IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CHROMADEX, INC. and TRUSTEES OF DARTMOUTH COLLEGE, Plaintiffs, v. ELYSIUM HEALTH, INC., Defendant.	C.A. No. 18-1434-CFC

JOINT [PROPOSED] PRELIMINARY JURY INSTRUCTIONS

1. INTRODUCTION

Members of the jury: Now that you have been sworn, I am going to give you some preliminary instructions to guide you in your participation in the trial.

2. THE PARTIES AND THEIR CONTENTIONS[1]

I am going to give you an overview of who the parties are and what each contends.

You may recall that during the process that led to your selection as jurors, I advised you that this is a civil action for patent infringement arising under the patent laws of the United States.

[**Plaintiffs' Proposal:** The plaintiffs in this case are ChromaDex, Inc. and Trustees of Dartmouth College. I will refer to ChromaDex and Dartmouth together as "Plaintiffs."][**Elysium's Proposal:** The plaintiff in this case is the Trustees of Dartmouth College. I may refer to Dartmouth as "Plaintiff" or "Dartmouth."][2] The defendant is Elysium Health, Inc. I will refer to Elysium as "Defendant" or "Elysium."

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[1] Fed. Cir. Bar Ass'n. Model Patent Jury Instructions A.2; 3d Cir. Model Civil Jury Instructions 1.2 (2017).

[2] **Elysium's Position:** Elysium objects to references to ChromaDex as a plaintiff because ChromaDex lacks standing. To avoid cluttering these instructions, Elysium has not changed other references to ChromaDex as a Plaintiff in these instructions, but the same objection applies throughout.

Plaintiff Dartmouth owns the two U.S. patents that are at issue in this case. Dartmouth licenses these patents to Plaintiff ChromaDex [**Plaintiffs' Proposal:** exclusively][3]. The two patents at issue are U.S. Patent No. 8,197,807 and U.S. Patent No. 8,383,086. Because patent numbers are so long, patents are usually referred to by their last three digits. For example, U.S. Patent No. 8,197,807 may sometimes be called "the '807 Patent." Thus, I will refer to the two patents at issue as the '807 Patent and the '086 Patent. I will refer to them together as the Dartmouth Patents or the Patents-in-Suit.

In this case, Plaintiffs contend that Elysium's Basis product infringes certain claims of the Dartmouth Patents. I will refer to these claims as the Asserted Claims.

[**Plaintiffs' Proposal:** Plaintiffs further allege that Elysium's infringement was willful.][4]

Elysium denies that the Accused Product infringes any of the Asserted Claims.

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[4] **Plaintiffs' Position:** As described in the Joint Pretrial Order, it is well established that the jury should decide the question of whether Elysium willfully infringed the Dartmouth Patents.

Elysium's Position: Elysium objects to the jury deciding willfulness for the reasons stated in the Joint Pretrial Order.

[**Elysium's Proposal (should the Court adopt Plaintiffs' Proposal on willfulness):** Elysium further denies that any infringement was willful.]

Elysium also contends that the Asserted Claims are invalid.

Plaintiffs deny that any of the Asserted Claims are invalid.

You will resolve the questions of infringement and invalidity for the Asserted Claims. You may also decide the issue of monetary damages, depending on your findings on infringement and invalidity.

[**Plaintiffs' Proposal:** During the course of this case, you will hear references to certain terms and phrases from the Asserted Claims. I will give you a list of those terms and phrases for which I have provided a definition that you are to use in deciding the issues presented to you. Any other terms and phrases that are not included on the list should be given their plain and ordinary meaning.][5]

3. JURORS' DUTIES[6]

Now that I have given you a brief overview of the case, let me talk about your duties as jurors in this case.

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[5] **Plaintiffs' Position:** As described in the Joint Pretrial Order, Plaintiffs request that the jury be given copies of the Dartmouth Patents and the Court's claim construction.

Elysium's Position: Elysium objects to providing the jury a copy of the *Markman* order for the reasons stated in the Joint Pretrial Order.

[6] 3d Cir. Model Civil Jury Instructions 1.1 (2017).

It will be your duty to find from the evidence what the facts are. You and you alone will be the judges of the facts. You will then have to apply those facts to the law as I will explain it to you both during these preliminary instructions and at the close of the evidence. You must follow that law whether you agree with it or not. You are bound by your oath as jurors to follow these and all the instructions that I give you, even if you personally disagree with them. All the instructions are important, and you should consider them together as a whole.

Perform these duties fairly and impartially. Do not let any bias, sympathy, fear, public opinion, or prejudice that you may feel toward one side or the other influence your decision in any way. Also, I play no part in judging the facts. Do not let anything that I may say or do during the course of the trial influence you. Nothing that I may say or do is intended to indicate, or should be taken by you as indicating, what your verdict should be. I will explain to you the legal principles that must guide you in your decisions.

4. EVIDENCE

4.1 Evidence Generally[7]

Now, let us talk about the evidence.

The evidence in this case includes three things. First, the evidence includes what the witnesses say while they are testifying under oath, including deposition

[7] 3d Cir. Model Civil Jury Instructions 1.5 (2017).

testimony that will be played or read to you. The testimony of witnesses consists of the answers to questions posed by the attorneys or the court. Second, the evidence includes the documents and other things I allow to be presented as exhibits. Third and finally, the evidence includes any facts that the parties have agreed to by stipulations or any facts that I may instruct you to find.

Nothing else is evidence. The lawyers' statements and arguments are not evidence. Their questions and objections are not evidence. My legal rulings are not evidence. None of my comments or questions are evidence. You must make your decision based only on the evidence that you see and hear in the courtroom. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of court influence your decision in any way.

Also during trial, you may be shown charts and animations to help illustrate the testimony of the witness. These illustrative slides are called "demonstrative exhibits" and are not evidence.

You must make your decision based only on the evidence that you see and hear in the courtroom. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of court influence your decision in any way.

You must completely ignore all of these things that are not evidence. Do not speculate about what a witness might say or what an exhibit might show. These

things are not evidence, and you are bound by your oath not to let them influence your decision in any way.

Additionally, there are rules that control what can be received into evidence. When a lawyer asks a question or offers an exhibit into evidence, and a lawyer on the other side thinks it is not permitted by the rules of evidence, that lawyer may object. This simply means that the lawyer is requesting that I make a decision on a particular rule of evidence. You should not be influenced by the fact that an objection is made. Objections to questions are not evidence. Lawyers have an obligation to their clients to make objections when they believe that evidence being offered is improper under the rules of evidence. You should not be influenced by the objection or by my ruling on it. If the objection is sustained, ignore the question. If it is overruled, treat the answer like any other. If you are instructed that some item of evidence is received for a limited purpose only, you must follow those instructions. During the trial, I may not let you hear the answers to some of the questions that the lawyers ask. I also may rule that you cannot see some of the exhibits that the lawyers want you to see. And sometimes I may instruct you to disregard things that you saw or heard. Do not consider my rulings on whether you can hear certain testimony or see certain exhibits as any indication of my opinion of the case or of what your verdict should be.

4.2 Direct and Circumstantial Evidence[8]

There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as when a witness testifies about something the witness knows through his or her own senses—something the witness has seen, felt, touched, heard, or did. For example, if a witness testified that she saw it raining outside, and you believed her, that would be direct evidence that it was raining.

Circumstantial evidence is proof of facts from which you may infer or conclude that other facts exist. For example, if someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude that it was raining.

As a general rule, the law makes no distinction between the weight that you should give to either direct or circumstantial evidence, but simply requires that you find facts from all the evidence in the case, both direct and circumstantial, and give it whatever weight you believe it deserves.

5. CREDIBILITY OF WITNESSES[9]

As I mentioned, one type of evidence the lawyers will present will be

[8] 3d Cir. Model Civil Jury Instructions 1.6 (2017).
[9] 3d Cir. Model Civil Jury Instructions 1.7 (2017).

witness testimony. You will have to decide what testimony you believe and what testimony you do not believe. You are the sole judges of each witness's credibility. "Credibility" means whether a witness is worthy of belief. You may believe everything a witness says or only part of it or none of it.

In deciding what to believe, you may consider a number of factors, including the following:

1) the opportunity and ability of the witness to see or hear or know the things the witness testifies to;

2) the quality of the witness's understanding and memory;

3) the witness's manner while testifying;

4) whether the witness has an interest in the outcome of the case or any motive, bias, or prejudice;

5) whether the witness is contradicted by anything the witness said or wrote before trial or by other evidence;

6) how reasonable the witness's testimony is when considered in light of other evidence that you believe; and

7) any other factors that bear on believability.

The weight of the evidence to prove a fact does not necessarily depend on the number of witnesses who testify. What is more important is how believable the witnesses were, and how much weight you think their testimony deserves.

These instructions apply to the testimony of all witnesses, including expert witnesses.

6. DEPOSITION TESTIMONY[10]

You may hear witnesses testify through deposition testimony. A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath and swears to tell the truth, and lawyers for each party may ask questions. A court reporter is present and records the questions and answers. The deposition may or may not be recorded on videotape. Deposition testimony is entitled to the same consideration and is to be judged, insofar as possible, in the same way as if the witness had been present to testify in the courtroom.

7. EXPERT WITNESSES[11]

When knowledge of subject matter might be helpful to the jury, an expert witness may be called. Expert testimony is testimony from a person who has a special skill or knowledge in some science, profession, or business. This skill or knowledge is not common to the average person but has been acquired by the expert through special study or experience. However, you are not required to accept an expert's opinion. As with any other witness, it is up to you to judge the

[10] 3d Cir. Model Civil Jury Instructions 2.5 (2017).

[11] *See* D.I. 307, *f'Real Foods, LLC v. Hamilton Beach Brands, Inc.*, No. 1:16-cv-41-CFC, *8–9 (D. Del. Sept. 30, 2019).

credibility of the expert witness and decide whether to rely upon his or her testimony.

In weighing expert testimony, you may consider the expert's qualifications, the reasons for the expert's opinions, and the reliability of the information supporting the expert's opinions, as well as the factors I have previously mentioned for weighing testimony of any other witness. Expert testimony should receive whatever weight and credit you think appropriate, given all the other evidence in the case. You are free to accept or reject the testimony of experts, just as with any other witness.

8. BURDENS OF PROOF[12]

Let us talk about burdens of proof.

As I have already told you, this is a civil case in which Plaintiffs are alleging that Elysium infringes certain claims of the Dartmouth Patents.

Plaintiffs have the burden of proving infringement by what is called a preponderance of the evidence. That means Plaintiffs have to produce evidence which, when considered in light of all of the facts, leads you to believe that it is more likely than not that Elysium has infringed the Asserted Claims of the Dartmouth Patents. To put it differently, if you were to put Plaintiffs' and

[12] 3d Cir. Model Civil Jury Instructions 1.10–1.11; Fed. Cir. Bar Ass'n. Model Patent Jury Instructions A.4.

Elysium's evidence on the opposite sides of a scale, Plaintiffs' would have to make the scales tip slightly on their side. Plaintiffs must also prove their damages, if there are any damages, by a preponderance of the evidence.

Elysium contends that the Asserted Claims are invalid. Elysium has the burden of proving invalidity by clear and convincing evidence. Clear and convincing evidence is evidence that produces an abiding conviction that the truth of a factual contention is highly probable. Proof by clear and convincing evidence is thus a higher burden than proof by a preponderance of the evidence.

Some of you may have heard the phrase "proof beyond a reasonable doubt." That burden of proof is a stricter burden of proof that does not apply in this case. It applies only in criminal cases and has nothing to do with a civil case like this one. You should therefore not consider it in this case.

9. GENERAL GUIDANCE REGARDING PATENTS

9.1 Patent Video

Now, we are going to show a 17-minute video that will provide background information to help you understand what patents are, why they are needed, the role of the Patent Office, and why disputes over patents arise. This video was prepared by the Federal Judicial Center, not the parties in this case, to help introduce you to the patent system. During the video, reference will be made to a sample patent.

[*The video will be played*.]

10. SUMMARY OF THE PATENT ISSUES

In this case, you must decide several things according to the instructions that I will give you at the end of the trial. Those instructions will provide more detail.

In essence, you must decide the following main issues:

1. Whether Plaintiffs have proven by a preponderance of the evidence (i.e., more likely than not) that Elysium has infringed any of the Asserted Claims of the Patents-in-Suit.

2. Whether Elysium has proven by clear and convincing evidence (i.e., highly probable) that one or more of the Asserted Claims are invalid.

3. If any Asserted Claims are infringed and not invalid, what amount of damages Plaintiffs have proven by a preponderance of the evidence are adequate to compensate for the infringement.

[**Plaintiffs' Proposal:** 4. If you find that Elysium has infringed any asserted claim, and that the claim is not invalid, whether Plaintiffs have proven by a preponderance of the evidence that the infringement was willful.][13]

11. CONDUCT OF THE JURY[14]

Now, a few words about your conduct as jurors:

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[13] **Plaintiffs' Position:** As described in the Joint Pretrial Order, the question as to Elysium's willfulness is correctly submitted to the jury.

Elysium's Position: Elysium objects to the jury deciding willfulness for the reasons stated in the Joint Pretrial Order.

[14] 3d Cir. Model Civil Jury Instructions 1.3, 1.9 (2017).

First, I instruct you that during the trial you are not to discuss the case with anyone or permit anyone to discuss it with you. During the trial and until you retire to the jury room at the end of the case to deliberate on your verdict, you are not to talk about this case, not even amongst yourselves. If anyone should try to talk to you about the case, including a fellow juror, bring it to my attention promptly. If any lawyer, party, or witness does not speak to you when you pass in the hall, ride the elevator, or the like, remember it is because they are not supposed to talk with you nor you with them. In this way, any unwarranted and unnecessary suspicion about your fairness can be avoided. That is why you are asked to wear your juror tags. It shows that you are not to be approached in any way.

There are good reasons for this ban on discussions. The most important is the need for you to keep an open mind throughout the presentation of the evidence.

Second, do not read or listen to anything touching on this case in any way other than the evidence admitted in this courtroom. By that I mean, if there may be a newspaper article or radio or television report relating to this case, do not read the article or watch or listen to the report. In addition, do not try to do any independent research or investigation on your own on matters relating to the case, the parties, the witnesses, lawyers, or this type of case. Do not do any research on the internet, for example.

You are to decide the case upon the evidence admitted at trial. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom.

I know that many of you use cell phones, smart phones, tablets, and other portable electronic devices; laptops, netbooks, and other computers. You must not talk to anyone at any time about this case or otherwise use these or other electronic devices to communicate with anyone about the case or, as I noted, get information about the case, the parties or any of the witnesses or lawyers involved in the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, text messaging, Facebook, TikTok, LinkedIn, YouTube, Twitter, Instagram, or any other social media platform or through any blog, website, or application. You may not use any similar technology or social media to get information about this case, even if I have not specifically mentioned it here.

Finally, do not reach any conclusion on the claims or defenses until all the evidence is in. Keep an open mind until you start your deliberations at the end of the case. After you retire to deliberate, you may begin to discuss the case with your

fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at its end.

The courtroom deputy will now distribute your jury notebooks. You are free to use them to take notes at any point during the trial. Each of you may take notes or not take notes. No one is required to take notes.

If you take notes, everything you write will be kept confidential; at the end of each day, you will leave it in the jury room, where it will be kept overnight. At the end of the trial your notes will be shredded. You do not have to take notes, but you may, if you wish to. If you do take notes, be careful not to get so involved that you become distracted and miss part of the testimony. Overuse of note taking may be distracting. You must determine the credibility of witnesses; so you must observe the demeanor and appearance of each person on the witness stand. Note taking must not distract you from that task.

Another word of caution is in order. There is generally I think a tendency to attach undue importance to matters that one has written down. Some testimony, which is considered unimportant at the time presented, and thus not written down, takes on greater importance later in the trial in light of all the evidence presented. Therefore, you are instructed that your notes are only a tool to aid your own individual memory and you should not compare your notes with other jurors in determining the content of any testimony or in evaluating the importance of any

evidence. Your notes are not evidence, and will by no means be a complete outline of the proceedings or a list of the highlights of the trial. Also, keep in mind that you will not have a transcript of the testimony to review. So, above all, your memory will be your greatest asset when it comes time to deliberate and render a decision in this case.

If you do take notes, you must leave them in the jury deliberation room which is secured at the end of each day. And, remember that they are for your own personal use. They are not to be given or read to anyone else. In your deliberations, give no more and no less weight to the views of a fellow juror just because that juror did or did not take notes. As I mentioned earlier, your notes are not official transcripts. They are valuable, if at all, only as a way to refresh your memory. Your memory is what you should be relying on when it comes time to deliberate and render your verdict in this case. You therefore are not to use your notes as authority to persuade fellow jurors of what the evidence was during the trial. Notes are not to be used in place of the evidence

[**Plaintiffs' Proposal:** In addition to some blank pages for notes, you will find in your notebooks copies of the Dartmouth Patents and a list of claim terms of

the Dartmouth Patents that have been construed by the Court and their definitions.][15] You can put the notebooks away for now.

12. COURSE OF THE TRIAL[16]

The trial will proceed in the following manner:

First, each side may make an opening statement. An opening statement is not evidence. It is simply an outline of what that party intends to prove, and is presented as a preview of that party's case to help you follow the evidence as it is offered.

After the opening statements, the parties will present evidence which may include testimony from live witnesses, deposition testimony, and documents and other things.

First Plaintiffs will present their evidence on the issues for which they bear the burden of proof. Then Elysium will put on its rebuttal evidence responding to those issues and also present evidence for the issues for which it bears the burden of proof. Plaintiffs will then have the opportunity to put on rebuttal evidence about

[15] **Plaintiffs' Position:** As described in the Joint Pretrial Order, Plaintiffs request that the jury be given a copy of the Dartmouth Patents and the Court's claim construction.

Elysium's Position: For the reasons stated in the Joint Pretrial Order, Elysium objects to providing the patents and claim construction to the jurors with their notebooks.

[16] 3d Cir. Model Civil Jury Instructions 1.4, 1.12, Fed. Cir. Bar Ass'n. Model Patent Jury Instructions A.5.

the issues for which Elysium has the burden of proof, and reply to Elysium's rebuttal evidence. Finally, Elysium will have the opportunity to reply to Plaintiffs' rebuttal evidence.

During the trial, it may be necessary for me to talk with the lawyers out of your hearing by having a bench conference, which is also called a sidebar. If that happens, please be patient. We are not trying to keep important information from you. These conferences are necessary for me to fulfill my responsibility to be sure that evidence is presented to you correctly under the law. We will, of course, do what we can to keep the number and length of these conferences to a minimum. While we meet, feel free to stand up and stretch and walk around the jury box, if you wish. I may not always grant an attorney's request for a sidebar. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of what your verdict should be.

After all of the evidence has been presented, I will give you instructions on the law and describe for you the matters you must decide. Then, the attorneys will make their closing arguments to summarize and interpret the evidence for you. You will then retire to the jury room to deliberate on your verdict in this case.

13. TRIAL SCHEDULE

I would like to outline for you the schedule I expect to maintain during the course of this trial. This case is expected to take 5 days to try. Going forward, we

will normally begin the day at 9:00 A.M. promptly and you will be excused at 4:30 P.M.

The schedule that I expect to keep over the days of evidence presentation will include a morning break of fifteen minutes, a lunch break of an hour, and an afternoon break of fifteen minutes.

The only significant exception to this schedule may occur when the case is submitted to you for your deliberations. On that day, the proceedings might last beyond 5:00 P.M.