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14 **UNITED STATES DISTRICT COURT**  
15 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**  
16 **(SOUTHERN DIVISION)**

17 ChromaDex, Inc.,

18 Plaintiff,

19 v.

20 Elysium Health, Inc.,

21 Defendant.

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

**ELYSIUM HEALTH, INC.'S  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR LEAVE TO FILE THIRD  
AMENDED COUNTERCLAIMS AND  
FIRST AMENDED ANSWER TO THIRD  
AMENDED COMPLAINT**

22  
23 Elysium Health, Inc.,

24 Counterclaimant,

25 v.

26 ChromaDex, Inc.,

27 Counter-Defendant.

Date: March 19, 2018  
Time: 9:30 a.m.  
Courtroom: 9B, 9th Floor

Discovery Cut-Off: June 14, 2018  
Pretrial Conference: September 10, 2018  
Trial: September 18, 2018  
Hon. Cormac J. Carney

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. PRELIMINARY STATEMENT**

Defendant and Counterclaimant Elysium Health, Inc. ("Elysium") respectfully seeks leave to file its Third Amended Counterclaims and a First Amended Answer to the operative Third Amended Complaint of Plaintiff and Counterdefendant ChromaDex, Inc. ("ChromaDex"). The proposed amended pleadings are attached as Exhibits 1 and 2, respectively, to the concurrently-filed Declaration of Michael M. Powell in Support of Defendant/Counterclaimant Elysium Health, Inc.'s Motion for Leave to File Third Amended Counterclaims and First Amended Answer to Third Amended Complaint ("Powell Decl.").<sup>1</sup>

As Elysium has alleged throughout this action, ChromaDex, in addition to its other misconduct, materially breached multiple provisions of the parties' Niagen Supply Agreement (the "NR Supply Agreement") and actively concealed its breaches from Elysium. For example, ChromaDex breached contractual provisions entitling Elysium to receive the most favorable pricing on nicotinamide riboside relative to other ChromaDex customers and prohibiting ChromaDex from selling or enabling others to sell a product substantially similar to Elysium's dietary supplement, Basis. Elysium now seeks leave to amend its counterclaim for breach of the NR Supply Agreement to include additional facts about ChromaDex's nonperformance under the Agreement and leave to amend its operative answer to include the affirmative defense of unclean hands. Elysium's proposed amendments incorporate information Elysium learned during discovery in this action.

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<sup>1</sup> Elysium also attaches a redline comparing the Third Amended Counterclaims to the Second Amended Counterclaims (Powell Decl. Ex. 3) and a redline comparing the First Amended Answer to the initially filed Answer to the Third Amended Complaint (Powell Decl. Ex. 4).

1 First, Elysium proposes to amend its breach of contract counterclaims to allege  
2 that ChromaDex extended nicotinamide riboside pricing to another ChromaDex  
3 customer totaling less than half the price offered to Elysium, and totaling just over  
4 60% of the revised price ChromaDex offered Elysium on a June 30, 2016 phone call  
5 where it falsely represented that the revised price was the lowest price ChromaDex  
6 offered any customer, regardless of volume. (Powell Decl. Ex. 2 ¶ 81.) This is  
7 information that ChromaDex never disclosed prior to discovery.

8 Second, notwithstanding that ChromaDex's performance or nonperformance  
9 under the NR Supply Agreement is central to this action, ChromaDex has asserted  
10 during discovery that it need not produce to Elysium documents demonstrating  
11 whether it was in material compliance with Section 3.7 of the NR Supply Agreement  
12 (the "cGMP Provision"), because Elysium did not expressly cite the cGMP Provision  
13 by name in the operative counterclaims. (See Powell Decl. ¶ 13.) Although Elysium  
14 respectfully disagrees with ChromaDex's position and maintains that ChromaDex's  
15 nonperformance under the cGMP Provision is well within the scope of the  
16 counterclaims as currently pled, Elysium seeks leave to amend its breach of contract  
17 claim to allege expressly that, in addition to ChromaDex's other breaches,  
18 ChromaDex sold and shipped to Elysium nicotinamide riboside that was not  
19 manufactured in accordance with certain current good manufacturing practices  
20 ("Pharmaceutical cGMPs") referenced in the NR Supply Agreement. (Powell Decl.  
21 Ex. 2 ¶¶ 11, 21, 68-69, 71, 87-89.) Moreover, although Elysium previously  
22 suspected that the nicotinamide riboside supplied to it by ChromaDex was not  
23 manufactured in accordance with Pharmaceutical cGMPs, it only recently confirmed  
24 its suspicions when, during discovery in this action (and despite ChromaDex's  
25 refusal to produce documents relating to cGMP compliance), ChromaDex revealed  
26 that it was advertising to potential customers that its nicotinamide riboside was

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1 produced in compliance with a cGMP standard substantially less stringent than  
2 Pharmaceutical cGMPs. (*Id.* ¶ 88.)

3 Third, Elysium recently discovered that ChromaDex failed promptly to inform  
4 it of information of which ChromaDex became aware concerning or potentially  
5 impacting the safety, identity, strength, quality or purity of the nicotinamide riboside  
6 it supplied to Elysium, in material breach of Section 3.9 of the NR Supply  
7 Agreement (the "Product Purity Provision"). Although a California voter initiative  
8 requires notice to consumers of the presence of more than threshold amounts of a  
9 certain substance (the "Regulated Substance") deemed by California authorities to be  
10 potentially hazardous to human health and although ChromaDex regularly conducted  
11 testing on its nicotinamide riboside for the presence of such chemicals and purported  
12 to set forth the results on certificates of analysis accompanying each shipment,  
13 ChromaDex repeatedly failed to inform Elysium that the Regulated Substance was  
14 present in the nicotinamide riboside that ChromaDex sold to Elysium. Elysium did  
15 not discover, and could not have discovered, these facts until recently, when it  
16 commissioned testing by an outside laboratory service to confirm the presence of the  
17 Regulated Substance in ChromaDex's NR and breaches of the Product Purity  
18 Provision. (*Id.* ¶¶ 99-101.) Moreover, ChromaDex actively concealed its breaches  
19 of the Product Purity Provision by providing Elysium with lot-specific certificates of  
20 analysis that omitted the results of the testing ChromaDex purportedly conducted on  
21 its nicotinamide riboside for chemicals subject to the California voter initiative,  
22 despite ChromaDex's practice of representing to customers that the certificates  
23 reflected the results of its testing for chemicals subject to the California voter  
24 initiative. (*Id.* ¶¶ 109-111.)

25 Finally, in light of ChromaDex's concealment of its breaches of the Product  
26 Purity Provision, Elysium seeks leave to amend its operative answer to include the  
27 additional affirmative defense of unclean hands, because ChromaDex's inequitable  
28



1 conduct precludes it from enforcing the NR Supply Agreement and seeking payment  
2 for exactly those non-conforming products whose defects ChromaDex concealed.  
3 (Powell Decl. Ex. 1 at 12.)

4 Leave to amend is to be liberally granted, for answers and counterclaims just  
5 as for complaints. A presumption in favor of permitting amendment applies unless  
6 ChromaDex can meet its burden to show undue prejudice, bad faith, undue delay,  
7 futility, or repeated failures to cure deficiencies by amendments previously allowed.  
8 Counsel for ChromaDex has indicated that ChromaDex only opposes Elysium's  
9 request for leave to amend insofar as it seeks leave to add certain allegations relating  
10 to ChromaDex's breach of the Product Purity Provision. ChromaDex cannot carry  
11 the heavy burden of showing amendment should not be permitted, for these or for  
12 any of the other new allegations and claims and defense that Elysium seeks to add.  
13 Elysium thus respectfully requests that the Court grant its motion for leave to amend.

14 **II. STATEMENT OF FACTS**

15 ChromaDex commenced this action on December 29, 2016, asserting claims  
16 against Elysium for breach of contract and fraudulent deceit and alleging that  
17 Elysium failed to pay the balance owed under the parties' supply contracts and had  
18 induced ChromaDex to fill orders at a time when Elysium purportedly had no  
19 intention to pay. (Dkt. 1.) Elysium answered on January 25, 2017 and asserted,  
20 among other things, that ChromaDex had breached the NR Supply Agreement and  
21 had sought to conceal those breaches, and that ChromaDex induced Elysium to sign  
22 a separate trademark license and royalty agreement under false pretenses. (Dkt. 11.)  
23 Elysium further sought a declaratory judgment of patent misuse and a judgment that  
24 ChromaDex committed unlawful and unfair business practices under California law  
25 by virtue of its violations of patent law and its attempts to conceal its breaches of the  
26 parties' agreements. (*Id.*)

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1 On February 15, 2017, ChromaDex filed a First Amended Complaint adding  
2 claims for misappropriation of trade secrets under state and federal law and alleging  
3 that Elysium misappropriated confidential business information, including the  
4 identity and contact information of prospective customers or business partners, from  
5 ChromaDex. (Dkt. 27.)

6 On March 6, 2017, Elysium filed First Amended Counterclaims tracking its  
7 original counterclaims, but excluding the additional allegation, contained in the  
8 original counterclaims, that ChromaDex had violated a confidentiality provision in  
9 the supply agreements by publicly disclosing pricing information. (Dkt. 31.)

10 The parties filed cross motions to dismiss each other's non-contract claims.  
11 (Dkts. 30, 34.) In a May 10, 2017 Order, the Court granted Elysium's motion in  
12 substantial part, dismissing ChromaDex's fraud claim with prejudice and dismissing  
13 its trade secrets claims with leave to amend. (Dkt. 44.) By the same Order, the  
14 Court denied ChromaDex's motion in large part, sustaining Elysium's claims for  
15 fraud and declaratory judgment of patent misuse, but granted ChromaDex's motion  
16 with respect to Elysium's claim of unlawful and unfair business practices. (*Id.*)

17 On May 24, 2017, ChromaDex filed a Second Amended Complaint amending  
18 its trade secret misappropriation claims. (Dkt. 45.) On June 7, 2017, by stipulation  
19 of the parties, ChromaDex filed the operative Third Amended Complaint deleting its  
20 trade secret misappropriation claims. (Dkts. 47, 48.) On June 21, 2017, Elysium  
21 filed the operative Answer to the Third Amended Complaint and restated its  
22 counterclaims against ChromaDex. (Dkt. 51.)

23 On August 14, 2017, ChromaDex moved for judgment on the pleadings as to  
24 Elysium's fourth amended counterclaim, declaratory judgment of patent misuse, on  
25 the grounds that the claim no longer presented an actual case or controversy. (Dkt.  
26 56.) The Court denied ChromaDex's motion on September 26, 2017 but directed  
27 Elysium to amend its counterclaims. (Dkt. 63.) Elysium filed its operative Second

1 Amended Counterclaims in accordance with the Court's Order on October 11, 2017  
2 and added a cause of action for unjust enrichment. (Dkt. 65.) ChromaDex then  
3 moved to dismiss Elysium's fourth (declaratory judgment of patent misuse) and fifth  
4 (unjust enrichment) counterclaims and to strike allegations in the fifth counterclaim.  
5 (Dkt. 67.) On November 28, 2017, the Court denied ChromaDex's motion. (Dkt.  
6 73.) ChromaDex filed an Answer to Elysium's Second Amended Counterclaims on  
7 December 12, 2017. (Dkt. 80.)

8 On September 1, 2017, the Court entered a scheduling order setting a June 14,  
9 2018 deadline for completion of discovery, including all discovery motions, and an  
10 August 13, 2018 deadline for all other motions, including motions to amend  
11 pleadings. (Dkt. 58.) The Court scheduled a pretrial conference for September 10,  
12 2018 and a jury trial to commence on September 18, 2018. (*Id.*)

13 Elysium recently discovered that, in addition to ChromaDex's other breaches  
14 of the NR Supply Agreement, ChromaDex breached the Product Purity Provision  
15 and concealed its breaches by providing Elysium with incomplete and misleading  
16 certificates of analysis with each shipment. (Powell Decl. Ex. 2 ¶¶ 12, 21, 70, 90-  
17 113, 154-155.) Elysium ascertained the existence of ChromaDex's breaches of the  
18 Product Purity Provision through testing it undertook in the fall of 2017 revealing  
19 that nicotinamide riboside supplied by ChromaDex contained the Regulated  
20 Substance in concentrations greater than the statutory safe harbor. (*Id.* ¶¶ 99-101.)  
21 Further, as part of discovery in this action, Elysium learned that ChromaDex  
22 extended nicotinamide riboside pricing to another ChromaDex customer totaling less  
23 than half the price offered to Elysium, and totaling just over 60% of the revised price  
24 Mr. Jaksch offered Elysium on a June 30, 2016 phone call where he falsely  
25 represented that such revised price was the lowest price ChromaDex offered any  
26 customer, regardless of volume. (Powell Decl. Ex. 2 ¶ 81.) Elysium now seeks to  
27 amend its counterclaim for breach of the NR Supply Agreement to include these

1 newly discovered facts and leave to amend its operative answer to include unclean  
2 hands as an affirmative defense in light of ChromaDex's inequitable conduct.

3 In addition, during discovery in this action, ChromaDex took the position, on  
4 relevance grounds, that it need not produce documents concerning its performance or  
5 nonperformance with the NR Supply Agreement's cGMP Provision. (Powell Decl. ¶  
6 13.) Although Elysium believes such documents are directly relevant to the  
7 counterclaims and affirmative defenses as currently pled, Elysium seeks to amend its  
8 counterclaims expressly to clarify that, in fact, ChromaDex breached the cGMP  
9 Provision. (Powell Decl. Ex. 2 ¶¶ 11, 21, 68-69, 71, 87-89, 151-153.) Moreover,  
10 despite ChromaDex's overall refusal to produce documents relating to cGMP  
11 compliance during discovery, Elysium learned in discovery that ChromaDex had  
12 been advertising to consumers that its nicotinamide riboside was produced in  
13 compliance with a cGMP standard substantially less stringent than Pharmaceutical  
14 cGMP. (*Id.* ¶ 88.) Elysium seeks leave to include these newly discovered facts in  
15 support of its existing counterclaim for breach of the NR Supply Agreement.

16 Pursuant to Local Rule 7-3, counsel for Elysium initially requested to meet  
17 and confer with counsel for ChromaDex regarding Elysium's intent to move for leave  
18 to amend its pleadings on January 4, 2018. (*See* Powell Decl. ¶ 7.) Following an  
19 exchange of correspondence that included Elysium's provision of a redline of its  
20 contemplated amended counterclaims, the parties met and conferred on January 29,  
21 2018. (*See id.* ¶¶ 8-9.) Counsel for ChromaDex indicated that ChromaDex would  
22 not oppose Elysium's request for amendment if Elysium would agree to join a  
23 request to the Court to extend the current discovery deadline by three months. (*See*  
24 *id.* ¶ 17.) Following further discussion, the parties agreed that ChromaDex would  
25 refrain from opposition in exchange for Elysium's agreement to join a request to the  
26 Court to extend the current discovery deadline by six weeks. (*See id.* ¶ 18.) Elysium  
27 prepared draft joint stipulations on both amendment and scheduling for ChromaDex's

1 review, delivered on February 12, 2018. (*See id.* ¶ 19.) Counsel for ChromaDex  
2 thereafter reversed course and asserted an objection to certain allegations relating the  
3 breach of the Product Purity Provision. Elysium now respectfully requests leave to  
4 amend and sets forth the reasons that leave to amend should be granted here.

5 **III. LEGAL STANDARD**

6 Under Rule 15 of the Federal Rules of Civil Procedure, leave to amend is  
7 freely given whenever justice so requires. *See* Fed. R. Civ. P. 15(a)(2). "The policy  
8 favoring amendment is to be applied with 'extreme liberality,' and the party opposing  
9 the motion has the burden to convince the court that justice requires denial."  
10 *Endurance Med., Inc. v. Smith & Nephew, Inc.*, No. SACV 15-01265-CJC(DFMx),  
11 2016 WL 8856660, at \*1 (C.D. Cal. Sept. 27, 2016) (Carney, J.) (quoting *Eminence*,  
12 316 F.3d at 1051). In assessing whether to grant leave to amend, courts consider  
13 whether there is "undue delay, bad faith or dilatory motive on the part of the movant,  
14 repeated failure to cure deficiencies by amendments previously allowed, undue  
15 prejudice to the opposing party by virtue of allowance of the amendment, [and]  
16 futility of amendment[.]" *Foman v. Davis*, 371 U.S. 178, 182 (1962). Although  
17 *Foman* lists several factors, prejudice is the "touchstone of the inquiry under rule  
18 15(a)." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003)  
19 (citation omitted). "Absent prejudice, or a strong showing of any of the remaining  
20 *Foman* factors, there exists a presumption under Rule 15(a) in favor of granting  
21 leave to amend." *Id.*<sup>2</sup> (emphasis added). This presumption is particularly strong

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23 <sup>2</sup> Once the district court issues a scheduling order establishing a deadline for  
24 amending the pleadings, motions for leave to amend filed *after* the deadline are  
25 governed by Rule 16 of the Federal Rules of Civil Procedure, which requires a  
26 showing of "'good cause.'" *Excelsa Creative, LLC*, 2014 WL 12589653, at \*4  
27 (quoting Fed. R. Civ. P. 16(b)). Here, however, Elysium's motion is well in advance  
of – in fact, nearly six months before – the August 13, 2018 deadline set forth in this  
Court's scheduling order (*see* Dkt. 58) and thus is governed by the more liberal Rule  
15 standard.

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1 where amendment would permit all of the parties' disputes regarding a specific  
2 agreement, like the NR Supply Agreement here, to be resolved in the same action.  
3 *See Endurance Med., Inc.*, 2016 WL 8856660, at \*1-2 (granting motion for leave to  
4 amend) ("However, given that Plaintiff seeks \$11 million dollars in damages, the  
5 Court finds that amendment is warranted to ensure that all the parties' disputes  
6 regarding the agreement are resolved.").<sup>3</sup>

7 **IV. ARGUMENT**

8 **A. ChromaDex Cannot Show Undue Prejudice**

9 "The party opposing amendment bears the burden of showing prejudice."  
10 *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987). Prejudice must  
11 be "undue" in order to overcome the strong presumption in favor of liberally granting  
12 leave to amend. *Foman*, 371 U.S. at 182. The Ninth Circuit has found undue  
13 prejudice where additional claims would significantly alter the nature of the litigation  
14 and would require the opposing party to undertake an entirely new course of defense  
15 at a late procedural stage of the case. *See Morongo Band of Mission Indians v. Rose*,  
16 893 F.2d 1074, 1079 (9th Cir. 1990). On the other hand, the non-movant's need to  
17 conduct additional discovery or modify its case strategy are not sufficient to  
18 demonstrate undue prejudice. *See, e.g., Vision Autodynamics, Inc. v. KASA Capital*  
19 *LLC*, No. CV 13-06003-DMG (MANx), 2014 WL 12614746, at \*3 (C.D. Cal. June  
20 6, 2014) ("KASA sites [sic] no case law in support of its contention that it would be  
21 prejudiced by having to conduct additional discovery and revise case strategy."); *see*  
22 *also Pipe Restoration Techs., LLC v. Pipeline Restoration Plumbing, Inc.*, No. 13-  
23 00499, slip op. at 2 (C.D. Cal. Apr. 11, 2014) (Carney, J.) ("Plaintiffs also contend  
24 that granting leave to amend would prejudice them because substantial discovery has

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26 <sup>3</sup> Although Rule 13 generally governs counterclaims, a request to amend a  
27 counterclaim is governed by Rule 15, just as any other amendment. *See Fed. R. Civ.*  
28 *P. 13 advisory committee's note to 2009 amendment.*



1 already been conducted and deadlines for fact discovery and motions are fast  
2 approaching. But discovery has not closed in this case . . ."). Moreover, where the  
3 non-movant "is on notice of the facts contained in an amendment . . . there is no  
4 serious prejudice . . . in allowing the amendment." *Excelsa Creative, LLC v. Deal*  
5 *Segments, LLC*, No. CV 14-03326 MMM (PLAx), 2014 WL 12589653, at \*4 (C.D.  
6 Cal. Dec. 5, 2014) (citation omitted).

7 In this case, ChromaDex cannot show prejudice, much less the undue  
8 prejudice required to overcome the presumption in favor of granting Elysium leave  
9 to amend. *Foman*, 371 U.S. at 182. The parties are still in the early stages of fact  
10 discovery, with a discovery cutoff four months away. (Dkt. 58.) Courts routinely  
11 decline to find undue prejudice when the discovery deadline is substantially sooner  
12 than it is here. *Cf. Pipe Restoration Techs., LLC*, slip op. at 2 (no undue prejudice  
13 where discovery deadline was one month away); *Hip Hop Beverage Corp. v. RIC*  
14 *Representacoes Importacao e Comercio Ltda.*, 220 F.R.D. 614, 622 (C.D. Cal. 2003)  
15 (no undue prejudice where motion for leave was "not an 'eleventh hour' action" and  
16 discovery cut-off was still two months away); *cf. Solomon v. N. Am. Life & Cas. Ins.*  
17 *Co.*, 151 F.3d 1132, 1139 (9th Cir. 1998) (affirming denial of leave to amend where  
18 "[a]llowing the motion would have required re-opening discovery"). And even if the  
19 Court were called upon to extend any existing deadlines to accommodate Elysium's  
20 amendments, "amending the scheduling order . . . would be preferable" to denying  
21 Elysium the opportunity to plead its counterclaims fully. *Pipe Restoration Techs.*,  
22 slip op. at 2.

23 ChromaDex cannot establish prejudice for at least two other reasons. First, the  
24 relevant evidence of ChromaDex's (1) sale to Elysium of nicotinamide riboside that  
25 was not manufactured in accordance with Pharmaceutical cGMPs; (2) failure to  
26 inform Elysium of information concerning the purity and quality of the nicotinamide  
27 riboside it supplied to Elysium; and (3) efforts to conceal its breaches by providing



1 incomplete and misleading certificates of analysis, would be largely if not entirely in  
2 ChromaDex's own possession. This weighs against a finding of undue prejudice to  
3 ChromaDex. *See, e.g., Dexcowin Glob., Inc. v. Aribex, Inc.*, No. CV 16-143-GW  
4 (AGRx), 2017 WL 3485790, at \*4 (C.D. Cal. Mar. 23, 2017) (no undue prejudice to  
5 Aribex where "the relevant evidence has always been in possession of Aribex");  
6 *Trimble Navigation Ltd. v. RHS, Inc.*, No C 03-1604 PJH, 2007 WL 2727164, at \*11  
7 (N.D. Cal. Sept. 17, 2007) (no undue prejudice to plaintiff where "defendants' new  
8 allegations all relate to evidence and discovery that is in plaintiff's possession and  
9 control").

10 Second, ChromaDex cannot establish prejudice because it has long been on  
11 notice of the facts and legal theories advanced in Elysium's proposed pleadings, and  
12 the amendments cannot be said to significantly alter the nature of the litigation. *See*  
13 *Morongo Band of Mission Indians*, 893 F.2d at 1079. Among other things, this  
14 action involves – and has always involved – whether ChromaDex (1) was in material  
15 compliance with its obligations under the NR Supply Agreement and (2) wrongfully  
16 concealed its breaches of that Agreement. Indeed, to prevail on its claim for breach  
17 of contract, ChromaDex will be required to show that it fully performed under the  
18 terms of the NR Supply Agreement, including the cGMP and Product Purity  
19 Provisions, or that its performance was excused. *See, e.g., Melton v. Bank of Am.,*  
20 *N.A.*, No. CV 15-06391 DDP (AGRx), 2016 WL 2858766, at \*1 (C.D. Cal. May 16,  
21 2016) (listing performance, or excusal of performance, as an essential element of a  
22 breach of contract claim under California law). It can hardly claim that Elysium's  
23 additional allegations of its noncompliance with the cGMP and Product Purity  
24 Provisions alter the nature of this case (let alone significantly, and let alone at the  
25 eleventh hour). *See also, e.g., Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, No.  
26 16-CV-01393-JST, 2017 WL 3149297, at \*3 (N.D. Cal. July 25, 2017) (noting that,

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1 although Oracle sought to add facts that it "always suspected" were true, "[f]urther  
2 factual support for Oracle's existing claims does not prejudice HPE").

3 Moreover, Elysium has already propounded discovery requests addressing  
4 ChromaDex's noncompliance with its obligations under Section 3.7 of the  
5 Agreement, including whether the nicotinamide riboside ChromaDex sold was  
6 manufactured in accordance with Pharmaceutical cGMPs. Elysium believes that  
7 such discovery requests are relevant under (1) the operative Second Amended  
8 Counterclaims, which already allege – as Elysium has all along – that ChromaDex  
9 materially breached multiple provisions of the NR Supply Agreement and (2)  
10 Elysium's operative affirmative defenses, which allege that ChromaDex did not  
11 perform fully under the NR Supply Agreement and engaged in deceitful conduct  
12 with respect to the Agreement. Although ChromaDex disputes whether Elysium's  
13 discovery requests seek relevant materials, ChromaDex cannot deny that these  
14 disputed requests and the parties' related meet and confer discussions have put it on  
15 notice of Elysium's position and indeed ChromaDex has acknowledged that it has  
16 already searched for documents responsive to Elysium's request. (Powell Decl. ¶  
17 15.) *Cf. Oracle Am., Inc.*, 2017 WL 3149297, at \*3 (no prejudice where "the 'only  
18 additional burden that HPE will incur is the obligation to provide Oracle with the  
19 discovery that Oracle has sought all along" (citation omitted)).

20 Because the nature of the litigation will not substantially change as a  
21 consequence of Elysium's amendments, and because ChromaDex has been on notice  
22 of Elysium's claims and defenses as they are proposed to be amended here, there can  
23 be "no serious prejudice . . . in allowing the amendment." *Excelsa Creative, LLC*,  
24 2014 WL 12589653, at \*4 (citation omitted).<sup>4</sup> In addition, the presumption in favor

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26 <sup>4</sup> And, because the Ninth Circuit permits parties to raise affirmative defenses for the  
27 first time at summary judgment or beyond, *a fortiori* ChromaDex is not unduly  
28 prejudiced by the introduction of an unclean hands defense at this stage of the

(cont'd)

1 of granting Elysium's motion is all the more appropriate here, where the amendment  
2 relates to the same NR Supply Agreement already the subject of this dispute. *See*  
3 *Endurance Med., Inc.*, 2016 WL 8856660, at \*1-2.

4 **B. ChromaDex Cannot Make A Strong**  
5 **Showing Of Any Other Foman Factor**

6 Because ChromaDex cannot show undue prejudice, only "a strong showing of  
7 any of the remaining *Foman* factors" could overcome the presumption under Rule  
8 15(a) in favor of granting leave to amend. *Eminence Capital*, 316 F.3d at 1052  
9 (citation omitted). ChromaDex cannot make the requisite showing of any factor.

10 1. ChromaDex Cannot Show Bad Faith

11 First, ChromaDex cannot establish that Elysium's amendment is offered in bad  
12 faith. "Courts have understood 'bad faith' to mean such tactics as, for example,  
13 seeking to add a defendant merely to destroy diversity jurisdiction." *Hip Hop*  
14 *Beverage Corp.*, 220 F.R.D. at 622 (citing *Sorosky v. Burroughs Corp.*, 826 F.2d  
15 794, 805 (9th Cir. 1987)). A party may also act in bad faith "when it seeks to amend  
16 its pleadings solely for a "wrongful motive" such as unnecessary delay or  
17 harassment." *Excelsa Creative, LLC*, 2014 WL 12589653, at \*7 (citation omitted).

18 ChromaDex cannot show that Elysium has employed any litigation tactic akin  
19 to adding a new party merely to destroy diversity jurisdiction. *See Hip Hop*  
20 *Beverage Corp.*, 220 F.R.D. at 622. Indeed, Elysium does not even propose to add  
21 any new causes of action or any new parties, but rather only new allegations and one  
22 affirmative defense based on facts already known to ChromaDex or that have only  
23 recently come to Elysium's attention and thus could not have been asserted by  
24 Elysium at the outset of the litigation. ChromaDex cannot show that Elysium's  
25 amendment is being proffered solely for a wrongful motive and thus cannot establish

26 *(cont'd from previous page)*  
27 proceedings, long before Elysium would be required to assert it under Ninth Circuit  
28 law. *See Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993).

1 bad faith. *Excelsa Creative, LLC*, 2014 WL 12589653, at \*7. Notably, numerous of  
2 Elysium's proposed amendments – such as its allegations that ChromaDex has  
3 advertised to potential customers that its nicotinamide riboside is manufactured in  
4 compliance with standards less stringent than Pharmaceutical cGMPs – were learned  
5 only through discovery. *See St. John v. Toyota Motor Corp.*, No. SACV 10-1460  
6 JVS (FMOx), 2013 WL 12182030, at \*1 (C.D. Cal. Apr. 5, 2013) (no bad faith  
7 where amendment sought to include "additional facts uncovered during discovery");  
8 *cf. Neighborhood Assistance Corp. of Am. v. First One Lending Corp.*, No. SA CV  
9 12-0463-DOC-(MLGx), 2013 WL 44567, at \*1 (C.D. Cal. Jan. 3, 2013) (noting that  
10 "seeking to amend a complaint based on facts uncovered during discovery provides  
11 good cause to seek leave to amend," which is a more exacting standard than Rule  
12 15).

13 Although Elysium maintains that it has exercised good faith and proper  
14 diligence at all stages of this action, to the extent ChromaDex contends that Elysium  
15 knew or should have known earlier in the litigation the facts it now seeks to add, this  
16 alone cannot establish bad faith or a dilatory motive. *See, e.g., Pipe Restoration*  
17 *Techs.*, slip op. at 2 ("Plaintiffs nevertheless contend that leave to amend should be  
18 denied because Defendants could have discovered any alleged noncompliance with  
19 NSF/ANSI standards earlier. But the fact that Defendants could have discovered the  
20 basis for their proposed amendments earlier, standing alone, does not warrant denial  
21 of leave to amend."); *Tech-4-Kids, Inc. v. Sport Dimension, Inc.*, No. CV 12-6769  
22 PA (AJWx), 2013 WL 12247761, at \*5 (C.D. Cal. Mar. 4, 2013) ("Although Plaintiff  
23 has known of the facts supporting much of its new claims for some time now, that  
24 fact alone is not sufficient to support a finding of bad faith."). ChromaDex cannot  
25 show, much less make a strong showing, that Elysium has engaged in impermissible  
26 litigation tactics or is seeking amendment solely for a wrongful motive.

27 2. ChromaDex Cannot Show Undue Delay

1 ChromaDex also cannot show undue delay. Even assuming that Elysium  
2 delayed in alleging the facts or affirmative defense proposed to be added – a position  
3 that Elysium would dispute – the Court ordered a June 14, 2018 discovery cutoff and  
4 an August 13, 2018 deadline to amend the pleadings, and discovery remains in its  
5 early stages, with both parties in the midst of document production and no  
6 depositions yet scheduled. ChromaDex cannot establish undue delay where  
7 Elysium's motion is filed so far in advance of the cutoff for amendments. *See, e.g.,*  
8 *Excelsa Creative, LLC*, 2014 WL 12589653, at \*8 ("Defendants, moreover, filed their  
9 motion to amend within the deadline for amendment set by the scheduling order.  
10 Thus . . . there is no indication that they 'unduly delayed.'"); *Endurance Med., Inc.*,  
11 2016 WL 8856660, at \*1 (no undue delay, even where document discovery was well  
12 underway, where fact discovery would not close for six months and depositions had  
13 not yet taken place). And even if ChromaDex could establish undue delay (which it  
14 cannot), "[u]ndue delay by itself is insufficient to justify denying a motion to  
15 amend." *Excelsa Creative, LLC*, 2014 WL 12589653, at \*8 (alteration in original)  
16 (quoting *Bowles v. Reade*, 198 F.3d 752, 757-58 (9th Cir. 1999)); *see also Hip Hop*  
17 *Beverage Corp.*, 220 F.R.D. at 622 (noting that "the Ninth Circuit has found that  
18 delay alone is not sufficient to justify the denial of a motion requesting leave to  
19 amend"). This is true even if the movant seeks to add facts that were known to him,  
20 and that he could have alleged, at the time he filed his original answer. *See, e.g.,*  
21 *Excelsa Creative, LLC*, 2014 WL 12589653, at \*8; *Oracle Am., Inc.*, 2017 WL  
22 3149297, at \*3 (plaintiff sought to add facts it "always suspected" were true).

23 In fact, it is ChromaDex, and not Elysium, who bears responsibility for any  
24 perceived "delay" in Elysium's amendments, for two reasons. First, because of  
25 ChromaDex's efforts to conceal its breaches of the Product Purity Provision (among  
26 other provisions), such as by providing to Elysium certificates of analysis that failed  
27 to disclose material information about product quality and purity – like the results of

1 testing ChromaDex conducted for chemicals regulated by the California voter  
2 initiative – Elysium was required to expend time and effort to commission testing by  
3 an outside laboratory service to confirm ChromaDex's breaches. This necessarily  
4 precluded Elysium from amending its counterclaims sooner. Second, during  
5 discovery, ChromaDex took the unreasonable position that it need not produce  
6 documents concerning its compliance with the cGMP Provision, because such  
7 documents were purportedly not relevant to Elysium's counterclaims or affirmative  
8 defenses as currently pled, which Elysium disputes but seeks to address through the  
9 instant motion. Any alleged "delay" by Elysium in seeking amendment is therefore  
10 the product of ChromaDex's own misconduct and its resistance to Elysium's proper  
11 discovery demands. In addition, although Elysium previously suspected that the  
12 nicotinamide riboside supplied to it by ChromaDex was not manufactured in  
13 accordance with Pharmaceutical cGMPs, it only recently confirmed its suspicions  
14 when ChromaDex revealed through production of discovery materials that it was  
15 advertising to potential customers that its nicotinamide riboside was produced in  
16 compliance with a cGMPs standard less stringent than Pharmaceutical cGMPs.

17 In light of the procedural posture of this action, the newly discovered nature of  
18 the facts proposed to be asserted in the Third Amended Counterclaims, and  
19 ChromaDex's own concealment of its misconduct and obstreperousness during  
20 discovery, ChromaDex cannot show that Elysium engaged in undue delay in seeking  
21 amendment.

22 3. ChromaDex Cannot Show That Amendment Would Be Futile

23 Nor can ChromaDex show that Elysium's proposed amendments would be  
24 futile. "A 'proposed amendment is futile only if no set of facts can be proved under  
25 the amendment to the pleadings that would constitute a valid and sufficient claim or  
26 defense.'" *Banc of California, Inc. v. Farmers & Merchs. Bank of Long Beach*, No.  
27 SACV 16-01601-CJC (AFMx), 2017 WL 2972338, at \*1 (C.D. Cal. Apr. 19, 2017)



1 (Carney, J.) (quoting *Sweaney v. Ada Cty., Idaho*, 119 F.3d 1385, 1393 (9th Cir.  
2 1997)). It is exceedingly rare for courts to deny leave to amend on futility grounds,  
3 because "[o]rdinarily, courts will defer consideration of challenges to the merits of a  
4 proposed amended pleading until after leave to amend is granted and the amended  
5 pleading is filed." *Excela Creative, LLC*, 2014 WL 12589653, at \*7 (citation  
6 omitted). Only in exceptional circumstances – such as when "the proposed pleading  
7 would run afoul of the statute of limitations, re-allege claims which the court had  
8 already rejected, or assert a claim which had yet to be recognized as a viable cause of  
9 action [in the governing jurisdiction]" – is denial of leave to amend on futility  
10 grounds appropriate. *O'Shea v. Epson Am., Inc.*, No. CV 09-8063 PSG (CWx), 2010  
11 WL 4025627, at \*4 (C.D. Cal. Oct. 12, 2010). None of Elysium's proposed  
12 amendments can be characterized as futile under this lofty standard.

13 First, Elysium proposes to add express allegations that ChromaDex supplied it  
14 with nicotinamide riboside that was not manufactured in accordance with  
15 Pharmaceutical cGMPs, placing ChromaDex in direct breach of the cGMP  
16 Provision. (Powell Decl. Ex. 2 ¶¶ 11, 21, 68-69, 71, 87, 151-153.) Elysium also  
17 alleges that ChromaDex's delivery of nicotinamide riboside that was not  
18 manufactured in accordance with Pharmaceutical cGMPs could not be discovered  
19 upon a reasonable inspection of the product shipped, as such defects were latent and  
20 became known to Elysium only after the parties' relationship ended. (*Id.* ¶¶ 88-89.)  
21 These allegations are more than sufficient to plead a claim for breach of the cGMP  
22 Provision.

23 Second, Elysium seeks leave to add allegations that, in direct contravention of  
24 the Product Purity Provision, ChromaDex – which was fully capable of conducting,  
25 and in fact routinely conducted, testing of the nicotinamide riboside it was supplying  
26 – failed to inform Elysium of information of which it learned concerning the quality  
27 and purity of the nicotinamide riboside it sold to Elysium, and that it further  
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1 concealed this breach by providing Elysium with incomplete and misleading  
2 certificates of analysis. (Powell Decl. Ex. ¶¶ 12, 21, 70, 90-101, 110-113, 154-155.)  
3 Elysium's own testing demonstrates that ChromaDex knowingly breached the  
4 Product Purity Provision during the parties' relationship. (*Id.* ¶¶ 102-109.) This  
5 squarely constitutes a material breach by ChromaDex of Section 3.9 of the NR  
6 Supply Agreement.

7       Next, Elysium seeks to allege that, in concealing its contractual breaches and  
8 in supplying a product that was not manufactured in accordance with Pharmaceutical  
9 cGMPs as promised, ChromaDex engaged in inequitable conduct that "precludes  
10 ChromaDex from enforcing the NR Supply Agreement, seeking payment for exactly  
11 those non-conforming products whose defects ChromaDex fraudulently concealed,  
12 against Elysium." (Powell Decl. Ex. 2 ¶ 112.) This gives rise to the affirmative  
13 defense of unclean hands, which "bars claims for money damages as well as those  
14 for equitable relief" and thus prohibits ChromaDex from seeking damages from  
15 pursuing its claim for breach of contract against Elysium. *POM Wonderful LLC v.*  
16 *Coca Cola Co.*, 166 F. Supp. 3d 1085, 1091 (C.D. Cal. 2016). The defense of  
17 unclean hands is sufficiently pled where it provides the opposing party "with fair  
18 notice of the nature and grounds for this defense." *Springer v. Fair Isaac Corp.*, No.  
19 14-CV-02238-TLN-AC, 2015 WL 7188234, at \*4 (E.D. Cal. Nov. 16, 2015).  
20 Because Elysium's proposed amendment readily meets this standard, it cannot be  
21 characterized as futile. (*See* Powell Decl. Ex. 1 at 12.)<sup>5</sup> Moreover, ChromaDex  
22 effectively recognized that Elysium's proposed amendment was not futile through its

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25 <sup>5</sup> To the extent ChromaDex attacks the merits of any of Elysium's proposed  
26 amendments, the Court should defer consideration of ChromaDex's argument "until  
27 after leave to amend is granted and the amended pleading is filed." *Excelsa Creative,*  
*LLC*, 2014 WL 12589653, at \*7 (citation omitted).

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1 offer to refrain from opposition in exchange for a substantial extension of the case  
2 schedule. (*See* Powell Decl. ¶ 17.)

3 4. ChromaDex Cannot Show Repeated Failure To Cure Deficiencies

4 Finally, ChromaDex cannot show that Elysium has repeatedly failed to cure  
5 deficiencies by amendments previously allowed. This is the first time that Elysium  
6 has sought leave of court to amend its pleadings, which counsels in favor of  
7 permitting amendment. *See, e.g., Pipe Restoration Techs.*, slip op. at 2 ("Moreover,  
8 Defendants have not repeatedly failed to cure deficiencies by amendments  
9 previously allowed – this is Defendants' first request to amend the pleadings.").  
10 Elysium's allegations relating to the Product Purity Provision and unclean hands  
11 defense are not intended to cure any actual or perceived deficiency; rather, the  
12 information underlying the allegations was discovered only recently. With respect to  
13 Elysium's allegations that ChromaDex breached the cGMP Provision, Elysium's  
14 amendment not only relies upon information Elysium learned for the first time in  
15 discovery, but is made in response to ChromaDex's position, taken for the first time  
16 during discovery, that Elysium did not identify the cGMP Provision with sufficient  
17 specificity to justify ChromaDex's production of responsive documents. It cannot be  
18 described as a failure to correct deficiencies by amendments previously allowed.

19 **V. CONCLUSION**

20 For the foregoing reasons, Elysium respectfully requests that the Court grant  
21 its motion for leave to amend.

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1 DATED: February 22, 2018

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