

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

**DEFENDANT ELYSIUM HEALTH, INC.’S OPPOSITION TO  
PLAINTIFFS’ MOTION TO LIFT STAY**

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## **I. Introduction**

Plaintiffs have not shown good cause to warrant the Court's reconsideration and reversal of its prior ruling staying this case pending resolution of Elysium's earlier-filed patent misuse counterclaim in California. If the California court finds that ChromaDex engaged in patent misuse and declares the two patents asserted in this Delaware action unenforceable, immediate dismissal of this action will be required. This Court's stay order reflected the inefficiency, wastefulness, and unfairness of proceeding with an infringement suit before the California court determines whether ChromaDex even has the right to sue for infringement.

Nothing has transpired since this Court entered the stay on June 18, 2019 that merits reconsideration. In fact, recent developments in the California case and the pending Federal Circuit appeal as to one of the patents demonstrate that a stay is as appropriate now as it was in June. In its October 9 order, the California court merely postponed the trial temporarily so the parties could submit supplemental briefing on issues the court wished to clarify in advance of trial. The main focus of the court's order was ChromaDex's overstated and untenable damages theories. The court also asked Elysium to clarify the relief it seeks for patent misuse. The supplemental briefing will conclude later this month, and the court will set a new trial date once it rules. In short, litigation of the patent misuse counterclaim is

proceeding apace in California; Plaintiffs' insinuation that Elysium's counterclaim will not be decided until the distant future is unfounded.

In the pending Federal Circuit appeal, which Plaintiffs ignore, Dartmouth now has abandoned its cross-appeal and thus concedes that four of the five claims in the '086 patent are *invalid*. Elysium's appeal focuses on the construction of the term "isolated" in claim 2 of the '086 patent and the invalidity of that claim under the correct construction. A ruling for Elysium will remove the '086 patent from this case entirely and effectively establish the invalidity of all three claims of the other asserted patent, the '807 patent, each of which likewise recites the term "isolated." The Federal Circuit has notified the parties that oral argument may occur as early as January 2020. It makes no sense to require this Court and the parties to devote time and resources to litigating claim 2 of the '086 patent and the three claims of the '807 patent before the Federal Circuit resolves the claim construction and validity issues soon to be argued.

Plaintiffs' motion presents no persuasive reasons for reconsidering the Court's stay order. The motion should be summarily denied.

## **II. Background**

Plaintiffs allege infringement of two patents, the '086 and the '807. Both relate to nicotinamide riboside (NR), a form of vitamin B3 that is naturally present in milk and other foods. After answering the Complaint, Elysium moved to stay

the case pending the outcome of two earlier-filed actions: a California counterclaim seeking a declaration that the '086 and '807 patents are unenforceable for patent misuse, and an *inter partes* review of the validity of the '086 patent. (D.I. 14.) On June 18, 2019, after extensive argument, this Court entered an order staying the case pending resolution of Elysium's patent misuse counterclaim. Ex. A at 33:25 – 35:11.<sup>1</sup> The Court stated that once the California court resolves the patent misuse issue, it would revisit the question of a further stay pending resolution of the IPR. *Id.*

Plaintiffs' motion is ostensibly based on the California court's temporary postponement of trial to permit supplemental briefing on pre-trial motions, but in truth it seeks reconsideration of the Court's reasons for entering the stay in the first place. Plaintiffs assert "changed circumstances" but spend little time discussing them. Instead, the centerpiece of their brief is a 5 1/2 page "Statement of Facts" reciting their allegations against Elysium in other cases. These allegations have nothing to do with patent infringement or patent misuse; indeed, their Statement has nothing to do with this case. They are, instead, an elaborate diatribe against Elysium, a false and misleading recounting of ChromaDex's commercial disputes with Elysium dating back to 2016. Plaintiffs' inflammatory rhetoric represents just

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<sup>1</sup> All exhibit citations herein refer to exhibits attached to the Declaration of Jeremy A. Younkin in Support of Defendant Elysium Health, Inc.'s Opposition to Plaintiffs' Motion to Lift Stay.

the latest chapter in an ongoing smear campaign against its main competitor, using court filings as its vehicle to influence investors.

Any doubt as to ChromaDex's motives was clarified on Tuesday, when ChromaDex's CEO told investors and analysts in a quarterly earnings call that they should "read the detailed accounts of [Elysium's] misdeeds in . . . [ChromaDex's] recently filed Delaware brief." Ex. B at 4-5. The Court should not countenance this abuse of its processes. Motion practice should not serve as a public relations tool to promote a litigant's talking points to investors.

Elysium fervently disputes ChromaDex's purported statement of "facts," but since they have nothing to do with the issues before this Court, Elysium will instead address the narrow issues raised with respect to the Court's stay order.

**A. The California Patent Misuse Counterclaim**

**1. Overview of the Counterclaim**

In December 2016, ChromaDex sued Elysium in the U.S. District Court for the Central District of California alleging breach of contract and deceit. *See* Ex. C, Docket in *ChromaDex Inc. v. Elysium Health, Inc.*, Case No. 16cv2277-CJC(DFM) (C.D. Cal.) (the "California Litigation") at D.I. 1. In January 2017, Elysium filed its answer and counterclaims, including a counterclaim for patent misuse. *Id.* at D.I. 11.

Patent misuse is an equitable doctrine developed to ensure that holders of patent rights do not abuse them to extend their patent monopoly beyond the scope of the patent. *Morton Salt Co. v. G.S. Suppiger*, 314 U.S. 488, 492 (1942). A successful patent misuse counterclaim renders the misused patents unenforceable. *See id.*; *see also United States Gypsum v. National Gypsum*, 352 U.S. 457, 465 (1957). The patents remain unenforceable unless and until the misuse is “purged,” which requires showing that (1) the misuse has been fully abandoned; and (2) the consequences of the misuse have been fully dissipated. *B.B. Chem. Co. v. Ellis*, 314 U.S. 495, 498 (1942). The patentee bears the burden of proving purgation. *Id.* In the California Litigation, Elysium seeks a declaration that ChromaDex misused the '086 and '807 patents, that ChromaDex has not purged its misuse, and that ChromaDex is barred from enforcing the patents.

The evidence in the California case shows that ChromaDex committed patent misuse by using its control of Dartmouth's patents to require ChromaDex's customers to use and/or license ChromaDex's NIAGEN® trademark, the mark it uses to identify its NR product. ChromaDex touted its status as Dartmouth's exclusive licensee of the patents to hold itself out as the sole authorized source of NR and then conditioned its supply of NR on its customers' use of, or purchase of a royalty-bearing license to use, the NIAGEN® mark. The evidence, including internal ChromaDex documents and testimony from an expert economist,

establishes that by imposing its trademark requirements on customers, ChromaDex leveraged its NR patent rights to build the strength of its NIAGEN® trademark, increasing barriers to entry and foreclosing competition more effectively and durably than could ChromaDex's patent rights alone.

## 2. Recent Developments

Under the California schedule in place when this Court decided the stay motion in June, pre-trial motions were due in August and September 2019. Ex. D. On October 9, after studying the motions, the California court (Carney, J.) requested supplemental briefing on several issues and postponed the motions hearing. *See* Ex. E at 9-10. The supplemental briefing will be completed later this month. Judge Carney will hear argument on January 13, 2020, and will set a new trial date after ruling on the motions. *See id.* at 11.

In his October 9 Order, Judge Carney explained that he “is seriously concerned that ChromaDex’s damages are overstated” and is “struggling to connect the dots” between ChromaDex’s causes of action and the tens of millions of dollars it claims as damages. *Id.* at 3. In view of these concerns, Judge Carney ordered the parties to address several causation-related issues in supplemental briefing. *See id.* at 9-10. With regard to patent misuse, Judge Carney noted that the parties did not address ChromaDex’s purge defense in their motion papers, and asked Elysium to explain what recovery Elysium may now seek on its patent

misuse counterclaim in light of ChromaDex's assertion that it had purged the misuse. *Id.* at 8, 10.

In its Supplemental Brief, Elysium explains that these issues were not addressed in the parties' motion papers for the simple reason that ChromaDex did not seek summary judgment on the issue of purge, recognizing there were genuine issues of disputed fact. Ex. F. at 23-24.

Elysium then reaffirms that its requested relief includes a declaration that ChromaDex has failed to purge its patent misuse, because ChromaDex has neither abandoned the misuse nor fully dissipated its effects. *See id.* at 18-25. In fact, based on the strength of its NIAGEN® brand, ChromaDex supplanted its direct-to-consumer licensees. It terminated their supply contracts and soon began promoting its own branded NR product. *Id.* at 19. ChromaDex, to this day, tells customers to ***“Look for ‘Niagen®’ on the label”*** to determine if an NR product is “authentic, safe, & effective.” *Id.* As recently as last month, ChromaDex issued a press release equating the compound NR with its commercial product NIAGEN®, stating “NR is also known as Niagen®.”<sup>2</sup> *Id.* In short, ChromaDex is continuing to capitalize on its patent misuse through a marketing strategy centered on

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<sup>2</sup> ChromaDex's suggestion that it has refunded royalty payments by Elysium for use of the trademark is false. ChromaDex Br. at 8-9. To date, ChromaDex has not refunded a single cent. Ex. F, at 20.

leveraging its patent rights to lead customers to conflate NR with its NIAGEN®-branded product.

## **B. The '086 IPR Proceedings**

### **1. Overview of the Proceedings**

Elysium filed its IPR petition challenging the validity of all 5 claims of the '086 patent in July 2017—more than a year before Plaintiffs filed their Complaint in this action. Over the course of 2017 and 2018, Elysium and Dartmouth submitted briefing and expert reports on claim construction and validity; conducted expert depositions; and tried the case to the PTAB. On January 16, 2019, the panel issued its Final Written Decision finding that claims 1, 3, 4, and 5 of the '086 patent were anticipated by each of two prior art references from the 1920s. Ex. G at 42. The panel found that only claim 2 was not anticipated, based on its narrow construction of the term “isolated” in that claim. *Id.* at 26-27.

Claims 1 and 2 of the '086 patent are directed to the following subject matter:

1. A pharmaceutical composition comprising nicotinamide riboside in admixture with a carrier, wherein said composition is formulated for oral administration.
2. The pharmaceutical composition of claim 1, wherein the nicotinamide riboside *is isolated from a natural or synthetic source*.

Ex. H at 53:38-43 (emphasis added). The panel found that the invention claimed in claim 1 was disclosed nearly 100 years ago, in journal articles describing the

pioneering work of Dr. Joseph Goldberger. Ex. G at 16-25. His publications disclose the oral administration of processed milk products, which contain NR, to prevent or treat pellagra, a then-prevalent life-threatening disease.

As to claim 2, Elysium had urged that the term “isolated” be construed according to its express definition in the specification of the ’086 patent. The specification defines as “isolated molecule” as follows:

As used herein, *an isolated molecule* (e.g., an isolated nucleic acid such as genomic DNA, RNA or cDNA or an isolated polypeptide) *means a molecule separated or substantially free from at least some of the other components of the naturally occurring organism*, such as for example, the cell structural components or other polypeptides or nucleic acids commonly found associated with the molecule.

Ex. H at 9:3-9:10 (emphasis added). Applying this definition, Elysium argued that claim 2 means that the NR “is separated or substantially free from at least some of the other components of the naturally occurring organism.” Ex. G, at 12.

Dartmouth proposed a different construction, and the panel then rejected both parties’ constructions. Significantly narrowing the specification’s definition of “isolated molecule,” the panel construed the term to require “that the nicotinamide riboside is separated or substantially free from at least some of the other components associated with the source of the molecule *such that it constitutes at least 25% (w/w) of the composition.*” *Id.* at 12-14 (emphasis added). In other words, the PTAB added a 25% purity requirement to claim 2, even though it recites no such requirement. Based on this construction, the panel held that

claim 2 was not anticipated because Goldberger did not specify that the NR in the milk products he administered constituted at least 25% of the milk.

Elysium appealed as to claim 2, and Dartmouth cross appealed the panel's invalidity findings as to the other four claims. *See* Ex. I at D.I. 7-11.

## **2. Recent Developments**

After Elysium filed its opening brief on appeal—and after this Court heard argument on Elysium's Motion to Stay—Dartmouth abandoned its cross-appeal. *Id.* at D.I. 17. Dartmouth thus conceded that the inventions described in claims 1, 3, 4, and 5 of the '086 patent were disclosed in Goldberger's publications nearly 100 years ago. Because Dartmouth abandoned its appeal, the PTAB's decision invalidating those claims is now final.

Elysium's appeal has been fully briefed. *Id.* at D.I. 23. Elysium argues on appeal that grafting a 25% purity requirement onto the phrase “is isolated” ignores the plain meaning of the specification and violates the most fundamental canons of claim construction, which dictate that the specification's express definitions control. *See* Exs. J, K.

In response, Dartmouth argues that the PTAB's 25% purity requirement should be affirmed, even though Dartmouth never suggested a purity requirement during prosecution and even though it never suggested a purity requirement in its

Preliminary Response to Elysium's IPR petition. Dartmouth does not contest that claim 2 is invalid under Elysium's proposed construction. Ex. L.

The Federal Circuit has not yet scheduled oral argument, but has asked the parties to notify it of any scheduling conflicts for court sessions in the first half of 2020, beginning in January. *See* Ex. I at D.I. 30. Argument thus may be scheduled as early as two months from now. If the Federal Circuit adopts Elysium's proposed claim construction and invalidates claim 2, the '086 patent will be eliminated from this case entirely.

### **C. The '807 Patent**

A favorable Federal Circuit decision would also effectively remove the second patent from this case. The '807 patent is the parent of the '086 patent and shares its specification. Ex. M. It contains only 3 claims, and each includes the "isolated" claim term. *Id.* at 53:58-54:64.

In 2017 Elysium filed an IPR petition for the '807 patent as well, challenging all three claims as anticipated by the Goldberger prior art. The same PTAB panel declined to institute a proceeding. As with the '086 patent, the panel construed the term "isolated" in each claim of the '807 patent to import a 25% purity requirement. On that basis, it ruled that the Goldberger prior art did not apply. Ex. N at 8-10.

The reasoning that led the PTAB to uphold the validity of claim 2 of the '086 patent—the subject of the pending appeal—is exactly the same reasoning that led it not to institute an IPR of the '807 patent. If the Federal Circuit holds that the PTAB's reasoning was erroneous and that claim 2 of the '086 patent is invalid under the correct construction of “isolated,” then all three claims of the asserted '807 patent will face the same fate, and this case will terminate.

### **III. ARGUMENT**

#### **A. Legal Standard**

A court should deny a motion to lift a stay where “there are no new circumstances that impose hardship on the plaintiff or that change the court’s earlier disposition imposing the stay.” *Princeton Dig. Image Corp. v. Konami Dig. Entm’t Inc.*, Civil Action No. 12-1461-LPS-CJB, 2015 U.S. Dist. LEXIS 4234, at \*6 (D. Del. Jan. 14, 2015). If circumstances have changed, the Court should determine what effect, if any, the changes have on the three factors that were analyzed when the stay was entered: “(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 id.* at \*5-6.

**1. Recent Developments in the California Case Do Not Support Reversal of the Stay Order**

The only new circumstances cited in ChromaDex’s brief is the temporary postponement of the California trial. The short extension of the deadlines in that case—largely caused by ChromaDex’s assertion of overreaching damages theories and the California court’s wish to address them before allowing them go to a jury—does not change analysis of the stay factors.

**a. A stay still simplifies the issues in this case**

The California court’s October 9 order does not alter the fact that a stay of this case has the potential to greatly simplify, if not eliminate, the issues for trial. As this Court recognized when it entered the stay, “[i]f, in fact, there’s a favorable ruling for the defense in California, this case it seems to me goes away.” Ex. A at 34:5-7. That was true before the California court’s October 9 order, and it continues to be true today. ChromaDex does not argue otherwise.

Instead, ChromaDex asserts without basis that “simplification of the issues here is less likely now . . . based at least on the California court’s stated skepticism of Elysium’s patent misuse defense.” ChromaDex Br. at 19. The California court did not express “skepticism” of Elysium’s patent misuse defense. Rather, the court observed that neither party addressed the purge issue in their summary judgment papers, and that when ChromaDex moved *in limine* to preclude the introduction at trial of certain evidence regarding the alleged purge, Elysium’s response did not

argue its inadequacy. Ex. E at 8-9. For these reasons, the Court requested clarification of the parties' positions. *Id.*

As Elysium explains in its Supplemental Brief, Elysium *does* contend, vigorously, that the alleged purge was insufficient. It has proffered substantial evidence, in the form of expert testimony and ChromaDex's admissions, demonstrating that the effects of the alleged purge have not been dissipated. Ex. F at 18-25. The reason Elysium did not address the adequacy of the alleged purge in response to ChromaDex's motion *in limine* is because its adequacy was not at issue in the motion. *Id.* at 24-25. In its October 9 order, the California court overlooked the fact that ChromaDex's motion *in limine* sought only to exclude *from the jury trial* (limited to the parties' contract and tort claims) certain of Elysium's evidence addressing ChromaDex's purge defense. *Id.* The parties had previously agreed that patent misuse is an equitable claim to be tried to the Court, not the jury. Because the purge issue is not relevant to the jury-triable claims, Elysium did not oppose ChromaDex's request to exclude that evidence from the jury. *Id.* The California court's request for clarification as to the relief Elysium was seeking does not suggest that its misuse claim is any less viable than when this Court granted the stay, and provides no basis for lifting it.

**b. The California Litigation is even more advanced now**

The October 9 order does not affect the second stay factor, which examines the status of the litigation. The Court previously noted that “[t]his case has just started” whereas the California Litigation is “well advanced.” Ex. A at 34:13-14. Plaintiffs concede that the October 9 order does not warrant reconsideration of this factor. Indeed, if anything has changed with respect to the second stay factor, it is that a stay is even more justified today, because the California Litigation is now even more advanced. Since entry of the stay in this case, the parties have filed motions for summary judgment, *Daubert* motions, motions *in limine*, witness lists, exhibit lists, and proposed jury instructions and verdict forms. *See* Ex. C at D.I. 229-378. The parties will complete their supplemental briefing this month and argue their summary judgment motions on January 13, 2020—less than two months from now. Ex. E at 10. In short, the California Litigation, filed approximately 20 months before this action, is in its final stages.

**c. As before, a stay will not cause ChromaDex unfair prejudice**

The California court’s request for supplemental briefing to narrow or clarify issues for trial does not change the calculus as to prejudice. This Court’s denial of Plaintiffs’ motion to lift stay will not cause them to suffer undue prejudice or allow Elysium to gain a clear tactical advantage.

Plaintiffs' brief fails to acknowledge that the "prejudice" prong of the stay analysis examines four sub-factors: (1) the timing of the parallel proceedings; (2) the timing of the request for stay; (3) the status of the parallel proceedings; and (4) the relationship of the parties. *See Bonutti Skeletal Innovations, Inc., L.L.C. v. Zimmer Holdings, Inc.*, Civil Action No. 12-cv-1107-GMS, 2014 U.S. Dist. LEXIS 47430, at \*8 (D. Del. April 7, 2014). Plaintiffs do not argue that any of the first three sub-factors supports a finding of prejudice. Elysium filed its patent misuse counterclaim in January 2017, long before Plaintiffs filed their Complaint in this case. After Plaintiffs brought this suit, Elysium promptly sought a stay. And the California litigation is nearly over. The first three sub-factors weigh strongly in favor of a stay.

Plaintiffs' argument instead rests on, first, the conclusory assertion that the stay will cause "too much prejudice" to Plaintiffs because a new trial date has not yet been set, and second, on a reprise of its contention, ***which this Court already rejected***, that this case should not be stayed because ChromaDex and Elysium are direct competitors. Neither argument warrants reversal of the stay. Plaintiffs are not prejudiced simply because they do not know the specific date on which the California trial will begin. Their suggestion that the trial will be postponed into the

distant future is baseless.<sup>3</sup> The California court will hear argument on summary judgment in *less than two months* and has stated that it will reschedule trial once it rules on the motions. Judge Carney has decided eight motions in the California Litigation, and each time he ruled within 30 days of completion of the briefing.<sup>4</sup> Under these circumstances, there is no good cause to lift the stay.

None of Plaintiffs' cases is to the contrary. In three of them, the movant sought a stay pending resolution of Patent Office reexamination—a process that takes *years* to complete.<sup>5</sup> There is no basis to conclude that the California Litigation will go on for years. The decision in *Helios* supports denial of Plaintiffs' motion because the court in that case *granted* a stay pending resolution of a jury trial and allowed the parties to seek an extension of the stay after the jury trial concluded. *Helios Software v. Spectorsoft Corp.*, No. 15-20-LPS-CJB, 2015

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<sup>3</sup> Seeking to have it both ways, ChromaDex also suggests that Elysium's patent misuse counterclaim will soon be dismissed on summary judgment. *See, e.g.*, ChromaDex Br. at 1, 13. Under that theory, which Elysium obviously disputes, maintaining the stay cannot possibly harm ChromaDex.

<sup>4</sup> *See* Ex. C, at D.I. 44, 63, 73, 98, 115, 152, 182.

<sup>5</sup> *See Intellectual Ventures I LLC v. Xilinx, Inc.*, No. 10-1065-LPS, 2014 U.S. Dist. LEXIS 33687, at \*5 (D. Del. March 5, 2014) (noting that reexamination would “likely take another *two to three years*”); *Cooper Notification, Inc. v. Twitter*, No. 09-865-LPS, 2010 U.S. Dist. LEXIS 131385, at \*12 (D. Del. Dec. 13, 2010) (stating that stay pending reexamination “would almost certainly last *many years*” if granted); *Life Techs. Corp. v. Illumina, Inc.*, No. 09-706-RK, 2010 U.S. Dist. LEXIS 55623, at \*8 (D. Del. June 7, 2010) (explaining that stay pending reexamination “will be in place for a *long period of time*” if granted) (emphasis added).

U.S. Dist. LEXIS 38057 (D. Del. March 25, 2015). The facts of *St. Clair* and *Masimo* bear no resemblance to the facts in this case.<sup>6</sup>

Plaintiffs' contention that a stay causes unfair prejudice because ChromaDex and Elysium are competitors has already been considered and rejected. When it entered the stay, this Court explained that it "realize[s] you are direct competitors" but found that the "balance of factors" warranted a stay. Ex. A at 34-35. Further, as Elysium previously explained, ChromaDex's own conduct refutes any claim that a stay would cause undue prejudice. It is undisputed that ChromaDex knew the facts on which it bases its infringement claims for over a year before initiating this litigation and represented to the California court (when it served ChromaDex's interests to do so) that it had no plans to sue Elysium for patent infringement. *See* D.I. 14 at 14-15. ChromaDex has never explained why it did not file suit sooner, nor has it attempted square its lengthy delay in suing Elysium with its new,

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<sup>6</sup> In *Masimo Corp. v. Philips Elecs. N. Am. Corp.*, No. 11-742-LPS-MPT, 2012 U.S. Dist. LEXIS 52941, at \*3 (D. Del. April 16, 2012), the court required plaintiff to select 4 of its 14 asserted patents to advance to claim construction and trial. It denied defendant's motion to stay litigation of the remaining patents because resolution of the first trial would not necessarily simplify issues for the remaining patents and some of the remaining patents were expected to expire in the near future. *Id.* at \*18.

In *St. Clair Intellectual Prop. Consultants, Inc. v. Fujifilm Holdings Corp.*, No. 08-373-JJF-LPS, 2009 U.S. Dist. LEXIS 5457, at \*7 (D. Del. Jan. 27, 2009), the party seeking the stay was "an adjudged infringer," the plaintiff was "likely to face evidentiary obstacles and the prospect of litigating an expired or nearly-expired patent," and a stay would disrupt the coordinated discovery of co-pending cases.

litigation-inspired position that Plaintiffs' infringement claims must be adjudicated immediately. Notably, ChromaDex did not seek a preliminary injunction in this case.

Plaintiffs' motion cites no new facts concerning the impact of competition between ChromaDex and Elysium. Instead, it improperly rehashes its previously-rejected arguments. While ChromaDex devotes numerous pages of its brief to describing the competition between it and Elysium and the comparative merits of the parties' products, it relies entirely on conclusory statements lacking any evidentiary basis, including allegations about events in 2016 and 2017 that arose long before this Court entered the stay.

ChromaDex's strategy is transparent. Its motion catalogs old grievances against Elysium, which are the subject of other proceedings in other courts, and inundates this Court with materials from the California Litigation for no purpose other than to tarnish Elysium's reputation.<sup>7</sup> As noted above, in a quarterly earnings call three days ago, ChromaDex's CEO urged investors to read its motion to lift stay to learn of Elysium's alleged misdeeds:

Elysium's actions demonstrate their blatant disregard for consumer safety as well as their unethical business conduct. These facts *are now part of the public record* and stand in stark contrast to the image

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<sup>7</sup> In this brief, Elysium will not burden this Court with its positions and contentions on the contract and tort claims being litigated in California. If this Court wishes to hear Elysium's evidence refuting ChromaDex's false and misleading narrative, Elysium would gladly submit supplemental briefing on the subject.

they attempt to convey. *We encourage you to read the detailed accounts of their misdeeds in the legal filings, including the recently-filed Delaware brief.*

Ex. B at 4-5 (emphasis added). ChromaDex's ulterior motive is apparent: it is using this proceeding to push its narrative to investors. The Court should not tolerate such brazen abuse of process.

## **2. Recent Developments in the Federal Circuit Appeal Demonstrate that ChromaDex's Motion Should Be Denied**

In granting the stay, this Court indicated it would revisit the question whether the case should be stayed pending resolution of the IPR proceedings after the patent misuse counterclaim is resolved:

I'm going to grant the stay until the resolution of the Northern District of California case and *revisit the issue at that point*. . . . If, in fact, there's a favorable ruling for the defense in California, this case it seems to me goes away.

*We can revisit at that juncture whether or not, if there's a victory for the plaintiffs in California, we should move right away or wait for the resolution. That's a PTAB issue.*

Ex. A at 33:25-34:11 (emphasis added).

Tellingly, Plaintiffs' brief does not mention the status of the Federal Circuit appeal in the IPR proceeding, let alone attempt to show that this case should proceed before the appeal is completed. In the time since the Court entered the stay, the parties have fully briefed the appeal. As discussed above, a Federal Circuit decision in Elysium's favor would remove the '086 patent from this case and in all likelihood would compel a determination that the '807 patent also is

invalid, ending this case. Nothing could be more inefficient and wasteful of judicial resources than to proceed with this infringement suit before the Federal Circuit rules on the meaning of “isolated” and the validity of the only remaining claim of the ’086 patent. Fortunately, this Court and the parties should not have to wait long; the Federal Circuit has already indicated that it plans to hold argument as early as January 2020.

Accordingly, even if the California court’s October 9 order warranted reconsideration of the present stay pending resolution of Elysium’s patent misuse counterclaim—and it does not—this case should remain stayed in any event pending final resolution of the ’086 patent IPR.

#### **IV. CONCLUSION**

For the reasons stated above, the Court should deny Plaintiff’s Motion to Lift Stay.

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type, font and word limitations set forth in this Court's Standing Order Regarding Briefing in All Cases, dated November 6, 2019. This brief contains 4,996 words (excluding the title page, table of contents, table of authorities, signature block, and certificate of compliance). This brief has been prepared in 14-point Times New Roman.

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