UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re Elysium Health-ChromaDex Litigation	Civ. No. 17-cv-07394 (VEC) ECF Case Electronically Filed **Oral Argument Requested**

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

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PRELIMINARY STATEMENT

ChromaDex, Inc. ("ChromaDex"), after being sued by Elysium Health, Inc. ("Elysium") for its campaign of disparagement slandering Elysium's sole product, continues its efforts with this retaliatory suit alleging Elysium is misleading consumers about the safety and regulatory status of and science behind its product. ChromaDex's allegations regarding the safety of Basis, the nutritional supplement sold by Elysium, are simply implausible in the face of ChromaDex's own admissions regarding its own products, which share the same qualities with Basis that ChromaDex contends render Basis unsafe and unregulated, yet are billed by ChromaDex as safe and enjoying all requisite regulatory approvals. ChromaDex attempts to cobble together statements by Elysium that include undisputed statements of fact, noncommercial speech, and even information that ChromaDex itself advertises to now accuse Elysium of misleading consumers on narrow points that are only distantly connected to Elysium's actual statements—and that thus bear no potential for actual deception.

Elysium's first-filed complaint charges ChromaDex with filing a sham petition with FDA that purported to raise a safety concern regarding the presence of minute amounts of toluene, a solvent, in Basis, and Basis's supposed regulatory status. Elysium's complaint alleges that ChromaDex itself had sold products containing the same amounts of toluene, and that ChromaDex's own product lacks the exact regulatory approval it had accused Elysium of failing to obtain, both of which ChromaDex concedes in its complaint here. Those admissions render implausible the central allegations of ChromaDex's complaint, which in large part simply repeats from its sham petition its contentions that the purported low levels of toluene in Basis and Basis's alleged regulatory status render it per se unsafe, making Elysium's advertising about Basis misleading.

To supplement the contentions recycled from its sham petition, ChromaDex repeats allegations previously dismissed with prejudice in a lawsuit currently pending between the parties in the United States District Court for the Central District of California, relies on "information and belief" pleading that lacks any identified basis for the purported belief, and misinterprets Elysium's public statements to ask this Court to make logical leaps no actual consumer of Elysium's products would make. None of these suffice to state a claim for false advertising. The complaint suffers from other fatal flaws as well. ChromaDex does not allege any improper conduct to support its claim for tortious interference, nor does it allege any injury to render any of its claims legally viable.

Accordingly, as discussed more fully below, ChromaDex's complaint should be dismissed with prejudice.

STATEMENT OF FACTS

A. The Parties

Elysium, a growth-stage start-up, utilizes science and technology to create consumer health products. (Compl. ¶ 7.)[1] One of Elysium's co-founders, who heads MIT's aging center, has been described as "one of the world's leading scientists in the field of aging research." (*Id.* Ex. M.) Elysium's flagship product, a nutritional supplement called "Basis," features nicotinamide riboside ("NR"), a precursor of a Vitamin B3 metabolite with "important anti-aging effects," and pterostilbene, an antioxidant derived from blueberries. (*Id.* ¶¶ 14, 29, 30.) ChromaDex, an ingredients company, licensed patents relating to NR and began selling Niagen,

[1] *See* Declaration of Joseph N. Sacca in Support of Elysium Health, Inc.'s Motion to Dismiss ChromaDex, Inc.'s Complaint ("Decl."), Ex. A, referenced herein as "Compl."

a branded NR ingredient product, to consumer product companies in 2013, and was the exclusive commercial supplier of NR for several years. (*Id.* ¶ 18.)

B. Elysium Enjoys Great Success in the NR Consumer Product Market

From its launch of Basis in 2015, Elysium has dominated the NR consumer product market. Through intensive marketing efforts, Elysium has publicized the beneficial effects of NR and NR-related research and garnered an enthusiastic customer base for Basis. (*See, e.g.*, Compl. ¶¶ 39, 43-47.) Elysium differentiates itself with a dedication to scientific research and rigor sorely lacking in the nutritional supplement industry, evident in its Scientific Advisory Board, a group including numerous Nobel Laureates that "advise[] the Elysium team on product identification and development, clinical studies and ongoing research" (Compl. Ex. P); its research partnerships with prestigious institutions such as Harvard and Oxford (Compl. ¶ 68); and its own scientific publication featuring articles on advances in aging and health-related research (*see, e.g.*, Compl. ¶ 50 & Ex. J). Its website describes a multi-stage R&D process for new products under development that includes a review of scientific literature, various stages of development, and safety testing conducted for regulatory submissions. (Compl. Ex. K.)

As Elysium has described in its business model, FDA does not recognize aging itself as a medical condition, and the development of pharmaceutical drugs addressing age-related issues is thus very complicated; studies necessary to prove the efficacy of these drugs can take more than a decade to complete. (Compl. Ex. M.) Thus, Elysium instead seeks to leverage breakthroughs in aging research relating to natural substances by incorporating these compounds into dietary supplements, which are subject to a different set of regulations than pharmaceutical drugs and do not require a decade-long lead time before manufacture and sale. (*Id.*) These regulations and related guidance provide that nutritional supplements may be sold pursuant to Generally Recognized As Safe ("GRAS") status. (*See, e.g.*, Compl. ¶ 26 & Ex. B.) A company may, but is

not required to, submit notice to FDA of its acquisition of GRAS status, which FDA may then make public. (*Id.* & Ex. C.) Alternatively, a dietary supplement manufacturer may submit a "New Dietary Ingredient Notice" ("NDIN") for products containing a "new dietary ingredient." (Compl. ¶ 22.)

To advertise Basis, Elysium has, at various times:

- Published statements regarding a clinical trial conducted with Basis (Compl. ¶¶ 45, 54-55); and
- Included on its website statements that "the ingredients in Basis have been tested for safety and are produced in facilities that meet FDA requirements" and Basis "undergoes rigorous third party purity testing" (Compl. ¶ 49); and "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 regulations as stipulated by the FDA." (*Id.* ¶ 51.)

Elysium also publishes Endpoints, a blog featuring articles on scientific research and related issues, including articles on FDA regulations. (*See* Compl. Ex. J.) Elysium's co-founder has been often interviewed regarding his aging-related research. (*See, e.g.*, Compl. Exs. G, H, M.) As ChromaDex disclosed in an SEC Form 8-K filed February 23, 2017, Elysium has completed a study on "the safety, tolerability and potential health benefits of the dietary supplement, Basis." (*See* Decl. Ex. B.) The filing described multiple other studies, two of which are described as "ChromaDex's." The Elysium study is not so described. *Id.*

C. ChromaDex Reacts to Elysium's Success in the NR Product Market

The relationship between Elysium and ChromaDex originally arose from several supply agreements between the parties, whereby ChromaDex undertook to supply NR and pterostilbene to Elysium for Basis. (Compl. ¶ 29.) After Elysium accused ChromaDex of breaching pricing and exclusivity provisions in late 2016, the two parties became embroiled in litigation (the "California Action"). Although ChromaDex terminated the agreement for supply of NR in early 2017, Elysium was able to locate an alternative source and to continue selling Basis. (*Id.* ¶ 4.)

Contemporaneous with litigating against Elysium, ChromaDex launched, for the first time, its own direct-to-consumer NR product, "TruNiagen," thus largely abandoning its position as a supplier to companies like Elysium and now attempting to compete with them. (*Id.* ¶ 19.) ChromaDex describes TruNiagen and Niagen as "safe" and touts the regulatory status of both products. (Compl. ¶¶ 21-27.) ChromaDex purports to sell Niagen pursuant to regulatory submissions that include an NDIN that it did not submit to FDA until 2015, two years after its first Niagen sales, and a notice of GRAS status that it did not submit to FDA until 2016. (*See* Compl. Exs. A & C.) TruNiagen is not covered by the NDIN applicable to Niagen. (Compl. ¶ 27 n.2.) ChromaDex claims that TruNiagen has been "well-received in the marketplace" because of its "safety." (Compl. ¶ 20.)

Two months after commencing sales of TruNiagen, ChromaDex submitted to FDA a citizen petition (the "Sham Petition") that purported to raise public safety concerns regarding Elysium's Basis, which was no longer formulated using the NR and pterostilbene sold by ChromaDex. (*See* Decl. Ex. C.) ChromaDex proclaimed that its in-house testing had revealed that Basis was "contaminated" with toluene, a solvent, and that Elysium had failed to submit an NDIN when it began incorporating NR and pterostilbene sourced other than from ChromaDex into Basis. (*Id.*; *see* Compl. ¶¶ 41, 69.) ChromaDex has itself sold products containing toluene for incorporation into consumer products. (Compl. ¶ 70 n.3.) Its TruNiagen likewise is not covered by an NDIN. (*Id.* ¶ 27 n.2.) In response to the Sham Petition, in a complaint filed before this Court on September 27, 2017, Elysium brought claims against ChromaDex for false advertising, trade libel, deceptive business practices pursuant to New York General Business Law § 349, and tortious interference with prospective economic relations. (*See* ECF. No. 1 ¶¶ 91-92.)

ChromaDex responded with this suit. Its kitchen-sink complaint, stuffed with accusations that range from accusing Elysium of conducting "short attacks" to make ChromaDex a "more accessible take-over target" to deceiving consumers about the existence of "'science'" (Compl. ¶¶ 3, 5), in major part relies on ChromaDex's Sham Petition argument that Basis using newly-sourced ingredients is unsafe and lacks regulatory approvals. ChromaDex brings claims for false advertising under federal and state law and tortious interference, and claims for unfair competition based on essentially the same conduct, culminating in a demand for, *inter alia*, $200 million in damages (an amount nearly equal to ChromaDex's entire market capitalization), injunctions against speech, and an order that Elysium cease and desist sales of Basis.

ARGUMENT

THE COMPLAINT SHOULD BE DISMISSED WITH PREJUDICE

A complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(6) unless it alleges "sufficient facts, taken as true, to state a plausible claim for relief." *Merryman v. J.P. Morgan Chase Bank, N.A.*, 319 F.R.D. 468, 470 (S.D.N.Y. 2017) (Caproni, J.) (citation omitted). Plausibility requires that the plaintiff plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Highline Capital Mgmt., LLC v. High Line Venture Partners, L.P.*, No. 15-CV-660(VEC), 2015 U.S. Dist. LEXIS 178069, at *5-6 (S.D.N.Y. Oct. 1, 2015) (Caproni, J.) (citation omitted). Where the factual allegations and the documents upon which the complaint relies conflict, "the document controls and the court need not accept as true the allegations." *Id.* at *6 (citation omitted). ChromaDex's Complaint, rife with contradictions and logical inconsistencies but bereft of relevant "factual content," fails to state a plausible claim for relief and should be dismissed.

I. CHROMADEX FAILS TO STATE A CLAIM UNDER THE LANHAM ACT OR NEW YORK FALSE ADVERTISING AND UNFAIR COMPETITION LAWS

To plead a claim under the Lanham Act, ChromaDex must establish that Elysium made statements that were "literally false," *i.e.*, they "conflict[] with reality," or that the advertisements, "while not literally false, [are] nevertheless likely to mislead or confuse consumers." *Reed Constr. Data Inc. v. McGraw-Hill Cos*., 638 F. App'x 43, 45 (2d Cir. 2016) (citations omitted). ChromaDex's claims for false advertising and unfair competition rest heavily on allegations made "on information and belief" with no facts pled to support the existence of either, coupled with strained misinterpretations of Elysium's advertising that bear no relation to what a reasonable consumer would infer but were instead manufactured wholesale by ChromaDex.[2] ChromaDex alleges little else in support of its contention that Elysium has misled consumers, and nearly every inference it asks this Court to draw is contradicted by its own allegations. In short, ChromaDex's allegations of falsity are entirely conclusory. ChromaDex's reliance on non-commercial speech and failure to allege damages only compound its failure to state a claim here.

A. ChromaDex Does Not Identify a Single False Statement

"[O]nly an unambiguous message can be literally false." *Apotex Inc. v. Acorda Therapeutics, Inc.*, 823 F.3d 51, 63 (2d Cir. 2016) (citations omitted). ChromaDex's complaint

[2] The Lanham Act prohibits a party from making a "false or misleading description [or representation] 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). Although ChromaDex purports to bring both unfair competition and false advertising claims under the Lanham Act, there is "no specific federal cause of action for unfair competition"; it is instead a "category of claims" that includes false advertising. *Sussman-Automatic Corp. v. Spa World Corp.*, 15 F. Supp. 3d 258, 272-73 (E.D.N.Y. 2014) (citations omitted). This duplication is reason enough to dismiss the claim, *see id.* at 273, but in any event, ChromaDex's federal unfair competition claim thus fails for the same reason its Lanham Act false advertising claim fails. Similarly, ChromaDex's claims pursuant to N.Y. Gen. Bus. Law §§ 349 and 350 are premised on the same allegations of consumer deception as its Lanham Act claims, (*see* Compl. ¶¶ 80-87), and are subject to the same analysis, with the narrow exception described below, and fail as they do. *See Gottlieb Dev. LLC v. Paramount Pictures Corp.*, 590 F. Supp. 2d 625, 636 (S.D.N.Y. 2008).

identifies only a handful of statements that it contends to be literally false but offers no allegations to make these contentions plausible, and for the majority, its own admissions render any inference of falsity implausible. The first such statement is Elysium's description of Basis as "the only supplement clinically proven to raise NAD+ levels" and the "world's first cellular health product informed by genomics" (Compl. ¶ 45), which constitute "outright falsehoods," ChromaDex alleges, concerning Elysium's "participation in relevant research," and contradicted by the existence of "Niagen and pTeroPure," which "came first." (*Id.*) First, Elysium made no "unambiguous" statement that it participated in the referenced research. *See Apotex*, 832 F.3d at 63. Even if it did, however, ChromaDex curiously alleges "on information and belief" that it has conducted the sole clinical trials on "NR and pTeroPure" (Compl. ¶ 54), yet simultaneously acknowledges that trials of Basis took place (albeit, it suggests, at a time when Basis incorporated ingredients from ChromaDex.) (*See* Compl. ¶ 54-55.) *See Hopper v. Banana Republic, LLC*, No. 07 Civ. 8526 (WHP), 2008 U.S. Dist. LEXIS 13503, at *5-6 (S.D.N.Y. Feb. 25, 2008) (two contradictory statements in complaint were "therefore implausible"). That ChromaDex alleges in its complaint before this Court that Elysium did not conduct a clinical trial on Basis is frankly shocking in light of (i) its disclosure to the SEC in a Form 8-K filed on February 23, 2017, of the existence of a study by Elysium of "the dietary supplement Basis;" and (ii) its own websites, which list clinical studies involving NR and NAD+ and include both "A Study to Evaluate Safety and Health Benefits of Basis™ Among Elderly Subjects" with "Elysium Health" listed as the study's "research institution," and "Pharmacokinetics, Pharmacodynamics and Safety of Basis in Acute Kidney Injury Study (BAKIS)," with Elysium listed as the trial's co-author. (*See* Decl. Exs. B, D, E.) *See, e.g., P&G v. Ultreo, Inc.*, 574 F. Supp. 2d 339, 355 (S.D.N.Y. 2008) (noting for false advertising claim that "at a time when

[plaintiff's] commercial interests were different, [plaintiff] made the very same claims that it now attacks as false").[3] Although ChromaDex disingenuously contends that Elysium's co-founder "admits" that the referenced eight-week study could not have been performed by Elysium because he was quoted in an article that observed clinical trials "can take more than a decade" (Compl. ¶ 56), the article itself makes clear his reference was to clinical testing for drugs to treat specific diseases, not nutritional supplements like Basis. (*See* Compl. Ex. M at 5-6.)

ChromaDex's gripe that Basis was preceded by Niagen and pTeroPure—ingredients, not consumer products, (*see* Compl. ¶ 30)—and is thus not the "first" product "informed by genomics" (*id.* ¶ 45), relies on inactionable "puffing," particularly because ChromaDex makes no effort to allege facts to support that its two ingredients were "informed by genomics" (or indeed what that vague phrase means.) *See Stokely-Van Camp, Inc. v. Coca-Cola Co.*, 646 F. Supp. 2d 510, 526 (S.D.N.Y. 2009) ("Claims that a product is 'The' something-or-other is commonly viewed [sic] as puffery . . . ").

Next, ChromaDex challenges as false, "on information and belief," the statements that Basis undergoes "five quality and purity audits before a batch is shipped" and its manufacturing facilities are "located in the US and compliant with cGMP." (Compl. ¶ 51.) ChromaDex further contends to be false, again on "information and belief," the statement that Elysium "conduct[s] rigorous safety studies for new dietary ingredient submissions to the FDA." (Compl. ¶¶ 40, 53.) Pleading on information and belief requires allegations of facts sufficient to demonstrate "a good-faith basis" for the belief. *Kajoshaj v. N.Y.C. Dep't of Educ.*, 543 F. App'x 11, 16 (2d Cir.

[3] "For purposes of a [Rule] 12(b)(6) motion to dismiss, a court may take judicial notice of information publicly announced on a party's website, as long as the website's authenticity is not in dispute and 'it is capable of accurate and ready determination.'" *Doron Precision Sys, Inc.. v. FAAC, Inc*., 423 F. Supp. 2d 173, 179 n.8 (S.D.N.Y. 2006) (citation omitted). This Court may take judicial notice of the Form 8-K as a document filed with the SEC. *See Soueidan v. Breeze-Eastern Corp.*, No. 16 Civ. 0015 (ER), 2017 U.S. Dist. LEXIS 21225, at *11 (S.D.N.Y. Feb. 15, 2017).

2013). ChromaDex's "information and belief" allegations, however, are entirely unsupported by facts to plead a good faith basis, and thus fail to meet the standard of plausibility required to survive a motion under Rule 12(b)(6). *See Turkmen v. Ashcroft*, 589 F.3d 542, 546 (2d Cir. 2009) (noting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) require "factual amplification . . . to render a claim plausible" (citation omitted)); *see also Pyskaty v. Wide World of Cars, LLC*, 856 F.3d 216, 226 (2d Cir. 2017) (noting that "a conclusory allegation on information and belief . . . [is] insufficient to make [a] claim plausible where the complaint's [f]actual allegations . . . [do not] raise a right to relief above the speculative level" (citations omitted)); *Lefkowitz v. John Wiley & Sons, Inc.*, No. 13 Civ. 6414 (KPF), 2014 U.S. Dist. LEXIS 75650, at *32-36 (S.D.N.Y. June 2, 2014) (information and belief allegations insufficient for infringement claim where plaintiff had not included "factual foundation").

ChromaDex challenges as literally false the statement Elysium purportedly made in an email to a single customer that Basis is "pure," as reflected in its white color, whereas, ChromaDex contends, "in its normal state, NR is brown." (Compl. ¶¶ 57-58.) One need look no further than ChromaDex's own complaint for a refutation of this allegation: ChromaDex's Niagen GRAS proposal, in listing specifications for its NR product, describes the "color" as "white to light brown." (Compl. Ex. B. at 11.) In the face of this conflict, the document controls. *See Highline Capital*, 2015 U.S. Dist. LEXIS 178069, at *6. Further, ChromaDex's own Sham Petition shows that Basis using its current ingredients actually contains more NR than

Basis using Niagen (Decl. Ex. C, Ex. 1 at 18), another admission by ChromaDex itself that renders implausible its suggestion that Basis is now impure.[4]

B. ChromaDex's Conclusory Allegations on the Safety of Basis Are Inadequate

ChromaDex accuses Elysium of misleading consumers by not including in its advertising that Basis purportedly contains minute levels of toluene, but alleges nothing that would give rise to a duty to disclose. Moreover, ChromaDex's attack on the safety of Basis, which rests on its legal conclusion that Basis is "adulterated" pursuant to FDA regulations and assertion that Basis is "contaminated with the toxin Toluene" (Compl. ¶ 42), is critically undermined by its own allegations. Further, ChromaDex by its own contention improperly invites this Court to rule on an issue properly within the purview of FDA.

1. ChromaDex Fails to Allege Violation of Any Duty of Disclosure

ChromaDex alleges that Elysium fails to disclose that Basis supposedly contains a "dangerous toxin," which it contends "would undoubtedly be material to the purchasing decisions of customers." (Compl. ¶¶ 69-71.) This states no claim. Omissions are inactionable unless they "render affirmative statements false or misleading," and a plaintiff must specifically "link" those affirmative statements to the omission. *Casper Sleep, Inc. v. Hales*, No. 16-cv-03223 (CM), 2016 U.S. Dist. LEXIS 150706, at *18 (S.D.N.Y. Oct. 20, 2016). ChromaDex cites no affirmative statements by Elysium that it claims were rendered misleading by the purported omission.

[4] This Court may consider on this motion to dismiss the Sham Petition and compositional testing report described therein as both a document referenced in the Complaint and the source of its allegations that Basis contains toluene and thus "integral" to it. (Compl. ¶ 69.) *See Wilson v. Kellogg Co*., 628 F. App'x 59, 60 (2d Cir. 2016) ("A complaint is deemed to include any written instrument attached to it as an exhibit, materials incorporated in it by reference, and documents that, although not incorporated by reference, are 'integral' to the complaint." (citations omitted))

2. ChromaDex Admits "Adulteration" Does Not Render a Product Unsafe or Impure

Next, ChromaDex's allegation that the "adulteration" of Basis rendered Elysium's statements on its safety false may be easily discarded. First, the fact of "adulteration" rests on ChromaDex's cursory legal conclusion that the newly sourced NR in Basis constituted a "new dietary ingredient" pursuant to 21 U.S.C. § 350(b) (*see* Compl. ¶ 41), which this Court need not accept. *See Kajoshaj*, 543 F. App'x at 13. Second, even if ChromaDex successfully pled that Basis did contain a "new dietary ingredient" so that omission of an NDIN meant that it met the legal definition for adulteration, however, ChromaDex's conflation of "adulterated" with "unsafe" and impure is completely without support, as its own complaint evidences: ChromaDex *itself* sells a product that is "adulterated" pursuant to the same regulation it accuses Elysium of violating.[5] That it nonetheless contends that its adulterated TruNiagen is "safe" makes its contention that the purported "adulteration" of Basis renders it per se unsafe and impure implausible. (Compl. ¶¶ 19-20, 23.) *See Carell v. Shubert Org., Inc.*, 104 F. Supp. 2d 236, 267 (S.D.N.Y. 2000) (dismissing claim where plaintiff's factual allegations contradicted conclusion urged by plaintiff).

[5] ChromaDex, in claiming that its direct-to-consumer NR product enjoys regulatory approvals that Elysium's Basis lacks, notes blandly in a footnote that "NDIN 882 relates to 180 milligrams of NIAGEN. TRU NIAGEN is 250 milligrams." (Compl. ¶27 n.2.) ChromaDex omits from its Complaint that FDA guidance requires submission of an NDIN for any product with an intake level that exceeds a previous NDIN, and ChromaDex was therefore required—and failed—to submit an NDIN to cover TruNiagen, which at a 250-milligram intake level is not covered by NDIN 882. (*See* Decl. Ex. F at 29 ("However, if you are planning to market a product that exceeds the highest daily intake level or single-serving dose for which safety information was submitted in the previous NDI notification, you should submit a new notification because the previous NDI notification does not cover the higher single-serving or daily intake level.")). This Court may take judicial notice of FDA guidance. *See Apotex*, 823 F.3d at 59-60.

3. ChromaDex's Own Admissions Make Implausible Its Assertion That Basis Is Unsafe Because It Purportedly Contains Toluene

The second ground upon which ChromaDex purports to rely in attacking the safety of Basis is a supposed "contamination" by toluene, a solvent. (Compl. ¶ 4.) ChromaDex cites in support of this contention the same material that it purported to rely upon in submitting its Sham Petition to FDA—a publication by the CDC of risks from environmental exposure to toluene and 21 C.F.R. 137(c), an FDA regulation listing approved residual solvents for food[6]—and attempts to parlay this into a claim that Basis is "unsafe for human consumption." (Compl. ¶ 42.)

A determination that Elysium has misrepresented the safety of Basis based on a "contamination" by toluene necessarily requires a determination that the toluene levels in Basis are unsafe. Thus, in so doing, ChromaDex invites this Court to develop its own position on the safe levels of toluene in a nutritional supplement, an action it has previously contended would constitute a "usurp[ation of] the FDA's prerogative" by this Court. (ECF No. 14 at 24.)[7] If, as ChromaDex has contended, FDA has indeed never provided guidance on whether and to what extent toluene in a nutritional supplement is unsafe (*see id.*), adjudication of that question would require analysis of exactly the type of "technical or policy" considerations that are entrusted to FDA, which weighs against this Court's ruling on the issue. *See Ellis v. Tribune Television Co.*, 443 F.3d 71, 82 (2d Cir. 2006). Conversely, to the extent ChromaDex suggests this Court find that Elysium sells products without proper FDA approval—made explicit in its request that

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[6] ChromaDex presumably intends to cite 21 C.F.R. § 173(c), which lists "secondary direct food additives permitted in food for human consumption," not 21 C.F.R. § 137(c). Although ChromaDex misleadingly cites the regulation as support for its contention that FDA has not approved toluene as a residual solvent "in food and dietary supplements," the regulation is specific to food only. *See id.* FDA has never promulgated a regulation on solvent levels specific to nutritional supplements.

[7] Elysium, in contrast, alleges that FDA has opined on the issue through its acceptance of submissions by nutritional supplement manufacturers relying on the ICH Guidelines so that an independent determination by this Court of safe toluene levels is unnecessary in determining that ChromaDex misled consumers. (*See* ECF No. 1 ¶ 54.)

Elysium be ordered to cease sales "unless or until the product is compliant with applicable federal and state law regulations" (Compl., Prayer)—its claims constitute an impermissible attempt to enforce the Federal Food, Drug, and Cosmetic Act by private right of action. *See PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1113 (2d Cir. 1997).

In any event, ChromaDex's suggestion that the inclusion of toluene renders Basis per se "unsafe" is also contradicted by ChromaDex's own complaint and thus implausible. First, the primary support ChromaDex cites in support of this argument, the CDC Report, states plainly that "[w]hether you are harmed [by exposure to toluene] will depend on such factors as the dose." (Compl. Ex. E at 1.) ChromaDex improperly ignores this statement entirely in asserting that toluene renders Basis per se unsafe. *See, e.g., S.F. ex rel S.E.F. v. Archer-Daniels-Midland Co.*, No. 1:13-cv-00634, 2014 U.S. Dist. LEXIS 55195, at *19-22 (W.D.N.Y. Apr. 21, 2014) (plaintiff's claim that product was unreasonably dangerous deemed implausible where authorities cited in complaint specified that harm came from "over-consumption"). Further, that the inclusion of (i) a substance deemed "hazardous" by the CDC and posing the potential for illness by exposure or (ii) a solvent not listed at 21 C.F.R. 137(c) does not render a product per se unsafe for human consumption is obvious from ChromaDex's own complaint: The specifications sheet attached to its Niagen GRAS notice, *i.e.*, the product it repeatedly alleges is safe in supposed contrast to Basis, contains product specifications that include upper limits for, *inter alia*, acetone and methyl tert-butyl ether, both the subject of their own CDC reports describing potential danger from exposure, and the latter of which has not been approved as a residual solvent pursuant to 21 C.F.R. § 173(c).[8] ChromaDex's reliance on the CDC Report and FDA

[8] *See* Decl. Ex. G. "[J]udicial notice may be taken of publicly available reports" when offered for the "fact of their publication." *Stephens v. Venettozzi*, No. 13-CV-5779 (RA), 2016 U.S. Dist. LEXIS 103681, at *9 (S.D.N.Y. Aug. 5, 2016).

solvent list to conclude that toluene within Basis is dangerous to consumers is unavailing in light of its contrary admission that products containing detectable levels of substances that are the subject of CDC reports on their toxicity and not approved as residual solvents in food are safe. *See Hopper*, No. 07 Civ. 8526 (WHP), 2008 U.S. Dist. LEXIS 13503, at *5-6. It offers no other allegations to support its claim that Basis is unsafe, rendering its claim of falsity entirely conclusory. *See Turbon Int'l, Inc. v. Hewlett-Packard Co.*, 769 F. Supp. 2d 262, 269 (S.D.N.Y. 2011) (dismissing claim where allegations did not "support a reasonable inference" that advertisements were false).

Even in the absence of these admissions, ChromaDex's manufactured contention that toluene is per se dangerous cannot stand in light of its buried admission that it sold products containing toluene. (*See* Compl. ¶ 70 n.3; *see also* ECF No. 14 at 22-23 & Ex. D.)[9] ChromaDex's attempted dereliction of responsibility for the safety of the products it sold and implicit suggestion that it believed its toluene-containing product to be dangerous (Compl. ¶ 70 n.3) flies in the face of its many allegations that the ingredients it sold to Elysium were safe. (*See, e.g.*, Compl. ¶¶ 13, 52.) This Court need not credit ChromaDex's contradictory allegations. *See In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 405-06 (S.D.N.Y. 2001). And ChromaDex's failure to offer anything beside them leaves it without a plausible claim that toluene rendered Basis unsafe and that any statement by Elysium relating to its safety was false. *See Turbon Int'l, Inc. v.*, 769 F. Supp. 2d at 268 (dismissing false advertising claim where plaintiff "fails to provide a basis to compare the challenged statements with the 'reality'"); *see also Ciaprazi v. Fischer*, No. 13cv4967-VEC-FM, 2015 U.S. Dist. LEXIS 38567, at *21-22 (S.D.N.Y. Feb. 24, 2015) (plaintiff's "wholly conclusory" allegation that paint fumes are toxic

[9] ChromaDex's statements within its brief constitute binding judicial admissions. *See Purgess v. Sharrock*, 33 F.3d 134, 144 (2d Cir. 1994).

"are not something that the Court can consider in determining the facial sufficiency" of claim), *adopted as modified*, 2015 U.S. Dist. LEXIS 36996 (S.D.N.Y. Mar. 24, 2015) (Caproni, J.).

C. ChromaDex Does Not Plausibly Allege Consumers Are Misled by Elysium's Advertising

ChromaDex's Complaint is rife with allegations that Elysium misled customers through statements that ChromaDex does not contend to be literally false. The claims based on these statements fail because ChromaDex fails to plausibly allege any customers are likely to be misled regarding Basis or Elysium.

1. ChromaDex's Suggestion That Consumers Have Been Misled Regarding FDA Approval Does Not Suffice to State a Claim

ChromaDex challenges Elysium's reference to third party purity testing and the existence of FDA regulations that supposedly "deceptively leads consumers to mistakenly believe that [FDA] has given its blessing to Basis." (Compl. ¶¶ 48-53.) ChromaDex seizes on a blog article published by Elysium describing the evolution in FDA regulation of dietary supplements and NDIN procedures and Elysium's statement that it conducts "rigorous safety studies" for NDIN submissions and that regulations require the submission of such studies to "demonstrate the safety of 'new dietary ingredients'" (Compl. ¶ 53) to allege these statements "confuse consumers … into believing that Basis is manufactured subject to an NDIN," and indeed its requested relief includes corrective advertising that "[Basis] is not the subject of a filed NDIN at the FDA." (Compl. ¶ 74 & Prayer.) ChromaDex thus attempts to elevate a description of an evolving regulatory regime and statement that Elysium conducts studies in connection with those regulations when it makes one of the submissions contemplated by them into a representation that Elysium made a specific submission at a specific time. To sustain ChromaDex's allegations here, however, would ignore that "the law does not impute representations of government approval . . . in the absence of explicit claims." *Avon Prods., Inc. v. S.C. Johnson & Son, Inc.*,

984 F. Supp. 768, 796 (S.D.N.Y. 1997) (emphasis added). As such, "the proposition that defendants have made implied misrepresentations about FDA approval . . . is unsustainable as a Lanham Act false advertising claim." *Merck & Co. v. Mediplan Health Consulting*, 425 F. Supp. 2d 402, 418 (S.D.N.Y. 2006).[10]

2. ChromaDex's Contention that Elysium Has Misled Consumers by Referencing the Existence of Clinical Studies Fails as a Matter of Law

Next, ChromaDex alleges that Elysium has misled consumers by referencing studies conducted with Basis containing NR and pterostilbene sourced from ChromaDex in connection with advertising Basis that contains ingredients sourced elsewhere. (Compl. ¶¶ 54-55.) ChromaDex does not allege, however, that the results of this study would be different if performed on Basis using the newly-sourced ingredients and thus alleges nothing to demonstrate that Elysium was not entitled to rely on the studies. *See Rexall Sundown, Inc. v. Perrigo Co.*, 651 F. Supp. 2d 9, 35 (E.D.N.Y. 2009) (noting that false advertising claim relating to "clinical testing" claims requires showing that tests do not support product claims or are not sufficiently reliable and finding that reference to "clinical testing" of product was not false because statement did not specifically refer to current formulation of product and "could be reasonably understood to refer to a prior formulation" or constituent ingredients).

3. ChromaDex Alleges No Plausible Manner in Which Consumers Have Been Deceived

The remainder of ChromaDex's allegations regarding consumer deception rely on a misinterpretation of Elysium's statements cooked up by ChromaDex solely for purposes of

[10] ChromaDex's attempt to convert statements Basis has been "tested for safety" and is produced in facilities that "meet FDA requirements" and are compliant with cGMP regulations "as stipulated by the FDA,"(Compl. ¶¶ 49, 51) into a representation that Elysium had specifically applied for and obtained an NDIN for its newly-sourced Basis, or even that it has obtained other FDA approvals, similarly relies on an implausibly strained reading of Elysium's actual statements. *See XYZ Two Way Radio Serv .Inc. v. Uber Techs., Inc.*, 214 F. Supp. 3d 179, 183-85 (E.D.N.Y. 2016) (dismissing false advertising claims where "nothing in the [challenged] statements themselves suggests that meaning" urged by plaintiffs).

litigation. These include references to research and clinical studies that purportedly convey "Basis has been better researched than it has [been]" (Compl. ¶¶ 43-47) and mention of Elysium's prestigious Scientific Advisory Board ("SAB") and partnership with "renowned academic institutions." (Compl. ¶¶ 61, 68.) ChromaDex does not controvert the existence of the research, the SAB, or the research partnerships. Instead, it seeks to elevate Elysium's straightforward statements of general matters into hyper-specific supposed deceptions that only faintly resemble their supposed source material. These include:

- Statements that the "science" behind Basis is "quite extensive" and "began almost 30 years ago," translated by ChromaDex into the deception that "Dr. Guarante and Elysium are the originators and primary contributors to this body of research" (Compl. ¶¶ 46-47);
- The statement that Elysium's SAB "guides the scientific direction of Elysium" and the feature of profiles of SAB members on Elysium's website, translated by ChromaDex as the deception that "[the SAB] have all been involved in the science and discovery behind the Basis product" and "vouch for the safety of the product" (Compl. ¶ 61); and
- The existence of Elysium's research partnerships with "renowned academic institutions," translated by ChromaDex as the deception of a "clear, implied endorsement of the company and its products as safe for human consumption." (Compl. ¶ 68.)

The juxtaposition between Elysium's actual statements and ChromaDex's strategic "translations" here makes clear the extent to which ChromaDex has strained to manufacture the existence of deception by Elysium. ChromaDex does not explain why, for instance, a consumer might understand a reference to the history of NR research as a declaration that the speaker conducted that research,[11] nor how a company's participation in a study on "cellular function,

[11] Even if ChromaDex had described statements by Elysium furthering the impression that Elysium itself was responsible for the research underlying NR, ChromaDex's own statements underscore the extent to which its arguments of falsity have been manufactured for litigation. ChromaDex charges Elysium with furthering the "false" impression "that Elysium itself played a significant role in the scientific research concerning NR," and gratuitously attacks the *bona fides* of Elysium's co-founder as an "unscrupulous researcher" whose claims about "relevant science" are "discredit[ed]." (Compl. ¶¶ 5, 44, 60.) ChromaDex omits, however, that its own online advertisement lists numerous papers written by Dr. Guarante regarding NR-related research (*see* Decl. Ex. D at 3 n. 8, 20, 22), which, along with its reliance on the NR research described above for which it identifies Elysium as the "research institution," shows ChromaDex's characterization of Elysium and its cofounder as not *(cont'd)*

aging, and gut microbiome" conducted by a university (Compl. Ex. P) would lead a consumer to believe that research institution has participated in safety testing for a particular product, and for good reason: The attenuated connections ChromaDex attempts to draw are utterly implausible. ChromaDex's assertions that Elysium has misled consumers thus fail to state a claim. *See Fink v. Time Warner Cable*, 714 F.3d 739, 742 (2d Cir. 2013) (claims "lack the facial plausibility necessary to survive a motion to dismiss" where allegations were "materially inconsistent" with actual advertisements); *Manchanda v. Google*, No. 16-CV-3350 (JPO), 2016 U.S. Dist. LEXIS 158458, at *12 (S.D.N.Y. Nov. 16, 2016) (dismissing claim where "allegations provide no basis on which to plausibly infer that Defendants' conduct is likely to mislead a reasonable consumer").

4. ChromaDex Improperly Disregards Disclaimers by Elysium That Ensure No Consumer Is Misled in the Manner ChromaDex Contends

ChromaDex's failure to plead that consumers would be or have been misled by Elysium's advertising continues with its disregard of context and disclaimers that ensure no consumer would receive the false impression ChromaDex alleges. In evaluating a false advertising claim, "context is crucial." *Fink*, 714 F.3d at 742. Accordingly, "[w]hile disclaimers do not ipso facto sanitize misleading marketing practices, . . . 'the presence of a disclaimer or similar clarifying language may defeat a claim of deception.'" *Kommer v. Bayer Consumer Health*, 252 F. Supp. 3d 304, 312 (S.D.N.Y. 2017) (citation omitted), *appeal docketed*, No. 17-1772 (2d Cir. June 2, 2017). The full context of Elysium's advertisements and disclaimers serve exactly that purpose. First, ChromaDex's contention that Elysium has led consumers to believe that it submitted an

(cont'd from previous page)

contributing to the "science" underlying NR to be entirely implausible. *See In re Complete Mgmt. Inc. Sec. Litig.*, 153 F. Supp. 2d 314, 332 n.13 (S.D.N.Y. 2001) (rejecting party's attempt to "have it both ways" in arguing fact of relationship between parties was minor when public filings touted relationship).

NDIN for Basis incorporating new ingredients falters in light of the context: Elysium described its conduct of safety studies in connection with NDIN submissions as part of a description of its "R&D Process" whereby it "discover[s] and commercialize[s] new products," thus making clear that its NDIN practices relate to products under development and not yet available to consumers, unlike Basis, which Elysium has sold for years. (Compl. Ex. K (emphasis added)). Similarly, ChromaDex's insistence that consumers are led to believe that Elysium's SAB endorses the safety of Basis cannot stand in light of the plain statement by Elysium that the SAB, "rather than endorsing a specific product," advises Elysium on other matters. (*See* Compl. Ex. P.) Lastly, the repetition throughout Elysium's website of the disclaimer that the FDA "has not evaluated these statements" militates against the impression urged by ChromaDex that FDA has "somehow approved or otherwise authorized" Basis. (*See* Compl. Ex. K.) This context, entirely omitted by ChromaDex, further establishes that ChromaDex has failed to plead Elysium misled consumers.

II. CHROMADEX'S FALSE ADVERTISING AND UNFAIR COMPETITION CLAIMS SUFFER ADDITIONAL DEFICIENCIES

A. ChromaDex Improperly Relies On Non-Commercial Speech

ChromaDex challenges numerous statements by Elysium that are not "advertising." These include statements in magazine profiles of Elysium's cofounder regarding his career (Compl. Exs. G, H, M), informational blog articles regarding FDA regulations (Compl. Ex. J), and a private, one-off response to an individual customer query. (Compl. Ex. N.) A Lanham Act claim requires that a defendant engage in "commercial advertising," *i.e.*, "(1) 'commercial speech,' (2) made 'for the purpose of influencing consumers to buy defendant's goods or services,' and (3) . . . 'disseminated sufficiently to the relevant purchasing public.'" *Gmurzynska v. Hutton*, 355 F.3d 206, 210 (2d Cir. 2004) (citations omitted). Statements featured in news

articles, or statements that are not widely circulated, do not constitute commercial speech. *See id.* at 211.

B. ChromaDex Fails to Plead Damages

ChromaDex's claims for false advertising and unfair competition fail for the additional reason that ChromaDex has failed adequately to allege a competitive injury. To survive dismissal, ChromaDex must plausibly allege "an injury to a commercial interest in sales or business reputation proximately caused by the defendant's misrepresentations." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1395 (2014). The plaintiff cannot simply allege harm in conclusory language, but rather must plead "factual support" for the purported harm. *See, e.g., Avalos v. IAC/Interactivecorp.*, No. 13-CV-8351 (JMF), 2014 WL 5493242, at *5 (S.D.N.Y. Oct. 30, 2014). Yet, ChromaDex fails to plead in anything more than the most conclusory rhetoric—and sometimes not even that—harm to its sales or business reputation caused by Elysium's alleged misrepresentations. Although it gives lip service to the requirement that it show competitive injury (*see* Compl. ¶ 75 (alleging "irreparable harm"), ¶ 78 (alleging "commercial detriment to ChromaDex")), nowhere does it plead any facts to raise a plausible right to relief. *See Avalos*, 2014 WL 5493242, at *5 (plaintiff's allegations of "consumer confusion" purportedly resulting in loss of "millions of dollars in revenue" insufficient to survive a motion to dismiss absent "factual support" that consumers would "withhold trade" from plaintiff as a consequence of the misstatements) (citations omitted). Courts have routinely dismissed claims that alleged more than ChromaDex's skeletal allegations of injury here. *See, e.g., id.*; *Vincent v. Utah Plastic Surgery Soc'y*, 621 F. App'x 546, 550-51 (10th Cir. 2015) (dismissal proper where plaintiff did not plead "a single factual allegation [of injury, such as] . . . how much . . . profits have decreased" or " number of potential customers . . . lost . . . or how that number would be measured").

C. ChromaDex's State Statutory Claims Also Fail

Finally, ChromaDex's claims pursuant to Sections 349 and 350 of the New York General Business Law, while largely duplicative of its Lanham Act claims and failing for the same reason those claims fail, are additionally defective due to ChromaDex's failure to meet specific pleading requirements applicable to them. Sections 349 and 350 prohibit deceptive acts or practices and false advertising, respectively, and the same analysis applies to both claims. N.Y. Gen. Bus. Law §§ 349-350 (McKinney 2012); *see New World Sols., Inc. v. NameMedia Inc.*, 150 F. Supp. 3d 287, 330 (S.D.N.Y. 2015). Both claims require a showing of conduct that is connected to New York State. *See* N.Y. Gen. Bus. Law §§ 349-350. ChromaDex, however, makes no allegations whatsoever specific to New York and instead alleges only broadly that Elysium's practices mislead or are likely to mislead "consumers in New York and across the country." (Compl. ¶¶ 74, 77.) The statutes' territoriality element requires that "some part of the underlying transaction must occur in New York State," and ChromaDex's failure to plead actual "consumer action or contact" occurring within the state is therefore inadequate. *Mountz v. Glob. Vision Prods., Inc.*, 3 Misc. 3d 171, 177 (Sup. Ct. N.Y. Cty. 2003). Further, to plead a claim under Section 350, a plaintiff must "demonstrate reliance on the allegedly false advertising." *Merriweather v. Metro. Prop. & Cas. Ins. Co.*, No. 13 CV 5976 (SJF)(AKT), 2013 U.S. Dist. LEXIS 171029, at *19 (E.D.N.Y. Dec. 3, 2013) (citation omitted). ChromaDex nowhere alleges reliance.

III. CHROMADEX FAILS TO PLEAD THE WRONGFUL CONDUCT AND INJURY NECESSARY FOR A TORTIOUS INTERFERENCE CLAIM

A. ChromaDex Does Not Identify Any Wrongful Conduct by Elysium

ChromaDex's tortious interference claim, bereft of allegations regarding any third party whose relationship with ChromaDex sustained injury, is a rehash of allegations previously

dismissed with prejudice in the California Action that this Court should not permit ChromaDex to resurrect. To establish a claim for tortious interference with prospective economic advantage, a plaintiff must plead that it (1) "had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice, or used dishonest, unfair, or improper means; and (4) the defendant's interference caused injury to the relationship." *Carvel Corp. v. Noonan*, 350 F.3d 6, 17 (2d Cir. 2003). Improper means, as a general rule, "must amount to a crime or an independent tort;" where none is alleged, a plaintiff must show that defendant acted "for the sole purpose of inflicting intentional harm on plaintiff[]," or relied on "'wrongful means' [that] include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions," or "extreme and unfair economic pressure." *Abbas v. Martin*, 689 F. App'x 43, 44 (2d Cir. 2017) (first alteration in original) (citation omitted).

The conduct ChromaDex describes as the basis for its claim is wholly insufficient. First, ChromaDex's attempt to base its tortious interference claim on its own conduct and interactions with Elysium displays a wrongheaded conception of the tort. A claim for tortious interference requires that the defendant "direct some activities towards the third party and convince the third party not to enter into a business relationship with the plaintiff." *Black Radio Network, Inc. v. NYNEX Corp.*, Nos. 96 L.C. 4138(DC) et al., 2000 WL 64874, at *4 (S.D.N.Y. Jan. 25, 2000) (emphasis added) (citation omitted). Here, ChromaDex points to Elysium's supposed "knowing induce[ment of] ChromaDex to modify and limit—at detriment to ChromaDex—its ability to sell" products in a contract between them, conduct directed to ChromaDex instead of a third party. (Compl. ¶ 89) The only other basis ChromaDex alleges in support of its tortious interference claim, the accusation that Elysium planned to "short" ChromaDex by placing a large

order for NR without intent to pay for it and thereby prevent it from filling other customer orders (*id.* ¶ 90), likewise involves alleged conduct directed to ChromaDex, not a third party. *See Carvel Corp. v. Noonan*, 818 N.E.2d 1100, 1105 (2004).

Nor does ChromaDex identify any improper conduct by Elysium relating to this supposed interference. While ChromaDex labels Elysium's exclusivity demand as one made in "bad faith," (Compl. ¶ 89), contractual negotiation, for a provision that ChromaDex agreed to, hardly rises to the level of "wrongful means" contemplated by controlling authority. *See Valley Lane Indus. Co. v. Victoria's Secret Direct Brand Mgmt., L.L.C.*, 455 F. App'x 102, 106-07 (2d Cir. 2012). Further, to the extent ChromaDex suggests that this "inducement" interfered in ChromaDex's pre-existing contracts with its other customers, ChromaDex in essence improperly seeks to hold Elysium responsible for its own apparent breach of contract. *See Semple v. Eyeblaster, Inc.*, No. 08CIV9004(H8), 2009 U.S. Dist. LEXIS 45349, at *17 (S.D.N.Y. May 26, 2009) ("[A]n assertion that a defendant is liable for a plaintiff's own breach of an agreement' is not . . . contemplated by the tortious interference doctrine . . ."') (citation omitted). With regard to ChromaDex's narrative that Elysium improperly attempted to "short" ChromaDex, these allegations are recycled from ChromaDex's complaint in the California Action and were previously deemed legally insufficient to state a claim for fraud by the court there, which credited Elysium's argument that the fraud claim was simply a "repackaging" of a claim for breach of contract.[12] Similarly, this Court should not accept ChromaDex's efforts to "repackage" its previously-dismissed fraud claim as wrongful conduct constituting tortious interference. *See Krepps v. Reiner*, 377 F. App'x 65, 67 (2d Cir. 2010) ("A plaintiff cannot avoid the preclusive

[12] *See ChromaDex, Inc. v. Elysium Health, Inc.*, No.: SACV 16-02277-CJC(DFMx), Order Granting in Substantial Part Defendant's Motion to Dismiss Claims and Granting in Part Plaintiff's Motion to Dismiss Counterclaims, ECF No. 44 (May 10, 2017), attached as Decl. Ex. H, at 11.

effect of a judgment simply by 'splitting' his claim into various suits based on different legal theories."). Contractual breach does not rise to the level of wrongful conduct necessary for a tortious interference claim. *See Carvel Corp. v. Noonan*, 818 N.E.2d 1100, 1102-04 (N. Y. App. 2004). Nor has ChromaDex plausibly alleged that Elysium's placement of the disputed order was "for the sole purpose of inflicting intentional harm on plaintiff;" the order provided Elysium with the two constituent ingredients of its main product, which Elysium used, by ChromaDex's admission, to manufacture its product thereafter. (*See* Decl. Ex. C.)

B. ChromaDex Fails to Allege that Any Tortious Interference Caused It Injury

Even in the absence of these deficiencies, ChromaDex's claim for tortious interference also fails due to its omission of any allegations that interference by Elysium actually caused "injury to [any] relationship." *Abbas*, 689 F. App'x at 44 (citation omitted). ChromaDex, critically, does not allege that it was actually unable to fulfill orders for other customers due to Elysium's large order, or that Elysium's actions caused third parties to stop working with ChromaDex, rather than ChromaDex to decide itself to terminate other contractual relationships. *See RFP, LLC v. SCVNGR, Inc.*, 788 F. Supp. 2d 191, 198 (S.D.N.Y. 2011) ("bare allegation" that plaintiff "suffered injury to its business relationship" was not sufficient to plead injury for tortious interference claim (citation omitted)).[13]

CONCLUSION

For the foregoing reasons, Elysium respectfully requests that the Complaint be dismissed with prejudice.

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[13] ChromaDex includes in its cause of action a puzzling accusation that "Elysium's dissemination of false information [to] the media …. asserting that ChromaDex was failing damaged additional existing and potential customer relationships," (Compl. ¶ 90), which is mentioned nowhere else in the Complaint. This threadbare allegation, which specifies no actual statements, let alone relationships that were damaged, may be disregarded. *See RFP*, 788 F. Supp. 2d at 191.

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Respectfully submitted,

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