

**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'S  
MOTION FOR SUMMARY JUDGMENT (NO. 4) REGARDING  
ALL CLAIMS ASSERTED BY CHROMADEX (D.I. 204)**

Dated: May 14, 2021

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<b>Abbreviation</b>	<b>Description</b>
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.
Healthspan	Healthspan Research LLC
December 17 Opinion	Revised Memorandum Opinion (D.I. 141)
Restated Exclusive Licensing Agreement	ChromaDex, Inc. - Dartmouth Restated and Amended Exclusive License Agreement, effective March 13, 2017 (D.I. 50, Ex. D)
Amendment to the Restated Exclusive Licensing Agreement	Amendment to the ChromaDex, Inc. - Dartmouth Restated and Amended Exclusive License Agreement, effective March 13, 2017 (D.I. 149, Ex. A)
XSF	Plaintiffs' Counterstatement of Facts in Opposition to Elysium's Motion for Summary Judgment (No. 4) Regarding All Claims Asserted by ChromaDex
Ex.	Exhibit of Declaration of Adam W. Poff in Support of Plaintiffs' Response to Elysium's Motion for Summary Judgment (No. 2) of Non-Infringement of Claim 2 of Each Asserted Patent

Elysium does not dispute the Court’s finding that, when this lawsuit was filed, ChromaDex had standing to pursue claims for infringement prior to March 13, 2017. Nor does Elysium dispute that ChromaDex has standing to pursue claims for infringement following the dissolution of Healthspan on January 15, 2021. Instead, Elysium asks the Court, in its perfunctory motion, to dismiss ChromaDex from the case because ChromaDex cannot prove infringement prior to March 13, 2017. Because Elysium ignores ChromaDex’s claims for infringement following the dissolution of Healthspan, its motion to dismiss ChromaDex from this case should be denied.

### **BACKGROUND**

**I. This Court found that ChromaDex had standing when the lawsuit was filed to allege infringement prior to the acquisition of Healthspan**

In May 2020, Elysium filed a motion to dismiss ChromaDex’s claims, arguing that ChromaDex was not an exclusive licensee and thus lacked constitutional standing to sue along with Dartmouth, the patent owner. D.I. 59, 1-2, 6-15; D.I. 65, 2-9. The Court granted-in-part and denied-in-part Elysium’s motion. D.I. 142. In its December 17 Opinion, the Court stated that the “question is whether [the plaintiff] has shown that it has the right under the patents to exclude *the Defendants* from engaging in the alleged infringing activity” and that an “exclusive licensee lacks standing to sue a party who has the ability to obtain such a license from another party with the right to grant it.” D.I. 141, 8 (quoting *WiAV Sols. LLC v. Motorola, Inc.*,

631 F.3d 1257, 1266-67 (Fed. Cir. 2010) (emphasis in original)). Applying these principles, the Court found that ChromaDex did not have standing to assert the Dartmouth Patents against Elysium for infringement occurring on or after March 13, 2017, as the Restated Exclusive License Agreement gave Healthspan the legal right to grant Elysium a sublicense since that date. D.I. 141, 8-12. The Court, however, expressly declined to dismiss ChromaDex from the case, finding that ChromaDex did have standing to allege infringement prior to the acquisition of Healthspan on March 12, 2017, when there was no evidence suggesting that another party had the ability to give Elysium a license. *Id.* at 12-13.

## **II. ChromaDex has resolved the standing issues identified by the Court**

Following the December 17 Opinion, Plaintiffs made two important changes to address the Court's standing concerns. First, on December 29, 2020, Dartmouth and ChromaDex executed an Amendment to the Restated Exclusive License Agreement, effective as of March 13, 2017. XSF-5. Most importantly, the Amendment adds new Section 2.02(b), providing in part that "an Affiliate of [ChromaDex] shall not grant a sublicense to a third party under Dartmouth Patent Rights without the prior written consent of [ChromaDex] and all of its other Affiliates." *Id.* Second, as Plaintiffs informed the Court on January 27, 2021, Healthspan was dissolved as of January 15, 2021, with ChromaDex assuming all of its assets and liabilities. XSF-6. Under the logic of the December 17 Opinion,

ChromaDex's standing to allege present infringement was restored at a minimum on December 29, 2020 or, in the alternative, no later than January 15, 2021.

Based in part on these factual developments, Plaintiffs moved for reargument or reconsideration pursuant to L.R. 7.1.5 of the December 17 Opinion.<sup>1</sup> D.I. 148, 1-2. On April 27, 2021, the Court denied Plaintiffs' motion, finding that neither the Amendment nor Healthspan's dissolution could be characterized as "not previously obtainable" or "discovered" as required for relief under L.R. 7.1.5. D.I. 181, 2-3. The Court, however, did not substantively address whether the Amendment retroactively restored ChromaDex's standing after March 13, 2017 or whether Healthspan's dissolution prospectively restored ChromaDex's standing after January 15, 2021. *Id.*

### **III. At trial, Plaintiffs will be able to offer proof of damages incurred after Healthspan's dissolution**

Given the close of fact discovery, the current damages expert reports both address infringement through the end of 2020.<sup>2</sup> Ex. 1, 7-15; Ex. 2, 6. The parties have agreed, however, to "produce documents (or supplement interrogatory responses) sufficient to show financial data related to the accused products ... on or

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<sup>1</sup> At the time of Plaintiffs' motion, Healthspan had not yet been dissolved, but ChromaDex informed the Court that it soon would be. D.I. 148, 2, 10.

<sup>2</sup> Elysium's damages expert elected to only address Dartmouth's damages. Ex. 2, 5.



before ... July 31, 2021 (approximately two months before trial),” which will include financial data at least as of June 30, 2021. XSF-7. Because Elysium continues to market and sell the accused infringing product, Plaintiffs will at least be able to show at trial damages after Healthspan’s January 15, 2021 dissolution, should the Court choose to include that time period in the currently scheduled trial.<sup>3</sup> XSF-8; *see also generally* Ex. 1.

### **ARGUMENT**

To justify ChromaDex’s dismissal from this case, Elysium could prove (1) that ChromaDex lacked initial standing or (2) that ChromaDex cannot pursue remedies during any time period in which it has standing to allege infringement. But Elysium does not dispute (let alone attempt to prove) either. Specifically, Elysium does not address or dispute this Court’s prior ruling that ChromaDex had initial standing when this lawsuit was filed, nor does it address or dispute that ChromaDex has standing to pursue claims for infringement following Healthspan’s January 15, 2021 dissolution. Thus, its motion for summary judgment must be denied.

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<sup>3</sup> If the Court decides to try the damages for infringement occurring after the close of fact discovery in this action, then Elysium will have to supplement its expert report to address damages owed to ChromaDex. If the Court determines that this damages period should not be considered in this action, ChromaDex and Dartmouth will consider filing a new proceeding covering that time period.

**I. It is undisputed that ChromaDex had standing when this suit was filed**

This Court has already determined that ChromaDex had standing when Plaintiffs filed their complaint on September 17, 2018. As described above, in its December 17 Opinion, the Court recognized that ChromaDex had standing when filing suit on September 17, 2018 to allege infringement and damages between July 13, 2012 and March 12, 2017—whether or not it was also an exclusive licensee on September 17, 2018. In fact, ChromaDex’s possession of initial standing is undisputed. *See* D.I. 204, 1-3.

**II. It is undisputed that ChromaDex has standing to allege infringement following the dissolution of Healthspan on January 15, 2021**

Elysium argues that ChromaDex should be dismissed from the case because it cannot prove infringement before March 13, 2017. But this is not sufficient to warrant outright dismissal, as there is another time period in which ChromaDex has standing to allege infringement. Specifically, Elysium fails to acknowledge, much less dispute, that ChromaDex has standing to allege infringement at least after Healthspan’s dissolution. Since January 15, 2021, ChromaDex has occupied the same position it did between July 13, 2012 and March 12, 2017, a time period the Court found ChromaDex to have standing because there was no other party that could grant a sublicense to Elysium. D.I. 141, 12. Now, like then, no other party exists that has the legal right to grant Elysium a sublicense in light of Healthspan’s dissolution. And because ChromaDex can establish it is entitled to damages and

injunctive relief as a result of Elysium's infringement during this time period, *supra* p. 3-4, Elysium's motion for summary judgment must be denied.

Elysium tries to skirt this issue by arguing that the Court's December 17 Opinion precludes ChromaDex from asserting infringement since March 13, 2017, regardless of any change in circumstance. But that cannot be the case. As the Court's December 17 Opinion makes clear, whether ChromaDex can allege infringement depends on the circumstances present during the particular time period at issue. The Court found that prior to the acquisition of Healthspan on March 13, 2017, no other party could grant a sublicense to Elysium and therefore ChromaDex had standing. On the other hand, the Court found that ChromaDex did not have standing after the acquisition of Healthspan on March 13, 2017 because Healthspan had a legal right to grant a sublicense to Elysium. Healthspan remained in existence when the Court issued the December 17 Opinion, and there is no suggestion that the Court was addressing anything other than the facts as they existed at that time. Further, the Court's order on the motion for reargument did not consider the effect of Healthspan's dissolution due to the nature of the legal standard. Thus, the Court has never actually decided whether ChromaDex has standing to allege infringement following the dissolution of Healthspan, but based on the facts and law at this time, ChromaDex does have standing to pursue remedies for infringement occurring after January 15, 2021. *Hamilton v. Leavy*, 322 F.3d 776, 786-87 (3d Cir. 2003); *Ocean*

*City Costa Rica Inv. Grp., LLC v. Camaronal Dev. Grp., LLC*, 571 F. App'x 122, 126-27 (3d Cir. 2014); *see also Toro Co. v. White Consol. Indus., Inc.*, 383 F.3d 1326, 1335 (Fed. Cir. 2005). For this reason, Elysium's motion should be denied.<sup>4</sup>

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<sup>4</sup> Because it is not necessary for denial of this motion, Plaintiffs have not addressed the effect of the Amendment to the Restated Exclusive Licensing Agreement on the time periods during which ChromaDex has standing to allege infringement and damages; however, Plaintiffs preserve all arguments concerning the Amendment.

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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 1,535 words (excluding the title, caption, tables, and signature block).

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**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:

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