

'All About the Wording': In Row Between Biosciences Companies, Federal Jury Rejects Trade Secrets Claims

Split verdict sides mostly with Elysium, and against its supplier ChromaDex.

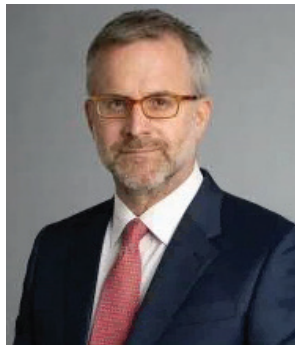
By **Meghann M. Cuniff**

What You Need to Know

- Two jurors discussed the verdict with attorneys in the hallway outside the courtroom late Monday.
- It's a split verdict, but it's also mostly a loss for ChromaDex and a win for Elysium.
- Jurors rejected ChromaDex's punitive damages request but awarded Elysium \$1.025 million in punitives.

A federal jury Monday night awarded bioscience company Elysium Health \$1.9 million in its five-year battle with its former supplier ChromaDex, rejecting all trade secrets claims brought by ChromaDex while embracing Elysium's counter-narrative about a plot by billionaire pharmaceutical investor Phil Frost.

Elysium is to pay ChromaDex nearly \$3 million for breach of contract, which is the amount of the unpaid June 2016 supply agreement that triggered the five-



**Reuven Cohen of
Cohen Williams.**



**Michael Attanasio, chair of
Cooley's global litigation
department.**



**Marc Williams of
Cohen Williams.**

Courtesy photos

year battle. Jurors also agreed that current Elysium Chief Product Officer Mark Morris breached his confidentiality agreement with ChromaDex, his ex-employer.

But jurors stopped well short of ordering Morris to disgorge \$675,935 of his salary and instead ordered him to give up only \$17,307.69. They also rejected a breach of fiduciary duty claim against him and punitive damages requests by ChromaDex while awarding Elysium \$875,000 for its breach of contract and fraudulent inducement claims

and ordering ChromaDex pay Elysium \$1.025M in punitive damages.

That and the jury's outright rejection of ChromaDex's trade secrets claims—along with the \$8.2 million in requested damages—is a loss for ChromaDex and its trial lawyers at Cooley, led by San Diego-based partner Michael Attanasio, who is head of the global litigation department.

Elysium's attorneys at Cohen Williams, based in Los Angeles, hugged in the courtroom after the verdict, which followed three

full days of testimony and about 12 hours of deliberation over two days.

Elysium lawyer Reuven Cohen said in an email to Law.com, “We represent a couple of brilliant mensches with an incredible company, and we couldn’t be more thrilled for them. We asked the jurors to take their time and get to the truth, and we’re gratified that they did just that.”

Attanasio said, “We appreciate the jury’s careful consideration of the case. We are gratified by its decision regarding ChromaDex’s contractual rights, and its award of an overall net recovery in ChromaDex’s favor.” Attanasio worked the case with Cooley’s Barrett Anderson, Jasmin Motlagh and Dylan Scott.

‘A Little Bit of Shadiness’?

In a discussion with attorneys outside the courtroom, the jury forewoman said she was particularly swayed by the “Miami Vice squad that loud-and-proud” tried to buy Elysium in 2015, then launched a rival company called Healthspan.

“Miami Vice: To me, that was key,” she said. “We thought there was a little bit of shadiness going on with Healthspan.”

She was referring to Frost, Barry Honig and Michael Brauser, who are business associates and ChromaDex investors. Entrepreneur and Hollywood movie producer Rob Fried, a

relative of Frost who’s now CEO of ChromaDex, arranged a meeting between them and Elysium founders Eric Marcotulli, Dan Alminana and Leonard Guarente, an anti-aging researcher and professor at MIT, at the Miami headquarters of Frost’s OPKO Health in 2015.

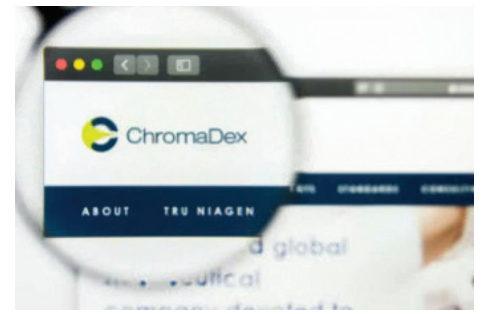
Guarente testified that the meeting reminded him of “the back-room at ‘The Sopranos,’” and Marcotulli testified that Fried warned them not to cross Frost after they rejected his offer to merge Elysium and ChromaDex.

Within a few weeks, Fried had started Healthspan, which like Elysium sold nicotinamide riboside, a key ingredient in anti-aging supplements, directly to consumers. ChromaDex, based in Irvine, California, was New York-based Elysium’s main supplier, buying the chemical from W.R. Grace and reselling it.

Elysium’s counter-complaint accused ChromaDex of breaching the most-favored-nation part of its contract by charging Elysium more for nicotinamide riboside than it charged other companies, including Healthspan. Elysium’s lawyers described the overcharging as part of a broader plot to put Elysium out of business.

‘A Breach of Personal Information’

Morris left ChromaDex for Elysium in July 2016 after months



ChromaDex’s website homepage.

of discussion, and he testified in trial that he knew he’d provided his new colleagues confidential information from ChromaDex, including the cost of its goods and all sales data for all customers for five years. He also said he could see how Elysium was using the information to craft its business strategy.

“This is a confession,” Attanasio told the jury in his closing argument on Sept. 24. “On the verdict form where you find the breach of contract against Mr. Morris, this is the answer. He admitted it right in front of you.”

Jurors quickly agreed.

“We definitely felt there was a breach of personal information,” the forewoman said after the verdict.

But by rejecting the two trade secrets claims and ordering such a low disgorgement amount, jurors showed the weight of Morris’ testimony that he was upset with ChromaDex for its dealings with Elysium, and that Elysium executives believed they were being cheated.

As Elysium’s lawyer Marc Williams explained in his closing

argument, “ChromaDex wanted its own direct-to-consumer [nicotinamide riboside] brand. If it could not own Elysium, it would start its own brand and eventually cut Elysium out.”

‘The Turning Point’

One of the two jurors who spoke with attorneys after the verdict said she owned a business with her ex-husband, and she experienced what it’s like to grow a business and be targeted for purchase or lawsuits. Elysium executives turning down Frost’s offer “was the turning point,” she said.

“All of a sudden, they go to compete with Elysium,” the woman said of ChromaDex. “That was very clear to me.”

Attanasio told the jury the testimony about Frost’s Miami meeting was a distraction, and he emphasized that Elysium’s attorneys never subpoenaed Frost, Brauser or Honig or called them as witnesses.

But Williams said their roles in the case are clear.

“No one came in here and denied that Frost, Honig and Brauser were the ones really in charge at the end of the day at ChromaDex,” Williams said in his closing.

Attanasio’s case for ChromaDex included correspondence between Morris and Elysium executives

while he was still at ChromaDex, some of which included icy wishes for ChromaDex and emotional pleas, such as one in which he described himself as a caged animal waiting to be released.

“Time to change the world and get rid of the scumbags holding this magnificent technology,” one text said.

Williams acknowledged Morris said things in text messages “that, in hindsight, everyone including Mark Morris, agrees were not smart.” But Williams said Morris was frustrated with ChromaDex for the very reasons Elysium states in the counter-complaint. Williams cited Marcotulli’s testimony in trial: “We’d been stolen from, and I wasn’t about to write another check so that we could continue to be stolen from.”

‘Take Emotion Out of It’

The trial included unusual testimony about Marcotulli’s prior cocaine usage after Elysium’s now-former counsel at Baker & Hostetler inadvertently released years of personal text messages as discovery, including messages between Marcotulli and his cocaine dealer, Kai.

Marcotulli and Alminana, who is ChromaDex’s chief operating officer, lied in their depositions when asked about the texts, and Cohen

Williams attorneys filed a notice of correction to the depositions after they took over the case from Baker & Hostetler. Cooley attorneys asked for terminating sanctions, but U.S. District Judge Cormac Carney of the Central District of California declined and said the issue could instead be introduced at trial.

Williams and his co-counsel, Cohen and Brittany Lane, approached the lies head on, with Cohen acknowledging them in his opening statement. Their questions about the personal text messages worked to portray ChromaDex’s Cooley lawyers as irresponsibly exploiting personal stuff they shouldn’t have, for the sole purpose of winning a lawsuit.

The jurors who spoke with attorneys after the verdict indicated it may not have helped ChromaDex’s case much.

The forewoman said she insisted jurors “take emotion out of it” and not focus on personal background, no matter how difficult. Some tried to keep returning to character, she said, but the jury instructions guided them.

“We had to look very closely at what are these words saying,” the juror said. “Because it’s all about the wording. I’m a writer. It’s all about the wording.”