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**VIA ECF**

April 14, 2021

Honorable Lewis J. Liman  
United States District Court  
Southern District of New York

*Re: In re Elysium Health-ChromaDex Litigation*, No. 17 Civ. 7394 (LJL)

Dear Judge Liman,

We write on behalf of Plaintiff ChromaDex, Inc. to oppose Defendant Elysium Health, Inc.'s letter-motion to compel responses to its Second Set of Interrogatories ("Interrogatories") and First Set of Requests for Admission ("RFAs"). ECF No. 186.

**Elysium's Interrogatories and RFAs are Untimely**

Elysium served its Interrogatories and RFAs on March 15 and March 23, 2021, respectively—over a month after the deadline the Court set for completion of all fact discovery.

This Court's orders have been unambiguous that February 9, 2021 was the fact discovery deadline. *See* 6/26/2020 Order, ECF No. 150 (extending the deadline for "fact discovery" to October 11, 2020, as extended by subsequent Orders at ECF Nos. 160 and 165 to December 11, 2020 and February 9, 2021, respectively). The Court denied Elysium's motion for leave to amend its counterclaims in part because granting Elysium's request would require extending the previously set fact discovery deadline. 1/19/2021 Order, ECF No. 170, at 3 (noting the Court "extended[ed] the deadline for *fact discovery and fact depositions* to February 9, 2021"); *id.* at 5 ("*all fact discovery* is scheduled to be completed by February 9, 2021."); *id.* at 11 ("[T]he Court set a *firm deadline* of February 9, 2021 for the conclusion of all fact discovery . . ."); *id.* at 14 ("As things now stand, fact discovery must be completed by February 9, 2021.") (italics added).

Elysium's attempt to cast the clear and consistent orders as only applying to the completion of fact *depositions*, *see* Mot. at 1, is unavailing. Equally unavailing is Elysium's attempt to call into question the statements in the 1/19/2021 Order because it was issued "less than 30 days from the February 9, 2021 deadline." Mot. at 1-2. The 1/19/2021 Order did not set any deadline; it reiterated the deadline previously set in November 2020. If, upon reading the Court's repeated references to the February 9 fact discovery deadline, Elysium was uncertain about the relevant dates, it could have sought clarification. Instead, Elysium waited for over a month after the deadline to serve its requests without seeking the Court's leave.<sup>1</sup>

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<sup>1</sup> ChromaDex served its final interrogatories on 12/18/2020, more than 30 days before the cutoff.

**Elysium Mischaracterizes its Interrogatories as Contention Interrogatories**

In an effort to gloss over its failure to adhere to the fact discovery deadline, Elysium now claims that Interrogatories 2-10 are “contention interrogatories.” However, FRCP 33(b)(2) and Local Rule 33.3(c) “anticipate[] that in the normal course, responses to contention interrogatories will be due at the very end of the *fact discovery* period.” *Erchonia Corp. v. Bissoon, M.D.*, No. 07 Civ. 8696 (DLC), 2011 WL 3904600, at \*8 (S.D.N.Y. Aug. 26, 2011) (emphasis added).

Further, Interrogatories 2-10 are not proper contention interrogatories. Interrogatories 2 and 3 ask ChromaDex to identify documents (namely, advertisements). Each of Interrogatories 4-10 follows the same format of asking ChromaDex to “state all facts supporting Your contention that . . . .” The Local Rules provide for “interrogatories seeking the claims and contentions of the opposing party.” Local Rule 33.3(c); *see also* FRCP 33(a)(2) (providing for interrogatories that “ask[] for an opinion or contention that relates to fact or the application of law to fact.”). “[T]he Local Rules do not anticipate that parties will use contention interrogatories to develop new information . . . .” *Erchonia*, 2011 WL 3904600, at \*8. An interrogatory seeking identification of facts or documents rather than the opposing party’s contentions or opinions is not transformed into a contention interrogatory merely because it contains the word “contend.” *See, e.g., Dot Com Ent. Grp., Inc. v. Cyberbingo Corp.*, 237 F.R.D. 43, 44 (W.D.N.Y. 2006) (finding that interrogatories were not contention interrogatories where they “simply require Defendants disclose the evidentiary basis upon which . . . a [legal] determination may be made at trial, presumably, with the assistance of expert opinion and legal argument based on such facts.”).

Elysium’s supposed “contention interrogatories” also fail for the independent reason that they are inherently improper. “Courts have stricken contention interrogatories which asked a party to describe ‘all facts’ that supported various allegations of the complaint, finding that to elicit a detailed narrative is an improper use of contention interrogatories.” *Pasternak v. Dow Kim*, No. 10 Civ. 5045 (LTS) (JLC), 2011 WL 4552389, at \*2 (S.D.N.Y. Sept. 28, 2011); *see also Clean Earth Remediation and Const. Servs., Inc. v. Am. Intern. Grp., Inc.*, 245 F.R.D. 137, 141 (S.D.N.Y. 2007) (collecting cases). That is exactly what Interrogatories 2-10 seek.

**Elysium has Served well in Excess of 25 Interrogatories**

“Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts.” FRCP 33(a)(1); *see Kennedy v. Cont. Pharmacal Corp.*, No. 12 Civ. 2664 (JFB) (ETB), 2013 WL 1966219, at \*1 (E.D.N.Y. May 13, 2013) (“The interrogatories, while sixteen in number, contain twenty-seven subparts and are therefore excessive in number.”).

Although Elysium purports to serve only 14 interrogatories, when counting discrete subparts, Elysium has served *hundreds*. Interrogatory No. 11 alone asks for three distinct pieces of information for 20 different alleged statements, constituting 60 subparts. Similarly, Interrogatory No. 12 seeks four different pieces of information for each of the 20 statements

identified in Interrogatory No. 11, constituting 80 subparts. Interrogatories 2-10 seek at least 10 separate pieces of information regarding each at-issue marketing communication.<sup>2</sup>

### **Elysium's Argument that Interrogatories are Related to 30(b)(6) Depositions Fails**

Elysium states that Interrogatories 11-13 seek information that Elysium “unsuccessfully attempted to illicit through deposition testimony, including Rule 30(b)(6) witnesses.” Mot. at 3.<sup>3</sup> In meet-and-confer correspondence, ChromaDex highlighted to Elysium that it had failed to cite to *any* transcript where a witness was asked—and could not provide responses to—the facts sought in these Interrogatories. Mot., Ex. C at 2. Nor did Elysium identify Rule 30(b)(6) topics that would cover its current requests. *Id.* Tellingly, Elysium’s letter-motion likewise fails to cite to a single transcript—or Rule 30(b)(6) topic—in support.

Elysium’s argument is especially problematic because during Rule 30(b)(6) depositions, ChromaDex invited Elysium to identify specific concerns so as to attempt to remedy issues during the deposition, and on multiple occasions voluntarily provided information following breaks to the extent a designated witness did not have relevant information when asked. At no time within the fact discovery period or in the weeks following the Rule 30(b)(6) depositions did Elysium claim that the witnesses were unable to provide the information.

### **Elysium's RFAs are Improper**

At the April 5, 2021 Status Conference, Elysium’s counsel represented to the Court that its RFAs were limited to confirming authenticity. *See* 4/5/2021 Tr. at 4, 8. Following the conference, ChromaDex “agree[d] to respond to the requests for authentication alone.” Mot., Ex. C at 2. However, Elysium now moves to compel portions of the RFAs that go beyond authenticity, including that the documents were “prepared in the regular course of business by a ChromaDex employee with knowledge of the matter to which the document pertains,” and were *used* by ChromaDex in its regular business activities. The RFAs are compound and seek additional facts that Elysium should have sought during fact discovery. With the parties’ joint Rule 56.1 statement and joint pretrial order upcoming, demanding ChromaDex respond to these requests at this stage will not streamline the litigation.

ChromaDex requests that Elysium’s motion be denied. To the extent the Court grants the motion in whole or in part, ChromaDex respectfully requests 21 days from the date of the order to respond because the parties are currently in the process of conducting nine expert depositions (two have been completed and seven remain) ahead of the deadline to complete expert discovery.

Sincerely,

*s/ Joe H. Tuffaha*

Joe H. Tuffaha

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<sup>2</sup> Elysium attempts to equate its Interrogatories to ChromaDex’s (served on December 18, 2021 and not at issue here). Mot. at 3 n. 4. However, each of ChromaDex’s interrogatories sought a single fact: the dates when an identified message was in the marketplace. Mot., Ex. D.

<sup>3</sup> Elysium is not moving to compel responses to Interrogatories 14-15. Mot. at 1, 3.