's Breach of the NR Supply Agreement Allegedly Leads Elysium to Seek Alternative Suppliers.

In the second quarter of 2016, Elysium "raised concerns about pricing under the [NR] Supply Agreement" with ChromaDex's CEO following its discovery that ChromaDex was in breach of the MFN Provision. (FAC ¶ 45.) Discussions between Elysium and ChromaDex failed to allay Elysium's concerns that ChromaDex's pricing was not in compliance with the MFN Provision, *i.e.*, that ChromaDex had secretly been offering Elysium's competitors lower prices on NR in violation of the NR Supply Agreement. (*Id.* ¶ 64.) Perceiving that its continued access to a source of NR was in jeopardy, in mid-July of 2016, Elysium elected to begin exploring development of a new supply chain for the ingredient that would not depend on its untrustworthy contractual partner, but would instead be entirely within Elysium's control. (*Id.* ¶¶ 100-101.)

D. ChromaDex Attempts to Impose Retroactive Confidentiality Obligations on Morris By Having Him Sign the New Employee Agreement Following His Resignation.

Morris had worked at ChromaDex from 2007 to 2009 and then continuously since 2011, but it was not until February of 2016 that ChromaDex first had Morris execute any document purporting to impose confidentiality obligations on him. (*Id.* ¶¶ 16-19.) Five months after that, on July 15, 2016, Morris resigned from his position as Vice President of Business Development at ChromaDex. (*Id.* ¶¶ 23, 70.) Following his resignation, ChromaDex on that day conducted an exit interview with Morris and provided him with the New Employee Agreement for him to sign. (*Id.* ¶¶ 23, 26, 72 & ECF No. 153-2.) That document, which prominently states that it is "FOR NEW EMPLOYEES" and that it can only be amended by a signed writing executed by the parties, purported to require Morris to safeguard ChromaDex's confidential information. (ECF 153-2 §§ 3, 10.) Section One of the document recites the following consideration:

> 1. CONSIDERATION
>
> Included in the mutual consideration acknowledged by the parties hereto, but without limitation, are an offer of employment with the Company in an at-will employment relationship and Employee's exposure to the Company's proprietary and confidential business information as its employee, and Employee's service to the Company, acting in good faith and in the Company's best interests.

(*Id.* § 1.) Morris began working at Elysium the next business day after he resigned from ChromaDex. (FAC ¶ 73.)

III. PROCEDURAL HISTORY

On December 29, 2016, ChromaDex filed its complaint in this action. (ECF No. 1.) Elysium answered the Complaint and asserted six counterclaims against ChromaDex (ECF No. 11), and ChromaDex thereafter filed a First Amended Complaint to add new claims for misappropriation of trade secrets under California and federal law. (ECF No. 30.)

In May of 2017, this Court dismissed the majority of ChromaDex's claims, including its claims for misappropriation of trade secrets on the grounds that ChromaDex failed to allege any protectable trade secret, instead "simply alleg[ing] in a conclusory fashion that [the purported trade secrets] are not generally known." (ECF No. 44 at 13-14.) The Court gave ChromaDex leave to amend the claims for trade secret misappropriation (*id.* at 14) and ChromaDex filed a Second Amended Complaint in May of 2017. (ECF No. 45.) The following month, ChromaDex withdrew its trade secret misappropriation claims after Elysium's counsel advised ChromaDex's counsel that the claims included demonstrable falsehoods. (Third Amended Complaint, ECF No. 48.)

ChromaDex amended its complaint yet again in June of 2018, again alleging a claim for trade secret misappropriation, this time relating to a single document, and

adding an entirely new claim for conversion. (Fourth Amended Complaint, ECF No. 109.) This Court dismissed the conversion claim with prejudice, holding that CUTSA "serves to preempt all claims premised on the wrongful taking and use of confidential business and proprietary information, even if that information does not meet the statutory definition of a trade secret." (ECF No. 115 at 7-8.) Because ChromaDex's conversion claim "alleg[ed] conduct that clearly amount[ed] to misappropriation of ChromaDex's business information, the claim [was] preempted by CUTSA." *Id.*

ChromaDex filed its Fifth Amended Complaint on November 27, 2018. (ECF No. 153.) The Fifth Amended Complaint represents ChromaDex's fourth bite at the apple in its attempt to retaliate against Elysium – and now Mark Morris – for removing ChromaDex from Elysium's supply chain, an action that came in response to ChromaDex's deception and breaches of the parties' agreements. Twenty-two months after it first brought claims against Elysium, ChromaDex for the first time now claims:

- That Morris breached the New Employee Agreement – a document he signed after he had already resigned – by allegedly retaining ChromaDex's purportedly confidential information, even though the alleged contract is entirely unsupported by consideration, given that Morris signed the document on his way out the door (FAC ¶¶ 223-237);
- That Morris breached his fiduciary duty to ChromaDex through his use and disclosure of ChromaDex's confidential information, even though such claims are entirely preempted by CUTSA (*id.* ¶¶ 238-243); and
- That Elysium aided and abetted those alleged breaches of Morris's fiduciary duty, even though preemption of the claim against Morris forecloses aiding and abetting liability (*id.* ¶¶ 244-251).

By these new allegations, ChromaDex seeks to enforce contractual rights it lacks and to repackage its dismissed conversion claim as a claim for breach of

fiduciary duty. Because these new allegations fail to state a claim, Elysium now moves for dismissal of the Sixth, Seventh, and Eighth Claims for Relief in the Fifth Amended Complaint.

IV. LEGAL STANDARD

To avoid dismissal under Rule 12(b)(6), a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level," that is, it must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although the factual allegations in a complaint are taken as true on a motion to dismiss, the Court is "not, however, required to accept as true allegations that contradict exhibits attached to the Complaint … or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010).

V. ARGUMENT

A. The New Employee Agreement Morris Signed After He Resigned Lacks Consideration and is Not an Enforceable Contract.

In a ham-handed attempt to impose retroactive obligations on Morris, ChromaDex had him sign the New Employee Agreement after he had already resigned, having apparently not seen fit to have Morris do so during his previous five years of actual employment with the company. (FAC ¶¶ 23.) This unenforceable agreement does not bind Morris because it lacks consideration, an essential element of any contract under California law. *Patriot Sci. Corp. v. Korodi*, 504 F. Supp. 2d 952, 960 (S.D. Cal. 2007) ("It is hornbook law that a contract, to be enforceable, must be supported by consideration."). Because ChromaDex provided no consideration to Morris in connection with the New Employee Agreement, no contract was formed and ChromaDex's Sixth Claim for Relief should be dismissed.

1. The New Employee Agreement's False Recitation of Consideration Does Not Support Contract Formation.

The New Employee Agreement falsely recites that ChromaDex's consideration includes, "without limitation," "an offer of employment with the Company in an at-will employment relationship and Employee's exposure to the Company's proprietary and confidential business information as its employee." (ECF 153-2 § 1.) The allegations in the Fifth Amended Complaint conclusively refute this false recitation and affirmatively establish that the document is unsupported by consideration. ChromaDex does not allege that it actually hired Morris on the day he resigned, nor that it extended an "offer of employment with the Company" on that day, nor even that it was remotely within the contemplation of the parties that ChromaDex would provide further access to its confidential information following his resignation. Instead, ChromaDex alleges that Morris resigned on the day he signed the document and went to work for Elysium the next business day, foreclosing any suggestion that future continued employment or access to confidential information formed the basis of the bargained-for exchange underpinning the contract. (FAC ¶¶ 70-74.) Because the New Employee Agreement was signed after Morris had already tendered his resignation, the failure of consideration could not be clearer.

2. ChromaDex's Past Consideration Likewise Fails to Support Contract Formation.

Rather than attempt to substantiate the New Employee Agreement's false recitation, ChromaDex instead relies on a theory of past consideration, alleging that it "fulfilled its obligations under the July Confidentiality Agreement by providing Morris with employment and benefits." (*Id.* ¶ 226.) But ChromaDex's past provision of employment and benefits is patently insufficient to support the New Employee Agreement. "Because the consideration must be given in exchange for the promise, past consideration cannot support a contract." *Patriot Sci. Corp.*, 504 F. Supp. 2d at

960 (citation omitted) (holding that party's past work as an independent contractor did not constitute consideration to support a new contract); *see also Simmons v. California Inst. of Techn.*, 34 Cal. 2d 264, 272 (1949) (past employment does not constitute consideration supporting a contract). Because ChromaDex's past employment of Morris is irrelevant to whether a contract was formed on the day he resigned, and because ChromaDex's allegations make clear that ChromaDex provided Morris neither continued employment nor benefits as a result of his signing the New Employee Agreement, the agreement lacks the requisite bargained-for exchange and does not bind Morris.

3. Due to the Failure of Consideration, Morris's Supposed Obligations in the New Employee Agreement are Merely Gratuitous Promises.

ChromaDex's failure to provide any consideration in connection with the New Employee Agreement renders Morris's promises contained therein gratuitous and thus unenforceable. Having already resigned by the time he signed the document, Morris indisputably was not seeking continued employment from ChromaDex – nor was ChromaDex offering any – and thus the agreement lacks any bargained-for exchange, the hallmark of a gratuitous promise that defeats contract formation. *Jara v. Suprema Meats, Inc.*, 121 Cal. App. 4th 1238, 1249 (2004) ("In view of the requirement of a bargained-for exchange, California courts have repeatedly refused to enforce gratuitous promises, even if reduced to writing in the form of an agreement."); *Simmons*, 34 Cal. 2d at 272 ("[T]he consideration for a promise must be an act or a return promise, bargained for and given in exchange for the promise.").

California courts refuse to enforce employment contracts executed subsequent to the conclusion of the employee's employment, concluding that they lack the requisite bargained-for exchange. In *Patriot Scientific Corporation*, the company promised in a written agreement to give 400,000 shares of stock to the consultant it simultaneously terminated. 504 F. Supp. 2d at 961. The court reasoned that the

simultaneous termination and promise compelled the conclusion that the company was not in fact bargaining for the consultant's services, and thus that the contract was unsupported by consideration, and granted the motion to dismiss as a result. *Id.* ("Patriot terminated Korodi's employment in the letter promising him 400,000 shares. In other words, Patriot in February of 2006 clearly did not bargain for Korodi's services in exchange for the promise to pay 400,000 shares, as evidenced by its decision to terminate Korodi's services in the same letter that promised the 400,000 shares."). So too here. ChromaDex's allegation that Morris signed the document after he resigned forecloses any showing of bargained-for exchange, and its retrospective attempt to impose a confidentiality obligation on Morris therefore amounts to nothing more than an unenforceable gratuitous promise. *See also Baron v. Quad Three Grp., Inc.*, No. 221 MDA 2012, 2013 WL 3822134 (Pa. Super. Ct. Jan. 22, 2013) (promise made at exit interview lacked consideration). Because the New Employee Agreement is unsupported by consideration, no contract was formed and ChromaDex's Sixth Claim for Relief against Morris should be dismissed.

B. ChromaDex's Breach of Fiduciary Duty Claim is Preempted by CUTSA.

1. The Gravamen of ChromaDex's Breach of Fiduciary Duty Claim is that Morris Wrongfully Misappropriated, Disclosed, and Used ChromaDex's Purportedly Confidential Information.

In is June 26, 2018, Opinion dismissing with prejudice ChromaDex's conversion claim, this Court declared that "CUTSA provides the exclusive civil remedy for conduct based upon misappropriation of a trade secret" or "of information that, although not a trade secret, is nonetheless of value to the claimant." ECF No. 115 at 7 (citation and marks omitted). *See also Mattel, Inc. v. MGA Entm't, Inc.*, 782 F. Supp. 2d 911, 987 (C.D. Cal. 2010) ("[C]UTSA supersedes claims based on the misappropriation of confidential information, whether or not that information meets the statutory definition of a trade secret."). Plainly hoping to save its fiduciary duty

claim from suffering the same fate as its conversion claim, ChromaDex attempts to omit any overt reference to trade secret information. But ChromaDex's contorted pleading cannot hide the fact that its core complaint against Morris, and its basis for claiming that he breached his purported fiduciary duties and thereby harmed ChromaDex, is that he and Elysium purportedly took ChromaDex's confidential information and used it to compete with ChromaDex. In connection with this supposed scheme, ChromaDex alleges that Morris slipped confidential information to Elysium for use in its purchase order negotiations with ChromaDex; that he remained silent about Elysium's plan to leverage the fruits of this negotiation advantage in order to develop competing supplies of NR and pterostilbene using ChromaDex's supposedly confidential information; that he resigned and recruited ChromaDex employee Ryan Dellinger to join him so that Elysium could profit from their familiarity with ChromaDex's confidential information; and that he was not forthcoming about his and Elysium's retention and use of ChromaDex's confidential information – all in breach of his claimed duties as a ChromaDex fiduciary. (FAC ¶¶ 240-42.) This alleged course of conduct simply restates ChromaDex's claim that Morris and Elysium misappropriated and used ChromaDex's confidential information to become ChromaDex's competitor. Because the "gravamen of the wrongful conduct asserted here is the misappropriation of" purported confidential information, the breach of fiduciary duty claim is preempted and should be dismissed, just like the conversion claim before it. *K.C. Multimedia, Inc. v. Bank of Am. Tech. & Operations, Inc.*, 171 Cal. App. 4th 939, 961 (2009).

2. The Fifth Amended Complaint Fails to State a Claim for Breach of Fiduciary Duty Once it is Stripped of Facts Supporting the Misappropriation Claim.

To avoid preemption, ChromaDex must show that each element of its claim for breach of fiduciary duty is supported by facts unrelated to the misappropriation or use of its confidential information. *Callaway Golf Co. v. Dunlop Slazenger Grp.*

Americas, Inc., 318 F. Supp. 2d 216, 220-21 (D. Del. 2004) (applying California law). "To state a claim for breach of fiduciary duty, plaintiff must allege: 1) the existence of a fiduciary relationship; 2) its breach; and 3) damages proximately caused by that breach." *Acculmage Diagnostics Corp. v. Terarecon, Inc.*, 260 F. Supp. 2d 941, 955 (N. D. Cal. 2003).

Once it is stripped of facts going to misappropriation of allegedly confidential information, the Fifth Amended Complaint fails to plead the elements of a breach of fiduciary duty, and the claim is therefore preempted. The majority of Morris's alleged breaches are, on their face, mere restatements of ChromaDex's theory that Morris misappropriated its confidential information. And the remaining alleged breaches, although superficially distinct from its core complaint of misappropriation of confidential information, nonetheless are poorly disguised restatements of that claim.

ChromaDex alleges that Morris recruited Dellinger while still a ChromaDex employee, in violation of his fiduciary duties. But even if the allegation is true, ChromaDex claims no damages from it – save for the inference that Dellinger when he left for Elysium took with him his knowledge of ChromaDex's confidential information and put that information to use at Elysium. So too for the allegation that Morris somehow breached his fiduciary duty to ChromaDex when he failed to disclose his intent to work for Elysium. Even if he had a duty and in fact breached it,[2] the only hint of damage flowing from the breach is that it hindered ChromaDex's ability to protect its allegedly confidential information. The alleged damage proximately caused by these two alleged breaches is therefore simply a restatement of the harm ChromaDex claims it suffered due to the alleged misappropriation and

[2] Morris's fiduciary duties, if he ever owed any, ended the moment he resigned from ChromaDex. *Thomas Weisel Partners LLC v. BNP Paribas*, No. C 07-6198 MHP, 2010 WL 1267744, at *8 (N.D. Cal. Apr. 1, 2010) ("an individual's fiduciary duty toward his employer continues until either the corporation to which the duty is owed ceases to exist or the fiduciary resigns."). By the time ChromaDex conducted its exit interview with Morris, he had no duty to breach, rendering the alleged omissions irrelevant.

use of its confidential information. Because of this, the Fifth Amended Complaint fails to allege the requisite elements of a claim for breach of fiduciary duty – Morris's breach and the resultant harm – once its fiduciary duty claim is "stripped of facts supporting trade secret misappropriation," and the claim is therefore preempted. *Waymo LLC v. Uber Techs., Inc.*, 256 F. Supp. 3d 1059, 1062 (N.D. Cal. 2017).

In *Anokiwave, Inc. v. Rebeiz*, the company sued its former board member, accusing him of misappropriating its confidential information in order to assist a competitor, which the board member joined after having misappropriated the confidential information. No. 18-CV-629 JLS (MDD), 2018 WL 4407591, at *4 (S.D. Ca. Sept. 17, 2018). The company sued for breach of fiduciary duty, but the court dismissed the claim as preempted by CUTSA because "the whole theory behind the breach of fiduciary duty here is the disclosure of proprietary information." *Id.* Here, as in *Anokiwave*, the conduct alleged in ChromaDex's fiduciary duty claim is indistinguishable from the conduct underpinning ChromaDex's CUTSA claim. *See also Farmers Ins. Exch. v. Steele Ins. Agency, Inc.*, No. 2:13-CV-00784-MCE, 2013 WL 3872950, *10 (E.D. Ca. July 25, 2013) (holding that breach of fiduciary claim alleging misappropriation and wrongful competition was preempted). Because neither the alleged breaches nor the alleged harms can be understood except with reference to the alleged misappropriation and use of ChromaDex's confidential information, the claim is preempted and should be dismissed.

C. ChromaDex's Breach of Fiduciary Duty Claim is Preempted by CUTSA.

ChromaDex's aiding and abetting claim against Elysium "rises and falls with" ChromaDex's breach of fiduciary duty claim against Morris. *Anokiwave*, 2018 WL 4407591, at *5. Because CUTSA preempts ChromaDex's breach of fiduciary duty claim against Morris, its aiding and abetting claim "is likewise preempted by CUTSA" and should be dismissed. *Id. See also Embarcadero Techs., Inc. v. Redgate Software, Inc.*, No. 1:17-CV-444-RP, 2018 WL 315753, at *4 (W.D. Tex. Jan. 5,

2018) ("Because the claim against the Redgate Defendants for aiding and abetting a breach of fiduciary duty is derivative of the [preempted] breach of fiduciary duty claim against Frignoca, it too must be dismissed.").

VI. CONCLUSION

The New Employee Agreement ChromaDex relies on for its Sixth Claim for Relief is unsupported by consideration and therefore unenforceable. And the breaches and harms ChromaDex relies on for its breach of fiduciary duty claim (and thus for its aiding and abetting claim) all concern Morris's alleged misappropriation, disclosure, or use of its purportedly confidential information, rendering the claims preempted by CUTSA. The Sixth, Seventh, and Eighth Claims for Relief in the Fifth Amended Complaint should therefore be dismissed with prejudice for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Respectfully submitted,

Dated: December 21, 2018

BAKER & HOSTETLER LLP

By: */s/ Joseph N. Sacca*
JOSEPH N. SACCA

Attorneys for Defendant and Counterclaimant ELYSIUM HEALTH, INC. *and Defendant* MARK MORRIS