

BAKER & HOSTETLER LLP
ATTORNEYS AT LAW
LOS ANGELES

1 MICHAEL R. MATTHIAS, Bar No. 057728
mmathias@bakerlaw.com
2 ELIZABETH M. TRECKLER, Bar No. 282432
etreckler@bakerlaw.com

3 **BAKER & HOSTETLER LLP**
11601 Wilshire Boulevard, Suite 1400
4 Los Angeles, California 90025-0509
Telephone: (310) 820-8800
5 Facsimile: (310) 820-8859

6 JOSEPH N. SACCA, (admitted *pro hac vice*)
jsacca@bakerlaw.com
7 ESTERINA GIULIANI (admitted *pro hac vice*)
egiuliani@bakerlaw.com
8 BENJAMIN D. PERGAMENT (admitted *pro hac vice*)
bpergament@bakerlaw.com
9 KRISTIN L. KERANEN (admitted *pro hac vice*)
kkeranen@bakerlaw.com

10 **BAKER & HOSTETLER LLP**
45 Rockefeller Plaza
11 New York, New York 10111-0100
Telephone: (212) 589-4290
12 Facsimile: (212) 589-4201

13 *Counsel continued on following page*

14 **UNITED STATES DISTRICT COURT**
15 **CENTRAL DISTRICT OF CALIFORNIA**
16 **WESTERN DIVISION**

17 ChromaDex, Inc.,
18 Plaintiff,
19 v.
20 Elysium Health, Inc. and Mark
Morris,
21 Defendants.

Case No.: 8:16-cv-02277-CJC-DFM
[Assigned to the Hon. Cormac J. Carney]

**ELYSIUM HEALTH, INC.'S AND
MARK MORRIS'S REPLY IN
SUPPORT OF THEIR MOTION IN
LIMINE TO EXCLUDE THE
SUPPLEMENTAL EXPERT
REPORT OF CARLA KAGEL**

22
23 Elysium Health, Inc.,
24 Counterclaimant,
25 v.
26 ChromaDex, Inc.,
27 Counter-Defendant.

Pre-Trial Conference: September 18, 2019
Trial: October 15, 2019

1 DONALD R. WARE (admitted *pro hac vice*)
dware@foleyhoag.com

2 MARCO J. QUINA (admitted *pro hac vice*)
mquina@foleyhoag.com

3 JULIA HUSTON (admitted *pro hac vice*)
jhuston@foleyhoag.com

4 **FOLEY HOAG LLP**
155 Seaport Boulevard
5 Boston, Massachusetts 02210
Telephone: (617) 832-1000
6 Facsimile: (617) 832-7000

7 *Attorneys for Defendant and Counterclaimant*
ELYSIUM HEALTH, INC.

8 *Attorneys for Defendant*
9 MARK MORRIS

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

BAKER & HOSTETLER LLP
ATTORNEYS AT LAW
LOS ANGELES

BAKER & HOSTETLER LLP
ATTORNEYS AT LAW
LOS ANGELES

1 **I. INTRODUCTION**

2 Defendant and Counterclaimant Elysium Health, Inc. (“Elysium”) and
3 Defendant Mark Morris (“Morris,” together, “Defendants”) respectfully submit this
4 Reply in further support of their Motion *in limine* to exclude the Supplemental
5 Expert Report of Dr. Carla Kagel disclosed on July 26, 2019 (“July Report”)¹ (ECF
6 No. 240-04), and barring Dr. Carla Kagel from testifying regarding any opinions or
7 analyses set forth therein. ChromaDex, Inc.’s (“ChromaDex”) attempts to downplay
8 it as “only three pages” (Opp.² at 2) notwithstanding, the fact remains is that the July
9 Report is a new, improper expert opinion that ChromaDex could have procured by
10 the agreed deadline for exchange of initial expert reports – particularly given that
11 the samples tested were in its possession for at least four years and the testing
12 methodology was readily available for at least nine months. Instead, ChromaDex
13 chose to sit on Dr. Kagel’s new expert opinion until the rebuttal deadline, and now
14 Elysium faces substantial prejudice unless this improper supplement is excluded.

15 **II. ARGUMENT**

16 **A. ChromaDex Admits the July Report Relies on Information and**
17 **Testing Methodologies Readily Available Before the Initial Expert**
18 **Disclosure Deadline**

19 ChromaDex claims that the July Report was a proper “supplement” pursuant
20 to Rule 26(e) “by using new information to fill in the gaps and interstices of [Kagel’s]
21 previous report.” (Opp. at 1). What ChromaDex describes as “gaps and interstices”
22 is, of course, Dr. Kagel’s complete failure to offer in her initial report any opinion on
23 the central issue of whether acetamide was present in the NR ChromaDex sold to
24

25 _____
26 ¹ Capitalized terms not otherwise defined here shall have the meanings
ascribed in Defendants’ initial Motion *in Limine* to Exclude the Supplemental Report
of Dr. Carla Kagel, ECF No. 266.

27 ² Citations to “Opp. at ___” refer to ChromaDex, Inc.’s Memorandum in
28 Opposition to Defendants’ Motion *in Limine* to Exclude the Supplemental Report
of Dr. Carla Kagel, ECF No. 293-00.

1 Elysium. The supposed “new information” she used to fill that chasm in her
2 “supplemental” report was, as ChromaDex admits, testing it performed following her
3 initial report that used a methodology available to ChromaDex no later than nine
4 months earlier on samples of product it had in its possession dating back as far as
5 2014. (ECF No. 293-02 at 18-19; ECF No. 240-04 at 1034-35). The July Report was
6 thus not based on truly newly available information.

7 First, ChromaDex contends that the July Report relies upon “its scientifically
8 verified and more accurate [testing] method,” a testing methodology that, as Dr.
9 Kagel’s initial report shows, was available to ChromaDex at least as early as
10 September 2018. (Opp. at 1; ECF No. 240-04 at 1034-35). ChromaDex waited a full
11 nine months after having the methodology to run “additional tests” on or around June
12 27, 2019, which ChromaDex says was “[d]uring the same period that Dr. Kagel was
13 preparing her initial report,” *id.*, but actually post-dated Dr. Kagel’s initial report,
14 served June 21, 2019. As a case ChromaDex cites explains, Rule 26(e)’s
15 supplementation requirement is not intended to permit parties to add new opinions to
16 an expert report based on evidence that was available at the time the initial expert
17 report was due. *United States ex rel. Brown v. Celgene Corp.*, 2016 WL 6562065, at
18 *4 (C.D. Cal. Aug. 23, 2016).

19 Second, ChromaDex admits that it used the methodology it possessed at least
20 as far back as September 2018 to test samples from the “*specific NR lots* where the
21 product sold to Elysium originated.” (Opp. at 3; ECF No. 240-04 at 1034-35). That
22 is, samples that ChromaDex does not deny had been in its possession since 2014 and
23 2015 (ECF No. 293-02; ECF No. 240-02 at 688-99), and that plainly could have been
24 tested by ChromaDex (1) at latest, within a few months after Elysium first asserted
25 its counterclaim relating to the purity of the NR sold by ChromaDex in March 2018,
26 and (2) long before Dr. Kagel submitted her initial report. The failure to timely test
27 product samples it had within its possession is the fault of ChromaDex alone.
28

1 Because the July Report rests on information that could have been developed
 2 at the time Kagel submitted the June Report—and in fact, well before that time—it
 3 is clearly an “untimely and improper expert disclosure” under Rule 26(e), and
 4 therefore should be excluded. *Mariscal v. Graco, Inc.*, 52 F. Supp. 3d 973, 980-82
 5 (N.D. Cal. 2014). The July Report here is, in fact, “a second bite at the apple—an
 6 opportunity to correct fatal defects in the [initial report] submitted. That is not what
 7 Rule 26(e) envisions.” *Cohlmia v. Ardent Health Servs., LLC*, 254 F.R.D. 426, 433
 8 (N.D. Okla. 2008). Rule 26(e) “does not give license to sandbag one’s opponent with
 9 claims and issues which should have been included in the expert witness’ report[.]”
 10 *Plumley v. Mockett*, 836 F. Supp. 2d 1053, 1062 (C.D. Cal. 2010) (citations omitted).
 11 “To rule otherwise would create a system where preliminary reports could be
 12 followed by supplementary reports and there would be no finality to expert reports
 13 ...” *Id.* (finding that supplemental reports that offer “strengthen” or “deepen”
 14 opinions expressed in the original expert report is “beyond the scope of proper
 15 supplementation”) (citation omitted). Indeed, this is exactly what ChromaDex has
 16 done in this case: attempted to correct a fatal flaw in its initial expert report by
 17 purposefully waiting to include new information that could and should have been
 18 included in its initial report, but was not.

19 **B. ChromaDex’s Failure to Timely Disclose Kagel’s July Report**
 20 **Deprived Defendants of Far More Than A Deposition Opportunity**

21 ChromaDex has not met its burden of demonstrating that its failure to timely
 22 submit the July Report was “substantially justified or harmless” as required under
 23 Rule 37(c)(1). *Torres v. City of Los Angeles*, 548 F.3d 1197, 1213 (9th Cir. 2008)
 24 (citing *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1107 (9th Cir.
 25 2001) (“Implicit in Rule 37(c)(1) is that the burden is on the party facing sanctions
 26 to prove harmlessness.”)); *see also Lanard Toys, Ltd. v. Novelty, Inc.*, 375 F. App’x
 27 705, 713 (9th Cir. 2010) (listing factors for court to consider in determining whether
 28 violation of expert discovery rules can be deemed harmless).

1 ChromaDex claims there was no harm in its delay of the July Report simply
2 because Defendants “could have deposed [Kagel] at any time.” (Opp. at 6).
3 ChromaDex’s attempt to shift the blame for its filing of an untimely new expert
4 opinion ignores the harm Defendants would suffer with respect to both planning and
5 deposing an expert witness in the midst of preparing for trial next month, as well as
6 the significantly diminished value that any testimony from such a deposition would
7 have Defendants at this late stage of the case. *See Yeti by Molly, Ltd.*, 259 F.3d at
8 1107 (late-filed expert report was not harmless in “complex case” where responding
9 party would be required to depose and prepare to question expert at trial).

10 More significantly, the prejudice to Defendants extends far beyond an inability
11 to timely depose Dr. Kagel. Indeed, because Dr. Kagel did not perform the testing
12 that is the subject of her new opinion and instead merely parroted the purported
13 results of ChromaDex’s in-house testing in her July Report, a deposition of her would
14 be of limited utility at best. ChromaDex only chose to do the new testing in late June
15 2019, and further decided to sit on the results of that testing for nearly an additional
16 month, until it made a supplemental document production to Defendants on July 24,
17 2019, a mere two days before rebuttal expert reports were due, on which date it served
18 the July Report. (ECF No. 266-3; ECF No. 240-02 at 688-99). ChromaDex provides
19 no justification for its delay in conducting the additional tests, in producing the test
20 results to Defendants, or in holding Dr. Kagel’s July Report until the deadline for
21 exchange of expert rebuttal reports, even though the July Report does not purport to
22 be a rebuttal to anything. This gamesmanship deprived Defendants of the
23 opportunity to take discovery on the additional testing performed by ChromaDex,
24 including but not limited to (i) how those tests were conducted, (ii) the chain of
25 custody of the samples used, and (iii) the conditions in which the samples were held.
26 All of that discovery would be required for a fair opportunity to respond to the new
27 opinions stated in Dr. Kagel’s July Report. (ECF No. 240-04). Defendants were also
28 denied the opportunity to retain an expert to review and rebut the new expert opinions

1 expressed in Dr. Kagel’s July Report, since ChromaDex delayed serving that report
2 until the day rebuttal expert reports were due. ChromaDex fails even to address these
3 harms to Defendants—none of which would be cured simply by a brief deposition of
4 Dr. Kagel.³

5 In addition, ChromaDex’s explanation that the test results on the samples of
6 product it had in its possession for five years were “not available” at the time of the
7 initial report (Opp. at 1), “does not amount to substantial justification.” *Dimension*
8 *One Spas, Inc. v. Coverplay, Inc.*, 2008 WL 4165034, at *12 (S.D. Cal. Sept. 5, 2008)
9 (granting motion to strike untimely expert opinions where expert did not provide
10 opinions at issue in initial report because he was asked not to do so). The only reason
11 the test results were not yet available was because ChromaDex chose not to perform
12 the additional testing until late June 2019, well after litigation was underway, well
13 after it had knowledge of Elysium’s counterclaims relating to the purity of the NR
14 that originated from ChromaDex, and after the date for initial disclosures of expert
15 opinions had passed. Accordingly, ChromaDex did not present a substantial
16 justification for its failure to timely disclose the July Report.

17 As a result, Rule 37(c)(1) weighs heavily in favor of excluding Dr. Kagel’s
18 improper July Report.

19
20
21
22
23
24
25 ³ The cases on which ChromaDex upon are not applicable here, given that they
26 involve expert opinions that were timely submitted and/or did not raise new opinions
27 that would merit additional discovery. *See e.g., P.E.A. Films, Inc. v. Metro-Goldwyn-*
28 *Mayer, Inc.*, 2016 WL 6818758, at *7 (C.D. Cal. Aug. 10, 2016) (supplemental report
was timely filed and did not present new opinions); *Nieto-Vincenty v. Valledor*, 22 F.
Supp. 3d 153, 157 (D.P.R. 2014) (denying motion to strike supplemental report
where defendants had knowledge of plaintiffs’ expert’s identity and substance of
preliminary report before deadline for expert reports).

1 **III. CONCLUSION**

2 For the foregoing reasons, Defendants respectfully request that the Court
3 grant the motion *in limine* to preclude Dr. Kagel from testifying about her opinions
4 and analyses set forth in the July Report.

5
6 Respectfully submitted,

7 Dated: September 4, 2019

BAKER & HOSTETLER LLP

8
9 By: /s/ Joseph N. Sacca
10 JOSEPH N. SACCA
11 *Attorneys for Defendant and*
12 *Counterclaimant ELYSIUM HEALTH,*
13 *INC. and Defendant*
14 MARK MORRIS

15
16
17
18
19
20
21
22
23
24
25
26
27
28
BAKER & HOSTETLER LLP
ATTORNEYS AT LAW
LOS ANGELES