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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

(WESTERN DIVISION)

ChromaDex, Inc.,

Plaintiff,

v.

Elysium Health, Inc. and Mark Morris,

Defendants.

Elysium Health, Inc.,

Counterclaimant,

v.

ChromaDex, Inc.,

Counter-Defendant.

Case No. 8:16-cv-2277-CJC (DFMx)

CHROMADEX, INC.'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION *IN LIMINE* TO EXCLUDE THE SUPPLEMENTAL EXPERT REPORT OF DR. CARLA KAGEL

Judge:	Hon. Cormac J. Carney
Courtroom:	7C
Date:	Sept. 18, 2019
Time:	9:00 AM
Trial:	Oct. 15, 2019
Pretrial Conference:	Sept. 18, 2019

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Plaintiff and Counter-Defendant ChromaDex, Inc. ("ChromaDex") respectfully requests that the Court deny the Motion *in Limine* to Exclude the Supplemental Expert Report of Carla Kagel filed by Defendant and Counterclaimant Elysium Health, Inc. ("Elysium") and Defendant Mark Morris (collectively, "Defendants"). (Dkt. 266.)

I. INTRODUCTION

Dr. Carla Kagel is an expert witness for ChromaDex in connection with Elysium's allegations that an ingredient that ChromaDex sold to Elysium contained elevated levels of acetamide. Although these allegations pertain solely to Elysium's breach-of-contract counterclaim, Elysium has put forward no expert witness of its own. Dr. Kagel's opening report, submitted on June 21, 2019 ("June Report"), analyzed the deficiencies in a testing method used by Elysium's Contract Manufacturer and the results Elysium obtained from a laboratory that used the Contract Manufacturer's method to test third party products. Dr. Kagel also opined on results from ChromaDex's scientifically verified and more accurate method showing that there is not and never was a problem with acetamide in ChromaDex's ingredients. Elysium declined to depose her on her opening report. On July 26, 2019, two weeks before the discovery cutoff, Dr. Kagel submitted a three-page supplement ("July Report"). She did not alter her opinions or change her methodology. She merely reviewed new data that was not available when she prepared her initial report. Defendants did not object to her supplementation at the time, nor did they reverse their prior decision not to depose her. Nonetheless, Defendants now move to exclude the July Report and bar Dr. Kagel from voicing its contents at trial. The motion should be denied.

The premise of Defendants' motion is that the July Report was not actually "supplemental," but was, in fact, an additional report submitted past the deadline. Defendants are wrong. Dr. Kagel properly supplemented her report pursuant to Federal Rule of Civil Procedure 26(e) by using new information to fill in the gaps and interstices of her previous report. And, in any event, even if the July Report went beyond proper supplementation, any prejudice here is slight. Precluding testimony for a discovery

violation is a drastic and disfavored measure, not remotely warranted here. To the extent Defendants need to depose Dr. Kagel on her supplemental report (which would not take long given that it is only three pages), ChromaDex has offered to make her available in the weeks remaining until trial. Flatly excluding the report and barring Dr. Kagel from testifying about matters that are important to the merits of the case would be a sanction disproportionate to any foul.

II. BACKGROUND

One of Elysium's counterclaims in this case is that the nicotinamide riboside ("NR") that ChromaDex sold to Elysium from 2014–2016 contained elevated levels of a regulated substance called acetamide. (Dkt. 103, Elysium's Third Amended Counterclaims ("TACC") ¶¶ 91–112.) Central to Elysium's counterclaim was the allegation that its testing of third-party consumer products supposedly revealed high levels of acetamide. (TACC ¶¶ 100–01, 106–08.) ChromaDex strongly disputed that allegation, contending that it was scientifically baseless.[1] To support its defense, ChromaDex retained Dr. Kagel, an analytical chemist, to offer expert testimony about the testing conducted by both companies.

The discovery cutoff in this case was August 9, 2019. (Dkt. 211.) The Court did not set deadlines for expert disclosures. But the parties agreed between themselves to exchange initial reports on June 21, 2019 and rebuttal reports on July 26, 2019. (Declaration of Barrett J. Anderson in Support of ChromaDex, Inc.'s Memorandum in Opposition to Defendants' Motion *in Limine* to Exclude the Supplemental Expert Report of Carla Kagel ("Anderson Decl.") ¶ 2.)

The June Report. ChromaDex served Dr. Kagel's initial report on June 21. (*Id.* ¶ 3.) In the June Report, Dr. Kagel rendered opinions about (1) the method developed by Elysium's Contract Manufacturer to test NR for acetamide, (2) tests conducted for

[1] Elysium also knew it was baseless: it knowingly used a testing method that generated false positives and deliberately sold Basis with NIAGEN into California to satisfy Proposition 65 while selling Basis with NR from its alternate source into the rest of the country. (*See* Dkt. 233-1 at 9–10, 16–17.)

Elysium using that method on third-party products containing NR, and (3) tests conducted by ChromaDex on samples of raw NR produced in 2015 and 2016. (*See* Anderson Decl. Ex. 1 ("June Report").)[2] Dr. Kagel thoroughly reviewed and analyzed Elysium's Contract Manufacturer's testing method and observed that the equipment specified in that method was "unable to distinguish acetamide from co-eluting compounds." (*Id.* at 9–10.) Dr. Kagel also thoroughly reviewed the results obtained by a lab using the Contract Manufacturer's method of third-party products, and concluded that they are "unreliable, inaccurate, and invalid." (*Id.* at 3.) With respect to ChromaDex's testing, Dr. Kagel opined that its new testing methodology was valid and reliable, and that the "data demonstrates that NIAGEN[3] does not contain acetamide at levels exceeding" the No Significant Risk Level ("NSRL") established by California law. (*Id.* at 4.) Dr. Kagel indicated that she might supplement her report should new information become available. (*Id.* at 2.) Defendants declined to depose Dr. Kagel on those opinions. (Anderson Decl. ¶ 4.)

The July Report. During the same period that Dr. Kagel was preparing her initial report, ChromaDex ran additional tests using its scientifically verified and more accurate method. (*Id.* ¶ 5.) Specifically, ChromaDex used the same methodology Dr. Kagel opined on in the June Report to test samples from the *specific NR lots* where the product sold to Elysium originated. (*Id.*) Unfortunately, results from those tests were not available until shortly after the exchange of initial reports, so Dr. Kagel could not include them. (*Id.*) But she did address them in a three-page supplement, which ChromaDex served on July 26. (*Id.* ¶ 6; *see* Anderson Decl. Ex. 2 ("July Report").) In that report, based on the new test results she received, Dr. Kagel concluded that "the NIAGEN lots purchased by Elysium during this period and incorporated into the Basis

[2] Defendants erroneously state that the June Report "opined only on acetamide testing done for Elysium of commercially available finished third party products (purchased on the open market) that contained NR supplied by ChromaDex." (Mot. at 3.) In fact, an entire section of the June Report opined on ChromaDex's testing of raw NR. (June Report at 15–18.) Defendants eventually concede as much. (Mot. at 5.)

[3] NIAGEN is the trade name for nicotinamide riboside.

product do not contain acetamide at levels that would cause Basis to exceed California's Proposition 65 NSRL threshold." (July Report at 2.) Defendants voiced no objection to her supplement when it was served. (Anderson Decl. ¶ 7.) Nor did they change their minds about deposing Dr. Kagel, even though two weeks remained for discovery, no expert on either side had yet been deposed, and the parties had scheduled expert depositions over the following two and a half weeks. (*Id.*)

Defendants' Motion. On August 15, the parties conferred telephonically about motions *in limine*. (*Id.* ¶ 8.) During this call, ChromaDex learned for the first time that Defendants objected to the July Report and would seek to exclude it. (*Id.*) On August 23, ChromaDex offered to make Dr. Kagel available for a deposition limited to the July Report—even though discovery is closed—as a way to eliminate this dispute. (*Id.* ¶ 9.) On August 28, Defendants declined. (*Id.*)

III. DR. KAGEL PROPERLY SUPPLEMENTED HER EXPERT REPORT

Rule 26(e) governs the supplementation of expert reports. This rule not only anticipates that an expert's report may need to be supplemented, it *requires* supplementation "if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e). Supplementation "means correcting inaccuracies, or filling the interstices of an incomplete report based on information that was not available at the time of the initial disclosure." *Luke v. Family Care & Urgent Med. Clinics*, 323 F. App'x 496, 500 (9th Cir. 2009) (citing *Keener v. United States*, 181 F.R.D. 639, 640 (D. Mont. 1998)).

Here, Dr. Kagel properly supplemented her report by incorporating data that was previously unavailable. She did not alter her prior opinions or apply a new methodology—but rather used the new information to fill in the gaps of her prior opinion about ChromaDex's testing of raw NR. Thus, there is no basis to exclude the July Report. *See Durham v. County of Maui*, 2011 WL 2532423, at *9 (D. Haw.

June 23, 2011) (holding supplemental report was "proper" where it merely "added information that was unavailable to [expert] at the time of the original report"); *see also KCH Servs., Inc. v. Vanaire, Inc.*, 2010 WL 1416672, at *3 (W.D. Ky. Mar. 31, 2010) (denying motion to exclude because, "[w]hile elements of damages were added based on new information," expert did not "fundamentally change" his methodology from one report to the next); *Capitol Justice LLC v. Wachovia Bank, N.A.*, 706 F. Supp. 2d 34, 39 (D.D.C. 2009) (holding report was properly supplemented where expert did not "wholly rework" opinions, but only changed inputs and calculations to produce more complete and accurate report).

Defendants claim that the July Report introduces "entirely new opinions" under the "guise" of a supplement. (Mot. at 6.) That is empty hyperbole, and the cases Defendants cite are not comparable. (Mot. at 6.) In *Celgene*, for example, the court struck portions from a supplemental report where the expert added "$15 billion in damages based on a theory that was not even hinted at" in the initial report and made a "sweeping change" to a key definition that increased damages by another $2.1 billion. *United States ex rel. Brown v. Celgene Corp.*, 2016 WL 6562065, at *7, *12–13 (C.D. Cal. Aug. 23, 2016). In *Plumley*, the expert submitted a supplemental report "well after" discovery closed, which "depart[ed] substantially" from his prior opinions specifically to get around damaging testimony. *Plumley v. Mockett*, 836 F. Supp. 2d 1053, 1062–63 (C.D. Cal. 2010). Likewise, in *Solaia Technology*, the expert submitted a 52-page declaration in response to a summary judgment motion with "much expanded" opinions that read "like a legal brief." *Solaia Tech. LLC v. ArvinMeritor, Inc.*, 361 F. Supp. 2d 797, 806 (N.D. Ill. 2005). Dr. Kagel did nothing of the sort. She added three pages to her report describing new data that jibed completely with her prior opinions. Thus Dr. Kagel's July Report is a proper supplement.

IV. ANY DELAY IN DISCLOSURE WAS HARMLESS

Even if the July Report went beyond mere "supplementation" (and it did not), the remedy sought by Defendants is not appropriate. "Precluding testimony is a drastic and

disfavored measure." *Simo Holdings Inc. v. Hong Kong uCloudlink Network Tech. Ltd.*, 354 F. Supp. 3d 508, 510 (S.D.N.Y. 2019). That is why the Rules contain "an express exception under which a failure timely to serve an expert report may be excused if the failure was substantially justified or is harmless." *Lanard Toys Ltd. v. Novelty, Inc.*, 375 F. App'x 705, 713 (9th Cir. 2010) (citing *Yeti by Molly, Ltd. V. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106–07 (9th Cir. 2001) (referring to Fed. R. Civ. P. 37(c)(1))). Among the factors courts consider in deciding whether to exclude are: (1) prejudice or surprise to the party against whom the evidence is offered; (2) the ability of that party to cure the prejudice; (3) the likelihood of disruption of the trial; and (4) bad faith or willfulness involved in not timely disclosing the evidence. *Id.*

Here, any prejudice is slight at best. Expert disclosure deadlines are intended "to prevent unfair surprise at trial," to "permit the opposing party to prepare for the expert's cross examination," and to "prevent experts from 'lying in wait' to express new opinions at the last minute, which might deny the opposing party an opportunity to depose the expert on such new information." *WildEarth Guardians v. Pub. Serv. Co.*, 2011 WL 5569499, at *4 (D. Colo. Nov. 16, 2011) (citations omitted). Dr. Kagel did not lie in wait and then switch theories after a deposition. She is not a moving target. She submitted a short, three-page supplement to flesh out her report while discovery was ongoing. Defendants could have deposed her at any time. They just chose not to. *See Nieto-Vincenty v. Valledor*, 22 F. Supp. 3d 153, 157 (D.P.R. 2014) (finding defendants could have arranged to depose expert prior to the close of discovery, and that "takes the wind out of the sails of defendants' prejudice argument").

In any event, if a deposition is what Defendants want, ChromaDex's offer is still on the table: ChromaDex will make Dr. Kagel available at a mutually acceptable time to answer questions about the July Report. This can and should end the dispute. *See P.E.A. Films, Inc. v. Metro-Goldwyn-Mayer, Inc.*, 2016 WL 6818758, at *7 (C.D. Cal. Aug. 10, 2016) ("Plaintiff has offered to make Cardwell available for an additional deposition which limits the risk of any prejudice to Defendant created by Cardwell's

Supplemental Report."); *Celador Int'l, Ltd. v. Walt Disney Co.*, 2008 WL 11342595, at *8 (C.D. Cal. Dec. 17, 2008) ("Defendants have deposed Mr. Marks subsequent to the issuance of the Supplemental Report. There is no prejudice."); *Wechsler v. Macke Int'l Trade, Inc.*, 221 F.R.D. 619, 623 (C.D. Cal. 2004) ("[B]ecause plaintiff is willing to allow defendants to take Goedde's deposition regarding the damage calculations contained in the Second Supplemental Expert Report, any prejudice to defendants will be minimized."). A deposition about the supplemental report would not take long. It certainly would not disrupt trial, scheduled for mid-October. And Defendants' apparent unwillingness to depose her now, especially when they waited weeks to even voice an objection to her supplement, cannot be held against ChromaDex.

Finally, Defendants have no evidence of "bad faith or willfulness." The need for supplementation was caused by new testing, conducted by ChromaDex as part of its continuing investigation into Elysium's counterclaims. When the testing was finished, ChromaDex had its expert memorialize her opinions regarding the results in a supplemental report. Both her report and the results were sent to Defendants within a month of ChromaDex obtaining them, which was two weeks before discovery closed. Defendants did not request a deposition. Their claim to have been sandbagged is facetious and should be disregarded. Rather, Elysium's goal is to keep relevant evidence away from the jury conclusively demonstrating that the NIAGEN it received from ChromaDex never had acetamide at the levels that Elysium's faulty and knowingly invalid testing suggested. That is not a sufficient ground on which to exclude Dr. Kagel's opinions.

V. CONCLUSION

Cases should be decided on their merits. For the reasons stated above, the Court should deny Defendants' motion and allow the jury to hear Dr. Kagel's opinions about an important issue in this case.

Dated: August 28, 2019

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