UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

REPLY IN SUPPORT OF PLAINTIFF CHROMADEX, INC.'S
MOTION TO ENFORCE THE PARTIES' SETTLEMENT AGREEMENT

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I. PRELIMINARY STATEMENT

In any dispute about the existence of a settlement agreement, one party argues—as Elysium does here—that it did not really intend to be bound and there are additional terms to negotiate. Elysium does not dispute the contents of the February 2, 2022, call between Mr. Carter and Dr. Wilhelm, including the representation that if Elysium agreed to the material terms, the parties would have a deal. Nor does it dispute Dr. Wilhelm's February 3 email re-stating all material terms and closing with the note: "now that we have an agreement." Instead, Elysium has cobbled together disparate statements from old discussions and settlement structures proposed before the California trial, and concocted a host of reasons it should not be bound.

Primarily, Elysium points to an old, defunct term sheet and conversations as somehow establishing that the parties expressly reserved the right not to be bound without a more formal agreement. Elysium omits that those prior discussions failed and were followed by a jury trial and extensive briefing. Exchanges that led to the February 2022 agreement included no reservation (because no formal writing was needed) and were *far narrower* than the type of agreement contemplated earlier, which would have resolved three cases, required an ongoing multi-faceted business agreement, and third-party cooperation. The at-issue agreement is a straightforward mutual dismissal of this action and cessation of further litigation of at-issue claims in California in exchange for a payment to ChromaDex. Elysium also insists that there were "many" terms left to be negotiated, contradicting Dr. Wilhelm's email that Elysium would not accept any additional terms. The "many" terms Elysium identifies (including interest rates and enforcement terms) are immaterial and, in any event, set by statute or the FRCP. Elysium's remaining arguments fare no better. The parties reached a settlement to resolve identified claims. This Court should enforce the settlement and put an end to this litigation.

II. ARGUMENT

A. There Was Mutual Assent

Elysium first argues, without elaboration, that there was no assent by ChromaDex. Opp. 9. A contract is formed when one party accepts another party's offer. There is no dispute that there was a telephone call on February 2, 2022 (the offer) and Elysium responded in writing on February 3, 2022 (the acceptance). The law requires nothing more.

In determining mutual assent, courts look "to determine whether there is a sufficiently definite offer such that its unequivocal acceptance will give rise to an enforceable contract." *Express Indus. & Terminal Corp. v. New York State Dep't of Transp.*, 93 N.Y.2d 584, 590 (1999). Mr. Carter declares that he told Dr. Wilhelm during the February 2 Call that if Elysium agreed to all the material terms, the parties would have a deal. 2/16/22 Carter Decl. ¶ 4. *Elysium and Dr. Wilhelm do not dispute the contents of this call*. In his February 3 email, Dr. Wilhelm reiterates all the material terms, and that Elysium would accept even though it was a "tough sell." *Id.*, Ex. A at 5. He concludes: "I understand that *now that we have an agreement* you will get started on documentation" and types his name in the signature block. *Id.* (emphasis added). The court's analysis in *Forcelli v. Gelco Corp.*, 109 A.D.3d 244 (2d Dep't 2013) is illustrative. There, one party had sent an email confirmation of an oral agreement that set forth the material terms, contained an expression of mutual assent, did not condition the settlement on any further occurrence, and contained the author's name typed at the bottom. The court found the parties had formed a valid contract. *Id.* at 251. No post-acceptance communication is needed for a contract.

B. Elysium Did Not Reserve any Right Not to be Bound

Elysium's assertion that the parties repeatedly expressed that settlement was contingent on a formal writing, Opp. 10–11, is based on three inapposite communications: (1) an August

2021 email from Mr. Carter summarizing high-level settlement discussion points for the first time; (2) a September 2021 draft term sheet emailed to Elysium; and (3) an email from Mr. Carter to schedule a call to discuss the term sheet. Wilhelm Decl., Exs. A–C. Elysium conflates prior, unsuccessful settlement communications with the exchange on February 2–3, which was an entirely different—and substantially narrower—deal to end certain litigation.

First, Elysium attempts to obfuscate by citing months-old, failed settlement communications, but omits the context of those discussions. Before trial in the California Action, the parties discussed a complex, global resolution that would have resolved *all claims* between the parties, including Delaware patent litigation (and any other IP claim). Supplemental Carter Decl. ¶ 2. That deal would have required—among other things—execution of several agreements memorializing a comprehensive, multi-faceted, ongoing business arrangement: a supply agreement between the parties and third-party W.R. Grace (with pricing and royalty terms to be negotiated); R&D and other IP coordination; ChromaDex's assistance in helping Elysium resolve *separate* patent litigation with Grace; a global resolution of *all* litigation between the parties; and jointly-authored public statements. *Id.* It goes without saying that establishing a complex business relationship and resolving a third-party's claims would require further discussions and separate written agreements.[1] However, those discussions were ultimately unsuccessful, and the parties went to trial in California. *Id.* ¶ 3.

In contrast, starting in December 2021, the parties initiated new settlement discussions

[1] The September 2021 term sheet included provisions related to "Facilitation of Grace Litigation Settlement"; "Public Communications"; "Covenants Regarding Intellectual Property"; "Purchase Covenants; Pricing"; "Supply Agreement Term"; "Usage Covenants"; "Quality, Purity and Stability Criteria"; "Branding and Marketing"; and "Confidentiality." *See* Wilhelm Decl., Ex. B. The at-issue exchanges include *none* of those issues and require no formal writing between the parties. *See id.*, Exs. E and F.

that contemplated a far narrower resolution: only mutual dismissal of this action and claims tried to the jury in California, and a payment by Elysium to ChromaDex. Notably, these discussions did not include any ongoing business relationship, resolution of the parties' Delaware patent litigation, or any commitment with respect to the Grace-Elysium litigation.

The authorities Elysium relies on offer it no support. In *Ciaramella v. Readers Digest Ass'n, Inc.*, 131 F.3d 320, 325 (2d Cir. 1997), the court found that the parties did not intend to bind themselves until the settlement had been signed because several paragraphs in the yet-to-be-signed settlement agreement itself "contemplated the moment of signing as the point when the settlement would become binding." *Id.* at 324-25. Similarly, in *Davidson Pipe Co. v. Laventhol & Horwath*, 1986 WL 2201, at *4 (S.D.N.Y. Feb. 11, 1986), the court found that the language in a settlement agreement that emphasized the execution date evinced an intent not to create a binding settlement until formal execution. *See also R.G. Group, Inc. v. Horn & Hardart Co*., 751 F.2d 69, 75 (2d Cir. 1984) (draft included integration clause and stated rights established "when duly executed"). In contrast, Dr. Wilhelm's February 3 email includes no such caveat. He confirms the February 2 Call, details all material settlement terms, states the parties "have an agreement," and asks ChromaDex to prepare the "documentation." Notably, although Elysium now claims that some further written agreement was contemplated, the email distinguishes between an "agreement" (which he states the parties now have) and "documentation" to perform the agreement—the stipulated judgment and dismissal that need to be filed with the courts. Elysium had never informed ChromaDex that settlement was contingent on yet another writing.

Second, Elysium's reference to ChromaDex's requirement of board approval is a red herring. On the February 2 Call, Mr. Carter informed Dr. Wilhelm that if Elysium accepted the offer, the parties would have a deal (which Elysium does not dispute). 2/16/22 Carter Decl. ¶ 4.

Mr. Carter—on behalf of ChromaDex—identified no further precondition or suggested in any way that he lacked settlement authority. Dr. Wilhelm has never stated that it was his understanding that the February settlement required further approval from ChromaDex. Nor did his February 3 email include any such understanding. *See* Wilhelm Decl., Ex. F. To the extent relevant, Mr. Carter had full settlement authority prior to the call. Supplemental Carter Decl. ¶ 5.

Third, Elysium relies on an email its outside counsel sent on January 5, 2022, to suggest that the parties contemplated formal documentation. Wilhelm Decl., Ex. E at 1. However, that email does not say what Elysium now claims. Elysium merely stated that if ChromaDex agreed to Elysium's proposed terms, the parties "can attempt to notify the New York court that they have reached an agreement in principle and request a continuance of the January 10 hearing date (or possibly a conditional dismissal of the case)."[2] *Id.* Nowhere in this email did Elysium's counsel require (or even mention) a formal signed agreement to effectuate settlement.[3] *See id.*

Dr. Wilhelm's February 3 email does not state that the agreement was only in "principle" and subject to further negotiation of a formal agreement. *Even if* he so stated, courts routinely enforce "in principle" settlement agreements. *See RES Exhibit Servs., LLC v. Genesis Vision, Inc*., 155 A.D.3d 1515, 1518 (4th Dep't 2017) (non-material terms left for future negotiations does not render agreement ineffective); *Bed Bath & Beyond Inc. v. IBEX Constr., LLC*, 52 A.D.3d 413, 414 (1st Dep't 2008) ("[U]se of the language 'subject to' in the LOI, and reference to the execution of a construction agreement as a 'qualification,' do not amount to an express reservation of the right not to be bound . . . ."); *Conopco, Inc. v. Wathne,* 190 A.D.2d 587, 588

[2] Given the upcoming summary judgment hearing in this action, it would have been routine for the parties to notify the Court of a settlement and request additional time to file a dismissal.

[3] Indeed, none of the emails leading up to the at-issue settlement—from either Elysium or ChromaDex—even mentions such a condition. *See* Wilhelm Decl., Ex. E.

(1st Dep't 1993) ("The Letter Agreement contains all of the essential terms of the contract, and the fact that the parties intended to negotiate a 'fuller agreement' does not negate its legal effect."); *Vari-O-Matic Mach. Corp. v. New York Sewing Mach. Attachment Corp*., 629 F.Supp. 257, 259 (S.D.N.Y. 1986) (enforcing agreement "reached in principle").

Finally, Elysium resorts to twisting Dr. Wilhelm's February 3 email to suggest that his use of the phrase "If I am remembering correctly these were the other terms…" means Elysium "sought [further] confirmation from ChromaDex" and "Elysium conveyed its understanding that settlement discussions would be ongoing while the parties finalized a written agreement . . . ." Opp. 9–11. Notably, Dr. Wilhelm does not declare that his figure of speech indicated any confusion about the material terms or that the parties would continue settlement discussions. To the contrary, he expressly states Elysium will accept no additional terms. Elysium fails to address the fact that Dr. Wilhelm ended his email by confirming: "now that we have an agreement."

C. <u>The Partial Performance Factor is Neutral</u>

Elysium argues that ChromaDex did not partially perform because it "maintained its motion for prejudgment interest in the California Action and never attempted to withdraw it" and only brought this motion after "Judge Carney ultimately denied ChromaDex's motion in the late afternoon of February 10." Opp. 13. This is disingenuous. ChromaDex's prejudgment interest motion was set for hearing on February 14, 2022. Supplemental Carter Decl. ¶ 6. Mr. Carter emailed Dr. Wilhelm on February 9, 2022, reiterating in writing that the parties reached an agreement on February 3. *Id.* Mr. Carter also informed Elysium on February 9 that ChromaDex would prepare joint papers to inform the courts of the settlement. *Id.* In response, Dr. Wilhelm wrote: "The parties clearly do not have an agreement as I told you last Thursday" and "as of now the cases are proceeding." Wilhelm Decl., Ex. F at 1. The court ruled on the motion on

February 10 (four days before the scheduled hearing). *Id*., Ex. G. Given Mr. Carter's repeated assertions on February 3 and 9 that the parties had reached an agreement, it is nonsensical to suggest that ChromaDex would have—or could have—backed out of the deal. Considering Elysium's refusal to acknowledge the settlement, the only reasonable next step for ChromaDex was to prepare its motion to enforce, which it did promptly.

D. The Parties Agreed on All Material Terms

Elysium argues that "there were many terms yet to be discussed"—namely boiler plate confidentiality, enforcement, choice of venue, and choice of law clauses. Opp. 14. As an initial matter, Dr. Wilhelm's February 3 email does not mention any of these terms. To the contrary, he goes out of his way to explain that Elysium will not accept *any* further conditions. Nor doer Dr. Wilhelm declare that Elysium contemplated these additional terms.

Second, Elysium does not mention or address authorities that clarify that a party cannot renege on a settlement agreement by arguing that boilerplate terms were material and undetermined. *See* Mot. 12–13. Instead, it relies on language from *Winston* that the third factor is an evaluation of "whether there was 'literally nothing left to negotiate.'" However, Elysium ignores that *Winston* and its progeny evaluate whether the remaining terms are *material*.[4] The terms Elysium now posits are not:

- Confidentiality. Not every agreement is confidential. Elysium's assertion is specious given that the February 3 email states there would be a dismissal filed in New York, and the $2.5 million payment would be included in a stipulated *judgment* in California. Court filings and judgments are a matter of public record and Elysium certainly did not demand any confidentiality in the Acceptance Email.

- Venue. Again, the settlement agreement contemplates a stipulated judgment; the FRCP governs enforcement of a federal judgment. *See* Fed. R. Civ. P. 69, *see also*

[4] *See Ciaramella*, 131 F.3d at 325 (remaining terms "are relevant ... only if they show that there were points remaining to be negotiated such that the parties would not wish to be bound until they synthesized a writing satisfactory to both sides in every respect.'")

Wright & Miller, 12 Fed. Prac. & Proc. Civ. § 3013 (3d ed.) Issuance of Execution or Other Process ("Execution normally issues from the [judgment-rendering] court.").[5]

- Interest rate and payment dates. Grasping at straws, Elysium claims the parties had to negotiate an interest rate, including the applicability of LIBOR. Opp. 15. The agreement is for a stipulated judgment; interest rates for federal judgments are set by statute. 28 U.S.C. § 1961 (rate based on 1-year Treasury yield). LIBOR has been phased out for years and is not even used for any new financial instruments. The February 3 email states payments will be made in February 2022 and February 2023. Elysium does not even attempt to argue that a difference between February 1 or February 28 is material, nor could it. *See Express Indus.*, 3 N.Y.2d at 590 (not all terms need to be certain and "parties also should be held to their promises and courts should not be 'pedantic or meticulous' in interpreting contract expressions.")

Third, there is nothing procedurally complicated about enforcing this settlement agreement. Parties often settle lawsuits that span multiple jurisdictions and here, the at-issue settlement requires the parties to dismiss this action with prejudice and file a stipulated judgment in the California Action.[6] Courts routinely order specific performance to enforce settlement agreements. *See, e.g.*, *Gladstone v. D.W. Ritter Co*., 508 N.Y.S.2d 880, 884 (Sup. Ct. 1986) (ordering specific performance and directing insurer "to fully comply with the settlement terms."); *see also Kokkonen v. Guardian Life Ins. Co. of Am*., 511 U.S. 375, 378, 114 (1994) (recognizing specific performance as one way courts enforce settlement agreements). The third *Winston* factor is in ChromaDex's favor.

[5] Elysium's citation to section 664.6 of the Cal. Civil Procedure Code is unavailing. Opp. 8 n.1. Elysium does not explain how—or why—California procedural rules apply to a federal judgment. Moreover, section 664.6 is "not the exclusive means to enforce a settlement" and instead "create[s] a summary, expedited procedure to enforce settlement agreements when certain requirements" are met. *Levy v. Super. Court*, 10 Cal. 4th 578, 585–86 (1995).

[6] Elysium claims that if the Court were to enforce the contract, it would contradict "the jury verdict and the amount that Judge Carney ordered when denying ChromaDex prejudgment interest." Opp. 14. Not so. The settlement resolved relevant claims in California and New York, including *appellate and post-judgment* rights. Notably, the $2.5 million amount appears nowhere in the jury verdict. Parties resolve claims for a negotiated amount to avoid further litigation.

E. The Settlement Agreement is Not Complex and *is* in Writing

Elysium argues that the Acceptance Email does not constitute a writing because the relevant case law "involved both written offers *and* written acceptances." Opp. 17 (emphasis in original). Elysium is incorrect. As discussed, *supra*, courts have regularly found email confirmations of oral agreements to constitute binding *writings*. *See e.g.*, *Forcelli*, 109 A.D.3d at 244; *Davidson v. Metropolitan Tr. Auth.*, 44 A.D.3d 819, 819 (1st Dep't 2007).

Scheinmann v. Dykstra, 2017 WL 1422972 (S.D.N.Y. 2017) and *Hostcentric Technologies, Inc. v. Republic Thunderbolt, LLC*, 2005 WL 1377853 (S.D.N.Y. 2005) also support ChromaDex's position that the Acceptance Email constituted a writing. In *Scheinmann*, the court found an email exchange constituted a writing because it contained all material terms. 2017 WL 1422972, at *5 ("In this case, moreover, there was a writing—Smith's counter-offer email that Bierman accepted by email.") In *Hostcentric*, the court found there was a writing because the email correspondence between the parties "memorialized all the terms . . . ." *Hostcentric*, 2005 WL 1377853 at *9-10. For there to be an enforceable writing, the material terms must be memorialized. Here, the Acceptance Email states in detail that there was an oral offer, and that Elysium would agree to all material terms included in the email. Nothing else is left to negotiate. Thus, the email constitutes an enforceable writing.

F. Elysium's Statute of Frauds and Agency Arguments are Without Merit

Elysium relegates to footnotes two misguided arguments.

First, Elysium argues that the settlement agreement violates the Statute of Frauds. Opp. 16 n.3. Not so. "If an agreement may be fairly and reasonably interpreted to permit performance within a year, the Statute of Frauds will not bar a breach of contract action no matter how improbable it may be that performance will actually occur within that time frame." *Guilbert v.*

Gardner, 480 F.3d 140, 151 (2d Cir. 2007). Nothing would prevent Elysium from making the second payment within a year; Dr. Wilhelm states Elysium will make the payment "on or *before*" February 2023. Wilhelm Decl., Ex. F at 5 (emphasis added). In any event, the Acceptance Email, containing Dr. Wilhelm's name at the end, is a writing that satisfies the Statute. *See Williamson v. Delsener*, 59 A.D.3d 291, 291 (1st Dep't 2009).

Second, Elysium states, without any elaboration, that the Acceptance Email did not include Mark Morris, a senior executive at Elysium. Opp. 15 n.2. Elysium's argument is unavailing. According to the Second Circuit, a party seeking to avoid the consequences of a settlement agreement executed by his attorney bears the burden of proving by affirmative evidence that his attorney lacked the actual or apparent authority to enter into such an agreement. *In re Artha Mgmt., Inc*., 91 F.3d 326, 329 (2d Cir. 1996). "The burden of proving that an attorney entered into a settlement agreement without authority is not insubstantial." *United States v. International Brotherhood of Teamsters*, 986 F.2d 15, 20 (2d Cir. 1993). Here, Mr. Morris was never represented by separate counsel and Dr. Wilhelm and Elysium's outside counsel indicated they had settlement authority on behalf of all parties on their side (including Mr. Morris). Supplemental Carter Decl. ¶ 7. Dr. Wihelm's Acceptance Email confirms that "*[a]ll* parties would agree not to seek attorney's fees or costs arising from the claims and counterclaims tried to the jury in the California action." Wilhelm Decl., Ex. F at 5 (emphasis added). Clearly, Dr. Wilhelm had at least apparent authority, if not actual authority, to bind Mr. Morris. Elysium has presented no evidence or argument to the contrary in its opposition.

III. CONCLUSION

Based on the foregoing, ChromaDex respectfully requests that the Court grant its motion and enter an order enforcing the parties' settlement agreement in its entirety.

Dated: New York, New York
March 9, 2022

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