UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re Elysium Health-Chromadex Litigation 17 Civ. 7394 (CM)

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DECISION AND ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

McMahon, C.J.:

On January 3, 2019, the Court issued a Decision and Order granting the motion of Defendant Chromadex, Inc. ("CMDX") – originally a motion to dismiss, converted to a motion for summary judgment – against Plaintiff Elysium Health, Inc. ("Elysium"). (Dkt. No. 63.) Presently before the Court is Elysium's motion for reconsideration of that order, pursuant to Fed. R. Civ. P. 59(e).

The motion is DENIED.

I. Background

The Court presumes the party's familiarity with the facts of this matter, which were recited in the Court's prior decisions denying Defendant's motion to dismiss in part and granting Defendant's (converted) motion for summary judgment – both of which are implicated by the present motion. (Dkt. Nos. 44, 63.)

II. Applicable Legal Standard

A court may grant reconsideration "when the [moving party] identifies an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Meyer v. Kalanick*, 185 F. Supp. 3d 448, 452 (S.D.N.Y. 2016)

(quoting *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 104 (2d. Cir. 2013)). The standard for granting reconsideration is "strict" and generally will be denied "'unless the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.'" *Id.* at 451–52 (quoting *Shrader v. CSX Transp. Inc.*, 70 F.3d 255, 257 (2d Cir. 1995)).

Reconsideration of a court's prior "is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." *Sikhs for Justice v. Nath*, 893 F. Supp. 2d 598, 605 (S.D.N.Y. 2012)). Accordingly, the burden is on the movant to demonstrate that the Court overlooked controlling decisions or material facts that were before it on the original motion, and that might "'materially have influenced its earlier decision.'" *Anglo Am. Ins. Group v. CalFed, Inc.*, 940 F. Supp. 554, 557 (S.D.N.Y. 1996) (quoting *Morser v. AT&T Info. Sys.*, 715 F. Supp. 516, 517 (S.D.N.Y. 1989)).

III. Discussion

Elysium assigns three reasons why the court's decision should be reconsidered.

First, Elysium argues that the decision to award summary judgment to CMDX contravenes the Second Circuit's holding in *Landmarks Holding Corp. v. Bermant*, 664 F.2d 891 (2d Cir. 1981), which it describes as "controlling authority." *Landmarks*, Elysium submits, stands for the proposition that courts must look to the totality of the circumstances in determining whether conduct is "objectively baseless" within the meaning of *Noerr-Pennington*'s sham exception.

As Plaintiff well knows, *Landmarks* was superseded by a subsequent decision of the United States Supreme Court, *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.* ("*PRE*"), 508 U.S. 49 (1993). Since it was decided, *PRE* is the case that articulates, for *all* Circuits (including

the Second Circuit), the standard for assessing *Noerr-Pennington*'s sham exception in the context of a single anti-competitive action. *Id.* at 56.

Moreover, to the extent that anything is left of *Landmarks*' purported "totality of the circumstances" test, the Court rejects Plaintiff's contention that it did not consider the totality of the circumstances. The Court in fact considered all circumstances that are relevant to a decision.

As a result, Eysium's first assigned basis for reconsideration is entirely unpersuasive.

Second, Elysium argues that the Court improperly resolved three disputed factual issues when it found (*i*) that the Citizen Petition caused Elysium to remove toluene from Basis; (*ii*) that removal of toluene was an outcome that CMDX sought; and (*iii*) that CMDX believed toluene to be unsafe at the levels it claimed to have found in Basis.

Elysium is incorrect.

The Court did not resolve the first issue so much as say, on the basis of the record evidence, no genuine issue of material fact was raised, because no reasonable trier of fact could conclude that the decision to remove toluene from Basis – which was made approximately four months after the Citizen Petition was filed, with no intervening event identified in the record – did not come about at least in part in response to the filing of the Citizen Petition. (*See* Dkt. Nos. 51-18 (Elysium's comment to supplemental citizen petition); 53-1 (Citizen Petition).) If that was not at least part of the reason for removing the toluene, Elysium needed no discovery to uncover the real reason, because Elysium made the decision to remove the toluene. Any evidence about the reasons why that decision was made was in the sole control of Elysium. Elysium did not offer any evidence about its motivations in connection with the response to the conversion order.

The only item in the record that comes close to addressing this issue is a single sentence taken from Elysium's response to the supplemental citizen petition ("Supplemental Petition") that

CMDX filed with the FDA, which was appended to its response to the conversion order. (Dkt. No. 51-18 at 1.) In that response, Elysium stated that it elected to eliminate the presence of toluene from Basis "as part of its continuing efforts to ensure superior product quality." The Court was aware of this sentence. But this brief representation is not inconsistent with Elysium's having acted at least partially in response to CMDX's filing of its Citizen Petition and the public scrutiny that comes with such a filing. The removal of a substance that was allegedly toxic from Elysium's product would certainly make sense "as part of [Elysium's] continuing effort to ensure superior product quality," since Basis *sans* toluene would undoubtedly have been perceived as "superior" after a publicly-filed petition alleged that Basis *cum* toluene was unsafe. Significantly, Elysium's statement does not indicate that its reconsideration of toluene as part of a "continuing effort to ensure superior product qualify" pre-dated the filing of CMDX's Citizen Petition.

Which is not to say that Elysium could not have raised a genuine issue of material fact on this score. Elysium could have, for example, introduced evidence of internal discussions about the elimination of toluene that took place prior to the filing of the Citizen Petition, or of experiments with new, no-toluene formulations of Basis that took place prior to the filing of the Citizen Petition – which evidence, if introduced, would have raised a genuine issue of material fact concerning the existence of any relationship (entire or partial) between the filing and the decision to eliminate the additive. Again, Elysium needed no discovery to introduce such evidence. Its failure to offer any evidence tending to show that the Citizen Petition had nothing to do with the decision to eliminate the toluene cannot now be reformulated as an error on the part of the Court.

Contrary to Elysium's contention, the Court did not "resolve" the second and third issues, because it did not need to do so. Whether CMDX really wanted its competitor driven out of the

market, and whether it really believed that the level of toluene in Basis was unsafe, are simply not relevant to the objective prong of *Noerr-Pennington*'s sham exception. *PRE*, 508 U.S. at 59–60, 65–66. In making a decision on the converted motion, the Court did not care about CMDX's subjective beliefs. It simply applied the rule of *PRE* to the evidence before it.

That application was straightforward: Because an *objective* litigant could conclude, based on the evidentiary record before the Court, that the petition was "reasonably calculated to elicit" the removal of toluene from Basis – and because the removal of an allegedly toxic substance would objectively qualify as a "favorable outcome" – the filing of the Citizen Petition could not be said to be "objectively baseless" under *Noerr-Pennington*'s sham exception. *Id.* at 60. This is true even if CMDX really, truly just wanted Elysium's products to be recalled.

The Court's conclusion in this regard follows from three principles that the Court articulated in its prior Decision and Order:

(i) Petitioning activity that "results" in a favorable outcome is axiomatic of the type of petitioning activity that is "designed to elicit" a favorable outcome and so is susceptible to *Noerr-Pennington* immunity;

(ii) The favorable outcome need not come about at the direction of a government entity or as a result of government action for it to qualify for *Noerr-Pennington* protection; it can be the result of a purely private decision (like Elysium's decision to take the toluene out of its product entirely); and

(iii) "A 'sham' situation involves a defendant whose activities are 'not genuinely aimed at procuring favorable government action' at all, not one 'who genuinely seeks to achieve his governmental result, but does so through improper means.'" *City of*

Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 380 (1991) (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 508 nn. 4 & 10 (1988)).

(Dkt. No. 63 at 9–13.)

What the Court did do that it regrets was use some loose language in one sentence of the original decision – language that should be clarified and corrected.

The offending sentence is this: "CMDX achieved the very outcome it petitioned for – the removal of toluene from a dietary supplement sold directly to consumers that it believed rendered that product potentially 'injurious' to public safety." (Dkt. No. 63 at 8.) If indeed CMDX wanted to drive Elysium out of the market – and for purposes of CMDX's summary judgment motion, the Court would have to, and did, assume that CMDX actually wanted to bring about the seizure of Elysium's Basis inventory, an injunction against any further manufacture or distribution of Basis, and a determination that Basis was adulterated (Dkt. No. 53-1 at 2) – then the Court should have written the sentence rather differently. It should have read, "Whether CMDX achieved the very outcome that motivated it to file the Citizen Petition, it obtained an outcome that any objective filer of this particular petition would have to view as 'favorable' – namely, the removal of toluene, a toxin alleged to be potentially injurious to public safety, from a dietary supplement sold directly to consumers." The January 3, 2019 Decision and Order will be modified to substitute that sentence for the poorly worded sentence in the original.

With that clarification, the Court's conclusion that *Noerr-Pennington* immunity attaches to the Citizen Petition is unaffected. What CMDX might have actually wanted to happen (or at least said it wanted to happen) is not co-extensive with what constitutes a "favorable outcome" to an *objective litigant*. Again, the removal of toluene from a dietary supplement intended for human consumption is, by all objective accounts, a favorable outcome, because there is no dispute that

toluene is considered an industrial solvent that potentially poses "serious health concern[s]" when ingested. (Dkt. No. 51-10 at 1, 3–5.) This was, and is, the basis of the Court's decision granting summary judgment on *Noerr-Pennington* grounds.[1]

Accordingly, Elysium's second assigned basis for reconsideration is not persuasive.

Third, Elysium contends that the Court committed a clear error of law when it converted CMDX's motion to dismiss to a motion for summary judgment and "then denied Elysium the opportunity to conduct discovery before granting that motion." (Mem. of Law in Supp. Mot. Recon. ("Pl.'s Br.") at 17, Dkt. No. 66.)

As a preliminary matter, the Court rejects Elysium's suggestion that converting CMDX's motion to dismiss on *Noerr-Pennington* grounds to one for summary judgment was improper. When a motion raises matters outside the pleadings, a district court may convert that motion to a motion for summary judgment, as long as it gives the parties sufficient notice and an opportunity to respond. *See Parada v. Banco Indus. De Venezuela, C.A.*, 753 F.3d 62, 68 (2d Cir. 2014). Invocation of that procedure is particularly appropriate where, as was the case here, summary judgment is limited to a single, discreet issue. *See, e.g.*, *Valentine v. Brain & Spine Surgeons of N.Y., P.C.*, No. 17 Civ. 2275 (NSR), 2018 WL 1871175, at *6 (S.D.N.Y. Apr. 16, 2018).

Because Elysium was given sufficient notice and an opportunity to respond to the Court's conversion order, the Court rejects the notion that conversion was inappropriate. On the contrary, conversion furthered the policies of Rule 12(b) and Rule 56 "by directing a pretrial motion to the vehicle most appropriate for its resolution, ensuring that the motion is governed by the rule specifically designed for the fair resolution of the parties' competing interests at a particular stage

[1] For good measure, the Court also notes that the requested relief in the Citizen Petition was not limited only to the solutions that CMDX proposed. Instead CMDX asked the FDA take "all appropriate remedial action." (Dkt. No. 53-1 at 2.) Thus, to suggest that the Citizen Petition did not contemplate the possibility of an order directing the removal of toluene from Basis would not be accurate.

of the litigation." *Global Network Communications, Inc. v. City of N.Y.*, 458 F.3d 150, 155 (2d Cir. 2006).

Moreover, the Court rejects Elysium's contention that granting CMDX's motion for summary judgment without lifting the stay of discovery was an error, because there was no relevant fact in dispute.

As the Supreme Court has instructed, discovery is not necessary on the issue of objective baselessness where "there is no dispute over the predicate facts underlying the legal proceeding." *PRE*, 508 U.S. at 63 (citations omitted); *accord Apotex, Inc. v. Acorda Therapeutics, Inc.*, 823 F.3d 51, 61-62 (2d Cir. 2017) (deciding objective baselessness at the pleading stage). In this case, there was no dispute over the predicate facts underlying the Citizen Petition, which were as follows:

CMDX's chemical testing established that Elysium's Basis contained levels of toluene ranging from 96 to 144 parts per million when it was being sold to retail consumers with ingredients sourced from a mystery supplier. (Dkt. No. 51-12 at 23.) This stood in stark contrast to the zero detectable levels of toluene that CMDX found when it tested older versions of Basis that were sourced with its own ingredients. (*Id.* at 22–23.) Those ingredients may have once contained trace amounts of toluene (at levels far below Basis') in their original forms, but any amounts of toluene dissipated to negligible levels below detection in the course of the manufacturing process. (Dkt. No. 51 ¶ 53.)

Taking these facts and viewing them in light of the scientific literature that warn that the human consumption of toluene, an industrial solvent, is potentially dangerous, *supra* at 7, an objective litigant could reasonably have concluded that the new version of Basis was unsafe, and so a citizen petition to the FDA apprising them of that concern was warranted. Having observed

that Elysium removed a potentially dangerous solvent from its product – a development that the Court reiterates was, by all objective measures, a "favorable outcome" – the Court, in turn, was compelled to conclude that the Citizen Petition could not be considered "objectively baseless."

None of the above facts is in dispute, nor could discovery have altered them – especially since, as noted, evidence about the reasons *why* Elysium removed toluene from Basis was solely within its own possession. *Supra* at 3–4. Rather, all of the issues on which Elysium contends it should have been allowed discovery related either to CMDX's motivations in filing the Citizen Petition, CMDX's subjective beliefs in filing the Citizen Petition, or other wholly irrelevant matters – all of which were not pertinent to the issue that was before the Court. (*See* Dkt. No. 53 ¶¶ 32–36; *id.* Exs. 20–21.)

For example, Elysium's repeated contentions that it needed to take discovery into Elysium's "intent" – evidence that, it argued, was in CMDX's "exclusive possession" and therefore was so critical – was anything but. (Pl.'s Br. at 18). As the Court noted in its prior Decision and Order, "[E]vidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham." *PRE*, 508 U.S. at 49. "Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation." *Id.* at 60. Because the discovery Elysium sought ultimately concerned CMDX's motivations in filing the Citizen Petition, they were "rendered irrelevant by the objective legal reasonableness" of that petition. *Id.* at 55–56.

Nor did Elysium need to take discovery into whether CMDX actually possessed a "genuine" "belief" that Basis was unsafe. (Pl.'s Br. at 13, 16, 19.) Once again, this argument wrongly conflates the sham exception's objective and subjective prongs, *see PRE*, 508 U.S. at 59–

60, 65–66, and so does not warrant the Court to reconsider its earlier decision. Indeed, Elysium's use of the word "genuine" is telling. The following passage from *PRE* is particularly enlightening:

> Some of the apparent confusion over the meaning of "sham" may stem from our use of the word "genuine" to denote the opposite of "sham." The word "genuine" has both objective and subjective connotations. On one hand, "genuine" means "actually having the reputed or apparent qualities or character." "Genuine" in this sense governs Federal Rule of Civil Procedure 56, under which a "genuine issue" is one "that properly can be resolved only by a finder of fact because it may *reasonably* be resolved in favor of either party." On the other hand, "genuine" also means "sincerely and honestly felt or experienced." To be sham, therefore, litigation must fail to be "genuine" in both senses of the word.

Id. at 60 (citations and alterations omitted).

In arguing that CMDX did not "genuinely" believe that the levels in toluene in Basis were unsafe, Elysium is engaging in the sort of linguistic sleight of hand that the Supreme Court warned against. As should be readily clear to the parties, there was ample evidence from which the Court could conclude – and, indeed, no evidence to the contrary – that CMDX could hold the "genuine" belief that the Citizen Petition was reasonably calculated to elicit a favorable outcome. Whether CMDX's position was a "genuinely" held belief, as opposed to one it adopted purely for anti-competitive purposes, is a different story. But the Court did not have occasion to address this argument, since its opinion was limited to the issue of objective baselessness.

At bottom, Elysium has not persuaded the Court that discovery would have revealed anything that could have altered the Court's conclusion that CMDX had an objective basis for filing the Citizen Petition.

Additionally, it appears to the Court that Elysium could and should have taken discovery on these issues months ago, because the stay of discovery entered by the Hon. Valerie Caproni, who initially presided over this matter, expired by its terms no later than January 18, 2018.

As the parties well know, this case was transferred to this Court from Judge Caproni's docket on May 23, 2018. (*See* Dkt. No. 39.) Judge Caproni entered a stay of discovery in

November 2017 in order to enable the parties to engage in a mediation. (*See* Dkt. No. 27.) Judge Caproni expressly stated that she only agreed to the stay to promote the possibility of a mediated settlement; indeed, she said on the record that she otherwise would not have agreed to the stay. (Dkt. No. 28 at 7:10-12 ("[o]therwise, I [Judge Caproni] would not have stayed discovery[.]").)

The mediator filed his final report indicating that settlement was not possible on January 18, 2018. (Dkt. No. 36.) In my courtroom, the stay of discovery would have been deemed over at that point, because it was entered *only* to facilitate the mediation, which failed. I do not know if Judge Caproni would have felt the same. But at a minimum, the parties were required to obtain clarification from Judge Caproni about the continued existence of the stay. They did not. Nor did they raise the issue with me until Elysium filed its opposition to CMDX's motion for summary judgment. Elysium did not ask this Court to extend the deadline for its response on the converted motion at any time during the 30 days it was given to file a response. Having waited nine months, only to raise the issue of discovery at the last possible second, Elysium cannot now claim that discovery was essential when the manner in which it prosecuted this action decidedly says otherwise.

I am sorry that I did not address the discovery issue in the Decision and Order granting summary judgment. That oversight has now been rectified.

CONCLUSION

Because Plaintiff has failed to meet the standard for reconsideration, its motion is denied. The Clerk of Court is respectfully directed to remove Dkt. No. 65 from the Court's list of pending motions.

Dated: February 6, 2019

Chief Judge

TO ALL PARTIES BY ECF