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IN THE 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-02277-CJC-DFM

Judge: Hon. Cormac J. Carney

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

[*Filed Concurrently with Declaration of Joseph Sacca; and (Proposed) Order*]

Date: September 18, 2019
Time: 9:00 a.m.

Pretrial Conference: September 18, 2019
Trial: October 15, 2019

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on September 18, 2019, at 9:00 am, or as soon thereafter as they may be heard, Defendant and Counterclaimant Elysium Health, Inc. and Defendant Mark Morris (together, "Defendants") will and do hereby move *in limine* for an order, pursuant to Federal Rules of Civil Procedure 26 and 37, excluding the Supplemental Expert Report of Dr. Carla Kagel ("Dr. Kagel") disclosed on July 26, 2019, and barring Dr. Kagel from testifying about her opinions and analyses set forth therein. This motion ("Motion") will be made in Courtroom 7C of the above-referenced court, located at 350 West 1st Street, Los Angeles, California, 90012.

This Motion is based made upon this Notice, the accompanying Memorandum of Points and Authorities, Declaration, Exhibits, and [Proposed] Order filed contemporaneously herewith, all the pleadings and papers on file in this action, and such further oral argument or any other evidence as may be presented at the hearing on this Motion.

Pursuant to Local Rule 7-3, this Motion is made following a conference of counsel that took place on August 15, 2019.

Dated: August 21, 2019

BAKER & HOSTETLER LLP

/s/ Joseph N. Sacca
JOSEPH N. SACCA

Attorneys for Defendant and Counterclaimant
ELYSIUM HEALTH, INC. *and Defendant* MARK MORRIS

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant and Counterclaimant Elysium Health, Inc. ("Elysium") and Defendant Mark Morris ("Morris," together, "Defendants") respectfully submit this Memorandum of Points and Authorities in support of their Motion *in limine* to exclude the Supplemental Expert Report of Dr. Carla Kagel disclosed on July 26, 2019 ("July Report")[1] (ECF No. 240-04), and barring Dr. Carla Kagel ("Dr. Kagel") from testifying regarding any opinions or analyses set forth therein.

The July Report does not "supplement" Dr. Kagel's initial expert report as contemplated by Federal Rule of Civil Procedure 26(e). Instead, under the guise of supplementation, the July Report offers an entirely new expert opinion on certain testing performed in-house by Plaintiff ChromaDex, Inc. ("ChromaDex") on its own product that could have and should have been performed earlier and addressed in her initial report. Because Dr. Kagel's new opinion rests on information that could have been available for her initial report, it is not a proper supplement and should therefore be excluded pursuant to Federal Rule of Civil Procedure 37(c)(1).

Pursuant to Rule 26(e), a party must supplement an expert report if it learns, based on newly available information, that the initial disclosure was incorrect or incomplete. However, the duty to supplement under Rule 26(e) is not a vehicle for ChromaDex to present new expert opinions after the expert disclosure deadline when Dr. Kagel's ability to address that information was wholly within ChromaDex's control at the time – and, in fact, well before – Dr. Kagel submitted her initial report. Elysium will suffer substantial prejudice and significant harm if Dr. Kagel's July Report, along with any related testimony, is not excluded from trial.

[1] *See* Declaration of Joseph N. Sacca ("Sacca Decl."). Unless otherwise stated, all references to Exhibits herein refer to exhibits attached to the Sacca Declaration.

A. Background

One of the several grounds for Elysium's claim for breach of contract by ChromaDex is the presence of the substance acetamide above the "No Significant Risk Level" ("NSRL") established by California's Proposition 65 in the nicotinamide riboside ("NR") that ChromaDex sold to Elysium. Elysium's claim is based principally on testing of the NR ingredient batches sold to it by ChromaDex performed by Elysium's new NR contract manufacturer ("Contract Manufacturer"), in 2017.[2] ChromaDex was clearly aware of this testing, as evidenced by the fact that ChromaDex had affirmatively used a document reflecting Contract Manufacturer's testing of ChromaDex's NR for acetamide during ChromaDex's Rule 30(b)(6) deposition of a Contract Manufacturer representative on November 29, 2018. *See* Ex. A.

On June 21, 2019, the deadline for disclosure of expert reports, ChromaDex served the initial Expert Report of Carla Kagel ("June Report"). *See* ECF No. 240-03. Dr. Kagel's 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. *Id.* The June Report did not address the testing of NR ingredient batches ChromaDex sold to Elysium, or address in any way Contract Manufacturer's testing of those batches. Moreover, it did not express any opinion on whether or not the NR ingredient batches sold to Elysium contained acetamide. Indeed, the list of documents considered by Dr. Kagel in preparing her June Report does not include the document bearing bates number ELY_0063252-98 (Ex. A) – the document reflecting Contract Manufacturer's acetamide testing – indicating that ChromaDex did not supply Dr. Kagel with information concerning the acetamide testing by Contract Manufacturer despite the fact that ChromaDex was not only aware of it, but had in fact used the document summarizing that testing as a deposition exhibit less than

[2] The identity of Elysium's NR manufacturer is confidential and proprietary business information.

three months earlier. *See* June Report (ECF No. 240-03), Appx. 1, at 1-3.

The deadline for rebuttal expert reports in this matter was July 26, 2019. Elysium elected to not prepare a rebuttal to Dr. Kagel's June Report because Dr. Kagel did not address the testing most relevant to Elysium's claim – the testing conducted by Contract Manufacturer – let alone express an opinion on the presence of acetamide in the NR it sold Elysium. However, on the July 26 rebuttal deadline, ChromaDex served Dr. Kagel's July Report, which for the first time opined that the NR ingredient batches ChromaDex sold Elysium contained NR below Proposition 65's NRSL based on purported acetamide testing of NR from lots that contained NR supplied by ChromaDex to Elysium, without addressing the age of the samples, opining on the storage conditions, or opining on whether or not the samples had degraded over time. *See* ECF No. 240-04. This wholly new opinion addressed new and different testing purportedly done by ChromaDex itself on June 27, 2019, on product samples ChromaDex had in its possession since 2014 and 2015. *See* ECF No. 240-04; ECF No. 240-02 at 8-20. Because this new opinion came on the day rebuttal expert reports were due, Elysium obviously had no opportunity to present any expert in rebuttal.

II. ARGUMENT

A. Legal Standard for Supplementing Expert Reports

Pursuant to Rule 26(e), a party must supplement an expert report if it "learns that in some material respect the disclosure or response is incomplete or incorrect." Fed. R. Civ. P. 26(e)(1)(A). As courts in this district have recognized, "Rule 26(e)'s supplementation requirement is not intended, however, to permit parties to add new opinions to an expert report based on evidence that was available at the time the initial expert report was due." *United States ex rel. Brown v. Celgene Corp.*, 2016 WL 6562065, *4 (C.D. Cal. Aug. 23, 2016). Indeed, while "Rule 26(e) obliges a party to 'supplement or correct' its disclosures upon information later acquired, this does not give license to sandbag one's opponent with claims and issues which

should have been included in the expert witness' report . . ." *Plumley v. Mockett*, 836 F. Supp. 2d 1053, 1062 (C.D. Cal. 2010) (internal quotation marks and citation omitted); *see also Carter v. Finely Hosp.*, 2003 WL 22232844, *2 (N.D. Ill. Sept. 22, 2003) ("It is disingenuous to argue that the duty to supplement under Rule 26(e)(1) can be used as a vehicle to disclose entirely new expert opinions after the deadline established by the court under Rule 26(a)(2)(C).")

Accordingly, a supplemental expert report that states new opinions is "beyond the scope of proper supplementation and subject to exclusion under Rule 37(c)." *Plumley*, 836 F. Supp. 2d at 1062 (*quoting Cohlmia v. Ardent Health Servs., LLC*, 254 F.R.D. 426, 433 (N.D. Okla. 2008).

B. Dr. Kagel's July Report is a Procedurally Improper New Expert Opinion Far Outside the Scope of Rule 26(e)

Dr. Kagel's July Report violates Rule 26(e) because it includes new opinions not expressed in the June Report that extend far beyond the proper scope of supplementation. Dr. Kagel's new opinions in the July Report are not dependent on truly newly available information, but rather rest on evidence ChromaDex could have developed at the time Dr. Kagel submitted her initial expert report – and, in fact, well before that time.

Indeed, Dr. Kagel's opinions in her July Report are impermissible new opinions because they concern a completely different set of acetamide testing than that which informed her opinions in her initial expert report. While the June Report opined on third party testing conducted for Elysium of commercially available finished third-party products containing NR supplied by ChromaDex and certain in-house ChromaDex testing of lots of NR out of which ChromaDex sold to those third parties, it did not address the purported testing done by ChromaDex of the NR ingredient samples it sold to Elysium. That was only addressed in the July Report. (ECF Nos. 240-03, 240-04). Not only is this a completely different set of testing, but the product samples tested had been in ChromaDex's possession since 2014 and

2015 (ECF Nos. 240-03, 240-02 at 8-20), and plainly could have been tested by ChromaDex before Dr. Kagel submitted her initial report, just as it had tested NR it sold to third parties so that she could report the results of that testing in her initial report. This is clearly not the type of "new" information that would warrant supplementation pursuant to Rule 26(e). The fact that ChromaDex waited until six days after the expert disclosure deadline to complete its testing, after actively withholding relevant documents from their expert, in no way justifies characterizing Dr. Kagel's new opinion on different testing as a "supplement" to her June Report.

As such, Dr. Kagel's July Report is an impermissible attempt to introduce new opinions after the disclosure deadlines under the "guise of a 'supplement.'" *Plumley*, 836 F. Supp. 2d at 1062; *see also Trinity Homes, LLC v. Ohio Cas. Ins. Co. Grp.*, 2011 WL 2261297, *3 (S.D. Ind. June 8, 2011) ("an expert report that discloses new opinions is in no way a mere supplement to a prior report"). Far from "new information," the July Report is based on ChromaDex's testing of product that was in its possession for years, highlighting how Dr. Kagel's new opinions rely on information ChromaDex could have supplied her much earlier than it did. *See, e.g*, *Celgene*, 2016 WL 6562065, *5 (concluding that opinions in expert reports were "untimely, not supplemental" when evidence used as basis for purported supplemental reports was available at time of initial reports); *Solaia Tech. LLC v. ArvinMeritor, Inc.*, 361 F. Supp. 2d 797, 807 (N.D. Ill. 2005) ("If the late-filed opinions are new, they must be stricken.").

Because the July Report propounds entirely new opinions not expressed in the June Report, it falls clearly outside the scope of proper supplementation under Rule 26(e), and therefore should be excluded. *See Mariscal v. Graco*, 252 F. Supp. 3d 973, 980-82 (N.D. Cal. 2014) (court observed that supplemental report "substantially enlarged the scope" of the expert's initial report and found that second expert opinion was an "untimely and improper expert disclosure"); *see also Plumley*, 836 F. Supp. 2d at 1062 (supplemental expert reports that state additional

opinions are "beyond the scope of proper supplementation and [are] subject to exclusion").

C. Dr. Kagel's July Report and Related Testimony Should Be Excluded Pursuant to Rule 37(c)(1)

Rule 37(c)(1) provides for the exclusion of expert reports deemed improper supplements under Rule 26(e). Indeed, "opinions expressed in an untimely expert report – even under the guise of supplementation – are [] subject to exclusion" under Rule 37(c)(1). *Celgene*, 2016 WL 6562065, *5. The Ninth Circuit gives "wide latitude to the district court's discretion to issue sanctions under Rule 37(c)(1)," which "gives teeth" to the requirements regarding expert disclosures. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp*., 259 F.3d 1101, 1106 (9th Cir. 2001). Rule 37(c)(1) is a "self-executing," "automatic" sanction designed to provide a strong inducement for disclosure. *Id.* (quoting Fed. R. Civ. P. 37 advisory committee's note (1993)).

Under Rule 37(c)(1), a party will be prohibited from using untimely expert witness testimony or opinions expressed in an improper expert report unless the party can show that its failure to disclose the information was either "substantially justified or harmless." *Id.* at 1106. The party facing exclusion of its expert's testimony bears the burden of demonstrating that its delay was justified or harmless. *Torres v. City of Los Angeles*, 548 F.3d 1197, 1213 (9th Cir. 2008). To that end, the Ninth Circuit has set forth several factors for the court to consider in determining whether a violation of expert discovery rules can be deemed harmless, which include: "(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 disclosing the evidence." *Lanard Toys, Ltd. v. Novelty, Inc*., 375 Fed. App'x. 705, 713 (9th Cir. 2010).

Rule 37(c)(1) mandates exclusion of Dr. Kagel's improper July Report given that all of the factors articulated by the Ninth Circuit for evaluating ChromaDex's violation of Rule 26(e) weigh against a finding of harmlessness. As for the first

factor, Elysium will suffer substantial prejudice if ChromaDex is permitted to sandbag Elysium with a new expert opinion based on evidence that could easily have been available for inclusion in Dr. Kagel's June Report. There is no ability for Elysium to cure the prejudice, so the second factor also weighs against harmlessness. Elysium was unable to prepare or provide a rebuttal to the new expert opinion first expressed in Dr. Kagel's July Report (since it was first served on the rebuttal deadline). The third factor also supports exclusion, as there is the potential for the trial to be disrupted if Elysium has to conduct what would amount to discovery concerning the new testing not disclosed until the July Report during an examination of Dr. Kagel at trial.

Finally, the fourth factor also weighs heavily against harmlessness. ChromaDex's decision not to disclose this new testing until it made a supplemental document production on July 24, 2019, almost a month after the testing was complete and a mere two days before rebuttal expert reports were due, clearly demonstrates ChromaDex's willfulness in not disclosing the evidence. (Ex. B; ECF No. 240-02 at 8-20). This delay came despite the fact that Elysium had made a standing request for all such acetamide testing and results at the deposition of ChromaDex's Director of Technology in March 2019 (Ex. C at 57:16-58:3; 181:20-184:17), and further deprived Elysium of the opportunity to respond to the new testing, or even take discovery into it.

Accordingly, the *Lanard Toys* factors weigh heavily in favor of excluding Dr. Kagel's improper July Report pursuant to Rule 37(c)(1).

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III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant its motion *in limine* and preclude Dr. Kagel from testifying about her opinions and analyses set forth in the July Report; or, in the alternative, Defendants request that they be permitted to take additional discovery as set forth above.

Respectfully submitted,

Dated: August 21, 2019

BAKER & HOSTETLER LLP

By: */s/ Joseph N. Sacca*
JOSEPH N. SACCA

Attorneys for Defendant and Counterclaimant ELYSIUM HEALTH, INC. *and Defendant* MARK MORRIS