

**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' OPENING BRIEF IN SUPPORT OF THEIR
MOTION TO LIFT STAY**

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs ChromaDex, Inc. and Trustees of Dartmouth College seek an order lifting the stay entered in this patent infringement case on June 19, 2019. (D.I. 27)

The circumstances that led the Court to stay this case—namely that Defendant’s patent misuse defense would soon be adjudicated in a separate California trade secret action between the parties (the “California Litigation”)—have changed materially. In the context of summary judgment, the California district court recently vacated the October 22, 2019 trial date and in so doing raised questions about the merits of the patent misuse defense, which was asserted in that case as a counterclaim. The court has ordered supplemental summary judgment briefing on, among other things, whether any recovery on the patent misuse claim is still available. The court has also rescheduled the summary judgment hearing for January 2020 and stated that it will only set a new trial date after it rules on the summary judgment motions. As a result, the patent misuse claim will either be dismissed on summary judgment or tried at some much later, undetermined date. Either way, this change in circumstances creates significantly more delay than what was contemplated when the Court entered a stay in this case—which was filed more than a year ago on September 17, 2018—and substantially increases the prejudice to Plaintiffs as a result. For these reasons, and as detailed below,

Plaintiffs respectfully request that the Court lift the stay and schedule a case management conference at the Court's earliest convenience.

II. STATEMENT OF FACTS

A. Plaintiffs' Patents and Commercialization of NR

Founded in 1999, ChromaDex is a science-based nutraceutical company devoted to improving the way people age. ChromaDex's current business is focused on nicotinamide riboside ("NR"), a novel form of vitamin B3 clinically proven to increase nicotinamide adenine dinucleotide ("NAD⁺"), a key component of cellular health. NAD⁺ is essential for life in all organisms, but NAD⁺ levels decrease as people age and as a result of physiological stresses.

The patents-in-suit are directed to formulations comprising isolated NR, and are the result of the work and discoveries of Dr. Charles M. Brenner, a former professor of Genetics and Biochemistry at Dartmouth Medical School. While at Dartmouth Dr. Brenner discovered that isolated NR could be formulated for oral administration and administered more effectively than other forms of Vitamin B3, while also avoiding undesirable side effects. ChromaDex licensed the patents-in-suit from Dartmouth in July 2012, and since that time the company has spent years and tens of millions of dollars to commercialize NR and ensure that it is safe for human consumption. As a result of these efforts, ChromaDex became the first company to successfully commercialize NR, and ChromaDex's initial NR

product—sold under the trade name “NIAGEN[®]”—has received two New Dietary Ingredient Notifications (“NDIs”) from the U.S. Food and Drug Administration (“FDA”), a determination that NIAGEN is Generally Recognized As Safe (“GRAS”), and a positive opinion from the European Food Safety Authority.

B. ChromaDex’s Supply of NR to Elysium

ChromaDex first sold NIAGEN in 2013, and in 2014 began to supply NR in commercial quantities to companies marketing direct-to-consumer products. One of those companies was Defendant Elysium Health, Inc. (“Elysium”), a Manhattan-based startup founded in 2013 by a stock broker and a venture capitalist. (Ex. A at 9:15–23.) In 2015, Elysium began selling its only product, a dietary supplement called “BASIS[®]” that contains NR and another ingredient called pterostilbene (“PT”). (*Id.* at 9:21–23, 14:7–17.) Until June 2016, Elysium sourced all of its NR and PT from ChromaDex.

C. Elysium’s Efforts to Obtain an Alternative Supply of NR Through Theft of Trade Secrets, Breach of Contract, and Patent Infringement

Beginning in 2016, Elysium’s principals got greedy, and developed a plan to seize ChromaDex’s intellectual property covering NR and either subvert ChromaDex’s supply of NR or develop a competing and infringing NR supply. Elysium began its plot by luring ChromaDex’s Vice President of Business Development Mark Morris from ChromaDex to Elysium with promises of future

employment and stock bonuses. (*See* Ex. B at 360–62.) On May 29, 2016, during a conversation about his potential employment, Morris divulged ChromaDex trade secrets to an Elysium executive. (Ex. B at 367–68.) Over the next month and a half, Elysium asked Morris for additional ChromaDex trade secrets and confidential information and schemed with Morris to develop a “game changing” patent strategy. (Ex. N at 455.) As described by Morris, the strategy was straightforward: “make [ChromaDex’s] worst nightmares come true!” and “get rid of the scumbags holding this magnificent technology.” (Ex. B at 376.) Morris, in his own words, wanted to “destroy [ChromaDex]!” (*Id.* at 393.)

As part of this plan to “destroy [ChromaDex]!,” and despite still being a ChromaDex executive, Morris began helping Elysium obtain a new source of NR, including by attempting to steal away ChromaDex’s exclusive NR manufacturer, and in the alternative by developing a strategy whereby Elysium would jumpstart its production of NR by copying ChromaDex’s manufacturing process. (*See, e.g.*, Ex. C.) To that end, Morris provided Elysium with a list of potential NR manufacturers and acted as Elysium’s inside agent as it sought to obtain a stockpile of NR on credit from ChromaDex to use as a bridge until it had a new source of NR. (Ex. D at 413.) On June 30, 2016, Elysium ordered large quantities of NR and PT to give it a stockpile that would last it for many months while it sought its new NR source. At the same time, Elysium intended to put enormous financial pressure

on ChromaDex by not paying for the \$3 million worth of ingredients it had ordered.

On August 10—the day Elysium received shipment confirmation for the last of its large orders—Elysium sent ChromaDex an email accusing it of breaching the NR supply agreement and thereafter withheld payment for the large orders it had placed. (*See e.g.*, Ex. E at 449–50.) By the end of 2016, with Elysium still refusing to pay, ChromaDex terminated its supply agreements with Elysium effective February 3, 2017. (Ex. F at 457.)

At the same time that it obtained this large quantity of ingredients (for which *to this day* it has not paid a dime), Elysium attempted to undermine ChromaDex’s exclusive relationship with Dartmouth in an effort to obtain rights to the patents-in-suit. As part of this underhanded effort, Elysium’s agents secretly visited Dartmouth and attempted to convince Dartmouth to terminate its exclusive license to ChromaDex. In so doing, Elysium made multiple misrepresentations about ChromaDex to Dartmouth employees, including that ChromaDex was insolvent, had serious problems with the U.S. Securities and Exchange Commission, and was in material breach of its license agreement with Dartmouth. (Ex. G at 427). With the exception of the assertions that ChromaDex was in financial distress (which resulted from Elysium’s failure to pay for the NR it had ordered), none of these assertions were true, as Elysium knew. Elysium also sought to cut ChromaDex off

from its exclusive contract NR manufacturer, W.R. Grace & Co. (“Grace”), again attempting to leverage the financial distress it had created through non-payment to convince Grace to cut ties with ChromaDex. (*Id.*) Elysium’s efforts to disparage ChromaDex to Dartmouth and Grace failed.

D. Elysium’s Loosening of Safety Requirements to Accommodate Deficiencies in Its Alternative Supply

Elysium had planned from the start that if it were unable to replace ChromaDex as patent licensee and take over Grace as its NR manufacturer, it would use the revenue generated from the \$3 million in ChromaDex ingredients to help finance the development of a new source of NR that infringed on ChromaDex’s NR patent rights. That plan hit a snag in late 2016 when Elysium realized that its new manufacturer would not be able to deliver a commercial batch of NR before the stockpile it had obtained from ChromaDex ran out. Aware that running out of NR inventory would cost it both customers and investors, Elysium severely reduced its marketing to limit its growth and conserve the supply it had. (*See, e.g.*, Ex. H at 517 (noting “we are most likely going to recommend shutting down all advertising activity until the commercial supply is established”).))

By May 2017, Elysium was desperate for NR. It was so desperate that, when its alternative manufacturer produced a batch that did not meet safety specifications, Elysium chose to dramatically loosen those safety specifications and accept the NR rather than wait to sell consumers product that met those safety

specifications. Specifically, Elysium had set the specification for acetamide, a byproduct of the NR manufacturing process and known carcinogen, at 40 parts per million (“ppm”). (Ex. I at 1.) When its new manufacturer informed Elysium that the NR it had manufactured had levels of acetamide over 40 ppm, Elysium raised the safety specification to 200 ppm, a five-fold increase, and commanded the manufacturer to “pull the ... NR[] batch from the reactor.” (Ex. J at 1.) When testing showed the batch contained over 200 ppm of acetamide, Elysium again raised the safety specification, this time all the way to 275 ppm, so that it could accept NR with high levels of acetamide. (*See* Ex. K at 4.)

III. NATURE AND STAGE OF PROCEEDINGS

Plaintiffs filed this patent infringement lawsuit against Elysium more than one year ago, on September 17, 2018. (D.I. 1.) As described above, ChromaDex is the exclusive licensee of two Dartmouth-owned patents directed to formulations comprising isolated NR, a compound that increases cellular metabolism, mitochondrial function, and energy production. ChromaDex was the only commercial source and supplier of NR in the United States until Elysium stopped purchasing NR from ChromaDex and began selling unlicensed and infringing NR from a source it developed using documents and other information misappropriated from ChromaDex.

ChromaDex sued Elysium in the Central District of California for breach of contract, misappropriation of trade secrets, and other torts, all of which stem from the facts discussed above. *ChromaDex, Inc. v. Elysium Health, Inc.*, 8:16-cv-02277-CJC-DFM (C.D. Cal.). As relevant to this litigation and its current status, Elysium asserted a counterclaim in the California Litigation for declaratory judgment of “patent misuse.” Elysium’s counterclaim is based on a deferred payment structure for the supply of NR that ChromaDex agreed to as an accommodation for Elysium. As a way to help offset Elysium’s limited resources as a start-up, ChromaDex agreed to a “Trademark License and Royalty Agreement” as a deferred payment mechanism for Elysium, which would provide ChromaDex with royalties on downstream sales of Elysium’s product and, separately, give Elysium the right to use ChromaDex’s trademarks. Elysium’s counterclaim contends that this deferred payment mechanism improperly conditioned the sale of NR on the payment of royalties for a trademark that Elysium did not want or use.

The Trademark License and Royalty Agreement terminated with the NR supply agreement on **February 2, 2017**. In an attempt to streamline the California Litigation, and to purge any possible misuse, on **May 24, 2017** ChromaDex renounced its right to collect any royalties owed under the agreement. ChromaDex further agreed to refund or credit all past royalty payments made under the

agreement to purge any alleged misuse that had occurred through its deferred payment accommodation to Elysium. ChromaDex has similarly terminated any provisions requiring other customers to use ChromaDex's trademarks, and refunded any royalties those customers had already paid. Despite ChromaDex's covenant, Elysium has continued to press its counterclaim.

Based on the overlap between Elysium's counterclaim and its patent misuse defense in the Delaware Litigation, and the approaching October 2019 trial in the California Litigation, this Court stayed this litigation on June 19, 2019, noting that the stay would only be for "six months" and that the decision was a "close call." (June 18, 2019 Hearing Trans. at 25–26 (D.I. 27).)

On August 16, 2019 ChromaDex moved for summary judgment in the California Litigation on a number of Elysium's counterclaims, including with respect to its patent misuse defense. Elysium also moved for summary judgment on a number of issues. On October 9, 2019, the California court issued an order regarding the pending summary judgment motions (Ex. L), in which it ordered supplemental briefing on multiple issues and rescheduled the summary judgment hearing for January 2020. With respect to Elysium's patent misuse counterclaim the court had questions concerning Elysium's standing to make the claim, which had not even been briefed by the parties. The order stated that: "The Court has questions regarding what relief, if any, Elysium now seeks and can seek on that

claim.... The Court also ORDERS the parties to submit supplemental briefs on what recovery is still available and sought on Elysium’s patent misuse claim given the Purge, and under what authority.” (*Id.* at 8, 10.) The California court vacated the October 22 trial date and stated that it would not set a new trial date until after it ruled on the motions for summary judgment sometime in 2020. (*Id.* at 11.)

IV. LEGAL STANDARD

A stay is an “intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right” *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quotation marks and citations omitted). “The decision whether to grant a stay in this case is committed to the district court’s discretion, since it is a matter of the court’s inherent power to conserve judicial resources by controlling its own docket.” *Cost Bros., Inc. v. Travelers Indem. Co.*, 760 F.2d 58, 60–61 (3d Cir. 1985); *Elm 3DS Innovations, LLC v. Samsung Elecs. Co.*, C.A. No. 14-1430-LPS-CJB, 2018 WL 1061370, at *1 (D. Del. Feb. 26, 2018). In determining whether a stay is appropriate, courts typically consider three factors: (1) whether granting the stay will simplify the issues for trial; (2) the status of the litigation, particularly whether discovery is complete and a trial date has been set; and (3) whether a stay would cause the non-movant to suffer undue prejudice from any delay, or allow the movant to gain a clear tactical advantage. *See, e.g., Princeton Dig. Image Corp. v. Konami Dig. Entm’t Inc.*, C.A. Nos. 12-1461-LPS-

CJB, 13-335-LPS-CJB, 2015 WL 219019, at *2 (D. Del. Jan. 14, 2015); *see also Cooper Notification, Inc. v. Twitter, Inc.*, C.A. No. 09-865-LPS, 2010 WL 5149351, at *1 (D. Del. Dec. 13, 2010); *St. Clair Intellectual Prop. v. Sony Corp.*, C.A. No. 01-557-JJF, 2003 WL 25283229, at *1 (D. Del. Jan. 30, 2003). A court may also consider “(1) the length of the requested stay [and] (2) the ‘hardship or inequity’ that the movant would face in going forward with the litigation.” *St. Clair Intellectual Prop. Consultants, Inc. v. Fujifilm Holdings Corp.*, C.A. No. 08-373 JJF-LPS, 2009 WL 192457, at *2 (D. Del. Jan. 27, 2009).

Importantly, “[w]hen a court has imposed a stay, but ‘circumstances have changed such that the court’s reasons for imposing [that] stay no longer exist or are inappropriate,’ the court also has the inherent power and discretion to lift the stay.” *Princeton Dig Image*, 2015 WL 219019, *2 (quoting *Auto. Techs. Int’l, Inc. v. Am. Honda Motor Co.*, C.A. Nos. 06-187-GMS, 06-391-GMS, 2009 WL 2969566, at *2 (D. Del. Sept. 15, 2009)).

V. ARGUMENT

The circumstances underlying the Court’s stay order of June 19, 2019 have materially changed since the order was entered, and the stay should therefore be lifted. The order staying this case until “resolution of Elysium’s patent misuse claim” was premised on the patent misuse counterclaim being resolved at the October 22, 2019 trial. (D.I. 27) The fact that the California trial would take place

in October meant that any stay of the Delaware Litigation would last only about six months, as noted by the Court at the June 18, 2019 hearing. (June 18, 2019 Hearing Trans. at 24 (D.I. 27).) And even with a stay of known and limited duration, this Court made clear that the decision to grant the stay was a “close call.” (*Id.* at 26.)

On October 9, 2019, the California court vacated the October 22 trial without rescheduling it based in part on its expressed skepticism of the validity of Elysium’s misuse claim in light of ChromaDex’s purge of any potential patent misuse in **mid-2017**. The California court’s skepticism is well-founded, as the patent misuse doctrine merely temporarily limits the time period during which a patent can be enforced, i.e., until there has been a successful purge. *See, e.g., U.S. Gypsum Co. v. Nat’l Gypsum Co.*, 352 U.S. 457, 465 (1957) (precluding the collection of damages from infringement during a period of misuse without purge); *Robintech, Inc. v. Chemidus Wavin, Ltd.*, 628 F.2d 142, 147 (D.C. Cir. 1980) (precluding the collection of royalties during a specific time frame where the patentee had misused its patent without purge); *McCullough Tool Co. v. Well Surveys, Inc.*, 343 F.2d 381, 410 (10th Cir. 1965) (finding that after the date of purge, patentee was “entitled to have its valid and unexpired patents enforced against infringement”).

Indeed, Courts have never applied patent misuse to *permanently* deprive a patent owner of the enforceability of its patent. *See C.R. Bard, Inc. v. M3 Sys., Inc.*,

157 F.3d 1340, 1372 (Fed. Cir. 1998) (“[A] holding of misuse renders the patent unenforceable until the misuse is purged; it does not, of itself, invalidate the patent.”); *Qualcomm Inc. v. Broadcom Corp.*, 548 F.3d 1004, 1025 (Fed. Cir. 2008) (“[T]he successful assertion of patent misuse may render a patent unenforceable until the misconduct can be purged; it does not render the patent unenforceable for all time.”). The defense of patent misuse is not intended to hold a legitimate claim for infringement at bay indefinitely; rather, it is intended to cure misuse. *See Robintech*, 628 F.2d at 147 (“The remedy for such misuse ... is that the patentee may not use the courts to enforce its rights under the patent until the misuse is purged.”). Here, any possible misuse was purged more than two years ago, and there is no credible argument to the contrary.

In any event, as a result of the California court’s order there is no longer a trial scheduled in the California Litigation, much less one in October, and what was once a six-month stay of the Delaware Litigation has now become indefinite.

A. The Prejudice to ChromaDex Has Increased Substantially.

Courts in this district have concluded that the duration of a potential stay is an important factor in determining whether a stay is appropriate. In *Masimo Corp. v. Philips Electronics North America Corp.*, the court denied a stay, in part, because it would have been indefinite in duration, lasting longer than just months. *See* C.A. No. 11-742 (LPS), 2012 WL 1267979, at *6 (D. Del. Apr. 16, 2012); *see*

also *St. Clair Intellectual Prop. Consultants*, 2009 WL 192457, at *2 (considering “the length of the requested stay”). And in *Helios Software LLC, et al. v. Spectorsoft Corp.*, the court restricted an otherwise indefinite stay to five months, stating that it was “unwilling to sign on to a stay of such indeterminate length.” C.A. No. 15-20-LPS-CJB, 2015 WL 1387583, at *2 (D. Del. Mar. 25, 2015); see also *Cooper Notification*, 2010 WL 5149351 at *4 (finding passage of time during a lengthy proposed stay would unduly prejudice plaintiff’s ability to prove patent infringement); *Intellectual Ventures I LLC v. Xilinx, Inc.*, C.A. No. 10-1065 (LPS), 2014 WL 906551 at *1 (D. Del. Mar. 5, 2014) (noting that the Court had previously denied an “indefinite stay” as unduly prejudicial); *Life Techs. Corp. v. Illumina, Inc.*, C.A. No. 09-706 (RK), 2010 WL 2348737 at *3 (D. Del. June 7, 2010) (finding that the “indefinite nature” of the proposed stay weighed against granting stay). In each of these instances, the court recognized that an indefinite stay would have caused too much prejudice to the party resisting the stay. The same is true here.

This prejudice is further enhanced by the fact that ChromaDex and Elysium are direct competitors in the NR space. Courts in this district commonly deny requests for stays under such circumstances—i.e., when the parties are direct competitors—to prevent undue prejudice. See, e.g., *Siemens Indus., Inc. v. Westinghouse Air Brake Techs. Corp.*, No. CV 16-284-LPS, 2018 WL 3046511,

at *2 (D. Del. June 20, 2018) (holding that the prejudice to the non-movant by granting a stay “would be significant, particularly given that the parties are competitors”); *Courtesy Prod., L.L.C. v. Hamilton Beach Brands, Inc.*, No. CV 13-2012-SLR-SRF, 2015 WL 5145526, at *2 (D. Del. Sept. 1, 2015) (failing to grant a stay where undue prejudice would result due to plaintiff’s prior licensing agreement with defendant and ongoing competitive relationship); *Cooper Notification*, 2010 WL 5149351, at *5 (finding that undue prejudice would result where parties competed in the market, despite defendants’ contention that the parties compete for only a small percentage of transactions).

Moreover, an indefinite stay of this litigation irreparably prejudices ChromaDex to a degree that was not contemplated when the parties addressed, and the Court granted, defendant’s motion for stay back in June. As described above, Elysium has made good on its intention to capitalize on the substantial investments ChromaDex has made in both clearing the necessary regulatory hurdles and advancing the NR market, and its infringing consumer product BASIS directly competes with ChromaDex’s own consumer product TRU NIAGEN®.

Accordingly, “there is a reasonable chance that delay in adjudicating the alleged infringement will have outsized consequences to the party asserting infringement has occurred, including the potential for loss of market share and an erosion of goodwill.” *Davol, Inc. v. Atrium Med. Corp.*, No. CV 12-958-GMS, 2013 WL

3013343, at *3 (D. Del. June 17, 2013) (citing *Neste Oil Oyj v. Dynamic Fuels, LLC*, No. CIV.A. 12-662-GMS, 2013 WL 424754, at *2 (D. Del. Jan. 31, 2013)).

The prejudice to Plaintiffs is substantial. Elysium has made clear that its intention is to “destroy [ChromaDex]!” Elysium’s efforts to destroy ChromaDex began with Elysium’s ordering a very large quantity of NR from ChromaDex that it never intended to pay for—so that it could develop its own source for NR—and have continued with Elysium’s willful infringement of Dartmouth’s patents. That infringement has had outsized consequences on ChromaDex’s bottom line, and has greatly delayed the timeline for ChromaDex to become a profitable company. Moreover, every sale of ChromaDex’s NR product results in a royalty to Dartmouth and Cornell, from whom ChromaDex has licensed patents directed to NR. Sales of Elysium’s products do not, thereby depriving innovators and research institutions of the lifeblood that allows them to research and develop medical breakthroughs like NR.

Importantly, not only is Elysium infringing, it is doing so unethically and in a way that could harm the public. As noted above, when it was running low on the NR it had acquired from ChromaDex (but not paid for), Elysium repeatedly raised the levels of acetamide (a carcinogen) that were allowable in the NR from its new manufacturer, and subsequently put that unsafe product into the stream of commerce and unnecessarily endangered the public by knowingly selling a

contaminated product containing a known carcinogen to the public. Beyond the immediate impact to customers purchasing these products, Elysium's actions also stand to negatively impact the public's confidence in properly formulated NR supplements like ChromaDex's TRU NIAGEN as safe for human consumption.

Elysium's actions in raising the acceptable levels of acetamide in its NR are consistent with its willingness to sell to the public products with known risk factors. Indeed PT, the other ingredient in Elysium's "Basis" product, is known to increase LDL cholesterol levels in humans, a known risk factor for cardiovascular disease. (Ex. M at 3–4.) Elysium omits this information while continuing to tout the purported benefits of PT. (*Id.*)

Finally, Plaintiffs are additionally prejudiced by the current stay through Elysium's continued erosion of their good will. ChromaDex was the first company to manufacture and sell NR on a commercial scale, using the technology it had licensed from Dartmouth and others. Elysium has damaged and continues to damage Plaintiffs' status as the true innovator, however, by falsely contending that it was "first" while relying on the very science that Plaintiffs are responsible for. Elysium likewise relies on its panel of Nobel laureates—who have nothing to do with NR—to give the false impression that it is an innovator in this space.

(Elysium Scientific Advisory Board, available at

<https://www.elysiumhealth.com/en-us/science/scientific-advisory-board>). Elysium

touts the credentials of these individuals, but apart from the vague statement that this Board “guide[s] the direction of our company,” it is silent as to the contributions of the Board in developing “Basis” or advancing NR research. In fact, none of the members of Elysium’s Scientific Advisory Board appears to have published studies or performed research relating to NR. (*Id.*)

For the reasons discussed above, the increased duration of the stay significantly increases the prejudice to ChromaDex (and potentially the public), as detailed above. The first factor courts consider in determining whether a stay is appropriate—undue prejudice to the non-moving party—therefore weighs far more heavily against a stay now than it did when the Court first considered the issue.

B. Simplification of the Delaware Litigation Has Become Less Likely.

In addition to prejudice to the non-moving party, courts also consider the potential for simplification of the case in determining whether to impose a stay. *See Kaavo Inc. v. Cognizant Tech. Sols. Corp.*, 2015 WL 1737476, at *1 (D. Del. Apr. 9, 2015). Plaintiffs explained in their prior opposition to Elysium’s motion to stay that any simplification from the California Litigation would be minimal at best because, even if the patent misuse counterclaim were to succeed in the California Litigation, it would only affect damages given that any misuse was purged. Notably, unprompted, the California court said the following about Elysium’s counterclaim:

Elysium seeks a declaratory judgment that ChromaDex’s patent rights are unenforceable due to ChromaDex’s patent misuse, a declaration that ChromaDex has not purged its misuse and has not dissipated the effects of the misuse Since the [Counterclaims] were filed, ChromaDex terminated any provisions requiring customers to use ChromaDex’s trademarks, and refunded or (in Elysium’s case) covenanted to refund any royalties its customers paid (the “Purge”). ChromaDex made clear that the Purge was ‘not an admission of any wrongdoing,’ but rather was ‘intended to prophylactically and completely eliminate issues in this and any other dispute related to ChromaDex’s patents by purging any and all unlawful conduct with respect to all allegations by Elysium of patent misuse.’ (citation omitted) *The parties do not address the Purge in their summary judgment briefing. The Court has questions regarding what relief, if any, Elysium now seeks and can seek on that claim. In response to ChromaDex’s motion in limine to preclude introduction of evidence regarding the Purge, Elysium does not argue that the Purge was insufficient or otherwise improper. It appears, then, that certain of Elysium’s requested damages on this claim may be unrecoverable.*

(Ex. L at 8–9 (emphasis added, citations omitted).) Elysium may argue that it still contests whether the alleged misuse has been purged. Even if it does, however, there can be no reasonable dispute that for purposes of deciding whether to continue to stay this litigation, simplification of the issues here is less likely now than it was at the time the Court Granted Elysium’s motion to stay, based at least on the California court’s stated skepticism of Elysium’s patent misuse defense. *See, e.g., Courtesy Prod., L.L.C.*, 2015 WL 5145526, at *2 (denying stay where “the parties’ dispute [would] not be fully resolved by the IPRs, regardless of the outcome of such”); *Davol*, 2013 WL 3013343, at *6 (“[A]ny efficiency that might have been realized through a stay would have been limited by the fact that [the

alleged infringer] has sought review of only two of the three patents-in-suit.”); *Intellectual Ventures I*, C.A. No. 10-1065-LPS, 2014 WL 906551 at *1 (finding that simplification did not weigh in favor of a stay where the litigation could not be entirely resolved by the other proceeding); *Boston Scientific Corp. v. Cordis Corp.*, 777 F. Supp. 2d 783, 788–89 (finding that simplification did not weigh in favor of a stay where other proceeding was far from resolution and had uncertain bearing on relevant issues).

C. The State of Discovery and Trial Scheduling is Unchanged.

The final factor courts consider in deciding whether to impose a stay is the state of discovery and whether a trial has been scheduled. *See Kaavo Inc.*, 2015 WL 1737476, at *1. Here, this factor standing alone, unlike the other two factors, is unchanged since the Court granted Defendant’s motion in June. Given the increased prejudice to ChromaDex caused by the now indefinite duration of the stay and the decrease in the likelihood that the California Litigation will simplify the Delaware Litigation through a finding that there was no purge, however, the comparative weight of this third factor is considerably diminished.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court lift the stay granted on June 19, 2019 (D.I. 27) and schedule a case management conference at the Court’s earliest convenience.

Dated: November 1, 2019

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**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

WORD COUNT CERTIFICATION

The undersigned counsel hereby certifies that Plaintiffs' Opening Brief in support of their Motion to Lift Stay contains 4,841 words (exclusive of the title, caption, and signature block) in Times New Roman 14-point font.

Dated: November 1, 2019

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CERTIFICATE OF SERVICE

I, Pilar G. Kraman, hereby certify that on November 1, 2019, 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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