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VIA CM/ECF AND HAND DELIVERY

The Honorable Jennifer L. Hall
J. Caleb Boggs Federal Building
844 N. King Street
Wilmington, DE 19801-3555

Re: *ChromaDex, Inc., et al. v. Elysium Health, Inc.*, C.A. No. 18-1434-CFC

Dear Judge Hall:

We write in response to Elysium's motion to strike portions of the expert report of Plaintiffs' damages expert, Lance Gunderson, or in the alternative to excuse Elysium from responding to portions of the expert report at this time.

Elysium's motion is another attempt by Elysium to derail the case schedule and extend the current trial date, a result that Elysium has thus far been unsuccessful in obtaining. The opinions Elysium asks the Court to strike are relevant regardless of the outcome of Plaintiffs' motion for reargument; they either relate to Dartmouth's past and future damages or ChromaDex's prospective damages. Moreover, expert reports often include opinions that may not ultimately be presented at trial for one reason or another, and opposing parties are obligated to respond to these opinions at the time set by the case schedule, not at some later, more convenient time for them. This should not be a surprise to Elysium, as its own invalidity expert report includes opinions regarding the alleged invalidity of the '086 Patent that Elysium is statutorily estopped from presenting at trial in light of the PTAB's final written decision upholding the validity of Claim 2 of the '086 Patent. 35 U.S.C. § 315(e)(2). Elysium's request to be excused from responding to Plaintiffs' expert opinions, and its accompanying cries of burden, miss the mark.

The Opinions At Issue Are Relevant to Dartmouth's Past and Future Damages and ChromaDex's Ongoing Damages: Elysium's complaints are directed to opinions that are relevant both to Dartmouth's past and future damages and to ChromaDex's damages going forward following the dissolution of Healthspan and resolution of Judge Connolly's concerns relating to standing (which Judge Connolly has not yet addressed).

First, the parties agree that Dartmouth has standing for all time periods as the patent owner and is therefore entitled to no less than a reasonable royalty for Elysium's infringement of

its patents. As Mr. Gunderson opines, one measure of Dartmouth's damages is to determine what ChromaDex's damages would be according to routine damages analyses, and then pursuant to the Dartmouth-ChromaDex agreement calculate the royalty that would be paid to Dartmouth by ChromaDex in such a scenario. This reflects the actual agreements between Dartmouth and ChromaDex pursuant to which only ChromaDex (or its affiliates) would have had the right to grant sublicenses to the asserted patents to Elysium at the time of the hypothetical negotiation.

Elysium argues that Dartmouth is the only "licensor" permitted at the table in the hypothetical negotiation. Elysium is wrong. Numerous courts have held that the licensor in the hypothetical negotiation is not necessarily the same as the party entitled to damages. *See, e.g.*, *Union Carbide Chemicals. & Plastics Tech. Corp. et. al. v. Shell Oil Company*, 425 F.3d 1366, 1378 (Fed. Cir. 2005) (holding that the hypothetical negotiation should take into account the "genuine relationship" between the subsidiary patent owner and its corporate parent, a licensee to the patent); *Oracle America, Inc. v. Google, Inc.*, 798 F.Supp.2d 1111, 1117 (N.D. Cal. 2011) (holding that the hypothetical licensor should be the previous owner of the patent (Sun), not the current patent owner and plaintiff (Oracle)); *AstraZeneca AB v. Apotex Corp.*, 985 F.Supp.2d 452, (S.D.N.Y. 2013), *affirmed-in-part and reversed-in-part* 782 F.3d 1324 (Fed. Cir. 2015), (holding that the hypothetical negotiation should "account" for the role of the exclusive licensee practicing the patent and not just the patent owner). The key theme in these cases is that the hypothetical negotiation construct must take into account the genuine relationship between owners and licensees, regardless of who is recovering damages in the litigation. Here, the contractual relationship between Dartmouth and ChromaDex makes clear that only ChromaDex and its affiliates could have granted a license to the asserted patents, even assuming that only Dartmouth could recover damages. The cases Elysium cites do not address this scenario and are thus inapposite. In any event, the parties' legal dispute does not excuse Elysium from disclosing rebuttal expert opinions in accordance with the scheduling order, to the extent it has any.

Second, assuming for the sake of argument that the motion for reargument is denied and ChromaDex is only permitted to pursue damages following the amendment of the license agreement and dissolution of Healthspan, the opinions in Categories 1–6 are relevant to those damages. For example, Mr. Gunderson's opinions as to ChromaDex's incremental profit margins and market shares under Categories 1 and 2 are relevant to a determination of the profits lost by Elysium's continued infringement. Similarly, Mr. Gunderson's opinions as to a reasonable royalty negotiated by ChromaDex under Categories 3 and 4 are relevant to a determination of any ongoing royalty due to Elysium's continued infringement. And Mr. Gunderson's opinions under Category 5 are relevant to the grant of a permanent injunction against Elysium. Given that these issues are relevant to this case going forward, Elysium should respond to Plaintiffs' expert opinion now, rather than wait for some unknown time in the future.

The Federal Rules Require A "Complete Statement Of All Opinions": Contrary to Elysium's suggestion, Plaintiffs' did not engage in "self-help." Rather, Plaintiffs simply followed the mandate of the Federal Rules, which require that expert reports contain "a ***complete*** statement of all opinions the witness will express and the basis and reasons for them." Fed. R. Civ. P. 26(a)(2)(B)(i) (emphasis added). Put differently, expert reports must contain ***all*** of the opinions an expert may offer at trial. Nothing in the Federal Rules requires an expert to testify as to every subject contained within their reports; indeed, an expert's testimony at trial is often substantially narrower than the opinions disclosed in their report. Regardless, the expert's report must contain a complete statement of all opinions that may be offered at trial so that the other

parties may respond as necessary and prepare well in advance of trial. Determinations of what fact and expert testimony will and will not be permitted at trial is typically part of the pre-trial process, not expert discovery. It is incumbent on parties to disclose during expert discovery all opinions they have a good faith intention to offer at trial, even if a Court may later exclude some or all of the opinions.

Plaintiff's motion for reargument or reconsideration of the Court's December 15 Orders remains pending. Should the Court grant the motion and determine that ChromaDex does have standing for some or all time periods, Plaintiffs expect to have Mr. Gunderson testify at trial as to ChromaDex's damages. Accordingly, pursuant to Rule 26 Plaintiff's disclosed a "complete statement" of Mr. Gunderson's opinions, including opinions as to ChromaDex's damages. Elysium should similarly provide its expert's rebuttal opinions, if any, as required by the scheduling order.

Elysium's Alternative Delayed-Response Proposal Is Untenable and Jeopardizes Trial: Even if the Court were to rule against Plaintiffs and deny the motion for reargument or reconsideration at some point in the future, it is best for the parties to prepare for all eventualities now, so that the case can proceed to trial without additional, wasteful rounds of supplemental expert reports and additional depositions. Elysium's proposal to allow it to forgo responding to certain opinions now is untenable. If Elysium is permitted to disclose its expert's responsive opinions at a date much closer to trial it will distract from Plaintiffs' pre-trial preparations and require Plaintiffs to reply to such opinions and potentially re-depose Elysium's expert. Not to mention that Elysium will have gained a substantial tactical advantage in this scenario: it can begin to formulate its responses to Plaintiffs expert's opinions and prepare its trial presentation now, but Plaintiffs will be forced to wait to do so until Elysium discloses its responsive opinions at some later date. In addition, Elysium's proposal—reopening expert discovery later on—would necessarily require delaying dispositive motions, and accordingly the trial date in this case, something the Court has already rejected, despite Elysium's prior request to do so. *See* D.I. 129. And as the Court is well aware, it is unclear when the trial could be rescheduled in light of the current backlog of civil and criminal trials due to COVID.

* * *

In sum, the expert opinions Elysium complains of are relevant to Dartmouth's damages as well as ChromaDex's remedies going forward, and there is no reason to strike them or permit Elysium to withhold its rebuttal opinions until some unknown date in the future. Doing so would only place Plaintiffs at a tactical disadvantage and jeopardize the trial date. The parties should continue to follow the schedule set by the court, and disclose all of their rebuttal expert opinions on March 9.

Respectfully submitted,

/s/ Adam W. Poff

Adam W. Poff (No. 3990)

cc: All Counsel of Record (via electronic mail)