COOLEY LLP
MICHAEL ATTANASIO (151529)
(mattanasio@cooley.com)
EAMONN GARDNER (310834)
(egardner@cooley.com)
JON F. CIESLAK (268951)
(jcieslak@cooley.com)
BARRETT J. ANDERSON (318539)
(banderson@cooley.com)
SOPHIA M. RIOS (305801)
(srios@cooley.com)
4401 Eastgate Mall
San Diego, CA 92121
Telephone: (858) 550-6000
Facsimile: (858) 550-6420

Attorneys for Plaintiff and Counter-Defendant ChromaDex, Inc.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

(SOUTHERN DIVISION)

ChromaDex, Inc.,

Plaintiff,

v.

Elysium Health, Inc.,

Defendant.

Elysium Health, Inc.,

Counterclaimant,

v.

ChromaDex, Inc.,

Counter-Defendant.

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

CHROMADEX, INC.'S OPPOSITION TO ELYSIUM HEALTH, INC.'S MOTION FOR LEAVE TO FILE THIRD AMENDED COUNTERCLAIMS

Table of Contents

Page

I. INTRODUCTION 1
II. RELEVANT HISTORY 4
A. The Parties' Present Allegations 4
B. Elysium's Proposed Allegations 5
1. The Proposed cGMP Warranty Allegations 6
2. The Proposed Safety Warranty Allegations 7
C. The Waiver Provision 9
D. Discovery Between the Parties 9
III. LEGAL STANDARD 10
IV. ARGUMENT 11
A. Elysium's PTACC Is Unduly Prejudicial to ChromaDex 11
B. Elysium Has Unduly Delayed Alleging the PTACC 16
C. Elysium's New Allegations Are Made in Bad Faith 18
D. The PTACC Is Futile Because Elysium Contractually Waived the Proposed Warranty Claims 21
E. If the Motion Is Granted, the Court Should Extend Discovery and Trial by Three Months 24
V. CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases

Acri v. International Association of Machinists & Aerospace Workers,
781 F.2d 1393 (9th Cir. 1986) 16

Ahlmeyer v. Nevada System of Higher Education,
555 F.3d 1051 (9th Cir. 2009) 21, 24

Bonin v. Calderon,
59 F.3d 815 (9th Cir. 1995) 19

Breakdown Services, Ltd. v. Now Casting, Inc.,
550 F. Supp. 2d 1123 (C.D. Cal. 2007) 21

Brion Jeannette Architecture v. KTGY Group Inc.,
2009 WL 10675886 (C.D. Cal. June 11, 2009) (Carney, J.) 12, 16

California ex. rel. California Department of Toxic Substances Control v. Neville Chemical Co.,
358 F.3d 661 (9th Cir. 2004) 21

Chodos v. West Publishing Co.,
292 F.3d 992 (9th Cir. 2002) 11

Contact Lumber Co. v. P.T. Moges Shipping Co.,
918 F.2d 1446 (9th Cir. 1990) 16

Dexcowin Global, Inc. v. Aribex, Inc.,
2017 WL 3485790 (C.D. Cal. Mar. 23, 2017) 14

Eminence Capital, LLC v. Aspeon, Inc.,
316 F.3d 1048 (9th Cir. 2003) 11

Excela Creative, LLC v. Deal Segments, LLC,
2014 WL 12589653 (C.D. Cal. Dec. 5, 2014) 13

Foman v. Davis,
371 U.S. 178 (1962) 1, 4, 10, 24

In re Garcelon's Estate,
104 Cal. 570 (1894) 22

Griggs v. Pace American Group, Inc.,
170 F.3d 877 (9th Cir. 1999) 18

Hand v. Mazer,
2010 WL 11515183 (C.D. Cal. Dec. 3, 2010) (Carney, J.) 16

Jackson v. Bank of Hawaii,
902 F.2d 1385 (9th Cir. 1990) 16

Kaplan v. Rose,
49 F.3d 1363 (9th Cir. 1994) 13, 17

KFD Enterprises, Inc. v. City of Eureka,
2012 WL 2196330 (N.D. Cal. June 14, 2012) 13, 19

Lee v. City of Los Angeles,
250 F.3d 668 (9th Cir. 2001) 6, 20

Lockheed Martin Corp. v. Network Solutions, Inc.,
175 F.R.D. 640 (C.D. Cal. 1997) 11, 14, 16

Marsh v. Janda,
2016 WL 4545323 (C.D. Cal. July 28, 2016) 19

McCoy v. Iberdrola Renewables, Inc.,
760 F.3d 674 (7th Cir. 2014) 21, 24

Mendoza v. Nordstrom, Inc.,
2012 WL 12888101 (C.D. Cal. May 2, 2012) (Carney, J.) 18, 21

MV American Queen v. San Diego Marine Construction Corp.,
708 F.2d 1483 (9th Cir. 1983) 18

In re MyFord Touch Consumer Litigation,
46 F. Supp. 3d 936 (N.D. Cal. 2014) 24

National Rural Telecommunications Cooperative v. DIRECTV, Inc.,
319 F. Supp. 2d 1040 (C.D. Cal. 2003) 23, 24

Olander Enterprises, Inc. v. Spencer Gifts, LLC,
2011 WL 13225064 (C.D. Cal. Dec. 1, 2011) (Carney, J.) 10

Pipe Restoration Tech., LLC v. Pipeline Restoration Plumbing, Inc.,
No. 13-00499, slip op. (Apr. 11, 2014) 18

Pollstar v. Gigmania Ltd.,
170 F. Supp. 2d 974 (E.D. Cal. 2000) 6

Reed v. KPS Alarms, Inc.,
2016 WL 6836949 (C.D. Cal. Feb. 4, 2016) 19, 21, 24

Trimble Navigation Ltd. v. RHS, Inc.,
2007 WL 2727164 (N.D. Cal. Sept. 17, 2007) 14, 15

Wible v. Aetna Life Ins. Co.,
375 F. Supp. 2d 956 (C.D. Cal. 2005) 6

Zivkovic v. Southern California Edison Co.,
302 F.3d 1080 (9th Cir. 2002) 11, 16

Statutes

Uniform Commercial Code, § 12-10 24

Other Authorities

Federal Rule of Civil Procedure 15 10

Federal Rule of Civil Procedure 16(b) 25

Federal Rule of Civil Procedure 34(b)(2)B 10

Federal Rule of Evidence 201 ..... 6, 20

I. INTRODUCTION

This is a breach-of-contract case about Elysium Health, Inc.'s ("Elysium's") willful refusal to pay for valuable product it ordered and received from ChromaDex, Inc. ("ChromaDex") in the summer of 2016. Elysium ordered and stockpiled enormous shipments of ChromaDex product far in excess of what it usually obtained, then profited immensely from its use in Elysium's retail sales. Yet to this day Elysium has refused to pay one nickel for what it accepted and used. Elysium's misappropriation, and the profits that followed, became its war chest in an offensive designed to drive ChromaDex from the retail market. Elysium's campaign included the brazen breach of contract at issue here, the stealth recruitment of key employees from ChromaDex, the exploitation of those employees' technical know-how to develop Elysium's own production capability, and a failed challenge to ChromaDex's intellectual property at the U.S. Patent and Trademark Office. Seeking to mask its overarching strategy to put ChromaDex out of business, Elysium now requests leave to add "new" claims that it has known about for *months* and even *years*, that will dramatically alter the scope and the timeline of this litigation, and that are verifiably false. The Court should reject Elysium's motion for leave to file its Proposed Third Amended Counterclaims ("PTACC"). The factors in *Foman v. Davis*, 371 U.S. 178 (1962)—including unfair prejudice to ChromaDex, Elysium's undue delay and bad faith, and futility of Elysium's additional allegations—each weigh in favor of denial.[1]

First, ChromaDex would be significantly prejudiced by the addition of additional, case-altering allegations at this stage of the action. This straightforward breach-of-contract case was filed by ChromaDex well over one year ago. Elysium does not even dispute the core fact of this case: that it ordered huge shipments of ChromaDex's ingredients and sold products containing them to the public for a

[1] "The Motion" and citations to "Mot." refer to Elysium's Memorandum of Points and Authorities in Support of its Motion for Leave to File Third Amended Counterclaims and First Amended Answer to Third Amended Complaint. [Dkt. 88-1.]

significant profit, but *did not pay* and *has not paid* ChromaDex what it owes. Rather, up to this point, Elysium has only contended that it has been charged *too much* for the products it received, as well as various (untrue) allegations surrounding the execution of the contracts between the parties. Now, Elysium seeks to fundamentally expand, and necessarily delay, this litigation by adding allegations that are wholly different from that core contract dispute. In particular, Elysium seeks to transform this case into a dispute over the *composition* and *manufacturing* of an ingredient made by ChromaDex called nicotinamide riboside ("NR"). The facts involved in these additional allegations would necessitate burdensome new discovery, scientific testing, and expert opinions. Allowing Elysium to add these allegations, more than sixteen months after the case began and only a few months before the Court-ordered discovery deadline, would be unduly prejudicial to ChromaDex.

Second, Elysium's proposed allegations are not "new" to Elysium, and Elysium has unreasonably delayed asserting them in this case. For example, as to Elysium's purportedly "new" Current Good Manufacturing Practices ("cGMP") allegations, Elysium expressly alleged in a complaint filed in the Southern District of New York that it "discovered" its cGMP claims in September 2016 (a year and a half before it filed the instant Motion). Likewise, as to Elysium's supposedly "new" "Regulated Substance" allegations, Elysium has been aware of the underlying grounds for these allegations since at least November 3, 2017—the date when Elysium's counsel levied extrajudicial threats against ChromaDex based on the same alleged facts. Whatever strategic basis Elysium may have had for waiting, its undue delay in bringing these allegations in this litigation weighs against its Motion.

Third, Elysium's apparent bad faith in filing the PTACC also weighs against its Motion, as shown by its discovery gamesmanship and its insistence in including unnecessary and untrue defamatory statements in its proposed additional allegations. Although Elysium contends that there is ample time to pursue discovery on its added claims in the next few months, Elysium fails to mention that it has thus far withheld

providing any meaningful discovery in response to ChromaDex's requests. ChromaDex first requested documents on June 30, 2017, but Elysium did not produce *anything* until December 1, 2017. In the *nine months* leading up to the filing of this Motion, Elysium has produced a meager 5,000 documents out of what it previously represented is a pool of more than 100,000 potentially responsive documents, and most of those only in response to this Court's order compelling it to do so.[2] In essence, Elysium wants this Court to grant it permission to investigate its "new" allegations, while it has been constantly and brazenly delaying providing discovery into the claims that have long been at issue.

Elysium's true intent in bringing its "new" allegations is demonstrated by the false and inflammatory allegations Elysium includes in the PTACC, notwithstanding (i) ChromaDex's offer to provide testing results showing the allegations are baseless and (ii) the fact that the allegations are not actually necessary to Elysium's additional claims. Despite repeated cautions from ChromaDex, Elysium insisted on naming many of ChromaDex's third-party customers in its public filing, and alleging that those products contain excessive amounts of a certain "Regulated Substance." ChromaDex's own diligent scientific testing reveals that any Regulated Substance in those third-party products, to the extent there is any, *could not have come from ChromaDex's NR*. ChromaDex offered to share its test results with Elysium, but Elysium refused. And when ChromaDex then requested that Elysium at least re-word its proposed Regulated Substance allegations to *generally* reference the third parties—thus permitting them without *specifically* identifying the products—Elysium also pointedly rejected the compromise. Elysium's unwarranted refusal to consider clear scientific evidence and Elysium's determination to name ChromaDex's customers lays bare its bad-faith

[2] On March 2, 2018—over a week after filing the Motion—Elysium produced a new batch of 2,166 documents, mostly non-unique communications between Elysium and ChromaDex. But this only highlights the paucity of Elysium's prior productions and does nothing to alleviate the prejudice already suffered by ChromaDex as a result of Elysium's inexcusable delays.

motive in bringing the PTACC, and the Court should decline to reward such conduct.

Fourth, Elysium has contractually and permanently waived any claim based on its proposed allegations, and any amendment now would be an exercise in futility. Under the NIAGEN Supply Agreement—the terms of which the Court may consider on this Motion—"all claims made with respect to the product shall be deemed waived by Elysium Health unless made in writing and received by ChromaDex within thirty (30) days of delivery" of the shipment ("the Waiver Provision"). Elysium's PTACC does not aver that Elysium made written claims about ChromaDex's NR within thirty days of receiving any shipment. Nor does it allege that Elysium provided ChromaDex an opportunity to cure any alleged non-conformity in any shipment. Instead, Elysium sold its product containing ChromaDex's NR to the consuming public, and profited handsomely from those sales. Elysium's attempt to creatively plead around its waiver of these claims is unavailing; the Waiver Provision is proper and enforceable, and ChromaDex cannot be blamed for Elysium's failure to test the NR it received. Elysium's PTACC allegations are thus waived and it would be futile to assert them here.

Elysium's Motion fails under the *Foman* factors. In a bid to distract from these deficiencies, Elysium misrepresents the parties' negotiations to make ChromaDex appear dilatory. Nothing could be further from the truth. On January 4, 2018, after learning of Elysium's plan to propose amended allegations, ChromaDex repeatedly requested that Elysium provide the proposed PTACC, but Elysium repeatedly refused. ChromaDex did not receive even a *draft* version of Elysium's PTACC until January 24, 2018. Once it did, ChromaDex diligently conducted its own scientific testing and, as soon as it was completed, presented its findings to Elysium. In the meantime, ChromaDex sought to reduce the prejudice of the PTACC and to seek additional time for the extensive discovery that they would require. ChromaDex is not the dilatory party here. Elysium's Motion should be denied, and its PTACC allegations rejected.

II. RELEVANT HISTORY

A. The Parties' Present Allegations

ChromaDex originally filed this breach-of-contract action on December 29, 2016 ("the Action"). [Dkt. 1.] After lengthy motion practice, during which each party refined their existing claims and asserted new ones, the parties' final allegations resolved into four documents: ChromaDex's Third Amended Complaint [Dkt. 48] ("TAC"), Elysium's Answer to the TAC [Dkt. 51], Elysium's Second Amended Counterclaims [Dkt. 65] ("SACC"), and ChromaDex's Answer to the SACC [Dkt. 80]. For its part, Elysium had the opportunity to file, and did file, four pleadings: two answers including counterclaims, and two independent sets of counterclaims. [Dkts. 11, 31, 51 & 65.] The parties' claims have narrowed to a few disputed matters focusing on proper payments under, and the execution of, the contracts between the parties, including: (1) how much Elysium owes ChromaDex for the ingredients it received but never paid for under the parties' contractual agreement; (2) whether ChromaDex abided by an exclusivity provision in the agreement; and (3) whether ChromaDex improperly used its patents covering NR in relation to the parties' contractual agreements. None of the factual issues now before the Court involve testing ChromaDex's NR ingredient or examining the conditions under which it is manufactured.

B. Elysium's Proposed Allegations

Elysium now seeks to allege two entirely different categories of claims under Sections 3.7 and 3.9 of the NIAGEN Supply Agreement.[3] For Section 3.7 ("the cGMP Warranty"), Elysium seeks to allege that ChromaDex failed to manufacture its NR in accordance with cGMPs for pharmaceutical products. [PTACC ¶ 87.] For Section 3.9 ("the Safety Warranty"), Elysium seeks to allege that ChromaDex did not warn it of potential "safety" concerns in the NR it delivered to Elysium based on the purported presence of a "Regulated Substance." [PTACC ¶¶ 97–98.] Elysium has never alleged

[3] The NIAGEN Supply Agreement is Exhibit A to the Declaration of Eamonn Gardner in Support of ChromaDex's Opposition to Elysium's Motion ("Gardner Decl.").

violations of the cGMP or Safety Warranties in this Action before.

1. The Proposed cGMP Warranty Allegations

Elysium has already alleged the cGMP Warranty claim in another complaint before a different court. Elysium filed a complaint in the Southern District of New York on September 27, 2017, alleging that ChromaDex engaged in false advertising and deceptive business practices. *In re Elysium Health—ChromaDex Litigation*, Case No. 17-CV-07394(VEC) (S.D.N.Y.) (the "New York Litigation"). In paragraph 81 of that complaint, it alleges that "Elysium discovered in September 2016 . . . that the facility in which ChromaDex's Niagen was produced did not meet cGMP standards and never had."[4] No facts are alleged about how Elysium supposedly "discovered" the claim.

Although Elysium included cGMP allegations in the New York Litigation, it did not make any similar allegations in this Action. Accordingly, on October 6, 2017, ChromaDex objected to the cGMP-related discovery requests Elysium served in this Action. [Gardner Decl. ¶ 5.] ChromaDex properly objected to these requests because Elysium's counterclaims at the time did not allege a breach of any cGMP provision. [Dkt. 31.] Five days after receiving ChromaDex's objections, on October 11, 2017, Elysium had an opportunity to include any cGMP allegations in its SACC, but chose not to do so. [Dkt. 65.] Elysium never explained how its cGMP requests were relevant to the claims it pled in this Action, and Elysium never moved to compel ChromaDex's production of cGMP-related documents in this Action. [Gardner Decl. ¶ 5.]

[4] Elysium's complaint in the New York Litigation is Exhibit B to the Gardner Declaration. The Court may consider it on this Motion because, under Federal Rule of Evidence 201, judicial notice of a matter of public record is proper. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001). Additionally, while the allegations in Elysium's complaint are not true, the fact that Elysium made them is "not subject to reasonable dispute" and "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Wible v. Aetna Life Ins. Co.*, 375 F. Supp. 2d 956, 965 (C.D. Cal. 2005); Fed. R. Evid. 201. Finally, judicial notice is also permitted where, as here, neither party questions the authenticity of the document. *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 978 (E.D. Cal. 2000).

2. The Proposed Safety Warranty Allegations

Elysium also includes in the PTACC allegations concerning a "Regulated Substance" purportedly present in ChromaDex's NR. The first time Elysium mentioned these allegations was on November 3, 2017, when counsel for both parties met at an initial pretrial conference for the New York Litigation. [Gardner Decl. ¶ 6.] In that meeting, Elysium's counsel stated that Elysium believed that ChromaDex's direct-to-consumer product TRU-NIAGEN contained levels of the "Regulated Substance" in excess of a safe harbor level set by a California voter initiative. [*Id.*] Counsel for Elysium impliedly threatened that the unsupported allegations, if made public, would lead to potential class action lawsuits and even a potential California Attorney General action damaging ChromaDex's business. [*Id.*] Elysium's lawyer, however, did *not* suggest or state that Elysium would levy such allegations in *this* Action. [*Id.*] Given the seriousness of Elysium's allegations, ChromaDex sent Elysium a letter dated November 9, 2017, requesting further information about the Regulated Substance and Elysium's testing, including the batch numbers of the ChromaDex product that was tested and the results. [*Id.* ¶ 7.] Elysium never responded. [*Id.*]

On January 4, 2018, Elysium notified ChromaDex that it intended to move for leave to file amended allegations and requested to meet and confer. [Dkt. 88.] Elysium's correspondence provided no detail as to the substance of the proposed allegations. [Gardner Decl. ¶ 9 & Ex. D.] When ChromaDex requested such detail in advance of the meet and confer, Elysium again refused to provide the actual PTACC language or the factual grounds for the allegations, instead vaguely stating that it intended to allege that ChromaDex breached the cGMP and Safety Warranties. [*Id.* ¶ 10.] Twice more, on January 10 and 16, ChromaDex again requested that Elysium provide the language of the proposed allegations and their factual grounds. [*Id.* ¶ 11.] Finally, on January 24, 2018, Elysium provided a redlined draft version of the PTACC, which for the first time informed ChromaDex of Elysium's plans (although that draft is

not the version that Elysium filed with this Motion). [*Id.* ¶ 12.] But despite repeated requests, Elysium has continued to refuse providing the purported testing data or any other information on which it bases its Safety Warranty claims. [*Id.* ¶¶ 7–11, 18–19.]

Shortly after receipt of the PTACC, ChromaDex began testing retained samples of the NR that it sold to Elysium and the third parties whose products are included by name in the PTACC. [Gardner Decl. ¶ 14.] On January 29, 2018, the parties met and conferred regarding Elysium's proposed Motion. [*Id.* ¶ 15.] ChromaDex advised Elysium that it was investigating the allegations in the draft PTACC, and emphasized its concerns over the substantial new discovery that the proposed allegations would require, especially in light of Elysium's discovery delays and the impending discovery deadline in June 2018. [*Id.*] However, ChromaDex offered a proposal for discussion: it would not oppose Elysium's PTACC if Elysium would agree to jointly seek a three-month extension of the current discovery deadline. Elysium agreed to consider the proposal, but later declined ChromaDex's offer of a three-month extension. [*Id.* ¶ 16.]

Before the parties reached a final agreement on the length of the extension, ChromaDex's testing conclusively revealed that it is *scientifically impossible* for ChromaDex's NR to have caused any of the third-party commercial products to have the Regulated Substance in excess of the safe harbor limit in the California voter initiative. [Gardner Decl. ¶ 17.] ChromaDex informed Elysium of its testing results on February 22, 2018, and requested that—given the clear scientific results disproving Elysium's additional allegations—Elysium provide the testing underlying the PTACC and refrain from publicly filing the PTACC as drafted. [*Id.* ¶¶ 17–19.] ChromaDex even offered to share its testing data with Elysium. [*Id.* ¶ 18.] Elysium declined. [*Id.*]

ChromaDex then sought a reasonable compromise: if Elysium would remove the specific names of the third-party products in the PTACC, and thereby mitigate the warrantless risk of harm to ChromaDex's reputation and business relationships, ChromaDex would agree not to oppose the PTACC. [Gardner Decl. ¶ 20.] ChromaDex's offer was entirely reasonable, and would have avoided this Motion

altogether, because the *specific names* of the third parties disclosed in the PTACC are wholly unnecessary to alleging the claims Elysium wishes to make. That ChromaDex has been forced to oppose this Motion underscores what is really afoot here: Elysium's proposed amendments are a Trojan Horse designed to publish bogus "test results" in an attempt to defame ChromaDex and harm its business. [*Id.* ¶ 21.]

C. The Waiver Provision

The NIAGEN Supply Agreement contains an express waiver of warranties by Elysium. Specifically, Section 3.7 of the agreement is titled "Limited Warranty and Disclaimer of all other Warranties," and it provides in pertinent part that:

> (x) ALL CLAIMS MADE WITH RESPECT TO THE PRODUCT SHALL BE DEEMED WAIVED BY ELYSIUM HEALTH UNLESS MADE IN WRITING AND RECEIVED BY CHROMADEX WITHIN THIRTY (30) DAYS OF DELIVERY; (y) ELYSIUM HEALTH MUST MAKE ANY CLAIM FOR . . . BREACH OF WARRANTY WITH RESPECT TO THE NIAGEN SOLD, OR ANY CLAIM OF ANY NATURE WHATSOEVER WITH RESPECT TO THE NIAGEN SOLD HEREUNDER IN WRITING WITHIN THIRTY (30) DAYS AFTER ELYSIUM HEALTH'S RECEIPT OF NIAGEN; AND (z) ELYSIUM HEALTH IRREVOCABLY WAIVES AND RELEASES ALL CLAIMS THAT ARE NOT PROPERLY MADE WITHIN SAID PERIOD.

[Gardner Decl. Ex. A at 11.] The PTACC suggests that the Waiver Provision is unenforceable because "it fails of its essential purpose, and enforcing it as written would deprive Elysium of the value of its bargain." [PTACC ¶ 89.] Elysium's proposed allegations do not aver that Elysium was unaware of the Waiver Provision or its import when Elysium executed the NIAGEN Supply Agreement, nor does Elysium allege that the Waiver Provision is inapplicable to the cGMP and Safety Warranties.

D. Discovery Between the Parties

ChromaDex has diligently pursued discovery related to the topics at issue in this Action, but has been stymied by Elysium at every turn. On June 30, 2017, ChromaDex served production requests on Elysium, and Elysium responded and objected on July 31, 2017. [Gardner Decl. ¶¶ 22–23.] The parties met-and-conferred on August 15,

2017, with ChromaDex specifically requesting a date for Elysium's production of documents under Federal Rule of Civil Procedure 34(b)(2)(B). [*Id.* ¶ 24.] Elysium refused to provide one. [*Id.*] However, Elysium notified ChromaDex that the agreed-upon search terms had returned over 100,000 documents in Elysium's files. [*Id.* ¶ 25.] On September 26, 2017, ChromaDex notified Elysium that its delay in producing documents was unwarranted, and that ChromaDex would move to compel if Elysium was not forthcoming. [*Id.* ¶ 26.] Elysium thereafter agreed to begin rolling productions on December 1, 2017. [*Id.*] The first batch of documents from Elysium on December 1 contained only 1,275 documents. [*Id.* ¶ 27.] Outside of a judicially-compelled production, Elysium produced only 99 more documents until March 2, 2018. [*Id.* ¶ 29.]

In the meantime, ChromaDex was forced to seek judicial relief as to certain categories of documents. On October 25, 2017, ChromaDex filed a motion to compel [Dkt. 68], which was vigorously opposed by Elysium [Dkt. 79]. The Court granted ChromaDex's motion on December 20, 2017, and ordered Elysium to produce documents responsive to the disputed requests within 21 days. [Dkt. 81.] Up until the filing of this Motion, including that compelled production, Elysium produced only 5,000 documents in total. [Gardner Decl. ¶ 30.] Despite repeated protestations by ChromaDex, it took Elysium over *nine months* to produce those 5,000 documents. [*Id.*]

III. LEGAL STANDARD

Federal Rule of Civil Procedure 15 governs motions for leave to amend. Although Rule 15 is generally favorable to a party seeking to amend, "leave to amend is not to be granted automatically." *Olander Enters., Inc. v. Spencer Gifts, LLC*, 2011 WL 13225064, at *3 (C.D. Cal. Dec. 1, 2011) (Carney, J.). When considering whether to deny leave to amend, courts weigh several factors: (1) undue prejudice; (2) undue delay; (3) bad faith or dilatory motive by the moving party; (4) futility of amendment; or a (5) repeated failure to cure deficiencies by previous amendments. *Foman v. Davis*, 371 U.S. 178, 182 (1962). A court also has broad discretion to deny leave to amend

where the party has previously amended its pleading. *Chodos v. West Publishing Co.*, 292 F.3d 992, 1003 (9th Cir. 2002).

IV. ARGUMENT

A. Elysium's PTACC Is Unduly Prejudicial to ChromaDex.

This is a straightforward breach-of-contract case, and it has been for sixteen months. From the beginning, this Action (and all discovery) has focused on how much Elysium owes ChromaDex for the NR it ordered, re-sold for profit, and never paid for, as well as the conduct of the parties under the contracts at issue. Elysium now seeks to significantly enlarge its scope to include the *composition* and *manufacturing* of the ingredient itself—issues that it has never before asserted, and which it has unreasonably delayed asserting until now. If permitted, the PTACC would thrust upon ChromaDex unwarranted additional allegations that would require substantial, additional, expensive, and time-consuming discovery, all on a greatly truncated discovery timeline. That, combined with Elysium's inexcusable delay complying with its existing discovery obligations, would unduly prejudice ChromaDex here.

When a court considers whether to deny leave to amend, the factor of undue prejudice "carries the greatest weight." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). Undue prejudice exists where "new claims radically shift the nature of the case, requiring the opposing party to engage in substantial new discovery or to undertake an entirely new course of argument late in the case." *Lockheed Martin Corp. v. Network Solutions, Inc.*, 175 F.R.D. 640, 644 (C.D. Cal. 1997); *see also Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002) (holding trial court did not abuse its discretion by denying leave to amend before the close of discovery when additional claims would require additional discovery). The PTACC implicates all of these concerns.

Elysium's PTACC would fundamentally shift the nature of the case. The Action presently concerns contractual issues: Elysium's failure to pay for the product it ordered from ChromaDex, the price Elysium received compared to the price other ChromaDex

customers received, and whether ChromaDex enabled other customers to sell certain products when it was prohibited from doing so. Elysium's PTACC, on the other hand, seeks to add significantly different claims related to the *composition* and *manufacture* of ChromaDex's ingredients and various commercial products. For example, the PTACC includes proposed allegations regarding, among other things: (1) whether ChromaDex's NR is manufactured in accordance with highly-technical cGMP standards; (2) purported modifications to ChromaDex's manufacturing process; (3) scientific testing and analysis of ChromaDex's NR and various other commercial products pertaining to the Regulated Substance; and (4) what quantity of the Regulated Substance, if any, in an ingredient shipment required disclosure by ChromaDex. By definition, Elysium's proposed claims will implicate an entirely different set of facts. This unduly prejudices ChromaDex. *See Brion Jeannette Architecture v. KTGY Group Inc.*, 2009 WL 10675886, at *2 (C.D. Cal. June 11, 2009) (Carney, J.) (denying leave to amend where the addition of claim would unduly prejudice the opposing party "by forcing them to prepare new legal defenses, possibly conduct new discovery, and file new substantive and pretrial motions").

The proposed allegations, and ChromaDex's defenses to them, will also require substantial additional discovery. While Elysium contends that it is in the "early stages of fact discovery," [Mot. at 10], that is only true with respect to *Elysium's* production schedule, and only then because of Elysium's inexcusable production delays over the last nine months. Before filing this Motion, Elysium had produced only 5,000 documents from four custodians (out of what Elysium has represented is at least 100,000 documents with relevant search terms), with most of that 5,000 coming as a result of the Court's order in the face of Elysium's intransigence. [Gardner Decl. ¶¶ 26, 28, 30.] In contrast, by the time the Court decides this Motion, ChromaDex will have substantially completed collecting, reviewing, and producing documents. [*Id.* ¶ 32.] But if the Court permits the PTACC, Elysium has already demanded that ChromaDex collect, review, and produce many *more* documents from *more* custodians. [*Id.* ¶ 33.]

That alone is undue prejudice to ChromaDex. *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994) (affirming denial where parties had already engaged in voluminous discovery), *overruled on other grounds by City of Dearborn Heights Act 435 Policy & Fire Ret. Sys. v. Align Tech., Inc.*, 856 F.3d 605 (9th Cir. 2017).

Elysium suggests that because "discovery cutoff" is only "four months away," there is no prejudice to ChromaDex. [Mot. at 10.] Not so. The discovery cutoff (June 14, 2018 [Dkt. 58]) is only *two* months from the Court's scheduled argument on this Motion (April 2, 2018 [Dkt. 92]). Given the radically different issues Elysium seeks to inject into this litigation, a two-month discovery timeline is also prejudicial to ChromaDex. *See e.g.*, *KFD Enters., Inc. v. City of Eureka*, 2012 WL 2196330, at *3 (N.D. Cal. June 14, 2012) (denying leave to amend on prejudice grounds because "[a] motion to dismiss the [new] claim would be briefed and heard, at the earliest, close to the discovery cut-off date, and, if the claim survived, that deadline would need to be extended; as a consequence, the entire action would be delayed").[5]

Elysium's Motion also ignores a critical part of the prejudice to ChromaDex: the PTACC would involve far more than just new document requests. If permitted, it would also require the parties to (1) engage in extensive and time-consuming independent scientific testing and analysis of ChromaDex's NR ingredient shipments and third-party

[5] Unlike here, the cases to which Elysium cites only found no prejudice because the proposed allegations at issue did not involve entirely new areas of factual inquiry. *See Excela Creative, LLC v. Deal Segments, LLC*, 2014 WL 12589653, *6 (C.D. Cal. Dec. 5, 2014) (finding proposed claims were based on "substantially similar, if not identical" facts as those "defendants pled in their answer"); *Hip Hop Beverage Corp. v. RIC Representcoes Importacao e Comercio Ltda.*, 220 F.R.D. 614, 622 (C.D. Cal. 2003) (holding proposed claims were "the same" as already pending claims and would require only "slight adjustment" to discovery plans). In contrast, ChromaDex faces undue prejudice from a two-month discovery window because (as discussed above) it had no notice of Elysium's actual allegations until January 24, 2018, and discovery on the proposed claims will require significant changes to the parties' discovery plans, including scientific testing, additional experts, and ChromaDex's reopening document discovery. This prejudice is compounded by Elysium's discovery delays and the many months Elysium waited before bringing the PTACC.

products; (2) retain, prepare, and defend experts; and (3) otherwise pursue what amounts to an entirely different case, including depositions of different witnesses, and briefing and argument on issues never raised before. [Gardner Decl. ¶ 34.] Given that Elysium has had *months* (and, with respect to the cGMP Warranty, *years*) to consider the allegations in the PTACC, the undue prejudice inherent in permitting the PTACC will be disproportionately borne by ChromaDex.

Elysium next contends that the "relevant evidence" for the PTACC's allegations "would be largely if not entirely in ChromaDex's own possession." [Mot. at 10–11.] Untrue again. Much of the information on which Elysium bases the PTACC—information that Elysium has refused to provide to ChromaDex—is (and has been) in *Elysium*'s possession. This includes the testing Elysium purportedly performed, its prior knowledge of the cGMP standards applicable to the manufacture of ChromaDex's NR, its knowledge regarding the presence of the Regulated Substance in ChromaDex's NR, the existence of any damages arising from the alleged breaches, its compliance or noncompliance with the California voter initiative, and more. Therefore, the PTACC would necessitate that *both* parties seek new discovery, and if Elysium persists in its current habit of delaying its productions, it would leave ChromaDex in an untenable position. *Lockheed Martin*, 175 F.R.D. at 644–45 ("The addition of a claim which depends on different facts, and requires new discovery this late in the litigation would prejudice [the non-moving party].").[6]

Finally, Elysium's argument that ChromaDex has been on "notice" in this Action

[6] Elysium's authority on this point is not to the contrary; those cases arise in wholly different contexts not comparable to this Action. *See Dexcowin Glob., Inc. v. Aribex, Inc.*, 2017 WL 3485790, at *4 (C.D. Cal. Mar. 23, 2017) (finding no prejudice where party opposing motion to amend "d[id] not deny that it has been on notice of" proposed defense for nine months and "acknowledge[d] that no additional discovery [was] necessary"); *Trimble Navigation Ltd. v. RHS, Inc.*, 2007 WL 2727164, at *11 (N.D. Cal. Sept. 17, 2007) (finding no prejudice where party sought to add allegation that already-alleged conduct was inequitable and new discovery was "necessarily limited only to plaintiff's failure to disclose the relevant prior art alleged").

of the allegations in the PTACC is demonstrably false. [Mot. at 11–12.] The first "notice" ChromaDex received was on January 24, 2018, and that only came after ChromaDex's persistent requests. [Gardner Decl. ¶¶ 9–12.] Elysium's argument that there was effective notice because this case "has always involved" breach-of-contract claims is nonsensical. [Mot. at 11.] The claims presently at issue have *nothing to do* with either the cGMP or Safety Warranties, and Elysium never alleged violations of those contractual terms. And despite numerous prior opportunities to do so, Elysium never amended its counterclaims to include its cGMP or Safety Warranty claims.

Elysium's argument that its cGMP-related discovery requests and the parties' meet-and-confers about them constitute "notice" is also unfounded. [Mot. at 12.] Elysium offers no authority (because there is none) that simply propounding discovery requests on a topic not at issue in a litigation opens the door to later adding allegations arising from that topic to the litigation.[7] This is especially true here. Elysium, when challenged at the time, did not explain the relevance of those cGMP requests to the current case, [Gardner Decl. ¶ 5], and even now merely asserts, without support, that "Elysium believes that such discovery requests are relevant," [Mot. at 12]. Elysium never moved to compel production on those cGMP requests—the true test of how "relevant" Elysium "believes" they are—and thus has effectively forfeited any argument to the contrary.

Additionally, because Elysium advances *the exact same* cGMP allegations in the New York Litigation, permitting the cGMP Warranty allegations in this litigation would force ChromaDex to defend duplicative claims in different forums across the country. That is not only prejudicial to ChromaDex, it also contravenes judicial efficiency. *See,*

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[7] Elysium's citation to *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, is inapposite. 2017 WL 3149297 (N.D. Cal. July 25, 2017). In that case, the movant's proposed amendment concerned "existing claims" that "hardly present[ed] new theories of liability that t[ook] [the opposing party] by surprise." *Id.* at *3. Elysium seeks to add two entirely new theories of liability based on entirely new sets of facts, and has propounded a new round of burdensome discovery on its proposed cGMP allegations.

e.g., *Hand v. Mazer*, 2010 WL 11515183, at *2–3 (C.D. Cal. Dec. 3, 2010) (Carney, J.) (staying second-filed case because allowing it to proceed would, *inter alia*, "reward forum shopping, result in duplicative litigation, and risk inconsistent judgments").

The PTACC would substantially change the nature of the case, require extensive and burdensome new discovery, and force ChromaDex to develop an entirely new case in a very short time. That is altogether unduly prejudicial to ChromaDex; the Motion should be rejected. The prejudice to ChromaDex is especially problematic when combined with the other factors discussed below. *Lockheed Martin Corp.*, 175 F.R.D. at 644; *Zivkovic*, 302 F.3d at 1087.

B. Elysium Has Unduly Delayed Alleging the PTACC.

Elysium incorrectly represents that the allegations based on the cGMP and Safety Warranties "have only recently come to Elysium's attention" and "could not have been asserted by Elysium at the outset of the litigation." [Mot. at 13.] To the contrary, Elysium has had knowledge of its proposed allegations for *months* if not *years*.

"Undue delay is a valid reason for denying leave to amend." *Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446, 1454 (9th Cir. 1990). If "the moving party knew or should have known the facts and theories raised by the amendment" at the time of the original pleading, then leave to amend should be denied. *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1388 (9th Cir. 1990) (holding district court did not abuse discretion by denying leave to amend complaint one year after action commenced; rejecting plaintiff's argument that facts were not "fully fleshed out" until that time). "[L]ate amendments to assert new theories are not reviewed favorably when the facts and theory have been known to the party seeking amendment since the inception of the cause of action." *Acri v. Int'l Ass'n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1398 (9th Cir. 1986); *see also Brion Jeannette Architecture*, 2009 WL 10675886, at *2 (denying leave to amend where movant was aware of facts underlying new claim for approximately eight months or longer). And when the moving party knows of the facts underlying its proposed allegations before the litigation begins, the undue delay factor

weighs more in the Court's analysis. *Kaplan*, 49 F.3d at 1370.

Elysium has allegedly known about its cGMP Warranty claim for at least sixteen months, and the Court should not credit Elysium's gratuitous statement that it "learned" about this claim "only through discovery." [Mot. at 14.] In the New York Litigation, Elysium alleged that it "discovered in *September 2016* . . . that the facility in which ChromaDex's Niagen was produced did not meet cGMP standards and never had." Ex. B ¶ 81 (emphasis added). That public allegation, while factually meritless, nevertheless contradicts Elysium's representations to this Court that it only "suspected" before that ChromaDex breached the cGMP Warranty. [Mot. at 16.] Of course, information discovered in September 2016 is hardly "newly discovered." Nor is a delay of sixteen months—September 2016 to February 2018—at all reasonable.

Moreover, Elysium could not have learned of the cGMP Warranty allegations "through discovery" in this case, for two reasons. First, ChromaDex did not file this Action until December 2016, over three months after Elysium contends that it "discovered" the purported cGMP Warranty breach. Second, Elysium first notified ChromaDex of its proposed additional allegations on January 4, 2018, but ChromaDex's first production was served four days later, on January 8. [Gardner Decl. ¶ 32.] Elysium knew of its proposed cGMP Warranty claim many months before it filed this Motion, and its attempts to suggest otherwise are disingenuous, at best.[8]

Elysium has also known about its Safety Warranty allegations for months. Based on its statements to ChromaDex's counsel on November 3, 2017, Elysium was apparently already in possession of its testing results at that time. [Gardner Decl. ¶ 6.] Thus, Elysium's claim that *ChromaDex* bears responsibility for "preclud[ing] Elysium from amending its counterclaims sooner" is misleading. That is especially true given that Elysium has *always* possessed the facts on which it grounds its unfounded "new"

[8] Elysium's bare assertion that ChromaDex's proper objections to its cGMP discovery requests—which Elysium never challenged before this Court—somehow constitute "misconduct" [Mot. at 15–16], is wholly unsupported.

allegations: the certificates of analysis (that it received with every NR shipment), and the NR shipments it received (that it could have tested at any time). [Mot. at 15–16.] Moreover, as discussed above, Elysium cannot plausibly suggest that ChromaDex documents (served January 8, 2018) were necessary for it to allege a Safety Warranty claim that it raised on January 4, 2018.

Elysium had *four* prior opportunities over the last year to allege counterclaims to this Action, but declined each chance to bring the cGMP and Safety Warranty allegations. Elysium's delay in bringing the PTACC is consequently unwarranted. *MV Am. Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1492 (9th Cir. 1983) (upholding denial of leave to amend because new allegations were already known to moving party, would totally alter basis of action, and would necessitate additional discovery); *Mendoza v. Nordstrom, Inc.*, 2012 WL 12888101, at *1 (C.D. Cal. May 2, 2012) (Carney, J.) (denying leave to amend because movant failed "to provide any reason for its additional delay in seeking leave to add these defenses [for] an additional period of approximately eight months during which plaintiffs and the court expended immense amounts of time, expense, and effort in discovery and law and motion").[9]

C. Elysium's New Allegations Are Made in Bad Faith.

Elysium's bad faith in bringing this Motion and filing the PTACC is evident from both its discovery gamesmanship and its insistence on including unnecessary defamatory statements in the PTACC. A motion for leave to amend is made in bad faith when the movant seeks "to prolong the litigation by adding new but baseless legal theories." *Griggs v. Pace Am. Grp., Inc.*, 170 F.3d 877, 881 (9th Cir. 1999). A court may also consider the movant's "history of dilatory tactics" in determining whether or

[9] *Pipe Restoration Tech., LLC v. Pipeline Restoration Plumbing, Inc.*, No. 13-00499, slip op. at 2 (Apr. 11, 2014), does not apply here. In that case, the party opposing amendment did not argue the bad faith or futility factors, and it was the moving party's first attempt to add claims. Elysium's gamesmanship, bad faith, multiple opportunities to add counterclaims, and the futility of its proposed allegations place it in an entirely different realm from *Pipe Restoration*.

not the movant seeks leave to amend in bad faith. *Reed v. KPS Alarms, Inc.*, 2016 WL 6836949, at *3 (C.D. Cal. Feb. 4, 2016).

First, Elysium's bad faith is revealed by its discovery delays and misrepresentations. As discussed in detail above, Elysium's argument that "numerous of [its] proposed allegations" "were learned only through discovery" is entirely misleading. [Mot. at 13–14.] Elysium had all of the information it needed to assert the PTACC months and years ago, and suggesting otherwise is bad faith standing alone. *Bonin v. Calderon*, 59 F.3d 815, 846 (9th Cir. 1995) (finding plaintiff's motion for leave to amend was in bad faith when plaintiff had failed to previously allege facts that "were apparent given the briefest of investigation"); *Marsh v. Janda*, 2016 WL 4545323, at *17 (C.D. Cal. July 28, 2016) (finding amended was made in bad faith where petitioner "offers no legitimate reason to excuse his delay"), *adopting report and recommendation*, 2016 WL 4544326 (C.D. Cal. Aug. 31, 2016) (Carney, J.); *KFD Enters., Inc.*, 2012 WL 2196330, at *2 (dismissing movant's argument that it only learned the facts contained in a proposed amendment where "facts sufficient to support [the proposed] claim have been known to the [plaintiff] for years").

Second, Elysium's bad faith is clear because it filed the Safety Warranty allegations with the sole motive to harm ChromaDex's reputation and commercial relationships. Specifically, as purported support for the claim that ChromaDex sold Elysium NR with a Regulated Substance, Elysium included allegations in the PTACC related to testing for *third-party products* currently on the market that contain ChromaDex's NR. [PTACC ¶ 101.] The supposed testing of these third-party products, which contain numerous ingredients entirely unknown to ChromaDex, lacks any meaningful connection to the NR that ChromaDex sold Elysium. [Gardner Decl. ¶ 13.] And, more importantly, ChromaDex's own scientific testing demonstrates that none of the NR it supplied to these third parties contained the Regulated Substance at the levels Elysium seeks to allege. [*Id.* ¶ 17.] ChromaDex's test results confirm that ChromaDex's ingredients are perfectly safe, something that Elysium has already

publicly touted. Elysium's advertising is replete with references to its human clinical trial showing that its product—Basis—was safe *when it contained ChromaDex's ingredients*. [*Id.* Ex. C ¶¶ 54–56.][10] Elysium's refusal to review ChromaDex's testing and provide its testing to ChromaDex, and the fact its proposed allegations contradict its own advertising, evidences a willingness to sling mud entirely without support.

Elysium's misbehavior with respect to the PTACC simply compounds the bad faith it has shown toward ChromaDex since the beginning of this dispute, including:

- Elysium's theft of ChromaDex's ingredient shipments and subsequent illicit profits, which gave Elysium a runway to continue its enterprise while concurrently launching a competing manufacturing line for ingredients it once purchased.
- Elysium's baseless challenges to ChromaDex's licensed NR patent rights, while at the same time having no intellectual property of its own covering NR. The U.S. Patent Trial and Appeal board wholly rejected one of Elysium's challenges, and partially rejected the other. *See Elysium v. Trustees of Dartmouth College*, IPR2017-01796, Paper No. 9 (PTAB January 18, 2018) (denying institution of *inter partes* review); *Elysium v. Trustees of Dartmouth College*, IPR2017-01795, Paper No. 9 (PTAB January 29, 2018).
- Elysium's stealth recruitment of two of ChromaDex's most knowledgeable employees—Mark Morris and Ryan Dellinger—in order to implement its plan. [*Compare* Dkt. 48 ¶¶ 37, 56–57 *with* Dkt. 51 ¶¶ 37, 56–57 (admitting Morris and Dellinger now work at Elysium).] While at ChromaDex, Morris (now "Head of Scientific Technology" at Elysium) and Dellinger (now "Director of Scientific Affairs") were positioned to know the sterling safety record of ChromaDex's

[10] Exhibit C to the Gardner Declaration—ChromaDex's complaint in the New York Litigation—gathers examples of Elysium's public statements touting the clinical trial. The Court may consider it under Federal Rule of Evidence 201 because it is a matter of public record. *Lee*, 250 F.3d at 689. In any case, it shows that the (undisputed) safety of ChromaDex's NR is already an issue in the New York Litigation, and Elysium's attempt to allege it anew in this Action is improper.

ingredients, including the results of clinical trials showing their safety and their numerous safety certifications from the U.S. Food and Drug Administration.

Further, both Morris and Dellinger joined Elysium around the same time it took delivery of ChromaDex's large ingredient shipments—July and August 2016—showing that, if there *were* grounds for the allegations in the PTACC (and there is not), Elysium would undoubtedly have learned of it when they entered Elysium's employ. Altogether, this further demonstrates both Elysium's bad faith and undue delay, and is more than sufficient to prohibit Elysium's PTACC here. *Mendoza*, 2012 WL 12888101, at *1 ("The Court simply cannot award such gamesmanship.").

D. The PTACC Is Futile Because Elysium Contractually Waived the Proposed Warranty Claims.

Elysium's PTACC is also futile because, under the Waiver Provision, Elysium relinquished all of its claims arising from shipments of ChromaDex NR. Futility of amendment alone is sufficient ground for denial of leave to amend. *Ahlmeyer v. Nev. Sys. of Higher Educ.*, 555 F.3d 1051, 1055 (9th Cir. 2009). An amendment made before the close of discovery is futile if "no set of facts can be proved under the amendment which would constitute a valid[] claim or defense." *Breakdown Services, Ltd. v. Now Casting, Inc.*, 550 F. Supp. 2d 1123, 1132 (C.D. Cal. 2007); *Reed*, 2016 WL 6836949, at *2 (holding amendment futile if it would be subject to dismissal). "Futility [also] includes the inevitability of a claim's defeat on summary judgment." *California ex. rel. Cal. Dept. of Toxic Substances Control v. Neville Chem. Co.*, 358 F.3d 661, 673 (9th Cir. 2004) (quoting *Johnson v. Am. Airlines*, 834 F.2d 721, 724 (9th Cir. 1987)). And a party's failure to allege the necessary elements of a proposed claim is also sufficient cause to deny its motion for leave to amend. *McCoy v. Iberdrola Renewables, Inc.*, 760 F.3d 674, 685 (7th Cir. 2014) (affirming denial where party's proposed amendment failed to allege required elements); *Reed*, 2016 WL 6836949, at *1 (same).

The Waiver Provision prohibits Elysium's PTACC allegations here. Under the NIAGEN Supply Agreement, which Elysium admits is valid and enforceable during the

time that Elysium was purchasing and receiving NR from ChromaDex, [Dkt. 51 ¶¶ 16, 50–53], Elysium agreed to submit any claims regarding ChromaDex's NR in writing within thirty days of receiving a shipment, or it would "IRREVOCABLY WAIVE[] AND RELEASE[] ALL CLAIMS" made "WITH RESPECT TO THE PRODUCT" or "WITH RESPECT TO THE NIAGEN SOLD." [Gardner Decl. Ex. A at 11.] Elysium conceded that it received its last shipment of ChromaDex's NR on July 1, 2016. [*Compare* Dkt. 48 ¶ 29 (alleging ChromaDex filled order of NR on July 1, 2016) *with* Dkt. 51 ¶ 29 ("Elysium admits the allegations in Paragraph 29 of the Third Amended Complaint.").] The PTACC does not allege that Elysium ever made any written claims about ChromaDex's NR within thirty days of receiving any shipment. The Warranty claims are plainly barred.

By its terms, the Waiver Provision applies to Elysium's cGMP and Safety Warranty allegations because both categories are claims "WITH RESPECT TO THE PRODUCT" and "WITH RESPECT TO THE NIAGEN SOLD." [Gardner Decl. Ex. A at 11.] The cGMP Warranty allegations pertain to how the NR was manufactured. And Elysium's proposed Safety Warranty allegations are about the composition of the product when it was shipped to Elysium, and would require scientific analysis of the composition, purity, and safety of the NR sold to Elysium.[11]

It is illogical to suggest, as Elysium does, that enforcement of the Waiver Provision would "deprive Elysium of the value of its bargain." [PTACC ¶ 89.] The bargain Elysium struck expressly included the Waiver Provision. According to longstanding established public policy in California, courts must enforce the language accepted by both parties at the time they executed a contract. *See e.g.*, *In re Garcelon's Estate*, 104 Cal. 570, 591 (1894) (holding parties "of full age and competent

[11] For the same reason, the Waiver Provision also prohibits Elysium from alleging an unclean hands defense. [Mot. at 18.] Elysium should not be permitted to pursue these unduly prejudicial allegations and substantial new discovery simply by styling the proposed allegations as a new "defense."

understanding shall have the utmost liberty of contract, and [] their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice"). Elysium does not allege any facts, nor could it, which would allow it to escape the Waiver Provision here.

Elysium's conclusory allegations that the cGMP Warranty provision "fails of its essential purpose" are also futile. [PTACC ¶¶ 89, 153.] The essential purpose doctrine applies when a party is "deprived of its contractual remedy." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 319 F. Supp. 2d 1040, 1055 (C.D. Cal. 2003) (citations omitted). Elysium's attempt to deploy it here is fruitless; the Waiver Provision's "essential purpose" is to limit ChromaDex's liability by shifting the risk of loss to Elysium. For example, in *Bullseye Telecom, Inc. v. Cisco Sys., Inc.*, the court found that "[b]y definition, a seller's warranty with a limited duration leaves the purchaser without a remedy under the express warranty after a certain period of time"; consequently, "the essential purpose of the limited warranty . . . was to ensure that the [product] would be free from defects in material and workmanship under normal use only for a period of 90 days." 2010 WL 1814669, at *4 (E.D. Mich. May 6, 2010). The court thus dismissed the plaintiff's allegation that an express warranty limitation that left it "without a remedy" was "not enforceable because it fails of its essential purpose." *Id.* Elysium's waiver here is proper for the same reason: the Waiver Provision's essential purpose is to prohibit Elysium from bringing allegations arising from ChromaDex's NR after the applicable time period has ended.

Similarly, in *Southwest Engineering, Inc. v. Yeomans Chicago Corp.*, the court found that it need not accept as true "[s]imple assertions that [the contract] provisions failed of [their] essential purpose and/or would be unconscionable to enforce." 2009 WL 10672252, at *5 (S.D. Cal. 2009) (internal quotation marks omitted). The court dismissed the plaintiff's complaint, even after "assuming the truth of all factual allegations and construing inferences in Plaintiff's favor," finding that "Plaintiff cannot recover damages or pursue remedies that are precluded by agreement between the

parties." *Id.* Similarly, even construing Elysium's "simple assertions" entirely in its favor, they cannot overcome the plain language of the Waiver Provision, and thus Elysium's Motion is futile.

The Motion is also futile for another reason: Elysium's PTACC fails to allege at least two of the elements necessary for the Court to find that Sections 3.7 and 3.9 have each failed of their essential purpose. First, Elysium fails to allege any "changed circumstances" that have occurred since the time the parties executed the NIAGEN Supply Agreement, such that enforcing "the limited remedy would essentially leave [Elysium] with no remedy at all." *Nat'l Rural Telecomms. Coop.*, 319 F. Supp. 2d at 1055. Second, Elysium fails to allege (as it must) that it provided ChromaDex an opportunity to cure the alleged defects in the NR it shipped. For example, in *In re Seagate Technology LLC Litigation*, the court rejected a failure of essential purpose argument where the plaintiff did not plausibly allege that the defendant had failed to cure after "more than one opportunity to fix the nonconformity." 233 F. Supp. 3d 776, 784 (N.D. Cal. 2017); *see also McCoy*, 760 F.3d at 685; *Reed*, 2016 WL 6836949, at *1; *In re MyFord Touch Consumer Litig.*, 46 F. Supp. 3d 936, 970 (N.D. Cal. 2014); 1 White & Summers, *Uniform Commercial Code*, § 12-10 at 661.

Elysium's additional allegations in the PTACC are futile under the Waiver Provision. This *Foman* factor not only weighs in favor of denying Elysium's Motion, but also provides independent grounds to deny it. *Ahlmeyer*, 555 F.3d at 1055 (futility of amendment alone is sufficient ground for denial of leave to amend).

E. If the Motion Is Granted, the Court Should Extend Discovery and Trial by Three Months.

Elysium's additional allegations and discovery gamesmanship gravely threaten ChromaDex's ability to fully and fairly litigate this matter, and thus the Motion should be denied. That is especially true given that this "Court sets **FIRM** trial dates and will

not change them without good cause having been shown."[12] However, insofar as the Court is inclined to grant Elysium's Motion, it should also find good cause under Federal Rule of Civil Procedure 16(b) to extend the discovery and trial dates in order to lessen the resulting prejudice to ChromaDex.[13]

ChromaDex estimates that it will require approximately three additional months for the parties to conduct proper discovery, obtain and analyze testing of the relevant products, retain, prepare, and depose new experts, and develop their respective cases in relation to Elysium's additional allegations. [Gardner Decl. ¶ 34.] Under the Court's current Scheduling Order, discovery closes on June 14, 2018, and the trial begins on September 18, 2018. [Dkt. 58.] ChromaDex suggests that an appropriate extension would move the discovery deadline to September 14, 2018, and set the trial for December 2018.

V. CONCLUSION

For the foregoing reasons, the Court should deny Elysium's Motion and reject the new allegations in the PTACC. To the extent the Court is inclined to grant leave to amend, it should concurrently extend the discovery and trial dates by approximately three months.

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COOLEY LLP
MICHAEL A. ATTANASIO (151529)
EAMONN GARDNER (310834)
JON F. CIESLAK (268951)
BARRETT J. ANDERSON (318539)
SOPHIA M. RIOS (305801)

/s/ Eamonn Gardner
Eamonn Gardner

Attorneys for Plaintiff and Counter-Defendant ChromaDex, Inc.

[12] https://www.cacd.uscourts.gov/honorable-cormac-j-carney (emphasis in original).
[13] Elysium appears to agree that such an extension would be appropriate. [Mot. at 10.]