22-1059-cv(L), 22-1153-cv(XAP)

United States Court of Appeals

for the

Second Circuit

ELYSIUM HEALTH, INC.,

Plaintiff-Counter Claimant-Appellant-Cross-Appellee,

– v. –

CHROMADEX, INC.,

Defendant-Counter Defendant-Appellee-Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR APPELLANT ELYSIUM HEALTH, INC.

TIFFANY R. CATERINA
(*Admission pending*)
FRANKFURT KURNIT KLEIN & SELZ PC
2029 Century Park East, Suite 2500N
Los Angeles, California 90067
(310) 579-9600

CRAIG B. WHITNEY
FRANKFURT KURNIT KLEIN & SELZ PC
28 Liberty Street
New York, New York 10005
(212) 980-0120

Attorneys for Plaintiff-Counter Claimant-Appellant-Cross-Appellee Elysium Health, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for Appellant Elysium Health, Inc. states that there is no parent company or publicly held corporation that owns 10% or more of its stock.

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Appellant Elysium Health, Inc. ("Elysium" or "Appellant") respectfully submits this brief in support of its appeal of the Opinion and Order Granting ChromaDex's Motion for Settlement Enforcement, dated April 19, 2019 (the "Settlement Order") and the Amended Decision and Order Granting ChromaDex's Motion for Summary Judgment, dated February 7, 2019 (the "Citizen Petition Order").

I.
PRELIMINARY STATEMENT

ChromaDex, Inc. ("ChromaDex") has sought to drive its competitor, Elysium, out of the direct-to-consumer supplement market through a relentless campaign of lawsuits, false advertising, and unfounded public attacks. Using its resources as a publicly traded company, ChromaDex deceived consumers about Elysium's flagship product, Basis, filed unsuccessful lawsuits in three different federal courts, and filed a public "citizen petition" with the U.S. Food and Drug Administration (FDA) in a bad faith effort to squeeze Elysium out of the marketplace.

After years of litigation, Elysium was vindicated in every action brought by ChromaDex. Unable to succeed on the merits of its claims, and faced with an impending trial for its own false advertising liability, ChromaDex seized on an opportunity to bind Elysium to a settlement based on a single e-mail that would never have bound ChromaDex had the situation been reversed.

The parties had been negotiating a settlement covering multiple lawsuits in fits and starts for years, always with the intention to reduce any settlement agreement to a formal, signed writing with board approvals. After two adverse rulings in two separate litigations, ChromaDex brought a motion in the Southern District of New York to enforce an alleged agreement based upon a single e-mail, which would settle multi-million-dollar litigations in the Southern District of New York ***and*** the Central District of California. The e-mail by Elysium's general counsel sought to confirm a phone conversation between him and the ChromaDex in-house lawyer from the day before, but was never assented to by ChromaDex. Nor did the e-mail outline all terms of a settlement agreement or contravene the stated understanding of the parties over the course of hundreds of hours of prior settlement negotiations that any settlement would need be reduced to a formal, signed written agreement before binding the parties.

But ChromaDex had just lost its summary judgment motion in the Southern District of New York and its motion for prejudgment interest in the Central District of California, and had nothing else to lose. At that point, the alleged settlement agreement would result in a better outcome for ChromaDex than the two courts had found. The Southern District of New York (the "District Court") accepted ChromaDex's uncorroborated claims of a valid offer in the phone call preceding the Elysium e-mail at issue and found the e-mail itself sufficient to bind Elysium to a

settlement of a claim pending before another court, notwithstanding the e-mail's language indicating Elysium's understanding that there was no binding agreement—as the parties' extensive negotiating history confirms—and the absence of a confirmation from ChromaDex to the terms of the e-mail that were never discussed in the phone call "offer."

The Settlement Order issued by the District Court must be reversed on three separate grounds:

First, the District Court exceeded its inherent power by ordering the settlement of a case pending before another court, and the entry of a stipulated order overriding a jury verdict and prejudgment interest order, summarily, on motion.

Second, the District Court's finding that ChromaDex's version of the parties' settlement discussions was "without contradiction" was clearly erroneous where ChromaDex's account of events was controverted by a declaration and documentary evidence submitted by Elysium. When viewed in its totality, the only reasonable conclusion from the evidence is that, at most, the parties had agreed to a "preliminary manifestation of assent" where the parties agree on certain major terms but left other terms open for good faith negotiation during the contract drafting process, and did not agree to a final binding settlement agreement.

Third, the District Court misinterpreted and misapplied the factors set forth in *Winston v. Mediafare Entertainment Corp*., 777 F.2d 78 (2d Cir. 1985) ("*Winston*"),

for determining whether the parties intended to be bound in the absence of an executed, written agreement.

For the foregoing reasons, Elysium respectfully requests that this Court reverse the District Court's Settlement Order and find that Elysium did not enter into a binding settlement agreement.

If this Court reverses the Settlement Order, this case will return to the District Court for a trial of Elysium's remaining claims against ChromaDex and Elysium's appeal of the Citizen Petition Order will be deferred until the issuance of a final order in the District Court. On the other hand, if this Court affirms the Settlement Order, Elysium's appeal of the Citizen Petition Order would be ripe for adjudication.

After ChromaDex knowingly filed a deceptive citizen petition (the "Citizen Petition") that sought relief that ChromaDex knew to be outside the scope of FDA's citizen petition procedures—merely as a vehicle to publicly injure Elysium's reputation in the marketplace—Elysium sued ChromaDex in the District Court for false advertising, trade libel, deceptive business practices, and tortious interference with prospective economic relations as a result of the sham Citizen Petition. ChromaDex moved to dismiss based upon *Noerr-Pennington* immunity, while Elysium argued that the Citizen Petition fell under the sham exception.

The District Court converted ChromaDex's motion to dismiss into a motion for summary judgment, and then concluded that the Citizen Petition was not a sham

because Elysium voluntarily improved the quality of its product, which the District Court concluded was a "favorable outcome" abolishing the possibility of a sham. In doing so, the District Court dramatically and improperly transformed the "objectively baseless" test set forth in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc*. ("*PRE*") 508 U.S. 49, 60 (1993), which asks whether there was "a reasonable belief that there is a chance that a claim may be held valid upon adjudication." No reasonable person could conclude that ChromaDex (or any reasonable petitioner) could have believed the Citizen Petition had a chance of being held valid upon adjudication by the FDA.

Therefore, if the Court declines to reverse the Settlement Order, Elysium respectfully requests that it reverse the Citizen Petition Order.

II.
STATEMENT OF JURISDICTION

On September 27, 2017, Elysium filed a complaint against ChromaDex for false advertising, trade libel, deceptive business practices, and tortious interference with prospective economic relations before the District Court (the "Citizen Petition Claims"). *See* Complaint, *In re Elysium Health-Chromadex Litigation*, No. 17-cv-7394 (S.D.N.Y Sept. 27, 2017), ECF No. 1. The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 15 U.S.C. § 1121 because this is a civil action arising under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), and supplemental jurisdiction of state law claims under 28 U.S.C. § 1367(a). The District Court also

had diversity jurisdiction under 28 U.S.C. § 1332 because Elysium is a citizen of New York and ChromaDex is a citizen of California, and the amount in controversy exceeded $75,000.

On October 25, 2017, ChromaDex filed a complaint against Elysium for false advertising. *See* Complaint, *ChromaDex, Inc. v. Elysium Health, Inc.*, No. 17-cv-8239 (S.D.N.Y. Oct. 25, 2017), ECF Nos. 1, 7. The District Court had jurisdiction under 28 U.S.C. § 1331 and 15 U.S.C. § 1121 because this is a civil action arising under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), and supplemental jurisdiction of state law claims under 28 U.S.C. § 1367(a). The District Court also had diversity jurisdiction under 28 U.S.C. § 1332 because Elysium is a citizen of New York and ChromaDex is a citizen of California, and the amount in controversy exceeded $75,000. Elysium also filed counterclaims for false advertising against ChromaDex (together with ChromaDex's affirmative claims, the "False Advertising Claims").

On November 3, 2017, the two cases were consolidated. *See* Order, *In re Elysium Health-Chromadex Litigation*, No. 17-cv-7394 (S.D.N.Y. Nov. 3, 2017), ECF No. 27.

On February 7, 2019, the District Court issued the Citizen Petition Order dismissing the Citizen Petition Claims. Appendix for Appellant ("A") 1258. On April 19, 2022, the District Court issued the Settlement Order enforcing an alleged

settlement of the False Advertising Claims. A 1399. On April 28, 2022, the District Court entered a final order dismissing all remaining claims and counterclaims with prejudice and closed the case. Special Appendix for Appellant ("SPA") 1. On May 11, 2022, Elysium filed a notice of appeal. A 1426.

III.
ISSUES PRESENTED

1. Whether the District Court erred in asserting inherent authority to, on motion, determine whether the parties had agreed to a settlement of a case pending before another district court, namely the U.S. District Court for the Central District of California?

2. Whether the District Court erred by finding that ChromaDex's February 2, 2022 phone call constituted an offer, and Elysium's February 3, 2022 e-mail constituted an acceptance of that offer, of all material terms to the purported settlement agreement?

3. Whether the District Court misinterpreted and misapplied the four-factor test set forth in *Winston v. Mediafare Entertainment Corp*., 777 F.2d 78 (2d Cir. 1985)?

4. Whether the District Court misinterpreted and misapplied the "objectively baseless" standard under the "sham exception" to the *Noerr-Pennington* doctrine when it dismissed the Citizen Petition Claims?

IV.
STATEMENT OF THE CASE

A. Relevant Factual Background

1. The Parties' Competitive Relationship

Elysium sells a dietary supplement called Basis. A 1258. Basis consists of two ingredients, nicotinamide riboside (NR) and pterostilbene (PT). *Id.* ChromaDex, which was exclusively an ingredient wholesaler when Elysium launched Basis, supplied NR and PT to Elysium. After witnessing Elysium's success with Basis, ChromaDex decided to enter the retail market with its own NR-based product, TruNiagen. A 1258-59. To eliminate competitors in this new market, ChromaDex ended its supply agreements with most of its wholesale customers, including Elysium. Elysium, however, began the process of developing its own method of manufacturing NR and PT to continue to sell basis and compete with TruNiagen. *Id*. In response, rather than compete fairly in the market, ChromaDex sought to use its considerable resources as a publicly traded company to destroy the up-start Elysium through ulterior means.

2. ChromaDex's Campaign Against Elysium

ChromaDex, as part of its deceptive campaign, filed a series of meritless legal actions against Elysium throughout the country. First, ChromaDex sued Elysium in California for breach of the old supply agreements. *See* Complaint, *ChromaDex, Inc. v. Elysium Health, Inc.*, 16-cv-2277 (C.D. Cal. Dec. 29, 2016), ECF No. 1. Next,

ChromaDex submitted the Citizen Petition to the FDA, alleging that Basis was dangerous to the public health. A 88. Then, ChromaDex sued Elysium in New York for false advertising (while engaging in its own false advertising). *See* Complaint, *ChromaDex, Inc. v. Elysium Health, Inc.*, No. 17-cv-8239 (S.D.N.Y. Oct. 25, 2017), ECF Nos. 1, 7. Finally, ChromaDex sued Elysium in Delaware for patent infringement. *See* Complaint, *ChromaDex, Inc. v. Elysium Health, Inc.*, No. 18-cv-1434 (D. Del. Sept. 17, 2018), ECF No. 1.

(a) The California Litigation

Under the supply agreement between Elysium and ChromaDex, Elysium was entitled to "most favored nations" pricing, i.e., Elysium was guaranteed to receive the best price for NR and PT that ChromaDex offered to any customer. For Elysium's last ingredient order, before ChromaDex terminated the supply agreement, ChromaDex's then-CEO accidentally revealed that other ChromaDex customers received better pricing. Elysium demanded that ChromaDex honor the most favored nations pricing provision. ChromaDex refused.

Instead, on December 29, 2016, ChromaDex sued Elysium in the U.S. District Court, Central District of California for breach of contract and misappropriation of trade secrets (the "California Litigation"). *See* Complaint, *ChromaDex, Inc. v. Elysium Health, Inc.*, 16-cv-2277 (C.D. Cal. Dec. 29, 2016), ECF No. 1. ChromaDex also sued Mark Morris, a former employee of ChromaDex and current

employee of Elysium, in the California Litigation for breach of contract and breach of fiduciary duty. *See* Fifth Amended Complaint, *ChromaDex, Inc. v. Elysium Health, Inc.*, 16-cv-2277 (C.D. Cal. Nov. 27, 2018), ECF No. 153. ChromaDex sought tens of millions of dollars in damages, disgorgement of profits, and punitive damages.

After nearly five years of litigation, a jury ultimately found that ChromaDex breached the most favored nations pricing provision, overcharging Elysium by $650,000. A 1321-31. The jury also found that ChromaDex fraudulently induced Elysium to enter a license agreement and awarded Elysium $250,000 in damages and $1,025,000 in punitive damages. *Id*. As a result, Elysium owed ChromaDex a net amount of $1,058,350 for the final ingredient order.[1] *Id*.

(b) The Citizen Petition

In August 2017, ChromaDex filed the Citizen Petition with the FDA asserting that Basis is "adulterated" and dangerous based upon trace amounts of toluene in Basis (A 87), despite the presence of toluene in ChromaDex's own ingredients, including those previously sold to Elysium. ChromaDex sought for the FDA to order that Elysium "cease distribution" of Basis, seize Elysium's existing Basis product, and enjoin Elysium from manufacturing Basis, despite the fact that such relief is not

[1] The jury separately found Mr. Morris breached his confidentiality agreement and awarded ChromaDex $17,307.69. A 1328.

available from the FDA's citizen petition process. A 265. Accordingly, the FDA has not granted any of the relief or taken any of the actions sought by ChromaDex in the over five years since its filing.

(c) The New York Litigation

On October 25, 2017, ChromaDex sued Elysium in the Southern District of New York for false advertising (the "New York Litigation"). *See* Complaint, *ChromaDex, Inc. v. Elysium Health, Inc.*, No. 17-cv-8239 (S.D.N.Y. Oct. 25, 2017), ECF Nos. 1, 7. The complaint functioned as a public relations attack, claiming that Elysium's product is not safe, effective, or pure, even though published studies and Certificates of Analysis have shown the opposite. *Id.*

After over three years of litigation, the entirety of ChromaDex's case was dismissed on summary judgment. *See* Order, *In re Elysium Health-Chromadex Litigation*, No. 17-cv-7394 (S.D.N.Y. Feb. 3, 2022), ECF No. 295, 302. On the other hand, several of Elysium's counterclaims for false advertising against ChromaDex survived. *Id.*

(d) The Delaware Litigation

In 2018, ChromaDex and Dartmouth College sued Elysium for patent infringement in the United States District Court for the District of Delaware (the "Delaware Litigation"), alleging that Elysium's Basis product, which contained NR manufactured by Elysium, infringed various NR patents licensed by ChromaDex

from Dartmouth. *See* Complaint, *ChromaDex, Inc. v. Elysium Health, Inc.*, No. 18-cv-1434 (D. Del. Sept. 17, 2018), ECF No. 1. Illustrating ChromaDex's pursuit of baseless litigation, the District of Delaware granted Elysium's motion to dismiss all of ChromaDex's infringement claims arising after March 13, 2017. *See* Complaint, *ChromaDex, Inc. v. Elysium Health, Inc.*, No. 18-cv-1434 (D. Del. Dec. 17, 2020), ECF No. 142. Yet, ChromaDex persisted in the Delaware Litigation despite its acknowledgement that Elysium did not start selling its own NR until July 2017. *See* A 91. On September 21, 2021, the Delaware District Court granted Elysium's motion for summary judgment, holding that the asserted patents were invalid. *See* Order, *ChromaDex, Inc. v. Elysium Health, Inc.*, No. 18-cv-1434 (D. Del. Sept. 21, 2021), ECF No. 370.

B. History Leading To The Citizen Petition Order

Each of the many legal actions asserted by ChromaDex against Elysium lacked merit. The Citizen Petition was particularly egregious, however, because ChromaDex filed a deceptive Citizen Petition that sought relief ChromaDex knew to be outside the scope of FDA's citizen petition procedures. ChromaDex did not care—as a public filing, the Citizen Petition's real purpose for ChromaDex was to injure Elysium's reputation in the marketplace.

Accordingly, on September 27, 2017, Elysium sued ChromaDex in the Southern District of New York for false advertising, trade libel, deceptive business

practices, and tortious interference with prospective economic relations as a result of the sham Citizen Petition.[2] *See* Complaint, *In re Elysium Health-Chromadex Litigation*, No. 17-cv-7394 (S.D.N.Y. Sept. 27, 2017), ECF No. 1.

1. Motion to Dismiss

On October 26, 2017, ChromaDex moved to dismiss Elysium's Complaint under Fed. R. Civ. P. 12(b)(6), arguing that the Citizen Petition qualifies for protection under the *Noerr-Pennington* doctrine, which safeguards the First Amendment right to petition the government for a redress of grievances by immunizing citizens from liability attending to that right. *See* A 58.

Elysium argued in opposition that the Citizen Petition fell under the "sham exception" of the *Noerr-Pennington* doctrine, which denies immunity for attempts to influence governmental action where doing so is a "mere sham to cover an attempt to interfere directly with the business relationships of a competitor." A 204, 210-16. ChromaDex's Citizen Petition was a sham because:

(a) the toluene levels that ChromaDex claimed were present in Basis were consistent with pharmaceutical safety standards (A 709-10, citing A 719-32, 728-51, 759-98);

[2] On November 3, 2017, the District Court consolidated that action with ChromaDex's false advertising lawsuit against Elysium. *See* Order, *In re Elysium Health-Chromadex Litigation*, No. 17-cv-7394 (S.D.N.Y. Nov. 3, 2017), ECF No. 27.

(b) ChromaDex's own pTeroPure (PT) product contained similar levels of toluene, such that ChromaDex could not actually believe that Basis was unsafe or that the Citizen Petition had merit (A 712, citing A 783-833); and

(c) ChromaDex could have no expectation that the FDA would grant its Citizen Petition because the FDA does not grant petitions seeking the commencement of enforcement actions via the citizen petition process (A 713-14, citing A 834-51).

On September 27, 2018, the District Court denied, in part, ChromaDex's motion to dismiss, and converted the remainder of the motion—the issue of whether the Citizen Petition qualified for immunity under the *Noerr-Pennington* doctrine—to a motion for summary judgement. A 259-60. In doing so, the District Court found that ChromaDex was "fully aware the specific enforcement action it sought in the Citizen Petition—a seizure order and/or an injunction against distributors of Basis—was beyond the purview of a citizen petition." A 265. The District Court also specifically requested that the parties present evidence regarding whether ChromaDex was selling a product containing toluene, which the District Court described as "[m]ost damning on the issue of objective baselessness[.]" A 268-69.

2. Summary Judgment

As directed by the District Court, both parties submitted evidence regarding the presence of toluene in ChromaDex's product. Indeed, ChromaDex conceded

that its product contained toluene, the same substance that it publicly declared made Elysium's product dangerous to the public health. A 295, 720-22, 738-65.

The District Court, however, shifted its focus away from whether ChromaDex had a genuine belief in the merits of the Citizen Petition. Instead, because Elysium ultimately removed all traces of toluene from Basis as part of its continuing efforts to develop its own method of manufacturing ingredients to ensure superior product quality compared to TruNiagen and others, the District Court improperly inferred that the Citizen Petition caused Elysium to improve its product quality. A 1264-65. The *District* Court then improperly concluded that Basis's improved product quality constituted a favorable outcome for ChromaDex and, therefore, the Citizen Petition was not objectively baseless. *Id.*

The Citizen Petition Claims were dismissed on February 7, 2019. *See* A 1258.

C. History Leading To The Settlement Order

1. The Undisputed Settlement History

Given the parties' extensive litigation history, they have a long settlement history as well. The parties first attempted private mediation in January 2018. A 1303. Since then, they spent well over 100 hours engaging in mediation and settlement discussions, including a settlement conference before a Magistrate Judge in the Central District of California, a settlement conference before a Magistrate Judge in the District of Delaware, and multiple private mediations. *Id*. The parties

also engaged in intermittent, informal settlement discussions through outside and in-house counsel. A 1303-04.

Over the course of these settlement discussions, the parties expressly stated and exchanged forthright signals that neither intended to be bound by settlement until the execution of a written agreement. *See, e.g.*, A 1302, 1314 ("Any agreement with respect to the matters set out in this term sheet would become binding on the parties only when and if the parties enter into one of more definitive agreements regarding such subject matter."); A 1318 ("Of course, our discussions won't be binding until reduced to a formal final agreed upon writing . . .").

The nature of the settlement proposals necessarily changed over time given the altered status of the legal proceedings during that span. And the parties did not reiterate the written agreement requirement in every one (or even in most) of their countless settlement communications. By December 2021, the jury had issued its verdict in the California Litigation, ChromaDex's motion for prejudgment interest in the California Litigation was also pending (and ultimately denied), and the parties had yet to file motions for attorneys' fees. *See* A 1320, 1350. The district court had granted summary judgment in the Delaware Litigation (*see* Order, *ChromaDex, Inc. v. Elysium Health, Inc.*, No. 18-cv-1434 (D. Del. Sept. 21, 2021), ECF No. 370), and the parties' cross-summary judgment motions remained pending in the New York Litigation.

Consistent with the parties' long-held understanding and prior express reservations of an approved, written settlement agreement, on December 2, 2021, Elysium's counsel presented certain "***principal terms***" for settlement, including that Elysium would make a settlement payment related to the California Litigation in two installments. A 1339; emphasis added. On December 19, 2021, ChromaDex's counsel presented a counteroffer that required, among other changes, a lump sum payment. A 1338. ChromaDex's counsel stated: "Any agreement on these proposed terms is, ***of course***, subject to final approval by ChromaDex's board of directors." A 1339; emphasis added.

After further negotiations, on January 5, 2022—days prior to the oral argument before the District Court on the parties' cross-summary judgment motions in the New York Litigation—Elysium presented its "best and final offer," which again included that Elysium would make the settlement payment in two installments. A 1333; emphasis in original. Elysium's counsel stated that, if ChromaDex accepted the terms, the parties could notify the District Court that they had "reached an agreement ***in principle***[.]" *Id*.; emphasis added.

In response, William Carter, in-house counsel for ChromaDex, called Thomas Wilhelm, in-house counsel for Elysium, to discuss additional terms. A 1305. ChromaDex's primary concern was Elysium's ability to make the second installment payment and thus explored how Elysium could "guarantee" the second payment be

made in full. A 1291. The parties did not reach an agreement and proceeded with oral argument in the New York Litigation. A 1305.

2. The Disputed Settlement History

According to Dr. Wilhelm, he received a telephone call from Mr. Carter on February 2, 2022 (the "February 2 Call"). A 1305, 1347. Mr. Carter called to propose additional "guarantees" or conditions with respect to Elysium's second installment payment. *Id*. Mr. Carter proposed that: (1) interest could accrue, but be forgiven or waived if the second payment was paid timely, and (2) ChromaDex would be entitled to attorneys' fees in connection with a collection action. *Id*.

During the February 2 Call, Mr. Carter did not discuss any other settlement terms from the parties' prior correspondence. A 1305. He did not tell Dr. Wilhelm that ChromaDex was withdrawing its prior, repeated reservations not to be bound absent a formal, written agreement. *Id*. Mr. Carter did not tell Dr. Wilhelm that, despite the hundreds of hours of prior settlement discussions to resolve many years of litigation in multiple courts throughout the country, he now had board approval to enter a binding agreement based on a phone call. *Id*.

On February 3, 2022, Dr. Wilhelm sent an e-mail to Mr. Carter that is consistent with Dr. Wilhelm's description of the February 2 Call (the "February 3 E-mail"). A1347-48. Dr. Wilhelm wrote that Elysium "can accept the ***additional*** terms you proposed yesterday." A 1347; emphasis added. Dr. Wilhelm further

expressed his understanding that the parties still had more to negotiate going forward, as he added: "I share this not to try and ***gain leverage moving forward*** but to make this point: we will not accept any additional 'guarantees' or conditions beyond the two you described yesterday . . ." *Id*.; emphasis added.

Dr. Wilhelm then added the settlement framework previously set forth in Elysium's January 5, 2022 e-mail, updated to reflect that it was now February. A 1333. The February 3 E-mail does not ***confirm*** such terms, but ***seeks*** confirmation, with Dr. Wilhelm prefacing the terms by stating "[i]f I am remembering correctly," and explicitly listing them as what the parties "would" do if there were a binding agreement. A 1347. The February 3 E-mail restated the parties' still unconfirmed agreement in principle, which overwhelmingly related to the California Litigation:

> 1. Elysium would agree to pay ChromaDex a total of $2.5 million to resolve any outstanding issues with respect to the claims and counterclaims tried to the jury in the California action, including the issue of prejudgment interest, as well as the entire New York action.
>
> 2. Pursuant to Fed. R. Civ. P. 54(b), the parties would agree to request that the Court enter a stipulated judgment in this amount with respect to the claims and counterclaims tried to the jury in the California action.
>
> 3. The stipulated judgment would be paid in two equal installments of $1.25 million each. The first would be paid on February X, 2022. The second would be paid on or before February X, 2023.
>
> 4. All 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. The parties would further

> agree not to file any other post-trial motions or appeals related to the claims and counterclaims tried to the jury in the California action.
>
> 5. The parties would agree to a mutual dismissal with prejudice of all claims and counterclaims raised in the New York action, with each side bearing its own attorney's fees and costs.

A 1347.

Further consistent with the parties' intention to reduce their agreement in principle to a formal signed writing, during which process they would pin down additional terms (with respect to which Dr. Wilhelm was not trying to gain leverage), in closing, Dr. Wilhelm wrote: "I understand that now that we have an agreement you will get started on the documentation." A 1348. Mr. Carter did not respond to Dr. Wilhelm's e-mail or confirm ChromaDex's agreement with the terms Dr. Wilhelm laid out.

Shortly after Dr. Wilhelm sent the February 3 E-mail, the District Court issued its ruling on summary judgment under seal. Approximately twenty minutes after that, Dr. Wilhelm wrote to Mr. Carter: "Hi Bill – With the decision in New York (that we still haven't seen in full), please hold off on drafting the documentation. We need to understand the decision and see how it impacts settlement." A 1346. Again consistent with the parties' intention that they had reached a settlement in principle to be further addressed during the drafting of a formal written agreement, Mr. Carter replied: "Tom, I haven't seen the ruling either but the ***settlement***

structure and amount isn't impacted." *Id*.; emphasis added. Dr. Wilhelm reiterated: "Obviously moving forward with settlement depended on agreeing on the documentation[.]" A 1344.

In support of ChromaDex's motion to enforce settlement, Mr. Carter submitted a declaration that told a different, more convenient, story. According to Mr. Carter, during the February 2 Call, Mr. Carter expressly laid out each of the terms from Elysium's January 5, 2022 e-mail nearly verbatim, not just his proposal for "guarantees" that Elysium make the second installment payment. A 1292-93. Mr. Carter claimed that he told Dr. Wilhelm that, if Elysium agreed to all of these terms, the parties "would have a deal." A 1293.

While Mr. Carter stated in his declaration that he and Dr. Wilhelm did not expressly discuss that any settlement would be contingent on a signed written agreement ***during the February 2 Call***, Mr. Carter did not deny that the parties had repeatedly exchanged forthright signals of such intention throughout the course of their bargaining history, such that "of course" the parties intended to be bound upon execution of a signed agreement only. A 1293, 1318.

3. The Settlement Order

On April 19, 2022, the District Court issued an order enforcing a settlement agreement based upon the February 2 Call and February 3 E-mail. A 1399. In reaching its conclusion, the District Court disregarded the complete record of the

parties' bargaining history as well as Dr. Wilhelm's version of the February 2 Call and February 3 E-mail. The District Court incorrectly stated:

> Mr. Carter declares, without contradiction, that he stated on the February 2 Call that if Elysium agreed to the terms he laid out then the parties would have a deal and that neither he nor Mr. Wilhelm stated that the settlement agreement (should Elysium accept the offer) would be contingent on a signed document. The language of Mr. Wilhelm's February 3 e-mail contains no express reservation and no indication of an intent not to be bound in the absence of a further written agreement.

A 1410. By disregarding Dr. Wilhelm's contrary version of the February 2 Call—seemingly because Dr. Wilhelm's declaration did not expressly accuse Mr. Carter of fabrication—and viewing the February 2 Call and February 3 E-mail in isolation from the context of the bargaining history, the District Court (1) wrongly concluded that the parties entered into a binding settlement agreement and (2) the parties did not intend to be bound only upon execution of a written agreement.

Consistent with ChromaDex's long history of misusing legal proceedings to its advantage, four months after the issuance of the Settlement Order and three months after Elysium's Notice of Appeal, ChromaDex attempted to enforce the Settlement Order ***against Mr. Morris***, who is not a party to the New York Litigation (and over whom the District Court has no authority or jurisdiction) by filing a Motion for Entry of Judgment in the California Litigation. *See*, ChromaDex's Notice of

Motion and Motion for Entry of Judgment, *ChromaDex, Inc. v. Elysium Health, Inc.*, 16-cv-2277 (C.D. Cal. Aug. 22, 2022), ECF No. 588.

V.
SUMMARY OF THE ARGUMENT

A. The Settlement Order

First, the District Court erred when it exercised its "inherent power" to enforce an alleged settlement agreement in which the alleged consideration was entry of a stipulated judgment ***in another district court***.[3] A 1408. Although the concept of inherent power of district courts is not new, its application has been very restricted, generally limited to the management of its own internal affairs. The use of the inherent power doctrine by district courts to expand the scope of federal judicial power to resolve disputes over which they do not have jurisdiction is a significant departure from past practice. To invoke the inherent power doctrine to issue an order, summarily, on motion, requiring the entry of a stipulated judgment that would override a jury verdict in a case pending before another court, violated public policy and basic notions of due process.

[3] The District Court does not expressly state that it has the inherent power to decide whether Mr. Morris, who was never before the District Court, is bound by the alleged settlement agreement. However, ChromaDex is now attempting to enforce the Settlement Order against Mr. Morris. Of course, the inherent power of a district court cannot extend to resolving litigation between different parties in a different case pending before a different court. To the extent the Settlement Order could be construed as ordering non-party Mr. Morris to enter into a stipulated judgment in the California Litigation, it must be reversed.

Second, if the Second Circuit finds that the District Court did have such inherent power, the District Court then erroneously disregarded the disputed accounts of the settlement discussions. Instead, the District Court wrongly concluded, without an evidentiary hearing, that Mr. Carter's version of events was "without contradiction." This clearly erroneous factual finding led the District Court to incorrectly conclude that the parties formed a binding settlement agreement.

Third, if the Second Circuit finds that the District Court properly resolved the parties' disputed version of events, then the District Court still misinterpreted and misapplied *Winston*, *supra*, 777 F.2d 78, which sets forth factors for determining whether the parties intended to be bound in the absence of an executed, written agreement. The District Court misinterpreted the factor regarding whether the parties' expressly reserved the right not to be bound in the absence of a writing by failing to give appropriate weight to the parties' forthright, reasonable signals of their intent be bound only by a written agreement throughout the parties' entire bargaining history, and, instead, focused only on the lack of an explicit reservation in the February 3 E-mail. A 1409-11. The District Court misconstrued the factor requiring that there is "literally nothing left to negotiate" to merely requiring that the parties agreed to "material" terms. A 1413-15. Finally, with respect to the factor considering whether this is the type of agreement usually committed to a signed writing, the District Court failed to follow the substantive legal precedent that

settlement agreements generally, and agreements in similar amounts over similar terms, are usually committed to a signed writing. A 1415-17.

B. The Citizen Petition Order

If the Second Circuit reverses the Settlement Order based on any of the foregoing grounds, this case would return to the District Court for a trial of Elysium's remaining False Advertising Claims. Thus, the appellate issues regarding the Citizen Petition Order would be deferred until after the final judgment on Elysium's remaining False Advertising Claims. If the Second Circuit affirms the Settlement Order, however, the Citizen Petition Order is ripe for appellate review, because such Citizen Petition Claims, which had been dismissed nearly two years prior, were not contemplated in the alleged settlement agreement.

Under the *Noerr-Pennington* doctrine, attempts to influence legislative, executive, administrative, or judicial action are immune from liability by virtue of the First Amendment right to petition the government for a redress of grievances. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136-39 (1961). The Citizen Petition is not entitled to such immunity, however, because it was a "mere sham to cover … an attempt to interfere directly with the business relationship of a competitor." *Id*. at 144.

To qualify for the "sham" exception to the *Noerr-Pennington* doctrine, the petition must be objectively baseless in the sense that no reasonable petitioner could

realistically expect success on merits, and such baseless petition must conceal an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process as an anticompetitive weapon. *PRE, supra*, 508 U.S. at 60.

The District Court unheeded the clear test set forth in *PRE* and, instead, fashioned its own test by concluding that any favorable outcome, including to the public as opposed to ChromaDex, automatically cloaks an otherwise objectively baseless petition with immunity. A 1265.

VI.

STANDARD OF REVIEW

A. The Settlement Order

A district court's determination of as to the scope of its inherent powers is a legal conclusion that is reviewed *de novo*. *See Emamian v. Rockefeller University*, 971 F.3d 380, 391 (2d Cir. 2020) (reviewing legal argument that district court lacked inherent power *de novo*); *Pedraza v. United Guar. Corp*., 313 F.3d 1323, 1328 (11th Cir. 2002) ("[A] determination as to the scope of those powers is a legal conclusion, and as such is reviewed *de novo*."); *Chase Manhattan Bank, N.A. v. Am. Nat'l Bank & Trust Co*., 93 F.3d 1064, 1070 (2d Cir.1996) (holding that this Court "review[s] *de novo* a district court's legal conclusion with respect to subject matter jurisdiction").

On appellate review of an order enforcing a settlement agreement, the Court reviews a district court's findings of law under a *de novo* standard, and its factual conclusions under a clearly erroneous standard of review. *Ciaramella v. Reader's Dig. Ass'n, Inc*., 131 F.3d 320, 322 (2d Cir. 1997). Mixed questions of law and fact are likewise reviewed *de novo*. *See Connors v. Conn. Gen. Life Ins. Co.*, 272 F.3d 127, 135 (2d Cir.2001).

When reviewing a purely factual finding, if the Court is "left with the definite and firm conviction that a mistake has been committed," the finding is "clearly erroneous." *Oscar Gruss & Son, Inc. v. Hollander*, 337 F.3d 186, 193 (2d Cir. 2003).

B. <u>The Citizen Petition Order</u>

In *PRE,* the Supreme Court held that whether a lawsuit is "objectively baseless" for the purposes of the sham litigation inquiry under the *Noerr-Pennington* doctrine is a legal question to be review *de novo*. *PRE, supra*, 508 U.S. at 63, 67. While some degree of factual inquiry may be required, the reasonableness of a party's litigation positions will ultimately turn on the *legal* merits of the underlying claims, defenses and legal theories. *Id*. at 60 (holding that, to be considered "sham," "a lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits"). In reviewing the "objective reasonableness" of the legal merits of a party's litigation positions on appeal, the district court is not in a superior position to the appellate court.

Accordingly, the ultimate question of whether ChromaDex's Citizen Petition was "objectively reasonable" should be reviewed *de novo* without deference to the district court's determinations.

VII.

ARGUMENT

A. The District Court does not have the inherent power to, on motion, determine whether the parties agreed settle a case pending before the Central District of California.

The District Court asserted authority to issue the Settlement Order based upon "the power to enforce summarily, on motion, a settlement agreement reached ***in a case that was pending before it***." A 1408, citing *Velazquez v. Yoh Services, LLC*, No. 17-cv-00842 CM, 2017 WL 4404470, at *2 (S.D.N.Y. Sept. 25, 2017) (emphasis added).) The Settlement Order, however, did not enforce a settlement agreement in a case pending before ***the District Court***. Rather, it enforced an alleged settlement agreement that dealt primarily with a case pending before ***another*** district court—namely, the Central District of California—and the District Court's decision on that settlement agreement undermined a jury verdict in that other district court and a subsequent determination by that other court regarding the applicability of prejudgment interest.[4] *See* A 1320, 1350.

[4] The Settlement Order is silent as to whether Mark Morris, Elysium's employee and co-defendant in the California Litigation, is bound by the alleged settlement agreement as ChromaDex contends. The District Court certainly does not have the inherent power to decide whether Mr. Morris, who is not a party before the District

In response to Elysium's challenge to the District Court's authority to enforce summarily, on motion, a settlement agreement reached in a case pending before the Central District of California, the District Court stated that to deny it such power "would mean that any settlement that resolves disputes spanning multiple jurisdictions and that lacks a forum selection clause is categorically unenforceable." A 1415. The District Court misunderstands the issue. Elysium's challenge to the court's authority is not about enforceability of the alleged agreement, but rather whether a district court possesses the authority to summarily, on motion and without an evidentiary hearing or other process, decide the enforceability of an alleged contract settling a different case before a different court.[5] Elysium submits that, by issuing the Settlement Order, in which the District Court ordered the parties to enter a stipulated judgment ***overriding*** a jury verdict and prejudgment interest order in a case pending before another district court, summarily, on motion, the District Court exceeded its authority.

Court, is bound by the alleged settlement agreement resolving his litigation in another court, particularly on a motion.

[5] Of course, the complex nature of resolving disputes spanning multiple jurisdictions and the issues of enforcement procedures that arise are strong indications that they are the type of agreements usually reduced to signed writings under the fourth *Winston* factor, addressed further below.

The Supreme Court has long recognized that district courts have the inherent authority to manage their own dockets and courtrooms with a view toward the efficient and expedient resolution of cases. *See, e.g.*, *Chambers v. NASCO, Inc*., 501 U.S. 32, 44 (1991) (district court has inherent power to vacate judgment procured by fraud); *Link v. Wabash R. Co.*, 370 U.S., 626, 631– 632 (1962) (district court has inherent power to dismiss case *sua sponte* for failure to prosecute); *United States v. Morgan*, 307 U.S. 183, 197–198 (1939) (district court has inherent power to stay disbursement of funds until revised payments are finally adjudicated); *Landis v. North American Co*., 299 U.S. 248, 254 (1936) (district court has inherent power to stay proceedings pending resolution of parallel actions in other courts).

The Supreme Court has cautioned: "Because the exercise of an inherent power in the interest of promoting efficiency may risk undermining other vital interests related to the fair administration of justice, a district court's inherent powers must be exercised with restraint." *Dietz v. Bouldin*, 579 U.S. 40, 48 (2016), *citing Chambers*, *supra*, 501 U.S., at 44 ("Because of their very potency, inherent powers must be exercised with restraint and discretion").

Elysium does not dispute that a district court's inherent power allows it to manage ***its*** proceedings, vindicate ***its*** authority, and effectuate ***its*** decrees. Elysium is not aware of a single case, however, that authorizes a district court to exercise inherent power in order to manage ***another court's*** proceedings. The District Court

is prohibited from expanding its own authority in this regard. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (the power of federal courts "is not to be expanded by judicial decree"). Further, if the District Court had inherent authority to determine whether the parties settled the California Litigation, the District Court abused its discretion by making such a determination without an evidentiary hearing and opportunity for cross-examination, particularly where, as discussed below, the question of whether the parties formed a binding settlement agreement hangs upon the credibility of contradictory accounts of settlement discussions.

B. The District Court disregarded evidence to erroneously conclude that the parties formed a binding settlement agreement.

The District Court found that: "Mr. Carter declares, without contradiction, that he stated on the February 2 Call that if Elysium agreed to the terms he laid out then the parties would have a deal and that neither he nor Mr. Wilhelm stated that the settlement agreement (should Elysium accept the offer) would be contingent on a signed document." A 1410. This was clearly erroneous.

It is indisputable that Dr. Wilhelm's declaration and the documentary evidence attached thereto contradicted Mr. Carter's account. *First*, Mr. Carter claimed that he conveyed each and every single term constituting the settlement offer. Dr. Wilhelm, in contrast, stated in his declaration that Mr. Carter only discussed additional "guarantees" or conditions with respect to Elysium's second

installment payment. According to Dr. Wilhelm, Mr. Carter "did not discuss all of the terms from the parties' prior communications." A 1305. *Second*, Mr. Carter claimed that, if Elysium accepted what he claimed was a complete settlement offer, the parties would "have a deal." A 1293. Dr. Wilhelm, however, stated in his declaration that "Mr. Carter never expressed to me that ChromaDex was withdrawing its repeated reservation that it required a formal, written agreement to be bound, nor did I state that Elysium no longer required a formal, written agreement to be bound." A 1305. Dr. Wilhelm further declared: "Mr. Carter also did not state that ChromaDex's Board of Directors had provided a final approval of the settlement." *Id*. In short, Dr. Wilhelm had no reason to believe that agreeing in the February 3 E-mail to the additional guarantees expressed by Mr. Carter in the February 2 Call would result in a final, binding agreement to all settlement terms for two pending litigations, as opposed to, at most, preliminary assent to a settlement in principle (as described in Elysium's January 5, 2022 e-mail). Indeed, the February 3 E-mail included additional terms from Elysium's prior settlement communication, which were never assented to by ChromaDex prior to ChromaDex's exploration of additional "guarantees" in response to Elysium's "best and final" offer, and thus the February 3 E-mail may not be considered more than an unaccepted counteroffer in the first place. A 1333, 1347.

The evidence contradicting Mr. Carter's version of events mandates the reversal of the District Court's legal conclusions regarding: (1) whether the February 2 Call constituted an offer and the February 3 E-mail constituted an acceptance; and, (2) whether the parties entered a final, binding agreement or, at most, a non-binding agreement in principle.

1. Offer and Acceptance

The February 2 Call did not constitute an offer because the parties did not discuss all of the terms that would make up the settlement in principle. *See Lamda Sols. Corp. v. HSBC Bank USA, N.A.*, 574 F. Supp. 3d 205, 213-14 (S.D.N.Y. 2021) ("In considering whether a binding contract exists, '[t]he first step ... is to determine whether there is a sufficiently definite offer such that its unequivocal acceptance will give rise to an enforceable contract.'") (citing *Kolchins v. Evolution Markets, Inc.*, 31 N.Y.3d 100, 106 (2018) (quoting *Matter of Express Indus. & Terminal Corp. v. New York State Dep't of Transp.*, 93 N.Y.2d 584, 589–90 (1999))).

The February 3 E-mail was not an "acceptance," but a counteroffer because it incorporated modified terms from Elysium's January 5, 2022 e-mail and qualified its acceptance of ChromaDex's proposed "guarantees" relating to the second installment payment by the condition that ChromaDex not try to impose any additional "guarantees." *See Batra v. Pace Univ.*, No. 90-cv-4315 DAB, 1998 WL 684621, at *11 (S.D.N.Y. Sept. 30, 1998), aff'd sub nom. *Batra v. Joyce*, 182 F.3d 898 (2d Cir.

1999) ("[i]t is a fundamental principle of contract law that a valid acceptance must comply with the terms of the offer ... and, if qualified with conditions, it is equivalent to a rejection and counteroffer") (citing *Roer v. Cross County Medical Center Corp.*, 441 N.Y.S.2d 844, 845 (N.Y. App. Div. 2d Dep't 1981)); *see also In re Westinghouse Electric Company LLC*, 588 B.R. 347, 354 (Bankr. S.D.N.Y. 2018) (an "acceptance" of an offer conditioned on new or modified terms rejects the offer). Nor did Dr. Wilhelm treat the February 3 E-mail as an acceptance, but rather as a counteroffer of the terms that the parties "would" agree to as part of a formal written agreement. A 1347.

ChromaDex never accepted the counteroffer set forth in the February 3 E-mail before Dr. Wilhelm informed ChromaDex to "hold off on drafting the documentation" until the parties could determine how the District Court's order regarding summary judgment "impacts settlement." *See Daimon v. Fridman*, 5 A.D.3d 426, 427 (N.Y. App. Div. 2d Dep't 2004) (mere silence in response to a counteroffer cannot be construed as acceptance).

2. A Settlement In Principle

To the extent the February 3 E-mail could be regarded as assent, it could be regarded as no more than a preliminary manifestation of assent. In general, "preliminary manifestations of assent that require further negotiation and further contracts do not create binding obligations." *Shann v. Dunk*, 84 F.3d 73, 77 (2d Cir.

1996). Elysium unmistakably stated its expectation of further negotiations ("gain leverage going forward") and further documentation ("get started on the documentation"). A 1347. Further negotiation and further documentation were required to agree to a mutually acceptable stipulated judgment in the California Litigation. Moreover, if the parties wanted to fully resolve the California Litigation, Mr. Morris also had to approve the settlement terms, which, as of the February 3 E-mail, he had not done, but could have done during the negotiation and documentation of the formal written agreement.

Similarly, Judge Leval (then a District Court Judge) identified a "binding preliminary commitment" where the parties agree on certain major terms but leave other terms open for good faith negotiation during the contract drafting process. *See Teachers Ins. & Annuity Ass'n of America v. Tribune Co.*, 670 F. Supp. 491, 497-99 (S.D.N.Y 1987). A "binding preliminary commitment" does not commit the parties to their ultimate contractual objective, but rather the obligation to negotiate the open issues in good faith in an attempt to reach the objective within the agreed framework. *See Adjustrite Sys., Inc. v. GAB Bus. Services, Inc.*, 145 F.3d 543, 548 (2d Cir. 1998). Elysium's January 5, 2022 e-mail describing "an agreement in principle" and ChromaDex's February 3, 2022 e-mail stating the parties agreed to a "settlement structure" lend additional support to the notion that the February 3 E-mail was not—

even stretched to its limits—an assent to be bound absent a formal, signed writing incorporating all of the settlement terms. A 1333.

C. The District Court misinterpreted and misapplied the four-factor test set forth in *Winston v. Mediafare Entertainment Corp*.

The Second Circuit described four factors to consider to help determine whether the parties intended to be bound in the absence of an executed, written agreement: (1) whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing. *R.G. Group Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 75-76 (2d Cir. 1984) ("*R.G. Group*"). "No single factor is decisive, but each provides significant guidance." *Id.* at 75. In *Winston, supra*, 777 F.2d at 79-80, the Court applied these factors to alleged settlement agreements.

1. Express Reservation

The District Court misconstrued the first factor—whether there has been an express reservation of the right not to be bound in the absence of a writing—by: (1) ignoring the parties' long history of expressed intentions to be bound only by a signed, written agreement; and (2) requiring that an express reservation had to be made during the February 2 Call or in the February 3 E-mail. A 1409.

As a preliminary matter, this Court has rejected "hard and fast requirements of form" of such reservation. *R.G. Group, supra*, 751 F.2d at 75. Rather, "when a party gives ***forthright, reasonable signals*** that it means to be bound only by a written agreement, courts should not frustrate that intent." *Id*. (emphasis added).

"[I]t does not matter whether the signal is given during the course of bargaining, or at the time of the alleged agreement." *R.G. Group, supra*, 751 F.2d at 75; *Reprosystem, B.V. v. SCM Corp.*, 727 F.2d 257, 262 (2d Cir. 1984) ("over the course of bargaining" parties exchanged drafts that stated agreement was effective upon execution and delivery); *ABC Trading Co. v. Westinghouse Electric Supply Co.*, 382 F. Supp. 600, 602 (E.D.N.Y. 1974) (no oral agreement because a letter ***written three and a half months before the alleged agreement*** stated "if your client finds this proposal agreeable in principle, we can proceed to reduce it to a written agreement") (emphasis added).

Such signals that the parties mean to be bound only by a formal, written agreement are not erased by subsequent expressions that an agreement has been reached. *Ciaramella v. Reader's Digest Ass'n, Inc.*, *supra*, 131 F.3d at 325 (counsel's statement that "we have a deal" at time of alleged agreement did not overcome "weeks of bargaining" in which the parties expressed the need for a signed agreement); *R.G. Group, supra*, 751 F.2d at 75 (the parties' statement of "handshake agreement" at the time of alleged agreement did not overcome references to need for

written contract over "months of bargaining"); *Stockalert, Inc. v. The Nasdaq Stock Market, Inc.*, 95-cv-9335 JFK, 1998 WL 556036, at *11 (S.D.N.Y 1998) (statement during telephone conversation at time of alleged agreement that parties "had a deal" was not enough to raise material issue of fact when viewed in the context of months of negotiations with references to reservation).

Here, the parties gave forthright, reasonable signals that they meant to be bound only by a written agreement. *See, e.g.*, A 1314 ("Any agreement with respect to the matters set out in this term sheet would become binding on the parties only when and if the parties enter into one of more definitive agreements regarding such subject matter."); A 1318 ("Of course, our discussions won't be binding until reduced to a formal final agreed upon writing . . ."); A 1339 ("principle terms"); A 1333 ("agreement in principle"); A 1347 ("gain leverage going forward"); A 1339 ("subject to final approval by ChromaDex's board of directors"). As the Second Circuit warned, "courts should not frustrate that intent." *R.G. Group*, *supra*, 751 F.2d at 75.

2. Nothing Left To Negotiate

The third factor[6] is "whether there was ***literally nothing left to negotiate*** or settle, so that all that remained to be done was to sign what had already been fully

[6] Elysium is not asking the Second Circuit to review the second factor—whether there has been partial performance of the contract—because Elysium agrees with the District Court that this factor is neutral due to the extremely short period of time

agreed to." *R.G. Group, supra*, 751 F.2d at 76 (emphasis added). Here, the District Court improperly altered the third factor into whether the parties had agreed on "all ***material*** terms." A 1413; emphasis added. The Second Circuit expressly rejected a "material" terms standard in *Winston*. *Id.*, 777 F.2d at 79-80 ("That these 'unnoticed' or 'passed by' points of disagreement may in the long view be fairly characterized as minor or technical does not mean that a binding contract was formed prior to the time that they were finally worked out.").

The Court has further recognized that, even where parties reach an agreement in principle on major terms, there are often many points left to negotiate where the parties contemplate a formal written agreement:

> The actual drafting of a written instrument will frequently reveal points of disagreement, ambiguity, or omission which must be worked out prior to execution. Details that are unnoticed or passed by in oral discussion will be pinned down when the understanding is reduced to writing. These considerations are not minor[.]

R.G. Group, supra, 751 F.2d at 75.

Any suggestion that there were no terms still to be negotiated is belied by the content of the Settlement Order, which notes that the settlement cannot be consummated without the documentation of the stipulated judgment in the California

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between the February 3 E-mail and Dr. Wilhelm's e-mail of the same day advising ChromaDex to hold off on starting documentation of the agreement in principle.

Litigation. A 1417. Yet, the content and wording of such stipulated judgement was never agreed to. Similarly, in *Ciaramella v. Reader's Digest Ass'n, Inc.*, *supra*, 131 F.3d at 325, the parties agreed that, as a part of settlement, Reader's Digest must deliver a letter of reference concerning Ciaramella to Ciaramella's attorney. The final draft of the settlement agreement contained an example copy of the letter of reference annexed as Exhibit B, but Ciaramella was not satisfied with the wording of the letter. *Id*. On that basis, the Court found that the parties "had not yet reached agreement on all terms of the settlement." *Id*. Likewise, because ChromaDex and Elysium never agreed on the wording of the stipulated judgment, they had not yet reached agreement on all terms of the settlement.

While the parties had agreed to a settlement framework, they had not agreed to key aspects of the stipulated judgment, including the dates of the payments or the applicable interest rate for ChromaDex's "guarantee" of the second installment payment. The Settlement Order underscores the fact that the interest rate was left to negotiate because the District Court unilaterally inserted the federal statutory judgment rate. A 1415. Although ChromaDex argued to the District Court that the parties' intended (but never discussed) applicable interest rate was the federal post-judgment interest rate under 28 U.S.C. § 1961, logic dictates otherwise. The interest rate was intended to provide a guarantee of payment by the second installment date (which was also undetermined). *See* A 1291, 1305. Under the alleged agreement,

interest would accrue but need not be paid if Elysium made the second payment on time. A 1347. It is inconceivable, therefore, that ChromaDex would have agreed to the federal rate—even though it now argues the applicability of such rate to salvage the inchoate agreement—because the federal rate tracks the prevailing Treasury yield. In other words, under the federal rate, there would be no incentive for Elysium to pay the second payment by the due date, because the only "penalty" for non-payment would be the minimal interest that would have already accrued on the money Elysium retained. Thus, the District Court's insertion of terms into the settlement agreement deprives the parties "of their right to enter into only the exact contract they desired." *Winston*, *supra*, 777 F.2d at 83.

Numerous other terms were to be discussed during the documentation of the formal settlement agreement, such as a confidentiality provision, enforcement provisions, choice of venue provisions, and choice of law provisions. Indeed, Dr. Wilhelm expressed to ChromaDex that his comments were not designed to "gain leverage moving forward" with the negotiation of such provisions. A 1347. The District Court, however, erroneously disregarded these open points of negotiation based upon a clearly mistaken reading of the February 3 E-mail. A 1410. The District Court found that Dr. Wilhelm's statement that Elysium would not accept any additional conditions applied to any possible additional terms, when it clearly

states that Elysium will not agree to any additional "guarantees" relating to the second installment payment. A 1414.

First, Dr. Wilhelm's position that Elysium would not accept additional guarantees or conditions reflected Elysium's understanding that ChromaDex was able to try to add such terms. If, on the other hand, everything had been agreed to and the agreement were binding, there would be no reason to assert this position. *Second*, the District Court did not attempt to square its mistaken reading with Dr. Wilhelm's statement that he was not trying to "gain leverage going forward" in the negotiations—if the parties had nothing left to negotiate, there was no leverage to gain going forward.

3. Agreement Usually Written

The District Court also misconstrued the fourth factor—whether the agreement at issue is the type of contract that is usually committed to writing—by: (1) ignoring precedential context that states settlement agreements are the type of agreement generally required to be in writing; and, (2) failing to adhere to any prior standard that treats contracts of similar amounts, terms, and complexity as those usually committed to writing. A 1415-17.

The Second Circuit declared: "Settlements of any claims are generally required to be in writing or, at a minimum, made on the record in open court." *Ciaramella v. Reader's Digest Ass'n, Inc.*, *supra*, 131 F.3d at 326. "Where, as here,

the parties are adversaries and the purpose of the agreement is to forestall litigation, prudence strongly suggests that their agreement be written in order to make it readily enforceable, and to avoid still further litigation." *Winston., supra*, 777 F.2d 83 (finding that a $62,500 settlement to be paid over several years was type of agreement expected to be in writing).

Here, the District Court reasoned that it could ignore this Second Circuit precedent "since the *Winston* test is designed to determine if a settlement agreement is binding absent a formal executed agreement, it would be a strange test if the fourth factor always favored finding no agreement on the ground that settlement agreement usually are written." A 1415-16, citing *Hostcentric Technologies, Inc. v. Republic Thunderbolt, LLC*, 2005 WL 1377853, at *9 (S.D.N.Y. 2005). The District Court's reasoning, however, ignores the fact that the so-called "*Winston* test" did not actually arise from the *Winston* case and, thus, was not "designed" to determine whether a settlement agreement specifically is binding. Rather, the four factors adopted in *Winston* were articulated in *R.G. Group, supra*, 751 F.2d at 75, which did not involve a settlement agreement. Thus, it would not "be strange" if settlements agreements are a type of agreement for which the fourth factor always weighs in favor of requiring a signed, written agreement, particularly where such settlement agreement involves multiple, million-dollar payments and is intended to forestall litigation in multiple active lawsuits.

There can be no doubt that the settlement of multi-million dollar litigations in multiple courts that would require a seven-figure settlement payment paid in more than one installment over more than a year is invariably done in writing. In *Stockalert, Inc. v. The Nasdaq Stock Market, Inc.*, 1998 WL 556036, *11 (S.D.N.Y 1998), the Southern District of New York determined that a contract term of one year and contract price of one million dollars indicated it was the type of agreement for which a writing requirement would be expected. *See, e.g., Jarowey v. Camelot Ent. Grp., Inc.*, No. 11-cv-2611 LAP, 2012 WL 7785096, at *6 (S.D.N.Y. Sept. 10, 2012), report and recommendation adopted, No. 11-cv-2611 LAP, 2013 WL 1189460 (S.D.N.Y. Mar. 18, 2013) (finding six installment payments of $100,000 each expected to be in signed writing); *Grupo Sistemas Integrales De Telecomunicacion S.A. De C.V. v. AT&T Commc'ns, Inc*., No. 92-cv-7862 KMW, 1994 WL 463014, at *5 (S.D.N.Y. Aug. 24, 1994) (finding settlement payment of $200,000 expected to be in signed writing because "the Second Circuit Court of Appeals has found even a simple settlement agreement to be one usually put in writing where the money at issue was not a trifling amount").

In rejecting the facts that courts in the Second Circuit have routinely found that settlements of similar or lessor amounts are expected to be binding only upon a signed writing, the District Court decided that "there is no rigid cutoff that settlements that exceed a million dollars must always be in the form of a document

executed by both sides." A 1417. While Elysium is not advocating for a rigid million-dollar cutoff, the failure to recognize that agreements of this type and magnitude are typically reduced to a signed writing controverts the express policy of this Circuit.

In addition to setting forth the factors for determining whether contract formation has occurred, the *Winston* court explained the important underpinnings of the doctrine that "[b]ecause of this freedom to determine the exact point at which an agreement becomes binding, a party can negotiate candidly, secure in the knowledge that he will not be bound until execution of what both parties consider to be a final document." *Winston, supra,* 777 F.2d at 80. And, as the Second Circuit noted in *R.G. Group, supra,*, 751 F.2d at 74-75, "[i]t is important to commerce that the law make clear what force will be given to various expressions of intent, for otherwise parties could never be assured that they were, in fact, channeling their negotiations toward an oral contract or toward a written one." Thus, parties discussing settlement must have confidence that courts will adhere to prior standards set by the Second Circuit that treat contracts of similar amounts, terms, and complexity as those usually committed to a signed writing.

D. <u>The Parties Must Be Free To Negotiation Without Fear Of Being Bound</u>

Finally, important policy considerations mandate against a forcible settlement. If attorneys and parties fear that what they say in settlement negotiations

will later be used against them to claim that a binding settlement agreement was formed, they will be reluctant to enter into negotiations. In addition to discouraging settlement negotiations, a policy of enforcing oral settlements based on conversations between outside or in-house attorneys would have the added effect of encouraging unnecessary, time consuming, collateral litigation and motion practice, requiring courts to re-focus their attention on whether cases were settled instead of moving the cases toward resolution. The case before this Court amply demonstrates how judicial resources will continue to be misspent is settlement agreements can be enforced based on informal settlement communications between the parties.

Enforcement is especially unjust here because Elysium would never be able to enforce settlement against ChromaDex based upon the unconfirmed February 3 E-mail alone if ChromaDex denied the existence of a settlement agreement. It is inconceivable to conclude that, following years of settlement discussions between counsel and the parties, multiple judicial settlement conferences, and multiple private mediations, that ChromaDex, a publicly traded company that requires board approval for an agreement of this magnitude, would expect a single e-mail to form a binding settlement of multiple litigations in different courts for payment of millions of dollars. Certainly, had the decisions in the California Litigation and New York Litigation come out in favor of ChromaDex instead of Elysium, ChromaDex would not have claimed the February 3 E-mail formed a final, binding settlement

agreement. Nor could Elysium have bound ChromaDex to the one-sided February 3 E-mail when ChromaDex expressly and repeatedly stated that it would not be bound absent a formal, written agreement.

Therefore, for the foregoing reasons, this Court should reverse the District Court's Settlement Order and rule that Elysium did not enter into a binding settlement agreement.

E. The District Court misconstrued the "objectively baseless" standard under the "sham exception" to the *Noerr-Pennington* doctrine

If this Court reverses the Settlement Order, this case will return to the District Court for a trial of Elysium's remaining claims against ChromaDex and Elysium's appeal of the Citizen Petition Order will be deferred until the issuance of a final order in the District Court. On the other hand, if this Court affirms the Settlement Order, Elysium's appeal of the Citizen Petition Order would be ripe for adjudication. In such instance, the Court should reverse Citizen Petition Order as discussed below.

1. The Existing Precedential Rule

Under the *Noerr-Pennington* doctrine, attempts to influence legislative, executive, administrative, or judicial action are immune from liability by virtue of the First Amendment right to petition the government for a redress of grievances. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136-39 (1961). The Supreme Court, however, refused to immunize petitioning activity when such activity "ostensibly directed toward influencing governmental action, is

a mere sham to cover … an attempt to interfere directly with the business relationship of a competitor." *Id*. at 144.

In *PRE*, *supra*, 508 U.S. at 60, the Supreme Court outlined a two-part definition of "sham" litigation:

> First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr* . . . Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere *directly* with the business relationships of a competitor," through the "use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon.

(emphasis in original; citations omitted). The Supreme Court reiterated: "sham litigation must constitute the pursuit of claims so baseless that no reasonable litigant could realistically expect to secure favorable relief." *Id*. at 62.

The Supreme Court further analogized the "objectively baseless" standard to require "probable cause to institute civil proceedings" or "a reasonable belief that there is a chance that a claim may be held valid upon adjudication." *Id.* 62-63.

This test generally applies to petitions to government agencies as well. *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 694 (2d Cir. 2009) (applying the *PRE* test to a citizen petition filed with the FDA).

Therefore, in the underlying case, the District Court should have asked whether a reasonable nutraceuticals ingredient manufacturer realistically could have expected the FDA to grant the relief sought by ChromaDex in the Citizen Petition.

2. The District Court Misinterpreted the "Objectively Baseless" Test

In the Citizen Petition Order, the District Court dramatically and improperly transformed the "objectively baseless" test into whether ChromaDex "obtained an outcome that any objective filer of this particular petition would have to view as 'favorable[.]'" A 1251. In doing so, the District Court disconnected the notion of a "favorable outcome" from an expectation of success on the merits or the chance that a claim may be held valid upon adjudication.

In arriving at its new test, the District Court first noted that "[a] winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham." A 1265, citing *PRE, supra*, 508 U.S. at 60, n.5. The Second Circuit has clarified that a "winning lawsuit" is not always dispositive of the question of objective baselessness. *T.F.T.F Capital Corp.* v. *Marcus Dairy, Inc.*, 212 F.3d 90, 94 (2002) ("although it is a winning lawsuit, a default judgment does not *ipso facto* constitute a determination of the 'objective reasonableness' of the lawsuit"). Of course, if the FDA granted the relief sought by ChromaDex in the Citizen Petition, it would be strong evidence that a reasonable petitioner could have realistically expected to secure favorable relief from the Citizen Petition. Yet, ***the FDA did not***

grant <u>any</u> relief sought by ChromaDex in the Citizen Petition. *See* FDA Non-Rulemaking Docket at https://www.regulations.gov/docket/FDA-2017-P-5082.

Undisputedly unable to conclude that ChromaDex "won" the Citizen Petition by securing relief from the FDA, the District Court next noted that, in several instances, courts have found that settlements of litigations can constitute a favorable outcome on the merits and constitute evidence that a claim may have been held valid upon adjudication. A 1267-68. In that regard, the District Court relies on a Southern District of Florida case, *In re Terazosin Hydrochloride Antitrust Litigation*, 335 F. Supp. 2d 1336 (S.D. Fla. 2004). A 1268. In *In re Terazosin*, Abbott sued Geneva for patent infringement and, as part of settlement, Geneva agreed to modify its manufacturing process in exchange for Abbott's dismissal of the lawsuit. *In re Terazosin, supra* 335 F. Supp 2d at 1357. Therefore, the Southern District of Florida concluded that the lawsuit was not objectively baseless because Abbott obtained the relief it sought and dismissed the lawsuit. *Id*. at 1358. Elysium, however, did not alter its manufacturing process as part of a "settlement" of the Citizen Petition (or even as a result of the Citizen Petition generally), nor did ChromaDex "dismiss" or withdraw the Citizen Petition as a result—which confirms that alteration of Elysium's manufacturing process to remove any traces of toluene was ***not*** the relief sought under the Citizen Petition.

Further, the District Court made an extraordinary leap that eradicates the Second Circuit's "objectively baseless" test. The District Court asserts that any outcome the filer could view as "favorable," whether or not actually sought through the legal process alleged to have been abused, automatically renders the legal process immune from liability. This *post hoc* test that is unmoored to the ***process used by the petitioner*** is the opposite of what the Second Circuit intended in *PRE*.

3. The Second Circuit Should Not Adopt The District Court's New Test, Which Is Contrary To Public Policy

The District Court's new rule incentivizes the very abuses that the "sham exception" to the *Noerr-Pennington* doctrine was intended to deter. It tells abusive litigants that, if they amp up their abusive tactics until they force their competitors into submission, their abusive tactics will be automatically immunized.

For example, under the District Court's new rule, a plaintiff may pursue a claim against its smaller competitor that lacks any legal or factual merit—an objectively baseless claim—but, if that smaller competitor goes out of business as a result of the expensive litigation—an outcome that an objective plaintiff would view as "favorable"—the objectively baseless claim is thereby transformed, *post hoc*, into an immunized claim.

The District Court's new rule for objective baselessness is contrary to the Supreme Court precedent of *PRE*, *supra*, 508 U.S. 49 (1993) and is contrary to public policy. Elysium, therefore, respectfully requests that the Second Circuit

reverse the Citizen Petition Order because the Citizen Petition was objectively baseless under *PRE*.

VIII.
CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court enter an Order: (i) reversing the Settlement Agreement Order; (ii) if the Court declines to reverse the Settlement Agreement Order, reversing the Citizen Petition Order; and, (iii) granting such other and further relief in favor of Appellant as the Court deems proper, including remanding to the District Court for further proceedings.

DATED: August 24, 2022 FRANKFURT KURNIT KLEIN + SELZ PC

By: */s/ Craig B. Whitney*
Craig B. Whitney
Tiffany R. Caterina
Attorneys for Elysium Health, Inc.

IX.

CERTIFICATE OF COMPLIANCE

PURSUANT TO FED. R. APP. 32(A)(7)(C)

Pursuant to Fed. R. App. P. 32 (a)(7)(C), I certify that the foregoing brief is proportionally spaced, has a typeface of 14-point Times New Roman, and contains 12,022 words.

DATED: August 24, 2022 FRANKFURT KURNIT KLEIN + SELZ PC

By: */s/ Craig B. Whitney*
Craig B. Whitney
Attorneys for Elysium Health, Inc.

SPECIAL APPENDIX

SPECIAL APPENDIX TABLE OF CONTENTS

SPA-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re Elysium Health-ChromaDex Litigation	17-cv-7394 (LJL)
	ORDER

LEWIS J. LIMAN, United States District Judge:

Pursuant to the Court's Opinion and Order at Dkt. No. 349, all remaining claims and counterclaims in this case are DISMISSED with prejudice. The Clerk of Court is respectfully directed to close the case. Any pending motions are dismissed as moot, and all conferences and deadlines are canceled.

SO ORDERED.

Dated: April 28, 2022
New York, New York

LEWIS J. LIMAN
United States District Judge