

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CHROMADEX, INC. and TRUSTEES OF)
DARTMOUTH COLLEGE,)
)
Plaintiffs,)
)
v.)
)
ELYSIUM HEALTH, INC.,)
)
Defendant.)

**REDACTED PUBLIC
VERSION**

C.A. No. 18-1434-CFC-JLH

**LETTER TO THE HONORABLE JENNIFER L. HALL FROM ANDREW C. MAYO
REGARDING MOTION TO STRIKE PORTIONS OF DAMAGES EXPERT REPORT**

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Attorneys for Defendant

Dated: February 23, 2021

Dear Judge Hall:

On December 17, 2020, Judge Connolly entered Orders (the “December Orders”) that: (1) dismissed “claims of infringement brought by ChromaDex Inc. for activities alleged to have occurred on or after March 13, 2017” (D.I. 142); and (2) denied Plaintiffs’ motion to add Healthspan Research LLC, ChromaDex’s sister corporation, as a plaintiff (D.I. 143). Judge Connolly ruled that ChromaDex and Healthspan lacked constitutional standing to seek damages for alleged infringement by Elysium after that date. D.I. 141 (Memorandum Opinion). Plaintiffs have filed a motion seeking reargument, D.I. 148, and Elysium has opposed, D.I. 160. *See* L.R. 7.1.5 (“Motions for reargument shall be sparingly granted.”).

In the meantime, Plaintiffs—flouting the December Orders—have exercised extrajudicial self-help by continuing to litigate this case as if ChromaDex’s claim for patent damages was not dismissed. On February 9, 2021, Plaintiffs served a 156-page damages expert report of Lance E. Gunderson (the “Gunderson Report”, attached (without exhibits) as Ex. A). The vast majority of this report sets forth opinions on damages allegedly sustained by ChromaDex for alleged infringement occurring after March 13, 2017, despite ChromaDex’s lack of standing.¹ Elysium is a small consumer products company and, absent relief, it will be forced to incur the substantial cost of preparing a rebuttal expert report by March 9 and thereafter deposing Plaintiffs’ expert and defending its own expert on claims Judge Connolly *has dismissed from the case*.

Elysium seeks an order: (i) striking damages opinions offered by Plaintiffs in violation of the December Orders, (ii) requiring Plaintiffs to serve a corrected report in compliance with the December Orders, and (iii) setting a schedule for Elysium to respond to the corrected report. Alternatively, Elysium seeks relief from expert discovery directed to the dismissed damages claims, including service of its responsive report on March 9, unless and until Judge Connolly grants the motion for reargument and vacates the December Orders, at which time the Court can schedule expert discovery on those issues.²

Argument

Plaintiffs’ submission of an expert report regarding issues that Judge Connolly has already dismissed from this case violates the December Orders, and those portions of the report should be stricken. *See, e.g. Krys v. Sugrue*, 2012 U.S. Dist. LEXIS 185904, at *44 (S.D.N.Y. Nov. 29, 2012) (“The expert opinions here, to the extent they evaluate the merits of dismissed claims, are simply seeking to relitigate adverse determinations by the court in this case.”); *Price v. Fox Entm’t Grp., Inc.*, 499 F. Supp. 2d 382, 388 (S.D.N.Y. 2007) (“Because striking similarity

¹ The expert report addresses lost profits and reasonable royalty damages for infringement for the period July 2017 to December 2020. *See* Ex. A at 7, 11, 15. Plaintiffs do not allege that Elysium engaged in any acts of infringement prior to March 13, 2017. Since ChromaDex lacks standing to sue for infringement after that date, the only remaining claims for damages are claims of Dartmouth.

² During the meet and confer process, Elysium explored whether Plaintiffs would agree to this relief. Plaintiffs stated, however, that they would not agree to a change to the schedule that might conceivably impact the current trial date of September 2021.

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is no longer an issue in the case, [the expert's] testimony on striking similarity is unnecessary..."); *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993) ("Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.").

The Gunderson Report includes seven opinions on damages for alleged infringement beginning in July 2017, and on ChromaDex's claim for injunctive relief. The first six categories concern remedies that are precluded under the December Orders³:

- (1) lost profits damages allegedly due ChromaDex regarding sales of its Tru Niagen product beginning in July 2017 (*e.g.* Ex. A. at 7-8, 69-70; *see also id.* at 31-69);
- (2) lost profits damages allegedly due ChromaDex regarding sales of its Niagen ingredient product beginning in July 2017 (*e.g. id.* at 8-9, 70-72; *see also id.* at 31-69);
- (3) reasonable royalty damages allegedly due ChromaDex on Elysium's sales beginning in July 2017 (*e.g. id.* at 11-13, 139-146);
- (4) hybrid lost profits/reasonable royalty damages allegedly due ChromaDex beginning in July 2017 (*e.g. id.* at 10-11, 146-147);
- (5) injunctive relief to which ChromaDex is allegedly entitled (*e.g. id.* at 154-156);⁴
- (6) "Dartmouth sublicense royalty on ChromaDex reasonable royalty" beginning in July 2017 (*e.g. id.* at 11-13, 148-151); and
- (7) reasonable royalty damages allegedly due Dartmouth beginning in July 2017 (*e.g. id.* at 14-15, 151-153).

Categories 1-5 claim damages (in the form of lost profits or a royalty) or injunctive relief as remedies to which ChromaDex allegedly is entitled based on Elysium's activities after March 13, 2017, in other words, during a time when ChromaDex lacked constitutional standing to sue Elysium for patent infringement. Such claims are impermissible under the December Orders. In addition, the lost profits claims seek damages not only for lost sales of ChromaDex, but also on account of sales allegedly lost by ChromaDex's sister corporation Healthspan, even though Judge Connolly denied Plaintiffs' motion to join Healthspan as a party.⁵

In category 6, Plaintiffs attempt to skirt the Court's December Orders by claiming ChromaDex damages in the guise of a Dartmouth royalty. Here, Plaintiffs' expert first calculates

³ Elysium does not challenge category 7, which seeks reasonable royalty damages on behalf of the patent owner and co-plaintiff Dartmouth.

⁴ While the Gunderson Report does not confine opinions on injunctive relief solely to ChromaDex, Plaintiffs' counsel confirmed in the meet and confer that Plaintiffs are not seeking injunctive relief on Dartmouth's behalf. Dartmouth is the patent owner and on that basis has standing to sue, but it sells no products practicing the patents and does not compete with Elysium.

⁵ *See* Ex. B., Fried Depo. Tr. at 50-51 [REDACTED]

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a reasonable royalty allegedly due to **ChromaDex** based on a hypothetical negotiation between ChromaDex and Elysium in July 2017 (*e.g.* Ex. A at 12, 148-149). He then gives Dartmouth a cut of the royalty damages **ChromaDex** allegedly would have received (*e.g. id.* at 12-13, 149-150). This transparent attempt to circumvent the December Orders is unfounded in law. Under Federal Circuit law, reasonable royalties are “based upon a hypothetical negotiation between **the patentee** and the infringer when the infringement began.” *Unisplay, S.A. v. Am. Elec. Sign Co.*, 69 F.3d 512, 517 (Fed. Cir. 1995) (emphasis added). In the December Orders, Judge Connolly found that ChromaDex did not qualify as a patentee as of the July 2017 hypothetical negotiation date, because it lacked exclusionary rights in the patent. D.I. 141 at 5-6. Dartmouth, not ChromaDex, would have been the hypothetical negotiator in a *Georgia-Pacific* reasonable royalty analysis. Category 6 of the Gunderson Report should be stricken because it improperly makes ChromaDex the hypothetical licensor, contrary to Judge Connolly’s finding that ChromaDex lacks exclusionary rights to the patents.

Plaintiffs’ filing of a motion for reargument does not excuse their non-compliance with Judge Connolly’s December Orders. If Plaintiffs wanted to litigate this case and proceed with expert discovery as if the December Orders were not in force, they could have filed a motion to stay the December Orders pending decision on their motion for reargument. *See, e.g. W.L. Gore & Assocs., Inc. v. Totes, Inc.*, 788 F. Supp. 800, 815 (D. Del. 1992) (denying motion to stay pending reconsideration). They did not. If Plaintiffs wished to conduct expert discovery on damages with the benefit of a ruling on their motion for reargument, they could have filed a motion to stay expert discovery on damages pending a decision. Again, they did not. Instead, Plaintiffs simply chose to ignore the December Orders, forcing Elysium to seek their enforcement.

For these reasons, the Court should enforce Judge Connolly’s December Orders and strike the opinions in Categories 1-6 of the Gunderson report. Elysium should not be required to proceed with costly expert discovery on issues that Judge Connolly removed from the case more than two months ago. The Court should order Plaintiffs to serve a corrected damages report that removes ChromaDex and Healthspan’s damages claims, and it should set a supplemental schedule for expert discovery on damages to provide Elysium time to address Dartmouth’s corrected report.

In the alternative, the Court should order that damages expert discovery proceed under the existing schedule only on Category 7 of the Gunderson report: Dartmouth’s claim for a reasonable royalty. At a minimum, Elysium respectfully submits that the Court should stay expert discovery on Categories 1-6 of the Gunderson Report, and should thereafter, in the event that Judge Connolly grants Plaintiffs’ motion for reargument, set a new schedule for a supplemental expert damages report, and for expert depositions, limited to those six categories.

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Respectfully,

/s/ Andrew C. Mayo

Andrew C. Mayo (#5207)

ACM: nml
Attachments

cc: All Counsel of Record (via electronic mail; w/attachments)

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ORDER

Having reviewed Defendant Elysium Health, Inc.’s (“Elysium”) Motion to Strike, it is hereby ORDERED, this _____ day of March, 2021, that:

- (i) Plaintiffs’ expert report of Lance E. Gunderson is hereby stricken;
- (ii) Within 14 days, Plaintiffs shall serve a corrected expert report on damages in compliance with Judge Connolly’s Orders in this case (D.I. 142, 143), addressing only category 7 of Mr. Gunderson’s current report as described in Elysium’s Motion to Strike;
- (iii) Elysium shall serve its rebuttal expert report on damages within 21 days of service of the corrected Gunderson report; and
- (iv) The parties shall thereafter meet and confer and provide an updated proposed schedule for the remaining case deadlines in this matter.

[Alternatively:

- (i) Elysium shall serve a rebuttal expert report in response to Category 7 of the expert report of Lance E. Gunderson (as described in Elysium's Motion to Strike) in accordance with the current schedule, and shall serve a supplemental expert report on damages in response to those portions of the Gunderson expert report directed to the dismissed damages claims, categories 1-6 of his current report, within 21 days of an Order vacating the Court's Orders of December 17, 2020 (D.I. 142, 143); and
- (ii) The parties shall thereafter meet and confer and provide an updated proposed schedule for the remaining case deadlines in this matter.]

United States Magistrate Judge