

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

CHROMADEX, INC. and TRUSTEES
OF DARTMOUTH COLLEGE,

Plaintiffs,

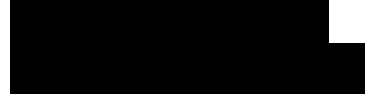
v.

ELYSIUM HEALTH, INC.,

Defendant.

REDACTED - PUBLIC VERSION
(Filed September 7, 2021)

C.A. No. 18-1434-CFC



JOINT PROPOSED FINAL PRETRIAL ORDER

Plaintiffs ChromaDex, Inc. (“ChromaDex”) and Trustees of Dartmouth College (“Dartmouth”) (collectively “Plaintiffs”) and Defendant Elysium Health, Inc. (“Defendant” or “Elysium”), by their undersigned counsel, collectively submit this Joint Proposed Final Pretrial Order pursuant to D. Del. L.R. 16.3. The parties attempted in good faith to reach consensus on the following issues. To the extent the parties had differing positions, each party’s respective proposal is explained for the Court’s consideration.

Plaintiffs’ Counsel:

Plaintiffs are represented by Christopher N. Sipes (csipes@cov.com), R. Jason Fowler (jfowler@cov.com), Ashley Winkler (awinkler@cov.com), Emily Mondry (emondry@cov.com), and Jason Reinecke (jreinecke@cov.com) of Covington & Burling LLP, One CityCenter, 850 10th St. NW, Washington, DC 20010; Patrick Flynn (pflynn@cov.com) of Covington & Burling LLP, 3000 El Camino Real, 5 Palo Alto Square, 10th Floor, Palo Alto, CA 94306; James F. Haley, Jr. (james.haley@hglaw.com) of Haley Guiliano LLP, 75 Broad Street, Suite 1000, New York, NY 10004; and Adam W. Poff (apoff@ycst.com) and Pilar G. Kraman (pkraman@ycst.com) of Young Conaway Stargatt & Taylor, LLP, 1000 North King Street, Wilmington, DE 19801.

Defendant's Counsel:

Defendant is represented by Donald R. Ware (dware@foleyhoag.com), Jeremy A. Younkin (jyounkin@foleyhoag.com), Marco J. Quina (mquina@foleyhoag.com), Richard Maidman (rmaidman@foleyhoag.com), and Joanna McDonough (jmcdonough@foleyhoag.com) of Foley Hoag LLP, 155 Seaport Boulevard, Boston, MA 02210; Jeffrey I. D. Lewis (jidlewis@foleyhoag.com) and Jenny Shum (jshum@foleyhoag.com) of Foley Hoag LLP, 1301 Avenue of the Americas, New York, NY 10019; and Steven J. Balick (sbalick@ashbygeddes.com) and Andrew C. Mayo (amayo@ashbygeddes.com) of Ashby & Geddes, 500 Delaware Avenue, 8th Floor, P.O. Box 1150, Wilmington, DE 19899.

I. Nature of the Case and Pleadings

A. The Parties

1. ChromaDex is a corporation organized under the laws of the State of California having a principal place of business at 10005 Muirlands Boulevard, Suite G, Irvine, California 92618.

2. Dartmouth is a non-profit educational research institution existing under the laws of the State of New Hampshire and having a principal place of business at 6066 Development Office, Hanover, New Hampshire, 03755.

3. Elysium is a corporation organized under the laws of the State of Delaware and having a principal place of business at 434 Broadway, Floor 2, New York, New York, 10013.

B. Nature of the Action

4. On September 17, 2018, Plaintiffs filed suit against Elysium alleging patent infringement of U.S. Patent Nos. 8,197,807 (“807 Patent”) (Count I) and 8,383,086 (“086 Patent”) (Count II) (collectively, the “Dartmouth Patents”). D.I. 1.

5. Dartmouth is the assignee of all right, title, and interest in the Dartmouth Patents. ChromaDex licenses the Dartmouth Patents in various fields, including dietary supplements.

6. On October 23, 2018, Defendant answered the complaint in this action and asserted defenses including, *inter alia*, non-infringement and invalidity of the Dartmouth Patents. D.I. 9. Elysium filed a First Amended Answer to Plaintiffs’ Complaint for Patent Infringement on November 7, 2018. D.I. 12. Elysium filed a Second Amended Answer to Plaintiffs’ Complaint for Patent Infringement on July 10, 2020. D.I. 79.

7. In a Revised Memorandum Opinion (D.I. 141) and related revised Orders (D.I. 142 and D.I. 143) issued on December 17, 2020, the Court dismissed for lack of subject matter jurisdiction claims of infringement brought by

ChromaDex, Inc. for activities alleged to have occurred on or after March 13, 2017. In its Revised Memorandum Opinion the Court stated that ChromaDex did not have standing because ChromaDex’s affiliate Healthspan “had the right to give Elysium a license to practice the asserted patents” as of that date (D.I. 141 at 11–12). Plaintiffs moved for reargument or reconsideration of the Court’s orders on December 29, 2020 arguing that an amendment to the Dartmouth license agreement and/or dissolution of Healthspan on January 15, 2021 restored ChromaDex’s standing to allege infringement (D.I. 148). Elysium opposed the motion. On April 27, 2021, the Court issued a Memorandum Order denying Plaintiffs’ motion for reargument or reconsideration . (D.I. 181).

Plaintiffs’ position: The Court found that ChromaDex had standing to pursue claims for infringement prior to March 13, 2017 when this lawsuit was filed. Although the Court dismissed ChromaDex’s claims for activities alleged to have occurred on or after March 13, 2017, Plaintiffs’ explained in their motion for reargument or reconsideration that the dissolution of Healthspan on January 15, 2021 restored ChromaDex’s standing at least as of that date (D.I. 148).¹ The Court’s Order denying Plaintiffs’ motion did not address

¹ Two weeks before Healthspan’s dissolution, ChromaDex and Dartmouth executed a revised license agreement retroactively clarifying their intent to grant joint exclusionary rights and a joint right to sublicense to ChromaDex and Healthspan (*see* D.I. 148).

whether Healthspan's dissolution restored ChromaDex's standing after January 15, 2021 (D.I. 181). ChromaDex's restored standing as of at least January 15, 2021 permits Plaintiffs to pursue damages on behalf of ChromaDex for Defendant's infringement following that date. Therefore Elysium's argument that Plaintiffs request "damages . . . occurring subsequent to March 13, 2017 [] in violation of both of this Court's orders" is false.

Elysium's position: Plaintiffs' continued insistence that they may seek damages on behalf of ChromaDex for activities occurring subsequent to March 13, 2017 is in violation of both of this Court's orders. This Court dismissed ChromaDex's claims of infringement based upon conduct occurring on or after March 13, 2017 for lack of standing. D.I. 141-142. It is undisputed that no infringing conduct occurred before that date, and none is asserted by Plaintiffs. The Court denied ChromaDex's motion for reargument, which relied on Healthspan's dissolution in 2021. (D.I. 181.). Moreover, under Supreme Court law, a Plaintiff cannot retroactively cure its standing and must trace and maintain its standing for the specific relief sought back to the filing of the complaint. *E.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs (TOC), Inc.*, 528 U.S. 167, 180, 185 (2000). Plaintiffs now act as if the Court's orders were mere suggestions and continue to assert that ChromaDex's is entitled to damages for acts occurring long after March 13,

2017. Plaintiffs' repeated insistence on relitigating decided issues is a waste of the time and resources of this Court, and Elysium. Elysium has relied on the Court's orders in framing discovery and preparing for trial, and the scope of the case should not be expanded on the eve of trial. For the reasons set out in Elysium's pending summary judgment motion #4 (D.I. 203), ChromaDex lacks standing and this Court lacks subject matter jurisdiction over the claim ChromaDex is attempting to assert in the face of the Court's two orders. Dartmouth does not make or sell dietary supplement products, and it has no basis to claim lost profits.

8. The operative pleadings are Plaintiffs' Complaint For Patent Infringement (D.I. 1), as modified by the Court's December 17, 2020 Revised Order (D.I. 142), and Defendant's Second Amended Answer to Plaintiffs' Complaint for Patent Infringement (D.I. 79).

C. Claims to be Litigated at Trial²

9. Plaintiffs allege that Defendant has been, and is still, knowingly and intentionally directly infringing claims 1–3 of the '807 Patent and claim 2 of the '086 Patent (collectively, the "Asserted Claims") by making, using, selling, and/or

² Subject to the Court's rulings on the pending motions for summary judgment and motions *in limine*. See *infra* § I(E).

offering for sale in or into the United States the accused BASIS® product containing nicotinamide riboside (“NR”) from a source other than ChromaDex.

10. Plaintiffs further allege that Defendant’s infringement of the Asserted Claims has been willful, intentional, and deliberate.

11. Plaintiffs seek a judgment that Defendant has infringed and continues to infringe the Asserted Claims.

12. Plaintiffs seek a judgment that the Asserted Claims are not invalid.

13. Plaintiffs also seek damages in accordance with 35 U.S.C. § 284, including supplemental damages for any post-verdict infringement up until entry of final judgment with an accounting, as needed, together with pre-judgment and post-judgment interest on the damages awarded.

Plaintiffs’ position: Plaintiffs seek damages adequate to compensate for Defendant’s infringement, including lost profits, but in no event less than a reasonable royalty. Plaintiffs are entitled to prove damages, including lost profits or reasonable royalty damages at least as of Healthspan’s dissolution, which is as early as December 29, 2020 or, in the alternative, no later than January 15, 2021 (D.I. 148; D.I. 284). Regardless of whether Plaintiffs may seek lost profits on behalf of Plaintiff ChromaDex, Plaintiffs contend that

Plaintiff Dartmouth is entitled to seek a reasonable royalty for the entire period of Defendant's infringement.

Elysium's position: For the reasons discussed in detail above, Plaintiffs' insistence that they may seek damages on behalf of ChromaDex, including lost profits, is improper and abusive, and in violation of this Court's orders.

14. Plaintiffs further seek a permanent injunction enjoining Defendant, together with its directors, officers, agents, servants, employees, attorneys, parents, subsidiaries, divisions, affiliates, other related business entities, and all persons in active concert or privity with them, and its successors and assigns, from directly or indirectly infringing the claims of the Dartmouth Patents.

15. Plaintiffs further seek a judgment that Elysium's infringement has been willful and that awards enhanced damages under 35 U.S.C. § 284.

Plaintiffs' position: Elysium argues below that the jury should not decide whether Elysium willfully infringed the Dartmouth Patents. Elysium's argument is plainly wrong. It is well established that Plaintiffs have a right to a jury trial on the question of willfulness. *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1341 (Fed. Cir. 2016) (citing *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1250 (Fed. Cir. 1989) ("Absent sufficient basis for directing the verdict, Richardson has the right of jury determination of this factual question. Willfulness of behavior is a classical jury question of intent. When trial is had

to a jury, the issue should be decided by the jury.” (citations omitted)); *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 769 F.3d 1371, 1386 (Fed. Cir. 2014) (O'Malley, J., concurring) (“[W]e have long held that a willfulness determination contains issues of fact that should be submitted to a jury.”); *see also Välinge Innovation AB v. Halstead New England Corp.*, No. CV 16-1082-LPS, 2018 WL 2411218, *5 n.4 (D. Del. May 29, 2018); *Andover Healthcare, Inc. v. 3M Co.*, No. CV 13-843-LPS, 2016 WL 6246360, at *3 (D. Del. Oct. 18, 2016)).

Elysium argues that the willfulness question should be taken from the jury by conflating the willfulness and enhancement inquiries. Contrary to Elysium’s suggestion, however, the Supreme Court’s decision in *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1934 (2016) makes clear that willfulness and enhancement of damages are separate inquiries. In *Halo*, the Supreme Court considered the language of 35 U.S.C. § 284 and explained that there is no requirement that “enhanced damages must *follow* a finding of egregious misconduct.” *Id.* at 1933 (emphasis added). Thus, the Court described two separate determinations: First, a finding by the fact finder as to the “subjective willfulness of a patent infringer”—a finding that is a classic fact question of intent. *Id.*; *see also WBIP*, 829 F.3d at 1341. Second, a

determination by the court related to whether enhanced damages are warranted. *Halo*, 136 S. Ct. at 1933.

Elysium's arguments based on *Eko Brands, LLC v. Adrian Rivera Maynez Enters.*, 946 F.3d 1367, 1378 (Fed. Cir. 2020) are similarly misplaced. Elysium argues that in *Eko*, the Federal Circuit did not go far enough in its decision because it failed to take the question of willfulness away from the jury. Far from stopping short, however, the Federal Circuit's decision, like the Supreme Court's decision in *Halo*, confirms the jury's role in the willfulness determination, explaining that the jury decides whether the defendant acted willfully, and then the court decides whether plaintiff is entitled to enhanced damages. *Eko*, 946 F.3d at 1377–79.

In sum, the question as to whether Elysium willfully infringed the Dartmouth Patents should be tried to the jury in this case.

Elysium's position: There is a threshold question as to whether willfulness is for the Court or the jury. Elysium maintains that willfulness must be tried to the Court, not to the jury, as a matter of law. Elysium is aware of the Federal Circuit's panel opinion in *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1341 (Fed. Cir. 2016), applying prior precedent that willfulness is question for the jury, but respectfully submits that the Federal Circuit precedent is contrary to the patent statute and the Supreme Court's decision in *Halo Elecs. v. Pulse*

Elecs., Inc., 136 S.Ct. 1923 (2016). The Patent Act explicitly states that enhancement of damages lies with the court. 35 U.S.C. § 284 (“In either event [*i.e.* compensatory damages were either assessed by a jury or a court], **the court** may increase the damages up to three times....”) (emphasis added). The Supreme Court emphasized this point in *Halo* by explicitly referring to Section 284 as a “statutory grant of discretion **to district courts.**” 136 S.Ct. at 1932 (emphasis added). *Halo* makes clear that the entire enhancement analysis lies within the discretion of the district court, including not just the amount but also whether enhancement is warranted—*i.e.*, whether the conduct was willful. *Id.* (“District courts enjoy discretion in deciding whether to award enhanced damages, and in what amount.”). *Accord Seymour v. McCormick*, 57 U.S. 480, 489 (1854) (the patent act “confines the jury to the assessment of ‘actual damages.’ The power to inflict vindictive or punitive damage is committed to the discretion and judgment of the court...”); *Day v. Woodworth*, 54 U.S. 363, 372 (1852) (“The only instance where this power of increasing the ‘actual damages’ is given by statute is in the patent laws of the United States. But there it is given to the court and not to the jury. The jury must find the ‘actual damages’... and if, **in the opinion of the court**, the defendant has not acted in good faith... the court may increase the amount of the verdict, to the extent of trebling it.”) (emphasis added).

Contrary to Plaintiffs' arguments, nowhere does *Halo* break out willfulness as a separate inquiry from questions of culpability, or hold that the former is decided by a jury and the latter by the Court. Instead, *Halo* and the statute repose the entire analysis with the district court. The Federal Circuit cases that break up the findings of intent into a two-part test, one to be decided by the jury and a second by the court, repeat the same type of error that the Supreme Court rejected in *Halo*. 136 S. Ct. at 1932 (rejecting previous Federal Circuit two-part willfulness test). Accordingly, Elysium objects to permitting the jury to decide willfulness and maintains this objection to preserve the issue.

In the alternative, the jury's task should be strictly limited to no more than making a determination as to whether Plaintiffs' have proved deliberate or intentional infringement. As the Federal Circuit has recently stated:

As the plain language of 35 U.S.C. § 284 makes clear, the issue of punishment by enhancement is for the court and not the jury. Under *Halo*, the concept of "willfulness" requires a jury to find no more than deliberate or intentional infringement. The question of enhanced damages is addressed by the court once an affirmative finding of willfulness has been made. It is at this second stage at which the considerations of egregious behavior and punishment are relevant. Questions of whether an accused patent infringer's conduct was "egregious behavior" or "worthy of punishment" are therefore not appropriate for jury consideration.

Eko Brands, LLC v. Adrian Rivera Maynez Enters., 946 F.3d 1367, 1378 (Fed. Cir. 2020). Much of the evidence and argument Plaintiffs propose to offer is

directed not to whether the alleged infringement of asserted claims was deliberate or intentional, but rather is directed to their claim that Elysium engaged in egregious behavior and should be punished. All such evidence and argument must be excluded from the jury trial under *Eko Brands*.

Elysium respectfully submits that *Eko Brands* does not go far enough—neither *Halo* nor the statute divide the intent findings underlying enhancement into a two-stage inquiry, but instead repose the entire analysis with the court. However, at minimum, this Court should not expand the jury’s role any further than *Eko Brands* permits.

16. Plaintiffs also seek a judgment that this case is exceptional under 35 U.S.C. § 285, an award of attorneys’ fees, and such further relief in law or equity as this Court deems just and proper.

17. Defendant denies that it infringes claims 1–3 of the ’807 Patent and claim 2 of the ’086 Patent. Defendant contends that the Asserted Claims are invalid under 35 U.S.C. §§ 101, 102, 103, and 112.

a) **Elysium’s Patent Eligibility (§ 101) Defense**: The parties wish to bring to the Court’s attention that they have differing views about how Elysium’s Section 101 patent eligibility defense should be tried to the jury or decided by the Court, and about how the jury should be instructed on that defense. The parties request that these issues be discussed at the pretrial conference, rather

than deferring them to a later charge conference. The parties' respective proposals and positions are set forth in the Joint [Proposed] Final Jury Instructions, filed concurrently herewith, at Instruction 5.2.

b) **Magni Paper**

Plaintiffs' position: Elysium should not be permitted to present Magni as prior art at trial. Elysium represents that it will not present the Magni reference as an anticipatory reference, or as part of an obviousness combination, but nevertheless wants to argue that the Magni reference is evidence of how a POSA would understand the prior art. Elysium did not assert any theory of invalidity based on Magni against the '807 Patent during expert discovery, or against the '086 Patent during either fact or expert discovery. And contrary to its assertion that Magni published before the priority date of the Dartmouth Patents, Elysium also failed to produce evidence sufficient to meet its burden of proving that Magni is prior art to the '807 Patent. *E.g.*, Deposition of Elysium's expert, Dr. Adams, at 198:6–11 (admitting that he does not "have any evidence" that Magni was "received by a member of the public" before the earliest filing date of the '807 Patent). Elysium should therefore not be permitted to suggest at trial that Magni is prior art.

Elysium's position: Plaintiffs' position on Magni amounts to an improper fourth motion in limine. It is also baseless. Elysium intends to offer Magni,

which published before the priority date of the patents, as contemporaneous evidence that a skilled artisan at the time of the alleged invention would have understood that the teachings of Elysium’s asserted prior art disclosed that NR is part of the NAD⁺ biosynthesis pathway in reactions catalyzed by human NRK—exactly what Dr. Brenner claims he “invented.” Elysium’s use of Magni was explicitly disclosed in the expert report of Elysium’s expert Dr. Adams. *E.g.* Adams Report at ¶ 23 (“Magni set out a detailed schematic of the knowledge of the human NAD⁺ biosynthetic pathway as shown by the work of Sasiak, Kornberg, and others”); ¶ 213 (“Citing to Sasiak... Magni describes the role of human NRK in catalyzing the conversion of NR into NMN”); ¶ 391 (“Magni is conclusive evidence that a person skilled in the art prior to the priority date would have recognized—and in fact did recognize—the teachings in Sasiak as disclosing NR’s role in the human NAD⁺ synthesis pathway.”). Elysium does not intend to offer Magni as an anticipatory reference, or as part of an obviousness combination.

18. Defendant contends that Plaintiffs’ claims are barred by equitable estoppel, unclean hands, the reverse doctrine of equivalents, and patent misuse. Plaintiffs deny each of these defenses. The parties agree these equitable defenses are triable to the Court, not to the jury.

Plaintiffs' position: Elysium's equitable defenses are improper. It is well-established that a party that comes into equity must come with clean hands. *E.g., Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945); *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245 (1933). Ample evidence in the record establishes that Elysium does not have clean hands and therefore may not invoke equitable defenses in this case.

Moreover, Elysium has never explained the factual or legal bases for its equitable defenses. For example, during the pretrial proceedings Elysium did not assert any factual or legal basis to meet its burden of proving a prima facie case supporting a non-infringement defense based on the reverse doctrine of equivalents. In particular, during fact discovery, Elysium did not include any assertion of reverse doctrine of equivalents to support non-infringement, including in response to Plaintiffs' interrogatories (e.g., Elysium's Responses to Plaintiffs' Interrogatory No. 15 ("the complete factual and legal basis" for "each Asserted Claim that Defendant contends is not infringed")). And during expert discovery, Defendant did not present any evidence purporting to demonstrate that the accused Basis product has been so changed that it is no longer the same invention.

Elysium's position: Plaintiffs' request that this Court make a determination prior to trial that Elysium has unclean hands is plainly improper. The Court

has heard no evidence, disputed facts exist, and Plaintiffs did not move for summary judgment motion on the issue.

As for Plaintiffs' other arguments, Plaintiffs did not serve discovery seeking Elysium's contentions regarding its equitable defenses, including the reverse doctrine of equivalents. Plaintiffs cite to Elysium's response to Interrogatory No. 13. However, after Elysium objected to that interrogatory as containing multiple subparts (e.g., for each Elysium defense) and the parties met and conferred on this issue. After these discussions, Plaintiffs ***agreed to limit the interrogatory*** to Elysium's license/authorization defense. *See* Elysium's Supplemental Responses to Plaintiffs' Interrogatory Nos. 5, 12, and 13 at 5-6 ("In meet and confer conferences, Plaintiffs have specified that they would like Elysium to address its License/Authorization affirmative defense."). Plaintiffs did not serve follow up discovery seeking Elysium's contentions on the remaining equitable defenses. As for Interrogatory 19, that interrogatory seeks Elysium's contentions as whether a claim is "not infringed." It does not seek contentions on equitable defenses, including the reverse doctrine of equivalents. The reverse doctrine of equivalents is an equitable affirmative ***defense*** that applies only once it is shown that a claim ***is*** literally infringed. Thus, the affirmative defense is not responsive to an interrogatory seeking contentions about whether a claim is "not infringed."

Finally, there is no requirement that every issue needs an expert, and Elysium is entitled to present this defense without expert testimony.

19. Defendant denies that Plaintiffs are entitled to any monetary, injunctive or other relief. In addition, Defendant denies that Plaintiffs may seek lost profits on behalf of either Plaintiff, or reasonable royalty damages on behalf of ChromaDex, in view of the Court's dismissal of ChromaDex's claims of infringement for acts occurring on or after March 13, 2017 (D.I. 142), Plaintiffs admit that they cannot prove any acts of infringement predating March 13, 2017, and the Court denied Plaintiffs' motion for reargument or reconsideration (D.I. 181) of Defendant's motion to dismiss for lack of standing. Further, Defendants contend that Dartmouth does not sell dietary supplement products and seeks only an award of reasonable royalties. For the same reasons, and others, Elysium denies that Plaintiffs have a basis to seek injunctive relief.

20. Defendant also denies that infringement has been willful under 35 U.S.C. § 284, that Defendant's conduct makes this case exceptional under 35 U.S.C. § 285 and that attorneys' fees or any other relief in Plaintiffs' favor is warranted or would be just or proper.

21. In addition, Defendant seeks a determination that based upon Plaintiffs' conduct this case is exceptional under 35 U.S.C. § 285, and Defendant should be awarded attorneys' fees and such further relief as the Court deems just and

proper. Plaintiffs deny that Plaintiffs' conduct makes this case exceptional under 35 U.S.C. § 285 and that attorneys' fees or any other relief in Defendant's favor is warranted or would be just or proper.

22. Although Defendant has asserted a patent misuse defense (Fourth Defense) in this action, patent misuse is also asserted by Elysium as a counterclaim in an earlier-filed, co-pending action in the U.S. District Court for the Central District of California before U.S. District Judge Cormac J. Carney ("California Action"). In the California Action Elysium seeks a declaration that the Dartmouth Patents are unenforceable due to patent misuse. In an order dated August 17, 2021, the court in the California Action bifurcated Elysium's patent misuse counterclaims and Elysium's other counterclaims from issues to be tried to a jury beginning September 21, 2021. The California court stated that it will issue a separate order scheduling a pretrial conference and bench trial on Elysium's bifurcated counterclaims.

Plaintiffs' position: Elysium's patent misuse defense should not be decided by this Court. Instead, Elysium's patent misuse defense should be decided in the California Action where Elysium's patent misuse counterclaim has been litigated for several years between ChromaDex and Elysium and where the counterclaim will soon be decided. Notably, Plaintiff Dartmouth is not a party

to the California Action. ChromaDex and Elysium will be bound by the decision on this issue in the California Action.

Elysium’s statement that it “sought Dartmouth's position on whether patent misuse should be tried to this Court” is categorically false. When Elysium served opening expert reports in this case on February 9, 2021, it stated “Elysium has also asserted a patent misuse defense that previously was raised in Elysium’s pending patent misuse counterclaim in California. Elysium anticipates that patent misuse will be tried to Judge Carney in California and not in Delaware. Out of an abundance of caution, however, we refer you to the expert report of Dr. Iain Cockburn, previously served on ChromaDex’s counsel in California on June 21, 2019.” When Plaintiffs served responsive expert reports on March 9, 2021, they stated that they “agree[d] with Elysium that the patent-misuse issue should be addressed in California by Judge Carney. Given that Elysium referred us to the expert report of Dr. Iain Cockburn served in the California litigation on June 21, 2019 when serving opening expert reports in this case, however, we likewise refer Elysium to the expert report of Dr. Randal Heeb, which ChromaDex served in the California litigation on July 26, 2019.” Elysium’s suggestion that this somehow constitutes an agreement to bind Dartmouth to the result of a proceeding in which it is not a party is baseless.

In sum, there is no reason to bifurcate and stay Elysium's patent misuse defense in this case.

Elysium's position: For most of this case, Elysium, ChromaDex and Dartmouth agreed that Elysium's patent misuse should be tried to the California court and not here. Now, at the eleventh hour, Dartmouth has asserted that it will not be bound by the findings of the California court on patent misuse. Accordingly, the issue of patent misuse and where it will be tried is now at issue in this case.

Months ago, Elysium's counsel sought Dartmouth's position on whether patent misuse should be tried to this Court as well. Specifically, on Feb. 9, 2021 Elysium's counsel sent an email to counsel for Dartmouth and ChromaDex explaining that while Elysium anticipated the patent misuse defense would be tried in California, Elysium was serving a courtesy copy of its California patent misuse expert report in this case in the event Plaintiffs believed differently. In response, by e-mail on March 9, 2021, counsel for Plaintiffs Dartmouth and ChromaDex served a courtesy copy of the California patent misuse rebuttal expert report, but further stated: “[W]e agree with Elysium that ***the patent-misuse issue should be addressed in California*** by Judge Carney.” Plaintiffs’ counsel drew no distinction between Dartmouth and ChromaDex in confirming the expressed agreement.

Elysium relied on that agreement in proceeding with expert discovery and trial preparation and, apparently so did Dartmouth. Notably, *no party* deposed a patent misuse expert in this case, listed exhibits related to patent misuse, designated deposition testimony on the issue, or indicated they would call their patent misuse experts as witnesses at trial in their pretrial disclosures. However, just one week ago, on August 17, 2021, Dartmouth indicated that it did not feel bound by its counsel’s agreement, *i.e.*, that it would not consider itself bound by the findings of the California court.

Given Dartmouth’s new position, this Court must address whether Dartmouth is bound by its counsel’s agreement “that the patent-misuse issue should be addressed in California by Judge Carney” or—if Dartmouth is allowed to repudiate counsel’s agreement—how to try Elysium’s patent misuse defense in this case. At this late stage, Dartmouth should be estopped from backing out of its counsel’s agreement since Elysium has relied on it.

Elysium continues to believe that patent misuse issues are best resolved by Judge Carney in California, where those issues already are present. If, however, Dartmouth is not bound by its counsel’s agreement or if Dartmouth—despite its privity with ChromaDex—is not bound by the California ruling, then those issues need to be heard in this case so that Elysium’s defense will be binding on both ChromaDex and Dartmouth. But

as a matter of fairness and judicial economy, that should occur only after Judge Carney has decided Elysium's patent misuse counterclaim in California. Thus, if this Court decides to hear the patent misuse defense, Elysium proposes that it be bifurcated and stayed until after Judge Carney's ruling on Elysium's patent misuse counterclaim in California (since that may resolve or simplify the issues without this Court having to try the defense). At that time, the parties can litigate the issue, if necessary, including the binding effect of a California ruling on Dartmouth.

However, should this Court not agree that Dartmouth is bound by its counsel's agreement, or should it not bifurcate the patent misuse defense, then the defense could proceed to trial here, inasmuch as the parties have exchanged copies of the California expert reports on the subject. However, neither side has included these issues, witnesses or documents in its pretrial submissions (as noted above). In addition, patent misuse is not jury-triable, and the parties will need to schedule a date for a bench trial. Therefore, if the Court decides it will try patent misuse in this case, Elysium respectfully requests, because Elysium reasonably relied on the prior agreement of ChromaDex's and Dartmouth's counsel, that it be permitted to supplement its pretrial disclosures to include evidence supporting its patent misuse defense.

D. Claim Construction

23. The Court held a *Markman* hearing on December 17, 2020, and issued its Claim Construction Order on January 5, 2021. D.I. 152. The terms and their constructions are as follows:

Term	Patent(s)/Claim(s)	Court's Construction
"nicotinamide riboside"	'807 Patent: Claims 1 and 2 '086 Patent: Claim 2	"nicotinamide riboside or a derivative (e.g., L-valine or L-phenylalanine esters) of nicotinamide riboside"
"isolated nicotinamide riboside"	'807 Patent: Claim 1	"nicotinamide riboside that is separated or substantially free from at least some of the other components associated with the source of the nicotinamide riboside"
"the nicotinamide riboside is isolated from a natural or synthetic source"	'807 Patent: Claim 2 '086 Patent: Claim 2	"the nicotinamide riboside is isolated from a natural source or synthetic source and is not chemically synthesized"
"in combination with one or more of tryptophan, nicotinic acid, or nicotinamide"	'807 Patent: Claim 1	"both isolated nicotinamide riboside and one or more of tryptophan, nicotinic acid, or nicotinamide are found in the composition"

Term	Patent(s)/Claim(s)	Court's Construction
“increases NAD+ biosynthesis upon oral administration”	’807 Patent: Claim 1	“increases NAD+ biosynthesis upon oral administration to an animal relative to the level of NAD+ biosynthesis if the composition were not administered to an animal”
“pharmaceutical composition”	’086 Patent: Claim 2	“a composition that can be used to improve or prolong the health or well-being of humans or other animals”

E. Pending Motions

24. The only motions currently pending before the Court are the motions *in limine* (described below in Section XI) and the parties’ respective summary judgment and *Daubert* motions identified below:

1. Plaintiffs’ Motions

- Plaintiffs’ Motion for Summary Judgment of Infringement of Claims 1 and 3 of U.S. Patent No. 8,197,807 (Motion No. 1) (D.I. 191);
- Plaintiffs’ Motion for Summary Judgment of No Anticipation of U.S. Patent Nos. 8,197,807 and 8,383,086 (Motion No. 2) (D.I. 199);
- Plaintiffs’ Motion for Summary Judgment that Milk Does not Anticipate U.S. Patent No. 8,197,807 (Motion No. 3) (D.I. 213);

- Plaintiffs' Motion for Summary Judgment Preventing Elysium from Asserting Invalidity Based on Brenner Two Pathways (Motion No. 4) (D.I. 207);
- Plaintiffs' *Daubert* Motion to Exclude Testimony of Elysium's Damages Expert Alexander Clemons (D.I. 186).

2. Defendant's Motions

- Defendant's Motion for Summary Judgment (No. 1) of Invalidity Under 35 U.S.C. § 101 (D.I. 182);
- Defendant's Motion for Summary Judgment (No. 3) of Invalidity Under 35 U.S.C. § 112 (D.I. 196);
- Defendant's Motion for Summary Judgment (No. 2) of Non-Infringement of Claim 2 of Each Asserted Patent (D.I. 189);
- Defendant's Motion for Summary Judgment (No. 4) Regarding All Claims Asserted by ChromaDex (D.I. 203);
- Defendant's *Daubert* Motion (No. 1) to Exclude Opinions of Robert W. Sobol and Robert D. Larsen that are Inconsistent with the Claims as Construed (D.I. 219);
- Defendant's *Daubert* Motion (No. 2) to Exclude Expert Testimony Regarding ChromaDex's Damages and Irreparable Harm (D.I. 210);

- Defendant's *Daubert* Motion (No. 3) to Exclude Opinions of Robert W. Sobol Regarding Willfulness (D.I. 216).

II. Jurisdiction

25. This civil action for patent infringement arises under the patent laws of the United States, including but not limited to 35 U.S.C. §§ 271 and 281–85. No party contests personal jurisdiction for purposes of this action.

26. No party contests that this Court has subject matter jurisdiction over Dartmouth's claims pursuant to 28 U.S.C. §§ 1331 and 1338. Elysium disputes that this Court has subject matter jurisdiction over ChromaDex's claims.

Plaintiffs' position: As described *supra* in Section I, Plaintiff ChromaDex had standing when this lawsuit was filed to pursue claims for infringement prior to March 13, 2017, and ChromaDex has standing to pursue claims subsequent to January 15, 2021 following dissolution of Healthspan. Plaintiffs do not agree with Elysium's assertions below that Elysium's fourth motion for summary judgment asserts any jurisdictional problem. Indeed, as explained in Plaintiffs' opposition to summary judgment, Elysium's motion does not address or dispute the Court's prior ruling that ChromaDex had initial standing at the time of filing, nor does it address or dispute that ChromaDex has standing to pursue claims for infringement following Healthspan's January 15, 2021 dissolution (D.I. 284).

Elysium's position: As described *supra* in Section I, this Court has already ruled that ChromaDex lacks standing (D.I. 141). Elysium has moved for summary judgment to dismiss ChromaDex as a party in this action (D.I. 203). Plaintiffs' assertion that Elysium's briefing does not assert any jurisdictional problem is false, as is their assertion that Elysium does not contest ChromaDex's standing. D.I. 305, at 1-2 (contesting standing). As for the Healthspan dissolution, as discussed above, the Court already rejected that argument when it denied Plaintiffs' motion for reargument. D.I. 181.

27. No party contests venue for purposes of this action in this Court under 28 U.S.C. § 1391 and 28 U.S.C. § 1400(b).

III. Statements of Fact

A. Joint Statement of Uncontested Facts

28. Attached as **Exhibit 1** are facts that are not disputed or have been agreed to or stipulated to by the parties and require no proof at trial. The facts set forth in **Exhibit 1** are part of the evidentiary record in the case. Subject to the Court's approval, any party may read any or all of the uncontested facts to the Court or jury.

B. Parties' Statement of Contested Issues of Fact to be Litigated at Trial

29. Plaintiffs' statement of contested facts that remain to be litigated is set forth in **Exhibit 2**. Defendant's statement of contested facts that remain to be litigated is set forth in **Exhibit 3**.

30. The parties reserve the right to modify or supplement their statements of facts that remain to be litigated to the extent necessary to reflect fairly the Court's rulings on any motions or subsequent orders of the Court or by agreement of the parties.

IV. Statements of Law and Statements of Intended Proofs

31. Plaintiffs' statement of the issues of law that remain to be litigated and a statement of what Plaintiffs intend to prove in support of Plaintiffs' claims is set forth in **Exhibit 4**. Defendant's statement of the issues of law that remain to be litigated is attached as **Exhibit 5A** and a statement of what Defendant intends to prove in support of Defendant's claims is set forth in **Exhibit 5B**.

32. The parties' statements of intended proof are limited to the issues for which the party bears the burden of proof at trial, and do not address the proof that the party may choose to present in rebuttal to the defenses that the other party may present in its case-in-chief or in its rebuttal case. These statements are based upon the current status of the case and the Court's current rulings. The parties reserve the right to revise these statements based on any further decisions or orders of the Court. The parties incorporate by reference their statements of contested facts. These statements are not intended to be exhaustive, and the parties reserve the right to prove any matters identified in their pleadings, contentions, interrogatory responses, or expert reports.

33. The parties reserve the right to modify or supplement their statements of issues of law that remain to be litigated and statements of intended proof to the extent necessary to reflect fairly the Court's rulings on any motions or subsequent orders of the Court or by agreement of the parties.

V. Exhibits

A. Trial Exhibits

34. Plaintiffs' list of exhibits that they may offer at trial, except demonstrative exhibits and exhibits used solely for impeachment, is attached as **Exhibit 6**. Plaintiffs identified their exhibits with PTX numbers, starting with PTX-001. **Exhibit 6** also includes Defendant's objections to Plaintiffs' trial exhibits including citations to the Federal Rules of Evidence.

35. Defendant's list of exhibits that it may offer at trial, except demonstrative exhibits and exhibits used solely for impeachment, is attached as **Exhibit 7**. Defendant identified its exhibits with DTX numbers, starting with DTX-001. **Exhibit 7** also includes Plaintiffs' objections to Defendant's trial exhibits including citations to the Federal Rules of Evidence.

36. Joint trial exhibits will be identified with JTX numbers, starting with JTX-001. The joint exhibit list is attached as **Exhibit 8**. Only the joint exhibits actually used at trial and moved into evidence without objection may be admitted into evidence. The presence of an exhibit on the joint exhibit list is not an admission

that the exhibit is admissible, and the Parties expressly reserve the right to object to admission of any exhibit on the joint exhibit list.

37. The parties have indicated their objections to the other side's trial exhibits in **Exhibit 6** and **Exhibit 7** utilizing objection codes, and the respective keys to their objection codes are appended at the end of each exhibit list.

38. This pretrial order contains the parties' good-faith efforts to identify the entire universe of exhibits to be used at trial, except demonstrative exhibits and exhibits to be used solely for impeachment, as well as all objections to the admission of such exhibits. Subject to the remaining provisions of this Order, no party may add to its exhibit list or may offer into evidence at trial an exhibit not present on its list absent agreement of the parties, or order of the Court upon a showing of good cause. Notwithstanding the foregoing, the parties agree that each side's exhibit list may be supplemented by September 3, 2021 to include the updated financial data produced by the parties on or around July 31, 2021 pursuant to D.I. 85 or updated summary exhibits to account for that updated financial data. Objections to such supplemental exhibits shall be provided by September 10, 2021.

39. Any party may use an exhibit that is listed on the other party's exhibit list, to the same effect as though it were listed on its own exhibit list, subject to all evidentiary objections (which may be raised at trial). Any exhibit, once admitted, may be used equally by each party, subject to any limitations as to its

admission. The exhibit lists may include exhibits that may not necessarily be offered or introduced into evidence.

40. The listing of a document on a party's exhibit list is not an admission that such document is relevant or admissible when offered by the opposing side.

41. The parties agree that any description of a document on an exhibit list, including the date listed for documents, is provided for convenience only and shall not be used as an admission or otherwise as evidence regarding the listed document.

42. The parties agree that if either party removes or otherwise withdraws an exhibit from its exhibit list, the other party may amend its exhibit list at any time to include that same exhibit without leave of Court. The parties also agree that the parties thereafter may make objections to such exhibit, other than an objection based on untimely listing.

43. Exhibits to be used solely for impeachment need not be included on the lists of trial exhibits or disclosed in advance of being used at trial. Such exhibits used solely for impeachment and not included on an exhibit list may not be admitted into evidence absent leave of Court.

44. [*Plaintiffs' proposal*]: The parties stipulate to the authenticity of each document that on its face appears to be generated by a party, including

documents generated by its employees during the course of their employment for a party, and produced by a party. Notwithstanding the foregoing, the parties reserve the right to object to the authenticity of a document if good cause is shown considering the context and use at trial, and each party reserves its right to object to the document on any other ground.]

[Elysium’s position: Elysium objects to a blanket order that any documents that “appear[s] to be generated by a party” are authentic. Fed. R. Evid. 901. Rule 901 exists for a reason, and Elysium believes that the parties should lay a proper foundation for the admission of documents. Elysium intends to raise authenticity objections only sparingly and where warranted, but it objects to a blanket ruling as inconsistent with Rule 901.]

45. Complete legible copies of documents may be offered and received in evidence to the same extent as an original unless a genuine question is raised as to the authenticity of the original, or in the circumstances it would be unfair to admit the copy in lieu of the original. Legible copies of United States patents and the contents of the Patent and Trademark Office file histories and records may be offered and received in evidence in lieu of certified copies thereof, subject to all other objections that might be made to the admissibility of certified copies.

46. All exhibits shall be pre-marked with a stamp on the first page, to the extent possible, using the following color labels and containing the following prefix identifiers:

- a) Plaintiffs' Exhibits (Yellow Labels): PTX (beginning with PTX-001);
- b) Defendant's Exhibits (Blue Labels): DTX (beginning with DTX-001);
- c) Joint Exhibits (Green Labels): JTX (beginning with JTX-001).

47. In the case of trial exhibits that have been previously marked as a deposition exhibit, to remove duplicates and improve legibility of the exhibits used at trial, the parties agree that the trial exhibit shall be treated as identical to the indicated deposition exhibit regardless of whether it bears a deposition exhibit sticker, unless a genuine question is raised as to whether the trial exhibit and deposition exhibit are identical. The parties also agree that two exhibits that are identical (notwithstanding different Bates numbers) shall be treated as identical, unless a genuine question is raised as to whether the exhibits are identical.

48. The parties will be presenting exhibits electronically and respectfully request access to the courtroom shortly before trial, at the Court's convenience, to test the Court's audio-video equipment and set up their equipment.

49. [*Plaintiffs' proposal:* Absent agreement between the parties and approval by the Court, no exhibit will be admitted unless offered into evidence through a witness, who must at least be shown the exhibit. Any party that has used an exhibit with the witness and wishes at trial will be received into evidence by the operation of the Joint Proposed Final Pretrial Order without the need for additional foundation testimony.]

[*Elysium's Position:* Elysium objects to Plaintiffs' proposal as contrary to numerous rules of evidence. First, their proposed requirement that all exhibits be offered through a witness ignores that under the Rules a variety of documents are self-authenticating. Fed. R. Evid. 902. In addition, Plaintiffs' proposal that documents are automatically received into evidence if merely "used with" a witness without objection is also contrary to the rules. There are many instances—such as, for example, refreshing recollection or impeachment—where use of a document may not be objectionable but its admission would be. Thus, there may be no reason to object to the use of a particular document in examining a witness, even though the document would be objectionable if offered into evidence.]

50. Nothing herein (including the exhibits hereto) shall be construed as a stipulation or admission that a document listed on a party's exhibit list is entitled to any weight in deciding the merits of this case.

51. Each party has made a good faith effort to list objections to deposition designations or exhibits offered by the other party as not relevant (FRE 402), unduly prejudicial (FRE 403), or for lack of foundation (FRE 602). However, each party reserves the right to object to any evidence offered by the other party, including the admission of deposition testimony or exhibits, on any of these three grounds, at the time such evidence is offered, in view of the specific context in which such evidence is offered.

52. On or before the first day of trial, counsel for each party will deliver to the Courtroom Deputy a completed AO Form 187 exhibit list for each party.

B. Demonstrative Exhibits

53. The parties agree that the demonstrative exhibits that the parties intend to use at trial do not need to be included on their respective exhibit lists that are part of this Final Pretrial Order.

54. Plaintiffs' demonstrative exhibits will be identified with PDX numbers, starting with PDX-001.

55. Defendant's demonstrative exhibits will be identified with DDX numbers, starting at DDX-001.

56. The party seeking to use a demonstrative exhibit in connection with direct examination will provide a color representation of the exhibit to the other

side in PDF or PPT form. However, for video or animations, the party seeking to use the demonstrative exhibit will provide it to the other side in an appropriate electronic format to view the video or animation. For irregularly sized physical exhibits, the party seeking to use the demonstrative exhibit will provide by electronic means a color representation as a PDF of 8.5” x 11” copies of the exhibits. For each demonstrative exhibit that is based on a document or documents produced or exchanged in discovery in this litigation, each party shall disclose to the other parties, either: (a) on the face of the demonstrative exhibit; or (b) in a table or other writing provided at the time the demonstrative exhibit is exchanged with the other parties, all documents that form the basis of the demonstrative exhibit.

57. These provisions regarding demonstrative exhibits do not apply to demonstratives created during testimony or demonstratives to be used for cross-examination, neither of which need to be provided to the other side in advance of their use. In addition, enlargements or highlights of exhibits, testimony, parts of exhibits or testimony, or the Court’s *Markman* order, are not required to be provided to the other side in advance of their use unless a party intends to use them in opening statements, in which case they must be exchanged in advance as set forth in Section VII.B.

58. Demonstratives disclosed by one party may not be used by the opposing party prior to being used by the disclosing party.

59. Demonstratives shall not be admitted into evidence.

VI. Witnesses

60. Plaintiffs' list of the names of the fact and expert witnesses that may be called to testify at trial, including live or by deposition, is attached as **Exhibit 9**. Asterisks indicate which witnesses may testify live, and carets indicate which witnesses may testify by deposition. **Exhibit 9** also includes Defendant's objections to Plaintiffs' witnesses including citations to the Federal Rules of Evidence.

61. Defendant's list of the names of the fact and expert witnesses that may be called to testify at trial, including live or by deposition, is attached as **Exhibit 10**. Asterisks indicate which witnesses may testify live, and carets indicate which witnesses may testify by deposition. **Exhibit 10** also includes Plaintiffs' objections to Defendant's witnesses including citations to the Federal Rules of Evidence.

A. Live Witnesses

62. The parties agree to disclose which witnesses they intend to call live (among the individuals identified by that party in Section VI above) on September 7, 2021. The parties shall meet and confer on a schedule for these witnesses' testimony at trial. Current employees of a party who are not on that party's September 7 list of witnesses they intend to call live and who are beyond the

Court's subpoena power may be called by the other side by deposition regardless of whether they later become available within the meaning of Rule 32(a)(4) of the Federal Rules of Civil Procedure.

63. If a party chooses to call a witness live as part of its case-in-chief, that party cannot also call that witness by deposition as part of its case-in-chief, except for testimony provided by that witness that was designated as being on behalf of an adverse party under Rule 30(b)(6). If a party chooses to call a witness live as part of its rebuttal to the other party's case-in-chief, that party cannot also call that witness by deposition as part of its rebuttal to the other party's case-in-chief, except for testimony provided by that witness that was designated as being on behalf of an adverse party under Rule 30(b)(6).

64. Pursuant to Federal Rule of Evidence 615, the parties request that the Court prevent fact witnesses, other than witnesses who have already testified, been excused, and will not testify again, from hearing the testimony of other witnesses. The parties further request that in accordance with provision (2)(b) of Rule 615, this exclusion rule will not apply to the officer or employee designated by each party as its representative. The parties further agree that expert witnesses need not be sequestered.

65. Except as permitted under Local Civil Rule 43.1 or by express permission of the Court, once tendered for cross-examination no witness shall

communicate with counsel offering the witness on direct examination regarding the substance of the witness's testimony until cross examination of that witness is concluded. If the witness will be called to the stand to testify at a later time during the trial, once the witness has completed his or her examination and leaves the stand, that witness can speak with counsel before taking the stand to testify at a later time during the trial.

66. If both sides expect to call a witness then the scope of any cross-examination of the witness will not be limited to the subject matters covered during direct examination. However, the scope of any redirect or any further questioning will be limited by the prior questioning.

B. Deposition Designations

67. With respect to those witnesses whom the parties have identified in Exhibits 9 and 10 who will be called to testify live at trial, no deposition designations or counter-designations are required. Should a fact witness identified in Exhibits 9 and 10 as testifying live at trial become unavailable, as that term is defined in the Federal Rules of Civil Procedure and Federal Rules of Evidence, the parties may designate specific pages and lines of transcript that they intend to read or play in lieu of the witness's appearance upon reasonable notice. The parties shall immediately notify each other in the event they have decided not to call a witness to testify live at trial or learn that a witness has become unavailable.

68. For the avoidance of doubt, any expert witness engaged by the offering party must testify live.

Elysium's position: Elysium reserves the right to offer deposition testimony of Plaintiffs' experts should any of those experts become unavailable, within the meaning of Fed. R. Civ. P. 32(a)(4), or for impeachment, as permitted by Fed. R. Civ. P. 32(a)(2).

69. A party's decision not to introduce some or all of the deposition testimony of a witness designated by that party herein shall not be commented upon by the other party at trial.

70. Each party may offer deposition testimony designated by the other party (whether as a designation or counter-designation), even if not separately listed on its own deposition designation list, subject to the limitations of the federal rules. A party may designate testimony identified as affirmative testimony as a counter-designation. A party's affirmative or counter-designation shall not be an admission that the testimony is admissible if offered by the opposing party.

71. The parties have exchanged transcripts of the deposition testimony that is being designated and counter-designated. The parties' disclosures of objections to designations and counter-designations are described in Section VII.F below.

72. By objecting to a designation on a given ground, a party asserts that at least one question or answer in the designation is subject to such objection. A party's objection to a question will also apply as an objection to the answer.

73. Designated deposition testimony will be offered to the Court as designated testimony that the parties play by video in Court, or have read into the record and will count against the party's trial presentation time. Specifically, any affirmative designations offered by a party will count against that party's trial presentation time, whereas any counter-designations by the other party will count against the party who made the counter-designations. All counter-designations will be charged against the party that made the counter-designations, including presumptively for counter-designations based on objections for alleged incompleteness pursuant to Fed. R. Civ. P. 32(a)(6) or Fed. R. Evid. 106. The parties agree to meet and confer regarding any disputes as to whether counter-designations based on incompleteness should not be charged to the counter-designating party. If the parties cannot reach an agreement, the counter-designating party reserves the right to raise the dispute with the Court as to which party should be charged the time for the alleged incompleteness designation.

74. All irrelevant and redundant material, including colloquy between counsel and objections [**Elysium's proposal**: (other than may be required

to establish context of the witness's answer)], will be eliminated when the deposition is read or played by video at trial.

75. When deposition designation excerpts are introduced, all admissible deposition counter-designation excerpts, whether offered by videotape or by transcript, will be introduced in the sequence in which the testimony was originally given. The specific portions of the deposition shall be read or played in page order. If an exhibit is introduced in a deposition designation, the exhibit may be moved into evidence if it is on a party's trial exhibit list, the offering party moves it into evidence, and it is not otherwise objected to or the Court overrules the objections. If an exhibit is referenced in a deposition designation played at trial and is in evidence, or is not objected to, or the Court has overruled any objections, the designating party may display the exhibit to the jury alongside the video and highlight or enlarge portions of the exhibit on the screen as if the exhibit was being shown to a live testifying witness.

76. When the witness is called to testify by deposition at trial, the party calling the witness shall provide the Court with three copies of the transcript of the designations and counter-designations that will be read or played. The parties shall provide the time to be charged to each party to the Court with the transcripts.

77. The above procedures regarding deposition designations do not apply to portions of deposition transcripts and/or video used for impeachment or

cross-examination of a witness. Any deposition testimony may be used at trial for the purpose of impeachment, subject to any objections and the limits of the federal rules, regardless of whether a party specifically identified that testimony on its list of deposition designations, if the testimony is otherwise competent for such purpose.

C. Objections to Expert Testimony

78. The parties agree that the Court should rule at trial on objections to expert testimony as beyond the scope of expert disclosures.

VII. Trial Disclosure Schedule

79. To streamline trial and the resolution of disputes, the parties have agreed to the trial disclosure schedule in this Section VII. Failure to comply with the procedures in this Section—absent an agreement by the parties or approval by the Court—will result in a waiver of the use of the exhibit, demonstrative, testimony, or witness (and objections thereto) except upon a showing of good cause. Notwithstanding the foregoing, each party shall make a good faith effort to identify its objections to evidence as not relevant (FRE 402), unduly prejudicial (FRE 403), or for lack of foundation (FRE 602). However, each party reserves the right to object to any evidence offered by the other party on any of these three grounds, at the time such evidence is offered, in view of the specific context in which such evidence is offered.

A. Designated Corporate Representative

80. Each party will provide to the other side the name of its designated corporate representative by no later than 8:00 p.m. two calendar days prior to the first day of trial.

B. Demonstratives for Opening Statements

81. By no later than 10:00 a.m. ET on the day before the first day of trial, the parties shall exchange color copies of demonstrative exhibits they intend to use in their respective opening statements. By no later than 2:00 p.m. ET that same day, any objections to the demonstrative exhibits shall be served on the other side. By 5:00 p.m. ET that day, the parties shall meet and confer to resolve any objections. If good faith efforts to resolve the objections fail, the parties will jointly notify the Court by electronic mail no later than 7:00 a.m. ET on the day of opening statements.

82. The parties agree that slides and other demonstratives for closing arguments need not be exchanged and all objections are reserved until closing.

C. Live Witnesses

83. A party will inform the opposing party of the witnesses they intend to call live (and the order in which the witnesses will be called) by email by 7:00 p.m. ET two calendar days before such witness will be called to testify. The other party shall identify any objections to such witness(es) by 7:00 p.m. ET the following day, and the parties shall meet and confer to resolve any objections by 9:00 p.m. ET that same evening. If good faith efforts to resolve the objections fail,

the parties will jointly notify the Court by electronic mail no later than 7:00 a.m. ET on the day of the intended use.³

84. A party shall promptly notify the opposing party of any change to the identity of witnesses or the anticipated order of witnesses.

D. Direct Examination Exhibits

85. A party will provide, by electronic mail or FTP, a list of trial exhibits to be used in connection with non-adverse direct examination (specifically identifying the exhibit in connection with the witness) including as necessary making any physical exhibits available for inspection by 7:00 p.m. ET two calendar days before their intended use, and objections will be provided no later than 7:00 p.m. ET the day before their intended use. The parties will meet-and-confer by 9:00 p.m. ET that same day. If good faith efforts to resolve the objections fail, the parties will jointly notify the Court by electronic mail no later than 7:00 a.m. ET on the day of the intended use. A party is not required to provide advance notice of exhibits to be used during an adverse direct examination or cross-examination.

³ For example, if the party expects to conduct the examination on Thursday, notice should be given to the opposing party by 7:00 p.m. ET on Tuesday, objections by the opposing party should be given by 7:00 p.m. ET on Wednesday, the parties shall meet and confer by 9:00 p.m. ET Wednesday, and the parties should jointly email the Court no later than 7:00 a.m. Thursday if objections remain.

E. Demonstratives for Direct Examination

86. A party will provide color copies of demonstrative exhibits by electronic mail or FTP to be used in connection with non-adverse direct examination (specifically identifying the exhibit in connection with the witness) including as necessary making any physical exhibits available for inspection by 7:00 p.m. ET two days before their intended use, and objections will be provided no later than 7:00 p.m. ET the day before their intended use. The parties will meet-and-confer at 9:00 p.m. ET that same day. If good faith efforts to resolve the objections fail, the parties will jointly notify the Court by electronic mail no later than 7:00 a.m. ET on the day of the intended use. If any of the demonstratives change after the deadline, the party intending to use the demonstrative will promptly notify the opposing party of the change(s).

87. A party is not required to provide advance notice of demonstrative exhibits to be used during an adverse direct examination or cross-examination.

F. Deposition Designations and Objections

88. The party offering deposition testimony (other than for the purpose of impeachment) shall identify the deposition testimony to be offered from the previously-exchanged designations by 7:00 p.m. ET at least four calendar days prior to the testimony being offered into the record. A party may choose not to

introduce deposition testimony designated in this Pretrial Order. The party receiving the designations shall inform the opposing party of any objections and any specific pages and lines from that deposition to counter-designate by 7:00 p.m. ET three calendar days prior to the testimony being offered into the record. To the extent necessary, the designating party will provide the opposing party with any objections to the opposing party's counter-designations by 7:00 p.m. ET two calendar days prior to the testimony being offered into the record. The parties will thereafter meet-and-confer by 9:00 p.m. on the same calendar day. If good faith efforts to resolve the objections fail, the parties will jointly notify the Court by electronic mail no later than 7:00 a.m. ET on the day before the designation is being offered into the record.

89. If deposition testimony is to be presented by video, then the party playing the designated testimony shall also serve the other party with electronic video clips of all testimony to be played (which shall include all designations and counter-designations) by 7:00 p.m. ET the calendar day before the witness is to be called at trial.

VIII. Number of Jurors

90. There shall be eight jurors. The Court will conduct jury selection through the "struck juror" method, beginning with the Court reading voir dire to the jury panel in the courtroom, continuing by meeting with jurors individually and addressing any challenges for cause, and concluding with peremptory strikes.

IX. Phases and Length of Trial

91. This case is currently scheduled for a 5-day jury trial beginning at 8:30 a.m. ET on September 27, 2021, with subsequent trial days beginning at 9 a.m. until the case is submitted to the jury for deliberations, the jury will be excused each day at 4:30 p.m. ET.

92. The trial will be timed. The parties propose 12 hours for each side's presentation of its case (including opening and closing statements). As part of the 12 hours for each side, each side's closing statements may be up to one hour, and Plaintiffs may reserve up to 15 minutes for rebuttal during closing.

93. Unless otherwise ordered, time will be charged to a party for its opening statement, direct and redirect examinations of witnesses it calls, cross-examination of witnesses called by any other party, introduced deposition designations and counter designations (pursuant to paragraph 73 above), and closing argument. The Courtroom Deputy will keep a running total of trial time used by counsel.

94. The parties propose that motions for judgment as a matter of law be made and argued when the jury is out of the courtroom, or at the end of the day after the jury has been dismissed. The parties agree that such motions will be raised with the Court at the first break after the appropriate point during trial so that the

Court may inform the parties when such motions will be heard and whether the Court wishes to receive briefing.

95. Opening statements shall be by Plaintiffs first, followed by Defendant. The order of presentation of evidence will follow the burden of proof. Plaintiffs will go first and present their case-in-chief. Then Defendant will present its response to Plaintiffs' case-in-chief and its case-in-chief. Plaintiffs will then present their rebuttal in support of its case-in-chief and present their response to Defendant's case-in-chief. Defendant will then present its rebuttal in support of its case-in-chief. The order of closing statements shall be Plaintiffs, followed by Defendant, and then Plaintiffs' rebuttal.

X. Amendments to Pleadings and Related Matters

96. The parties do not seek to amend the pleadings.

97. Defendant has asserted defenses of License/Authorization (Eleventh Defense), Waiver (Twelfth Defense), and Patent Exhaustion (Thirteenth Defense) based on ChromaDex's supply of NR to Defendant. However, Plaintiffs do not assert that any accused product made using NR supplied to Defendant by ChromaDex infringes the Asserted Patents. Accordingly, Elysium withdraws its Eleventh through Thirteenth Defenses without prejudice to reassert those defenses should Plaintiffs hereafter assert infringement of the Asserted Patents by any product made using NR supplied by ChromaDex.

XI. Motions *in Limine*

98. Plaintiffs' motions *in limine* are attached as **Exhibits 11-13**, each of which contains Plaintiffs' opening motion, Defendant's opposition, and Plaintiffs' reply. Plaintiffs seek a motion *in limine* on the following:

1. **Exhibit 11:** Plaintiffs' Motion *In Limine* to Preclude Elysium from Presenting Any Evidence or Argument Related to Irrelevant and Prejudicial Third-Party IPRs (Motion No. 1);
2. **Exhibit 12:** Plaintiffs' Motion *In Limine* to Preclude Elysium from Introducing Evidence and Argument Related to Alleged Wrongdoing By, or Reputational Attacks Against, Plaintiff ChromaDex, Inc. (Motion No. 2); and
3. **Exhibit 13:** Plaintiffs' *In Limine* to Preclude Elysium from Presenting Any Improper Opinion, Testimony, or Argument Relating to the Term Derivative (Motion No. 3).

99. Defendant's motions *in limine* are attached as **Exhibits 14-16**, each of which contains Defendant's opening motion, Plaintiffs' opposition, and Defendant's reply. Defendant seeks a motion *in limine* on the following:

4. **Exhibit 14:** Elysium's Motion In Limine No. 1;
5. **Exhibit 15:** Elysium's Motion In Limine No. 2; and
6. **Exhibit 16:** Elysium's Motion In Limine No. 3.

XII. Certification Regarding Settlement

100. The parties hereby certify that they have engaged in a good faith effort to explore resolution of the controversy by settlement. The parties have been unable to reach agreement.

XIII. Other Matters

A. Jury Notebooks

101. The parties agree that jurors be permitted to write notes, in paper provided in the jury notebooks, during the presentations of the parties and that jurors be permitted to bring these notes into the deliberation room. The parties propose that jurors be instructed not to exchange or share their notes with other jurors (though they may discuss the contents of their notes) and that the juror's notes be collected by the clerk each evening after the jury has been excused, and collected and destroyed without review after the jury is discharged.

102. The parties agree that the jury notebooks shall include a copy of the sample patent referenced in the Federal Judicial Center's video, *see infra* § XIII(c), and pages for notes.

Plaintiffs' position: Per the Court's typical practice, Plaintiffs also request the jury receive the Court's claim constructions and a copy of each of the Dartmouth Patents in the jury notebooks.

Elysium's position: Elysium objects to providing the Court's claim constructions or copies of the patents to the jury. The jurors' possession of

these documents may distract them from presentation of testimony, arguments, and evidence. Moreover, it may cause jurors to review these materials out of the proper context that a witness or argument will provide. Providing them also improperly encourages jurors to review these materials before they have seen and heard all the evidence.

B. Handling of Confidential Information at Trial

103. On April 13, 2020, the Court adopted the parties' Proposed Protective Order (D.I. 44) to safeguard the confidentiality of certain of the parties' business and technical information, as well as that of third parties. All outside counsel shall handle such protected information in accordance with the terms of the Protective Order and shall not disclose such Confidential Information to persons not authorized to view such information under the terms of the Protective Order. Nonetheless, the presentation of evidence at trial shall take place in open court, unless a party specifically requests, and the Court agrees, that the Court be closed during presentation of certain portions of the evidence.

104. It is agreed that any party or non-party whose information is subject to the Protective Order may request that testimony or an exhibit, subject to the Protective Order, be placed under seal and handled in accordance with the Protective Order. With the Court's permission, the parties may request that demonstrative exhibits or evidence potentially reflecting confidential information

not be made available to the public. The parties have agreed that the individuals designated as In-House Counsel in accordance with Protective Order, or other In-House Counsel agreed to by the parties, may attend any sealed portion of the trial.

105. Notwithstanding the above, pursuant to certain third party confidentiality obligations under agreement between the parties, subject to the Court's approval, a party may request the Court to seal the Courtroom with respect to highly confidential information of a third party, and such request may include a request for In-House Counsel to leave (or otherwise be secluded from) the virtual Courtroom during such sealed portion of the trial in which such third party evidence is presented.

C. Federal Judicial Center's Patent Video

106. The parties agree that the Federal Judicial Center's video, "The Patent Process: An Overview for Jurors," will be played to jurors during the Preliminary Jury Instructions, and the jurors will be provided with a copy of the sample patent referenced in the video. *See* <https://www.fjc.gov/publications/patent-process-overview-jurors>. The parties further agree that the time for playing this video will not be charged to any party.

XIV. Order Controls

107. This order shall control the subsequent course of the action, unless modified by the Court to prevent manifest injustice.

Dated: August 24, 2021

YOUNG CONAWAY STARGATT &
TAYLOR, LLP

/s/ Adam W. Poff

Adam W. Poff (No. 3990)
Pilar G. Kraman (No. 5199)
Rodney Square
1000 North King Street
Wilmington, DE 19801
(302) 571-6600
apoff@ycst.com
pkraman@ycst.com

*Counsel for Plaintiffs ChromaDex, Inc.
and Trustees of Dartmouth College*

OF COUNSEL:

Christopher N. Sipes
R. Jason Fowler
Ashley Winkler
Emily Mondry
Jason Reinecke
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street NW
Washington, DC 20001
(202) 662-6000
csipes@cov.com
jfowler@cov.com
awinkler@cov.com
emondry@cov.com
jreinecke@cov.com

Patrick Flynn
COVINGTON & BURLING LLP

ASHBY & GEDDES

/s/ Steven J. Balick

Steven J. Balick (#2114)
Andrew C. Mayo (#5207)
500 Delaware Avenue, 8th Floor
P.O. Box 1150
Wilmington, DE 19899
(302) 654-1888
sbalick@ashbygeddes.com
amayo@ashbygeddes.com
Attorneys for Defendant

OF COUNSEL:

Donald R. Ware
dware@foleyhoag.com
Jeffrey I.D. Lewis
jlewis@foleyhoag.com
Marco J. Quina
mquina@foleyhoag.com
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, Massachusetts 02210
Phone: (617) 832-1000

3000 El Camino Real
5 Palo Alto Square, 10th Floor
Palo Alto, CA 94306
(650) 632-4732
pflynn@cov.com

James F. Haley, Jr.
HALEY GUILIANO LLP
75 Broad Street, Suite 1000
New York, NY 10004
(646) 973-2500
james.haley@hglaw.com

CERTIFICATE OF SERVICE

I, Adam W. Poff, hereby certify that on September 7, 2021, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

Steven J. Balick
Andrew C. Mayo
ASHBY & GEDDES
500 Delaware Avenue, 8th Floor
Wilmington, DE 19899
sbalick@ashbygeddes.com
amayo@ashbygeddes.com

Donald R. Ware
Peter G. Ellis
Jeremy A. Younkin
Urszula Nowak
Marco J. Quina
Richard Maidman
Joanna McDonough
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02210
dware@foleyhoag.com
pgellis@foleyhoag.com
jyounkin@foleyhoag.com
unowak@foleyhoag.com
mquina@foleyhoag.com
rmaidman@foleyhoag.com
jmcdonough@foleyhoag.com
elysiumdelaware-dist@foleyhoag.com

Jeffrey I. D. Lewis
Jenny Shum
FOLEY HOAG LLP
1301 Avenue of the Americas
New York, NY 10019
jidlewis@foleyhoag.com
jshum@foleyhoag.com

Attorneys for Defendant

I further certify that on September 7, 2021, I caused the foregoing document to be served via electronic mail upon the above-listed counsel.

Dated: September 7, 2021

YOUNG CONAWAY STARGATT &
TAYLOR, LLP

/s/ Adam W. Poff

Adam W. Poff (No. 3990)

Pilar G. Kraman (No. 5199)

Rodney Square

1000 North King Street

Wilmington, Delaware 19801

(302) 571-6600

apoff@ycst.com

pkraman@ycst.com

*Attorneys for Plaintiffs ChromaDex,
Inc. and Trustees of Dartmouth
College*