UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re Elysium Health-ChromaDex Litigation	Case No. 1:17-cv-07394 (LJL)

MEMORANDUM OF LAW IN SUPPORT OF ELYSIUM HEALTH, INC.'S MOTION FOR LEAVE TO SUPPLEMENT AND AMEND ITS COUNTERCLAIMS

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PRELIMINARY STATEMENT

Counterclaim Defendant ChromaDex has long used false and misleading advertising to dupe consumers into believing that its Tru Niagen product can help prevent or cure various diseases. These deceptive practices are a core component of Elysium's pending counterclaims against ChromaDex for false advertising and unfair competition. An 8-K filed by ChromaDex three weeks ago makes clear that its misconduct is getting even worse.

Over the past several months, as Americans sheltered at home in the face of the surging COVID-19 pandemic, ChromaDex engaged in a concerted campaign of false and misleading press releases, social media posts, "educational" website content, and television appearances designed to deceive consumers into believing that Tru Niagen could help prevent and treat COVID-19. ChromaDex's deceptive practices are unlawful, harmful to competitors including Elysium, and highly dangerous.

In fact, ChromaDex's claims were so deceptive and dangerous that the FDA and FTC took action to protect the public. On November 17, 2020, the FDA and FTC issued a joint letter to ChromaDex stating that claims on its website and elsewhere "misleadingly represent" ChromaDex's products "as safe and/or effective for the treatment or prevention of COVID-19." The FDA also added Tru Niagen to a public list of "Fraudulent COVID-19 Products." The joint letter from the FDA and FTC was posted publicly on December 1, 2020. In short, two federal agencies just determined that the Counterclaim Defendant in this false advertising case is engaged in false advertising.

To this day, copies of ChromaDex's deceptive statements about Tru Niagen and COVID-19 can easily be found on Twitter, on webpages controlled by ChromaDex, and on news aggregating websites that save and republish public companies' press releases. And ChromaDex's false and misleading claims live on in consumer reviews that cite the company's deceptive press

releases and spread false hope on Amazon and elsewhere. ChromaDex's dangerous claims have spread throughout the Internet.

Elysium respectfully seeks leave to supplement its operative pleading to include allegations concerning ChromaDex's recent and relevant false advertising related to COVID-19. These allegations relate directly to—and provide strong support for—claims and allegations already pending in this litigation. Elysium also seeks leave to supplement its pleading with minor additional allegations regarding other relevant post-pleading conduct by ChromaDex, namely an October 2020 change to a ChromaDex website already at issue in this action, which now calls out Elysium and its Basis product by name. Finally, Elysium seeks leave to amend its pleading to withdraw Elysium's copyright infringement claim, which has not been the subject of significant document discovery, before the parties enter depositions.

ChromaDex will suffer no undue prejudice on account of the proposed changes, and Elysium has acted promptly and in good faith in bringing them to the Court. Elysium therefore respectfully requests this Court's leave to file the proposed Supplemented and Fourth Amended Counterclaims attached as Exhibit A to the concurrently filed Declaration of John C. Quinn.[1]

BACKGROUND

A. Procedural History

From the outset of this litigation, Elysium has asserted counterclaims arising out of ChromaDex's misleading national advertising campaign for its dietary supplement, Tru Niagen, the active ingredient of which is nicotinamide riboside ("NR"), and which ChromaDex markets in direct competition with Elysium's NR-based product, Basis. *See* ECF No. 45, Counterclaims at

[1] A redline comparison of Elysium's proposed Supplemented and Fourth Amended Counterclaims against its Third Amended Counterclaims (ECF No. 141) is attached as Exhibit B to the Declaration of John C. Quinn. References herein to "Ex. A" and "Ex. B" refer to Exhibits A and B to the Quinn Declaration, respectively.

14-36. A core component of those counterclaims has always been that ChromaDex makes false and misleading claims about Tru Niagen's capacity to cure various diseases. *Id.* ¶¶ 80-91; ECF No. 82, Counterclaims ¶¶ 96-108; ECF No. 89, Counterclaims ¶¶ 115-127; ECF No. 141 ¶¶ 138-151.

More specifically, Elysium's original answer in this action asserted three counterclaims against ChromaDex for: (1) false advertising under the Lanham Act, 15 U.S.C. § 1125(a); (2) unfair competition under the Lanham Act, *id.*; and (3) deceptive business practices under New York General Business Law § 349. ECF No. 45, Counterclaims ¶¶ 92-104. In support of those counterclaims, Elysium alleged, among other things, that ChromaDex sought to mislead the public and consumers about the disease-curing abilities of its products by placing its advertisements and direct links to purchase Tru Niagen on blog posts created and maintained by one of its shareholders. *Id.* ¶¶ 80-91. Elysium further alleged that these advertisements misled the public into believing that Tru Niagen cures and treats diseases such as Alzheimer's, heart disease, Parkinson's, and breast cancer. *Id.* ¶ 87.

When ChromaDex amended its complaint against Elysium in March 2019 (on consent), Elysium filed an answer to the amended complaint, which included the same counterclaims and substantially the same allegations about ChromaDex's efforts to deceive the public into believing its products could cure diseases. ECF No. 82, Counterclaims ¶¶ 96-108. Elysium also added a counterclaim for copyright infringement. *Id.* ¶¶ 131-134.

Elysium amended its counterclaims again approximately two months later, also on consent, to identify additional false and misleading advertising by ChromaDex. ECF No. 89, Counterclaims. And in February 2020, both parties amended their pleadings, again on consent, to include additional factual allegations. ECF Nos. 139, 141. In each of its pleadings, Elysium

included the same counterclaims and substantially the same allegations about ChromaDex's efforts to deceive the public into believing that its products could cure diseases. ECF No. 89, Counterclaims ¶¶ 115-127; ECF No. 141 ¶¶ 138-151.[2]

In recent months, with the onset of the COVID-19 pandemic, ChromaDex has ratcheted these deceptive practices up to a new and even more dangerous level.

B. ChromaDex Falsely Advertises that Tru Niagen Helps Fight COVID-19

As alleged in the proposed Supplemented and Fourth Amended Counterclaims, when the COVID-19 pandemic hit, ChromaDex launched a concerted campaign designed to deceive the public into believing that Tru Niagen could help fight COVID-19. *See* Ex. A ¶ 153. Beginning in the spring, ChromaDex issued a series of false and misleading press releases suggesting that new, often incomplete research had demonstrated that NR, and by extension, ChromaDex's Tru Niagen, could be used as a treatment for COVID-19 or to prevent infection by SARS-CoV-2, the novel coronavirus that causes COVID-19. *Id.* ¶¶ 154-157.

For example, on April 20, 2020, ChromaDex issued a press release on preclinical COVID-19 research findings, stating that NR "may support innate immunity to coronaviruses." *Id.* ¶ 154. ChromaDex later asserted in another press release on July 7, 2020, that cells infected by SARS-CoV-2 "suffer significant NAD+ depletion" and that "ChromaDex's Niagen is proven to effectively restore and maintain NAD+ levels." *Id.*

ChromaDex issued additional press releases on July 9, 2020, and October 6, 2020, in which ChromaDex continued making unproven claims about Tru Niagen and COVID-19. *Id.* Also in

[2] Each of Elysium's pleadings also alleged that ChromaDex maintains a website that falsely implies that Elysium's NR-product, Basis, is "counterfeit." *See* ECF No. 45, Counterclaims ¶¶ 14, 34-41, 94; ECF No. 82, Counterclaims ¶¶ 22, 46-55, 120; ECF No. 89, Counterclaims ¶¶ 30, 74-83, 139; ECF No. 141 ¶¶ 31, 97-106, 162. ChromaDex revised that website in October 2020 to now say so explicitly. Ex. A ¶ 106.

October 2020, ChromaDex revised its website to explicitly call out Elysium by name, and to assert that Elysium's Basis product is counterfeit and unsafe. *Id.* ¶ 106.

In each of its COVID-19 press releases, after hyping the supposed antiviral or immune boosting properties of NR, ChromaDex concluded by promoting its "flagship ingredient, NIAGEN® nicotinamide riboside, sold directly to consumers as TRU NIAGEN®." *Id.* ¶ 155.

The studies referenced in these press releases did not support ChromaDex's claim that Tru Niagen is an effective COVID-19 therapeutic. One of the studies involved animal model tests on different forms of coronaviruses, not including the type that causes COVID-19; another examined the effect of a broad nutritional support regimen that included NR as only one of several supplements, rendering it impossible to draw any conclusions about NR's unique potential for treatment of COVID-19. *Id.* ¶ 157. None of the studies ChromaDex pointed to tested Tru Niagen on patients with COVID-19. *Id.* ¶ 156. And none of ChromaDex's statements had been approved by the FDA. *Id.*

To ensure as wide an audience as possible for its misleading claims, ChromaDex posted links to each of the press releases on its social media pages with accompanying captions that compounded the false and misleading message. For example, ChromaDex posted the April 20, 2020 Press Release to Facebook with the message: "[E]arly preclinical data suggests that increasing cytoplasmic NAD levels through a NAD precursor, such as NR, may support innate immunity to coronaviruses and other viruses." *Id.* ¶ 161. As federal regulators later documented, ChromaDex reposted every one of its false and misleading press releases to Facebook. *Id.* ¶ 167.

ChromaDex's executives also pushed the company's deceptive press releases to their followers on Twitter. *Id.* ¶ 161. For example, on July 9, 2020, ChromaDex's CEO Rob Fried tweeted "important new study" with a link to Yahoo News's reposting of ChromaDex's press

release that day titled "ChromaDex Announces New Study Highlighting Promising Anti-Viral Effects of Niagen in Coronavirus Cell Model." *Id.*

ChromaDex also took its deception to the airwaves. In multiple television appearances across the country, high-ranking company personnel repeated the suggestion that Tru Niagen could help prevent or treat COVID-19. *Id.* ¶¶ 162-163. At least one of these televised segments was paid for entirely by ChromaDex. *Id.* ¶ 162. In one segment that prominently identified him as ChromaDex's CEO, Fried was asked by a local newscaster about the future of COVID-19 research. *Id.* Fried answered by pointing to Tru Niagen: "when the virus attaches to the cell itself . . . there's a battle that goes on," and "what we have shown is that Niagen, the ingredient that we work with, elevates those enzymes responsible for that battle." *Id.*

ChromaDex also uses its website www.aboutNAD.com, which it presents as an unbiased "educational resource," to falsely suggest that NR products help fight COVID-19. *Id.* ¶ 164. On the AboutNAD "About Us" page, ChromaDex states: "In the midst of the COVID-19 pandemic, the latest findings on the protective role NAD may play in the innate immune response and cellular repair and controlling inflammation are of particular importance to share." *Id.* It is only at the very bottom of the page that ChromaDex discloses "AboutNAD is curated by ChromaDex Corp." *Id.*

As with ChromaDex's other false disease-curing claims, as previously alleged in Elysium's prior pleadings (*see supra*, Background A), ChromaDex's misleading assertions about Tru Niagen and COVID-19 have also been republished and discussed at length on the blog of its shareholder and affiliate at www.right-of-assembly.org in a special section specifically devoted to misinformation about Tru Niagen and COVID-19. Ex. A ¶ 164.

By reposting its deceptive press releases across social media and affiliated websites it controls and echoing its false claims in television appearances around the country, ChromaDex ensured even more consumers would be exposed to its false claims about Tru Niagen's potential for fighting COVID-19.

And consumers were indeed deceived. Just two days after ChromaDex issued the April 20 press release, a ChromaDex customer posted a product review to Tru Niagen's sales page on Amazon that explicitly referenced the deceptive press release, writing:

> Chromadex is the company that makes Tru Niagen. As of April 22, 2020, there's some new promising research that Tru Niagen might help boost immunity. They are specifically studying Tru Niagen's effect against Covid-19 as I type this. Don't take my word for it. Go look up the press releases on the company website.

Id. ¶ 158. Elysium's proposed Supplemented and Fourth Amended Counterclaims documents other customer reviews that reflect the pervasive consumer confusion that inevitably resulted from ChromaDex's false advertising around Tru Niagen and COVID-19. *Id.* ¶¶ 158-160.

C. Federal Regulators Take Action to Stop ChromaDex's False Advertising

ChromaDex's campaign of misstatements and misinformation about Tru Niagen and COVID-19 continued until government agencies recently stepped in to protect the public.

On November 17, 2020, the FDA and FTC issued a joint warning letter to ChromaDex demanding that it immediately cease its false marketing relating to Tru Niagen and COVID-19. *Id.* ¶ 166. Following a review of ChromaDex's websites and Facebook page, the FDA and FTC determined that ChromaDex was marketing Tru Niagen as a product "intended to mitigate, prevent, treat, diagnose, or cure COVID-19 in people." *Id.* The agencies informed ChromaDex that its Tru Niagen products were thus: (1) "unapproved new drugs sold in violation of section 505(a) of the Federal Food, Drug, and Cosmetic Act (FD&C Act), 21 U.S.C. § 355(a)"; and (2) "misbranded drugs under section 502 of the FD&C Act, 21 U.S.C. § 352." *Id.*

The FDA and FTC specifically identified Facebook posts linking to each of the press releases described above as "some examples of the claims on your websites that establish the intended use of your products and misleadingly represent them as safe and/or effective for the treatment or prevention of COVID-19." *Id.* ¶ 167.

The FDA and FTC required ChromaDex to "take immediate action to cease the sale of such unapproved and unauthorized products," and warned that the "[f]ailure to immediately correct the violations cited in this letter may result in legal action, including, without limitation, seizure and injunction." *Id.* ¶ 168. The agencies further informed ChromaDex that its advertising of Tru Niagen was unlawful under the Federal Trade Commission Act because "any coronavirus-related prevention or treatment claims regarding such product are not supported by competent and reliable scientific evidence." *Id.* ¶ 169. Accordingly, the agencies demanded that ChromaDex "immediately cease making all such claims." *Id.* The FDA also added Tru Niagen to a list of "Fraudulent COVID-19 Products" that the FDA maintains on its website "to protect consumers from firms selling unapproved products and making false or misleading claims." *Id.* ¶ 170.

On November 23, 2020, a week after receiving the warning letter, ChromaDex filed an 8-K with the SEC, disclosing only that the FDA and FTC had warned ChromaDex to cease its misleading advertising. *Id.* ¶ 171. In the 8-K, ChromaDex indicated that it had removed from its website and from social media the statements the FDA and FTC identified as false and misleading. *Id.* But ChromaDex's action was too little too late for customers who had already purchased Tru Niagen on account of ChromaDex's false and misleading advertising. And as documented in Elysium's proposed Supplemented and Fourth Amended Counterclaims, the misinformation put out by ChromaDex remains widely available to consumers on news aggregating websites that

republish public companies' press releases,[3] in posts on Twitter, on ChromaDex's affiliated websites, and in consumer reviews that quote the deceptive press releases in comments on Tru Niagen's Amazon sales page and elsewhere. *Id.* ¶ 172.

The FDA and FTC posted the warning letter to their websites for public access on December 1, 2020.[4] *Id.* ¶ 170. On December 10, 2020, Elysium wrote to ChromaDex to inform ChromaDex of its intention to seek the Court's leave to supplement and amend its counterclaims. On December 11, 2020, Elysium provided ChromaDex with a redline of Elysium's proposed supplemented and amended pleading. On December 14, 2020, ChromaDex advised Elysium that it would oppose Elysium's motion.

ARGUMENT

Federal Rule of Civil Procedure 15(d) provides that a "court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fed. R. Civ. P. 15(d). "Under Rule 15(d), . . . a motion to supplement a pleading is properly made when a party seeks to plead events which have happened since the date of the pleading sought to be supplemented." *Ruotolo v. City of New York*, No. 03 Civ. 5045, 2005 WL 1253936, at *4 (S.D.N.Y. May 25, 2005) (quotation and citation omitted).

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[3] *See, e.g.*, *ChromaDex Announces New Study Results Highlighting Promising Anti-Viral Effects of Niagen® in Coronavirus Cell Model*, Bloomberg (July 9, 2020, 6:36 AM EDT), https://www.bloomberg.com/press-releases/2020-07-09/chromadex-announces-new-study-results-highlighting-promising-anti-viral-effects-of-niagen-in-coronavirus-cell-model (republishing the July 9, 2020 press release) (last accessed Dec. 14, 2020); *ChromaDex Announces Study Results Showing Nutritional Protocol Including Nicotinamide Riboside Plus Standard of Care Reduces Recovery Time in COVID-19 Patients by Nearly 30%*, Business Wire (Oct. 6, 2020, 6:35 AM EDT), https://www.businesswire.com/news/home/20201006005386/en/ChromaDex-Announces-Study-Results-Showing-Nutritional-Protocol-Including-Nicotinamide-Riboside-Plus-Standard-of-Care-Reduces-Recovery-Time-in-COVID-19-Patients-by-Nearly-30 (republishing the October 6, 2020 press release) (last accessed Dec. 14, 2020).

[4] *See Warning Letter, ChromaDex*, Fed. Trade Comm'n (Nov. 17, 2020), https://www.ftc.gov/system/files/warning-letters/fda-covid-19-letter-chromadex.pdf (last accessed Dec. 14, 2020); *Warning Letter, ChromaDex*, U.S. Food & Drug Admin. (Nov. 17, 2020), https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/chromadex-607692-11172020 (last accessed Dec. 14, 2020).

"Leave to file a supplemental pleading should be freely permitted when the supplemental facts connect it to the original pleading." *Kleeberg v. Eber*, 331 F.R.D. 302, 315 (S.D.N.Y. 2019) (quoting *Quaratino v. Tiffany & Co.*, 71 F.3d 58, 66 (2d Cir. 1995)). Indeed, "Rule 15(d) motions are evaluated by the court under the same standards used to evaluate motions to amend pleadings under Rule 15(a), with leave freely given when justice so requires." *Ruotolo*, 2005 WL 1253936, at *5 (citations omitted). Accordingly, leave is appropriate "absent evidence of undue delay, bad faith or dilatory motive on the part of the movant, undue prejudice to the opposing party, or futility." *Monahan v. N.Y. City Dep't of Corrs.*, 214 F.3d 275, 283 (2d Cir. 2000) (articulating applicable standards for leave to amend); *Kleeberg*, 331 F.R.D. at 315 (applying same standards to motion to supplement and granting leave); *Ruotolo*, 2005 WL 1253936, at *5 (same).

As set forth more fully below, leave to supplement Elysium's Third Amended Counterclaims is appropriate in the circumstances presented here. *First*, the new allegations documenting ChromaDex's false advertising around COVID-19 relate directly to Elysium's existing claims, but took place after Elysium filed its operative pleading in February 2020. *Second*, Elysium has promptly moved for leave to supplement two months after ChromaDex's most recent false statement, three weeks after the joint letter from the FDA and FTC to ChromaDex, and less than two weeks after that letter was posted publicly. *Third*, ChromaDex will not suffer undue prejudice, as the new allegations regarding ChromaDex's recent conduct do not materially alter the contours of Elysium's claims against it. *Fourth*, the new allegations are not futile, as they offer additional factual support for viable claims that are already pending before the Court.

Finally, Elysium's proposed supplemental allegation concerning the October 2020 change to ChromaDex's website relates to and provides additional support for existing claims, and is brought within two months of that change. And as to Elysium's motion to amend, ChromaDex

cannot plausibly claim any undue prejudice on account of Elysium's decision to withdraw its copyright infringement claim, with prejudice, in the interest of focusing the parties' dispute, particularly given that the copyright claim has not been the subject of significant document discovery and the parties have not yet commenced depositions.

I. LEAVE TO SUPPLEMENT WITH ALLEGATIONS ABOUT CHROMADEX'S RECENT MISCONDUCT SHOULD BE GRANTED.

A. The Proposed Supplemental Allegations Connect Directly to the Operative Pleading.

As a threshold matter, Elysium's proposed supplemental allegations "challenge[] precisely the same type of conduct attacked in the current . . . [counter]claims." *Argus Inc. v. Eastman Kodak Co.*, 552 F. Supp. 589, 602 (S.D.N.Y. 1982) (granting leave to supplement).

For example, Elysium's current operative pleading alleges that ChromaDex "misleadingly creates the impression with consumers that its Niagen-containing Tru Niagen product prevents and cures diseases," even though it is "well aware" that "it lacks the kind of extensive clinical data FDA regulations require and FDA approval to support such statements." ECF No. 141 ¶¶ 138-39. The proposed supplemental pleading alleges that ChromaDex has made precisely the same sorts of deceptive claims abouts Tru Niagen's supposed ability to treat or prevent COVID-19. Indeed, as detailed in Exhibit A, the FDA and FTC told ChromaDex just weeks ago that "claims on your websites that establish the intended use of your products . . . misleadingly represent them as safe and/or effective for the treatment or prevention of COVID-19," even though "coronavirus-related prevention or treatment claims regarding such products are not supported by competent and reliable scientific evidence." Ex. A ¶¶ 167, 169. (*See supra*, Background B-C.) In short, Elysium's proposed supplemental allegations detail more recent (and even more egregious) instances of the very same misconduct already at issue.

The same is true of Elysium's proposed supplemental allegations concerning the October 2020 change to ChromaDex's website. Elysium's current operative pleading alleges that ChromaDex's website "falsely impl[ies] that the NR in Elysium's Basis is 'counterfeit.'" ECF No. 141 ¶ 99. The proposed supplemental pleading alleges that ChromaDex changed that website to make the same claim explicitly, and with reference to Elysium and Basis by name. Ex. A ¶ 106.

Because the "supplemental facts are connected to the original pleading," leave is appropriate absent "good reason to deny the request." *Kleeberg*, 331 F.R.D. at 315. No such reason exists here.

B. Elysium Has Moved Promptly and in Good Faith.

There is no evidence here of undue delay, bad faith or dilatory motive on Elysium's part. The primary proposed supplemental allegations are based on recent conduct that ChromaDex acknowledged in its 8-K on November 23, 2020. Ex. A ¶ 171. The FDA/FTC warning letter included in Elysium's new allegations became public only on December 1, 2020. *Id.* ¶ 170. And the only other proposed supplemental allegation concerns a change ChromaDex made to its website less than two months ago in October 2020. *Id.* ¶ 106. ChromaDex cannot possibly charge that moving to supplement this soon after ChromaDex's new relevant misconduct was somehow dilatory. *See, e.g.*, *Aktiebolag v. Andrx Pharm., Inc.*, 695 F. Supp. 2d 21, 30 (S.D.N.Y. 2010) (granting motion to supplement and finding no undue delay where supplementing party moved within four months).

C. ChromaDex Will Not Suffer Undue Prejudice.

Nor can ChromaDex claim any undue prejudice on account of Elysium's proposed revised pleading. Elysium's proposed new allegations about ChromaDex's false COVID-19 advertising merely build upon the false advertising and deceptive practices claims Elysium has asserted against ChromaDex since day one of this litigation. "It is well established that merely defending against

a new theory is not prejudicial." *Kleeberg*, 331 F.R.D. at 316 (collecting cases). And it is ChromaDex that elected to double down on its own misconduct while this litigation was proceeding. *See, e.g.*, *NordicTrack, Inc. v. Consumer Direct, Inc.*, 158 F.R.D. 415, 421-22 (D. Minn. 1994) (granting motion to supplement to seek relief under Lanham Act based on allegedly false advertisements published after filing of complaint).

Though additional limited discovery may be required, it will be targeted in scope and time, and is the unavoidable consequence of ChromaDex's misconduct. *See Kleeberg*, 331 F.R.D. at 316 (holding that "the Court finds no prejudice" where "any additional discovery required to address [movant's] newly alleged facts and claims would take no longer than an additional one or two months"). Undue prejudice does not arise when the opposing party "already possesses most documents relevant to its defense, and any additional discovery, including additional depositions, is unlikely to be onerous." *Fancaster, Inc. v. Comcast Corp.*, No. 08 Civ. 2922, 2010 WL 4320422, at *2, 5 (D.N.J. Oct. 26, 2010) (granting motion to supplement complaint "to add new infringing activities . . . committed after the close of discovery").[5]

D. The Proposed Supplemental Allegations Are Not Futile.

Elysium's supplemented pleading also would not be futile. As a general rule, "[w]here, as here, a [movant] alleges a single, ongoing pattern of . . . conduct, a motion to supplement the Complaint by adding further events . . . in the same alleged pattern is not futile." *Ruotolo*, 2005 WL 1253936, at *6 (citing 6A Charles A. Wright et al., Federal Practice and Procedure § 1508, at 204-205 (3d ed. 2002); *see also Hogan v. Cty. of Lewis*, No. 11 Civ. 754, 2012 WL 12919146, at *3 (N.D.N.Y. Aug. 23, 2012) (same). Here, the proposed supplemental allegations build directly

[5] Due to challenges posed by the COVID-19 pandemic, the Court has granted extensions to the case management order to allow additional time for document production and depositions. *See* ECF No. 165. The deadline for completing fact discovery is currently set at February 9, 2021. The parties are still completing document production and depositions have not yet commenced.

on Elysium's existing allegations about ChromaDex's long history of false advertising to suggest its products prevent or cure diseases. The same is true of the change to ChromaDex's website. (*See supra* Background B.)

There can also be no doubt that Elysium's proposed supplemental allegations provide "colorable grounds for relief." *Ruotolo*, 2005 WL 1253936, at *5 (quoting *Ryder Energy Distrib. Corp. v. Merrill Lynch Commodities Inc.*, 748 F.2d 774, 783 (2d Cir. 1984)). The FDA and FTC have already determined that "some examples of the claims on [ChromaDex's] websites that establish the intended use of your products . . . misleadingly represent them as safe and/or effective for the treatment or prevention of COVID-19," and that "any coronavirus-related prevention or treatment claims" about ChromaDex's products "are not supported by competent and reliable scientific evidence." Ex. A ¶¶ 167, 169.

In these circumstances, leave to supplement should be granted. *Ruotolo*, 2005 WL 1253936, at *6 (finding "no persuasive reason why this Court should deny [movant] the opportunity to assert new allegations in further support of the claims he has already asserted and which have already been upheld as adequately pleaded").

II. LEAVE TO AMEND TO WITHDRAW ELYSIUM'S COPYRIGHT INFRINGEMENT CLAIM SHOULD BE GRANTED

Elysium should also be granted leave to amend its Third Amended Counterclaims to withdraw its previously asserted copyright infringement claim, with prejudice.[6] Leave to amend to withdraw a claim is properly granted where doing so "narrows the scope of the case" and "causes

[6] In the alternative, Elysium moves to voluntarily dismiss its copyright claim, with prejudice, pursuant to Federal Rule of Civil Procedure 41(a)(2). *See generally Abbott v. Wyoming Cty. Sheriff's Off.*, No. 15 Civ. 531, 2020 WL 2468132, at *1 (W.D.N.Y. May 13, 2020) ("Although Rule 41(a)(2) refers to dismissal of an 'action,' it may be used to dismiss less than the entire case."). There is a "presumption in this circuit . . . that a court should grant a dismissal pursuant to Rule 41(a)(2) absent a showing that defendants will suffer substantial prejudice as a result." *Paulino v. Taylor*, 320 F.R.D. 107, 109 (S.D.N.Y. 2017) (quoting *Banco Cent. De Paraguay v. Paraguay Humanitarian Found., Inc.*, No. 01 Civ. 9649, 2006 WL 3456521, at *2 (S.D.N.Y. Nov. 30, 2006)).

no cognizable prejudice" to the opposing party. *Time Warner Cable of N.Y. City v. Kline, Davis & Mann, Inc.*, No. 00 Civ. 2897, 2000 WL 1863763, at *2 (S.D.N.Y. Dec. 20, 2000) (granting motion to amend to withdraw claim). Here, withdrawal of the copyright claim will not cause ChromaDex undue prejudice. Minimal discovery has been pursued by either side on the copyright allegations, and the parties have not yet commenced depositions.

CONCLUSION

For the foregoing reasons, Elysium respectfully requests leave to file its Proposed Supplemented and Fourth Amended Counterclaims.

Dated: December 14, 2020

Respectfully submitted,

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