

**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' ANSWERING BRIEF IN OPPOSITION TO
DEFENDANT'S MOTION TO STAY**

Dated: November 21, 2018

YOUNG CONAWAY STARGATT
& TAYLOR LLP

Of Counsel:

Christopher N. Sipes
R. Jason Fowler
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street NW
Washington, DC 20001
(202) 662-6000

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

James F. Haley, Jr.
HALEY GUILIANO LLP
75 Broad Street, Suite 1000
New York, New York 10004
(646) 973-2500

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

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF ARGUMENT 1

II. NATURE AND STAGE OF PROCEEDINGS AND STATEMENT OF FACTS 2

 A. The California Litigation 2

 B. IPR Proceedings..... 4

III. LEGAL STANDARD..... 4

IV. ARGUMENT..... 5

 A. Resolution of the '086 IPR will not eliminate or materially simplify the infringement issues that must be resolved in this case. 6

 1. The '086 IPR involves only one of the patents asserted in this case. 6

 2. The outcome of the '086 IPR will have no impact on the '807 patent..... 7

 B. Resolution of Elysium’s “patent misuse” counterclaim will not eliminate or materially simplify the infringement issues that must be resolved in this case..... 8

 1. Even if Elysium’s counterclaim is successful, it will only be a limitation on ChromaDex’s past damages. 8

 2. The first-filed rule is inapplicable..... 9

 C. A stay would severely prejudice Plaintiffs and provide a tactical advantage to Elysium in light of their competitive relationship. 11

 D. The early stage of the case weighs against a stay. 13

V. CONCLUSION..... 14

TABLE OF AUTHORITIES

Cases

Ambato Media, LLC v. Clarion Co.,
 No. 2:09-CV-242-JRG, 2012 WL 194172 (E.D. Tex. Jan. 23, 2012)13

B. Braun Med., Inc. v. Abbott Labs.,
 124 F.3d 1419 (Fed. Cir. 1997).....8

Butamax Advanced Biofuels LLC v. Gevo, Inc.,
 868 F. Supp. 2d 359 (D. Del. 2012).....12

Cooper Notification, Inc. v. Twitter, Inc.,
 No. CIV. 09-865-LPS, 2010 WL 5149351 (D. Del. Dec. 13, 2010)12

Courtesy Prod., L.L.C. v. Hamilton Beach Brands, Inc.,
 No. CV 13-2012-SLR-SRF, 2015 WL 5145526 (D. Del. Sept. 1, 2015).....5, 6, 12

Davol, Inc. v. Atrium Med. Corp.,
 No. CV 12-958-GMS, 2013 WL 3013343 (D. Del. June 17, 2013).....6, 11, 13

Grider v. Keystone Health Plan Cent., Inc.,
 500 F.3d 322 (3d Cir. 2007).....10

ImageVision.Net, Inc. v. Internet Payment Exch., Inc.,
 No. CV 12-054-GMS-MPT, 2013 WL 663535 (D. Del. Feb. 25, 2013).....11

ImageVision.Net, Inc. v. Internet Payment Exchange, Inc.,
 No. CV 12-054-GMS-MPT, 2012 WL 5599338 (D. Del. Nov. 15, 2012).....5

In re Mobile Telecommunications Techs., LLC,
 243 F. Supp. 3d 478, 485 (D. Del. 2017).....10

McRo, Inc. v. Bethesda Softworks LLC,
 No. CV 12-1509-LPS-CJB, 2014 WL 1711028 (D. Del. May 1, 2014)13

Nexans Inc. v. Belden Inc.,
 No. CV 12-1491-SLR-SRF, 2014 WL 651913 (D. Del. Feb. 19, 2014)13

Nken v. Holder,
 556 U.S. 418 (2009).....4

Plastic Omnium Advanced Innovation & Research v. Donghee Am., Inc.,
 No. CV 16-187-LPS (D. Del. Oct. 27, 2017)6

President & Fellows of Harvard Coll. v. Micron Tech., Inc.,
 No. CV 17-1729-LPS-SRF (D. Del. Jan. 8, 2018)6

<i>Qualcomm Inc. v. Broadcom Corp.</i> , 548 F.3d 1004 (Fed. Cir. 2008).....	9
<i>SAS Inst., Inc. v. Iancu</i> , 138 S. Ct. 1348 (2018).....	4
<i>Siemens Indus., Inc. v. Westinghouse Air Brake Techs. Corp.</i> , No. CV 16-284-LPS, 2018 WL 3046511 (D. Del. June 20, 2018).....	12
<i>Toshiba Samsung Storage Tech. Korea Corp. v. LG Elecs., Inc.</i> , 193 F. Supp. 3d 345, 349 (D. Del. 2016).....	6
<i>Toshiba Samsung Storage Tech. Korea Corp. v. LG Elecs., Inc.</i> , No. CV 15-691-LPS-CJB, 2015 WL 7824098 (D. Del. Dec. 3, 2015)	13
<i>U.S. Gypsum Co. v. Nat’l Gypsum Co.</i> , 352 U.S. 457 (1957).....	9
<i>Universal Elecs., Inc. v. Universal Remote Control, Inc.</i> , 943 F. Supp. 2d 1028 (C.D. Cal. 2013)	13
<i>Universal Secure Registry, LLC v. Apple Inc.</i> , No. CV 17-585-CFC-SRF, 2018 WL 4486379 (D. Del. Sept. 19, 2018).....	13
Other Authorities	
37 C.F.R. § 42.71(d)(2).....	7

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Elysium's motion to stay should be denied. The factors this Court considers in evaluating such a request weigh heavily against a stay here. First, a stay will not resolve the entire dispute between the parties, nor will it materially simplify the issues to be resolved in this case. Although Elysium bases its requested stay on the pending IPR proceedings involving the '086 patent ("the '086 IPR"), those proceedings only impact one of the patents asserted in this case. The '807 patent is not subject to IPR proceedings, and indeed Elysium's petition to institute such proceedings was denied. As a result, whatever the outcome of the '086 IPR may be, it will do nothing to resolve the issues raised by Elysium's infringement of the '807 patent. Elysium also bases its requested stay on a "patent misuse" counterclaim pending in the California Litigation. That counterclaim, however, even if Elysium is successful, can only serve to limit the time period for which ChromaDex can recover damages for Elysium's infringement. Resolution of that counterclaim cannot dispose of the issues that must be decided in this case as a result of Plaintiffs' infringement claims.

Second, a stay would severely prejudice Plaintiffs and provide a tactical advantage to Elysium. ChromaDex and Elysium are direct competitors, and Elysium's infringing sales continue to erode ChromaDex's sales and the goodwill that ChromaDex has built through substantial investments. This Court has recognized that stays are generally improper under such circumstances, given the potential for any stay to have outsized consequences to the nonmoving party.

Finally, the early stage of this case, and the advanced stages of the '086 IPR and California Litigation, weigh against a stay. The '086 IPR will be decided in January and the California counterclaim will be resolved no later than July. Given that no schedule has yet been entered in this case, any schedule that is likely to be entered will place the *Markman* hearing well

after the '086 IPR and counterclaim have been resolved. As a result, any impact the resolution of these issues could have will not impose a burden on the Court. Moreover, because the '086 IPR and California Litigation cannot resolve the issues raised in this case by Elysium's infringement, there is no justification for delaying discovery on those issues.

For these reasons, and as explained in more detail below, Plaintiffs respectfully request that the Court follow its standard practice and deny Elysium's motion to stay.

II. NATURE AND STAGE OF PROCEEDINGS AND STATEMENT OF FACTS

ChromaDex is the exclusive licensee of two Dartmouth-owned patents directed to formulations comprising isolated nicotinamide riboside ("NR"), a compound that increases cellular metabolism, mitochondrial function, and energy production. ChromaDex was the only commercial source and supplier of NR in the United States until Elysium stopped purchasing it from ChromaDex and began selling unlicensed and infringing NR from a source it developed using documents and other information misappropriated from ChromaDex. These circumstances have resulted in the following proceedings, which Elysium relies on as grounds to stay this case.

A. The California Litigation

On December 29, 2016, ChromaDex sued Elysium in the Central District of California. *ChromaDex, Inc. v. Elysium Health, Inc.*, 8:16-cv-02277-CJC-DFM (C.D. Cal.). As amended, ChromaDex's complaint includes claims for breach of contract, misappropriation of trade secrets, and other torts, which stem from ChromaDex's allegations that Elysium made large purchases of NR from ChromaDex that it never intended to pay for, misappropriated proprietary ChromaDex documents and information, and hired away ChromaDex employees for the purpose of developing another source for NR and taking over the market for dietary supplements containing isolated NR. Ex. 1 (Fourth Amended Complaint, D.I. 109).

As relevant to this motion, Elysium asserted a counterclaim in the California Litigation for declaratory judgment of “patent misuse.” Elysium’s counterclaim is based on a payment accommodation ChromaDex made for Elysium in the original NR supply agreement. Ex. 2 (Motion to Dismiss, D.I. 34-1, at 4–5). As a way to help offset Elysium’s limited resources as a start-up, ChromaDex agreed to a “Trademark License and Royalty Agreement” as a deferred payment mechanism for Elysium, which would provide ChromaDex with royalties on downstream sales of Elysium’s product and, separately, give Elysium the right to use ChromaDex’s trademarks. *Id.* Elysium’s counterclaim contends that this deferred payment mechanism improperly conditioned the sale of NR on the payment of royalties for a trademark that Elysium did not want or use. *Id.* at 4–6, 13–14.

In an attempt to streamline the California Litigation, and to purge any possible misuse, ChromaDex terminated the Trademark License and Royalty Agreement on February 2, 2017, and renounced its right to collect any royalties owed under the agreement. Ex. 1 (Fourth Amended Complaint, D.I. 109 ¶ 116). ChromaDex further agreed to refund or credit all past royalty payments made under the agreement to purge any alleged misuse that had occurred through its deferred payment accommodation to Elysium. *Id.* ¶ 118. Despite ChromaDex’s covenant, Elysium has continued to press its counterclaim. Ex. 3 (Opp’n to Motion to Dismiss, D.I. 71 at 13). Regardless, this and all other issues in the California Litigation will be resolved in a trial set to commence on July 9, 2019.¹

¹ Elysium makes much of ChromaDex’s representation in the California Litigation in October 2017 about ChromaDex not having made plans to sue Elysium for patent infringement. Def.’s Br., D.I. 14 at 5. That representation, made in support of ChromaDex’s argument that there was no case or controversy sufficient to confer declaratory judgment jurisdiction, was fully accurate when it was made.

B. IPR Proceedings

On July 17, 2017, Elysium filed petitions requesting institution of IPRs for all of the claims of the '807 and '086 patents. In January 2018, the PTAB denied Elysium's petition to institute an IPR on any of the claims of the '807 patent, finding, among other things, that Elysium was unlikely to prevail on its arguments that the prior art discloses compositions containing "isolated" NR.² Def.'s Decl. in Supp. of Mot., D.I. 15-1, Decl. Ex. 7 at 10, 11. The PTAB partially granted Elysium's petition to institute an IPR on the '086 patent, but only on claims 1 and 3–5, which do not require the recited compositions to contain "isolated" NR.³ The PTAB expressly declined to institute an IPR on claim 2 of the '086 patent, again finding that Elysium was unlikely to prevail on its arguments that the prior art discloses NR in "isolated" form. Def.'s Decl. in Supp. of Mot., D.I. 15-1, Decl. Ex. 4 at 13–14.

On April 24, 2018, the Supreme Court held that the PTAB is obligated to decide the patentability of all claims that are challenged in a petition for IPR. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1359–60 (2018) (holding that the PTAB must issue a final decision regarding every patent claim challenged in a petition for *inter partes* review). Specifically in light of the *SAS* decision, the PTAB modified its institution decision in the '086 IPR to add claim 2.

III. LEGAL STANDARD

A stay is an "intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right" *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quotation

² All claims of the '807 patent recite a "composition comprising isolated nicotinamide riboside"

³ Claims 1 and 3–5 of the '086 patent recite a "pharmaceutical composition comprising nicotinamide riboside" Claim 2, on the other hand, recites a "pharmaceutical composition comprising nicotinamide riboside ... wherein the nicotinamide riboside is isolated from a natural or synthetic source."

marks and citations omitted). Consequently, “the decision of whether to grant a stay rests within the sound discretion of the court through the exercise of judgment.” *Courtesy Prod., L.L.C. v. Hamilton Beach Brands, Inc.*, No. CV 13-2012-SLR-SRF, 2015 WL 5145526, at *1 (D. Del. Sept. 1, 2015). Courts generally look to three factors when evaluating a movant’s request to stay litigation: “(i) whether a stay would unduly prejudice or present a clear tactical disadvantage to the non-moving party; (ii) whether a stay will simplify the issues in question and trial of the case; and (iii) whether discovery is complete and whether a trial date has been set.” *Id.* (quotation marks omitted). When the request to stay the litigation is based on pending IPR proceedings, courts additionally ask “whether a stay, or the denial thereof, will reduce the burden of litigation on the parties and on the court.” *Id.* (citing AIA § 18(b)(1)(D)) (quotation marks omitted). If “there is even a fair possibility that the stay would work damage on another party,” then “the party requesting a stay must demonstrate that the denial of a stay would result in a ‘clear case of hardship or inequity.’” *ImageVision.Net, Inc. v. Internet Payment Exchange, Inc.*, No. CV 12-054-GMS-MPT, 2012 WL 5599338, at *3 (D. Del. Nov. 15, 2012) (citing *Bagwell v. Brewington-Carr*, No. CV 97-321-GMS, 2000 WL 1728148, at *20 (D. Del. Apr. 27, 2000)).

IV. ARGUMENT

Nothing about the outcome of the IPR or the California Litigation, even if Elysium is successful, will obviate the need to resolve the infringement dispute at issue in this matter. Regardless of the outcome of either proceeding, substantial issues will remain before this Court. Therefore, a stay would only serve to provide a tactical advantage to Elysium and cause severe prejudice to Plaintiffs. As such, and because Elysium has not even attempted to show that denying the stay would result in a “clear case of hardship or inequity,” Elysium’s motion to stay should be denied.

A. Resolution of the '086 IPR will not eliminate or materially simplify the infringement issues that must be resolved in this case.

1. The '086 IPR involves only one of the patents asserted in this case.

As Elysium acknowledges, only one of the two asserted patents is at issue in the '086 IPR. Although Elysium sought to institute IPR proceedings on the '807 patent, the PTAB declined to do so because Elysium had “not demonstrated that there is a reasonable likelihood that it would prevail with respect to at least one of the claims challenged by the Petition.” Def.’s Decl. in Supp. of Mot., D.I. 15-1, Decl. Ex. 7 at 2. In other words, Elysium failed to convince the PTAB that its arguments were likely to invalidate a single claim of the '807 patent.

Judges in this District regularly decline to stay cases in favor of pending IPR proceedings when not all of the asserted patents are involved in the IPRs because, in such circumstances, a stay would not resolve the entire dispute between the parties. In *Courtesy Products*, for example, the alleged infringer requested a stay where IPR proceedings were instituted on only two of the three patents-in-suit. *Courtesy Prod., L.L.C.*, 2015 WL 5145526, at *1. The court denied the motion to stay, reasoning that “the parties’ dispute [would] not be fully resolved by the IPRs, regardless of the outcome of such.” *Id.* at *2. The court denied a motion to stay under similar circumstances in *Davol*, observing that “any efficiency that might have been realized through a stay would have been limited by the fact that [the alleged infringer] has sought review of only two of the three patents-in-suit.” *Davol, Inc. v. Atrium Med. Corp.*, No. CV 12-958-GMS, 2013 WL 3013343, at *6 (D. Del. June 17, 2013).⁴

⁴ See also Ex. 4, *President & Fellows of Harvard Coll. v. Micron Tech., Inc.*, No. CV 17-1729-LPS-SRF (D. Del. Jan. 8, 2018) (denying stay where one claim of the asserted patent had not been instituted and in light of the possibility that the claims that were instituted could survive review); Ex. 5, *Plastic Omnium Advanced Innovation & Research v. Donghee Am., Inc.*, No. CV 16-187-LPS (D. Del. Oct. 27, 2017) (denying stay where “at least one patent-in-suit would remain to be litigated even if all requested proceedings [were] instituted.”); *Toshiba Samsung* (continued...)

The same rationale applies here. Despite Elysium's unsupported speculation to the contrary (addressed below), the '086 IPR cannot resolve the entire infringement dispute between the parties. Elysium's attempt to stay this case based on that IPR should therefore be denied.

2. The outcome of the '086 IPR will have no impact on the '807 patent.

Elysium remarkably contends, without support, that if the PTAB "finds that claim 2 of the '086 patent is invalid over the prior art, it is also likely to conclude that the prior art invalidates all claims of the '807 patent as well." Def.'s Br., D.I. 14 at 9. It is unclear how Elysium expects the PTAB to invalidate the claims of the '807 patent, however, when that patent is not being adjudicated in any pending proceeding at the Patent Office. Indeed, the '807 patent was the subject of a *different* petition for IPR that the PTAB specifically declined to institute.⁵

At best, Elysium could file a *new* petition for IPR on the '807 patent in January 2019 if it receives a favorable decision in the '086 IPR. Even assuming that the PTAB would grant the petition and institute a new IPR on the '807 patent, any final decision of the PTAB in that IPR would not be expected for approximately 18 months from filing of the petition. The mere possibility that the claims of the '807 patent could be invalidated in a new and yet-to-be-filed IPR that will not be resolved for nearly two years does not support Elysium's requested stay.

But more fundamentally, there is no reason to believe that Elysium will even receive a favorable decision in the '086 IPR, particularly with respect to claim 2. The PTAB concluded in its original institution decision in the '086 IPR that Elysium had not shown even a "reasonable likelihood" that it would prevail on its argument that the prior art discloses "isolated" NR.

Storage Tech. Korea Corp. v. LG Elecs., Inc., 193 F. Supp. 3d 345, 349 (D. Del. 2016) (denying stay where at most 50% of the relevant claims could be invalidated).

⁵ Elysium did not request reconsideration of the PTAB's decision not to institute an IPR on the '807 patent, and the deadline for doing so has long since passed. *See* 37 C.F.R. § 42.71(d)(2).

Although the PTAB was required to add claim 2 into the '086 IPR following the Supreme Court's decision in *SAS*, Elysium's speculation about what could happen if the PTAB changes its mind about the construction of "isolated" is wishful thinking at best.

B. Resolution of Elysium's "patent misuse" counterclaim will not eliminate or materially simplify the infringement issues that must be resolved in this case.

1. Even if Elysium's counterclaim is successful, it will only be a limitation on ChromaDex's past damages.

Elysium separately argues that this case should be stayed pending resolution of its "patent misuse" counterclaim in the California Litigation. As discussed above, Elysium alleges through that counterclaim that ChromaDex improperly required Elysium to pay royalties for a trademark that Elysium did not want or use. ChromaDex vigorously disagrees with Elysium's allegations. But even if the counterclaim is decided in Elysium's favor,⁶ that will only serve as a limitation on the damages that can be recovered by ChromaDex for Elysium's infringement.

Although Elysium speculates that "the outcome of [the patent misuse] counterclaim may entirely dispose of this case," this is not correct. Def.'s Br. at 16. Patent misuse is an equitable defense to infringement meant to "restrain practices that [do] not in themselves violate any law, but that [draw] anticompetitive strength from the patent right." *B. Braun Med., Inc. v. Abbott Labs.*, 124 F.3d 1419, 1427 (Fed. Cir. 1997). This limitation to asserting infringement is not intended to extend *ad infinitum*; rather, it lasts only until the underlying misuse has been purged. The Federal Circuit has made clear that, at best, patent misuse only results in unenforceability of

⁶ Elysium repeatedly emphasizes that the California court has not dismissed the patent-misuse counterclaim on the pleadings, as if to suggest that the California court has found some merit in the claim. As this Court is well-aware, the fact that Elysium's counterclaim has survived dismissal on the pleadings does not say anything about whether it will ultimately be successful.

the patent until the misuse is purged, and “does not render the patent unenforceable for all time.” *Qualcomm Inc. v. Broadcom Corp.*, 548 F.3d 1004, 1025 (Fed. Cir. 2008).

As a result, there is no potential outcome in the California Litigation that would serve to dispose of the issues that must be resolved in this case. ChromaDex is confident that it will defeat Elysium’s counterclaim on the merits. But even assuming for the sake of argument that Elysium prevailed, that determination will only affect the time period during which ChromaDex may not recover damages—i.e., the time period up to when the alleged misuse was purged. *See U.S. Gypsum Co. v. Nat’l Gypsum Co.*, 352 U.S. 457, 465 (1957) (holding that misuse merely prevents a patentee from recovering damages “accruing during the period of misuse or thereafter until the effects of such misuse have been dissipated, or ‘purged’ ...”). That proceeding will not result in a finding of permanent unenforceability as Elysium hopes, nor could it in light of the well-established law discussed above. Infringement, validity, and damages must still be resolved in this case, and there is no rational basis to postpone the litigation of those issues until the California court reaches a decision.⁷

2. The first-filed rule is inapplicable.

Elysium repeatedly characterizes this case as “parallel” to the California Litigation and argues for that reason that the “first-filed rule” supports a stay. Elysium’s attempt to rely on the first-filed rule fails.

To be considered parallel proceedings for purposes of the first-filed rule, “[t]he one must be materially on all fours with the other.... [T]he issues ‘must have such an identity that a

⁷ Notably, Elysium does not argue that its counterclaim against ChromaDex in the California Litigation would have any impact on the ability of Dartmouth—co-Plaintiff and owner of the asserted patents—to enforce those patents against Elysium and recover damages. Dartmouth’s claims will remain before this Court regardless of the outcome of the California Litigation.

determination in one action leaves little or nothing to be determined in the other.” *Grider v. Keystone Health Plan Cent., Inc.*, 500 F.3d 322, 330 (3d Cir. 2007) (citation omitted). Consequently, this Court has refused to apply the first-filed rule where the earlier filed proceeding would not resolve all of the issues in the Delaware case. *See In re Mobile Telecommunications Techs., LLC*, 243 F. Supp. 3d 478, 485 (D. Del. 2017) (concluding that first-filed rule did not apply where Delaware action involved accused products not at issue in the earlier filed action).

There is no such identity between this case and the California Litigation. This case involves claims that Elysium infringes the '086 and '807 patents. There are no infringement claims in the California Litigation. That action instead involves claims for breach of contract and trade secret misappropriation, among others. The fact that Elysium has asserted a counterclaim for “patent misuse” in the California Litigation does not put it “materially on all fours with” this infringement action. *Grider*, 500 F.3d at 330.⁸ As discussed above, resolution of the counterclaim in the California Litigation, even assuming Elysium is successful, will only impact the time period for which ChromaDex can recover damages. It will not resolve the questions of infringement, validity, or quantum of damages that must be decided in this case. Consequently, the first-filed rule has no application here.

⁸ In light of the lack of relatedness, per D. Del. LR 3.1(b), ChromaDex did not identify the California Litigation as a “related case” in the civil cover sheet. If Elysium believed the civil cover sheet was inaccurate, it was obligated to bring “such missing or inaccurate information to the attention of the Clerk, all parties, and the Court.” D. Del. LR 3.1(a). Elysium never did so, and for good reason; the California Litigation is a separate proceeding between the parties that does not arise from “the same or substantially identical transactions, happenings, or events” as this case. *Id.*

C. A stay would severely prejudice Plaintiffs and provide a tactical advantage to Elysium in light of their competitive relationship.

“It is well established that ‘[c]ourts are generally reluctant to stay proceedings where the parties are direct competitors.’” *ImageVision.Net, Inc. v. Internet Payment Exch., Inc.*, No. CV 12-054-GMS-MPT, 2013 WL 663535, at *6 (D. Del. Feb. 25, 2013), *report and recommendation adopted*, No. CV 12-054-GMS-MPT, 2013 WL 1743854 (D. Del. Apr. 22, 2013). The rationale behind this reluctance is that “there is a reasonable chance that delay in adjudicating the alleged infringement will have outsized consequences to the party asserting infringement has occurred, including the potential for loss of market share and an erosion of goodwill.” *Davol, Inc.*, 2013 WL 3013343, at *3 (D. Del. June 17, 2013) (citing *Neste Oil Oyj v. Dynamic Fuels, LLC*, No. CIV.A. 12-662-GMS, 2013 WL 424754, at *2 (D. Del. Jan. 31, 2013)).

Elysium’s motion to stay should be denied because ChromaDex will suffer significant prejudice if a stay is granted. As detailed in ChromaDex’s pleadings in the California Litigation, Elysium purchased extraordinarily large quantities of ChromaDex’s NR—which it never paid for—to give it runway to develop an alternative source for NR, all with the assistance of confidential and proprietary sales information gleaned from misappropriated ChromaDex documents and former ChromaDex employees that Elysium hired away shortly after it made the massive purchases. Ex. 1 (Fourth Amended Complaint, D.I. 109 ¶¶ 21–51). Elysium has since developed that alternative source for NR, and Elysium’s infringing sales of its consumer product BASIS® therefore compete with ChromaDex’s own consumer product TRU NIAGEN®. By capitalizing on the substantial investments ChromaDex has made in both clearing the necessary regulatory hurdles and advancing the NR market, Elysium now seeks to undermine ChromaDex with ChromaDex’s own proprietary information.

This Court commonly denies requests for stays under such circumstances—i.e., when the parties are direct competitors—to prevent undue prejudice. *See, e.g., Siemens Indus., Inc. v. Westinghouse Air Brake Techs. Corp.*, No. CV 16-284-LPS, 2018 WL 3046511, at *2 (D. Del. June 20, 2018) (holding that the prejudice to the non-movant by granting a stay “would be significant, particularly given that the parties are competitors”); *Courtesy Prod., L.L.C.*, 2015 WL 5145526, at *2 (failing to grant a stay where undue prejudice would result due to plaintiff’s prior licensing agreement with defendant and ongoing competitive relationship); *Cooper Notification, Inc. v. Twitter, Inc.*, No. CIV. 09-865-LPS, 2010 WL 5149351, at *5 (D. Del. Dec. 13, 2010) (finding that undue prejudice would result where parties competed in the market, despite defendants’ contention that the parties compete for only a small percentage of transactions).

The delay resulting from a stay could have substantial adverse consequences for ChromaDex. ChromaDex is an exclusive licensee of the ’086 and ’807 patents covering formulations containing isolated NR, and currently derives a large portion of its income from sales of such products. Prior to Elysium’s development of an alternative source of isolated NR, ChromaDex was the only supplier of that product in the U.S. Ex. 1 (Fourth Amended Complaint, D.I. 109 ¶ 20). Elysium became an infringer when it developed its own, competing supply of NR and sold it as an ingredient in its consumer product BASIS®. A stay delaying the ultimate resolution of ChromaDex’s patent-infringement claims will only serve to allow Elysium to further erode ChromaDex’s sales to, and goodwill with, existing and potential customers. As courts have recognized, such losses are often irreparable. *Butamax Advanced Biofuels LLC v. Gevo, Inc.*, 868 F. Supp. 2d 359, 374 (D. Del. 2012) (“[D]irect competition in a marketplace weighs heavily in favor of a finding of irreparable injury.”) (citation omitted). Furthermore, a

patentee “has an interest in the timely enforcement of its patent rights.” *Ambato Media, LLC v. Clarion Co.*, No. 2:09-CV-242-JRG, 2012 WL 194172, at *1 (E.D. Tex. Jan. 23, 2012). “Staying a case while such harm is ongoing usually prejudices the patentee that seeks timely enforcement of its right to exclude.” *Universal Elecs., Inc. v. Universal Remote Control, Inc.*, 943 F. Supp. 2d 1028, 1034 (C.D. Cal. 2013).

D. The early stage of the case weighs against a stay.

Although in some circumstances a case being in its early stages can weigh in favor of a stay, courts commonly deny stays, even in the earliest stages of the case, where the stay will not simplify the issues to be decided or the stay will substantially prejudice a party. *See, e.g., Davol, Inc.*, 2013 WL 3013343, at *6 (denying a stay where “no scheduling conference ha[d] occurred or been set, no discovery ha[d] taken place, and no trial date ha[d] been scheduled,” undue prejudice existed due to the parties’ relationship as direct competitors, and numerous issues would remain even given a resolution of the IPR in defendant’s favor). In addition, judges in this District often deny stays early in the case where a pending IPR is scheduled to be completed within the next few months. *See, e.g., Universal Secure Registry, LLC v. Apple Inc.*, No. CV 17-585-CFC-SRF, 2018 WL 4486379, at *3 (D. Del. Sept. 19, 2018); *Toshiba Samsung Storage Tech. Korea Corp. v. LG Elecs., Inc.*, No. CV 15-691-LPS-CJB, 2015 WL 7824098, at *1 (D. Del. Dec. 3, 2015); *McRo, Inc. v. Bethesda Softworks LLC*, No. CV 12-1509-LPS-CJB, 2014 WL 1711028, at *3 (D. Del. May 1, 2014); *Nexans Inc. v. Belden Inc.*, No. CV 12-1491-SLR-SRF, 2014 WL 651913, at *4 (D. Del. Feb. 19, 2014), *report and recommendation adopted*, No. CV 12-1491-SLR-SRF, 2014 WL 1232218 (D. Del. Mar. 12, 2014). Where the outcome of a pending IPR will be announced early in the case, the Court has found that any potential benefits of reduced discovery are unlikely to be significant. *See Nexans Inc.*, 2014 WL 651913, at *4

(“The potential benefits of reduced discovery are not likely to be so significant to the parties that they warrant taking this case off of its present scheduling track.”).

The '086 IPR will be decided in January and the California counterclaim will be resolved no later than July. Because this case has not moved beyond the pleadings stage, and with no schedule having yet been entered, any schedule the Court is likely to impose will put the *Markman* hearing well after Elysium's counterclaim is resolved. As a result, any impact the '086 IPR or California Litigation could have on this case will not burden the Court. Moreover, to the extent that the outcomes of either of these proceedings do impact the litigation, the Court can easily tailor the schedule to take those outcomes into account. As a result, Elysium's request to stay all proceedings in this case until resolution of the '086 IPR and California counterclaim is not justified.

V. CONCLUSION

For the foregoing reasons, Elysium's motion to stay should be denied.

Dated: November 21, 2018

YOUNG CONAWAY STARGATT
& TAYLOR LLP

Of Counsel:

Christopher N. Sipes
R. Jason Fowler
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street NW
Washington, DC 20001
(202) 662-6000

James F. Haley, Jr.
HALEY GUILIANO LLP
75 Broad Street, Suite 1000
New York, New York 10004
(646) 973-2500

/s/ Pilar G. Kraman

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*