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December 9, 2020

**VIA ELECTRONIC FILING**

The Honorable Jennifer L. Hall  
J. Caleb Boggs Federal Building  
844 N. King Street  
Unit 17, Room 3124  
Wilmington, DE 19801-3555

Re: *ChromaDex, Inc., et al. v. Elysium Health, Inc.*,  
C.A. No. 18-1434-CFC-JLH

Dear Judge Hall:

We write in response to Elysium’s request for a 60-day continuance of fact discovery, and all dates and deadlines thereafter, including trial. Elysium’s request unfairly prejudices Plaintiffs and should be denied for the reasons below.

This lawsuit was filed on September 17, 2018, and trial is currently scheduled to begin on September 27, 2021—i.e., more than three years later. The case was delayed by more than sixteen months as a result of a motion to stay by Elysium.<sup>1</sup> When setting the schedule, Judge Connolly made clear to Elysium that he was setting the schedule in part to ameliorate the delay and prejudice caused by the stay. *See* 3/10/2020 Hrg. Tr. at 7 (Judge Connolly acknowledging that he previously “acceded to [Elysium’s] request,” and that as a result, “plaintiff was prejudiced”). If granted, Elysium’s motion would only further delay trial, possibly indefinitely, given the potential application of Judge Connolly’s procedure that upon extension of the dispositive motions deadline, trial will be taken off calendar and not rescheduled until any dispositive motions *are resolved*.<sup>2</sup> The impact of Judge Connolly’s procedure on this case may

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<sup>1</sup> Elysium moved for a stay on November 7, 2018 (D.I. 13), shortly after it answered Plaintiffs’ Complaint. The Court granted the requested stay on June 19, 2019 (D.I. 27). The stay was lifted on February 4, 2020 (D.I. 36).

<sup>2</sup> *See* <https://www.ded.uscourts.gov/judge/judge-coltm-f-conolly>: “**Important Note concerning Summary Judgment Motions**[:] Should the parties stipulate or otherwise request to have their dispositive motion deadline extended, and a trial date is currently set on the court’s calendar in the case,

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be particularly significant in light of the challenges of scheduling trials as a result of the ongoing COVID-19 pandemic. Nothing Elysium says, or could say, changes this reality.

Contrary to Elysium’s false allegations, Plaintiffs did not “withhold” the entirety of their document production until the deadline for substantial completion on November 6, 2020. The parties conducted ESI discovery in this matter pursuant to a Stipulation Governing Discovery of Electronically Stored Information, which Judge Connolly so ordered on August 6. *See* D.I. 85. The parties thereafter worked together—as agreed upon in the stipulation—to narrow search terms until the document “hit counts” for the identified custodians reached certain agreed-upon numbers. It was not until September 30, 2020—approximately five weeks before the substantial complete deadline—that the parties completed that process and agreed to move forward with a review of the documents that resulted from the narrowed search terms. Ex. A (email from M. Quina to J. Fowler, dated Sept. 30, 2020).

Elysium’s complaints that Plaintiffs produced “over 200,000 pages (including the named inventor’s production)” ring hollow. Elysium fails to mention that almost 198,000 of those pages constituted Plaintiffs’ review and production of ESI (including from the inventor, whom Elysium identified as a desired ESI custodian) —*a process that could not have started until September 30* when Elysium “agree[d] to call it at this point and have both sides move forward based on the search terms and hit counts as they currently exist.” Ex. A. Although Elysium boasts that “the volume of Elysium’s final production (25,000 pages)” was “dramatically less” than Plaintiffs’, Elysium fails to mention that its production on the substantial-completion deadline constituted approximately 71% of its total production in the case. That is, Elysium’s production of ESI was substantially smaller than Plaintiffs’, and Elysium is trying to take advantage of that fact.<sup>3</sup>

Elysium’s complaints about the number of depositions to be taken prior to the close of fact discovery are also baseless. Plaintiffs timely served a Rule 30(b)(6) notice on November 24, and noticed seven depositions of Elysium’s employees on December 1. Elysium has stated that the topics in Plaintiffs’ Rule 30(b)(6) notice will be handled by a subset of the already-noticed deponents. Elysium, on the other hand, waited until November 30 to notice depositions of twelve current and former employees of Plaintiffs, until December 1 to subpoena three third-party depositions, and served two Rule 30(b)(6) notices on Plaintiffs on December 4. In other words, of the 20+ depositions that Elysium complains must be taken, twice as many have been requested by Elysium, often with less notice. To the extent Elysium thinks it is jammed, it is jammed because it wants to take an unreasonable number of depositions and waited too long to request them. Elysium is the author of its own misfortune.<sup>4</sup>

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the parties will lose their trial date upon the court's granting the extension. No new trial date will be given until the dispositive motion(s) have been decided.”

<sup>3</sup> Prior to Elysium’s production on the substantial-completion deadline, it had produced just 10,000 pages of documents. This is not unsurprising, given both parties’ expectation that the bulk of document discovery would be conducted through the agreed-upon ESI process.

<sup>4</sup> While Plaintiffs are sympathetic to Elysium’s counsel’s staffing issues, Elysium has a very large team that is more than capable of handling these depositions. Before the scheduling dispute, four partners

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Finally, Elysium's reliance on the recently set trial date in the California litigation is misplaced. Notably, that trial date was set *sua sponte* without knowledge of the existing trial date in this action. There is no reason to think that the California trial date, which has already been changed eight different times,<sup>5</sup> cannot be moved to accommodate the preexisting trial, which has now been in place since Judge Connolly's March 19, 2020 Scheduling Order.

\* \* \*

Plaintiffs are happy to entertain additional ways to add time to fact discovery, but cannot risk losing the trial date set by Judge Connolly. Notably, Plaintiffs suggested two alternate proposals that would allow more time in the schedule for fact depositions while not impacting the trial date. One would have added an additional three weeks to fact discovery while preserving the existing amount of time to prepare responsive and reply reports. Ex B (email from J. Fowler to M. Quina, dated Nov. 18, 2020).<sup>6</sup> The other proposal would have added six to seven weeks to fact discovery with the parties agreeing to forego dispositive motions. *Id.* Elysium rejected both out of hand, positing that completing depositions was impossible and stating its intention to file an opposed motion to extend the schedule. Elysium then, before filing this motion, requested seventeen depositions, making clear that what Elysium actually meant was that completing depositions would be inconvenient.

Plaintiffs respectfully request that the Court deny Elysium's motion for a 60-day continuance of trial and all other remaining dates in the schedule.

Respectfully submitted,

*/s/ Adam W. Poff*

Adam W. Poff (No. 3990)

cc: All Counsel of Record (via electronic mail)

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from Foley Hoag had entered an appearance on Elysium's behalf, not to mention the numerous associates who are not on the docket. Since this dispute has arisen, an additional partner and special counsel have been added.

<sup>5</sup> See *ChromaDex, Inc. v. Elysium Health, Inc.*, 8:16-cv-2277 (C.D. Cal.), Dkt. Nos. 58, 99, 114, 150, 211, 220, 362, 431, 452.

<sup>6</sup> Elysium complains that Plaintiffs' proposal would take time from Elysium's preparation of opening and reply invalidity expert reports. Elysium, however, would not be prejudiced by Plaintiffs' proposal. Elysium served invalidity contentions on May 29, 2020, and supplemental invalidity contentions on September 25, 2020. Elysium is bound to these contentions, and an extension in the fact discovery deadline should not impact Elysium's ability to prepare for expert discovery.