

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CHROMADEx, INC. and TRUSTEES)	
OF DARTMOUTH COLLEGE,)	
)	
Plaintiffs,)	C.A. No. 18-1434-CFC
)	
v.)	
)	
ELYSIUM HEALTH, INC.,)	
)	
Defendant.)	
)	

**OPPOSITION TO PLAINTIFFS’ MOTION FOR LEAVE TO FILE A
REPLY BRIEF IN CONNECTION WITH PLAINTIFFS’ MOTION FOR
REARGUMENT**

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This Court's rules recognize that reargument is an extraordinary remedy. Local Rule 7.1.5 ("Motions for reargument shall be sparingly granted."). The rules give the moving party one shot to make its best case, sharply limit page counts, emphasize the motion must "briefly and distinctly state [its] grounds", and give the party defending the Court's order the last word. *Id.* Plaintiffs seek to upend that design, asking that this Court grant them twice the briefing and 50% more pages than Elysium, and the last word. The Court should reject this attempt to circumvent the rule, and should reject the proposed reply.

Plaintiffs' motion is based on supposed "factual and legal mischaracterizations" in Elysium's brief. Such accusations—that counsel has not complied with their duty of candor to this Court—are serious, and should not be deployed tactically or lightly. Regrettably, Plaintiffs have done that here. Their bare-bones two-page motion is entirely conclusory, and its assertions of mischaracterization are easily disproven. In truth, Plaintiffs' assertions are a pretext to circumvent the local rules in order to make additional legal arguments in a reply brief.

Plaintiffs' motion identifies three supposed "mischaracterizations." All are spurious.

First, they accuse Elysium of "mischaracterizing the Amended Agreement" by "disregarding that it clarifies the parties' original understanding and intentions

about licensing rights.” Mot. at 2. Elysium’s brief did not “disregard” this assertion: it hit it head on. Elysium argued it was not credible that Plaintiffs have now twice told this Court that each of two separate amendments—one in September 2019 and another in December 2020—restates their supposed original intent. Oppo. Br. at 8. Elysium noted that Plaintiffs have not sought reformation of their prior agreements, nor have they asserted any drafting error or mistake. On the contrary, Plaintiffs state that the earlier, September 2019 Restatement accurately reflected their intent. *Id.* at 5-6. As is apparent, Plaintiffs’ accusation is just an excuse to reargue about case law, not to correct any purported “mischaracterization.”

Second, Plaintiffs accuse Elysium of “rais[ing] for the first time and mischaracteriz[ing] the effect of the implied covenant of good faith and fair dealing.” There was no mischaracterization. Elysium’s position is well supported by governing New York case law and reasoned argument. Oppo. Br. at 7-9. Plaintiffs nowhere demonstrate or even argue that Elysium has misstated the holding or reasoning of those cases. Tellingly, in neither their motion nor their reply do Plaintiffs address those (or any other) New York cases. In their proposed Reply, Plaintiffs do not seek to correct “misrepresentations;” they seek to present additional arguments.

Plaintiffs' assertion that Elysium's implied covenant argument was raised for the "first time" in Elysium's opposition brief is meritless. Elysium obviously could not have argued earlier why Plaintiffs' December 2020 Amendment was insufficient to confer standing. Plaintiffs did not execute that agreement until *the day they filed their motion for reargument*. A Rule 7.1.5 motion ordinarily requires a showing of intervening law or newly discovered evidence. Of necessity, the non-moving party's response to new law or new evidence will require making arguments for the "first time." Adopting Plaintiffs' logic would eviscerate Rule 7.1.5's limits on briefing.

Third, Plaintiffs accuse Elysium of "bas[ing] certain of its arguments on the continued existence of Healthspan LLC when it has known for weeks that Healthspan LLC was formally dissolved." That accusation is demonstrably false. Elysium's brief (at 10, n.5) expressly noted Plaintiffs' filing of its January 27 "notice" regarding Healthspan's alleged dissolution (Dkt. 159), thus ensuring that the Court was aware of that development. Elysium argued that Plaintiffs' eleventh-hour "notice" was untimely and an improper attempt to supplement the record after the fact. According to Plaintiffs' notice, the dissolution did not occur until January 15, 2021, a full month after the Court ruled on standing, and more than two weeks after the deadline for Plaintiffs to seek reargument. Elysium also

argued why Healthspan's eventual dissolution was legally irrelevant, even if the record could be supplemented post hoc to reflect it. Oppo. Br. at 10.

This Court should not reward Plaintiffs' baseless attacks on opposing counsel's professional character and candor, particularly as part of a thinly-disguised attempt to rationalize a reply brief despite the strictures of Rule 7.1.5. If the Court is inclined to consider their reply, Elysium respectfully requests that the Court grant Elysium leave to file a 5-page surreply. Rule 7.1.5 is designed to give both sides equal briefing and equal pages, and to allow the party defending the Court's decision to have the final word.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for leave to file a reply.

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