

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

CHROMADEx, INC. and
TRUSTEES OF DARTMOUTH
COLLEGE,

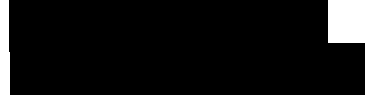
Plaintiffs,

v.

ELYSIUM HEALTH, INC.,

Defendant.

Civil Action No. 18-1434-CFC



**PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR
SUMMARY JUDGEMENT PREVENTING ELYSIUM FROM ASSERTING
INVALIDITY BASED ON BRENNER TWO PATHWAYS
(MOTION NO. 4) (D.I. 207)**

Dated: May 21, 2021

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35 U.S.C. § 102(b) 1, 2
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TABLE OF ABBREVIATIONS

Abbreviation	Description
The Dartmouth Patents	U.S. Patent Nos. 8,383,086 and 8,197,807
ChromaDex	Plaintiff ChromaDex, Inc.
Dartmouth	Plaintiff Trustees of Dartmouth College
Plaintiffs	collectively, Plaintiffs ChromaDex, Inc. and Trustees of Dartmouth College
Elysium	Defendant Elysium Health, Inc.
POSA	person of ordinary skill in the art
D.I. 209	Plaintiffs' Opening Brief in Support of Plaintiffs' Motion for Summary Judgment Preventing Elysium from Asserting Invalidity Based on Brenner Two Pathways (Motion No. 4), D.I. 209 (April 27, 2021)
D.I. 208, CSUF	Plaintiffs' Concise Statement of Facts in Support of Plaintiffs' Motion for Summary Judgment Preventing Elysium from Asserting Invalidity Based on Brenner Two Pathways (Motion No. 4), D.I. 208 (April 27, 2021)
D.I. 283	Elysium's Answering Brief In Opposition to Plaintiffs' Motion for Summary Judgment Preventing Elysium from Asserting Invalidity Based on Brenner Two Pathways (Motion No. 4), D.I. 283 (May 14, 2021)
D.I. 285, CSUF-Resp	Table 1 (untitled), <i>in</i> Defendant Elysium Health, Inc.'s Counterstatement of Facts in Opposition to Plaintiffs' Concise Statement of Facts in Support of Plaintiffs' Motion for Summary Judgment Preventing Elysium from Asserting Invalidity Based on Brenner Two Pathways (Motion No. 4), D.I. 285 at pp. 1-8 (May 14, 2021)
D.I. 285, ESMF	Table 2 ("Defendant's Counterstatement of Material Facts"), <i>in</i> Defendant Elysium Health, Inc.'s

Abbreviation	Description
	Counterstatement of Facts in Opposition to Plaintiffs’ Concise Statement of Facts in Support of Plaintiffs’ Motion for Summary Judgment Preventing Elysium from Asserting Invalidity Based on Brenner Two Pathways (Motion No. 4), D.I. 285 at pp. 8-9 (May 14, 2021)
Ex. 1-9	Exhibit to Declaration of Adam W. Poff in Support of Plaintiffs’ Motion for Summary Judgment Preventing Elysium from Asserting Invalidity Based on Brenner Two Pathways (Motion No. 4), D.I. 224 (April 27, 2021)
Brenner Two Pathways	Ex. 6 (BRENNER_000000174–194)

The only remaining question in resolving this motion is whether Brenner Two Pathways—a slide presentation, the relevant portion of which was displayed for mere minutes—is a “printed publication” under Section 102(b).¹ Elysium does not dispute that Brenner Two Pathways was a slide presentation presented at Dartmouth in December 2002 as part of a job interview, attended by “probably 40 or 50” people from Dartmouth. CSUF-Resp-4; CSUF-Resp-5.² Elysium also does not dispute that the pertinent slides were displayed for no more than about 6-9 minutes. ESMF-6; CSUF-Resp-11. Finally, Elysium does not dispute that the slides were never put online, but nevertheless contends in a footnote—through unsupported attorney argument—that “they were prepared with the expectation that a reader would have a copy in hand” and the “factfinder could also reasonably conclude that an applicant giving a lecture as part of a job interview would make his copies of his slides available.” CSUF-Resp-7; D.I. 283, 2 n.1; CSUF-Resp-6; D.I. 283, 5 n.2.

The Court should find as a matter of law that Brenner Two Pathways was not a “publicly accessible” printed publication, a finding Elysium cannot avoid by

¹ Elysium does not argue that Brenner Two Pathways is prior art under Section 102(a), nor under any other category in Section 102(b). Further, Elysium does not argue online availability, mooting the question of 35 U.S.C. §315(e)(2) estoppel. D.I. 283.

² The presentation was open to the public, in that there were “no restrictions” on attendance. ESMF-2; Ex. 4, 16:23-24 (the “doors were not locked”).

providing unsupported attorney speculation in lieu of evidence. As a result, the Court should preclude Elysium from relying on Brenner Two Pathways.

I. Brenner Two Pathways Is Not a Printed Publication.

Elysium has failed to meet its burden of proving that Brenner Two Pathways is a printed publication:

“Public accessibility” has been called the touchstone in determining whether a reference constitutes a “printed publication” bar under 35 U.S.C. § 102(b). A reference is publicly accessible if it was disseminated or otherwise made available to the extent that persons interested and ordinarily skilled in the subject matter or art exercising reasonable diligence *can locate it*.

Medtronic, Inc. v. Barry, 891 F.3d 1368, 1380 (Fed. Cir. 2018) (cleaned up) (emphasis added). The relevant portion of Brenner Two Pathways was accessible only for minutes to POSAs in the Dartmouth community³ and thus was never made reasonably available to diligent POSAs seeking to locate the presentation. It therefore does not qualify as a “printed publication.” See *Regents of Univ. of Cal. v. Howmedica, Inc.*, 530 F. Supp. 846, 859-60 (D.N.J. 1981) (presentation slides not a printed publication where they were not “disseminated or otherwise made available to the extent that persons interested in the information could locate it”); *Solarex Corp. v. Arco Solar, Inc.*, 121 F.R.D. 163, 176 (E.D.N.Y. 1988) (“Limited distribution [], even to those skilled in the art, does not amount to ‘publication’ under

³ As described in Section II, Elysium has not successfully manufactured a *genuine* dispute about alleged distribution of the slides.

the statute unless the material is otherwise so situated that anyone who chooses may avail himself of the information it contains” (citation omitted)).

Internet printed-publication cases illustrate this point by analogy. An unindexed internet page is not a printed publication unless the defendant shows that a POSA “could have reasonably found the website and then found the reference on that website.” *Samsung Elecs. Co., Ltd. v. Infobridge Pte. Ltd.*, 929 F.3d 1363, 1369 (Fed. Cir. 2019). Similarly here, the relevant inquiry is not whether the presentation was technically open to the public (as unindexed webpages are) or whether a limited number of POSAs absorbed the information, but whether a diligent POSA could have reasonably located it. Notably, Elysium does not argue that POSAs generally would have any reason to monitor job-interview presentations occurring at Dartmouth in December 2002. *Cf. Voter Verified, Inc. v. Premier Election Sols., Inc.*, 698 F.3d 1374, 1381 (Fed. Cir. 2012) (finding an unindexed webpage a printed publication because it was on a “prominent forum”).

Elysium ignores these principles and instead rests its argument on a mechanical application of the *Klopfenstein* factors. But as even *Klopfenstein* recognized, the factors are non-exhaustive and only an “aid” to resolve the ultimate question of public accessibility. *In re Klopfenstein*, 380 F.3d 1345, 1350 (Fed. Cir. 2004). And here, two factors (one from *Klopfenstein*, one not) are determinative: time displayed and nature of the meeting. Slides displayed for only minutes at a job-

interview presentation not generally known to interested persons cannot be said to be reasonably locatable, regardless of the other *Klopfenstein* factors. It is telling that Elysium cannot point to a single case where slides accompanying a short presentation, but not otherwise displayed or disseminated, were found to be a printed publication.⁴ Having no legal support, Elysium instead argues, based on its attorneys' interpretation of the slides, that POSAs would readily understand slide 191 in the short time it was displayed, D.I. 283, 6-7, but fails to mention that Elysium's own expert testified that "[a] POSA would have to do some work to figure out what was going on" in that slide. Ex. 7, 213:18-214:2.⁵ In short, when properly focused on the public-accessibility standard, Brenner Two Pathways was not, as a matter of law, made reasonably available to the diligent, interested person seeking to locate it.

⁴ Elysium's cited cases are not on point. *Klopfenstein*, 380 F.3d at 1347, 1350 (printed *poster* of presentation slides accessible for "approximately three cumulative days" at two professional conferences); *SRI Int'l, Inc. v. Internet Sec. Sys., Inc.*, 511 F.3d 1186, 1195 (Fed. Cir. 2008) (paper placed on a server); *Jazz Pharm., Inc. v. Amneal Pharm., Inc.*, 895 F.3d 1347, 1358 (Fed. Cir. 2018) (materials placed online); *Am. Standard, Inc. v. Pfizer Inc.*, 722 F. Supp. 86, 129 & n.42 (D. Del. 1989) (a speech analyzed under the Section 102(a) publicly known prong).

⁵ Elysium's interpretations regarding Dr. Brenner's "purpose" are equally flawed. D.I. 283, 6. The *SRI* court explained that the *Klopfenstein* "posters were printed publications because their entire purpose was public communication of the relevant information," but specifically noted that the posters were displayed at two professional *conferences*. 511 F.3d at 1196. The same purpose cannot be inferred from a job interview. *Cf. In re Cronyn*, 890 F.2d 1158, 1160 (Fed. Cir. 1989) ("The [*In re Bayer*, 568 F.2d 1357 (C.C.P.A. 1978)] court rejected ... that [a] student's defense of his thesis before a faculty committee reflected an intent to make the result of his research available to the public.").

II. There Is No Genuine Dispute as to Whether Brenner Two Pathways Was Distributed.

Dr. Brenner testified that he did not put Brenner Two Pathways online or otherwise distribute copies at any time. ESMF-11; CSUF-6. There is no genuine dispute to the contrary. Elysium’s attorneys merely provide conjecture dressed up as “objective indicia” to manufacture a dispute. They hypothesize, for example, that one would expect slides with scientific citations and a hyperlink to be distributed to attendees. CSUF-Resp-6; D.I. 283, 5 n.2. But Elysium provides no evidence, including from its own expert, that such expectations existed in the scientific community. Indeed, Elysium’s expert never contended that the slides were distributed in hard copy, but instead proffered that they may have been available online, a theory that Elysium has now abandoned in favor of its new theory, presented for the first time in its opposition to this motion. CSUF-Resp-7; D.I. 283, 2 n.1.

In the face of clear testimony from Dr. Brenner that his slides were *not* distributed to presentation attendees, unsubstantiated attorney conjecture does not create a genuine dispute that precludes summary judgment—particularly for an issue on which *Elysium* would bear the ultimate burden of proof at trial. *Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.3d 1276, 1283-84 (Fed. Cir. 2005) (finding that attorney argument did not demonstrate a genuine issue of material fact sufficient to

avoid summary judgment); *cf. Daniels v. Metro. Life Ins. Co.*, 2019 WL 1369611, at *5 (D.Del. 2019).

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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 1,332 words (excluding the title, caption, tables, and signature block).

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CERTIFICATE OF SERVICE

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