

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

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## LIST OF ABBREVIATIONS

- **“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 attached Declaration of Adam W. Poff.
- **“Op.”** refers to the Court’s Revised Memorandum Opinion issued December 17, 2020 (D.I. 141).
- **“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).

Plaintiffs respectfully request reargument or reconsideration pursuant to L.R. 7.1.5. of the Court’s December 17, 2020 orders granting-in-part Elysium’s motion to dismiss for lack of standing and denying Plaintiffs’ motion for leave to amend complaint. D.I. 142, 143. The Court’s conclusion that ChromaDex does not have standing for claims of infringement on or after March 13, 2017 was based on the factual premise that “Healthspan had the right to give Elysium a license to practice the asserted patents as of March 13, 2017.” Op. at 11-12. A December 29, 2020 Amendment to the Restated Agreement, however, which is retroactive to March 13, 2017, explains that the parties have always understood and intended the Restated Agreement to provide exclusionary rights that are jointly held by both ChromaDex and Healthspan and that those companies will not act adversely to each other with respect to the licensed patent rights, a proposition inconsistent with the Court’s conclusion.

The Court correctly noted that “Healthspan would likely have refused to give Elysium a license,” but stated “that conclusion is ultimately conjecture—an inference formed without proof.” Op. at 11. It is not conjecture, however, that Healthspan would not have granted a license to Elysium. Indeed, it was undisputed. If there is any doubt, the declaration of Mark Friedman, Chief Legal Officer of the ChromaDex organization, submitted herewith, removes it. And the Restated Agreement—by itself and with the Amendment—confirms that neither ChromaDex

nor Healthspan can sublicense the Asserted Patents without the other's prior written consent.<sup>1</sup>

Relatedly, Healthspan will soon be dissolved, with its rights, obligations, and operations merged into ChromaDex. ChromaDex will then be the only entity with exclusionary rights, including the right to sublicense, under the Restated Agreement. ChromaDex will notify the Court when this transaction is complete.

### LEGAL STANDARD

Reargument or reconsideration is warranted where, *inter alia*, “new factual matters not previously obtainable have been discovered since the issue was submitted to the Court,” and “the Court should not hesitate to grant [such a] motion when compelled to prevent manifest injustice or to correct clear error.” *Brambles USA, Inc. v. Blocker*, 735 F. Supp. 1239, 1241 (D. Del. 1990).

### ARGUMENT

#### **I. The Restated Agreement Has Been Amended, Retroactive to March 13, 2017, to Make Clear That the Parties Have Always Understood and Intended That ChromaDex and Healthspan Must Act Jointly.**

The Court concluded that “[b]ecause Healthspan had the right to give Elysium a license to practice the asserted patents as of March 13, 2017, ChromaDex did not

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<sup>1</sup> When considering motions to dismiss for lack of standing, courts must “construe all factual disputes in favor of [plaintiff].” *James v. J2 Cloud Servs., LLC*, 887 F.3d 1368, 1373 (Fed. Cir. 2018); *see also Lone Star Silicon Innovations, LLC v. Nanya Tech. Corp.*, 925 F.3d 1225, 1234 (Fed. Cir. 2019) (“general factual allegations ... may suffice” to satisfy constitutional standing requirements at the pleading stage).

have the right to exclude Elysium from practicing the patents from that date forward.” Op. at 11-12. Healthspan, however, had no such unilateral right, as Dartmouth and ChromaDex understood and intended the Restated Agreement to require ChromaDex and Healthspan not to act adversely to one another with respect to the rights under the agreement.

The Restated Agreement is governed by New York law. D.I. 50, Ex. D, § 10.01; *Canon Inc. v. Tesseron Ltd.*, 146 F. Supp. 3d 568, 577 (S.D.N.Y. 2015) (“Construction of a patent ‘licensing agreement is solely a matter of state law.’” (citation omitted)). Under New York law, agreements should be “read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose.” *Beal Sav. Bank v. Sommer*, 865 N.E.2d 1210, 1213-14 (N.Y. 2007) (internal quotation marks omitted).

The Restated Agreement reflects the parties’ intent to grant *joint* exclusionary rights and a *joint* right to sublicense to ChromaDex and Healthspan, to be exercised by mutual agreement. In Section 2.01, Dartmouth granted “an exclusive, royalty-bearing license under Dartmouth Patent Rights” to “Company and its Affiliates” (i.e., ChromaDex and Healthspan). Section 2.02 grants to “Company and its Affiliates” the “right to grant sublicenses to third parties under Dartmouth Patent Rights.” And Section 8.01 authorizes “Company and its Affiliates” to “commence proceedings in their own names against [an] infringer.”



Importantly, Section 1.05 defines “Affiliate” by reference to Schedule 1, which lists only Healthspan, as an entity “that directly or indirectly controls, is controlled by, or is *under common control with* [ChromaDex]” (emphasis added). It further provides that “[a]n entity is an Affiliate only during such time as it meets the criteria of this definition.” *Id.* The Restated Agreement thus grants Healthspan exclusionary rights, including a right to sublicense, “only during such time” as Healthspan “is under common control with [ChromaDex].” This provision reflects the parties’ understanding and intention that the exclusionary rights granted to ChromaDex and Healthspan must be exercised jointly.<sup>2</sup>

The corporate organization of ChromaDex and Healthspan confirms that the Restated Agreement was intended to grant exclusionary rights to be exercised jointly. The Friedman Declaration established—and Elysium did not dispute—that ChromaDex and Healthspan are both “wholly owned by ChromaDex Corporation” and “are under the complete control of ChromaDex Corporation because all entities

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<sup>2</sup> It is black-letter law that an exclusionary right can be jointly held by two or more parties, such as co-owners of a single patent. *See, e.g., Israel Bio-Eng’g Project v. Amgen, Inc.*, 475 F.3d 1256, 1264 (Fed. Cir. 2007) (“A patentee or his assignee may grant and convey to another: (1) the whole patent, (2) an undivided part or share of that exclusive right, or (3) the exclusive right under the patent within and throughout a specified part of the United States. Where one co-owner possesses an undivided part of the entire patent, that joint owner must join all the other co-owners to establish standing.” (citations omitted)). As long as all those holding exclusionary rights act jointly, they have the right to sue for damages.

in the ChromaDex corporate family are managed by a single executive management team” that makes all decisions “in the interests of the ChromaDex corporate family as a whole and its shareholders.” D.I. 62 ¶¶ 3, 5, 6. Mr. Friedman stated “definitively and without reservation that Elysium would not have been able to obtain a license to the Asserted Patents from ChromaDex or Healthspan.” *Id.* ¶ 7.<sup>3</sup> Again, Elysium did not dispute this, but any such dispute would have to be resolved in Plaintiffs’ favor. *James*, 887 F.3d at 1373; *Lone Star Silicon Innovations*, 925 F.3d at 1234.

As recited in the Amendment to the Restated Agreement, ChromaDex and Dartmouth knew that ChromaDex and Healthspan were Affiliates under common control. ChromaDex and Dartmouth understood and intended, therefore, that ChromaDex and Healthspan could exercise their exclusionary rights only when acting together, not independently. *See* Dec. 30, 2020 Friedman Decl. ¶¶ 3-8. Indeed, the Restated Agreement itself was entered into for the purpose of enabling Healthspan to sue Elysium.

To the extent there is any ambiguity regarding the meaning of the Restated Agreement, the shared understanding of Dartmouth and ChromaDex controls. Where the parties to a contract “have a contemporaneous understanding that, although unexpressed, is harmonious, that understanding may inform the meaning

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<sup>3</sup> The management of the ChromaDex organization complies with Delaware and California law, which require wholly owned subsidiaries to be managed “in the best interests of the parent and its shareholders.” *See* D.I. 91 at 2 (citing cases).

of an ambiguous contract.” *In re Old Carco LLC*, 551 B.R. 124, 129 (Bankr. S.D.N.Y. 2016) (citation omitted); *see id.* (“Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.” (quoting Restatement (Second) of Contracts § 201(1)); *id.* (“where parties share a common meaning, prevailing view is that their subjective understanding controls” (citing Farnsworth on Contracts § 7.9 (3d ed. 2004))).

To remove any doubt about the parties’ understanding and intentions with respect to the Restated Agreement, on December 29, 2020, Dartmouth and ChromaDex executed the Amendment to the Restated Agreement, effective as of March 13, 2017. Ex. A; Ex. B; *see Brambles*, 735 F. Supp. at 1241. The Amendment’s Recitals explain that the parties have always understood and intended that the Restated Agreement requires ChromaDex and Healthspan to act jointly with respect to the Asserted Patents. The Recitals explain that the Restated Agreement grants “an exclusionary right that is jointly held by [ChromaDex] and Healthspan ....” Amendment at 2 (citing Restated Agreement §§ 1.05, 2.01, and 8.01). The Recitals also confirm that “because they are under common control, [ChromaDex] and Healthspan do not act adversely to one another and, in particular, would not grant a sublicense under the [Restated] Agreement without the consent of the other.” *Id.* at 1.

The Recitals explain 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 [ChromaDex] or Healthspan granting a sublicense to the Dartmouth Patent Rights without the consent of the other.” *Id.* at 1-2. The Recitals further explain that “Dartmouth, the licensor, understands, and has always understood, that it was granting an exclusive license to [ChromaDex] and Healthspan, including the rights to sublicense and to sue for damages, because, and only for so long as, they were under common control.” *Id.* at 2. “Dartmouth understood, and has always understood, that [ChromaDex] and Healthspan would not act adversely to each other with respect to Dartmouth Patent Rights and that the purpose of the [Restated] Agreement was to permit [ChromaDex] and Healthspan to sue infringers of Dartmouth Patent Rights for damages.” *Id.*

Given these mutual understandings and intentions when the Restated Agreement was executed, which are consistent with the Restated Agreement’s provisions granting “an exclusionary right that is jointly held by [ChromaDex] and Healthspan,” *id.*, there was no need for a further amendment to the Restated Agreement. But because Elysium “has contended that the sublicensing provision of the [Restated] Agreement acts to deny the parties the benefits of an exclusive license, including the right of [ChromaDex] and Healthspan to sue an infringer for damages,”

the parties executed the Amendment “to remove any doubt” about their intentions.

*Id.*

The Amendment adds new Section 2.02(b), which states:

Notwithstanding the foregoing, (i) [ChromaDex] shall not grant a sublicense to a third party under Dartmouth Patent Rights without the prior written consent of each of its Affiliates; and (ii) an Affiliate of [ChromaDex] shall not grant a sublicense to a third party under Dartmouth Patent Rights without the prior written consent of [ChromaDex] and all of its other Affiliates. Any purported sublicense in violation of this Section 2.02(b) shall be null and void.

*Id.* As the Recitals make clear, Section 2.02(b) reflects the parties’ original understanding and intention that ChromaDex and Healthspan could not exercise their exclusionary rights under the Restated Agreement without the other’s consent.

Assuming for the sake of argument that the parties’ intentions were not clear from the Restated Agreement alone, the Amendment removes any ambiguity. *See Alternatives Fed. Credit Union v. Olbios, LLC*, 14 A.D.3d 779, 781 (N.Y. App. Div. 2005) (“Where an ambiguity is present in a contract ... the subsequent conduct of the parties [may] be used to indicate their intent.”); *Photopaint Techs., LLC v. Smartlens Corp.*, 335 F.3d 152, 161 (2d Cir. 2003) (“We need not rely on the breadth of this initial letter agreement, however, because the parties’ intent was clarified in subsequent letter agreements ....”).

The Federal Circuit has held that a plaintiff has standing when an agreement executed after the filing of the complaint reflects the parties’ intent with respect to a

prior patent license or assignment agreement. *See, e.g., Schwendimann v. Arkwright Advanced Coating, Inc.*, 959 F.3d 1065, 1073-74 (Fed. Cir. 2020) (pre-suit assignment that “failed to express the real intention of the parties” could be reformed based on an agreement executed after suit was filed that “merely reaffirmed the [pre-suit] agreement”); *IpVenture, Inc. v. Prostar Comput., Inc.*, 503 F.3d 1324, 1327 (Fed. Cir. 2007) (district court “should have considered” agreement executed “after th[e] suit was filed” that “serves to remove any uncertainty arising from the language of the [pre-suit] agreement”).

Although *Alps South, LLC v. Ohio Willow Wood Co.*, 787 F.3d 1379, 1384-86 (Fed. Cir. 2015), did not permit the plaintiff to cure an initial lack of standing through a retroactive license agreement, that case is inapposite because the plaintiff there had no initial standing whatsoever because it had failed to join the patent owner as a co-plaintiff and did not have all substantial rights to the patent. Here, by contrast, the Court has found that ChromaDex had initial standing “to allege an infringement claim based on Elysium’s conduct occurring between July 13, 2012 and March 12, 2017,” Op. at 12, and Dartmouth, the owner of the Asserted Patents, has been a party since the filing of the Complaint. The issue here, therefore, is not whether ChromaDex had standing to bring this case, but rather for which periods of time ChromaDex may seek relief for Elysium’s infringement.

The Amendment confirms that Healthspan never had a unilateral right to grant Elysium a sublicense, and thus that Elysium never had “the ability to obtain such a license from another party with the right to grant it.” *WiAV Solutions LLC v. Motorola, Inc.*, 631 F.3d 1257, 1266 (Fed. Cir. 2010). In addition to reflecting the parties’ original understanding and intention in the Restated Agreement, moreover, the Amendment is effective retroactively to March 13, 2017, and prospectively. Ex. A; Ex. B. Retroactive licenses are permitted under federal patent law and New York contract law. *See Canon*, 146 F. Supp. 3d at 574-79. Notably, the Restated Agreement itself was executed in September 2019, and the parties here did not dispute—and the Court agreed—that it was retroactive as of March 13, 2017. ChromaDex has therefore had the right to exclude Elysium’s infringement during all relevant time periods. *See WiAV*, 631 F.3d at 1266-67.

**II. Healthspan Will Soon Be Dissolved, Leaving ChromaDex as the Only Entity with Exclusionary Rights and the Right to Sublicense Under the Restated Agreement.**

Additional new evidence warranting reargument or reconsideration is that Healthspan will soon be dissolved, and its rights, obligations, and operations will be merged into ChromaDex. Dec. 30, 2020 Friedman Decl. ¶ 9. ChromaDex will then be the only entity with exclusionary rights, including the right to sublicense, under the Restated Agreement, thus unquestionably resolving any doubts about its standing to sue Elysium. ChromaDex will notify the Court once this transaction is complete.

## CONCLUSION

For the foregoing reasons, ChromaDex respectfully requests that the Court grant its motion for reargument or reconsideration and find that ChromaDex and Healthspan have standing to pursue claims of infringement against Elysium not only for the time period prior to March 13, 2017, but also for all time periods thereafter.

Dated: December 29, 2020

Respectfully submitted,

YOUNG CONAWAY STARGATT &  
TAYLOR, LLP

/s/ Adam W. Poff

Adam W. Poff (No. 3990)  
Pilar G. Kraman (No. 5199)  
Rodney Square  
1000 North King Street  
Wilmington, DE 19801  
(302) 571-6600  
apoff@ycst.com  
pkraman@ycst.com

OF COUNSEL:

Christopher N. Sipes  
R. Jason Fowler  
COVINGTON & BURLING LLP  
One CityCenter  
850 Tenth Street, NW  
Washington, DC 20001  
(202) 662-6000

*Counsel for Plaintiffs ChromaDex, Inc.  
and Trustees of Dartmouth College*



**WORD COUNT CERTIFICATION**

The undersigned counsel hereby certifies that Chromadex, Inc. and Trustees of Dartmouth College’s Motion for Reargument or Reconsideration of the Revised Memorandum Opinion and Orders Issued December 17, 2020 contains 2,499 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: December 29, 2020

Respectfully submitted,

YOUNG CONAWAY STARGATT &  
TAYLOR, LLP

*/s/ Adam W. Poff*

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Adam W. Poff (No. 3990)  
Pilar G. Kraman (No. 5199)  
Rodney Square  
1000 North King Street  
Wilmington, DE 19801  
(302) 571-6600  
apoff@ycst.com  
pkraman@ycst.com

*Counsel for Plaintiffs ChromaDex, Inc.  
and Trustees of Dartmouth College*

**CERTIFICATE OF SERVICE**

I, Adam W. Poff, hereby certify that on December 29, 2020, 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:

Steven J. Balick  
Andrew C. Mayo  
ASHBY & GEDDES  
500 Delaware Avenue, 8th Floor  
Wilmington, DE 19899  
sbalick@ashbygeddes.com  
amayo@ashbygeddes.com

Donald R. Ware  
Peter G. Ellis  
Jeremy A. Younkin  
Urszula Nowak  
Marco J. Quina  
FOLEY HOAG LLP  
155 Seaport Boulevard  
Boston, MA 02210  
dware@foleyhoag.com  
pgellis@foleyhoag.com  
jyounkin@foleyhoag.com  
unowak@foleyhoag.com  
mquina@foleyhoag.com  
elysiumdelaware-dist@foleyhoag.com

*Attorneys for Defendant*

I further certify that on December 29, 2020, I caused the foregoing document to be served via electronic mail upon the above-listed counsel.

Dated: December 29, 2020

YOUNG CONAWAY STARGATT  
& TAYLOR, LLP

/s/ Adam W. Poff  
Adam W. Poff (No. 3990)  
Pilar G. Kraman (No. 5199)  
Rodney Square  
1000 North King Street  
Wilmington, Delaware 19801  
(302) 571-6600  
apoff@ycst.com

27532371.1