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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 REPLY
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 MOTION FOR LEAVE TO FILE THIRD
 AMENDED COUNTERCLAIMS AND
 FIRST AMENDED ANSWER TO THIRD
 AMENDED COMPLAINT**

23 Elysium Health, Inc.,

24 Counterclaimant,

25 v.

26 ChromaDex, Inc.,

27 Counter-Defendant.

Date: April 2, 2018
 Time: 1:30 p.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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 10 656 F. Supp. 2d 1190 (C.D. Cal. 2009), *aff'd sub nom. C. F. ex*
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13 *Community Voice Line, LLC. v. Great Lakes Communication Corp.*,
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16 *DCD Programs, Ltd. v. Leighton*,
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17 *Estate of Tungpalan v. Crown Equipment Corp.*, No. 11-00581 LEK-BMK,
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1 *Micro Modular Technologies PTE Ltd v. Atheros Communications Inc.*,
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11 *POM Wonderful LLC v. Coca Cola Co.*,
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18 *In re Seagate Technology LLC Litigation*,
 19 233 F. Supp. 3d 776 (N.D. Cal. 2017) 17

20 *Southwest Engineering, Inc. v. Yeomans Chicago Corp.*,
 21 CASE NO. 09-CV-110 JLS (RBB), 2009 WL 10672252 (S.D. Cal. Apr.
 22 20, 2009)..... 17

23 *Standard Furniture Manufacturing Co. v. LF Products PTE Ltd*, No. SACV
 24 16-02097-CJC(KESx),
 25 2017 WL 308221 (C.D. Cal. June 13, 2017)..... 5

26 *Urango v. Frozen Food Expressindustries, Inc.*, No. 13-cv-02661 TLN-AC,
 27 2014 WL 1379892, at *6 (E.D. Cal. Apr. 4, 2014)..... 16

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1 **REPLY MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. PRELIMINARY STATEMENT**

3 In a steady crescendo of petulance, ChromaDex¹ opposes Elysium's request
4 for leave to amend its counterclaims and affirmative defenses on grounds of
5 prejudice, delay, bad faith, and futility. Its opposition brief ("[Opp.](#)"), while long on
6 rhetoric and loose with the facts, is short on the law, and ChromaDex fails to
7 establish the existence of a single *Foman* factor, let alone meet the high standard set
8 by Rule 15(a) to show Elysium's request for leave to amend should not be granted.

9 **II. STATEMENT OF ADDITIONAL FACTS**

10 **Notice of Elysium's Intent to Amend**

11 The allegations Elysium seeks leave to add to its already existing
12 counterclaims (the "Proposed Amendment") relate in large part to ChromaDex's
13 breach of the NR Supply Agreement's cGMP Provision and Product Purity
14 Provision.² As described in the declaration submitted with Elysium's opening brief,
15 Elysium put ChromaDex on notice of its contention that compliance with the cGMP
16 Provision was at issue at least by September 2017, and its motion to add allegations
17 expressly describing the breach came after numerous objections by ChromaDex that
18 it would not provide discovery because Elysium had not yet made these specific
19 allegations. (See [Powell Decl.](#) ¶ 12-16.)

20 Elysium made ChromaDex aware of its intent to bring counterclaims relating
21 to the Product Purity Provision on November 3, 2017, after a conference in a
22

23 ¹ All capitalized terms shall have the meanings ascribed to them in Elysium's
24 opening brief ("[Br.](#)"). All emphases are added unless otherwise indicated. The new
25 facts set forth are described in the accompanying declaration ("[Powell Reply Decl.](#)").

26 ² Included within the Proposed Amendment are certain allegations derived
27 from discovery, like the specific lower price impermissibly extended by ChromaDex
28 to another party in breach of the MFN Provision. ChromaDex makes no mention of
these allegations in its opposition and thus presumably consents to their addition.

1 separate litigation between the parties (the "New York Litigation"). Through a
2 hearsay declaration ("[Gardner Decl.](#)") from a lawyer who was not present for the
3 discussion, ChromaDex falsely claims Elysium did not notify it of its intent to bring
4 additional claims or reveal the basis for its assertion that ChromaDex's Niagen
5 contained the Regulated Substance at levels in excess of the Safe Harbor Limit.³
6 (*See* [Gardner Decl.](#) ¶ 6.) Elysium did in fact inform ChromaDex that it contemplated
7 bringing claims based on the Regulated Substance levels and disclosed that
8 compositional testing had revealed the presence of the Regulated Substance above
9 the Safe Harbor Limit. (*See* Powell Reply Decl. ¶ 7.) That Elysium conveyed this
10 information, contrary to the declaration submitted by ChromaDex, is evidenced by
11 the letter sent by ChromaDex shortly thereafter that references, ChromaDex admits
12 (*see* [Gardner Decl.](#) ¶ 7), Elysium's performance of compositional testing and
13 demands that Elysium provide the testing results. Elysium never threatened, during
14 this conversation or later, to report ChromaDex's violations to the California attorney
15 general or to bring its potential liability to the attention of the California plaintiffs'
16 bar. Nor has it taken any steps to do so. (*See* Powell Reply Decl. ¶ 7.) Instead,
17 Elysium raised its intent to bring these additional allegations (and pointed out the
18 obvious consequences to ChromaDex of publication of its lapses) to inform
19 discussion at the mediation the parties had been ordered to participate in several
20 minutes before this discussion took place. (*See id.*)

21 **The Course of Discovery to Date**

22 ChromaDex claims in its opposition brief to have "diligently pursued
23 discovery," in purported contrast to Elysium. ([Opp.](#) at 9.) The documented history

24 _____

25 ³ Each of the three attorneys representing ChromaDex who did participate in
26 that conversation continue to be associated with Cooley LLP, although the one who
27 also represented ChromaDex here withdrew as counsel of record several weeks ago
without explanation. ChromaDex does not explain its decision to submit a hearsay
declaration rather than to obtain a declaration from one of these individuals.

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1 between the parties belies this contention. For example, ChromaDex makes much of
2 the five months that passed between its service of requests for production on Elysium
3 on June 30, 2017 (six weeks before the parties met and conferred pursuant to Rule
4 26(f) on the then-current pleadings⁴ and two months before the Court so ordered a
5 case schedule), and Elysium's initial production of documents. (See Powell Reply
6 Decl. ¶ 4-5.) ChromaDex does not mention that over *four* months elapsed between
7 Elysium's service of requests for production on ChromaDex and ChromaDex's own
8 first production of documents. (See *id.*) Nor does ChromaDex describe its own
9 maneuvers to delay discovery and stall the action, which most recently included its
10 refusal, on the very day it submitted its opposition brief on this motion, to provide a
11 date by which it would substantially complete its production of documents in
12 response to Elysium's first set of requests for production. (See Powell Reply Decl. ¶
13 14-18.) ChromaDex's insistence that Elysium has dragged its heels in discovery
14 depends on a flawed assumption that the volume of discovery produced by Elysium,
15 a growth-stage startup that hired its first employee nearly two years after the start of
16 the period designated by ChromaDex for discovery, should match the scale of
17 discovery by ChromaDex, a public company with a more than \$250 million market
18 capitalization, several subsidiaries, and scores of employees. Elysium, although
19 grappling with obstacles thrown up by ChromaDex,⁵ has diligently worked to

20 _____
21 ⁴ ChromaDex had shortly before amended its complaint for a third time to
22 withdraw its claims for trade secret misappropriation and corresponding allegations
23 that Elysium employees Mark Morris and Ryan Dellinger, previously employed by
24 ChromaDex, had improperly conveyed confidential ChromaDex information to
25 Elysium. ***ChromaDex was forced to rescind these allegations when counsel for
Elysium provided incontrovertible documentary evidence that they were completely
false.*** (See Powell Reply Decl. ¶ 3.) Despite its hasty withdrawal of these
26 allegations, ChromaDex nonetheless continues to suggest without basis, including in
27 its opposition brief, (see [Opp.](#) at 20-21), that these employees somehow acted
28 improperly.

⁵ These include, for example, its demand, two weeks after Elysium made a
27 compelled production of *highly* sensitive documents, that Elysium allow

(cont'd)

1 progress through discovery and anticipates substantial completion shortly, and
2 certainly by the time of ChromaDex's own substantial completion.⁶ (*See id.* ¶ 23.)

3 ChromaDex's gamesmanship came to a head in its conduct in response to
4 Elysium's plans for amendment, which is described in the declaration accompanying
5 Elysium's opening brief. (*See Powell Decl.* ¶ 17-21.) ChromaDex's counsel attempts
6 to camouflage its bad faith—delaying Elysium's motion by stringing Elysium along
7 with false promises of non-opposition to the motion—by claiming, in a sworn
8 declaration that "[b]efore the parties reached a final agreement on the length of the
9 extension" that had been proposed in exchange for ChromaDex's non-opposition,
10 ChromaDex had received the product testing results that purportedly contradicted the
11 Proposed Amendment and caused ChromaDex to file this opposition. (*Opp.* at 8;
12 *Gardner Decl.* ¶ 17.) ***This representation by ChromaDex is false***, as is shown by the
13 documentary evidence of ChromaDex's unequivocal acceptance of Elysium's
14 proposal of a six-week extension in exchange for non-opposition on February 12,
15 2018, and its indication more than a week afterward that it was "just made aware" of
16 the testing results. (*See Powell Reply Decl.* ¶ 11-13.)

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21 *(cont'd from previous page)*

22 ChromaDex to circumvent the protective order and give virtually the entirety of its
senior management and a significant percentage of its board access to Elysium's
"attorneys eyes only" information. (*See Powell Reply Decl.* ¶ 24-27.)

23 ⁶ ChromaDex's continual references to "100,000 documents" supposedly
24 returned by ChromaDex's proposed search terms and suggestion that Elysium has
strategically withheld some stratospheric number of documents to delay discovery is
25 misguided. The broad search terms proposed by ChromaDex included, for example,
the names of two employees as standalone search terms, leading to a high degree of
26 chaff among the universe of documents for review. In reality, Elysium anticipates
that its next production, for substantial completion, will be several thousand
27 documents. (*See Powell Reply Decl.* ¶ 22-24.)

1 **III. ARGUMENT**

2 **A. ChromaDex Sustains No Prejudice from the Proposed Amendment**

3 ChromaDex's efforts to manufacture undue prejudice as a result of Elysium's
4 Proposed Amendment are unavailing here. ChromaDex contends that Elysium's
5 Proposed Amendment "would fundamentally shift the nature of the case," which
6 "presently concerns contractual issues." ([Opp.](#) at 11.) ChromaDex overlooks
7 Elysium's existing claims for fraud and patent misuse, both of which it has tried and
8 failed to obtain dismissal of multiple times (*see* ECF Nos. [44](#), [73](#)), but more
9 fundamentally misrepresents the character of the Proposed Amendment. Elysium
10 does not "seek[] to add significantly different claims related to the composition and
11 manufacture of ChromaDex's ingredients and various commercial products," ([Opp.](#)
12 at 12), but rather seeks to add allegations to its existing counterclaims that "concern
13 contractual issues," namely, ***ChromaDex's breaches of the primary contract at issue***
14 ***in this litigation.*** (*See* [Powell Decl.](#) Ex. 1 at ¶ 151-55.) These allegations support
15 both Elysium's existing counterclaim for breach of the NR Supply Agreement and
16 Elysium's defenses to ChromaDex's claims, as ChromaDex's own lack of compliance
17 with the NR Supply Agreement, described in the Proposed Amendment, is fatal to its
18 claim for breach. (*See* [Br.](#) at 11); *see also Standard Furniture Mfg. Co. v. LF Prods.*
19 *PTE. Ltd.*, No. SACV 16-02097-CJC(KESx), 2017 WL 3082221, at *3 (C.D. Cal.
20 June 13, 2017) (Carney, J.) (describing second element of cause of action for breach
21 of contract as "plaintiff's performance or excuse for nonperformance").

22 ChromaDex's red-herring citation to the "composition and manufacture" of
23 ChromaDex's product—*i.e.*, the characteristics of the very product that it sold to
24 Elysium in the transaction that is the subject of its claims, and the extent to which
25 those characteristics met ChromaDex's obligation under the contract—and attempt to
26 distort these facts cannot survive a plain reading of the Proposed Amendment. *See*
27 *id.* at *2-4 (denying motion to dismiss breach claim based on defendants' provision

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1 of substandard product under product supply contract). As such, the Proposed
2 Amendment does not implicate "an entirely different set of facts" ([Opp.](#) at 12) but
3 simply another aspect of ChromaDex's misconduct central to the extant claims.⁷

4 ChromaDex's claims of prejudice because the Proposed Amendment would
5 require additional discovery are no more convincing. In claiming prejudice due to
6 delay, ChromaDex effectively asks this Court to reward its own delay tactics—
7 baselessly refusing Elysium's request to meet and confer on its proposed amendment
8 for three weeks, falsely agreeing to refrain from opposition of amendment, allowing
9 Elysium to believe for nearly two weeks that it simply had not gotten around to
10 reviewing Elysium's proposed stipulation allowing amendment, and rescinding its
11 agreement at the last possible moment. (See [Powell Decl.](#) ¶ 7-21; Powell Reply
12 Decl. ¶ 10-13.) ChromaDex's contention that *Elysium* has engaged in delay is, as
13 described above, incorrect, but more simply is unrelated to the question of whether
14 additional discovery would result in undue prejudice to ChromaDex.⁸

15 First, numerous aspects of ChromaDex's conduct belie its suggestion that in
16 the absence of the Proposed Amendment, it would be prepared to conclude discovery
17 shortly. These include, for example: (i) ChromaDex's decision to ignore Elysium's
18 invitation to discuss discovery matters, including a deadline for substantial
19 completion of production; (ii) that the parties have barely discussed the logging of

20

21 ⁷ Moreover, ChromaDex's implicit assertion that the Proposed Amendment
22 should properly be presented as claims in a separate litigation, rather than added
23 through amendment, runs contrary to authority from the Court indicating that the
24 possibility of resolution of all claims on the same contract counsels in favor of
allowing amendment. (See [Br.](#) at 12-13.)

25 ⁸ ChromaDex's attempts to distinguish the authority cited by Elysium
26 regarding the lack of prejudice in circumstances similar to these—a request to amend
27 made long before a court-ordered discovery deadline and relating to contracts at
issue in the litigation—largely depend on ChromaDex's contention that Elysium's
Proposed Amendment "involve[s] entirely new areas of factual inquiry" and "new
sets of facts" ([Opp.](#) at 13 n.5, 15 n.7), which is baseless as described above.

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1 privileged documents and reached no agreement on the issue; and (iii) ChromaDex's
2 refusal to provide Elysium with a date for substantial completion of its production
3 that same day it filed its opposition brief, which was preceded by ChromaDex's
4 provision of two previous substantial completion deadlines that it let pass. (*See*
5 Powell Reply Decl. ¶ 16-20.) ChromaDex's laggard discovery progress also is fatal
6 to its claims of prejudice resulting from additional discovery (*see* [Opp.](#) at 13-14),
7 such as the need for additional depositions or the retention of new experts—
8 ChromaDex has not noticed a *single* deposition to date, and the day it filed its
9 opposition brief, ChromaDex confessed that it had not yet decided what experts it
10 would offer even on the extant claims. (*See* Powell Reply Decl. ¶ 21.)⁹

11 Next, discovery on the Proposed Amendment is not in the nascent stage
12 ChromaDex implies. ChromaDex first attempts to exaggerate the magnitude of
13 discovery required, implying, for example, that the parties would need discovery on
14 "whether ChromaDex's NR is manufactured in accordance with highly-technical
15 cGMP standards" ([Opp.](#) at 12), disingenuously overlooking Elysium's allegation,
16 based on prior discovery, that ChromaDex advertised to customers that it was not.
17 (*See* [Powell Decl.](#) Ex. 1 ¶ 88.) This admission obviates the need for the complex
18 discovery ChromaDex suggests is warranted. Next, although (contrary to
19 ChromaDex's representation), Elysium has never demanded that ChromaDex provide
20 documents from additional custodians (*see* Powell Reply Decl. ¶ 31), both parties
21 have exchanged sets of requests for production relating to the Proposed Amendment
22 and will provide responses before the scheduled hearing date on this motion.

23 _____
24 ⁹ ChromaDex's assertion that the Proposed Amendment would require the
25 parties to "engage in extensive and time-consuming independent scientific testing
26 and analysis of ChromaDex's NR ingredient shipments and third-party products"
27 ([Opp.](#) at 13-14) is rather at odds with the position it advances otherwise—that the
28 scientific testing that ChromaDex supposedly already performed renders Elysium's
allegations "scientifically impossible" so that they must be brought in bad faith. (*Id.*
at 8).

1 Elysium also has served subpoenas relating to the Proposed Amendment and
2 received responses. (See Powell Reply Decl. ¶ 31-32.) Finally, ChromaDex has
3 already run search terms and determined the universe of responsive documents
4 relating to the cGMP Provision allegations. (See [Powell Decl.](#) ¶ 15.)

5 ChromaDex's attempt to disclaim that it has been on notice of Elysium's
6 Proposed Amendment for months is contradicted even by its own brief. ChromaDex
7 does not dispute, because it cannot, that Elysium served a discovery request relating
8 to the cGMP Provision on September 6, 2017, and that the parties discussed
9 numerous times over the subsequent months Elysium's position that ChromaDex's
10 contractual compliance, including with the cGMP Provision, was at issue in the
11 litigation. Having insisted numerous times during that period that Elysium could not
12 take discovery on the cGMP Provision because its breach was not expressly alleged,
13 ChromaDex now faults Elysium for its efforts to follow exactly that course of
14 conduct and instead bizarrely suggests that Elysium's failure to move to compel
15 production of these documents weighs against allowing amendment relating to the
16 subject now. ChromaDex's muddled attack ignores that Elysium's request for leave
17 to amend is exactly consistent with the position it has taken all along, that the parties'
18 dispute largely centers around each party's compliance with the NR Supply
19 Agreement. ChromaDex's breach of that agreement, whether through the breaches
20 previously pled or new allegations described in the Proposed Amendment, are
21 entirely relevant to both parties' claims.

22 ChromaDex's final stab at establishing prejudice rests on misdirection.
23 ChromaDex carefully describes Elysium as advancing the same cGMP "allegations"
24 in the New York Litigation as it describes in the Proposed Amendment ([Opp.](#) at 15)
25 but pivots to asserting that permitting the "*allegations*" here "would force
26 ChromaDex to defend duplicative *claims* in different forums across the country."
27 (*Id.*) The Court should not countenance this sleight of hand. Elysium's complaint in
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1 the New York litigation makes clear that it asserts no breach of contract claims in
2 that action, let alone a claim duplicative of the breach claim asserted here; rather,
3 Elysium cites ChromaDex's misrepresentations about cGMP status in alleging that
4 ChromaDex lied to the FDA and the public about the safety of its own Niagen and
5 TruNiagen. (See [Gardner Decl.](#) Ex. C at ¶ 79-84.) The fact that ChromaDex
6 misrepresented its cGMP status both to Elysium and to the FDA and public and must
7 face the music on both sets of lies does not transform Elysium's claims for false
8 advertising, trade libel, deceptive business practices, and tortious interference in New
9 York into the claim for ChromaDex's breach at issue here, and ChromaDex's citation
10 to "duplicative claims" is thus nothing more than misrepresentation.

11 **B. Elysium Has Not Delayed in Assertion of Its Proposed Amendment**

12 In the Ninth Circuit, "delay alone is not sufficient to justify the denial of a
13 motion to amend." See *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th
14 Cir. 1987). Even if it were, however, ChromaDex fares no better in its attempt to
15 establish that Elysium unduly delayed in bringing its motion for leave to amend.
16 First, ChromaDex's attack on Elysium's cGMP Provision-related allegations depends
17 on ChromaDex's disregard of the position taken by Elysium throughout this litigation
18 and well-supported by black-letter California law that ChromaDex's contractual
19 compliance was properly within the purview of the parties' claims of breach, and that
20 Elysium's assertion of the new allegations came only after months of stonewalling by
21 ChromaDex on providing discovery relating to its contractual compliance.
22 ChromaDex's assertion that Elysium knew about its cGMP Provision "claim" before
23 this point is thus beside the point. ([Opp.](#) at 17.)

24 The remainder of ChromaDex's delay argument on Elysium's cGMP Provision
25 allegations relies on a brazen misrepresentation of Elysium's opening brief.
26 Although ChromaDex accuses Elysium of falsely arguing that "it 'learned' about this
27 *claim* 'only through discovery,'" ([Opp.](#) at 17 (citing [Br.](#) at 14)), the language from
28

1 Elysium's brief that ChromaDex so carefully excises lays bare the lie: Elysium has
2 never argued that it "only" learned of a cGMP Provision-related "claim" through
3 discovery. Indeed, the Proposed Amendment does not seek to add an additional
4 "claim" at all but rather new *allegations* underlying its existing claim for breach of
5 contract and an additional affirmative defense. (See [Br.](#) at 13.) As Elysium's brief
6 makes clear, it learned only of certain new *facts* that underlie those allegations
7 through recent discovery, including its new allegation that ChromaDex has
8 essentially admitted to a breach of the cGMP Provision through its advertisement to
9 potential customers that its nicotinamide riboside is manufactured in compliance
10 with standards less stringent than Pharmaceutical cGMPs. (See [Br.](#) at 14.) Elysium
11 never suggested that it was previously unaware of another aspect of ChromaDex's
12 breach, and indeed put ChromaDex on notice of such in September 2017.

13 The sole argument that ChromaDex presents on delay relating to Elysium's
14 Product Purity Provision allegations may be easily dismissed. ChromaDex points to
15 Elysium informing ChromaDex of its intent to bring a claim relating to the Product
16 Purity Provision in November 2017 ([Opp.](#) at 17) but cites no authority to support its
17 apparent contention that Elysium's decision to wait two months—during which time
18 the parties engaged in a court-ordered mediation¹⁰—before it formally requested a
19 meet and confer on its intent to amend constitutes cognizable delay. And
20 ChromaDex's nonsensical contention (*see* [Opp.](#) at 17-18) that Elysium's possession
21 of ChromaDex's misleading certificates of analysis—the very vehicle by which
22 ChromaDex concealed its breach from Elysium—can be twisted to suggest that
23 Elysium unduly delayed in making these allegations defies logic.

24 _____
25 ¹⁰ See, e.g., *Carlin v. DairyAmerica, Inc.*, No. 1:09-CV-00430 AWI EPG,
26 2017 WL 3671860, at *8 (E.D. Cal. Aug. 24, 2017) (referencing the parties' interim
27 engagement in settlement negotiations and mediations as factor weighing against
finding of delay where plaintiff had secured evidence underlying amended claim five
months before seeking leave).

1 ChromaDex's reference to Elysium having previously had "four prior
2 opportunities to allege counterclaims" also misstates the record. (See [Opp.](#) at 18.)
3 Elysium first asserted counterclaims on January 25, 2017. (See ECF No. [11](#).) It
4 amended these counterclaims on March 6, 2017. (See ECF No. [31](#).) This Court
5 instructed Elysium to further amend its counterclaims relating solely to its patent
6 misuse claim on September 26, 2017 (see ECF No. [63](#)), and Elysium did so on
7 October 11, 2017. (See ECF No. [65](#).) ChromaDex's transmutation of these events
8 into "four prior opportunities" to make the allegations in the Proposed Amendment
9 studiously ignores that at the time of the most recent amendment, which scope was
10 restricted by Court order in any event: (i) Elysium had not yet received any
11 discovery whatsoever; (ii) Elysium had not yet acquired the Regulated Substance
12 testing results set forth in the Proposed Amendment; and (iii) Elysium had only five
13 days earlier received ChromaDex's objection to its request for discovery on the
14 cGMP Provision and not yet met and conferred to learn of ChromaDex's position
15 that ChromaDex's compliance with the NR Supply Agreement was not within the
16 scope of the extant pleadings. (See [Powell Decl.](#) ¶ 13.) Accordingly, the cases cited
17 by ChromaDex in its opposition brief are entirely inapt here.¹¹

18 **C. ChromaDex's Bare Assertion of Bad Faith Is Inadequate**

19 ChromaDex's opposition brief culminates in a histrionic accusation that
20 Elysium requests leave to amend in bad faith, which in large part asks this Court,
21 without basis, to simply accept ChromaDex's representation that Elysium's new
22 allegations are untrue. ChromaDex asserts that Elysium makes the Product Purity
23

24

25 ¹¹ See [Opp.](#) at 18 (citing *M/V Am. Queen v. San Diego Marine Constr. Corp.*,
26 708 F.2d 1483, 1492 (9th Cir. 1983) (motion to amend denied where "[n]o facts,
27 newly discovered in that period, were alleged") and *Mendoza v. Nordstrom, Inc.*, No.
SACV 10-00109-CJC(MLGx), 2012 WL 12888101, at *1 (C.D. Cal. May 2, 2012)
(denying motion to amend where proposed amendments were "facial Constitutional
challenges ... that were available to Nordstrom when the case was filed initially")).

28

1 Provision breach allegations "with the sole motive to harm ChromaDex's reputation
2 and commercial relationships." ([Opp.](#) at 19.) ChromaDex's primary support for this
3 contention is that ChromaDex's "own scientific testing demonstrates that none of the
4 NR it supplied to these third parties contained the Regulated Substance at the levels
5 Elysium seeks to allege," *i.e.*, that it disputes Elysium's allegations. (*Id.*)
6 ChromaDex does not cite a single case indicating that bad faith may be inferred
7 because the party opposing the amendment disputes the allegations, and for good
8 reason: "[A] motion to amend the complaint is not the proper stage in which to
9 address [a] factual dispute." *Estate of Tungpalan v. Crown Equip. Corp.*, No. 11-
10 00581 LEK-BMK, 2013 WL2897777, at *5 (D. Haw. June 12, 2013) (amendment
11 properly allowed despite factual dispute on merits of new claims).

12 ChromaDex goes on to fault Elysium for declining to provide it with the
13 testing results referenced in the Proposed Amendment (*see* [Opp.](#) at 20), yet
14 references no authority indicating that a party is obligated to provide pre-claim
15 discovery in advance of a motion to amend, or that a failure to do so gives rise to an
16 inference of bad faith. But even if ChromaDex had provided the Court with its own
17 testing results, which it did not, ChromaDex's implication of a contradiction between
18 the testing performed by Elysium and that performed by ChromaDex constitutes
19 nothing more than its presentation of a factual dispute,¹² not the basis for an

20 _____
21 ¹² And ChromaDex's basis to dispute the accuracy of Elysium's testing results
22 is unsupported indeed. In addition to failing to submit the testing results alongside
23 its declaration supporting its brief (which in any event would only emphasize the
24 existence of a factual dispute), ChromaDex *tellingly* references only the testing of
25 the Niagen incorporated into "third-party products" in its brief and declaration. (*See*
26 [Gardner Decl.](#) ¶¶ 14, 17.) ChromaDex has been on notice since before it conducted
27 these tests (*see* [Gardner Decl.](#) ¶ 14) that Elysium alleges the presence of the
28 Regulated Substance in the Niagen it sold to Elysium and its ChromaDex's own
TruNiagen product as well as the third party products ChromaDex describes. (*See*,
e.g., [Powell Decl.](#) Ex. 1 at ¶¶ 91, 100-01.) Yet, although trumpeting its "scientific
testing" purporting to contradict Elysium's allegations, (*see* [Opp.](#) at 19), ChromaDex
makes no reference whatsoever to having tested these core products—or, is not
willing to make a representation to the Court on the results of those tests.

1 inference of bad faith. Likewise, ChromaDex's claim that the third-party products
2 tested by Elysium "contain numerous ingredients entirely unknown to ChromaDex"
3 and implicit contention that those non-Niagen ingredients (which ChromaDex does
4 not name and whose presence at what levels in the products it does not describe) are
5 responsible for the presence of the Regulated Substance above the statutory safe
6 harbor in nine of the eleven Niagen-containing products on the market, including
7 ChromaDex's own TruNiagen, constitutes nothing more than a factual dispute to be
8 tested through discovery. (See [Opp.](#) at 19.)

9 To the extent ChromaDex intends to suggest that Elysium's decision to decline
10 to censor its amended pleading to ChromaDex's liking is evidence of bad faith
11 because the language of Elysium's Proposed Amendment is "wholly unnecessary to
12 alleging the claims Elysium wishes to make" (see [Opp.](#) at 7-9), ChromaDex ignores
13 that "[t]he fact that amendment may not be strictly necessary does not alone evidence
14 bad faith." *St. Paul Fire & Marine Ins. Co. v. Heath Fielding Ins. Broking Ltd.*, No.
15 91 Civ. 0748 (MJL), 1995 U.S. Dist. LEXIS 19847, at *20 n.18 (S.D.N.Y. Dec. 30,
16 1995); see also *Cmty. Voice Line, Ltd. Liab. Co. v. Great Lakes Commc'n Corp.*, 295
17 F.R.D. 313, 320 (N.D. Iowa 2013) (rejecting "bare assertion" that plaintiff acted in
18 bad faith in seeking to amend complaint to "embarrass" defendant by involving
19 defendant's customers in litigation). Moreover, even ChromaDex's own brief is at
20 odds with its argument that the specific language of the Proposed Amendment is
21 "unnecessary;" the testing that underlies ChromaDex's (procedurally improper)
22 dispute of the accuracy of Elysium's allegations (see [Opp.](#) at 19) and that is
23 purportedly the basis of its decision to oppose Elysium's motion (see [Opp.](#) at 8-9)
24 depended on Elysium's specific identification of those products.

25 ChromaDex further contends that its test results "confirm that ChromaDex's
26 ingredients are perfectly safe," and references Elysium's human clinical trial showing
27 the safety of Basis, Elysium's product that formerly contained Niagen. (See [Opp.](#) at
28

1 19-20.) This puzzling *non sequitur* provides no grounds for an inference of bad
2 faith, however; Elysium's Proposed Amendment contends that ChromaDex violated
3 the cGMP Provision and the Product Purity Provision by selling Elysium Niagen that
4 was not manufactured pursuant to the specifications outlined in the NR Supply
5 Agreement and by failing to notify Elysium of information concerning the Niagen's
6 purity and quality, not that ChromaDex sold Niagen that was unsafe.¹³

7 ChromaDex's contention that bad faith may be inferred from Elysium's
8 "discovery delays" is based on the same strategic misframing of the history of
9 discovery in this case and Elysium's arguments described above and may be
10 dismissed for the same reasons. The ready distinctions apparent in the cases cited by
11 ChromaDex only buttress this conclusion: the two *habeas* petition cases ChromaDex
12 relies upon involved amendments duplicative of claims that had previously been
13 dismissed (*see Bonin v. Calderon*, 59 F.3d 815, 846 (9th Cir. 1995); *Marsh v. Janda*,
14 No. 13-2227-CJC, 2016 WL 4545323, at *17 (C.D. Cal. July 28, 2016)), an
15 argument inapplicable here, and the third case likewise involved a new claim based
16 on facts previously alleged by the plaintiff. *See KFD Enters., Inc. v. City of Eureka*,
17 No. C 08-4571 MMC, 2012 WL 2196330, at *2 (N.D. Cal. June 14, 2012). None of

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19 ¹³ *See Powell Decl.* Ex. 1 ¶ 21(ChromaDex failed to give Elysium information
20 "concerning the quality or purity" of the Niagen sold); ¶ 90 (same); ¶ 108
21 (ChromaDex failed to inform Elysium of "material information concerning the
22 Niagen's quality and purity") ¶ 109 (same); ¶ 111 (ChromaDex purported to provide
23 information impacting "the purity and quality of the Niagen it sold"); ¶ 112
24 (ChromaDex omitted information impacting "the quality and purity of the Niagen
25 sold"); ¶ 113 (Elysium would not have agreed to terms of the NR Supply Agreement
if it had known ChromaDex "was supplying a product of lower purity or quality than
warranted"); *see also* ¶ 92 ("the Regulated Substance ... is not generally considered
to be hazardous to human health").

26 The *safety* of Niagen is, as ChromaDex acknowledges, "an issue in the New
27 York Litigation" (*Opp.* at 20 n. 10) and before the FDA; ChromaDex's description of
the safety of Niagen in the same sentence as "undisputed" is curious. (*See id.*)

1 the cases ChromaDex cites indicate bad faith in delay may be inferred where a party
2 bases its amendment partially on new discovery or where a party opposing
3 amendment concealed the facts underlying the amendment. *See also C.F. v.*
4 *Capistrano Unified Sch. Dist.*, 656 F. Supp. 2d 1190, 1198 (C.D. Cal. 2009) (no
5 basis for dilatory tactics where defendants gave a "plausible" explanation for delay);
6 *Chang Bee Yang v. Sun Tr. Mortg., Inc.*, No. 1:10-cv-01541-AWI-SKO, 2011 WL
7 2433640, at *4 (E.D. Cal. June 14, 2011) (prior knowledge of basis for amendment
8 "is not, by itself, objective evidence of bad faith or tactical gamesmanship").

9 The remainder of ChromaDex's argument on bad faith merely rehashes, in
10 highly colored fashion,¹⁴ its unsupported allegations from this litigation and
11 elsewhere. (See [Opp.](#) at 20-21.) Bad faith "is typically 'understood to mean such
12 tactics as, for example, seeking to add a defendant merely to destroy diversity
13 jurisdiction'"; ChromaDex's tired retread of its allegations makes no suggestion
14 Elysium has engaged in such tactics. *Urango v. Frozen Food Expressindustries,*
15 *Inc.*, No. 13-cv-02661 TLN-AC, 2014 WL 1379892, at *2 (E.D. Cal. Apr. 4, 2014).
16 Accordingly, ChromaDex has failed to demonstrate the existence of bad faith that
17 would warrant denial of Elysium's request.

18 **D. Neither of Elysium's Proposed Amended Counterclaims, Nor Its**
19 **Proposed Amended Defense, Are Futile**

20 Finally, ChromaDex, in the scant handful of pages dedicated to the legal
21 sufficiency of Elysium's amendment, has failed to show, much less make a strong
22 showing, that Elysium's Proposed Amendment is futile. Its futility argument hinges
23 entirely on its position that Elysium "contractually waived the proposed warranty
24

25 ¹⁴ ChromaDex contends, for example, that Elysium has brought "baseless
26 challenges to ChromaDex's licensed NR patent rights" through its commencement of
27 *inter partes* review proceedings, yet elides the fact that in "partially reject[ing]"
Elysium's second claim, the Patent Trial and Appeal Board allowed Elysium to
proceed with the majority of the claim. ([Opp.](#) at 20.)

1 claims" such that "the [w]arranty claims are plainly barred." (See [Opp.](#) at 21-22.)
2 However, any such waiver is unenforceable under settled law where, as here, the
3 defects were not detectable upon a reasonable inspection. See, e.g., *Marr Enters.,*
4 *Inc. v. Lewis Refrigeration Co.*, 556 F.2d 951, 955 (9th Cir. 1977) (collecting cases).

5 As an initial matter, only ChromaDex's breach of the cGMP Provision, and not
6 its breach of the Product Purity Provision, can be described as a breach of "warranty"
7 at all. The Product Purity Provision is not a warranty, but a notice provision that
8 requires ChromaDex to promptly inform Elysium of anything potentially concerning
9 the quality and purity of the Niagen it was selling, such as the presence of the
10 Regulated Substance above the Safe Harbor Limit. No limitation of "warranties,"
11 like that in Section 3.7, could excuse ChromaDex's non-warranty obligations under
12 an entirely separate provision, just as it could not excuse obligations under the MFN
13 or Exclusivity Provisions, and ChromaDex thus presents no argument that Elysium's
14 Product Purity Provision-related allegations are futile.

15 Moreover, Elysium's Proposed Amendment clearly alleges that the limited
16 warranty fails of its essential purpose, and is thus unenforceable, because the breach
17 could have been detected within the time period prescribed by the limitation.
18 ([Powell Decl.](#) Ex. 1 ¶ 87.) This is in stark contrast to *Bullseye Telecom, Inc. v. Cisco*
19 *Systems, Inc.*, No. 09-13046, 2010 WL 1814669 (E.D. Mich. May 6, 2010). There,
20 the court simply observed that an express warranty does not fail of its essential
21 purpose merely because it has a limited duration, but had no occasion to address the
22 shipment of a product whose non-conformity is not discoverable upon a reasonable
23 inspection. See *id.* at *4. Further, ChromaDex's attempt to add nonexistent
24 "elements" to the failure-of-essential-purpose doctrine should be rejected; it is well
25 settled that Elysium need only plead, as it has, that the warranty fails of its essential
26 purpose because the defects were latent and not discoverable upon a reasonable
27 inspection. See, e.g., *Micro Modular Techs. PTE Ltd v. Atheros Commc'ns Inc.*, No.

28

1 SACV 10-443 JVS (MLGx), 2010 WL 11558160, at *6 (C.D. Cal. Nov. 3, 2010)
2 (rejecting application of limited remedy provision where plaintiffs "pled that the
3 defects were latent and difficult to detect"); *Marr Enters., Inc.*, 556 F.2d at 955
4 ("Limited remedies ... fail of their essential purpose when defects in the goods are
5 latent and not discoverable on reasonable inspection.").¹⁵

6 ChromaDex cites no authority requiring Elysium to allege "changed
7 circumstances" where a non-conformity was not detectable upon a reasonable
8 inspection. Nor is Elysium obligated to plead that it gave ChromaDex an
9 "opportunity to cure" defects that it plainly could not cure: as discovery makes clear,
10 ChromaDex's facilities did not meet Pharmaceutical cGMP standards, so no
11 replacement was possible, and Elysium had already incorporated the non-conforming
12 Niagen into a product sold to consumers. *See, e.g., Galoski v. Stanley Black &*
13 *Decker, Inc.*, No. 1:14 CV 553, 2015 WL 5093443, at *6 (N.D. Ohio Aug. 28, 2015)
14 ("[I]f Plaintiff's claims are true, no repair would cure the defect, and no replacement
15 would solve the problem. Therefore, requiring notice and a prior opportunity to cure
16 the defect would be wholly futile."); *Neville Chem. Co. v. Union Carbide Corp.*, 294
17 F. Supp. 649, 655 (W.D. Pa. 1968) (striking limited warranty provision under the
18 UCC where defect was latent and not discovered until the defective material had
19 been "processed" and passed "into the hands of consumers"), *aff'd in part, vacated in*
20 *part*, 422 F.2d 1205 (3d Cir. 1970).¹⁶

21 _____
22 ¹⁵ None of the cases cited by ChromaDex in support of its newfound
23 "elements" of the essential purpose doctrine has any application here, as none
24 involved latent defects discovered only after the seller's final shipment. *Cf., e.g., In*
25 *re Seagate Tech. LLC Litig.*, 233 F. Supp. 3d 776, 784 (N.D. Cal. 2017); *In re*
26 *MyFord Touch Consumer Litig.*, 46 F. Supp. 3d 936, 970 (N.D. Cal. 2014); *Sw.*
27 *Eng'g, Inc. v. Yeomans Chi. Corp.*, No. 09-CV-110 JLS (RBB), 2009 WL 10672252,
28 at *5 (S.D. Cal. Apr. 20, 2009); *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*,
319 F. Supp. 2d 1040, 1055 (C.D. Cal. 2003).

¹⁶ In addition, because ChromaDex knew at the time of the parties' relationship
that its process was not compliant with Pharmaceutical cGMPs, any opportunity-to-
cure requirement that might otherwise exist is excused. *See, e.g., Alberti v. Gen.*

(cont'd)

1 Nor is there any merit to ChromaDex's (unsupported) position that an
2 affirmative defense of unclean hands would be futile. That defense plainly "bars
3 claims for money damages as well as those for equitable relief" and thus prohibits
4 ChromaDex from seeking damages in pursuing its claim for breach of the NR Supply
5 Agreement against Elysium. *POM Wonderful LLC v. Coca Cola Co.*, 166 F. Supp.
6 3d 1085, 1091 (C.D. Cal. 2016).

7 **IV. A THREE-MONTH EXTENSION IS NOT WARRANTED HERE**

8 Prior to ChromaDex's eleventh-hour about-face, it had agreed to refrain from
9 opposing Elysium's request for leave to amend in exchange for Elysium's joining a
10 request to extend the discovery deadline by six weeks. Elysium sees no reason why
11 an extension twice that length and postponement of trial would be warranted now.

12 **V. CONCLUSION**

13 For the foregoing reasons and those described in its previously-submitted
14 memorandum of points and authorities, Elysium respectfully requests that the Court
15 grant its motion for leave to amend.
16

17 DATED: March 19, 2018

18 SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
19 FOLEY HOAG LLP
20

21 By: /s/ Joseph N. Sacca
22 JOSEPH N. SACCA

23 Attorneys for Defendant and
24 Counterclaimant Elysium Health, Inc.

25 (cont'd from previous page)
26 *Motors Corp.*, 600 F. Supp. 1026, 1028 n. 2 (D.D.C. 1985); *Radford v. Daimler*
Chrysler Corp., 168 F. Supp. 2d 751, 754 (N.D. Ohio 2001).
27