UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELYSIUM HEALTH, INC.,	:	Civ. No. 17-cv-07394 (VEC)
Plaintiff,	:	ECF Case
- against -	:	Electronically Filed
CHROMADEX, INC.,	:	
Defendant.	:	**Oral Argument Requested**

MEMORANDUM OF LAW OF PLAINTIFF ELYSIUM HEALTH, INC. IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

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Plaintiff Elysium Health, Inc. ("Elysium") respectfully submits this memorandum of law in opposition to the motion to dismiss filed by Defendant ChromaDex, Inc. (the "Brief" or Br.").

PRELIMINARY STATEMENT[1]

ChromaDex's characterization of Elysium's claims for false advertising, trade libel, deceptive business practices, and tortious interference with prospective economic relations as matters implicating its "First Amendment right" to petition FDA regarding "a matter of serious public safety" constitutes nothing more than a disingenuous disregard for the contents of Elysium's complaint, which specifically pleads that ChromaDex's professed newfound concern for "public safety" is nothing more than a smokescreen for a carefully-orchestrated campaign of disparagement against a competitor. The malicious defamation and falsehoods for which ChromaDex now claims protection include:

- A public proclamation that Elysium sells a product contaminated with a "toxic industrial solvent found in paint thinner" (omitting that the levels of this purported "contaminant" fall below 1% of those permitted by FDA);
- A charge that this "contaminant" renders Elysium's product "injurious to health" (omitting that ChromaDex itself sold products containing the same "contaminant," thus demonstrating that ChromaDex knew it not to be injurious at all);
- Repeated descriptions of Elysium's product as "adulterated" based on a purported failure to submit a regulatory notice to FDA (omitting that ChromaDex's own competing product is "adulterated" under that standard, again showing that ChromaDex knows there exists no "public safety" risk); and
- A fearmongering demand that FDA immediately seize all supplies of Elysium's product and legally enjoin any further manufacture (omitting that FDA does not even allow such relief in response to petitions like that filed by ChromaDex).

The First Amendment, and related privileges, do not protect such false speech uttered with intent to harm. ChromaDex's Brief relies on misstating the applicable authorities,

[1] Capitalized terms not defined herein have the same meaning assigned to them in the Complaint ("Compl.").

controverting Elysium's well-pled facts, and ignoring the existence of those allegations when it cannot conjure up a counter-narrative. Missing, however, is any indication that Elysium has not adequately alleged its claims. ChromaDex's motion to dismiss must therefore be denied.

STATEMENT OF FACTS

A. ChromaDex's Misconduct Disrupts Its Supplier Relationship with Elysium

Defendant ChromaDex, which bills itself as the sole commercial source of nicotinamide riboside ("NR"), entered into agreements with Elysium in 2014 whereby it committed to supply Elysium with the NR and pterostilbene that make up Elysium's nutritional supplement called "Basis." (Compl. ¶ 22.) After the revelation of ChromaDex's contractual breaches and fraud landed it in litigation against Elysium, ChromaDex's supply business, having lost its largest customer, withered. (*Id.* ¶ 27.) ChromaDex thus began to transition out of its faltering NR supply business and into the direct-to-consumer NR product market, then and now dominated by Elysium. (*Id.* ¶ 31-33.) Desperate to seek a foothold in the market and to retaliate against its new rival, ChromaDex, rather than simply market its competing product, resorted instead to manipulation of public opinion through the submission of a false and inflammatory petition (the "Sham Petition") to FDA on August 18, 2017, that claimed Elysium's Basis to be "contaminated" with toluene, a "toxic industrial solvent," and purported to demand that FDA initiate specific "enforcement action" that included seizure of Elysium's inventory of Basis and an injunction against any further manufacture or distribution. (*Id.* ¶ 35-36.)

B. ChromaDex's Submission of the Sham Petition to FDA Serves to Disparage Elysium's Basis Rather Than to Invite Agency Action

That ChromaDex did not expect FDA to take the severe enforcement action it claimed to seek is evident from the very nature of the Sham Petition, which is in the form of a citizen petition pursuant to 21 C.F.R. § 10.30. (Compl. ¶ 39.) The regulations establishing the Citizen

Petition Process do not allow for relief in the form of the "enforcement" action demanded in the Sham Petition (*id.* ¶ 40), as FDA has repeatedly made clear in rejection of citizen petitions, and the Sham Petition therefore has no chance of eliciting the relief it seeks. (*See id.* ¶ 41-42.) And ChromaDex never expected success: It had no basis to believe that FDA would take any action at all in response to its allegations about the "contamination" of Basis, no matter the form in which those contentions were submitted or the relief demanded, as the "danger" of Basis had been totally fabricated, and ChromaDex was well aware that the amounts of toluene it purportedly found in Basis constituted only a fraction of the amount considered unsafe by FDA. (*Id.* ¶ 43.) Rather, ChromaDex, which boasts considerable regulatory expertise, purposefully opted for the incorrect vehicle of the Citizen Petition Process because the Citizen Petition Process provides a public forum for airing purported safety concerns, in contrast to the "trade complaint" process, whereby competitors may confidentially submit information to FDA in support of a request for enforcement action. (*Id.* ¶ 41-43.) Thus, ChromaDex publicly submitted its statements to FDA reporting this "danger" solely to injure Elysium's reputation. (*See id.* ¶ 43-44.)

C. ChromaDex's Purported Concern about the Safety of Basis Is Belied by Its Long History of Selling Products Embodying the Same "Danger"

In the Sham Petition, ChromaDex describes a supposed concern about Elysium's sales of Basis no longer incorporating Niagen, ChromaDex's proprietary NR product, that led it to surreptitiously obtain samples of Basis for testing in its in-house laboratory. (Compl. ¶ 45-50.) This testing revealed, ChromaDex alleged in the Sham Petition, that certain samples of Basis dating from July 2017 were compositionally different from samples dating from August 2017, and that the August Samples contained minute amounts of a substance called toluene. (*Id.* ¶ 52-53, 58.) The presence of this small amount of toluene, ChromaDex contended, rendered Basis "injurious to human health" and deserving of FDA's severe enforcement action. (*Id.* ¶ 52-59.)

ChromaDex dramatically proclaimed that FDA had "not set any allowed level of exposure to toluene through oral ingestion of a dietary supplement," misleadingly omitting that while FDA itself has set no independent standards for solvent levels in nutritional supplements, it (i) instead has adopted guidelines from the ICH (the "ICH Guidelines") for pharmaceuticals that do provide standards for solvent levels (*id.* ¶ 8) and (ii) regularly accepts submissions that apply these standards to show that nutritional supplements contain acceptable solvent levels, thereby establishing de facto standards for solvent levels in nutritional supplements. (*Id.* ¶¶ 8, 54.) Having omitted mention of the existence of the FDA-adopted ICH Guidelines, ChromaDex of course also omitted mention of the fact that the small levels of toluene in Basis were at less than 1% of the permitted levels and thus in no way dangerous to human health. (*Id.* ¶ 55.)

ChromaDex's awareness that toluene in the levels purportedly found in Basis is safe and recognized as such by FDA through its adoption of the ICH Guidelines is plainly inferable. First, ChromaDex's own pterostilbene product, which it sold to Elysium and other retailers for inclusion in consumer products and which it at one time itself incorporated in products it sold directly to consumers, contained levels of toluene virtually identical to that purportedly found in the August Samples. (*See* Compl. ¶ 64-66.)[2] The deceit of ChromaDex's suggestion in the Sham Petition that FDA had never sanctioned any level of toluene in nutritional supplements is further established by ChromaDex's regular reliance on the ICH Guidelines to establish that the products it sold to nutritional supplement manufacturers had safe levels of toluene. (Compl. ¶ 67-75.)[3]

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[2] ChromaDex's sale of a product containing "detectable" levels of toluene for inclusion in nutritional supplements eliminates any pretension that it viewed toluene in any amount to be dangerous or unsanctioned by FDA.

[3] ChromaDex's suggestion in its Brief that it disclosed solvent levels to customers like Elysium "so that the manufacturer can ensure that it removes or reduces any potentially harmful element" is not only unsupported and completely implausible—ChromaDex does not attempt to explain how a manufacturer might remove trace levels of substances present in less than 100 parts per million, or why it would expect to do so for an ingredient that ChromaDex had sold as "food grade"—but also disregards that ChromaDex's inclusion of the ICH *(cont'd)*

ChromaDex additionally contended in the Sham Petition that Elysium's Basis lacked a specific regulatory status and was therefore "adulterated," thereby contributing to the impression created by its toluene allegations that Basis was dangerous. (Compl. ¶ 91-92) As with its phony concerns about the "danger" of the toluene purportedly found in Basis, ChromaDex's insincerity on this issue is evident from its own longtime disregard of that same regulatory requirement. (Compl. ¶ 96-98.) To complement these misleading and false statements about the safety and quality of Basis, ChromaDex larded the Sham Petition with gratuitous statements about the safety and quality of its own competing NR product. (*See* Compl. ¶ 76-90.) Much of this boasting was itself false or misleading, including statements on improperly-acquired GRAS status, and all of it was, from a regulatory standpoint, unnecessary to the Sham Petition, which purported to describe concerns with Basis. (*Id.* ¶ 77-84.) These statements thus had no effect on the merits of the (procedurally defective) Sham Petition but only promoted ChromaDex's competing NR product, furthering ChromaDex's ultimate goal of seizing Elysium's market share.

D. ChromaDex's False Statements Find Their Mark

After submitting the Sham Petition and with no expectation of FDA action in response, ChromaDex quickly acted to ensure the Sham Petition reached its intended audience: Elysium's current and potential customers and others in the NR consumer product market whose desire not to be associated with a product "contaminated" by a "toxic industrial solvent" might lead to the destabilization of Elysium's business relationships and consequently its business. (Compl. ¶ 100.) To disseminate the falsehoods in the Sham Petition, ChromaDex undertook a number of

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Guidelines as a reference and proxy for the product's safety completely undermines this contention. (Compl. ¶¶ 70-72.) ChromaDex's further claim that it included reference to ICH Guidelines only because it sold to pharmaceutical companies (Br. at 5) is likewise shown to be completely baseless by its express designation of ICH Guidelines as the specification for residual solvent levels for sales to Elysium—not a pharmaceutical company—of products labeled as both "food grade" and "dietary supplement bulk material." (Compl. ¶ 68-70.)

coordinated actions, including tipping off industry publications and taking advantage of personal relationships to ensure the news of the Sham Petition was broadcast widely (*id.* ¶101-02); causing circulation of commentary relating to the Sham Petition to investors who had subscribed to a listserv through ChromaDex's website, a group that includes Elysium customers (*id.*¶ 104-09); and reaching out repeatedly to Elysium's advisors regarding the allegations in the Sham Petition, with messages that included additional defamatory statements on Elysium's ethics, to demand that those advisors rethink their association with Elysium. (Compl. ¶ 110-17.)

Elysium has not escaped this onslaught of disparagement unscathed. Immediately after ChromaDex began its efforts to publicize the Sham Petition, Elysium began receiving calls from customers panicking about toluene exposure and received an influx of concerned messages from investors and partners. (Compl. ¶ 120-21.) As of the filing of the Complaint, twelve individual customers had canceled their Basis subscription and expressly described their concerns about toluene from the Sham Petition as their reason for canceling. (Compl. ¶ 121.) In addition to these lost customers, Elysium sustained damages from the loss of a new supply chain partner (the "Lost Supplier") with whom it had been deep in discussion regarding a new product relying on the Lost Supplier's best-in-market plant extract. (*Id.* ¶ 126-28.) After ChromaDex publicized the Sham Petition, the Lost Supplier informed Elysium that it refused to do business with Elysium because of the situation. (*Id.*) Elysium therefore must seek regulatory approval for an alternative extract to replace the Lost Supplier's, and calculates that it will sustain $2,439,000 in damages from lost revenue due to product launch delay and increased costs from the need to obtain new regulatory approvals. (*See id.* ¶ 132.) These damages and the harm to Elysium's reputation generally are the foreseeable and intended result of ChromaDex's inclusion of false and misleading statements within the Sham Petition and the basis for ChromaDex's liability here.

ARGUMENT

CHROMADEX'S MOTION TO DISMISS SHOULD BE DENIED

ChromaDex's Brief—mostly an assertion of entitlement to inapplicable privileges that asks this Court to accept an implausible narrative unmoored from Elysium's allegations, and the remainder a series of desultory, one-line challenges to the substance of Elysium's claims—shows a dire misunderstanding of the motion to dismiss standard. A motion under Rule 12(b)(6) must be denied where the complaint "allege[s] sufficient facts, taken as true, to state a plausible claim for relief." *Johnson v. Priceline.com, Inc.*, 711 F.3d 271, 275 (2d Cir. 2013) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007)). Accordingly, a defendant may not dispute the accuracy of the complaint's factual contentions; rather, on a motion to dismiss, a court "must 'accept all allegations in the complaint as true and draw all inferences in the non-moving party's favor.'" *Ying Jie Zhao v. L & K Rest., Inc.*, No. 14-CV-6103 (VEC), 2015 WL 1809115, at *1 (S.D.N.Y. Apr. 21, 2015) (Caproni, J.) (citation omitted). Rather than argue that Elysium has failed to plead allegations that state a plausible claim for relief, however, ChromaDex in major part simply disputes the truth of Elysium's factual allegations. (*See, e.g.*, Br. at 12 (allegations "should not be credited"); *id.* at 23 (allegation is "untrue"); *id.* (allegation is "dishonest").) And where ChromaDex does not dispute the accuracy of Elysium's allegations, it ignores them altogether. Neither practice suffices to establish that ChromaDex is entitled to dismissal here.

I. CHROMADEX IS NOT ENTITLED TO FIRST AMENDMENT PROTECTION FOR ITS FALSE STATEMENTS MADE SOLELY TO INJURE ELYSIUM

A. ChromaDex's Sham Petition, Brought to Injure Elysium Rather than Incite FDA Action, Falls Squarely within the *Noerr-Pennington* Doctrine's Sham Exception

1. The Sham Petition Is Not the Proper Exercise of Any Right to Petition

ChromaDex's pretension to *Noerr-Pennington* immunity disregards that Elysium has pled that the Sham Petition was just that: a sham, not brought to actually prompt any action by FDA,

but solely to disparage a competitor. Elysium's detailed allegations explaining the basis for its contention that ChromaDex brought the Sham Petition in bad faith and with no belief that it would achieve its stated purpose more than suffice to plead the "sham exception" to *Noerr-Pennington* immunity, which strips the privilege from one who has brought a petition that is "(i) 'objectively baseless,' and (ii) 'an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process.'" *Meijer, Inc. v. Ferring B.V.* (*In re DDAVP Direct Purchaser Antitrust Litig.*), 585 F.3d 677, 686 (2d Cir. 2009).

2. ChromaDex's Sham Petition Was Both Objectively Baseless and Brought Solely to Injure Elysium by Use of the Citizen Petition Process

ChromaDex's attempts to evade application of the sham exception to the *Noerr-Pennington* doctrine relies on misstating both applicable authorities and Elysium's claims.[4]

(a) The Sham Petition, Requesting Redress that FDA Regulations Do Not Permit, Had No Chance of Success on the Merits.

ChromaDex's Sham Petition, brought pursuant to an improper procedure and therefore dead in the water, is precisely the type of objectively meritless petition that qualifies for the sham exception. While ChromaDex elevates dicta to suggest that Elysium must show that ChromaDex lacked "probable cause" to file the Sham Petition in pursuit of an undefined and vague "favorable outcome" (Br. at 13), the first prong of the "two-part" standard is in fact whether the lawsuit is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *PREI*, 508 U.S. at 60 (emphasis added). Under either standard, however, the Sham Petition, which requested relief that FDA has repeatedly made clear it will not grant, thus precluding even a "favorable outcome," let alone success on the merits, was objectively baseless.

[4] ChromaDex's own caselaw, contrary to its statement otherwise (Br. at 13), establishes that the sham exception applies to single actions like ChromaDex's. *See Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 53 (1993) (analyzing whether infringement action was sham) ("*PREI*"); *see also Apotex Inc. v. Acorda Therapeutics, Inc.*, 823 F.3d 51, 59 (2d Cir. 2016) (noting sham exception may apply to single FDA petition).

ChromaDex attempts to reframe its Sham Petition as a general request that FDA "evaluate and investigate the issue and enforce the laws at its discretion" (Br. at 14), but cannot escape that the Sham Petition requests specific relief—enforcement action—that it is simply not possible for FDA to give in response to a citizen petition. ChromaDex never disputes that FDA does not grant citizen petitions requesting enforcement action (*see* Br. at 14)—a concession buttressed by ChromaDex's own exhibits in which FDA repeatedly advises that "[r]equests for the Agency to initiate enforcement actions are not within the scope of FDA citizen petition procedures," *see* Br. Ex. G at 5—but instead insists that some undefined "favorable outcome" was nonetheless possible because FDA could conceivably use the information in the Sham Petition "even if it does not grant the petition itself." (Br. at 14.) This tacit acknowledgement by ChromaDex that the relief it actually sought is not available through the Citizen Petition Process is fatal to its argument that the sham exception does not apply. As the Second Circuit has indicated, a petition that requests relief that is procedurally unavailable meets the standard for objective baselessness. *See Apotex*, 823 F.3d at 61 (distinguishing case before it, where petitioner had inadequately pled objective baselessness of citizen petition based on ultimate rejection by FDA, from "objectively baseless" FDA citizen petition for which "indicia" of baselessness included that "FDA acknowledged . . . that it had no authority to grant much of [the] requested relief" (citing *In re Suboxone Antitrust Litig*., 64 F. Supp. 3d 665, 690-91 (E.D. Pa. 2014))); *see also MCI Commc'ns Corp. v. Am. Tel. & Tel. Co*., 708 F.2d 1081, 1156 (7th Cir. 1983) ("There can be no genuine attempt to petition the government when the petitioners know in advance that the governmental body lacks the authority to take the action desired."); *In re Flonase Antitrust Litig.*, 795 F. Supp. 2d 300, 316 (E.D. Pa. 2011) ("Plaintiffs' evidence is sufficient to raise genuine issues of fact as to whether the November Petition requested relief that

was contrary to FDA practice, and thus whether the November Petition was objectively baseless."). Indeed, *PREI* itself characterizes this prong of the sham exception as an assessment of a petition's "legal viability," 508 U.S. at 61 (emphasis in original), a description plainly at odds with ChromaDex's urging that this Court disregard the Sham Petition's legal deficiencies.

Elysium's discussion of the trade complaint process, the correct procedure by which ChromaDex could have submitted concerns to FDA if public health rather than disparaging Elysium were indeed its motivation, only underscores the Sham Petition's objective baselessness. ChromaDex's *ipse dixit* contention that "[w]hether an alternative form of speech was available is of no consequence" begs the question (Br. at 14); the trade complaint process does not constitute an "alternative" form of petition but the correct form of petition to obtain the enforcement action relief requested by ChromaDex and thus the form of petition for which a petitioner might objectively expect success on the merits.[5] (Compl. ¶ 41-43.) Thus, ChromaDex's assertion of "probable cause" to file "a" petition (Br. at 15), in addition to misstating the applicable standard, also misses the point: Even if ChromaDex had reason to raise an issue to FDA (which it did not), it rejected the correct process to achieve the relief it purported to desire, and chose instead a fundamentally defective (albeit public) method, rendering the Sham Petition doomed from the outset and "objectively baseless" pursuant to the sham exception to *Noerr-Pennington* immunity.

(b) The Sham Petition Represents an Effort to Harm Elysium through Dissemination of False Statements as Part of the Petition Process.

ChromaDex also misstates the standard for the second prong of the sham exception to *Noerr-Pennington* immunity. While ChromaDex declares that a plaintiff must allege that the Sham Petition "conceals an attempt to interfere directly with the business relationships of a

[5] ChromaDex argues Elysium "cannot show that a trade complaint stood any more chance of a favorable outcome" (Br. at 15), but it alleges just that, as a trade complaint requesting enforcement action has at least a theoretical chance of success, whereas a citizen petition requesting that improper relief has none. (Compl. ¶ 41.)

competitor (Br. at 13 (citing *PREI*, 508 U.S. at 60-61)), it excises the second part of the standard, that the attempts at interference occur "through the 'use [of] the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon.'" *PREI*, 508 U.S. at 61 (emphasis in original). Elysium's allegations of ChromaDex's knowing abuse of the Citizen Petition Process amply satisfy all aspects of the complete standard.

ChromaDex contends, based on statements by Elysium that the Sham Petition "'request[ed] that FDA' act," that Elysium "admits" ChromaDex sought FDA enforcement action. This sophistry disregards the multitude of facts Elysium has pled establishing that ChromaDex's pursuit of FDA action was not sincere, and that even if ChromaDex had "want[ed] the FDA to [take enforcement action]" (Br. at 16 (emphasis added)), it did not actually expect that it would do so, rendering its petition a sham. *Litton Sys., Inc. v. Am. Tel. & Tel. Co.*, 700 F.2d 785, 812 (2d Cir. 1983) (noting "to be sure, [a competitor] would always be pleased to obtain a governmental decision against his rival. But where he had no reasonable expectation of obtaining the favorable ruling, his effort to do so [is] a sham"). Elysium has pled in support that: (i) the Citizen Petition Process does not allow for the type of relief requested by ChromaDex in the Sham Petition (Compl. ¶ 39-42); (ii) ChromaDex, which maintains a regulatory consulting business that specifically advertises expertise with FDA petitions, was aware that the relief it sought was not available through the Citizen Petition Process (*id.* ¶ 43); and (iii) ChromaDex nonetheless chose to bring the Sham Petition in lieu of a trade complaint so that it could publicly disparage a competitor's products in the guise of neutrally reporting an issue to FDA. (*Id.*) Elysium thus has adequately pled the Sham Petition "conceal[ed] an attempt to interfere directly with [Elysium]'s business relationships through the use of the process," here, the dissemination

of disparaging statements in the public petition, "as opposed to the outcome," here, the unavailable and therefore unexpected enforcement action. *PREI*, 508 U.S. at 61.

Further, ChromaDex completely ignores Elysium's many allegations regarding ChromaDex's subjective belief that the Sham Petition was also substantively deficient and would not result in FDA action even if it had requested procedurally-available relief. These include the allegations that: (i) the Sham Petition charged that Elysium's Basis was "contaminated" and dangerous, despite the fact that the toluene levels were at less than 1% of the permitted levels allowed by standards adopted by FDA (Compl. ¶ 55); (ii) ChromaDex was well aware of these standards establishing that the low toluene levels purportedly found in Basis posed no health risk, and itself frequently relied on those standards in attesting to the safety of its own toluene-containing product (*id*. ¶ 60-75); and (iii) ChromaDex itself was in knowing violation of the regulation that it accused Elysium of violating and therefore it is not plausible that it expected FDA would take the severe enforcement action it requested. (*Id.* ¶ 92-98.)

Elysium accordingly does not just "disagree with the arguments [ChromaDex] advanced in its citizen petition" (Br. at 17); it plausibly has alleged that ChromaDex itself did not believe in those arguments and brought them for an improper purpose. *See Hirschfeld v. Spanakos*, 104 F.3d 16, 20 (2d Cir. 1997) (district court erred in finding no sham exception where bad faith of petitioner was established); *ICOS Vision Sys. Corp. v. Scanner Techs. Corp.*, No. 05 Civ. 6322 (DC), 2006 U.S. Dist. LEXIS 13847, at *13 (S.D.N.Y. Mar. 27, 2006) ("The subjective inquiry turns on the good faith of the [petitioner].") ChromaDex's strained attempts to manufacture another motive for itself—that it had "every reason to genuinely seek the FDA's action" based on preserving its "commercial reputation and business by disassociating its NIAGEN® ingredient

from Plaintiff's new, and potentially harmful, Basis" (Br. at 16-17)[6]—improperly seeks to controvert Elysium's numerous allegations that ChromaDex did not act based on that motivation and instead submitted the Sham Petition solely to harm Elysium.[7] These well-pled allegations showing no reasonable petitioner would expect the Sham Petition to obtain success on the merits, and that ChromaDex itself had no such expectation, rendering its petition a sham, more than suffice to preclude dismissal based on *Noerr-Pennington*. *See Alt. Electrodes, LLC v. Empi, Inc.*, 597 F. Supp. 2d 322 (E.D.N.Y. 2009) (denying motion to dismiss pursuant to *Noerr-Pennington* where plaintiff plausibly supported that litigation was objectively and subjectively baseless).

B. The Litigation Privilege Does Not Apply to ChromaDex's Sham Petition

ChromaDex's attempt to immunize its conduct through New York's litigation privilege is no more availing. First, ChromaDex's own authority undermines its attempts to show that the litigation privilege covers its submission of the Sham Petition. The litigation privilege attaches to "judicial" or "quasi-judicial" proceedings. *Rosenberg v. MetLife, Inc.*, 8 N.Y.3d 359, 365 (2007). ChromaDex argues that the litigation privilege applies to FDA proceedings generally, but the caselaw it cites in support establishes that the litigation privilege applies to a particular type of FDA proceeding that was adjudged to be "quasi-judicial" because the process "explicitly provide[d] for court review of final administrative actions taken by the Commissioner" and "the

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[6] This theory, in addition to being completely at odds with Elysium's allegations as pled, is also nonsensical: ChromaDex suggests that it submitted the Sham Petition to "preserve its commercial reputation," yet the reputational harm that it identifies—association with Elysium's "potentially harmful" Basis—is entirely of its own making, through submission of the Sham Petition claiming that Basis was "potentially harmful."

[7] ChromaDex's last-ditch effort to shield its defamatory statements from liability by arguing that its knowingly deficient Sham Petition represents a "valid effort to influence government action" because FDA is a "disinterested decision maker" that would undertake an "independent" investigation (Br. at 17), not only relies on a complete non-sequitur, it also cites inapposite caselaw. *See Armstrong Surgical Ctr., Inc. v. Armstrong Cty. Mem'l Hosp.*, 185 F.3d 154, 164 (3d Cir. 1999) (citing "disinterested decision makers, an independent investigation, an open process, and extensive opportunities for error correction" as factors relevant to extension of immunity to state actors accused of misconduct rather than "bona fide execution of state policy" under *Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991), not to existence of *Noerr* immunity itself).

possibilit[y] of an adversarial regulatory hearing before the FDA." *Stega v. New York Downtown Hosp.*, 148 A.D.3d 21, 28 (1st Dep't 2017). ChromaDex expressly admits, however, the FDA enforcement action ChromaDex purported to seek by the Sham Petition had no such procedural safeguards, *see* Br. at 14 n.6, and thus does not constitute a "quasi-judicial" proceeding.

These efforts more significantly ignore, however, that ChromaDex's conduct in filing and disseminating Sham Petition just to harm Elysium falls under a longstanding exception to the privilege. The "*Williams* exception" to the litigation privilege strips speakers of immunity for false statements—like those made by ChromaDex here—designed solely to injure the plaintiff through dissemination. *See, e.g.*, *Bridge C.A.T. Scan Assocs. v. Ohio-Nuclear Inc.*, 608 F. Supp. 1187, 1194 (S.D.N.Y. 1985) (citing *Williams v. Williams*, 23 N.Y.2d 592 (1969)). Under this exception, courts have held that the litigation privilege is lost where the defendant makes libelous statements in a judicial or quasi-judicial proceeding in order to injure the plaintiff through subsequent publication of the false statements or related commentary about those statements. *See id.* at 1194, 1197 (no privilege where defendant maliciously institutes a judicial proceeding for purpose of disseminating false statements (citing *Williams*, 23 N.Y.2d 592).)

Here, Elysium alleges that ChromaDex filed the Sham Petition, replete with "false and misleading" accusations about Elysium's sole product, "solely for the purpose of causing injury to Elysium for its own ends, which it accomplished by disseminating [the] false and misleading statements." (Compl. ¶¶ 36, 44.) As alleged in the Complaint, ChromaDex's desired audience for the Sham Petition was not FDA, but "customers and other participants in the NR consumer product market currently or prospectively doing business with Elysium," and ChromaDex engaged in a calculated effort to disseminate the Sham Petition's false statements. (Compl. ¶¶ 101-118, 143.) ChromaDex's conduct in filing and disseminating the Sham Petition was

malicious. (Compl. ¶¶ 140, 144.) These allegations are more than sufficient, particularly at the pleading stage, to implicate the settled exception to New York's litigation privilege. *Cf. Bridge C.A.T. Scan Assocs.*, 608 F. Supp. at 1194-97. To the extent ChromaDex disputes that its intent was to use the Sham Petition as a vehicle maliciously to injure Elysium it presents a fact question that cannot be resolved on a motion to dismiss, particularly where ChromaDex itself (as opposed to a disinterested third party) orchestrated the Sham Petition's publicity. *See Halcyon Jets, Inc. v. Jet One Grp., Inc.*, 69 A.D.3d 534, 534-35 (1st Dep't 2010) (affirming denial of motion to dismiss where defendants' "intention to use the [judicial] action as such a device [to disseminate defamatory information] is a factual issue that is sufficiently pleaded and cannot presently be decided" and noting that "defendants' self-publication" of litigation press release about the litigation was relevant to *Williams* exception).[8]

Finally, even if ChromaDex's conduct did merit application of the *Williams* exception, it cites no authority to show the privilege applies to Elysium's Lanham Act claim, a federal cause of action for which state law does not provide the rule of decision. *See, e.g., Troyer v. Shrider*, No. CV 08-5042 PSE (JWJ), 2008 WL 4291450, at *3 (C.D. Cal. Sept. 15, 2008) ("Because federal law governs Plaintiff's Lanham Act claim, the court must apply federal privilege law.").[9]

C. New York's Anti-SLAPP Law Does Not Protect Statements Like the Sham Petition

ChromaDex's assertion of entitlement to protection under New York's anti-SLAPP law also fails. First, New York's anti-SLAPP statute applies to a suit "brought by a public applicant or permitee [that] is materially related to any efforts of the defendant to report on, comment

[8] Not one of the authorities ChromaDex cites even addresses the *Williams* exception, much less refutes its application here. (*See* Br. at 18-21.)

[9] Courts routinely decline to apply state litigation privileges to Lanham Act claims. *See, e.g.*, *Shirokov v. Dunlap, Grubb & Weaver, PLLC*, 2012 WL 1065578, at *23 n.11 (D. Mass. Mar. 27, 2012); *Troyer*, 2008 WL 4291450, at *3; *Conditioned Ocular Enhancement, Inc. v. Bonaventura*, 458 F. Supp. 2d 704, 708 (N.D. Ill. 2006).

on . . . challenge or oppose such application or permission." N.Y. Civ. Rights Law § 76-a(1)(a) (emphasis added). ChromaDex's own cited authority establishes that "a SLAPP-suit defendant must directly challenge an application or permission in order to establish a cause of action under the [anti-SLAPP statute.]" *Silvercorp. Metals Inc. v. Anthion Mgmt. LLC*, 948 N.Y.S.2d 895, 901 (Sup. Ct. N.Y. Cnty. 2012). That a party requires regulatory approval to act generally does not render statements to that regulatory body a "direct[] challeng[e] [to] an application or permission" that qualifies for anti-SLAPP protection; instead the SLAPP-suit defendant must show that its statements targeted a "pending application" to that regulatory body or constituted a direct challenge to the plaintiff's fundamental ability to operate pursuant to regulation. *Id.*

ChromaDex has not done so here. Although it attempts to conceal its failure to meet this standard by claiming that Elysium represents to consumers that Basis is "blessed by the FDA" (Br. at 20), this careful phrasing cannot obfuscate its utter failure to identify a single "application or permission" upon which the Sham Petition supposedly commented. The sole grounds ChromaDex identifies in support of its contention that Elysium represents that Basis is "blessed" by the FDA—citing only its Sham Petition and not any actual publication by Elysium—are purported statements by Elysium that Basis "Exceeds FDA Recommendations," is produced in facilities that "meet FDA requirements," undergoes "five quality and purity audits," and is manufactured in facilities compliant with regulations "as stipulated by the FDA." (Br. at 21.) ChromaDex additionally contends that Elysium's facilities are "by law subject to FDA registration and inspection requirements." (*Id.*) Despite ChromaDex's attempt to characterize these as "purported FDA approvals" (Br. at 21), conspicuously absent from this litany is a single application submitted by Elysium to FDA or permission extended by FDA to Elysium, let alone one upon which the Sham Petition comments "directly." Accordingly, the Sham Petition does

not qualify for anti-SLAPP protection. *See Stolatis v. Hernandez*, 2016 N.Y. Slip Op 50365(U), at *3 (Sup. Ct. Westchester Cnty.) (anti-SLAPP statute did not protect defendant's "attempt to report or comment" on activity by regulated plaintiff that did not challenge a license or permit application) (citing *Guerrero v. Carva*, 10 A.D.3d 105, 118 (1st Dep't 2004).)

Even if ChromaDex had successfully identified a "direct challenge" to a license or permit application, ChromaDex would nonetheless be unable to call upon the anti-SLAPP statute to shield the malicious statements of the Sham Petition. The anti-SLAPP statute sets forth that in a SLAPP suit, "damages may only be recovered if the plaintiff . . . shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false." N.Y. Civ. Rights Law § 76-a(2). Elysium, by pleading myriad specific facts to show that ChromaDex knew and disregarded that the Sham Petition falsely stated the danger of the toluene in Basis purely to defame a competitor, has plainly met that standard.[10]

II. CHROMADEX'S REMAINING ARGUMENTS FOR DISMISSAL ALSO FAIL

A. That ChromaDex Disputes the Falsity of Its Statements Does Not Negate that Elysium Has Alleged the Existence of False Statements

ChromaDex's assertion that Elysium has failed to allege falsity in pleading claims for false advertising, trade libel, and deceptive business practices relies entirely on ChromaDex's strategic disregard of the standards applicable to its motion: That ChromaDex (baselessly)

[10] ChromaDex further offers no support that New York's anti-SLAPP statute would apply to federal claims like Elysium's Lanham Act claim. *See Ginx, Inc. v. Soho All.*, 720 F. Supp. 2d 342, 366 (S.D.N.Y. 2010) ("In every other case this Court has located, federal courts have declined to apply Anti-SLAPP statutes to federal claims.").

disputes the truth of Elysium's allegations does not mean that Elysium has not adequately pled them. *See Zhao*, 2015 WL 1809115, at *1 n.1 (allegations assumed true on motion to dismiss).[11]

As an initial matter, ChromaDex, in itemizing Elysium's accusations of falsity, omits the overarching false statement inherent in the Sham Petition: that Basis is "dangerous" and poses a danger to consumers. (*See* Compl. ¶¶ 11, 44, 52, 58, 59, 66, 74.) ChromaDex argues that Elysium cannot aver falsity because "the issue of whether daily consumption of toluene in dietary supplements is safe . . . is an issue never before addressed by the FDA" (Br. at 24), but this is in effect nothing more than a (unfounded) challenge to Elysium's allegations that inclusion of minute levels of toluene in dietary supplements is not dangerous and is recognized as such by FDA. This type of fundamental disagreement over the accuracy of a party's factual allegations is exactly the type of dispute that precludes dismissal pursuant to Rule 12(b)(6).

ChromaDex disputes that the Sham Petition misled the public by failing to cite the ICH Guidelines showing that the amounts of toluene allegedly found in Basis were less than 1% of the permitted levels established by those FDA-adopted standards. (Br. at 22-23.) ChromaDex asserts that the Sham Petition was not misleading because "the ICH Guidelines only apply to pharmaceuticals" and, relatedly, that Elysium's numerous allegations that FDA "adopted" the ICH Guidelines are "conclusory" and "belied by the CDC Statement, which does not mention the ICH Guidelines at all." (*Id.*) Through both rationales, ChromaDex seeks to invert the pleading standard, whereby the Court must accept Elysium's factual allegations as true and draw all inference in Elysium's favor. *See Zhao*, 2015 WL 1809115, at *1. As ChromaDex recognizes, Elysium alleges repeatedly that FDA has adopted the ICH Guidelines and regularly accepts

[11] Indeed, the Second Circuit has noted that the question of falsity "typically requires discovery" and is ill-suited for resolution at the pleadings stage. *Church of Scientology Int'l v. Behar*, 238 F.3d 168, 173 (2d Cir. 2001).

submissions from dietary supplement manufacturers relying on the ICH Guidelines, which starkly contradicts the suggestion in the Sham Petition that FDA has never accepted guidelines providing for the inclusion of any toluene in a nutritional supplement. (*See* Br. at 22-23.) *See Mimedx Grp., Inc. v. Osiris Therapeutics, Inc.*, No. 16 Civ. 3645 (KPF), 2017 U.S. Dist. LEXIS 114105, at *29 (S.D.N.Y. July 21, 2017) (denying motion to dismiss that contended plaintiff's allegations of falsity were "conclusory" and did not cite objective data).

And ChromaDex's statement that these allegations are "belied by the CDC Report, which does not mention the ICH Guidelines" is no more successful. ChromaDex's reliance on the CDC Report on its motion to dismiss is wholly improper. Although "[c]onsideration of materials outside the complaint is not entirely foreclosed on a 12(b)(6) motion . . . [i]t must [] be clear that there exist no material disputed issues of fact regarding the relevance of the document." *Faulkner v. Beer*, 463 F.3d 130, 134 (2d Cir. 2006). The deficiency that precludes this Court's consideration of the CDC Report for the purposes of this motion also renders the CDC Report substantively useless: ChromaDex nowhere explains why the CDC Report, a publication of the Environmental Protection Agency (which, obviously, is not FDA), has any relevance here. Even a brief perusal of the CDC Report reveals that it focuses on <u>environmental</u> exposure to toluene from, *e.g.*, "solvent and petroleum products spills." (Br. Ex. E at 2.) Accordingly, the standards it cites for acceptable toluene levels all involve exposure in "air and water," not food or dietary supplements, which are within the purview of FDA. (*Id.* at 8.) As such, the absence of the ICH Guidelines from the CDC Report sheds no light on the accuracy of Elysium's complaint,[12] and Elysium's allegations that ChromaDex's omission of the accepted ICH Guidelines in the Sham

[12] ChromaDex perhaps does not realize that by its reasoning, the CDC Report "proves" that FDA has not even adopted the ICH Guidelines for pharmaceuticals, something not even ChromaDex dares assert. *See Q3C — Tables and List Guidance for Industry*, U.S. Dep't of Health & Human Servs., Food & Drug Admin. (June 2017) (FDA guidance setting forth ICH Guidelines).

Petition misleadingly suggested FDA has never sanctioned the presence of toluene in a nutritional supplement are more than adequate to plead falsity.

ChromaDex's next attack on Elysium's allegations of falsity may be even more easily disregarded. ChromaDex states that Elysium's "conclusory" allegation that Niagen's GRAS status is based on a misrepresentation about its production in compliance with cGMP standards "is wholly unsupported by actual alleged facts (and untrue)" (Br. at 23), thus even more blatantly raising a factual dispute inappropriate for resolution on a motion to dismiss. *See Ray v. Weit*, No. 16-1106, 2017 U.S. App. LEXIS 17353, at *6 (2d Cir. Sept. 8, 2017). ChromaDex also ignores that Elysium has pled factual specifics to support this allegation, including when Elysium discovered the misrepresentation. (Compl. ¶ 82.) ChromaDex's insistence that "Niagen® is undeniably safe" (Br. at 23) contradicts numerous allegations by Elysium about the safety and regulatory issues with ChromaDex's own product (*see* Compl. ¶¶ 58 n.1, 76-90, 94-96) and thus constitutes yet another factual dispute by ChromaDex that precludes dismissal here. *See Kaplan, Inc. v. Yun*, 16 F. Supp. 3d 341, 347 (S.D.N.Y. 2014).

Elysium alleges that ChromaDex did not disclose to FDA in the Sham Petition there was toluene in its own pterostilbene product to show that ChromaDex knew its statements of danger were false. (*See* Compl. ¶ 60.) From this, ChromaDex crafts a muddled argument attempting to establish that its sale of toluene-containing products accompanied by disclosure to its customers that the level of toluene in its products was within ICH Guidelines does not prove that it believed its toluene-containing products to be safe. (Br. at 23.) ChromaDex does not at all explain the supposedly "key distinction" between a toluene-containing ingredient and a toluene-containing "combination" of ingredients on which this argument appears to rest (*id.*), and in any event, ChromaDex's plea that this Court adopt its narrative over Elysium's allegations is inappropriate

on a 12(b)(6) motion. ChromaDex's accompanying proclamation that "Plaintiff does not allege that ChromaDex has ever sold a product directly to consumers containing toluene, because it is not true" (Br. at 23) is not only completely unexplained—perhaps ChromaDex expects this Court to believe that its refraining from direct consumer sales establishes that it considered toluene to be dangerous, but its sales of toluene-containing products to retailers for resale to those same consumers reveals nothing about ChromaDex's perception of any "danger"—but is also incorrect, as Elysium's allegations that ChromaDex sold its proprietary pterostilbene in consumer products and that the pterostilbene contained toluene call for exactly that inference. (Compl. ¶ 63.)

ChromaDex's final attempt at obtaining dismissal for the claimed failure to allege falsity is its suggestion that by adjudicating Elysium's claims, this Court would "usurp the FDA's prerogative to enforce the FDCA." (Br. at 24.) This characterization, however, depends on a factual predicate that the parties dispute: whether the small amounts of toluene purportedly found in Basis (and ChromaDex's product) are actually dangerous. Elysium contends that it is not dangerous, and has alleged FDA's adoption of the ICH Guidelines in support (Compl. ¶ 54-59), while ChromaDex, despite its own sales of toluene-containing products, now argues that the safety is an open question, and, despite its habitual reliance on ICH Guidelines to establish the safety of the toluene levels in its own products, now disputes their relevance. (Br. at 24.) That ChromaDex contests the accuracy of Elysium's detailed allegations of falsity does not entitle it to dismissal. *See World Wrestling Fed'n Entm't, Inc. v. Bozell*, 142 F. Supp. 2d 514, 527 (S.D.N.Y. 2001) (falsity adequately alleged by pleading facts to contradict defendant's misstatements).

B. ChromaDex's Threadbare Arguments on the Substance of Elysium's Claims Do Not Suffice to Show that Dismissal Is Warranted

ChromaDex's motley collection of conclusory declarations that Elysium has failed to adequately plead each of its claims (Br. at 24-25) deserves the same amount of attention

ChromaDex paid to it: minimal. First, ChromaDex's contention that Elysium's Lanham Act and deceptive trade practices claims must be dismissed because the Sham Petition "is not 'commercial advertising or promotion'" (Br. at 24)[13] disregards that Elysium has pled: (i) ChromaDex's purpose in bringing the public Sham Petition was to injure Elysium's reputation among consumers and "to promote its own competing product" (Compl. ¶¶ 36, 76-90); and (ii) ChromaDex carefully disseminated the Sham Petition first to the public and then to subgroups that included Elysium's customers and potential customers. (Compl. ¶¶ 43-44, 101-09.) Moreover, ChromaDex itself admits that its purpose in bringing the Sham Petition was to target the public with messages about its and Elysium's competing products and thereby "preserve its commercial reputation and business," thus conceding the Sham Petition is commercial speech. (*See* Br. at 17.) *See Benihana of Tokyo, LLC v. Benihana, Inc.*, No. 17 Civ. 224 (PAE), 2017 U.S. Dist. LEXIS 60234, at *14 (S.D.N.Y. Apr. 19, 2017).

ChromaDex's three-sentence challenge to Elysium's deceptive business practice claim is similarly deficient. ChromaDex falsely asserts that Elysium "incorrectly pleads injury only to its business," rather than injury to "the public at large" (Br. at 24), but Elysium has pled both through its allegations that by publishing and disseminating the falsehoods in the Sham Petition, ChromaDex attempted to "interfere with the decision-making process of FDA, waste FDA resources, and mislead the public regarding the safety and quality of Basis, Niagen, and TruNiagen." (Compl. ¶ 150.) As the Second Circuit has found, "the harm to the public [i]s manifest" for a Section 349 claim where there are allegations of the submission of "false

[13] "Commercial advertising or promotion" for purposes of the Lanham Act requires that a statement be "(i) 'commercial speech,' (ii) 'made for the purpose of influencing consumers to buy [the defendant's] goods or services,' and (iii) 'disseminated sufficiently to the relevant purchasing public.'" *Mimedx Grp.*, 2017 U.S. Dist. LEXIS 114105, at *12. That a communication also includes discussion of scientific matters or social issues (*id.* at *18-19) does not mean that it is not commercial where "[i] it is an advertisement; [ii] it refers to a specific product or service; and [iii] the speaker has an economic motivation for the speech." *Id.*

information" that "complain[s] of non-existent 'potential danger'" to a "regulatory agency primarily concerned with the safety of the public." *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 264 (2d Cir. 1995) (citation omitted). Next, Elysium's allegation of damages stemming from the injury to its reputation and lost sales (*see* Compl. ¶ 119-35) suffices to allege injury. *See UPS Store, Inc. v. Hagan*, 99 F. Supp. 3d 426, 441-42 (S.D.N.Y. 2015) (denying motion to dismiss Section 349 claim where plaintiff pled harm to public through deceptive pricing practices that resulted in injury in form of plaintiff's lost business). Lastly, ChromaDex cites no authority to support its contention that alleging ChromaDex's deceptive business practices affected Elysium's customers and potential customers in New York (Compl. ¶ 150) is not sufficient to plead Section 349's territoriality requirement. *Cf. 4 K & D Corp. v. Concierge Auctions, LLC*, 2 F. Supp. 3d 525, 548 (S.D.N.Y. 2014) ("no allegations" to show territoriality).

ChromaDex's cursory challenges to Elysium's trade libel claim fares no better. To plead malice, a plaintiff must plead that the defamatory statements were made "with knowledge of falsity or reckless disregard of the truth." *World Wrestling*, 142 F. Supp. 2d at 531. ChromaDex's contention that Elysium alleges only a "general contempt between the parties and prior business disputes" (Br. at 25) disregards the multitude of detailed allegations in the Complaint regarding ChromaDex's knowledge of the falsity of its statements in the Sham Petition, including: (i) that ChromaDex's own sales of toluene-containing products, to Elysium and third parties, showed that it knew its statements regarding the "danger" of toluene were baseless (Compl. ¶ 60-67); (ii) that ChromaDex's own reliance on the ICH Guidelines in a variety of specific documents showed that it knew its statements that FDA had never adopted guidelines allowing for the inclusion of toluene in a nutritional supplement were substantially misleading (Compl.¶ 67-75); and (iii) that ChromaDex had affirmatively made

misrepresentations to FDA regarding the cGMP status of Niagen in submitting its GRAS Proposal and then intentionally omitted mention of that fact in describing Niagen as GRAS in the Sham Petition. (*Id.* ¶ 76-84.) Resolution of malice claims "'typically requires discovery' and, therefore, should not be resolved in the pleadings stage" in any event, but there is no question these detailed allegations constitute "objective facts from which one can reasonably infer . . . malice." *World Wrestling*, 142 F. Supp. 2d at 528 (citation omitted).

Next, ChromaDex argues that Elysium did not "identify customers it lost and itemize its losses" (Br. at 25) when Elysium has listed (i) twelve specific lost customers,[14] with detail including the type of subscription they held and the tenure of their relationship with Elysium, the calculation of lost sales at $10,680, and the information underlying that calculation (Compl. ¶ 121); and (ii) one lost supply chain partner, with detail including the existence of the parties' prior relationship and disrupted projects, the calculation of lost revenue and additional development costs at $2,439,000, and the information underlying that calculation, *i.e.*, an eighteen-month delay to market and specified additional regulatory costs. (Compl. ¶ 132.) This is in stark contrast to insufficient "[r]ound figures or a general allegation of a dollar amount." *See Gucci Am., Inc. v. Duty Free Apparel, Ltd.*, 277 F. Supp. 2d 269, 277-78 (S.D.N.Y. 2003) (citation omitted). And ChromaDex's statement that Elysium "fails to connect any lost customers to any purportedly misleading statements" (repeated in its argument on Elysium's tortious interference claim) simply ignores Elysium's allegation that each of the lost customers it identifies "expressly cited their concern over toluene exposure as the reason behind their decision

[14] ChromaDex cites caselaw regarding pleading special damages for lost customers but omits that Elysium did not plead simply the loss of customers and potential customers, but also the loss of a specific supply chain relationship (the "Lost Supplier") and resulting injury from increased development costs and delay to market that is described at length in the Complaint. Thus, even if the allegations regarding these lost customers were held to be deficient, ChromaDex offers nothing to establish that the allegations relating to the Lost Supplier are.

[to cancel]," and the Lost Supplier likewise "informed Elysium that because of the [Sham Petition] situation, it … refused to do business." (Compl. ¶¶ 121, 126.)

As ChromaDex does throughout the Brief, its final challenge to Elysium's claim for tortious interference relies on simply disregarding Elysium's allegations. ChromaDex contends Elysium "made no effort to allege that [ChromaDex] knew of its business relationships" (Br. at 25), while Elysium in fact alleges that ChromaDex, a competitor of Elysium's, not only knew of Elysium's business relationships but specifically sought to disrupt them by targeting Elysium's market share, thereby promoting its own product among and specifically directing its defamatory statements to that audience. (*See, e.g.*, Compl. ¶¶ 35, 59, 90, 100-18.) ChromaDex is also incorrect in contending that Elysium does not allege that ChromaDex employed "wrongful means" (Br. at 25),[15] overlooking Elysium's well-pled claims for the independent torts of trade libel and deceptive business practices, which describe the means by which ChromaDex tortiously interfered in Elysium's business relationships. *All R's Consulting, Inc. v. Pilgrims Pride Corp.*, 2008 U.S. Dist. LEXIS 30626, at *44-48 (S.D.N.Y. Mar. 28, 2008). As such, ChromaDex's challenge to Elysium's claim for tortious interference should be denied. *See AIM Int'l Trading, L.L.C. v. Valcucine S.p.A.*, 2003 U.S. Dist. LEXIS 8594, at *26 (S.D.N.Y. May 21, 2003).

CONCLUSION

For the foregoing reasons, ChromaDex's motion to dismiss the complaint should be denied in all respects.

[15] "Wrongful means" in a claim for tortious interference include the commission of "independent torts." *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 190-91 (2004).

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Respectfully submitted,

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