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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

NOVEX BIOTECH, LLC, a Utah Limited Liability Company. Plaintiff and Counter-claim Defendant, **vs.** **CHROMADEX, INC.,** a California Corporation and **DOES 1-10**. Defendants and Counter-claim Plaintiff.	**PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO DISMISS COUNTERCLIAM** Case No. 2:19-cv-00271-JNP-PMW The Honorable Judge Jill N. Parrish Magistrate Judge Paul M. Warner

Plaintiff Novex Biotech, LLC ("Novex") hereby makes the following Reply in support of its Motion to Dismiss (the "Motion") ChromaDex Inc.'s ("ChromaDex") Counterclaim.

A. Chromadex lacks standing because it does not allege that Oxedrene competes with Tru Niagen.

In responding to Plaintiff's showing that the Counterclaim fails to allege the products compete, ChromaDex misstates Novex's position and argument. ChromaDex says that "Novex has now moved to dismiss on the grounds that NIAGEN and Oxydrene do *not compete*" and accuses Novex of "gamesmanship" and "bad faith" for making this argument. Opposition at 2, 9 (emphasis in original). But Novex does not contend or argue that the products do not compete. Novex is explicit that the products do in fact compete, including in the Motion itself. *See, e.g.* Motion at 2 ("ChromaDex's Tru Nia[g]en directly competes with Novex's Oxedrene"). The facts will demonstrate that the products compete. But the facts themselves and Novex's own contentions in its Complaint are not what are at issue in this Motion to Dismiss. "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties may present at trial but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Advanced Comfort Tech. Inc., v. London Luxury LLC*, 2017 WL 6060634, at *4 (D. Utah Dec. 5, 2017). What matters is whether or not the Counterclaim alleges that the products compete, which it does not. Instead, the Counterclaim alleges only that "***If*** Novex and ChromaDex compete—as alleged by Novex—Novex's false claims have harmed ChromaDex in the marketplace, in an amount to be proven at trial." Counterclaim at ¶ 65 (emphasis added). This allegation cannot confer standing. Parties seeking relief from federal courts "bear the burden of showing standing by establishing, inter alia, that they have suffered an injury in fact, i.e., a concrete and particularized, actual or imminent invasion of a legally protected interest." *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992).

Thus, ChromaDex's argument that it can plead a form of hypothetical standing in the alternative is misplaced. Opposition at 6-9. This is not a case of alternate causes of action or theories of recovery, which the Federal Rules contemplate. The Supreme Court has explicitly held that standing itself cannot be conjectural or hypothetical.

> Our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.

Lujan, 504 U.S. at 560 (citations and quotations omitted). *See also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1543 (2016). Furthermore, ChromaDex's argument that litigants are allowed to plead based on alternative theories misses the fact that all pleadings, whether arguing one theory or multiple, must "state a plausible claim for relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Counterclaim fails to do this. There are no facts offered that show that the products compete, only the mere hypothetical and formulaic conclusion that they do. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The only facts that ChromaDex does assert indicate that the products do not compete. *See* Complaint ¶ 65.[1] Taken together with its clear denials, there is no basis on which ChromaDex asserts that the products actually do compete.

[1] ChromaDex's explanation that its allegation that "NIAGEN and Oxydrene are not even remotely comparable products" (Counterclaim ¶ 65) "has little to do with Novex bringing this lawsuit on the basis that the products allegedly compete" ignores the context of that statement in the Counterclaim which appears in a paragraph discussing precisely that issue. Opposition at 9. The Counterclaim paragraph begins by discussing whether the products compete and specifically attacks Novex's allegation that the products do compete. *See* Counterclaim at ¶ 65. But even if it is true that the statement only has "little to do with" whether the products compete, it is the essentially the only factual allegation that has anything at all to do with that question.

B. **ChromaDex fails to plead facts that would show that Novex's claim that Oxydrene is revolutionary, new, and proprietary is false.**

ChromaDex claims that "Novex appears to concede that Oxydrene is neither 'new,' nor 'proprietary,' nor 'revolutionary.'" Opposition at 9. However, on the very next page ChromaDex notes that Novex "claims its 'formula' is new and proprietary." Opposition at 10 (citing Motion at 8-9). Regardless, what matters for the purpose of this Motion is whether the Complaint alleges particular facts which, if true, would render Novex's advertising false. *Aloudi v. Intramedic Research Grp., LLC*, 729 F. App'x 514, 516 (9th Cir. 2017). And the facts alleged the Counterclaim simply do not render Novex's representation that its product is new, revolutionary, and proprietary false. ChromaDex cites the Counterclaim at ¶ 50 for the allegation that the product is "comprised entirely of garden variety commodity ingredients." Opposition at 10. But even accepting this allegation as true it does not mean that the product itself or the composition of the supposedly "garden variety ingredients" is not new, revolutionary or proprietary. Nowhere does the counterclaim even allege that the formula used in Oxydrene is not new, revolutionary, or proprietary. Thus, it does not render Noxex's advertising false.

ChromaDex contends that the question of whether the representation is about a specific ingredient or about the formula itself is an argument for "after discovery." Opposition at 10. But whatever facts may come from discovery are irrelevant to this issue. The ads themselves, as they are incorporated into the Counterclaim, use the words "compound" and "formula" and do not use the word "ingredient." Even the Counterclaim itself states that Novex represents that Oxydrene "contains a 'revolutionary new ***compound***' and 'proprietary ***formula***.'" Counterclaim at ¶ 44 (emphasis added). This actual representation, as it appears in the Counterclaim itself, is

not rendered false by the allegations in the Counterclaim. No discovery is needed. The Counterclaim fails to state a claim.

ChromaDex's reliance on *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134 (9th Cir. 1997), to argue that it does not need to show Novex's advertising is false, only that it is misleading, misses the point. Whether ChromaDex is arguing that the adverting is false or whether it is arguing that it is just misleading, it still "has the burden to plead and prove facts that show that the claims that [d]efendant made in connection with product are false or misleading." *Hughes v. Ester C Co.*, 930 F. Supp. 2d 439, 457 (E.D.N.Y. 2013). The Counterclaim is devoid of any facts showing how consumers are mislead by Novex's advertising or any facts that support its bare label or conclusion that the advertising is misleading. *Twombly*, 550 U.S. at 555.

ChromaDex dismisses the case cited by Novex showing that the words "new," "revolutionary," and "proprietary" as they are used in the actual context of the ads are too generalized to sustain false adverting claim. Opposition at 14. ChromaDex ignores the fact that these cases discuss the very words and usages that ChroamDex contends are false. *See* Motion at 10. ChromaDex simply characterizes their holdings in general terms, while ignoring what the cases actually said. *See* Opposition at 14. And the cases relied on by ChromaDex dealt with highly specific representations that were alleged to be false. In *Int'l Franchise Sols. LLC v. BizCard Xpress LLC*, 2013 WL 2152549 (D. Ariz. May 16, 2013), the compliant made the specific factual allegation that the software at issue lacked "unique or customized features that give franchise systems any special ability to customize their franchise territories to maximize their short- or long-term economic value" *Id.* at *2. Yet, as the *BizCard* court observed, allegations of fraud "cannot be predicated upon the mere expression of an opinion or upon

representations in regard to matters of estimate or judgment." *Id.* (quotation omitted). Whether a product is new, revolutionary, or proprietary is a matter opinion, estimate, and judgment, unlike the specific allegations in *BizCard*.[2]

In *McCabe*, 2013 WL 6185035 (D. Utah Nov. 26, 2013) the advertising at issue did not simply represent that its methodology was "time-tested and proprietary" as the Opposition implies. Opposition at 13. Instead, the plaintiff alleged that the defendant's advertising represented that its stock recommendations "were supported by research derived from the work of a team comprised of multiple analysts, with significant experience and contacts" and the advertising described a specific investing methodology "whereby any stock Defendant recommended satisfied criteria Defendant described as the 'Profit–Potential Checklist.'" *Id.* at *4. The plaintiff alleged that no such research team and checklist even existed; "rather, Plaintiff alleges, Defendant recommended the stock of companies who had paid Defendant to promote their stock." *Id.* Given that level of specificity, the court observed that "[w]hether research has been subjected to the scrutiny of an experienced team is objectively verifiable and would likely be a highly relevant consideration for a reasonable investor." *Id.* ChromaDex cites *Osmose, Inc. v. Viance*, LLC, 612 F.3d 1298 (11th Cir. 2010) as illustrating "the context of Novex's claims." Opposition at 13. But in *Osmose*, a product disparagement case, the representations at issue were that "the use of a particular product 'poses a considerable safety hazard'" and "'[t]he severity of the decay on these micronized copper-treated posts raises alarming consumer safety

[2] Indeed S.*E.C. v. McCabe*, specifically relied on by ChromaDex, found that the term "ground breaking" is non-actionable puffery. 2013 WL 6185035, at *4. *See also Haskell v. Time, Inc.*, 857 F.Supp. 1392, 1399 (E.D.Cal.1994) ("The distinguishing characteristics of puffery are vague, highly subjective claims as opposed to specific, detailed factual assertions").

concerns about structures built using micronized copper treated wood.'" *Id.* at 1311-1312. ChromaDex's relied on cases all involve "specific, detailed factual assertions" as opposed to the "vague, highly subjective claims" in the Counterclaim. *Haskell*, 857 F.Supp. at 1399.

Finally, in stating that the issue of puffery cannot be resolved at this stage, ChromaDex relies on a District Court opinion analyzing context specific allegations. Opposition at 14-15 (citing *digEcor*, 2009 WL 928679, at *3). But ChromaDex fails to point to any context that is missing from its Counterclaim.[3] On the contrary, the ads at issue appear in full in the Counterclaim and the plain meaning of the words is fully available for the Court to analyze at this stage. *See Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1053 (9th Cir. 2008) ("the determination of whether an alleged misrepresentation 'is a statement of fact' or is instead 'mere puffery' is a legal question that may be resolved on a Rule 12(b)(6) motion").

C. CromaDex does not plead facts showing that Oxydrene does not provide the benefits

ChromaDex responds to Novex's showing that the Counterclaim is devoid of any facts showing that Oxedrene does not provide the promised benefits by claiming that "Novex's only argument is to point to paragraphs in its own complaint 'by way of contrast' discussing Novex's reading of scientific studies that it believes support its claims against ChromaDex." Opposition at 21. What Chromadex ignores is that fact that Novex quoted all of ChromaDex's allegations on this point in their entirety in the Motion and there is not one single fact plead that supports any of these bare labels and conclusions. *See* Motion at 11. ChromaDex also requotes these conclusions in its Opposition but fails to point to any actual fact in the Counterclaim that would

[3] ChromaDex does not cite any authority for its assertion that "consumer interpretation of the claim is crucial to the puffery analysis." Opposition at 14.

support them. Opposition at 21. All of these allegations "are simply naked assertion[s] devoid of further factual enhancement." *Twombly*, 550 U.S. at 557 (quotations omitted). ChromaDex seeks to get around this lack of factual allegations by pointing out that "ChromaDex alleged that Oxydrene is 'comprised entirely of garden variety commodity ingredients that have been on the market for years.'" Opposiont at 19 (quoting Counterclaims ¶ 50). However, even accepting this allegation as true, it does not make Novex's advertising false. Just because the ingredients in a formula have been on the market or are commonly available, it does not mean that the formula does not work. By definition, all efficacious drugs, cosmetics, and supplements are formulated from "available" ingredients.

ChromaDex's reliance on *Racies v. Quincy Bioscience, LLC*, 2015 WL 2398268 (N.D. Cal. May 19, 2015) is misplaced. The plaintiff in *Racies* did not simply state in conclusory fashion, as ChromaDex does, that the product does not work or that science shows that the product does not work. The plaintiff in *Racies* pleaded actual facts showing that the product does not work, including the facts that:

> one of the world's foremost experts in brain chemistry ... has concluded that: (1) [the Product] cannot work as represented because apoaequorin, the only purported active ingredient in [the Product], is completely destroyed by the digestive system and transformed into common amino acids no different than those derived from other common food products ...; (2) the average daily diet contains about 75 grams of protein, contains all the required amino acids, and has about 7,500 times more amino acids than [the Product] (10 mg or 0.01 grams) and, as a result, any amino acids derived from the digestion of [the Product] would be massively diluted and could have no measurable effect on the brain…

Racies, 2015 WL 2398268, at *1 (quoting the complaint) (ellipses and bracketed text in *Racies*). ChromaDex fails to point to any such specific facts which would show falsity but simply repeats its naked assertions that the product does not work. *Twombly*, 550 U.S. at 557.

D. ChromaDex fails to show that Novex Lacks Adequate Substantiation

ChromaDex claims that it makes "numerous factual allegations" showing that Novex's claims to clinical support for its product are false. *See* Opposition at 16. Yet none of the allegations that ChromaDex goes on to cite, even if true, have any bearing on falsity. The fact that Novex does not put a study up on its website has no bearing on the question of whether or not it has such a study. Nor does the fact that ChromaDex itself and one blogger (which ChromaDex now pluralizes as "watchdogs") did not find a study. Opposition at 16. As Novex already pointed out in its Motion, it is true that "establishment" or "level of proof" claims are cognizable under the Lanham Act. *See* Motion at 12. However, a Lanham Act plaintiff must still plead facts showing that the representations are "unsupported by accepted authority or research or [] are contradicted by prevailing authority or research." *Alpo Petfoods, Inc. v. Ralston Purina Co*., 720 F. Supp. 194, 213 (D.D.C. 1989). ChromaDex fails to plead facts showing either.

But even if ChromaDex did state enough facts to support this theory for its Lanham Act cause of action, it cannot bring claims under Californian Consumer protections based on the theory or allegation that there is no study supporting Novex's advertising. ChromaDex contends that it can get around California's substantiation bar because Novex put the clinical proof for its product "at issue." Opposition at 18. However, this is the precise argument that was rejected by the Ninth Circuit in *Kwan*. There, the plaintiff argued that the defendant puts its clinical proof at issue when it claimed its product was "clinically tested." *Kwan v. SanMedica Int'l*, 854 F.3d 1088, 1096 (9th Cir. 2017). The Ninth Circuit recognized this as an attempt to incorporate the exception that allows for establishment or level of proof claims in Lanham Act case law into

California law. *Id.* at 1097. The Court concluded that "no authority exists under California law for using the Lanham Act distinction between 'establishment' and 'non-establishment' claims as a means of shifting the burden of proof in California consumer protection law actions" and ruled that accepting such an argument "would clearly violate recognized California law on the burden of proof placed on the plaintiff." *Id*. Likewise in *Aloudi v. Intramedic Research Grp., LLC*, 2015 WL 4148381 (N.D. Cal. July 9, 2015) the court explicitly rejected the very reasoning used by ChromaDex that "[s]ince Defendant's advertising expressly states that it has clinical proof to support [its product's] effectiveness, Plaintiff plausibly alleges falsity when he contends that there is an absence of such proof." *Id.* at *1. "The Court finds that such reasoning cannot be reconciled with *King Bio*'s clear prohibition on consumer protection claims based on a lack of substantiation." *Id.* at *4.

McCrary v. Elations Co., LLC, 2013 WL 6403073 (C.D. Cal. July 12, 2013), relied on by ChromaDex was decided before the Ninth Circuit rejected ChromaDex's establishment claims argument in *Kwan*. Indeed, the portion of *McCrary* which, ChromaDex cites was referred to and explicitly rejected by *Aloudi*. 2015 WL 4148381 at *4. This was then followed by *Kwan.* 854 F.3d at 1097.[4] Furthermore, in *McCrary*, the court noted that "[t]o demonstrate the false and misleading nature of Defendant's claims, Plaintiff point[ed] to numerous scientific studies" and the plaintiff affirmatively "identifie[d] studies which he claims show that the scientific 'consensus' is that GH is no more effective than a placebo for the treatment of osteoarthritis." 2013 WL 6403073 at *2. Likewise, *Cabral v. Supple, LLC*, 2012 WL 12895824 (C.D. Cal. July 3, 2012), was also decided before the Ninth Circuit's definitive ruling in *Kwan*. Still, the

[4] *Aloudi* itself was also affirmed by the Ninth Circuit on appeal. 729 F. App'x 514.

plaintiff in *Cabral* alleged "that a series of clinical trials demonstrate that the combinations of these ingredients is no more effective than a placebo." *Id.* at *1. And the court the court found that this was not a lack of substantiation case because the Defendants affirmatively represented the presence of ingredients in its products which were not there. *Id*. at *2. The Counterclaim has nowhere close to the level of specific factual allegations found in *McCrary* or *Cabral*.

Finally, ChromaDex seeks to distinguish the cases cited by Novex by arguing that "there plaintiffs were challenging the substantiation behind the benefit claims, not that the statement about an existence of the study was false." Opposition at 18. But this ignores the definition of substantiation claims in *Kwan* and *King Bio*. "Plaintiff's argument that Defendant claims support for its representations, when there in fact is no such support, perfectly describes a substantiation claim." *Kwan v. SanMedica Int'l, LLC*, 2014 WL 5494681, at *3 (N.D. Cal. Oct. 30, 2014) (citation omitted). And ChromaDex's effort at a distinction is what was alleged and rejected in *Racies*:

> Plaintiff alleges that "there is absolutely no evidence in the public record" that any clinical studies were ever performed on the Product and "no RCT involving apoaequorin and brain function or memory" has ever been "registered to be considered for publication in a peer reviewed journal.

Racies, 2015 WL 2398268, at *1. The court ruled that this very allegation is a lack of substantiation allegation and that "Plaintiff cannot state a claim under the fraudulent prong of the UCL based solely on an alleged lack of substantiation." *Id.* at *3.

E. Conclusion

For all the foregoing reasons, Novex requests that the Court dismiss ChromaDex's Counterclaim in its entirety.

DATED this 9th day of August 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2019 I caused the foregoing **PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO DISMISS COUNTERCLIAM** to be served by email on all counsel, which will send notice of filing to all counsel of record.

/s/ Angela Johnson