

**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

**CHROMADEX, INC. AND TRUSTEES OF DARTMOUTH COLLEGE'S
REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR LEAVE TO FILE
A FIVE-PAGE REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR
REARGUMENT OR RECONSIDERATION OF THE REVISED
MEMORANDUM OPINION AND ORDERS ISSUED DECEMBER 17, 2020**

Elysium requests leave to file a 5-page sur-reply if the Court considers the proposed Reply of Plaintiffs ChromaDex, Inc. and Trustees of Dartmouth College (together “ChromaDex”). Opp. to Mot. for Leave at 4. ChromaDex does not oppose that request, in the interest of providing a full presentation of the issues.

In opposing ChromaDex’s motion for leave to file a reply, Elysium argues that it did not disregard that the Amended Agreement clarifies the parties’ original understanding and intentions in the Restated Agreement. *Id.* at 1-2. But the gravamen of Elysium’s contentions opposing reargument is that the Amended Agreement “further revise[d the] sublicensing terms” to confer “retroactive standing” and that *IpVenture, Inc. v. Prostar Computer, Inc.*, 503 F.3d 1324 (Fed. Cir. 2007), “has nothing to do with retroactively granting rights to confer standing.” Opp. to Mot. for Reargument at 7. Elysium thus does disregard that the Amended Agreement not only retroactively amended the Restated Agreement, but also clarified the parties’ original intentions, which should inform the Restated Agreement’s interpretation.¹

Elysium argues that it did not misrepresent the law regarding the implied covenant of good faith and fair dealing, and accuses ChromaDex of ignoring New

¹ Although Elysium argues that ChromaDex does not claim a mistake in or seek reformation of the Restated Agreement, Opp. to Mot. for Reargument at 4-6, ChromaDex showed why *Schwendimann v. Arkwright Advanced Coating, Inc.*, 959 F.3d 1065 (Fed. Cir. 2020), is not limited to those circumstances. Proposed Reply at 2-3.

York cases. Opp. to Mot. for Leave at 2-3. But Elysium overlooks ChromaDex’s argument that Elysium “mischaracterizes the *effect* of the implied covenant ... on the parties’ contractual obligations.” Mot. for Leave at 2 (emphasis added); Proposed Reply at 4-5. ChromaDex, moreover, cited New York cases regarding New York contract law. Mot. for Reargument at 3, 5-6, 8, 10. Furthermore, in explaining why it first raised the implied covenant in opposing reconsideration, Elysium essentially recognizes that the Amended Agreement is “new evidence” that warrants reargument or reconsideration under Rule 7.1.5. Opp. to Mot. for Leave at 2-3.

Finally, Elysium disputes that it has known for weeks that Healthspan was formally dissolved. *Id.* at 3-4. But while ChromaDex notified the Court of Healthspan’s dissolution on January 27, it provided the dissolution documents to Elysium earlier, on January 16, a fact Elysium fails to disclose in its response. Elysium notes its argument that the Healthspan dissolution is irrelevant, but ChromaDex showed that the dissolution is new evidence warranting reargument or reconsideration and that it confirms that ChromaDex is now the only party with any sublicensing rights and has the right to exclude Elysium’s infringement. Proposed Reply at 1, 5. Elysium’s Opposition to ChromaDex’s Motion for Reargument (at 7-9) also incorrectly presumes the continued existence of Healthspan by arguing that “Healthspan still has the right to grant a license to Elysium” and conjuring a hypothetical licensing agreement between Healthspan and Elysium.

Dated: February 19, 2021

Respectfully submitted,

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WORD COUNT CERTIFICATION

The undersigned counsel hereby certifies that ChromaDex, Inc. and Trustees of Dartmouth College’s Reply Brief in Support of Their Motion for Leave to File a Five-Page Reply Brief in Support of Their Motion for Reargument or Reconsideration of the Revised Memorandum Opinion and Orders Issued December 17, 2020 contains 481 words (exclusive of the title, caption, and signature block) in Times New Roman 14-point font.

Dated: February 19, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Adam W. Poff, hereby certify that on February 19, 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:

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I further certify that on February 19, 2021, I caused the foregoing document to be served via electronic mail upon the above-listed counsel.

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