

Exhibit A

**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 REARGUMENT
OR RECONSIDERATION OF THE REVISED MEMORANDUM OPINION
AND ORDERS ISSUED DECEMBER 17, 2020**

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LIST OF ABBREVIATIONS

- **“The Amended Agreement”** refers to the Amendment to the ChromaDex, Inc. – Dartmouth Restated and Amended Exclusive License Agreement, effective March 13, 2017, and executed on December 29, 2020 (D.I. 149-1).
- **“The Asserted Patents”** refers to U.S. Patent Nos. 8,383,086 and 8,197,807.
- **“ChromaDex”** refers to Plaintiff ChromaDex, Inc.
- **“Dartmouth”** refers to Plaintiff Trustees of Dartmouth College.
- **“Elysium”** refers to Defendant Elysium Health, Inc.
- **“Ex.”** refers to exhibits to the Declaration of Adam W. Poff in Support of Plaintiffs’ Motion for Reargument or Reconsideration of the Revised Memorandum Opinion and Orders Issued December 17, 2020 (D.I. 149).
- **“Mot.”** refers to ChromaDex, Inc. and Trustees of Dartmouth College’s Motion for Reargument or Reconsideration of the Revised Memorandum Opinion and Orders Issued December 17, 2020 (D.I. 148).
- **“Op.”** refers to the Court’s Revised Memorandum Opinion issued December 17, 2020 (D.I. 141).
- **“Opp.”** refers to Elysium’s Opposition to Plaintiffs’ Motion for Reargument or Reconsideration of the Revised Memorandum Opinion and Orders Issued December 17, 2020 (D.I. 160).
- **“Original Agreement”** refers to the ChromaDex, Inc. – Dartmouth Exclusive License Agreement, effective July 13, 2012 (D.I. 50, Ex. C).
- **“The Restated Agreement”** refers to the Restated and Amended Exclusive License Agreement between ChromaDex and Dartmouth, effective March 13, 2017 (D.I. 50, Ex. D).

Elysium’s Opposition rests on numerous mischaracterizations of fact and law.

I. Elysium Mischaracterizes the Reconsideration Standard

Elysium dismisses the Amended Agreement and Healthspan dissolution because they occurred after the Court’s decision. Opp. at 2-3, 9-10. But such evidence meets the reargument standard because it is “new factual matter[] not previously obtainable” that “ha[s] been discovered since the issue was submitted to the Court.” *Brambles USA, Inc. v. Blocker*, 735 F. Supp. 1239, 1241 (D. Del. 1990).

II. Elysium Mischaracterizes the Amended Agreement as an Impermissible Retroactive Agreement

Elysium argues that the Amended Agreement is a “nunc pro tunc” agreement that cannot confer retroactive standing. Opp. at 3-7 (citing *Enzo APA & Son, Inc. v. Geapag A.G.*, 134 F.3d 1090 (Fed. Cir. 1998); *Alps South, LLC v. Ohio Willow Wood Co.*, 787 F.3d 1379 (Fed. Cir. 2015)). As the Court explained, however, “Elysium treats the [September 2019 Restated Agreement] as effective as of March 13, 2017” and “argues that ChromaDex therefore lacked standing to bring this case in 2018.” Op. at 2 (citing D.I. 59 at 4-6). The Court agreed that the Restated Agreement is “effective as of March 13, 2017.” *Id.* Having argued that the Restated Agreement is retroactive to March 13, 2017, and purportedly defeats ChromaDex’s standing, Elysium should not be permitted to deny that the Amended Agreement is also retroactive to March 13, 2017, and confirms ChromaDex’s standing. Furthermore, even if the Court accepted Elysium’s new position that post-complaint agreements

cannot retroactively amend licensing rights and affect standing, ChromaDex would still have standing because the operative agreement when the Complaint was filed would have been the Original Agreement, and ChromaDex was indisputably an exclusive licensee under the Original Agreement. *Id.* at 12.

Enzo and *Alps South* are inapposite. They held that retroactive agreements granting all substantial rights to the asserted patents could not confer standing on plaintiffs that had failed to join the patent owners as co-plaintiffs because that would be an end run around the prohibition on plaintiffs without all substantial rights suing alone and would “risk multiple litigation[s].” *Enzo*, 134 F.3d at 1093-94; *see Alps South*, 787 F.3d at 1384-86. Here, by contrast, Dartmouth, the patent owner, has been a co-plaintiff since the filing of the Complaint, and there is no risk of multiple litigations if ChromaDex remains a co-plaintiff.

In addition to retroactively amending the Restated Agreement, the Amended Agreement explains that “[ChromaDex] and Healthspan understand, and ***have always understood***, their exclusive rights under the [Restated] Agreement to require that they act in unison with respect to the Dartmouth Patent Rights and not adversely to the other” and “to preclude either [of them] granting a sublicense ... without the consent of the other.” Amendment (Ex. A) at 1-2 (emphasis added).

Elysium mischaracterizes *Schwendimann v. Arkwright Advanced Coating, Inc.*, 959 F.3d 1065 (Fed. Cir. 2020), and *IpVenture, Inc. v. Prostar Computer, Inc.*,

503 F.3d 1324 (Fed. Cir. 2007), which held that a post-complaint agreement that clarifies the parties' original intent in a pre-complaint agreement can confirm patent rights and standing as of the filing date. Elysium argues that *Schwendimann* is limited to contract reformation, Opp. at 4-6, but the purpose of reformation in *Schwendimann* was the same as ChromaDex and Dartmouth's purpose in the Amended Agreement: to clarify the parties' original intent in their prior agreement.

Elysium mischaracterizes *IpVenture* as establishing only that "an agreement to assign is not a present assignment, and subsequent evidence ... can confirm that an agreement to assign never matured into a present assignment." *Id.* at 6. But *IpVenture* is broader, recognizing "uncertainty arising from the language of the [pre-suit] agreement" and holding that the district court "should have considered" a post-suit agreement that "remove[s] any [such] uncertainty." 503 F.3d at 1327.

III. Elysium Mischaracterizes the Caselaw Regarding Exclusive Licensees

Elysium is incorrect that, under the Amended Agreement, both ChromaDex and Healthspan have "the right to grant a license to Elysium" and that "it cannot be said that either one received Dartmouth's promise of exclusionary rights." Opp. at 8. As this Court explained, *WiAV Solutions LLC v. Motorola, Inc.*, 631 F.3d 1257 (Fed. Cir. 2010), held that a plaintiff has exclusionary rights if "it has the right under the patents to exclude the Defendants from engaging in the alleged infringing activity," which requires that the Defendant does not have "the ability to obtain [a

license] from another party with the right to grant it.” Op. at 8 (quoting *WiAV*, 631 F.3d at 1266-67). The Restated Agreement, as confirmed by the Recitals of the Amended Agreement, “preclude[s]” ChromaDex and Healthspan from “granting a sublicense to the Dartmouth Patent Rights without the consent of the other.” Amendment at 1-2. Healthspan never had the “right to grant” Elysium a license without ChromaDex’s consent, and thus ChromaDex had the right “to exclude” Elysium’s infringement. Op. at 8 (quoting *WiAV*, 631 F.3d at 1266-67).

Elysium argues that the “implied covenant of good faith and fair dealing” constrains ChromaDex’s discretion to reject a sublicense. Opp. at 8-9. It conjures a hypothetical in which “Healthspan and Elysium reached agreement on economic terms highly favorable to Healthspan,” and asserts that “ChromaDex could not, without violating its implied covenant, refuse its consent” to such an agreement. *Id.*

Elysium’s hypothetical is speculative and fanciful. It is undisputed that Healthspan would never have granted a sublicense to Elysium. D.I. 62 ¶ 7. And even if Healthspan were inclined to do so, ChromaDex is managed “in the interests of the ChromaDex corporate family as a whole and its shareholders,” D.I. 62 ¶ 6, and the rational pursuit of those interests—consistent with the covenant of good faith and fair dealing—would legally foreclose ChromaDex’s consent to such a sublicense.

Courts have found standing based on similar license agreements. For example, a plaintiff was found to be an exclusive licensee where the license agreement granted

a sublicensing right to the plaintiff and “any of its related entities” and the evidence showed that “there must be unanimous agreement between [the patentee, the plaintiff, and the related entities] before any other license ... could be granted.” *Tinnus Enterprises, LLC v. Telebrands Corp.*, No. 6:15-CV-00551-RWS, 2018 WL 4997909, at *4-6 (E.D. Tex. Sept. 11, 2018), *report and recommendation adopted*, No. 6:15-CV-00551-RWS, 2018 WL 5629622 (E.D. Tex. Oct. 31, 2018). And a plaintiff was found to be an exclusive licensee where the patentee could grant licenses in settlement of litigation only with the plaintiff’s consent, which could “not be unreasonably withheld”—a greater restriction on the ability to withhold consent than the “promise not to act arbitrarily or irrationally” under the “implied covenant of good faith and fair dealing.” *Blue Gentian, LLC v. Telebrands Corp.*, No. CIV. 13-4627 FSH, 2014 WL 2094089, at *12-13 (D.N.J. May 20, 2014); *Opp.* at 8-9.

Finally, in light of the January 2021 dissolution of Healthspan (D.I. 159), ChromaDex is now the only party with any sublicensing rights under the Amended Agreement. This confirms that ChromaDex “has the right under the patents to exclude” Elysium’s infringement and thus is an exclusive licensee with standing to sue. *Op.* at 8 (quoting *WiAV*, 631 F.3d at 1266-67).

For the foregoing reasons and those in its Motion, ChromaDex respectfully requests that the Court grant its motion for reargument or reconsideration.

Dated: February 8, 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 Reargument or Reconsideration of the Revised Memorandum Opinion and Orders Issued December 17, 2020 contains 1205 words (exclusive of the title, caption, Table of Contents, Table of Authorities, List of Abbreviations, and signature block) in Times New Roman 14-point font.

Dated: February 8, 2021

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