UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

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

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I. PRELIMINARY STATEMENT

Settlement agreements—like all contracts—represent a bargain. They reflect parties' assessments about the strengths and weaknesses of their case, and reflect a consideration of time, cost, risk, and business interests. A party may prevail on pending motions, trials, and appeals. Or not. Parties settle cases to avoid the unpredictability of litigation and minimize further litigation expenses. Basic contract principles do not allow a party to have its cake and eat it too. Unless expressly negotiated and made part of the deal, a settling party does not get to wait for litigated resolution to then decide whether it will abide by the bargain. Yet, that is what Elysium demands here.

After months of unsuccessful negotiation, on February 2, 2022, the head of ChromaDex's legal department conveyed a detailed settlement offer by telephone to Elysium's General Counsel to resolve this action and all issues tried to the jury in the Central District of California in September 2021.[1] One day later, on the afternoon of February 3, 2022, at 12:02 p.m. EST, Elysium's General Counsel wrote an email memorializing *each and every material term* that had been discussed during the prior day's call and stating that Elysium agreed: "I understand that *now that we have an agreement* you will get started on documentation. Let me know *if there are any other next steps.*" Emphasis added. There were no contingencies regarding pending motions in this Court or California.

[1] As explained in detail below, that would include ChromaDex's complaint and Elysium's counterclaims in this action; and ChromaDex's complaint against Elysium and its executive Mark Morris and Elysium's contractual counterclaims in the C.D. Cal. action. The C.D. Cal. action includes a patent misuse claim by Elysium against ChromaDex that Elysium sought to retain. The settlement agreement did not include resolution of ChromaDex's District of Delaware patent infringement action, which is currently on appeal to the Federal Circuit.

A little over two hours later, this Court issued orders on motions for summary judgment and to strike expert opinions. Elysium then wrote asking that ChromaDex "hold off on drafting the documentation." Presumably, Elysium wanted to carefully evaluate the 200+ pages of orders, and then decide whether it wanted to stick with the contract or try to extract more concessions. ChromaDex *immediately* wrote back, stating: "I haven't seen the ruling either but the settlement structure and amount isn't impacted." A week later, on February 10, 2022, Elysium reneged and claimed that it was open to "discussing new terms."

It is a bedrock principle of contract law that once a party agrees to terms, it is bound by them. The parties struck a bargain in which ChromaDex and Elysium agreed to dismiss relevant claims with prejudice (which meant foregoing resolution on pending motions, avoiding filing new ones, and not appealing any adverse ruling to the Second and Ninth Circuits). Elysium agreed to a settlement amount paid in two installments and agreed to forego some of its claims. The law requires that the contract be enforced.

II. STATEMENT OF MATERIAL FACTS

In this action, filed in 2017, ChromaDex has asserted claims against Elysium for false advertising and unfair competition under section 43 of the Lanham Act and deceptive trade practices under section 349 of the New York General Business Law. Elysium has asserted counterclaims against ChromaDex under the same statutes. ChromaDex and Elysium are also parties to a related action pending in the Central District of California (8:16-cv-02277-CJC-DFM) (the "California Action").

In the California Action, ChromaDex asserted the following claims that were tried to a jury: (1) breach of contract (for the NIAGEN and pTeroPure supply agreements); (2) trade secret misappropriation; (3) aiding and abetting breach of fiduciary duty; (4) breach of contract (for

certain confidentiality agreements); (5) misappropriation of trade secrets; and (6) breach of fiduciary duty.[2] *See* California Action at ECF No. 570 (Verdict Form). Elysium asserted the following counterclaims against ChromaDex that were tried to a jury: (1) breach of the "most-favored-nation" provision of the NIAGEN supply agreement; and (2) fraudulent inducement. *Id.*[3]

Throughout January 2022, ChromaDex and Elysium were engaged in settlement negotiations to jointly resolve both this action and the California Action. Declaration of William Carter dated February 15, 2022 ("Carter Decl.") ¶ 2. Although the parties were in general agreement as to a settlement amount, there remained disagreements that prevented the parties from concluding a settlement agreement. *Id.* Those remaining disagreements were finally resolved in the beginning of February 2022, resulting in the parties agreeing on all material terms and entering into a binding settlement agreement as set forth below.

A. <u>The Parties Entered into a Binding Settlement Agreement in Writing</u>

On February 2, 2022, William Carter, the head of ChromaDex's legal department, called Thomas Wilhelm, the General Counsel of Elysium, to make a settlement offer on behalf of ChromaDex (the "February 2 Call"). Carter Decl. ¶ 3. During this call, Mr. Carter communicated a settlement offer (the "Offer") to Mr. Wilhelm that consisted of the following terms (collectively, the "Material Terms"):

(1) Elysium would pay ChromaDex a total of $2.5 million to resolve all outstanding issues with respect to the claims and counterclaims tried to the jury in the California

[2] Claims (1) to (3) were asserted against Elysium, and (4) to (6) were asserted against Morris.
[3] Elysium's counterclaims for unjust enrichment and patent misuse were bifurcated for a separate bench trial. Subsequent to the jury trial, pursuant to a joint stipulation of the parties, the Court dismissed the unjust enrichment counterclaim without prejudice and stayed the patent misuse counterclaim pending resolution of appeal in a separate patent action.

Action, including the issue of prejudgment interest, as well as the entire action pending between the parties in the Southern District of New York (*i.e.*, this action);

(2) The parties would request that the court enter a stipulated judgment in the amount of $2.5 million with respect to the claims and counterclaims tried to the jury in the California Action;

(3) The $2.5 million stipulated judgment would be paid in two equal installments of $1.25 million, with the first payment to be made in February 2022, and the second payment to be made one year from the first payment. Regarding the second payment, interest would accrue from the date of the settlement agreement but would be waived if the payment were timely made. ChromaDex would be entitled to seek attorney's fees incurred in collecting the second payment should Elysium fail to make it on time.

(4) The 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, and would 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; and

(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.

Id. ¶ 3. During the February 2 Call, Mr. Carter informed Mr. Wilhelm that if his clients agreed to the Material Terms, then the parties would have a deal. *Id.* ¶ 4. No other term was discussed on the call. *Id.* ¶ 5. Mr. Wilhelm indicated to Mr. Carter that he understood the offer and that he would discuss it with his clients and get back to Mr. Carter as soon as possible. *Id.* ¶ 4.

The next day, on February 3, 2022, at 12:02 p.m.,[4] Mr. Wilhelm sent an email to Mr. Carter accepting the Offer (the "Acceptance Email"). The body of that email is set forth in its entirety below:

> Bill-
>
> Following our call yesterday, we discussed your settlement proposal. Under the circumstances it was a tough sell. The recent hearing in New York and the briefing in California weighed heavily against accepting what is basically the same offer that you rejected in January. There was considerable pressure to modify the economics. In the end, however, we can accept the additional terms you proposed yesterday.
>
> I share this not to try and gain leverage moving forward but to make this point: we will not accept <u>any</u> additional "guarantees" or conditions beyond the two you described yesterday (i.e., interest that accrues but is forgiven/waived provided the 2nd payment is made on time and the ability to get fees if the matter goes to collection).
>
> If I am remembering correctly these were the other terms, modified to reflect that it's now February, not January:
>
> 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.

[4] All times listed herein are in Eastern Standard Time. As Mr. Carter explains in his declaration, because he was located in the Mountain Time Zone, while Mr. Wilhelm was located on the East Coast, the time stamps in the email chain reflect different time zones.

> 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.
>
> I understand that now that we have an agreement you will get started on the documentation. Let me know if there are any other next steps.
>
> Best regards,
> Tom

See Carter Decl., Ex. A at 5 (emphasis in original).

B. Elysium Subsequently Reneges on the Settlement Agreement

At the time that the parties entered into the settlement agreement, the parties' cross-motions for summary judgment and *Daubert* motions were still pending. Approximately two hours after the parties entered into the settlement agreement, the Court entered an Order stating that opinions on the pending summary judgment and *Daubert* motions were being filed by the Court under seal. The sealed opinions were filed on ECF at 2:22 p.m. and 2:31 p.m., respectively. Thereafter, Mr. Wilhelm emailed Mr. Carter stating: "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." Carter Decl., Ex. A at 4. Mr. Carter responded six minutes later stating: "Tom I haven't seen the ruling either but the settlement structure and amount isn't impacted." Carter Decl., Ex. A at 3.

On February 9, 2022, Mr. Carter emailed Mr. Wilhelm, "Tom: I haven't heard anything from you/Elysium since last Thursday. The parties' settlement agreement is memorialized in your email sent to me last Thursday (February 3). We will begin drafting the filings to inform the respective courts of the agreement and send the drafts to you for Elysium's approval to file." Carter Decl., Ex. A at 1. Mr. Wilhelm responded by email the next day—February 10, 2022—stating: "The parties clearly do not have an agreement as I told you last Thursday. We are still

open to discussing new terms, including ones that reflect the changed circumstances in New York, but as of now the cases are proceeding." Carter Decl., Ex. A at 1.

III. ARGUMENT: THE COURT SHOULD ENFORCE THE PARTIES' BINDING SETTLEMENT AGREEMENT IN ITS ENTIRETY

"A settlement agreement is a contract that is interpreted according to general principles of contract law." *Powell v. Omnicom*, 497 F.3d 124, 128 (2d Cir. 2007).[5] To have a binding settlement agreement, "there must be an offer, acceptance, consideration, mutual assent and intent to be bound." *Register.Com. Inc. v. Verio, Inc.*, 356 F.3d 393, 427 (2d Cir. 2004). "Settlement agreements are strongly favored in New York and may not be lightly cast aside." *Willgerodt v. Hohri*, 953 F. Supp. 557, 560 (S.D.N.Y. 1997), *aff'd sub nom. Majority Peoples' Fund for 21st Century, Inc. v. Hohri*, 159 F.3d 1347 (2d Cir. 1998). Once reached by the parties, settlement agreements are binding and enforceable "even if a party has a change of heart between the time of the agreement . . . and the time it is reduced to writing." *Oparah v. N.Y.C. Dep't of Educ.*, No. 12 Civ. 8347 (JGK) (SN), 2015 WL 4240733, at *4 (S.D.N.Y. July 10, 2015) (collecting cases); *see Omega Eng'g, Inc. v. Omega, S.A.*, 432 F.3d 437, 445 (2d Cir. 2005) ("It is an elementary principle of contract law that a party's subsequent change of heart will not unmake a bargain already made."). It is well established that a district court "has

[5] For cases, such as this one, arising under both state and federal law, the Second Circuit has not decided whether courts should apply federal or state law in determining the enforceability of settlement agreements. *See Figueroa v. N.Y.C. Dep't of Sanitation*, 475 F. App'x 365, 366 (2d Cir. 2012); *Powell v. Omnicom*, 497 F.3d 124, 129 n.1 (2d Cir. 2007). However, the Second Circuit has also stated that the applicable New York and federal common law are "materially indistinguishable." *Powell*, 497 F.3d at 129 n.1 (stating that the Court therefore "will apply New York and federal common law interchangeably"); *accord Est. of Brannon v. City of New York*, No. 14 Civ. 2849 (AJN)(SN), 2015 WL 13746664 (S.D.N.Y. Oct. 19, 2015*), report and recommendation adopted sub nom. Est. of Andrea Brannon v. City of New York*, 2016 WL 1047078 (S.D.N.Y. Mar. 10, 2016) (examining both sources of law in light of the lack of definitive ruling from the Second Circuit on this issue).

inherent power to enforce summarily a settlement agreement when the terms of the agreement are clear and unambiguous." *Omega*, 432 F.3d at 444.

Courts have consistently concluded that emails can create binding settlement agreements. *See Scheinmann v. Dykstra*, No. 16 Civ. 5446 (AJP), 2017 WL 1422972, at *6 (S.D.N.Y. Apr. 21, 2017) (granting a motion to enforce a settlement formed by email, finding that "[a]n exchange of e-mails may constitute an enforceable agreement if the writings include all of the agreement's essential terms"); *Brannon*, 2015 WL 13746664, at *5 ("The fact that the exchange occurred by email does not weaken the enforceability of the agreement. Indeed, if anything, the fact that the exchange was written strengthens its power to bind."); *Hostcentric Tech., Inc. v. Rep. Thunderbolt, LLC*, No. 04 Civ. 1621 (KMW) (AJP), 2005 WL 1377853 (S.D.N.Y. June 9, 2005) (enforcing settlement agreement created via email); *Forcelli v. Gelco Corp.*, 109 A.D.3d 244, 251 (2d Dep't 2013) (when the defendants attempted to renege on the parties' email settlement agreement after a subsequent favorable summary judgment decision, the court granted the plaintiff's motion to enforce the agreement, finding that the email from defendants' representative setting forth the material terms of the agreement and containing an expression of mutual assent was an enforceable settlement agreement). Indeed, emails often contain "a classic offer and acceptance." *Hostcentric*, 2005 WL 1377853, at *4.

To determine whether the parties intended to be bound in the absence of a fully executed formal written agreement, the Second Circuit has articulated a four-factor test. *See Winston v. Mediafare Entm't Corp.*, 777 F.2d 78, 80 (2d Cir. 1985). These four factors are: (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. *Id.* Here, the *Winston* factors weigh overwhelmingly in favor of finding a binding and enforceable settlement agreement. Each factor is discussed below.

A. No Reservation of Right Not to be Bound

"The first factor, the parties' objectively-expressed intent, is the most important." *Hostcentric*, 2005 WL 1377853, at *7 (collecting cases); *see Walker v. City of New York*, No. 05 Civ. 0004 (JBW)(JMA), 2006 WL 1662702, at *6-7 (E.D.N.Y. June 15, 2006) (observing that "the first prong, an express reservation not to be bound, is perhaps one factor with the power to tip the scales"). Here, this factor weighs heavily in favor of finding that the parties entered into an enforceable settlement agreement.

Neither party reserved the right not to be bound by the settlement agreement reached on February 3, 2022 until a formal written agreement was executed. To the contrary, the parties' correspondence constitutes "a classic offer and acceptance." *See Hostcentric*, 2005 WL 1377853, at *7. ChromaDex made an oral offer, proposing all Material Terms of the agreement, and Elysium accepted the offer in the Acceptance Email, which reiterated with particularity the Material Terms and made clear that no other terms were left to be negotiated. *See* Carter Decl. ¶¶ 3-4; Carter Decl., Ex. A at 5. To avoid any doubt, the Acceptance Email explicitly stated: "we have an agreement." Carter Decl., Ex. A at 5. The Acceptance Email further emphasized that Elysium's acceptance came after careful consideration and lengthy internal deliberation. *Id.* There is nothing in the Acceptance Email suggesting that it is anything other than what it appears to be: acceptance of ChromaDex's Offer resulting in a binding settlement agreement between the parties.

Elysium's attempt to back out of the contract by claiming that "moving forward with settlement depended on agreeing on the documentation," Carter Decl., Ex. A at 2, misses the mark. "The mere fact that the parties contemplate memorializing their agreement in a formal document does not prevent their informal agreement from taking effect prior to that event." *Hostcentric*, 2005 WL 1377853, at *5 (quoting *V'Soske v. Barwick*, 404 F.2d 495, 499 (2d Cir. 1968)) (collecting cases). A party cannot avoid the conclusion that the parties intended to be bound by an agreement "based solely on the fact that formal documentation was contemplated." *Id.* at *6; *see V'Soske*, 404 F.2d at 499 ("To overcome the reasonable inference we draw from the language of the correspondence that the parties did indeed intend thereby to create a binding contract, appellees must do more than merely point to the circumstance that a formal document was contemplated."); *Westwide Winery, Inc. v. SMT Acquisitions, LLC*, 511 F. Supp. 3d 256, 261-62 (E.D.N.Y. 2021) (email stating that the parties "will have to paper this and of course confirm the details with our clients" did "not 'expressly' reserve the right not to be bound"); *Brannon*, 2015 WL 13746664, at *5 ("intention to memorialize the agreement in writing does not vitiate the binding power of the e-mail exchange"). "In the same vein, courts have declined to read in an 'express' reservation where none is expressly made, despite a lingering need to 'paper' the deal." *Westwide Winery*, 511 F. Supp. 3d at 262.

"In determining the parties' intent, a court must look, not to their after-the-fact professed subjective intent, but their objective intent as manifested by their expressed words and deeds at the time." *Hostcentric*, 2005 WL 1377853, at *6 (internal quotation marks omitted); *see Brannon*, 2015 WL 13746664, at *5 (parties "should be held to their promises and courts should not be 'pedantic or meticulous' in interpreting contract expressions"). Thus, Mr. Wilhelm's and Elysium's "after-the-fact professed subjective intent" is irrelevant. The facts here demonstrate

the sound logic of this rule. The Acceptance Email states: "I understand that *now that we have an agreement* you will get started on the documentation." Carter Decl., Ex. A at 5 (emphasis added). By the plain language of the Acceptance Email, Elysium specifically "understand[s]" that a settlement was entered into. However, Elysium regretted entering into the settlement agreement based on post-settlement developments and sought to back out. In the face of such a clear and unambiguous contemporaneous record of the settlement agreement, Elysium was left to resort to claiming the words do not mean what they say, *i.e.*, professing its self-serving after-the-fact subjective intent despite it being contradicted by the Acceptance Email.

B. Partial Performance

The second *Winston* factor is "essentially neutral" because Elysium repudiated the agreement shortly after entering into it.[6] *Hostcentric*, 2005 WL 1377853, at *8 ("The second *Winston* factor, partial performance, is essentially neutral. Since Republic repudiated the agreement before the time for Hostcentric's payment or removal of its property from the premises, it is not surprising that Hostcentric did not thereafter perform."); *see Scheinmann*, 2017 WL 1422972, at *4 ("As to the second factor, there was no partial performance since Dykstra repudiated the agreement before the judgment was signed. This factor is neutral.").

C. The Parties Agreed on All Material Terms

The third *Winston* factor, whether all material terms had been agreed to, strongly favors enforcement of the settlement agreement. The Acceptance Email makes this clear. Mr. Wilhelm states in the email that the Offer "was a tough sell" for Elysium and there was "pressure to modify the economics," but that "[i]n the end" Elysium accepted ChromaDex's offer terms. *See*

[6] Courts have stated that of the four *Winston* factors, partial performance has the least effect on the Court's analysis. *See Walker*, 2006 WL 1662702, at *8.

Carter Decl., Ex. A at 5. The Acceptance Email goes on to accurately reiterate the Material Terms in detail, which include: (1) the amount and timing of payment; (2) the requirement that both sides dismiss this action with prejudice (with each to bear its own fees and costs); (3) that the parties would request that the court enter a stipulated judgment with respect to the claims and counterclaims tried to the jury in the California Action; (4) the mutual waiver of post-trial and appellate litigation; and (5) enforcement mechanisms for the second payment. *Id.*

The fact that there were no material terms left to negotiate is exemplified by Mr. Wilhelm's inclusion of a payment date. Although Elysium now claims that the agreement was pending "documents," the first payment is due in *February 2022*, not when "documentation" is finalized. Indeed, Mr. Wilhelm emphasized that Elysium "will not accept any additional 'guarantees' or conditions." Carter Decl., Ex. A at 5 (emphasis in original). That leaves no doubt that the parties' agreement was final.

Any dispute about the existence of a settlement agreement involves one party claiming that some unspecified "material" term was left to be negotiated when lawyers put pen to paper. Yet, courts in this Circuit have routinely enforced settlement agreements notwithstanding the absence of final documentation. That is because boilerplate language and clauses that are always included are not material terms that need to be negotiated prior to entering an agreement. *See Hostcentric*, 2005 WL 1377853, at *8 (rejecting argument that the parties "did not finally resolve the scope of the release" and noting that the concept of mutual releases is "well known to lawyers and usually contained in a standard Blumberg form."); *Jericho Grp. Ltd. v. Mid-Town Dev. Ltd. P'ship*, No. 14 Civ. 2329 (DLI) (VMS), 2016 WL 11263660, at *10 (E.D.N.Y. Dec. 5, 2016), *report and recommendation adopted* 2017 WL 4221068 (E.D.N.Y. Sept. 22, 2017) (agreement was complete once material terms were settled, though both sides added terms to the

agreement while papering it). A party cannot use such formalities to back out of the agreement. *See Brown v. Nationscredit Commercial*, No. 99 Civ. 592 (EBB), 2000 WL 888507 at *2 (D. Conn. June 23, 2000) (A "settlement is still binding even if a party has a change of heart between the time of the agreement to the terms of the settlement and the time those terms are reduced to writing."); *Foster v. City of New York*, No. 96 Civ. 9271 (PKL), 2000 WL 145927 at *4 (S.D.N.Y. Feb. 7, 2000) ("This Court must enforce a binding oral agreement, notwithstanding that plaintiff may have had a change of heart."); *Willgerodt*, 953 F. Supp. at 560 ("Afterthought or change of mind are not sufficient to justify rejecting a settlement.").

D. The Settlement Agreement is Not Complex

The fourth factor also weighs in favor of finding an enforceable settlement agreement. The inquiry "is whether the settlement agreement terms are sufficiently complex or involve long time periods, such that there should be a formal writing." *Hostcentric*, 2005 WL 1377853 at *9. "Courts evaluate complexity by considering (1) the amount of money at issue, (2) whether the terms of agreement will carry into perpetuity, and (3) the length and complexity of the agreement itself." *Scheinmann*, 2017 WL 1422972, at *5 (internal quotation marks omitted). Here, whether or not the underlying litigation is considered complex, the settlement agreement is not.

The parties agreed to a settlement amount of $2.5 million to be made in two equal installments (with interest accruing on the second $1.25 million payment unless payment is made on time), to file a request for partial judgment in the California Action, and to dismiss this action in its entirety with prejudice. Far from carrying into perpetuity, the agreement will last only until payment of the settlement amount. In sum, the agreement is not complex. *Compare Hostcentric*, 2005 WL 1377853 at *9 (finding the fourth factor to weigh in favor of enforcement where emails memorialized all the terms and "the agreement would last only the short time

necessary for payment and removal of property, not for a lengthy time into the future") *with Adjustrite Sys., Inc. v. GAB Bus. Servs., Inc.*, 145 F.3d 543, 547-48 (2d Cir. 1998) (finding the fourth factor to weigh against enforcement "[i]n view of the size of the transaction, the nature of the assets being purchased, and the length of the contemplated employment contracts").

Moreover, in this case, there *was* a writing—Mr. Wilhelm's Acceptance Email—that memorialized the agreement's terms, and settled this lawsuit. *See, e.g.*, *Scheinmann*, 2017 WL 1422972, at *5 ("In this case, moreover, there was a writing—Smith's counter-offer email that Bierman accepted by email. Those emails memorialized the agreement's only terms, and settled this lawsuit."); *Hostcentric*, 2005 WL 1377853 at *9-10 ("Moreover, in this case there was a writing-Republic's email (and Hostcentric's email accepting Republic's proposal without change). Those emails memorialized all the terms [of the agreement]."). Thus, as in *Hostcentric*, "even if one were to find that this type of agreement should be in writing, it was—the parties were not dealing with an oral agreement but one written in an email . . . ." *Hostcentric*, 2005 WL 1377853 at *10.

Based on the foregoing, the fourth *Winston* factor weighs in favor of enforcement.

E. Weighed Together, the *Winston* Factors Heavily Favor Enforcement

As discussed above, the first—and most important—*Winston* factor (no reservation of right not to be bound) weighs heavily in favor of enforcement, as do the third (agreement on all material terms) and fourth (lack of complexity/necessity of formal writing) factors. The second—and least important—*Winston* factor is essentially neutral. Thus, weighing the four factors together, and looking at the totality of the circumstances—including the plain language of the Acceptance Email—heavily favors a finding that the parties intended to be bound by the Agreement, and that the Agreement was not conditioned upon the execution of a formal executed

document. Elysium's post-settlement conduct has all the tell-tale signs of a later change of heart, which courts have consistently found do "not frustrate the agreement's enforceability." *Conway v. Brooklyn Union Gas Co.*, 236 F. Supp. 2d 241, 251 (E.D.N.Y. 2002).

F. Strong Public Policy Favors Enforcement of Voluntary Settlements

Courts in this Circuit adhere to a strong public policy in favor of enforcing out-of-court settlements. Indeed, "voluntary out-of-court settlements are highly favored and will be upheld whenever possible." *Allen v. Colgate Palmolive Co.*, No. 79 Civ. 1076, 1986 WL 8218, at *1 (S.D.N.Y. Feb. 20, 1986). Settlements alleviate overburdened court calendars, save judicial resources, and spare parties from the time and expense of further litigation. *See id.* Therefore, a party attacking a settlement agreement bears the burden of showing that the contract the party made "is tainted by invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted." *Nat'l Lawyers Guild v. Att'y Gen.*, 94 F.R.D. 592, 599 (S.D.N.Y. 1982). "Unless this burden is met, it is a court's inherent power and duty to enforce a settlement agreement entered into by litigants in an action before it." *Allen*, 1986 WL 8218, at *2.

Elysium's conduct here exemplifies the importance of enforcing settlement agreements. ChromaDex engaged in months of negotiations, including minutiae about payment terms and joint court filings to effectuate the parties' agreement, in a good-faith effort to resolve years-long litigation. After it agreed, Elysium saw an opening to demand more favorable terms based on ECF bounces and sought to back out. If Elysium wanted to wait for resolution of pending motions, another trial, and inevitable appeals, it certainly could have done so.[7] Nothing in the

[7] Elysium has now stated that it wants to "vigorously" litigate this case which would necessarily include further proceedings before this Court and an appeal to the Second Circuit on all claims. *See* https://www.prnewswire.com/news-releases/elysium-health-announces-summary-judgment-decision-in-case-against-chromadex-in-new-yorkall-of-chromadexs-claims-against-elysium-health-dismissed-301482365.html.

law requires a party to settle its dispute out of court. But what the law does *not* permit is for a party to agree in writing to a final, carefully constructed settlement and then try to renegotiate it based on perceived ebbs-and-flows of litigation. Crediting Elysium's conduct creates the likelihood that parties prolong litigation—and the concomitant drain on judicial resources—by delaying "final" documents and hoping to capitalize on interim court rulings. Frustrated counterparties are then forced to drag litigation out even further. The result is a litigation shell game where trust in the out-of-court resolution process is diminished.

IV. 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
February 16, 2022

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