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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

(SOUTHERN DIVISION)

ChromaDex, Inc.,

Plaintiff,

v.

Elysium Health, Inc., and Mark Morris

Defendants.

Elysium Health, Inc.,

Counterclaimant,

v.

ChromaDex, Inc.,

Counter-Defendant.

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

CHROMADEX, INC.'S REPLY IN SUPPORT OF ITS MOTION FOR PREJUDGMENT INTEREST

Judge:	Hon. Cormac J. Carney
Courtroom:	9B
Date:	February 14, 2022
Time:	1:30 p.m.

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I. INTRODUCTION

ChromaDex's motion seeks no more than the legally mandated prejudgment interest on its liquidated breach-of-contract damages, an award that is "an element of plaintiff's complete compensation." *Lumens Co., Ltd. v. GoEco Led LLC*, 2018 WL 11356419, at *2 (C.D. Cal. Feb. 6, 2018) (Carney, J.) (internal quotation marks omitted). Elysium's opposition ignores controlling law, misapprehends the underlying facts, and attempts to re-write the jury verdict to advance the extreme and unsupported position that ChromaDex is not entitled to *any* prejudgment interest. And Elysium's alternative argument—while conceding the obvious point that prejudgment interest is required here—substantially undervalues the *amount* of that interest by misreading the applicable authority and relying on incorrect assumptions and erroneous calculations. Elysium's attempt to avoid the prejudgment interest that it must pay should be rejected.

First, Elysium incorrectly argues that ChromaDex's breach-of-contract damages are not certain, and thus ChromaDex is not entitled to mandatory prejudgment interest under California Civil Code Section 3287(a). The only basis for that claim? That *Elysium's* damages under the MFN provision counterclaim are unliquidated. But well-established law in California provides that an award of "offsetting unliquidated damages does not render a liquidated damage award unliquidated." *Haskell Corp. v. ConocoPhillips Co.*, 2012 WL 845398, at *23 (Cal. Ct. App. Mar. 14, 2012) (citing *Great W. Drywall, Inc. v. Roel Const. Co.*, 166 Cal. App. 4th 761, 768–70 (2008)). Elysium knew the exact amount it owed for the ingredients it ordered and received from ChromaDex in the June 30 orders—$2,983,350—and that is the same amount claimed as damages by ChromaDex and for which the jury found Elysium liable. That amount is thus certain and prejudgment interest on it is required by law.

Second, Elysium is also wrong that its MFN award should be deducted from ChromaDex's damages before that mandated prejudgment interest is calculated and applied. This Court previously considered this exact issue in *Lumens*, which Elysium fails to distinguish from this case. Applying California law, the Court concluded in

Lumens that, when a defendant is found liable for the payment of specific invoices, any award for an unliquidated counterclaim is not deducted until "*after* prejudgment interest is applied." 2018 WL 11356419, at *2 (emphasis added). But even if the MFN award is offset before prejudgment interest is applied, the Court must consider the date on which to apply the offset in order to calculate the correct interest-bearing net amount from which to calculate ChromaDex's prejudgment interest. Elysium's argument that the offset should be deducted as of June 30, 2016 is unsupported by the jury's verdict or any fact in the record. With no other option, the earliest ascertainable date for an offset is when the Court enters final judgment, an outcome that comports with the law as well as principles of equity and fairness.

Elysium's other argument—that its fraudulent inducement damages should also be deducted before ChromaDex's prejudgment interest is applied—likewise misses the mark. Damages from an unliquidated tort counterclaim may not offset damages from a liquidated breach-of-contract claim arising from a different transaction. While Elysium now argues that the Trademark License and Royalty Agreement ("TLRA") and the NIAGEN Supply Agreement are the same contract, it should be estopped from asserting that argument because that is clearly inconsistent with Elysium's previous argument on summary judgment that the documents are wholly distinct contracts. Moreover, although ChromaDex fully intends to repay the royalties it offered to moot Elysium's patent misuse counterclaim—which is still a live claim—those royalties should not be offset from the claims resolved by the jury as part of the final judgment.

In sum, the Court should reject Elysium's effort to avoid paying the proper and fair amount of legally mandated prejudgment interest, grant ChromaDex's motion, and award ChromaDex prejudgment interest in the amount of $1,634,949.48.

II. RELEVANT FACTS

The statement of facts in Elysium's opposition ignores or mischaracterizes parts of the record. ChromaDex is compelled to provide additional context.

A. The payment and orders provisions.

The NIAGEN Supply Agreement contained a process and a defined schedule under which Elysium would place firm purchase orders for ingredients, ChromaDex would accept and invoice Elysium for those orders, and Elysium would pay the amounts in those invoices. Specifically, Sections 3.4 and 3.5—titled "Payments" and "Orders," respectively—obligated Elysium to "make all purchases hereunder by submitting firm purchase orders to ChromaDex" and then "pay ChromaDex within thirty (30) days from the date of the applicable invoice by ChromaDex to Elysium Health for all Niagen purchased hereunder." (Declaration of Brittany L. Lane ("Lane Decl."), Ex. A at 4.)

The parties' conduct confirmed that process: Elysium would place an order, ChromaDex would accept and invoice it, and Elysium would then pay according to the terms agreed to in that invoice: 30% of the total within 30 days of the invoice and the remaining 70% within 60 days of the invoice. (Declaration of Barrett J. Anderson ("Anderson Decl."), Ex. 24 at 54, 56, 57; *see also* Reply Declaration of Barrett J. Anderson ("Anderson Reply Decl."), Ex. E at 40:20–25 (fact testimony regarding invoices and payments under the NIAGEN Supply Agreement).)[1] The same payment and orders process applied to Elysium's orders under the pTeroPure Supply Agreement. (Anderson Reply. Decl., Ex. E at 42:4–43:12.) Neither the payment nor orders provisions in either supply agreement contained a term that would have allowed Elysium to withhold payment on an invoice past the agreed-upon payment deadlines.

B. The MFN provision.

Separate from the payment and orders provisions in the NIAGEN Supply Agreement is Section 3.1, titled "Price," which contained the MFN provision. (Dkt. 559 ("Jury Instructions") at 23.) Among other things, the MFN provision set forth a separate procedure by which Elysium could receive a "refund or credits" in the event that an MFN price was warranted. The circumstances under which Elysium would be eligible

[1] The Anderson Decl. was filed with ChromaDex's opening brief.

to receive an MFN price were heavily contested by the parties. Elysium's opposition contains its interpretation. (Opp. at 3.)[2] ChromaDex's interpretation was that the MFN provision applied "only if the amounts of Elysium's purchases of Niagen in total were equal or greater than the amounts of other customer's purchases in total over a year." (Jury Instructions at 23.)

Assuming Elysium was eligible for an MFN price, the MFN provision stated that ChromaDex would then "revise[]" the price of eligible previous NIAGEN sales to Elysium, (*id.*), which would be accomplished by revising the prices in prior invoices issued to Elysium. Only after applying a revised price to those specific invoices was ChromaDex to "promptly provide . . . any refund or credits thereby created." (*Id.*) The MFN provision did not include a particular date or timeline by which a refund or credit would be due, and neither party included a particular date or timeline in the interpretations that they presented to the jury. (*Id.* at 23–24.)

Notable is what the MFN provision did not include: any reference or link to the payment or orders provisions. For example, the MFN provision did not state that Elysium could withhold payment for an invoice past the payment deadlines agreed to by the parties, even if it believed a refund or credit was due. Elysium was still obligated to pay the invoices on time, after which (if applicable) the MFN price could be separately calculated by "revis[ing]" those invoices to arrive at a later-owing "refund or credits." (*Id.* at 23; *see also* Anderson Reply Decl., Ex. E at 125:1–21 (fact testimony that "[i]n the ingredients industry" a refund or credit are "something you get after you've already paid for a purchase" and "Elysium would need to pay first and get a refund or credit later").)

C. The June 30 orders and pre-litigation disputes.

On June 30, 2016, Elysium placed firm purchased orders with ChromaDex for $2,983,350 worth of ingredients, which ChromaDex invoiced on July 1, 2016.

[2] "Opp." refers to Elysium's brief in opposition, (Dkt. 581), and "Br." refers to ChromaDex's opening memorandum in support of the motion, (Dkt. 580-1).

(Anderson Decl., Ex. 24 at 54, 56, 57.) Elysium did not pay by the agreed-upon deadlines in those invoices, asserting that it was due a refund or credit under the MFN provision. ChromaDex disagreed that an MFN refund or credit was due, and informed Elysium that "[t]he fact that you have brought up the MFN pricing matter, which we have a disagreement on, does not make the $2.8 million receivable any less in amount or any less currently payable." (Lane Decl., Ex. F at 2.)

However, in an effort to resolve the dispute without the need for litigation, ChromaDex made multiple good-faith offers to settle the MFN dispute, all of which were refused by Elysium. As shown by an email dated November 1, 2016 from Elysium's CEO, Eric Marcotulli, ChromaDex first offered $300,000 and then "[u]pped that to $500k when [Elysium] wouldn't budge." (Anderson Decl., Ex. 153.) Elysium did not settle because it was holding out for an offer of $800,000. (*Id.*) Only after Elysium refused those good-faith settlement offers was ChromaDex forced to file this lawsuit to obtain the nearly $3 million that Elysium still refused to pay.

D. Litigation, trial, and the jury verdict.

Since the beginning of the suit, Elysium has never disputed the amount invoiced for the June 30 orders. (Dkt. 192, Elysium's Answer to the Fifth Amended Complaint ¶ 63 (admitting "[t]he total amount ChromaDex invoiced Elysium for the Past Due Invoices is $2,983,350") & ¶ 68 (admitting "Elysium has not paid what ChromaDex has demanded").) Instead, Elysium asserted an unliquidated counterclaim under the MFN provision and sought an offset from that invoiced amount. (Dkt. 103, Elysium's Third Amended Counterclaims ¶ 156 (alleging damages under the MFN provision "in an amount to be determined at trial"); *id.* at 36 (praying for MFN damages as an "offset of the amount, if any, Elysium may owe to ChromaDex").

Leading up to trial, Elysium requested several different jury instructions that would have allowed it to argue that it was entitled to withhold payment for the June 30 orders because its obligation to pay under the supply agreements was "excused" by an MFN breach. (Dkt. 524, Parties' Updated Proposed Jury Instructions at 111–13; 131–

33; 165–66.) ChromaDex opposed those instructions, arguing *inter alia* that an excuse defense was unavailable in this case "because the NIAGEN Supply Agreement does not provide Elysium the right to withhold payment for product that it had already accepted or for any of the breaches alleged by Elysium." (*Id.* at 112.) The Court agreed with ChromaDex, and the Court's final instructions to the jury did not contain any excuse-related defenses for Elysium. (*See generally* Jury Instructions.)

At trial, consistent with its past admissions, Elysium did not dispute the amounts of the invoices for the June 30 orders. Further, the trial record shows that both parties, and the jury, understood that what Elysium owed for the June 30 orders was separate from any later refund or credit it was due under the MFN provision. Elysium placed the June 30 orders with the exact prices and quantities of ingredients it sought to purchase, totaling $2,983,350. (Anderson Decl., Ex. 24 at 53, 55.) Frank Jaksch, ChromaDex's CEO at the time, testified that (based on assurances Elysium provided about future orders) ChromaDex accepted the prices that Elysium proposed, and that the parties separately "agreed to disagree and revisit [the MFN] issue later." (Lane Decl., Ex. E at 28:12–14.) Elysium's CEO, Marcotulli, conceded that Elysium placed the June 30 orders with those prices and quantities and that, although he believed Elysium was "owed a refund," Elysium "put the amount of the refund discussion off for another day" to obtain the ingredients it desperately needed. (Anderson Reply Decl., Ex. G at 108:21–109:7.) After accepting Elysium's firm purchase orders on June 30, ChromaDex shipped them and invoiced Elysium accordingly. (Anderson Reply Decl., Ex. E at 45:6–51:19 (fact testimony about June 30 orders); Ex. 24 at 54, 56, 57 (invoices for June 30 orders).) Prior to receiving the ingredients, Elysium did not inform ChromaDex that "Elysium planned to withhold payment for those orders." (Anderson Reply Decl., Ex. E at 133:5–11.) At the end of trial, the jury found that Elysium breached the NIAGEN and pTeroPure Supply Agreements and awarded ChromaDex the amount from the unpaid invoices: $2,983,350.00. (Dkt. 570 ("Verdict Form") at 2.)

With respect to the MFN counterclaim, the parties disputed liability and the amount of damages at trial. Each presented multiple ways to calculate any MFN award: ChromaDex offering amounts of $0 or $300,000 and Elysium's arguing for $1.7 million to $3 million. (*See* Br. at 5.) The jury did not agree with either party, instead selecting the amount of $625,000, a number not in the trial record and falling in the middle of the parties' proffered ranges. (Verdict Form at 10.) Other than a finding of liability and the damages amount, the jury's verdict did not contain any other finding with respect to the MFN counterclaim. (*Id.* at 9–10.) For example, the jury verdict did not specify an MFN price, did not identify any invoice that should be revised using that price, and did not specify a date on which the refund or credit would have been due to Elysium.

III. ARGUMENT

A. ChromaDex is entitled to prejudgment interest on the breach-of-contract damages awarded by the jury against Elysium.

As established by the unpaid invoices for the June 30 orders, ChromaDex's breach-of-contract damages against Elysium are both certain in amount and vested on a particular date. ChromaDex is therefore entitled to prejudgment interest on those damages under Section 3287(a). *Thompson v. Asimos*, 6 Cal. App. 5th 970, 991 (2016) (holding prejudgment interest is mandated under Section 3287(a) "where the amount due plaintiff is fixed by the terms of a contract"); *Leaf v. Phil Rauch, Inc.*, 47 Cal. App. 3d 371, 376 (1975) ("The sum paid by plaintiffs pursuant to the contract was fixed by its terms. Therefore, this element of damage was certain."). In response, Elysium argues that, because Elysium's MFN counterclaim damages are unliquidated, ChromaDex is not due *any* prejudgment interest on its liquidated damages. (Opp. at 7–11.) Elysium's extreme position is not supported by law or fact.

At base, Elysium conflates two distinct concepts: ChromaDex's affirmative contract damages (which are undoubtedly certain) and the net final judgment that Elysium will owe to ChromaDex at the conclusion of the case (which may require offsetting other amounts, such as from Elysium's unliquidated counterclaims).

Section 3287(a) requires only that *ChromaDex's* affirmative contract damages be certain, not the net final judgment, for prejudgment interest to be mandated. *See Safeway Stores, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa*., 64 F.3d 1282, 1292 (9th Cir. 1995) ("The fact that the amount that National Union was required to pay might be reduced as the result of allocation did not in itself make the amount of damages uncertain."). To find otherwise would be incorrect because it would allow Elysium to defeat ChromaDex's "right to interest on a liquidated sum by setting up an unliquidated claim as an offset." *Hansen v. Covell*, 218 Cal. 622, 629 (1933).

Numerous courts applying well-established California law have recognized the distinction that Elysium misses: namely, that an award of "offsetting unliquidated damages does not render a liquidated damage award unliquidated." *Haskell*, 2012 WL 845398, at *23; *see also Elia v. Roberts*, 2018 WL 4849653, at *3 (E.D. Cal. Oct. 4, 2018) (rejecting argument that alleged offset rendered damages uncertain and ruling "Plaintiff is entitled to prejudgment interest"); *Great W. Drywall*, 166 Cal. App. 4th at 768 ("The mere pleading of unliquidated counterclaims does not render unliquidated an otherwise certain or determinable debt owing to the plaintiff."); *Hansen*, 218 Cal. at 629–30 (awarding prejudgment interest on liquidated damages notwithstanding offset from unliquidated counterclaim). Even Elysium's cases adhere to this black-letter principle. *See, e.g.*, *Chesapeake Indus., Inc. v. Togova Enterprises, Inc.*, 149 Cal. App. 3d 901, 907 (1983) (ruling "[t]he injured party's right to prejudgment interest is further protected by the rule that the legal interest allowable under section 3287 cannot be defeated by setting up an unliquidated counterclaim as an offset"). Applying that rule here, the unliquidated damages from Elysium's MFN counterclaim do not render uncertain ChromaDex's liquidated damages arising from its breach-of-contract claims.

Elysium's authority is not to the contrary. Elysium's cases all involved disputes over the amount of damages affirmatively claimed by the plaintiff, not the amount of an offsetting unliquidated counterclaim. For example, in *Chesapeake Industries*, the

court addressed "Chesapeake's liability under section 14 of the lease agreement," and found that the damages arising from the "initial claim" for contract damages were uncertain because, among other things, a creditor filed a cross-claim for an accounting, the plaintiff admitted its own uncertainty about the amount, there was a large discrepancy between the initial claim and the final judgment amount, and the defendant could not compute its liability on the plaintiff's damages claim. 149 Cal. App. 3d at 907, 910; *see also id.* at 907–13. None of those circumstances obtain here. No accounting action was filed or necessary to ascertain the amount due on the June 30 orders. ChromaDex was never uncertain about that amount. There is no discrepancy, let alone a large one, between the amount ChromaDex claimed for Elysium's breaches of contract and the jury's verdict on those claims. And Elysium has known since it placed the June 30 orders how much it owed for them; there is nothing to compute.

Elysium's other cases are inapt for the same reason: they involved disputes over the amount of the plaintiff's damages claim, not an unliquidated counterclaim. *See Berg v. Pulte Home Corp.*, 67 Cal. App. 5th 277, 294 (2021) (finding "dispute as to the *basis* of the computation of damages" that plaintiff "sought against each of the defendants"); *Craig Milhouse v. Travelers Com. Ins. Co.*, 2014 WL 12707309, at *2 (C.D. Cal. Jan. 2, 2014) (Carney, J.) (recognizing "the jury faced conflicting evidence" on plaintiff's damages claims); *Cardet v. Burlison*, 2008 WL 5235871, at *14 (Cal. Ct. App. Dec. 17, 2008) (noting "[plaintiff's] claim is not for a specified amount due under a construction contract; her claim is for negligence," which "was not a certain amount"); *Duale v. Mercedes-Benz USA, LLC*, 148 Cal. App. 4th 718, 729 (2007) (finding damages calculation for plaintiff's claims required trial resolution of multiple contested issues); *Mitsui Sumitomo Ins. Co. v. Singh*, 2007 WL 969541, at *6 (Cal. Ct. App. Apr. 3, 2007) (observing plaintiff "sought damages in the amount of $787,823.54," which was ultimately reduced to "$100,000" by the court); *Conderback, Inc. v. Standard Oil Co. of Cal., W. Operations*, 239 Cal. App. 2d 664, 690 (1966) (finding "exact sum" from plaintiff's claim uncertain because, among other things, "according

to plaintiff's theory of the case which the jury accepted, there is no single contractual document in which the sum due or the means of calculating it are clearly provided for"). Here, there is (and has never been) a dispute over the amount that Elysium owed for the June 30 orders. (*See* Section II.D, *supra*.) That is the all the certainty required by Section 3287(a). *See Haskell*, 2012 WL 845398, at *22–23 (affirming trial court's decision to award prejudgment interest on liquidated damages under Section 3287(a) before deducting offsetting unliquidated counterclaim).

Elysium attempts to side-step this obvious conclusion by making two false claims. *First*, Elysium contends that it did not "kn[o]w the amount it actually owed ChromaDex" because the MFN provision "directly controlled the price Elysium was supposed to pay" and that required a jury determination. (Opp. at 8.) But Elysium has known since it placed the June 30 orders the exact amount that it owed for them—$2,983,350—which is exactly "the amount of the plaintiff's claim," *Chesapeake*, 149 Cal. App. 3d at 907, as well as the exact amount the jury awarded to ChromaDex, (Verdict Form at 2). The MFN provision creates no uncertainty here because it does not govern Elysium's obligation to pay its invoices on time; rather, it was the payment and orders provisions of the NIAGEN and pTeroPure Supply Agreements that controlled. (*See* Section II.A, *supra*.)[3] Every time Elysium placed a firm purchase order and ChromaDex accepted it, Elysium agreed to pay the invoiced amount for that order within the contractual payment period. For example, with respect to the June 30 orders, Elysium selected the price it included in its firm purchase orders, the parties negotiated over that price, and ChromaDex (reluctantly) accepted the orders. (*Id.*) Elysium's failure to pay those invoices by the agreed-upon deadlines is the payment obligation that the jury found Elysium breached in this case. (Verdict Form at 9.)

In contrast, the MFN provision came into play only *after* Elysium had been invoiced and paid for its orders. By its plain language, that term provided only for later

[3] The pTeroPure Supply Agreement did not contain an MFN provision; Elysium cannot even claim that excuse for withholding payment on the invoices for that ingredient.

revisions to prices in previously issued invoices, and any resulting (but later-owing) refund or credit on future orders. (*See* Section II.B, *supra*.) Any MFN calculation was thus separate from, and did not halt, Elysium's independent obligation to pay the invoiced amounts on time. That is confirmed by the parties' conduct at the time of the June 30 orders: both ChromaDex and Elysium agreed that any MFN calculation was a separate matter that would be addressed at a later time. (*See* Section II.D, *supra*.) Moreover, the Court recognized that the MFN calculation was not a necessary element in calculating what Elysium owed for the June 30 orders when it rejected Elysium's proposed jury instructions that it could be "excused" from paying what it owed simply because it alleged an unliquidated MFN counterclaim. (*See* Section II.D, *supra*.) The liquidated amount that Elysium owed for the June 30 orders did not rest on a determination of the unliquidated MFN award. Consequently, ChromaDex's breach-of-contract damages are certain.

Second, Elysium claims that ChromaDex's damages are uncertain because "the jury necessarily found that Elysium was entitled to a $625,000 credit against any amount owed on the June 30 Order." (Opp. at 10.) However, the jury's verdict contained no finding of how or when the MFN award was to be provided, let alone that it should be applied as a credit on the June 30 orders. Rather, the MFN damages are an unliquidated award, and thus "given treatment as [a] discount[], not as payment[] made at the time . . . the debt is due." *Lumens*, 2018 WL 11356419, at *2 (internal quotation marks omitted). Nor is applying the MFN award as a credit on the June 30 orders required by the MFN provision, under which ChromaDex could provide either a refund or credits. Elysium's newfound insistence that the MFN award be a credit is also belied by the trial record, which shows that even Elysium's CEO, Marcotulli, understood that any MFN payment could have come in the form of a "refund." (*See* Section II.D, *supra*.) And a refund, as Elysium's counsel explained to the jury, would only be possible *after* a purchaser made the initial payment. (Anderson Decl., Ex. D at 46:8–

11.)[4] The Court should reject Elysium's attempt to re-write the jury verdict and thus manufacture uncertainty where there is none.

Given the above, the Court should find that ChromaDex's damages from Elysium's non-payment of the June 30 orders are certain, notwithstanding the unliquidated MFN award, and grant ChromaDex the prejudgment interest to which it is entitled by law. *Lumens*, 2018 WL 11356419, at *1; (*see also* Br. at 1–3).

B. Any offset for Elysium's unliquidated damages should be applied after ChromaDex's prejudgment interest is calculated and applied.

The jury found Elysium breached the NIAGEN and pTeroPure Supply Agreements when it refused to pay what it owed for the June 30 orders by the specific payment deadlines in the applicable invoices. (Verdict Form at 9.) In contrast, none of Elysium's unliquidated counterclaims have particular dates on which they were due. Because unliquidated damages cannot be awarded until the amount is determined by the factfinder, the Court should offset Elysium's unliquidated counterclaim damages only after it applies ChromaDex's prejudgment interest. (Br. at 4–8.)

Elysium argues that its MFN and fraudulent inducement damages should be deducted from the principal of ChromaDex's breach-of-contract damages, which would have the effect of reducing ChromaDex's prejudgment interest by almost $500,000. (*Compare* Declaration of Lance Gunderson ¶ 6 (expert opinion that ChromaDex's prejudgment interest totals $1,634,949.48) *with* Lane Decl., Schedule 2F (attorney opinion that ChromaDex's prejudgment interest totals $1,150,123.48).) Elysium's position misapplies the law, rests on the faulty assumption that Elysium's damages were due at the same time as ChromaDex's, and relies on erroneous underlying calculations.

[4] Elysium is also incorrect that, even if the MFN award was a credit, the jury necessarily found that it would have applied to the June 30 orders. (Opp. at 10, 18.) A credit may also apply to an amount due for a *future* order, and the trial record shows that Elysium promised to place more orders after June 30, 2016. (Anderson Reply Decl., Ex. E at 130:8–22.)

1. When unliquidated damages are not due at the same time as liquidated damages, they are offset only after prejudgment interest is applied to the liquidated damages.

Elysium incorrectly contends that unliquidated counterclaims must be offset before prejudgment interest on a liquidated damages claim is applied. (Opp. at 13.) As this Court held in *Lumens Co., Ltd. v. GoEco Led LLC*, when liquidated damages are awarded on a breach-of-contract claim arising from a series of unpaid invoices, an unliquidated counterclaim "should be offset from [the plaintiff's] award *after* prejudgment interest is applied." 2018 WL 11356419, at *2 (emphasis added). The Court's decision in *Lumens* was correct. The California rule is that, when a "claim for deduction could not be said to be demandable at the time when the original liquidated claim became due, [it] [i]s rather the proper subject of a counterclaim for damages than of an offset in the nature of a payment." *Hansen*, 218 Cal. at 629. In such cases, like this one, "the plaintiff is given interest on the full amount and the defendant's unliquidated demand is treated as a discount and not as a payment." *Id.*; *see also Haskell*, 2012 WL 845398, at *23 (holding "trial court properly awarded prejudgment interest to ConocoPhillips before offsetting its award against Haskell's damages").

The Court's ruling in *Lumens* comports with the long-recognized principle that prejudgment interest must "compensate[] the plaintiff for the loss of the use of property or money during the period before the judgment is entered." *Watson Bowman Acme Corp. v. RGW Constr., Inc.*, 2 Cal. App. 5th 279, 293 (2016). That is why damages must be "certain" as of a particular date before they can be charged against a party: "because liability for prejudgment interest occurs only when the defendant knows or can calculate the amount owed and does not pay." *Id.* If a liquidated amount (which is certain as of particular date) is offset by an unliquidated amount that is not due on the same date, it would deprive the plaintiff of compensation for its loss of the use of the full amount during the period between the dates that the liquidated and unliquidated sums were due, and result in an unearned windfall for the defendant who improperly withheld payment during that period. That is why, when a party seeking to offset an

unliquidated counterclaim against a liquidated claim "offers no evidence" to support a particular date on which the offset would apply, the proper approach is for the unliquidated damages to be "'given treatment as discounts, not as payments made at the time . . . the debt is due.'" *Lumens*, 2018 WL 11356419, at *2 (quoting *Great W. Drywall*, 166 Cal. App. 4th at 768). "In other words, an award of unliquidated damages to a cross-complainant is a setoff against prejudgment interest awarded a plaintiff for liquidated damages," *Great W. Drywall*, 166 Cal. App. 4th at 768, which in practice means the offset is deducted only "*after* prejudgment interest [on the liquidated claim] is applied," *Lumens*, 2018 WL 11356419, at *2 (emphasis added).

Elysium fails to distinguish this clear authority. *First*, Elysium asserts that the *Lumens* case does not apply on its facts because the MFN award was "demandable" as of June 30, 2016. (Opp. at 14.) Neither the jury's verdict nor the MFN provision support that claim. And, as argued above, there is no basis to assert that the jury's verdict necessarily means that the MFN award is a credit against the June 30 orders. (*See* Section III.A, *supra*.) Moreover, even if there was, Elysium represented to ChromaDex on June 30 that it intended to purchase more ingredients after June 30. (Anderson Reply Decl., Ex. E at 130:8–22.) It cannot be that an unliquidated damages award was "demandable" on a date well before either party was aware that no further orders would come. Similarly, the MFN award could not have been "demandable" on June 30 because the amount was disputed by the parties until trial, and "it is unreasonable to expect a defendant to pay a debt before he or she becomes aware of it or is able to compute its amount." *Hewlett-Packard v. Oracle Corp.*, 65 Cal. App. 5th 506, 576 (2021). *Lumens* is squarely applicable, and Elysium's MFN award should be deducted after ChromaDex's prejudgment interest is added. 2018 WL 11356419, at *2.

Second, Elysium contends that the decision in *Haskell Corp. v. ConocoPhillips Co.* does not apply because of "certain other factors." (Opp. at 15.) Neither of the two factors cited by Elysium makes *Haskell* inapt here. In that case, the California court of appeal affirmed a decision applying prejudgment interest to liquidated damages *before*

deducting an unliquidated offset, ruling that "the trial court fashioned an appropriate determination of prejudgment interest." 2012 WL 845398, at *23. In reaching that conclusion, one of the factors the court considered was that the opposing claims were not "fully intertwined." *Id.* The same reasoning applies here, where Elysium's obligation to pay for the June 30 orders (while part of the same contract) was not otherwise intertwined or dependent on any later-occurring MFN calculation. The second factor at issue arose from the principle that an award of "offsetting unliquidated damages does not render a liquidated damage award unliquidated," which the court found constituted a "basic principle of compensation" such that the unliquidated damages should not cancel out prejudgment interest on liquidated damages. *Id.* The reasoning in *Haskell* thus counsels that the Court should fashion a prejudgment interest award to protect ChromaDex's fair compensation on its liquidated damages.

Based on the foregoing, any offset for Elysium's unliquidated damages should be deducted only after applying ChromaDex's prejudgment interest. (Br. at 4–5.)

2. The only ascertainable date for when Elysium's unliquidated MFN award was due is the date of the Court's final judgment.

Even if the Court finds that Elysium's MFN award should be offset from ChromaDex's damages before prejudgment interest is applied, the Court should not apply the offset to ChromaDex's interest-bearing principal until the date of final judgment. Elysium's position is that its MFN award does not need to be applied as of a certain date. (Opp. at 15.) It bears repeating that, if unliquidated damages became due on a date *after* the liquidated sum, then offsetting the unliquidated amount as of the same date would deprive the plaintiff of its fair compensation for the interim period. (*See* Section III.B.1, *supra*.) Thus, while prejudgment interest is applied "on the net amount owed under the contract," calculating that net amount "must take into account the timing and amount" of any offsetting payments. *Watson*, 2 Cal. App. 5th at 295; *see also Hansen*, 218 Cal. at 629 (allowing interest on "balance found to be due from the time it became due"); *Pub. Employees' Ret. Sys. v. Winston*, 209 Cal. App. 3d 205,

210 (Ct. App. 1989) (noting "timing of the offset" can be "critical").[5] The timing of when Elysium's counterclaims became due is critical for the same reason: if those damages are deducted from ChromaDex's as of a date before they were due, it would deprive ChromaDex of its fair compensation and result in a windfall to Elysium.

Elysium is incorrect that the applicable cases require that its MFN award offset ChromaDex's damages as of the same date that Elysium's payments were due for the June 30 orders. (Opp. at 16.) Applying an unliquidated offset to a liquidated sum in that manner is proper only when the two sums were actually due on the same date, such as "when the deduction is for defective workmanship, or is otherwise of a character such as to constitute payment to the contractor." *Hansen*, 218 Cal. at 630. *Watson* illustrates the point. That case involved a breach-of-contract claim for non-payment and a counterclaim for defective workmanship of products delivered under the contract. 2 Cal. App. 5th at 292. The court deducted the damages for the defective product from the non-payment because the defective products were worth less on delivery than the products that were promised; in other words, the counterclaim damages arose on the same date as the liquidated damages. *Id.*; *see also Burgermeister Brewing Corp. v. Bowman*, 227 Cal. App. 2d 274, 285 (1964) (finding plaintiff's wrongful termination of contract meant "plaintiff was never entitled to more than the net amount"). Here, the MFN counterclaim did not allege that ChromaDex's ingredients were deficient or never delivered; indeed, Elysium received and sold them all for a profit. This authority thus does not support Elysium's position that the MFN award must be deducted as of the dates that it was obligated to pay ChromaDex for the June 30 orders.

The *Watson* decision also establishes the importance of the timing of offsetting payments. In that case, the defendant paid two sums to the plaintiff several years after the defendant's initial payment was due, and the court carefully instructed that—for the

[5] Elysium asserts that ChromaDex misconstrued *Public Employees Retirement System*, (Opp. at 17 n.4), but that is not true. That case stands for the proposition for which ChromaDex cited it: that offsetting payments should be applied on the dates they accrue.

purposes of calculating prejudgment interest—those two sums should only be deducted from the plaintiff's damages as of the dates they were received by the plaintiff. *Watson*, 2 Cal. App. 5th at 295. The same principle applies in this case: ChromaDex is entitled to prejudgment interest on the full amount that Elysium withheld for the June 30 orders, and the MFN award may only reduce that amount when it became due.

The question remaining is when the MFN award became due. The only possible date is that of the entry of final judgment. Elysium's effort to select June 30 misses the mark because "[it] is nowhere supported by the record." *Thompson*, 6 Cal. App. 5th at 992. That is because, as argued above, Elysium's obligation to pay for the June 30 orders was independent from any later-occurring MFN calculation, and the jury verdict did not link the MFN award to Elysium's payments for the June 30 orders. (*See* Section III.A, *supra*.) June 30 is also not appropriate because the MFN award is unliquidated and thus ChromaDex could not have paid it on that date. *See Union Pac. R.R. Co. v. Santa Fe Pac. Pipelines, Inc.*, 231 Cal. App. 4th 134, 203 (2014) (ruling that "a party cannot pay the amount due until it is determined what that amount was"). Elysium points to no other possible date. The Court should thus apply any offsets as of the final judgment date because deducting them any earlier would unfairly deprive ChromaDex of its full measure of compensation. (Br. at 5–7.)[6]

[6] In a footnote and without citing any authority, Elysium asks the Court to award it prejudgment interest on the MFN award. (Opp. at 13 n.3.) That request is presented improperly, is too late, and should not be granted. But even if the Court were to entertain it, in California "[t]he rule is that if, during any prejudgment period, a party has dominion and control over money that is awarded to it as damages, it is not entitled to prejudgment interest for that period." *Greg Opinski Construction Inc. v. City of Oakdale*, 199 Cal. App. 4th 1107, 1119 (2011). Here, Elysium withheld payment for the June 30 orders, against which it claims an offset for the MFN award, and thus has had dominion and control over that sum since its payments for those orders were due. Furthermore, Section 3287(b) of the California Civil Code—which governs prejudgment interest on unliquidated contract damages—gives the Court discretion about whether to award prejudgment interest and, if so, when to fix the start date for such interest, which can "in no event [be] earlier than the date the action was filed." Here, the Court should decline to award prejudgment interest for the reasons above, because granting it to Elysium here would penalize ChromaDex for litigating a *bona fide* dispute over the MFN provision, and because Elysium's refusal of prior settlement offers "plac[ed] the prejudgment amount at risk." *Zargarian v. BMW of N. Am., LLC*, 442 F. Supp. 3d 1216, 1226 (C.D. Cal. 2020).

3. Any offset for Elysium's fraudulent inducement damages should be deducted only after the Court applies ChromaDex's prejudgment interest.

Next, Elysium argues that the Court should offset its damages for its fraudulent inducement counterclaim as of the same date its payments for the June 30 orders were due. (Opp. at 18–21.) Elysium is mistaken for three reasons.

First, because the fraudulent inducement damages arise from a different transaction—the TLRA—they cannot offset ChromaDex's breach-of-contract damages arising from the supply agreements (and thereby reduce its prejudgment interest). *Haskell*, 2012 WL 845398, at *23. Elysium does not dispute the principle, but rather contends that the NIAGEN Supply Agreement and TLRA "comprised the same contractual agreement." (Opp. at 19.) However, in Elysium's opposition to ChromaDex's motion for summary judgment on Elysium's patent misuse counterclaim (which is still pending in this litigation), Elysium argued the exact opposite: that "[t]he supply agreement and trademark license are two distinct, separately executed, instruments, each specifying its own terms" and "[t]he integration clauses do not merge the two agreements into one." (Dkt. 296, Elysium's Opposition Brief at 13 n.6.) The Court accepted Elysium's prior argument and denied summary judgment on the patent misuse counterclaim, finding "there is a factual dispute" on the issue. (Dkt. 413, Court's Order on Motions for Summary Judgment at 23–24.) Elysium cannot "gain[] an advantage by asserting one position, and then later seek[] an advantage by taking a clearly inconsistent position." *Toyo Tire & Rubber Co. v. Hong Kong Tri-Ace Tire Co.*, 281 F. Supp. 3d 967, 981 (C.D. Cal. 2017) (Carney, J.) (internal quotation marks omitted). Accordingly, the Court should estop Elysium from asserting this inconsistent position and decline to offset the fraudulent inducement damages until after ChromaDex's prejudgment interest is applied. (Br. at 7.)

Second, because the fraudulent inducement counterclaim is a tort, damages arising under it should not offset ChromaDex's breach-of-contract damages. Elysium's only response is to quote from *Great Western Drywall*, but that case is not to the

contrary because "[b]oth parties had claims against each other under the subcontract" and "[i]t is undisputed that [the defendant's] damages arose entirely from [the plaintiff's] deficient performance of the contract." 166 Cal. App. 4th at 770. That is not this case, where the fraudulent inducement counterclaim is a tort arising from a different transaction than the one underlying ChromaDex's claims. (Br. at 7–8.)

Third, Elysium should not, in effect, be granted prejudgment interest on its tort counterclaim when it neglected to seek a jury question on that issue under Section 3288 of the California Civil Code. Elysium wrongly argues that an offset here would "prevent ChromaDex from recouping on amounts it is not owed." (Opp. at 19.) But the fraudulent inducement damages are not for a breach of contract, and there is (as with the MFN award) no basis in the jury verdict to find that these unliquidated damages applied as of a particular date. Elysium's reliance on *Hansen* is misplaced; the court did not address prejudgment interest for *tort* damages (which are governed by Section 3288), but only found that Section 3287 would not preclude on offset for a contract counterclaim damages. 218 Cal. at 631–32. The Court should not grant Elysium the prejudgment interest on its tort counterclaim when the jury did not. (Br. at 8.)

Finally, Elysium urges the Court to apply an offset for the royalty payments that ChromaDex agreed to repay. (Opp. at 21–23.) ChromaDex is not "attempt[ing] to go back on its word," as Elysium suggests. "ChromaDex will still provide that credit." (Br. at 8 n.4.) However, that credit should not be *offset* from ChromaDex's breach-of-contract damages because it was offered only to resolve Elysium's patent misuse counterclaim, which was not part of the jury trial and is still a live claim. Elysium cites no authority to support its position that such an offset must occur now, as opposed to after the patent misuse counterclaim is finally resolved.

4. Elysium's calculations are erroneous.

The Court should not adopt or credit Elysium's calculations of prejudgment interest for two reasons. *First*, they are incorrect because Elysium applies the offsets for its counterclaim starting on far earlier dates than permitted under the law. Elysium's

calculations thus improperly reduce ChromaDex's fair compensation and give Elysium a windfall for withholding the sums it owed. (*See* Sections III.B.1–3, *supra*.)

Second, Elysium's calculations are inflated at the margins. For example, Elysium enlarges its offset (and thereby reduces ChromaDex's compensation) by assuming that the jury's verdict transformed its unliquidated damages into liquidated damages, such that Elysium's counterclaims must be deducted from ChromaDex's damages on date of the verdict. (Opp. at 24; *see also* Lane Decl., Schedules 1A–1C.) Elysium cites no authority for that novel proposition. Nor does it make sense, for the simple reason that a final judgment has not been rendered yet. After all, the Court is applying pre-*judgment* interest, not pre-*verdict* interest. Elysium's counterclaim damages are and remain unliquidated until the final judgment, and thus any offset should only be applied as of the date the Court enters final judgment.

In another example, Elysium's Schedule 1A purports to calculate the "principal balance" owed to ChromaDex on the invoices for the June 30 orders by subtracting $1.9 million as an "Offset." (Lane Decl., Schedule 1A.) That number is wrong because it includes Elysium's punitive damages award, and punitive damages are not eligible for prejudgment interest in this case. (Br. at 8 n.4.) Elysium cites no authority to the contrary, and appears to concede that punitive damages should not be subtracted. (*See* Lane Decl., Schedule 1A at n.2 (listing only MFN and fraudulent inducement damages as offsets).)[7] The "Offset" should only be $875,000, which would correspondingly increase the principal balance and the final prejudgment interest award to ChromaDex.

Applying the correct legal principles, the prejudgment interest due to ChromaDex on the damages the jury awarded for Elysium's breaches of contract is **$1,634,949.48**, which results in a net total final award in this case for ChromaDex in the amount of **$2,735,607.17**. (Br. at 2–3, 9; Declaration of Lance Gunderson ¶¶ 6, 9.)

[7] Elysium suggests that $1,900,000 is an amount it was "deprived of using," (Opp. at 24), but punitive damages are not compensatory and thus Elysium could not have been deprived of that amount. *Lakin v. Watkins Assoc. Indus.*, 6 Cal. 4th 644, 664 (1993).

IV. CONCLUSION

ChromaDex respectfully requests that the Court grant its motion.

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