

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

CHROMADEx, INC. and TRUSTEES
OF DARTMOUTH COLLEGE,

Plaintiffs,

v.

ELYSIUM HEALTH, INC.,

Defendant.

Civil Action No. 18-1434-CFC



**PLAINTIFFS' RESPONSE TO ELYSIUM HEALTH'S
DAUBERT MOTION (NO. 3) TO EXCLUDE OPINIONS OF
ROBERT W. SOBOL REGARDING WILLFULNESS (D.I. 217)**

Dated: May 14, 2021

YOUNG CONAWAY STARGATT &
TAYLOR, LLP

OF COUNSEL:

Christopher N. Sipes
R. Jason Fowler
Ashley Winkler
Emily Mondry
Evan S. Krygowski
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
ekrygowski@cov.com

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*

Patrick Flynn

COVINGTON & BURLING LLP
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

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
TABLE OF ABBREVIATIONS iii

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Deere & Co. v. AGCO Corp.</i> , No. 18-cv-827-CFC, 2019 WL 668492 (D. Del. Feb. 19, 2019)	2
<i>Halo Elecs., Inc. v. Pulse Elecs., Inc.</i> , 136 S. Ct. 1923 (2016).....	1, 2
<i>Imperium IP Holdings (Cayman), Ltd. v. Samsung Elecs. Co.</i> , No. 4:14-cv-371, 2016 WL 3746523 (E.D. Tex. Jan. 26, 2016).....	2, 3
<i>Pavo Sols. LLC v. Kingston Tech. Co.</i> , No. 8:14-cv-0135, 2019 WL 8138163 (C.D. Cal. Nov. 20, 2019).....	3

TABLE OF ABBREVIATIONS

Abbreviation	Description
The Dartmouth Patents	U.S. Patent Nos. 8,383,086 and 8,197,807
Plaintiffs	collectively, Plaintiffs ChromaDex, Inc. and Trustees of Dartmouth College
Elysium	Defendant Elysium Health, Inc.
IPR	inter partes review
U.S.P.T.O.	U.S. Patent and Trademark Office
POSA	person of ordinary skill in the art
D.I. 217	Elysium Health's Opening Brief in Support of its <i>Daubert</i> Motion (No. 3) to Exclude Opinions of Robert W. Sobol Regarding Willfulness, D.I. 217 (Apr. 27, 2021)
Ex.	Exhibit to Declaration of Adam W. Poff in Support of Plaintiffs' Response to Elysium Health's <i>Daubert</i> Motion (No. 3) to Exclude Opinions of Robert W. Sobol Regarding Willfulness

Plaintiffs' expert, Dr. Robert Sobol, opined that Elysium is a willful infringer because its actions constituted a high risk of infringement of the Dartmouth Patents. The Court should deny Elysium's motion to exclude the testimony of Plaintiffs' expert Dr. Sobol related to willfulness (D.I. 217) because Dr. Sobol's testimony is proper and will assist the jury in determining whether Elysium willfully infringed the Dartmouth Patents.

To prove that Elysium's infringement was and is willful, "Plaintiffs must prove by a preponderance of the evidence that [Elysium] knew of Plaintiffs' patents and intentionally infringed at least one asserted claim of the patent." Final Jury Instructions § 4.3, *f'Real Foods, LLC v. Hamilton Beach Brands, Inc.*, No. 16-cv-41-CFC((D. Del. Sept. 30, 2019), D.I. 307-1, *20 (Willful Infringement); *see also Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1932-34 (2016). If the jury, after "consider[ing] all facts," determines that Elysium's infringement rises to the level of the "most egregious behavior," it may determine that Elysium's infringement is willful. *f'Feal Foods*, D.I. 307-1, *21.

Elysium mischaracterizes Dr. Sobol's testimony as "opinions on Elysium's intent" based "on his review of nontechnical matters." D.I. 217, 1. That is incorrect. Elysium seeks to exclude six paragraphs from Dr. Sobol's opening expert report addressing facts and evidence that will assist the jury in its willfulness determination, including Elysium's communications regarding, and attempts to license, the

Dartmouth Patents; marking the accused Basis product with the Dartmouth Patents; and allegations of invalidity in petitions for IPR before the USPTO. Ex. 1, ¶¶ 123-128.

Plaintiffs will not elicit testimony from Dr. Sobol regarding Elysium’s intent, motive, or state of mind. Rather, Plaintiffs will elicit testimony from Dr. Sobol regarding whether Elysium “should have known that its actions constituted an unjustifiably high risk of infringement.” *See Deere & Co. v. AGCO Corp.*, No. 18-cv-827-CFC, 2019 WL 668492, *4 (D. Del. Feb. 19, 2019) (citation omitted).

Critically, in considering whether the facts demonstrate that Elysium should have known of this risk, Dr. Sobol draws from his infringement analysis—testimony that Dr. Sobol is qualified to offer and that Elysium does not dispute. *Imperium IP Holdings (Cayman), Ltd. v. Samsung Elecs. Co.*, No. 4:14-cv-371, 2016 WL 3746523, *2 (E.D. Tex. Jan. 26, 2016) (permitting technical expert testimony regarding willful infringement where it “draws, at least in part, on [the expert’s] technical conclusions, particularly [the] assertion that defendants should have known of the high risk of infringement”).

To offer useful testimony that will assist the jury in determining whether Elysium engaged in egregious behavior that rises to the level of willful infringement, Dr. Sobol has considered the totality of the circumstances. And Dr. Sobol uniquely possesses the experience and expertise—employed in connection with his analysis

of infringement—to address whether the *risk* of infringement was unjustifiably high. *See, e.g.*, Mem. Order, *Hologic, Inc. v. Minerva Surgical, Inc.*, No. 15-cv-1031, (D. Del. July 6, 2018), D.I. 452, *5 (Ex. 2) (permitting technical expert testimony that “assists the trier of fact”); *Pavo Sols. LLC v. Kingston Tech. Co.*, No. 8:14-cv-0135, 2019 WL 8138163, *13 (C.D. Cal. Nov. 20, 2019). To the extent Elysium disagrees with Dr. Sobol’s opinions, the appropriate way to challenge them is through cross-examination, not exclusion. *See Imperium*, 2016 WL 3746523, *2.

Dated: May 14, 2021

OF COUNSEL:

Christopher N. Sipes
R. Jason Fowler
Ashley Winkler
Emily Mondry
Evan S. Krygowski
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
ekrygowski@cov.com

Patrick Flynn
COVINGTON & BURLING LLP
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

Respectfully submitted,

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*

WORD COUNT CERTIFICATION

The undersigned counsel hereby certifies that the foregoing brief complies with the type-volume limitations of paragraph 20(c) of the Scheduling Order (D.I. 40). The text of the brief, including footnotes, was prepared using Times New Roman 14-point font, and it contains 542 words (excluding the title, caption, tables, and signature block).

Dated: May 14, 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*

CERTIFICATE OF SERVICE

I, Adam W. Poff, hereby certify that on May 28, 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 May 28, 2021, I caused the foregoing document to be served via electronic mail upon the above-listed counsel.

Dated: May 28, 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*