UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

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

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I. PRELIMINARY STATEMENT

Elysium and ChromaDex have been litigating in multiple federal courts throughout the United States continuously for the past five years. During that time, Elysium estimates that the parties have spent well over 100 hours in settlement negotiations, including paying thousands of dollars to well-respected professional mediators and engaging in periodic mediation sessions and settlement conferences that continued on and off for years. Numerous settlement offers and demands have been exchanged and mediation statements written. Throughout this time, ChromaDex has made one point repeatedly clear: "Of course, our discussions won't be binding until reduced to a formal final agreed upon writing."

ChromaDex ignores this and the many other, similar statements made during the parties' extensive settlement negotiations. Instead, it seeks to have this Court interpret a single, unconfirmed email as a binding, definitive multi-million dollar settlement of multiple federal litigations spanning several years. ChromaDex's position is not only contrary to law, it is disingenuous and defies common practice and common sense.

During the course of the parties' settlement discussions leading up to the email at issue on February 3, 2022, the court in one of the cases between the parties, a patent case in the District of Delaware, found ChromaDex's patent invalid and dismissed the case. The two other cases—in the Central District of California involving a breach of contract dispute, among other claims ("the California Action") and the present case before this Court involving false advertising claims ("the New York Action")—remained pending in various respects.

Last September 2021, following a trial in the California Action, the jury found for ChromaDex on certain of its breach of contract claim claims against Elysium and Mark Morris—an Elysium employee and individual defendant named in the California Action. The jury found in Elysium's and Mr. Morris's favor on ChromaDex's remaining claims, however, as well as on Elysium's counterclaims. The total net award to ChromaDex on the claims by and against all three parties amounted to $1,100,658, with prejudgment interest and attorneys' fees yet to be decided, plus the possibility of additional post-trial motions and appeals. On January 10, 2022, the parties

appeared for oral argument on their cross summary judgment and *Daubert* motions in the New York Action. In mid-to-late January 2022, the parties also briefed the prejudgment interest issue in the California Action. All throughout, as in the months and years prior, the parties engaged in sporadic settlement discussions, each time falling short because of changes in and disagreements over the proposed terms.

On February 2, 2022, ChromaDex's in-house counsel communicated directly with Elysium's in-house counsel (as had become common) by phone to propose additional terms involving two payments related to the California Action. Elysium responded by email the following day, February 3, that it would accept ChromaDex's "additional terms." Elysium also clarified what it recalled to be the other terms from prior discussions, with certain key terms yet to be decided—including the interest rate applied to the second payment, payment dates, confidentiality, choice of law, and many others. Elysium expressed its expectation that ChromaDex would attempt to modify these new additional terms, as had happened in the past, so Elysium said it would not accept any additional guarantees or conditions regarding the second settlement payment. As ChromaDex had already made clear on multiple occasions, nothing was binding "until reduced to a formal final agreed upon writing." Elysium concluded with its "understand[ing] that now that we have an agreement you will get started on the documentation."

ChromaDex did not confirm its agreement to these terms. Nor did the parties discuss any of the additional terms yet to be negotiated. Presumably, ChromaDex was deciding its next move, but whatever the reason for its silence, the Court issued its order on the parties' summary judgment and *Daubert* motions a few hours later. Elysium told ChromaDex to "please hold off drafting the documentation. We need to understand the decision and see how it impacts settlement." Shortly after that, Elysium stated that the parties "can resume settlement discussions after we have had the time to evaluate and digest the decision." A few minutes later, ChromaDex stated "Let's discuss once you review. I'm a bit confused now by your earlier statement 'I understand that now that we have an agreement you will get started on the documentation,'" to which Elysium responded (all within a few hours), "Just to be clear – with the decision in New York, again not having reviewed

yet – settlement discussions are now on hold. . . . Obviously moving forward with settlement depended on agreeing on the documentation, and from our conversation yesterday I understood you would be preparing. That was the origin of the statement from my prior email."

ChromaDex now wants the Court to order that Elysium's one-sided email was a binding settlement of over five years of ongoing litigation in multiple courts, even though ChromaDex had repeatedly expressed that any settlement would "of course" require a formal, written agreement and approval before binding the parties. ChromaDex had not even confirmed its agreement with the email in writing prior to Elysium's notification that the parties needed to evaluate the Court's order to determine how it impacted settlement. And there were several terms that had yet to be discussed—including, for example, the governing law and venue for resolving disputes, which is telling because ChromaDex is seeking to enforce a settlement in this Court under New York law when ChromaDex is based in California and the payment and most of the terms in the email related only to the California Action. It is unclear whether one court can, on motion, enforce an agreement to resolve an action pending before another court, which is what ChromaDex is asking this Court to do with respect to the California Action.

The parties were undoubtedly approaching an enforceable agreement, as they had done several times in the past, and they may ultimately reach one. But, they have not yet agreed to a binding settlement and, as often happens, circumstances changed, for better or for worse. ChromaDex makes no credible argument that Elysium's February 3 email somehow bound either party when ChromaDex expressly stated no agreement would be binding absent a formal, written agreement. Nor did ChromaDex confirm its agreement to the existing terms discussed in writing. Certainly, Elysium could not have brought a motion to enforce its one-sided February 3 email—to which ChromaDex never responded—against ChromaDex. The parties were still free to negotiate (as Elysium's email reflects), notwithstanding ChromaDex's inaccurate assertion that it never expressly required a formal, written agreement and that it *would* have confirmed its agreement with the February 3 email.

Even if ChromaDex had not reserved its rights and had confirmed its agreement with the terms in Elysium's February 3 email, the parties still had additional terms to discuss. And the other party whose claims were at issue in the settlement (Mr. Morris) had not confirmed his agreement either. It is inconceivable that the parties would have agreed to be bound by a few terms in an email to settle multiple federal litigations spanning many years involving millions of dollars without agreeing to a formal, complete settlement agreement.

The law—both New York and California—as well as common sense, dictates that there is no binding settlement agreement between the parties based on Elysium's February 3 email. Elysium respectfully requests that ChromaDex's motion be denied.

II. RELEVANT FACTUAL BACKGROUND

A. Extensive Settlement History

The California Action began in December 2016 and the New York Action in September 2017. *See* Declaration of Thomas Wilhelm ("Wilhelm Decl.") ¶ 2. The parties' first organized attempt at settlement was a mediation in January 2018 before a private mediator. *Id.* ¶ 3. Since that time, Elysium estimates that it has spent well over 100 hours engaging in mediation and settlement discussions with ChromaDex. *Id.* ¶ 4. This included a settlement conference before a Magistrate Judge in the California Action, a settlement conference before a Magistrate Judge in the Delaware patent case, and multiple mediations before yet another private mediator. *Id.* The parties have also engaged in direct settlement discussions without a mediator, particularly leading up to the trial in the California Action and the months following. *Id.* ¶ 5.

The parties agreed that any settlement would require a formal writing and approval prior to being final. ChromaDex emphasized this point numerous times throughout the negotiation process. For example, on August 11, 2021, ChromaDex's in-house counsel, Bill Carter, summarized discussion points to date, and clarified: "And of course, all the terms, *once finalized* will require approval by both sides and thus these are not final and subject to change." *Id.* ¶ 6 & Ex. A at 3 (emphasis added). In other words, even after the parties finalized settlement terms, the

agreement would still require approval. On September 2, 2021, ChromaDex sent Elysium a detailed term sheet titled "Confidential Global Settlement Proposal," which stated up front:

> This term sheet is non-binding and non-final in all respects and may be withdrawn by ChromaDex at any time, in whole or in part. ***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 or more definitive agreements regarding such subject matter.***

Id. ¶ 7 & Ex. B at 2 (emphasis added).

And, on September 9, 2021, Mr. Carter wrote Elysium to schedule a further settlement call, and clarified, once again: "Of course, our discussions won't be binding until reduced to a formal final agreed upon writing . . . ." *Id.* ¶ 8 & Ex. C at 1.

B. California Jury Verdict and Outstanding Litigation Matters

On September 27, 2021, following trial in the California Action, the jury entered a verdict as follows: Elysium owed ChromaDex $2,983,350 for its unpaid ingredient order; Mark Morris owed ChromaDex $17,307.69 for breach of contract; ChromaDex owed Elysium $625,000 for ChromaDex's breach of the most favored nation pricing provision, $250,000 in damages for fraudulent inducement, and $1.025 million in punitive damages. Wilhelm Decl. Ex. D. Issues surrounding prejudgment interest and attorneys' fees still remained. In addition, the parties' counter-summary judgment and *Daubert* motions were pending in the New York Action.

C. Recent Settlement Communications

After the verdict, the parties' settlement discussions continued. As before, the settlement communications were replete with statements expressing the parties' intent not to be bound absent an approved writing. On December 19, 2021, for example, in the negotiations leading up to the oral argument in the New York Action, ChromaDex's counsel provided another counter-offer and stated: "Any agreement on these proposed terms is, *of course*, subject to final approval by ChromaDex's board of directors." Wilhelm Decl. Ex. E at 7 (emphasis added). On January 5, 2022, days before oral argument in the New York Action, Elysium made its "best and final" offer to ChromaDex to resolve the California and New York Actions. *Id.* at 1. In response, Mr. Carter

called Elysium's Chief Legal Officer and General Counsel, Thomas Wilhelm, and tried to negotiate additional terms, notwithstanding Elysium's statement that it would not accept additional terms. Wilhelm Decl. ¶ 11. Once again, no agreement was reached. *Id.*

On February 2, 2022, the day before the Court issued its order on the summary judgment and *Daubert* motions, Mr. Carter called Dr. Wilhelm again, this time with revised additional settlement terms. *Id.* ¶ 12. The parties did not discuss all of the prior terms and Mr. Carter never expressed to Elysium that ChromaDex was withdrawing its repeated reservation that it required a formal, written agreement to be bound. *Id.* Nor did Mr. Carter state that ChromaDex's Board of Directors had provided final approval of the settlement. *Id.* In fact, given that the parties were still negotiating and there was no agreement to approve, ChromaDex's board almost certainly had not.

The next day, on February 3, Dr. Wilhelm wrote Mr. Carter and stated that "we can accept the additional terms you proposed yesterday." Wilhelm Decl. Ex. F at 5. Anticipating that ChromaDex would seek once again to add terms—and understanding that not all of the terms had been decided and the parties were not bound until the parties approved a formal, written agreement—Elysium added: "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)." *Id.* (emphasis in original).

Dr. Wilhelm then set forth the five additional terms addressed in earlier settlement communications "[i]f I am remembering correctly," explicitly listing them as what the parties "would" do if there were a binding agreement. *Id.* He concluded by saying, "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." *Id.*

ChromaDex did not respond to this email. *Id.* Instead, shortly thereafter, the Court granted in part and denied in part both parties' motions for summary judgment and *Daubert* motions. ECF Nos. 296 & 297. Because the orders were initially filed under seal, most of Elysium's principals

were unable to review the full decisions at that time. 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." Wilhelm Decl. Ex. F at 4.

The parties exchanged a few additional emails that same day:

- From ChromaDex: "Tom I haven't seen the ruling either but the settlement structure and amount isn't impacted."
- From Elysium: "Bill - from our perspective that is not true. We can resume settlement discussions after we have had time to evaluate and digest the decision."
- From ChromaDex: "Let's discuss once you review. I'm a bit confused now by your earlier statement 'I understand that now that we have an agreement you will get started on the documentation.'"
- From Elysium: "Just to be clear – with the decision in New York, again not having reviewed yet – settlement discussions are now on hold. We need to understand the NY decision to decide if anything has changed. ***Obviously moving forward with settlement depended on agreeing on the documentation***, and from our conversation yesterday I understood you would be preparing. That was the origin of the statement from my prior email."

Id. at 1-2 (emphasis added).

D. <u>Court Decision Leading To ChromaDex's Motion To Enforce Settlement</u>

Even though Elysium expressly told ChromaDex on February 3 to hold off on drafting the documentation and later that same day told ChromaDex that the settlement negotiations were "on hold" (*id.* at 1), ChromaDex alleges that Elysium did not "renege" on the agreement until February 10. *See* ChromaDex's Motion (ECF No. 304 ("Mot.")) at 2.

Importantly, during this period, ChromaDex maintained its motion for prejudgment interest in the California Action and never attempted to withdraw it. Wilhelm Decl. ¶ 14. Judge Carney ultimately denied ChromaDex's motion in the late afternoon of February 10. Wilhelm Decl. ¶ 14

& Ex. G. The next week, only after the denial of ChromaDex's motion for prejudgment interest in the California Action, ChromaDex filed its present motion—before this Court rather than in the California Action—to enforce the settlement agreement.

III. ARGUMENT

ChromaDex seeks to create a binding agreement based on Elysium's one-sided email with partial terms, when the parties made clear that a final settlement would require approval of a formal, written document. ChromaDex has no basis for such a result, which is contrary to law.[1]

A. Legal Standard

Both sides recognize that a settlement agreement is a contract subject to the rules governing construction of contracts. *See Red Ball Interior Demolition Corp. v. Palmadessa*, 173 F.3d 481, 484 (2d Cir. 1999); *Goldman v. Commissioner*, 39 F.3d 402, 405 (2d Cir. 1994); *Bank of New York v. Amoco Oil Co.*, 35 F.3d 643, 661 (2d Cir. 1994). "To form a valid contract under New York law, 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).

ChromaDex bears the burden of proving that the parties had a meeting of the minds on an agreement. *See Prince of Peace Enters., Inc. v. Top Quality Food Mkt., LLC*, 760 F. Supp. 2d 384, 398 (S.D.N.Y. 2011), *adhered to on denial of reconsideration*, No. 07 Civ. 00349 (RJH) (FM), 2011 WL 650799 (S.D.N.Y. Mar. 14, 2011) ("The burden of establishing that the parties reached a meeting of the minds is on the party seeking to enforce the settlement.").

[1] ChromaDex relies solely on New York law without justification. The parties, of course, never agreed on a choice of law provision and, as noted, ChromaDex is based in California and the majority of the terms of the purported agreement concerned the California Action. Nevertheless, at least one court has recognized that, in the context of enforcing a settlement agreement, "the law regarding the formation of an enforceable agreement is the same in both jurisdictions" *Prince of Peace Enters., Inc. v. Top Quality Food Mkt., LLC*, 760 F. Supp. 2d 384, 397 (S.D.N.Y. 2011). It is worth noting, however, that enforcement of a settlement agreement pursuant to California Code of Civil Procedure section 664.6 requires a written agreement signed by all parties. *See, e.g., J.B.B. Investment Partners, Ltd. v. Fair*, 232 Cal. App. 4th 974, 985-86 (2014).

The Second Circuit has identified "several factors that help determine whether the parties intended to be bound in the absence of a document executed by both sides." *Winston v. Mediafare Entm't Corp.*, 777 F.2d 78, 80 (2d Cir. 1985). These include: (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.* ChromaDex's argument that the parties entered into an enforceable agreement relies entirely on Elysium's February 3, 2022 email, ignoring the impact of all prior and subsequent settlement communications between the parties. All four *Winston* factors counsel against finding that both parties intended to be bound by Elysium's February 3 email.

B. No Assent to the Terms by ChromaDex

As a preliminary matter, ChromaDex never assented to the terms of the February 3 email in the first place. Wilhelm Decl. Ex. F. Because ChromaDex never agreed to be bound by the terms *at all*, there was no mutual assent and, hence, no binding agreement. *See Express Indus. & Terminal Corp. v. New York State Dep't of Transp.*, 93 N.Y.2d 584, 589 (1999) ("To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms").

First, Elysium sought confirmation from ChromaDex of the earlier settlement terms discussed because not all of those terms were addressed on the February 2 call. *See* Wilhelm Decl., ¶ 12 & Ex. F at 5 ("***If I am remembering correctly*** these were the other terms . . .") (emphasis added). ChromaDex never confirmed whether Elysium remembered the terms accurately. Wilhelm Decl. Ex. F.

Second, Elysium expressed its expectation that ChromaDex would try to negotiate additional terms. In the February 3 email, Elysium explained: "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 (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)." *Id.* at 3 (emphasis in original). If the terms of the February 3 email were legally binding and final, there would be no need to negotiate in this regard.

C. The Parties Expressed That a Formal, Approved Writing Was Required

1. The Parties' Repeated Reservations Not To Be Bound

Under the first *Winston* factor, the court is to consider "whether there has been an express reservation of the right not to be bound in the absence of a writing[.]" *Winston*, 777 F.2d at 80. ChromaDex isolates the February 3 email from the parties' years of settlement discussions and improperly seeks to argue for a binding agreement on the basis of that email alone. *See Ciaramella v. Readers Digest Ass'n, Inc.*, 131 F.3d 320, 325 (2d Cir. 1997) ("an attorney's statement that 'a handshake deal' existed was insufficient to overcome 'months of bargaining where there were repeated references to the need for a written and signed agreement, and where neither party had ever . . . even discussed dropping the writing requirement." (citations omitted)). The February 3 email was, quite plainly, not sent in a vacuum. The parties have been negotiating a possible settlement for over four years, and the Court must consider the totality of the circumstances. *See, e.g.*, *U.S. v. Sforza*, 326 F.3d 107, 116 (2d Cir. 2003) (courts look to the totality of the circumstances when determining whether there had been a meeting of the minds with respect to the terms of a settlement agreement).

Where "there is a writing between the parties showing that [one party] did not intend to be bound … a court need look no further than the first factor." *Kaczmarcysk v. Dutton*, 414 F. App'x 354, 355 (2d Cir. 2011) (quoting *RKG Holdings, Inc. v. Simon*, 182 F.3d 901, 901 (2d Cir. 1999)) (alteration in original). Throughout the parties' extensive negotiation, the parties (and particularly ChromaDex) expressed—repeatedly—that a "formal final agreed upon writing" was "of course" required and that final board approval was also "of course" required. Wilhelm Decl. Exs. C at 1, E at 7. On September 2, 2021, for example, ChromaDex's term sheet clarified both parties' position that "[a]ny 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 or more definitive agreements

regarding such subject matter." Wilhelm Decl. Ex. B at 2. On September 9, 2021, ChromaDex reiterated: "Of course, our discussions won't be binding until reduced to a formal final agreed upon writing . . .." *Id*. Ex. C at 1. And, on December 19, 2021, ChromaDex again specified, with respect to proposed terms that were comparable in part to the terms in the February 3 email, that "Any agreement on these proposed terms is, ***of course,*** subject to final approval by ChromaDex's board of directors." *Id*. Ex. E at 7 (emphasis added).

A few weeks later, on January 5, 2022, as part of the same email chain, Elysium proposed modified terms shortly before oral argument on the parties' motions in the New York Action. *Id.* at 1. Elysium clarified that, if the terms were accepted, the parties would request of this Court "a continuance of the January 10 hearing date (or possibly a conditional dismissal of the case)." *Id*. Again, the exchange made clear that an agreement on those terms did not yet end the case.

There can be no question that the parties were operating under the express understanding that no party was bound in the absence of, as ChromaDex put it, "a formal final agreed upon writing." Wilhelm Decl. ¶ 8 & Ex. C at 1. Accordingly, ChromaDex's motion can and should be denied on this basis alone.

Moreover, an express reservation is not required where the parties' language reveals an intent not be to bound until execution of a written agreement. *See, e.g.*, *Grgurev v. Licul*, 1:15-cv-9805-GHW, 2016 WL 6652741, at *4 (S.D.N.Y. Nov. 10, 2016) (recognizing that "although [the first] factor refers to 'express reservation of the right not to be bound,' the Court in *Winston* clarified that this factor is to be answered in the affirmative when language in the parties' correspondence 'reveal[s] such an intent.'"). In addition to the parties' explicit reservation not to be bound in earlier emails, Elysium's February 3 emails also reveal such an intent. In its initial email, Elysium conveyed its understanding that settlement discussions would be ongoing while the parties finalized a written agreement, noting that it was not trying "to gain leverage moving forward," and that it "would not accept <u>any</u> additional 'guarantees' or conditions." Wilhelm Decl. Ex. F at 5 (emphasis in original). Elysium also stated its understanding that ChromaDex would "get started" on the first draft of the settlement documentation and then, without further discussion,

told ChromaDex to "hold off." *Id.* at 2-3. Elysium further clarified that same day the parties' mutually expressed understanding: "Obviously moving forward with settlement depended on agreeing on the documentation . . . ." *Id.* at 1. Both parties thus expressly understood that the February 3 email was not a final, binding agreement.

2. ChromaDex's Reliance On *Hostcentric* Supports Denial of Its Motion

Hostcentric Technologies, Inc. v. Republic Thunderbolt, LLC, No. 04 Civ. 1621 (KMW) (AJP), 2005 WL 1377853 (S.D.N.Y. June 9, 2005), on which ChromaDex relies extensively, is instructive. In that case, Magistrate Judge Peck found an enforceable settlement agreement based on facts that are almost entirely absent here. *Id.* In *Hostcentric*, the party opposing settlement had made a formal, written settlement offer. *Id.* at *1-2. The party seeking to enforce the settlement agreement stated, in writing, that it had "*formally accepted*" the other party's written offer and that the matter was "*conclusively settled.*" *Id.* at *2 (emphasis in original). The party opposing settlement then wrote, to the court, that the "*action has been settled.*" *Id.* (emphasis in original). The court then dismissed the action, but provided that the case could be reinstated if the settlement was not consummated. *Id.*

Nearly every aspect of *Hostcentric* illustrates why the parties' actions in this case evidence the intent not to be bound. In *Hostcentric*, both parties acknowledged the terms of the agreement in writing. *Id.* at *2, 7. Here, ChromaDex never acknowledged any agreement in writing until after Elysium clarified its understanding that the settlement was not yet binding. Wilhelm Decl. Ex. F. In *Hostcentric*, the party seeking to enforce the agreement sent a "follow-up email confirming the finality of the settlement and asking whether [the other party] still wanted to draft formal papers." *Id.* at 7. Here, in contrast, Elysium sent a follow-up email—prior to any response from ChromaDex—stating "please hold off on drafting the documentation." Wilhelm Decl. Ex. F at 4. And, in *Hostcentric*, the parties informed the court that "this action has been settled." *Id.* at *7. Here, no party informed the Court of anything regarding these emails or any purported settlement agreement.

The parties' express language and behavior make clear that neither party intended to be bound by any settlement terms prior to the execution of a formal, written document. *See Winston*, 777 F.2d at 81 (finding that the "language in the correspondence" revealed an intent not to be bound even absent an express reservation of rights).

D. Neither Party Performed Under the Alleged Agreement and ChromaDex Continued to Pursue Prejudgment Interest

ChromaDex seeks to disregard the second *Winston* factor—partial performance—as neutral "because Elysium repudiated the agreement shortly after entering into it." Mot. at 11. The facts belie this conclusion. According to ChromaDex, even though Elysium expressly told ChromaDex on February 3 to hold off on drafting the documentation and that the settlement negotiations were "on hold" (Wilhelm Decl. Ex. F at 2, 4), Elysium allegedly did not "renege" on the agreement until on February 10. Mot. at 2. ChromaDex, therefore, argues that the parties had a binding agreement from February 3 to February 10 that Elysium had not yet "reneged." Yet, during this period, ChromaDex maintained its motion for prejudgment interest in the California Action and never attempted to withdraw it. Wilhelm Decl. ¶ 14. Judge Carney ultimately denied ChromaDex's motion in the late afternoon of February 10. Wilhelm Decl. ¶ 14 & Ex. G. Only after this denial did ChromaDex bring its present motion—before this Court rather than in the California Action—to enforce the settlement agreement. The lack of performance by either party under the purported agreement, and ChromaDex's behavior to the contrary, further demonstrates that the parties had not entered into a binding agreement.

E. Several Settlement Terms Had Yet to Be Decided

1. The Parties Had Not Even Resolved Which Court Should Hear This Motion.

ChromaDex's argument that there were no "material" terms to be decided is incorrect for multiple reasons. Mot. at 11. At the outset, the Second Circuit does not require that the unresolved terms be "material." To the contrary, *Winston* specifies that the third factor is "whether there was 'literally nothing left to negotiate.'" *Winston*, 777 F.2d at 82 (quoting *R.G. Group, Inc. v. Horn &*

Hardart Co., 751 F.2d 69, 76 (2d Cir. 1984)). There could be no dispute that, other than the five enumerated points set forth in the February 3 email, there were many terms yet to be discussed. Those include, for example, any confidentiality provisions, enforcement provisions, choice of venue provisions, and choice of law provisions, to name a few.

The significance of the lack of agreement on enforcement, venue, and choice of law provisions is on full display in this motion. In particular, while '[a] district court has the power to enforce summarily, on motion, a settlement agreement reached in a case pending before it," *MacDonald v. Dragone Classic Motor Cars*, No. 395CV499 (JBA), 2003 WL 22056626, at *6 (Apr. 29, 2003) (quoting *Meetings & Expositions, Inc. v. Tandy Corp.*, 490 F.2d 714, 717 (2d Cir.1974)), Elysium is not aware of any authority where one court can, on motion, enforce a settlement of a case *pending before another court*.

Yet, ChromaDex brings a motion in this Court to enforce a settlement agreement that primarily—or, at a minimum, equally—resolved the California Action. If the Court were to enforce the February 3 email as a binding settlement agreement, it would require the parties to enter a stipulated judgment in the California Action that contradicts the jury verdict and the amount that Judge Carney ordered when denying ChromaDex prejudgment interest. *See* Wilhelm Decl. Ex. F at 5 ("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."). It would also require that the parties forgo any rights to attorneys' fees and to other post-trial motions and appeals in the California Action. *Id.* At the same time, the Court could not reasonably enforce a settlement agreement only with respect to the New York Action, because the parties did not agree that any settlement terms were severable. *See Municipal*

Capital Appreciation Partners, I, L.P. v. Page, 181 F. Supp. 2d 379, 395 (S.D.N.Y. 2002) (finding settlement agreement not severable in part because it lacked a severability clause).[2]

The procedural impropriety of ChromaDex's motion underscores the fact that there were still numerous settlement terms to be negotiated that were not merely ministerial. The purported settlement would have resolved two multi-million dollar federal cases being litigated on opposite coasts for several years. Issues such as confidentiality, enforcement, choice of law, and venue were meaningful. As the Second Circuit has made clear, the "third factor 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 agreed to." *R.G. Group, Inc.*, 751 F.2d at 76.

2. Other Material Terms Remained Open

Further, even if the third factor focused on only ChromaDex's so-called "material" terms, ChromaDex ignores that there was at least one such indisputably material term that the parties had not agreed upon. ChromaDex's in-house counsel concedes that ChromaDex's "primary concern" leading up to his February 2, 2022 phone call to Elysium's General Counsel (what ChromaDex terms the "Offer") was "how Elysium could 'guarantee' the second payment be made in full." Declaration of William Carter (ECF No. 305) ¶¶ 2-3. ChromaDex thus proposed, for the first time, that "to ensure timely payment, interest would accrue from the date of the settlement agreement but would be waived if the payment were timely made." *Id.* ¶ 3(3). While Elysium's February 3 email agreed in principle with this structure, the parties had yet to negotiate *what that interest rate would be*. The second payment would have been for $1.25 million. The difference, therefore, between the LIBOR rate (less than 1%), for example, and the New York statutory interest rate (9%) or the California statutory interest rate (10%) was certainly a "material" amount, and one that the parties had yet to discuss. Nor had the parties agreed on the payment dates, which were left

[2] In addition, as noted above, the February 3 email did not include Mr. Morris, who was another party to the California Action whose rights would be impacted by the purported settlement and resolution of that action. See Wilhelm Decl. Ex. F.

blank in the February 3 email pending the parties' agreement on a formal settlement document. Wilhelm Decl. Ex. F at 5.

"The fundamental basis of a valid, enforceable contract is a meeting of the minds of the parties, and, if there is no meeting of the minds on all essential terms, there is no contract." *Benicorp Ins. Co. v. Nat'l Med. Health Card Sys., Inc.*, 447 F. Supp. 2d 329, 337 (S.D.N.Y. 2006). There was undoubtedly no meeting of the minds on several terms of the agreement—essential, material, or otherwise.

F. The Settlement of a Multi-Million Dollar, Multi-Year, Multi-Litigation Dispute is Usually in Writing

ChromaDex argues that this settlement is not complex and, accordingly, is not the type of agreement one would expect to be in writing. Mot. at 13. As noted, the parties were attempting to settle two multi-million dollar litigations that they have litigated extensively for years. In *Winston*, the Second Circuit found that a $62,500 settlement payment was "not a trifling amount" as part of its conclusion that it was the type of agreement that generally requires a written contract. *Winston*, 777 F.2d at 83. Here, the payment was for $2.5 million in two installments, with the second $1.25 million due at least a year after the first payment, with accrued interest (at an undetermined rate) that would be enforceable if Elysium failed to make the second payment. The notion that ChromaDex, a large, publicly traded company, would have simply used the February 3 email—particularly without any identified interest rate or definitive payment date—to seek to enforce this million-dollar payment is nonsensical.[3]

[3] The purported agreement would also be invalid without a writing because it violates the Statute of Frauds. Under N.Y. Gen. Oblig. Law § 5-701(a)(1), an agreement that "[b]y its terms is not to be performed within one year from the making thereof" is invalid if not memorialized in writing and signed by the party to be charged or the party's agent. Because the second settlement payment would not have been due until at least one year after the first payment, which itself would not have been due until some point *after* the execution of the agreement—again, material terms that had yet to be decided—the agreement could not have been performed within one year. This is another reason why the agreement would have been in a signed writing. *See also* Cal. Civ. Code § 1624(a)(1) ("An agreement that by its terms is not to be performed within a year from the making thereof" is invalid if not memorialized in writing and signed by the party to be charged or the party's agent).

A writing is considered the norm when the agreement concerns "substantial business matters." *CAC Grp., Inc. v. Maxim Grp., LLC*, No. 12 Civ. 5901 (KBF), 2012 WL 4857518, at *3 (S.D.N.Y. Oct. 10, 2012) *aff'd*, 523 F. App'x 802 (2d Cir. 2013) ("The allegation that $250,000 was at stake itself demonstrates that this is just such a matter."). ChromaDex tacitly acknowledges that a $2.5 million settlement of multiple litigations in multiple payments is typically (if not always) in writing, but argues that the February 3 email—to which ChromaDex never agreed in writing before the Court issued its summary judgment order—qualifies as such a writing. Mot. at 14. The cases it cites in support, however, involved both written offers *and* written acceptances, and far less lucrative agreements than what is at stake here. *See Hostcentric*, 2005 WL 1377853, at *7 (noting that there was an emailed offer and emailed acceptance); *Scheinmann v. Dykstra*, 16 Civ. 5446 (AJP), 2017 WL 1422972, at *5 (S.D.N.Y. Apr. 21, 2017) (same).

This case is more akin to *Winston*, 777 F.2d at 83, *CAC Group*, 2012 WL 4857518, at *3, *Langreich v. Gruenbaum*, 775 F. Supp. 2d 630, 639 (S.D.N.Y. 2011), and the many others finding that settlements of this nature (or less significant) are usually in writing. Again, this counsels in favor of denying ChromaDex's motion.

G. The Totality of the Circumstances Dictates That No Binding Agreement Exists

Ultimately, ChromaDex cannot carry its burden and argue around (1) its multiple express reservations not to be bound absent an approved, formal writing, (2) its failure to assent to the terms of the February 3 email, (3) the numerous open terms—material and otherwise—yet to be decided, and (4) the fact that such agreements are typically in writing, to create a binding agreement where none exists. ChromaDex even attempts to shift the burden of proof to Elysium (Mot. at 15) when, in fact, "[a] party seeking to enforce a purported settlement agreement has the burden of proof to demonstrate that the parties actually entered into such an agreement." *Benicorp.*, 447 F. Supp. 2d at 335; *see also Grgurev*, 2016 WL 6652741, at *3 (same).

ChromaDex's argument that the Court must enforce a non-binding settlement agreement because otherwise parties could delay in finalizing an agreement is meritless. Mot. at 16. If the

parties have not yet reached a binding agreement, then both parties risk circumstances changing in the interim—for better or for worse. Certainly, had the decisions in the California Action and New York Action been different, ChromaDex would not be making this motion. Nor could Elysium have brought such a motion in that instance seeking to bind ChromaDex to a one-sided February 3 email when ChromaDex expressly and repeatedly stated that it would not be bound absent a formal, written agreement. Wilhelm Decl. ¶ 8 & Ex. C at 1. ChromaDex's attempt to have this Court order the dismissal of both the California and New York Actions exhibits the same opportunistic behavior that ChromaDex complains of about Elysium.

The facts and the law are clear. The February 3 email did not create a binding, enforceable settlement agreement between the parties mandating the dismissal of two separate litigations and the payment of millions of dollars. ChromaDex's motion should be denied.

IV. CONCLUSION

For the reasons set forth above, Elysium respectfully requests that the Court deny ChromaDex's motion.

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