UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re Elysium Health—ChromaDex Litigation	Civil Action No. 1:17-cv-07394 (VEC)

MEMORANDUM OF LAW OF CHROMADEX, INC.
IN OPPOSITION TO ELYSIUM HEALTH, INC.'S MOTION TO DISMISS

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I. INTRODUCTION

Elysium Health, Inc. ("Elysium") falsely advertises and unscrupulously sells to consumers a product for daily human consumption called "Basis", which Elysium wrongly claims, among other things, (i) contains ingredients approved and regulated by the U.S. Food and Drug Administration ("FDA"), (ii) has been endorsed by an advisory panel of blue ribbon and Nobel laureate scientists, and (iii) has been proven safe through extensive clinical trials. In reality, the current version of Basis has never been proven safe in clinical trials, contains ingredients that have not been approved by either the FDA or Elysium's scientific advisors, and is in fact contaminated with a toxic solvent. Elysium's falsehoods are undeniable: whereas Elysium once sourced its ingredients from ChromaDex, Inc. ("CMDX")—a company that sells ingredients that *have* passed numerous safety studies and *are* approved and regulated by the FDA—Elysium concedes that it no longer has access to CMDX's ingredients, yet continues to advertise and sell its product as if it does. Nor does Elysium deny that its new Basis, with mystery ingredients, contains toluene or that toluene is toxic. Altogether, those facts—pleaded in CMDX's complaint and which must be accepted as true for purposes of the present motion—are far beyond sufficient to state claims under the Lanham Act and New York state law prohibiting false advertising and unfair competition.

Elysium's confusing and jumbled Motion to Dismiss (which reads more as a premature and deeply flawed request for summary judgment rather than a motion under Rule 12(b)(6)) misinterprets and distorts allegations, improperly draws inferences in Elysium's favor, and attempts to distract the Court by repeatedly referencing Elysium's claims in a separate lawsuit filed against CMDX regarding CMDX's Citizen Petition before the FDA. The allegations in the Complaint, however, plainly state actionable claims and the Court should deny Elysium's motion.

II. STATEMENT OF FACTS[1]

A. CMDX and Its Business

CMDX primarily develops, produces, and sells bulk ingredients "in the dietary supplement, food, beverage, skin care, and pharmaceutical markets." ¶¶ 6, 13. As is relevant in this case, CMDX is the "industry leader in science, research, and development of nicotinamide riboside," known in short as "NR." ¶ 4. In 2006, CMDX became aware of the potentially huge benefits of NR to "delay certain effects associated with the aging process" and eventually "developed the first sustainable way to reliably produce NR for testing, observation, and, eventually, human consumption as a dietary supplement." ¶¶ 15–16. CMDX's NR ingredient is called "NIAGEN®." ¶ 18. CMDX produces NIAGEN® in accordance with the FDA's current good manufacturing practices ("cGMP"), ¶ 21, and has since 2013 signed over 120 "Material Transfer Agreements" with research organizations that are further "studying the safety and efficacy of NR" and publishing their results in peer-reviewed scientific journals, ¶ 16.

Over the past eleven years, CMDX has successfully performed the "maximum safety and toxicology studies" on NIAGEN® and sought and received from the FDA both a New Dietary Ingredient Notification ("NDIN") and Generally Recognized as Safe ("GRAS") designation for the ingredient. ¶¶ 22–26, 28. In order to obtain the NDIN and prove that NIAGEN® is safe for consumption, CMDX put NIAGEN® through "a comprehensive toxicology program that included Geno toxicity and mutagenicity studies, acute toxicity, a 14-day dose range finding study, sub-chronic toxicity, and a human study." ¶ 24 & Ex. B. CMDX obtained GRAS status for NIAGEN® by "submit[ting] it to a panel of independent experts in toxicology." ¶ 26 & Ex. C.

In addition to marketing NIAGEN® as a bulk ingredient to product manufacturers, CMDX

[1] The facts in this Opposition are drawn from the factual allegations in CMDX's Complaint and other documents that the Court may consider. All "¶ _" citations in this brief refer to the specific paragraph(s) of the Complaint.

also markets a dietary supplement directly to consumers called "TRU NIAGEN™." ¶ 19. Because TRU NIAGEN™ contains NIAGEN® as its only active ingredient, *id.*, it benefits from the cGMP, NDIN, and GRAS status covering the ingredient, ¶ 27.

B. Elysium and Its Business

Recently founded in 2014, Elysium is a business that does only one thing: it makes, markets, and sells Basis for direct human consumption. ¶¶ 2, 28. Elysium instructs consumers to take two Basis capsules twice a day. ¶ 29. A daily dose of Basis contains two active ingredients—250 milligrams of NR and 50 milligrams of pterostilbene. ¶ 29. On information and belief, from its first sale in 2015 Elysium sourced both NR and pterostilbene exclusively from CMDX. ¶¶ 28, 30. However, the agreement governing the supply of those ingredients expired in early 2017 when—following a dispute currently being litigated in another forum—CMDX opted to not renew it. ¶ 39. The Basis presently marketed by Elysium thus no longer contains ingredients sourced from CMDX. ¶ 39. Elysium's new ingredients, obtained from an anonymous supplier, have not completed the same extensive safety and toxicology studies as CMDX's ingredients. ¶ 40. Additionally, neither the NR nor the pterostilbene presently used by Elysium is manufactured according to FDA-required cGMP standards, and neither is produced under an NDIN or has been granted GRAS status by the FDA. ¶ 40.

C. Elysium Makes False Public Statements To Consumers About Its Product

In marketing and advertising Basis, Elysium falsely represents to its consumers that, among other things, Basis is safe to consume, that it is pure, and that it has been approved, and is regulated by, the FDA. ¶¶ 48–58. Included among the many false public statements made by Elysium are: (1) "the ingredients in Basis have been tested for safety and are produced in facilities that meet FDA requirements. Basis also undergoes rigorous third party purity testing," ¶ 49 & Ex. I; (2) "during the course of manufacturing Basis there are a total of five quality and purity audits before

a batch is shipped. All manufacturing facilities are located in the US and are compliant with the cGMP [Current Good Manufacturing Practices] regulations as stipulated by the FDA," ¶ 51 & Ex. K; and (3) "[w]e conduct rigorous safety studies for new dietary ingredient (NDI) submissions to the FDA. The Federal Food, Drug, and Cosmetic Act (FD&C) requires that we submit studies to demonstrate the safety of 'new dietary ingredients,'" ¶ 53 & Ex. K. These statements are false because Basis, as presently marketed and sold, does not contain CMDX ingredients, which are the only ingredients of their type that have received FDA approvals and been the subject of extensive underlying safety research; the new mystery ingredients now used by Elysium lack FDA approvals and are not supported by extensive safety studies. ¶¶ 48–58.

Elysium conducted a clinical trial on Basis, which it announced as final on December 6, 2016. ¶¶ 54–55. CMDX disclosed the same trial in its securities disclosure filed on February 23, 2017. Dkt. No. 33-4 at 7. However, because Elysium was still sourcing ingredients for Basis from CMDX during the entirety of the trial, the results from that trial are wholly inapplicable to the currently-marketed version of Basis. ¶¶ 54–56.[2]

Elysium has made further misrepresentations to consumers concerning Basis. First, although Elysium was only founded in 2014, it represents to consumers that it has extensively researched the efficacy and safety of NR; in reality, the research into the safety and efficacy of NR is based almost entirely on work done by CMDX. ¶¶ 44–47. Second, one of Elysium's co-founders—Dr. Leonard Guarente—is the lead "scientific" spokesman for Basis, but all three of his papers on anti-aging have either been fully retracted or "mega-correct[ed]," which is not disclosed by Elysium. ¶¶ 59–60. Third, although Elysium publicly touts that Basis is supported by a long

[2] Despite the pendency of this lawsuit, Elysium has continued to publish false statements concerning its clinical trial conducted on the Basis made with CMDX ingredients. *See e.g.,* http://markets.businessinsider.com/news/stocks/Elysium-Health-Announces-Positive-Data-on-Its-Product-BASIS-Published-in-Nature-Partner-Journals-Aging-and-Mechanisms-of-Disease-1009670588.

list of highly-credentialed scientists—and thereby implies that these scientists vouch for its safety—these scientists have not studied the safety of Basis, and not all of them have endorsed Basis or vouched for its safety. ¶¶ 61–62. Fourth, Elysium publishes "client testimonials" to persuade consumers to purchase Basis based on the false impression of safety created by Dr. Guarente and the all-star scientists put forward by Elysium to the public. ¶¶ 63–67. Fifth, Elysium cites collaborations and partnerships with elite academic institutions like Cambridge, Oxford, and Harvard to create the false impression that these institutions endorse Basis as safe for consumption. ¶ 68. Sixth, Elysium does not reveal to consumers that, since it began using ingredients sourced from an unknown supplier, its Basis product contains a toxic solvent called toluene. ¶¶ 69–71.

III. PROCEDURAL POSTURE

This action is the most recent of several legal disputes between the parties. First, after Elysium ordered, received, and then refused to pay for an abnormally large order of ingredients from CMDX, CMDX filed suit for breach of its supply agreements with Elysium to collect payment. That case—*ChromaDex, Inc. v. Elysium Health, Inc.*, Case No. SACV 16-02277-CJC(DFMx)—was filed on December 30, 2016, in the Central District of California and is presently in the discovery stage.

Second, in July 2017, Elysium initiated two *inter partes* reviews (IPRs) before the U.S. Patent Trial and Appeal Board ("PTAB") to challenge two of CMDX's patents covering NR. Those IPRs are *Elysium v. Trustees of Dartmouth College*, IPR2017-01795 (PTAB July 17, 2017) and *Elysium v. Trustees of Dartmouth College*, IPR2017-01796 (PTAB July 17, 2017)). The PTAB is currently considering whether or not to institute the IPRs.

Third, after CMDX discovered that Basis contains new ingredients and is contaminated with a toxic solvent, it filed a Citizen Petition with the FDA requesting that the agency take action

at its discretion to investigate the issue, enjoin sales of Basis pending a final determination of its safety, and seize adulterated product prior to sale to the public. The petition was filed on August 18, 2017 (Docket No. FDA-2017-P-5082) and is currently under FDA consideration.

Fourth, in response to the Citizen Petition, Elysium filed an action before this Court on October 27, 2017 alleging that CMDX has engaged in false advertising, deceptive trade practices, and tortious interference with prospective economic relations. CMDX moved to dismiss the complaint (Dkt No. 20) and the parties have now completed briefing. The Court consolidated that case with the present case and has stayed discovery pending mediation.

IV. LEGAL STANDARD

"In evaluating a motion to dismiss, the Court must 'accept all factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff.'" *In re Commodity Exchange, Inc.*, 213 F. Supp. 3d 631, 649 (S.D.N.Y. 2016) (quoting *Meyer v. Jinkosolar Holdings Co.*, 761 F.3d 245, 249 (2d Cir. 2014)) (Caproni, J.). "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharms., Inc.*, 847 F.3d 92, 94 (2d Cir. 2017) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Plausibility is not certainty. [Rule 12(b)(6)] does not require the complaint to allege facts which can have no conceivable other explanation, no matter how improbable that explanation may be." *In re Commodity Exchange*, 213 F. Supp. 3d at 649–50 (quoting *Cohen v. S.A.C. Trading Corp.*, 711 F.3d 353, 360 (2d Cir. 2013)). Instead, a claim is plausible when there is sufficient "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Boehringer*, 847 F.3d at 94.

V. CMDX'S COMPLAINT ALLEGES VIABLE CLAIMS UNDER THE LANHAM ACT BECAUSE IT SUFFICIENTLY ALLEGES THAT ELYSIUM USES FALSE AND MISLEADING STATEMENTS TO ADVERTISE ITS PRODUCT

Elysium grounds its motion to dismiss on one plainly incorrect theory: that the Complaint fails to state a claim under Rule 12(b)(6).[3] But the Complaint's well-pleaded allegations are more than sufficient to allege that Elysium has made statements in its public advertising and marketing of Basis that are likely to mislead consumers. The Lanham Act prohibits Elysium from making a "false or misleading description of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities." 15 U.S.C. § 1125(a)(1). Elysium primarily challenges three elements: (1) whether its speech was "advertising or promotion," Motion at 20–21; (2) whether its statements were false, *id.* at 7–20; and, (3) whether the Complaint properly pleads damages, *id.* at 21. Because Elysium's scatter-shot Motion fails to undermine any of the elements, it should be denied.

A. Elysium's Statements Constitute Advertising And/Or Promotion

"[T]he touchstone of whether a defendant's actions may be considered 'commercial advertising or promotion' under the Lanham Act is that the contested representations are part of an organized campaign to penetrate the relevant market." *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 314 F.3d 48, 57 (2d Cir. 2002). Whether speech is "advertising or promotion" is shown by three elements: (1) whether it is "commercial speech," (2) that is "made for the purpose of influencing consumers to buy a defendant's goods or services," (3) with sufficient dissemination "to the relevant purchasing public." *Enigma Software Group USA, LLC v. Bleeping Computer LLC*, 194 F. Supp. 3d 263, 293 (S.D.N.Y. 2016). Factors that courts consider when determining

[3] Elysium's brief in support of its motion to dismiss is cited herein as "Motion" and is located at Dkt. No. 32.

whether statements were "part of an organized campaign to penetrate the relevant market" include: "(1) the number of alleged statements; (2) to whom the statements were made; (3) where the statements were made; and (4) the size of the relevant market." *Chamilia, LLC v. Pandora Jewelry, LLC*, 2007 WL 2781246, at *8 (S.D.N.Y. 2007).

The Complaint alleges many specific public statements by Elysium about the safety and purity of Basis, as well as representations about the FDA's approval and regulation of its product. Elysium argues that a subset of this speech is not "commercial," namely three categories: statements in magazine profiles on Dr. Guarente, Elysium's informational blog articles on FDA regulations, and Elysium's response to a consumer inquiring about, among other things, the color and purity of Basis. Motion at 20–21. These statements, because they are properly alleged as part of Elysium's organized campaign to advertise and promote Basis, plainly and indisputably qualify as "advertising or promotion" under the Lanham Act.[4]

First, Dr. Guarente's scientific acumen and credentials are heavily referenced by Elysium in its promotional materials, and thus statements made by him to media outlets touting his supposed expertise and research into anti-aging (minus his two retracted and one "mega-corrected" articles) serve to bolster Elysium's efforts to bill itself as a "different kind" of supplement company focused on science and safety. ¶¶ 45, 46, 56, 59–60 & Exs. G, H, M. The many statements made to media outlets about Dr. Guarente, as well as Elysium's direct reference to them via its "client testimonials," which (as alleged in the Complaint) reflect Elysium's efforts to leverage them by encouraging consumers to buy Basis, are more than sufficient to show at the pleading stage that those statements are "advertising and promotion" by Elysium. *See Handsome Brook Farm, LLC*

[4] Elysium's citation to *Gmurznska v. Hutton*, 355 F.3d 206, 211 (2d Cir. 2004), is inapposite because the allegation in that case was that the defendant "caused" media outlets to publish certain articles. Here, the Complaint alleges that Elysium *directly published* the blog posts and response to the consumer, and with regard to Dr. Guarente's magazine profiles, those included statements by Dr. Guarente which, as evident by the context and specific content, were made for the sole purpose of promoting Elysium's Basis product.

v. Humane Farm Animal Care, Inc., 193 F. Supp. 3d 556, 569 (E.D. Va. 2016) (holding speech was commercial when, *inter alia*, its "organizational goal is to direct demand toward certain consumer goods" and "the speaker receives revenue based on the amount of those goods sold").

Second, Elysium's "informational" blog articles on FDA regulations are (as alleged in the Complaint) plainly designed to re-assure consumers that Elysium's products are approved by the FDA. ¶¶ 48–53 & Ex. J. Elysium falsely assures consumers that "all [of its] products" go through the FDA approval process. Compl. Ex. K at 3. Why would a company purposefully post and publicize information about the FDA approval process if it did not complete that process for the *one product it actually sells?* The impression conveyed by these posts to consumers—that Elysium *did* complete the FDA process—is unmistakably misleading. *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 67–68 (1983) (holding informational pamphlets "properly characterized as commercial speech" because they were "made in the context of commercial transactions"); *Mimedx Grp., Inc. v. Osiris Therapeutics, Inc.*, 2017 WL 3129799, at *8 (S.D.N.Y. 2017) (finding speech commercial because it "tout[ed] the benefits of Defendant's product over Plaintiff's competing product" and was "principally directed to a consumer audience, not a scientific one").

Third, Elysium's response to a consumer concerning the new formulation of Basis undeniably proves that Elysium has deceptively informed the public that its currently-marketed product is somehow more pure than the original Basis made with the authentic CMDX ingredients. ¶¶ 57–58 & Ex. N. That Elysium responds to consumer inquiries about its product with falsehoods is, as alleged, part of its over-arching, concerted campaign to mislead the public that Basis is a superior product. "By disparaging the plaintiff's business and simultaneously promoting [the defendant's business], the defendants acted in pursuit of their economic interests." *Romeo & Juliette Laser Hair Removal, Inc. v. Assara I LLC*, 2016 WL 815205, at *7 (S.D.N.Y. 2016).

Indeed, it is easily inferred that Elysium responds to all customer inquiries in this manner, suggesting a pattern of misleading (even if private) statements to potential consumers. The Complaint alleges clear evidence of one such communication; other communications will likely be found during discovery. *Mimedx Grp.*, 2017 WL 3129799, at *8 (finding speech sufficiently disseminated and noting "many of those details would be difficult to ascertain absent discovery"); *Student Advantage, Inc. v. CollegeClub.com*, 1999 WL 1095601, at *2 (S.D.N.Y. 1999) (finding allegation that, *inter alia*, defendant "directly [told] potential sponsors" false statements was "more than sufficient for pleading purposes").

B. Elysium Makes False and Misleading Statements About Basis

The bulk of Elysium's Motion relates to the allegations that its advertising is false. Motion 7–20.[5] Elysium's arguments are difficult to follow, but amount to a general disagreement as to whether its statements to consumers were misleading. Of course, such a determination can be made only after discovery; at this stage, well-pleaded allegations that Elysium's advertising is false (like those in the Complaint) are sufficient to defeat Elysium's motion to dismiss. *Mimedx Grp.*, 2017 WL 3129799, at *11 ("Whether the challenged statement in fact 'deceive[s] or confuse[s] consumers' . . . cannot be adjudicated at [the motion to dismiss] stage." (internal quotations omitted)); *Conopco Inc. v. Wells Enters, Inc.*, 2015 WL 2330115, at *4 (S.D.N.Y. 2015) (finding that, even if one possible interpretation of allegedly false statement was literally true, "it is nevertheless plausible that consumer studies would show that consumers interpret [the statement] on the packaging to indicate [a misleading statement]" and the "allegations are thus sufficient to permit it to further develop facts on this theory.").

[5] Elysium itself argued, in opposing CMDX's motion to dismiss Elysium's "sham petition" lawsuit, that the issue of falsity "typically requires discovery." Dkt. No. 26 at 18 n.11 (quoting *Church of Scientology Int'l v. Behar*, 238 F.3d 168, 173 (2d Cir. 2001)).

While Elysium protests that CMDX alleges some facts "on information and belief," Motion at 7–10, such allegations are wholly appropriate where, as here, the relevant information is "particularly within [defendant's] control." *Boykin v. KeyCorp*, 521 F.3d 202, 215 (2d Cir. 2008) ("[p]leading on the basis of information and belief is generally appropriate" in such a scenario); *see also Next Commc'ns, Inc. v. Viber Media, Inc.*, 2016 WL 1275659, at *5 (S.D.N.Y. 2016) (upholding allegations because "[a]t this stage, without discovery, it is to be expected that Plaintiffs would have limited knowledge" of the issues). The facts necessary to prove the "information and belief" allegations here—for example, details on the source, composition, and safety profile of the mystery ingredients in Basis, as well as whether Elysium has ever submitted those ingredients for FDA approval—lie exclusively in Elysium's hands. *See, e.g.*, ¶¶ 3, 40, 51, 52, 54.[6]

Falsity can come in two flavors: literal or by implication. The Complaint alleges both.

1. Elysium's Literally False Statements

A court may find literal falsity where an "advertisement either makes an express statement that is false" or "is 'false by necessary implication,' meaning that the advertisement's 'words or images, considered in context, necessarily and unambiguously imply a false message.'" *Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GmbH*, 843 F.3d 48, 65 (2d Cir. 2016) (quoting *Time Warner Cable Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 158 (2d Cir. 2007). The Complaint alleges numerous statements made by Elysium that meet this standard.

[6] The cases cited by Elysium actually support this point. *See* Motion at 9–10. Each involved allegations made "on information and belief" that were unsupported by plausible inferences from other allegations; in other words, they were entirely out on a limb. *See Pyskaty v. Wide World of Cars, LLC*, 856 F.3d 216 (2d Cir. 2017); *Kajoshaj v. N.Y.C. Dep't of Educ.*, 543 F. App'x 11 (2d Cir. 2013); *Lefkowitz v. John Wiley & Sons, Inc.*, 2014 WL 2619815 (S.D.N.Y. 2014). Here, however, each of the "on information" allegations has ample supporting facts; for example, the averments concerning the dubious source, testing, and safety of Elysium's new ingredients are supported by, among other things, allegations that Elysium no longer sources ingredients from CMDX and that the new ingredients are not FDA-approved and contain a toxic solvent. Elysium's other case—*Turkmen v. Ashcroft,* 589 F.3d 542 (2d Cir. 2009)—is inapposite because it has nothing at all to say about allegations pleaded "on information and belief."

First, Elysium represents to consumers that its current Basis product is made with ingredients approved by the FDA, that it is manufactured in cGMP-compliant facilities, and, most egregiously, that Elysium submitted Basis to the FDA for approval. The Complaint plainly alleges that those statements are literally false, because Elysium no longer uses the CMDX ingredients to which those FDA-approvals appertain. ¶¶ 48–58. Those false statements are unambiguous and are absolutely sufficient to state a claim at this stage. *JHP Pharms., LLC v. Hospira, Inc.*, 52 F. Supp. 3d 992 (C.D. Cal. 2014) (holding that the "public could have construed" a statement saying that a drug was an "NDA product" to say that it was "FDA-approved" even though it was not).[7]

Second, Elysium's advertising improperly claims that Basis is the "only supplement clinically proven to raise NAD+ levels" and is "the world's first cellular health product informed by genomics." ¶ 45. The Complaint alleges those statements are false, namely because CMDX's NIAGEN® ingredient (and, through it, the TRU NIAGEN™ supplement) are clinically proven to raise NAD+ levels, and NIAGEN® preceded Basis on the market. *Id.*[8] Thus, it is false that Basis is the "only" described supplement or the "first" such product on the market.

Third, Elysium falsely represents to consumers that the presently-marketed version of Basis is more pure than the Basis produced with CMDX ingredients because it is white rather than brown. ¶¶ 57–58. While it is true that the specifications for NR *permit* it to appear white, the

[7] Elysium's only argument to the contrary is that the allegations of FDA approval are "on information and belief" and thus must be alleged on a "good faith basis." Motion at 9. As discussed above, Elysium controls the facts of whether its new ingredients have FDA approval and thus such allegations are appropriate. Also, the good-faith basis for the allegations is clearly alleged: CMDX is the only manufacturer with an NDIN and GRAS status to produce NR, which leads to the natural inference that the mystery source of Elysium's NR must not have the same FDA approvals. ¶ 77.

[8] With regard to the statement that Basis is the "first" product "informed by genomics," Elysium suggests such advertising is merely puffery. Motion at 9. However, given that Basis originally was comprised only of CMDX ingredients, any statement that Basis was the "first" of anything is undoubtedly and provably false. *Burton v. Iyogi, Inc.*, 2015 WL 4385665, at *8–9 (S.D.N.Y. 2015) (rejecting puffery argument because false statement can be proven false). Instead, it inexplicably pivots to a factual dispute about all clinical trials of NR, which has nothing to do with the false statement at issue; the allegations in Paragraph 45 relate only to the specific CMDX studies to which Elysium expressly links in its promotional materials, not all clinical studies on NR. ¶ 45.

Basis made with CMDX ingredients *actually appeared* brown, and the specifications do not state that white-colored NR is "pure" and that brown is not (because that would be incorrect). ¶ 58. As alleged in the Complaint, the new Basis is only white because it does not contain authentic NR. ¶ 58.[9] The false premise that color equates or even relates to purity, advanced by Elysium in its Motion, is the same one that Elysium deceptively asserts to consumers to claim that Basis is "purer" than the version made with CMDX ingredients. Regardless, the document Elysium cites does not contradict CMDX's allegations because it only specifies NR's color; purity is addressed separately in that document. *See* Compl. Ex. B at 6, 9. Elysium's statements to consumers that the Basis made with CMDX ingredients was less pure than it is now are therefore literally false.

Fourth, Elysium misinforms consumers by saying that the Basis it is selling them is the same as the Basis tested in the recent clinical trial it published. ¶¶ 54–56. Those representations are literally false because the Basis it markets now is comprised of different ingredients than those in the Basis it actually tested.

2. Elysium's Impliedly False Statements

In addition to Elysium's literally false advertising, the company has relied on misleading implications to create an aura that Basis is safe, pure, and FDA-approved. "If a message is not literally false, a plaintiff may nonetheless demonstrate that it is impliedly false if the message leaves 'an impression on the listener or viewer that conflicts with reality.'" *Church & Dwight Co.*, 843 F.3d at 65 (quoting *Time Warner Cable Inc.*, 497 F.3d at 153).

a. The Complaint Sufficiently Pleads Impliedly False Statements

The most general, and perhaps the most dangerous, impression with which Elysium leaves consumers is that Basis is safe for human consumption on a daily basis. The Complaint lists and

[9] Elysium's representation that the new Basis contains "more NR," Motion at 10–11, has no bearing on the product's color or purity, and the Court may properly disregard it as completely irrelevant.

recites the many specific ways that Elysium furthers this false impression of safety, including by claiming that Basis has multiple FDA approvals and implied endorsements by renowned scientists and academic institutions, none of which have actually been obtained. Other allegations supporting the falsity of the impression that Basis is safe are that Elysium implies that the current version of Basis has passed multiple safety trials, when those trials were conducted on the Basis containing CMDX ingredients -- not the new, unknown, mystery ingredients. *Id.* Finally, Elysium uses client testimonials to convince customers that all of these representations of safety should be unquestionably trusted. Both separately and together, these allegations are by far enough to show that Elysium's implication that Basis is safe is materially misleading. *Mimedx Grp.*, 2017 WL 3129799, at *9–13 (denying motion to dismiss because defendant's false statements created incorrect impressions for consumers about its product).

Elysium's advertising conveys additional false impressions. Among them are that Elysium has been significantly involved in NR development since the beginning, ¶¶ 43–47, and that Elysium's "Scientific Advisory Board" was involved in the science and discovery of NR, ¶ 61. Such misleading statements not only damage CMDX's reputation as the entity that first commercialized and has invested millions of dollars in the research of NR, but further confuse consumers into believing that the current Basis product is safe, reliable and scientifically tested.

b. Elysium's Arguments That Its Advertising Did Not Mislead Consumers Are Incorrect

Elysium contends that its statements directly referencing FDA approval and outlining the FDA approval process of new dietary ingredients do not mislead consumers into believing that Basis is approved by the FDA. Motion at 16–17. This argument defies belief. Elysium expressly references the FDA and FDA approval process in statements directed at consumers, and Elysium sells only one product: Basis. ¶¶ 48–53 & Exs. I, J, K (representing that "all products" are

submitted to the FDA for an NDIN before "becoming available for purchase"). It is thus quite plausible – and indeed likely - that consumers would construe and mistake Elysium's statements regarding FDA approval as applying to Basis.[10]

Elysium, relying on *Rexall Sundown, Inc. v. Perrigo Co.*, 651 F. Supp. 2d 9 (E.D.N.Y. 2009), further argues that its advertising referencing its clinical test is not actionable because the Complaint does not allege that the test would have come out differently using the Basis containing mystery ingredients. Motion at 17. Elysium misreads *Rexall*. In *Rexall*, the court found that that phrase "clinically tested" was ambiguous and thus could apply to "a prior formulation or to the current active ingredients." *Id.* at 35.[11] That is vastly different than the allegations here, which aver that it is misleading to attribute a specific test performed on certain active ingredients to a product containing different and untested ingredients from an unknown source. ¶¶ 54–55. Consequently, because Elysium's statements unambiguously attribute testing of the original Basis produced with CMDX ingredients to its presently-marketed version, no allegation of a different test outcome is warranted.[12]

Elysium also takes issue with certain allegations in the Complaint concerning the falsity of Elysium's representations about the science behind Basis, as well as the misleading impression created by Elysium's statements about its scientific advisory board and academic partnerships.

[10] Elysium's cited cases are inapplicable because, unlike here, in each of them there were no express allegations of FDA approval of the accused product. *Avon Prods., Inc. v. S.C. Johnson & Son, Inc.*, 984 F. Supp. 768, 796 (S.D.N.Y. 1997) (dismissing allegation because no "specific claims" of approval); *Merck & Co. v. Mediplan Health Consulting*, 425 F. Supp. 2d 402, 418 (S.D.N.Y. 2006) ("[P]laintiffs do not allege that defendants make explicit misrepresentations as to FDA approval of their . . . products.").

[11] The Court in *Rexall* found that allegations are sufficient where, as here, they allege "the tests relied upon do not prove the proposition for which they are cited." *Id.* at 35. That is exactly the allegation here, where Elysium's claims of clinical testing are misleading because, among other problems, its new ingredients are unknown and contain a toxic solvent.

[12] Even if such an allegation were necessary, given that the source and identity of Elysium's new ingredients are unknown, Elysium does not explain how one could possibly allege different test results. Discovery concerning the new ingredients and purported test results (which are entirely within the control of Elysium) is necessary before the truth can be uncovered.

Motion at 17–19. Any such factual dispute is plainly impermissible on a motion to dismiss. *Fin. Guar. Ins. Co. v. Putnam Advisory Co.*, 783 F.3d 395, 405 (2d Cir. 2015). Regardless of factual disputes, it is certainly plausible that Elysium's statements on these topics are likely to mislead consumers, especially when viewed in the context of Elysium's overarching marketing and advertising campaign. ¶¶ 43–47, 61, 68. Taken in context, the false advertising directed to consumers about the science undergirding Basis, and creating the impression that Basis is safe because it is endorsed by all-star scientists and well-known research universities, demonstrate that Elysium's overall advertising campaign is misleading and its conduct is deceptive. *Mimedx Grp.*, 2017 WL 3129799, at *13 (denying motion to dismiss Lanham Act claims because, "assuming truth of the [Complaint's] factual allegations . . . the Court easily finds that Plaintiff has plausibly alleged the false or misleading nature of the [advertising]"); *Dependable Sales & Serv., Inc. v. Truecar, Inc.*, 2016 WL 79992, at *4 (S.D.N.Y. 2016) (refusing to dismiss Lanham Act claim because defendant "raised 'a factual dispute that is inappropriate for resolution on a motion to dismiss'" (quoting *Fin Guar. Ins.*, 783 F.3d at 405)).

Finally, Elysium argues that no consumer could possibly be misled by its false advertising because it includes "disclaimers." Motion at 19–20. As a threshold matter, just because there are other possible inferences from language (which Elysium may argue to a jury) does not make the allegations insufficient; all favorable inferences must be drawn in favor of the plaintiff. *Yin Jie Zhao v. L & K Rest., Inc.*, 2015 WL 1809115, at *1 (S.D.N.Y. 2015) (Caproni, J.) (citation omitted). In any case, the specific statements cited by Elysium hardly qualify as "disclaimers." For example, Elysium argues that consumers would understand that Basis did not go through the R&D process because the phrase "new products" would make clear that "its NDIN practices relate to products under development and not yet available to consumers." But that is not at all clear,

and when seen in proper context, the "R&D Process" broadly refers to Elysium's "process for *all* products," including those that are "available for purchase." Compl. Ex. K at 3 (emphasis added). For Elysium, and for its deceived consumers, that can mean only one product: Basis. As for the Scientific Advisory Board, Elysium claims that no consumer would believe it endorses the safety of Basis because the phrase "rather than endorse a specific product" is buried in the middle of a lengthy paragraph describing the board. Compl. Ex. P. But that phrase does not state that the board disclaims endorsement of the safety of Basis, and the impression advanced by the entire advertisement reassures consumers that none of these people would associate their names with an unsafe, much less untested, product. *SmithKline Beecham Consumer Healthcare, L.P. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 906 F. Supp. 178, 182 (S.D.N.Y. 1995), *aff'd,* 100 F.3d 943 (2d Cir. 1996) ("[A] disclaimer or contradictory claim placed in an ad will not remedy an ad, which is misleading. . . ."). Finally, a general disclaimer at the bottom of a website that the FDA "has not evaluated these statements," Compl. Ex. K, refers to "statements" and not products, and thus cannot be read to disclaim Elysium's otherwise-clear implication that Basis has the requisite FDA approvals. *See Eastman Chemical Co. v. PlastiPure, Inc.*, 969 F. Supp. 2d 756, 770–71 (W.D. Tex. 2013) (declining to permit disclaimer as remedy for misleading speech because "there is no basis for concluding the [disclaimers] would remove the potential for harm other than Defendants' attorney argument").

c. Elysium's Arguments Regarding Toluene Lack Merit

Elysium devotes five pages to argue that the allegations that the current Basis product contains toluene are "inadequate." Motion at 11–16.[13] First, Elysium contends that the Complaint

[13] Elysium incorrectly argues that the Complaint alleges Basis is unsafe solely on the ground that it contains toluene, Motion at 11, but the Complaint alleges otherwise. *See* ¶ 2 (listing many allegations for why Basis is misrepresented as "safe").

fails to allege any "duty of disclosure." *Id.* at 11. While omissions on their own are inactionable under the Lanham Act, the many affirmative statements by Elysium that Basis is safe, undergoes repeated testing, and is approved by the FDA provide the requisite context for Elysium's crucial omission to consumers that its newly-constituted Basis contains toluene. And the toluene allegations are properly "linked" to these affirmative statements because Elysium's failure to reveal to consumers that they are ingesting a toxic substance on a daily basis comes amidst Elysium's effort to persuade them that Basis is safe for their consumption. For example, in Paragraph 3 of the Complaint, CMDX plainly alleges that Elysium represents that Basis is safe but does not disclose the presence of toluene, which renders that affirmative statement misleading. *Clark Consulting, Inc. v. Financial Partners, LLC*, 2005 WL 3097892, at *5 (S.D.N.Y. 2005) (upholding omissions as basis for liability under Lanham Act because they were "made in the context of commercial advertising or promotion").

Second, Elysium argues that an "adulterated" product is not *per se* unsafe or impure. Motion at 12. Elysium's problem is that Basis is adulterated because it contains new ingredients sourced from an unknown supplier and Elysium has not obtained the FDA approvals that it represents it has; nor has it disclosed either salient fact and omission to consumers. Thus, the Complaint does not allege that adulteration automatically means that a product is unsafe; it merely alleges that in Elysium's case, it is. ¶¶ 3, 41.[14]

Third, Elysium incorrectly contends that the allegations concerning toluene are contradicted by the Complaint and implausible. Motion at 14–16. But Elysium does not contest that toluene is toxic to humans in certain doses and merely disputes the conclusion that concealing from consumers that a product contains a toxic substance is misleading. Such an argument "raises

[14] Elysium's contention that CMDX sells an "adulterated" product need not be credited by the Court, nor is it relevant to the Court's determination of whether Elysium is engaged in false advertising and deceptive practices.

a factual dispute that is inappropriate for resolution on a motion to dismiss." *Fin. Guar. Ins.*, 783 F.3d at 405. In any case, the CDC Report attached to the Complaint plainly states that toluene consumed in food or drink in sufficient quantities is unsafe for humans. Compl. Ex. E at 4. Elysium recommends that its customers take two Basis pills daily indefinitely; it cannot simply state that such consumption is safe and at the same time entirely withhold from those same customers the presence of toluene and its attendant dangers.

Elysium's next gambit is to point to the NIAGEN® specifications and claim that, because the ingredient may include upper limits of other substances, it somehow makes the allegations as to toluene inoperative. Motion at 14–15. This argument is wholly incorrect. The Complaint alleges that Elysium has concealed the presence of toluene in the presently-marketed Basis from consumers; the specification for NIAGEN®, regardless of what it contains, has no bearing on whether Elysium's statement conveys a false impression because Basis no longer contains NIAGEN®. Even if it were relevant, Elysium's contention ignores that NIAGEN® (unlike Elysium's ingredients) has undergone numerous safety studies, including on humans, and is covered both by an NDIN and GRAS status. Thus, it is not contradictory to claim that NIAGEN® is safe and that Basis is not.

Finally, Elysium's suggestion that TRU NIAGEN™ is also adulterated is both untrue and irrelevant to the question of whether Elysium has misled consumers. It is untrue because the NDIN dosage restrictions apply only to ingredients, not to supplements like TRU NIAGEN™, and thus it is nonsensical to say that TRU NIAGEN™ is "adulterated" because of the amount of the ingredients it contains. That is vastly different than the "adulteration" afflicting the mystery

ingredients in Basis, which are untested, unknown, and contaminated with an industrial solvent.[15] There is simply no comparison with Elysium's deception of consumers and, in any event, this distraction is irrelevant to the allegations here: the issue is whether *Elysium* is engaged in false advertising and deceptive conduct. Elysium merely casts stones in a classic effort to distract from its own behavior. Its unsupported attacks on CMDX do not render its own conduct non-deceptive.

d. CMDX's Lanham Act Claims Are Not Preempted By The Food, Drug & Cosmetic Act

Elysium asserts that CMDX is a "hypocrite" because CMDX argued in moving to dismiss Elysium's complaint that the FDA is the proper body to determine whether Elysium misrepresented the safety of Basis by failing to disclose the presence of toluene. Motion at 13–14. But Elysium's argument ignores that CMDX does not allege in the Complaint that the toluene levels themselves are "unsafe" (which is properly before the FDA on CMDX's citizen petition); rather, in this false advertising case it alleges that Elysium misleads consumers and has never disclosed the presence of toluene in Basis, which is undoubtedly a material fact in a purchasing decision. ¶ 71. The Court need not substantively decide the FDA issue of whether toluene is present in unsafe levels to determine whether Elysium's failure to disclose it to consumers, while at the same time touting Basis' safety, violates the Lanham Act. *Church & Dwight Co.*, 843 F.3d at 62–65 (holding Lanham Act claim not precluded because it protects competitors from misleading claims).[16]

[15] Furthermore, FDA regulations entitle CMDX to sell TRU NIAGEN™ in the current dosage regardless of the dosage level contained in the NDIN on NIAGEN®, provided CMDX possesses the appropriate underlying scientific support to do so. CMDX represents that it has the necessary support based on extensive clinical trials.

[16] Contrary to Elysium's claim, this does not conflict with CMDX's argument that Elysium's "sham petition" complaint seeks to usurp the FDA's prerogative as to CMDX's citizen petition. Motion at 13. In that case, Elysium alleges liability for statements made to the FDA in the course of its investigation, which plainly relates to the FDA's mission, and a determination by the Court necessarily intrudes on the FDA's discretion. In contrast, Elysium's false claims of FDA approval here have nothing to do with the FDA's investigation into Basis' contamination. *Church & Dwight Co.*, 843 F.3d at 62–65.

Elysium's contention that the Court may not find that it sells products without proper FDA approval because such a finding would be an "impermissible attempt to enforce the Food, Drug & Cosmetic Act by private right of action" is likewise misplaced. Motion at 13–14. The Court may certainly determine whether the FDA has granted the ingredients in Basis the approvals that Elysium claims it has. "[A] court can test the truth of the statement without any need to interpret FDA regulations[;] the question will simply be whether the FDA official conferred 'approval' or not." *Mut. Pharm. Co. v. Ivax Pharm., Inc.*, 459 F. Supp. 2d 925, 935 (C.D. Cal. 2006); *see also Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GmbH*, 2014 WL 2526965, at *12–14 (S.D.N.Y. 2014) (refusing to preclude Lanham Act claim because it would not "necessarily require the Court to apply an FDA regulation to test the veracity of the advertising at issue").

C. Elysium's Speech Caused Injury To CMDX

Elysium next incorrectly argues that the Complaint fails to sufficiently plead damages to CMDX. At the threshold, the Complaint plainly and repeatedly includes allegations that Elysium's false advertising has caused harm to CMDX's business and reputation. ¶¶ 1, 75, 77–79; *see also* ¶¶ 82–83, 86–87 (injury under New York state claims). CMDX further alleges in the Complaint factual support for the harm to CMDX's business interests. For example, it alleges that CMDX's product NIAGEN® and supplement TRU NIAGEN™ have undergone extensive research and testing and have both an NDIN and GRAS status from the FDA, whereas Elysium's supplement Basis with its new ingredients has none of the same support, yet Elysium represents falsely that it does. *See, e.g.*, ¶¶ 3–5. CMDX not only alleges that "TRU NIAGEN™ directly competes with Elysium's Basis product," ¶ 19, but also that consumers rely on Elysium's false statements in making their purchasing decisions, ¶¶ 64–66, 71, 74, 78. The very logical inference from those factual allegations is that consumers would be more likely to choose Basis over TRU NIAGEN™ as a result of Elysium's misleading advertising, thereby increasing sales of Basis at the expense of

CMDX's sales and causing competitive injury to CMDX. *Diascience Corp. v. Blue Nile, Inc.*, 2009 WL 1938970, at *4 (S.D.N.Y. 2009) (upholding damages allegations because plaintiff "provided the basic outline of a theory that, if proven, would entitle it to relief"). And while Elysium attempts to make hay of the fact that no specific losses have yet been alleged, discovery of Elysium's ill-gotten revenues during its false advertising campaign is required before CMDX can ascertain just how much it has lost and how much Elysium should be required to disgorge. *Id.* (finding plaintiff was "permitted to conduct discovery" on the "causal nexus between [defendant's] alleged false advertising and [plaintiff's] lost sales").

VI. CMDX'S COMPLAINT ALLEGES CLAIMS UNDER NEW YORK STATE LAWS

New York General Business Law § 349 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." Section 350 prohibits "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state." Courts analyze claims under §§ 349 and 350 in much the same way that they do claims under the Lanham Act. *Mimedx Grp.*, 2017 WL 3129799, at *14 (upholding §§ 349 and 350 claims "for substantially the same reasons it upholds the federal [Lanham Act] claims"). Consequently, for the reasons argued above in Section V with respect to the Lanham Act claims, the Court should likewise sustain the New York state law claims.

Elysium argues only two points with respect to the state claims: (1) that the allegations are insufficiently related to New York consumers, and (2) for § 350, there are insufficient allegations of reliance. Motion at 22. Both of these arguments are incorrect. First, the Complaint clearly alleges that Elysium is headquartered in New York, thus inferring that Elysium's false advertising campaign was conducted and emanated from the state, and that New York consumers have been deceived and otherwise harmed by Elysium's misconduct. ¶¶ 7, 12, 69, 74, 77, 81, 85. Those averments suffice to allege that Elysium sells products to New York consumers. *Leider v. Ralfe*,

387 F. Supp. 2d 283, 294 (S.D.N.Y. 2005) ("Those cases that have rejected § 349 claims for lack of geographical nexus to New York involved schemes with no tangible tie to the state."); *Rodriquez v. It's Just Lunch, Int'l*, 2010 WL 685009, at *8 (S.D.N.Y. 2010) (finding allegations of advertising reaching New York consumers and office in state were sufficient).

Second, the Complaint directly and sufficiently alleges that consumers rely on Elysium's false advertising when making their purchasing decisions. ¶¶ 64–66, 71, 74, 78. But even if those allegations were not enough, reliance under § 350 is satisfactorily pleaded because, "when defendants effectively controlled all the information about the transaction . . . the existence of misrepresentations give[s] rise to an inference of reliance without need for further proof." *Leider*, 387 F. Supp. 2d at 297–98. Here, the Complaint clearly alleges, among other things, that Elysium conceals from consumers that its statements about the safety, purity, and FDA-approval status of Basis relate to the former version made with CMDX ingredients and not its currently-marketed product, which contains mystery ingredients and is contaminated with toluene. *See, e.g.*, ¶ 3. As further support for the fact that Elysium "controlled all information," the Complaint alleges that the only way CMDX was able to discover that Elysium is selling an adulterated and unsafe product was through scientific testing in a laboratory. ¶ 69. Because consumers cannot be reasonably expected to test every shipment of product they buy, it is proper for the Court to presume that consumers relied on Elysium's false advertising in this case.[17]

[17] Even if the Court does not presume reliance, it is sufficiently pleaded because the reliance element generally only requires the Complaint allege a "specific advertisement or public pronouncement." *Leider*, 387 F. Supp. 2d at 292. Allegations abound in the Complaint of specific false advertisements propounded by Elysium and that this advertising misled and deceived consumers.

VII. THE COMPLAINT PROPERLY ALLEGES TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

CMDX's allegations establish all of the elements for its interference claim.[18] The Complaint alleges that Elysium knew of CMDX's active business relationships but proceeded to have those relationships terminated through intentional and deceptive conduct. ¶ 89. Elysium sought to wrest complete control of the NR market and economically injure CMDX by initially demanding that CMDX transact exclusively with Elysium, while knowing that it would later sabotage its connection with CMDX by refusing to pay for extraordinarily large orders of NR and conspiring with CMDX's employees against CMDX. ¶¶ 31-38, 89-90. This "one-two punch" was intended to (and did) significantly injure CMDX. ¶ 91.

Elysium wrongly argues that CMDX's interference claim is merely a repackaging of a previously-dismissed fraud claim in the parties' California litigation. Motion at 24 n.12. In the California litigation, the court dismissed CMDX's claim that Elysium made false representations in placing large orders of NR because the claim fell within the economic loss rule. *See* Exhibit H to Sacca Decl. (Dkt. No. 33-11). CMDX's interference claim, however, concerns Elysium's intentional interference with CMDX's business relations before the supply agreement was executed; it is not about the lies Elysium told two years later.

Elysium also argues that its conduct did not rise to the level of "wrongful means" required to sustain a tortious interference claim. Motion at 24. Elysium simply ignores the Complaint's allegations of Elysium's intentional, long-term plan to force CMDX to sever its existing business relationships, while at the same time intending to injure CMDX and seize complete control of the NR market. ¶¶ 31-38, 89-90. These allegations clearly establish wrongful means and malice under

[18] The elements of a claim for tortious interference with business relations are "(1) the plaintiff had business relations with a third party; (2) the defendant interfered with those business relations; (3) the defendant acted for a wrongful purpose or used dishonest, unfair, or improper means; and (4) the defendant's acts injured the relationship." *Catskill Dev., L.L.C. v. Park Place Entm't Corp*., 547 F.3d 115, 132 (2d Cir. 2008).

New York law. *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp*., 50 N.Y.2d 183, 196 (1980) ("wrongful" interference includes "fraud, misrepresentations, threats, and other wrongful conduct"); *AIM Int'l Trading LLC v. Valcucine S.p.A*., No. 02 Civ. 1363, 2003 WL 21203503 at *7 (S.D.N.Y. May 22, 2003) (allegations of "fraudulent and improper means" "must be considered true at this stage of the proceedings, [and] are sufficient to plead wrongful means").

Elysium further argues that its conduct was directed towards CMDX and it cannot be held liable for CMDX's interactions with its customers. Motion at 23-24. This argument elevates form over substance. Elysium intended to disrupt known CMDX business relationships. ¶ 89. Elysium did this—and forced third parties to cease and forgo doing business with CMDX—by demanding exclusivity as a prerequisite to transacting business, despite its intention to sabotage and injure CMDX. ¶¶ 31, 89-90. In other words, Elysium interfered with CMDX's business relations for a wrongful purpose and with improper means.

Finally, Elysium argues that CMDX fails to allege causation. Motion at 25. The Complaint properly alleges that Elysium's improper actions caused CMDX to lose out on existing and prospective business relationships—relationships that (unlike the supply agreement with Elysium) were not premised on lies and improper motives. ¶¶ 89-91.

VIII. CONCLUSION

For all of the above reasons, Elysium's motion to dismiss CMDX's claims should be denied, or if the Court thinks otherwise on any issue, CMDX should be granted leave to file an amended Complaint.

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