

In the Supreme Court of the United States

No. 23A_____

CHROMADEx, INC. AND
TRUSTEES OF DARTMOUTH COLLEGE,

Applicants,

v.

ELYSIUM HEALTH, INC.,

Respondent.

**APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR
A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

To the Honorable John G. Roberts, Jr.
Chief Justice of the United States and
Circuit Justice for the U.S. Court of Appeals for the Federal Circuit

Pursuant to Rules 13.5 and 30.2 of this Court, counsel for applicants ChromaDex, Inc. and Trustees of Dartmouth College (“Applicants”) respectfully request a 30-day extension of time, to September 7, 2023, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case. The Federal Circuit entered its judgment and issued an opinion in support of the judgment on February 13, 2023. Applicants filed a timely Combined Petition for Panel Rehearing and Rehearing En Banc on March 15, 2023. The Federal Circuit denied the Combined Petition on May 10, 2023. Unless extended, the time within which to file a petition for writ of certiorari will

expire on August 8, 2023. This Application is filed at least ten days prior to that date pursuant to Supreme Court Rule 13.5.

The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1). Attached are copies of the Federal Circuit's opinion (Exhibit A) and its order denying the Combined Petition (Exhibit B).

1. This case presents important questions about the framework for determining patent eligibility. In particular, the case concerns whether compositions are patent-eligible when they contain a natural substance that has been isolated and incorporated into a dosage form, but have different characteristics than and can be used in a different manner than the substance as it appears in nature. This Court addressed a related, but distinct question in *Association for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013), and the Federal Circuit has applied *Myriad* inconsistently.

2. At issue in this case is U.S. Patent No. 8,197,807 ("the '807 patent"), owned by Trustees of Dartmouth College and licensed exclusively to ChromaDex, Inc. Claim 1 of the '807 patent is representative and recites:

A composition comprising ***isolated nicotinamide riboside*** in combination with one or more of tryptophan, nicotinic acid, or nicotinamide, wherein said combination is in admixture with a carrier comprising a sugar, starch, cellulose, powdered tragacanth, malt, gelatin, talc, cocoa butter, suppository wax, oil, glycol, polyol, ester, agar, buffering agent, alginic acid, isotonic saline, Ringer's solution, ethyl alcohol, polyester, polycarbonate, or polyanhydride, wherein said composition is formulated for oral administration and increases NAD⁺ biosynthesis upon oral administration.

(emphasis added). While nicotinamide riboside exists in nature, it is undisputed that *isolated* nicotinamide riboside does not.

2. This Court has held that a claim to a manufacture or composition of matter made from a natural product is not directed to the natural product—and is thus patent-eligible subject matter—where it has “markedly different characteristics” and “the potential for significant utility.” *Diamond v. Chakrabarty*, 447 U.S. 303, 310 (1980). In *Myriad*, this Court held that patents claiming isolated DNA segments were invalid where Myriad “found an important and useful gene” but “did not create anything” because “separating that gene from its surrounding generic material is not an act of invention.” 569 U.S. at 591. The Court contrasted Myriad’s claims with those at issue in *Chakrabarty*, which claimed something “with markedly different characteristics from any found in nature.” *Id.* at 590–91 (citing *Chakrabarty*, 447 U.S. at 310).

3. In the decision below, the Federal Circuit held that the patent claims were “invalid for claiming a patent-ineligible product of nature.” *ChromaDex v. Elysium Health, Inc.*, 59 F.4th 1280, 1284 (Fed. Cir. 2023). Specifically, the Federal Circuit held that the “claims are very broad and read on milk,” except that “[m]ilk contains [nicotinamide riboside], but the [nicotinamide riboside] is not isolated.” *Id.* at 1283. Citing this Court’s decision in *Myriad*, 569 U.S. at 590–93, the Federal Circuit concluded that “the act of isolating the [nicotinamide riboside] compared to how [nicotinamide riboside] naturally exists in milk is not sufficient, on its own, to confer patent eligibility.” *Id.* at 1284. Because, in the Federal Circuit’s view, the “claimed compositions do not exhibit markedly different characteristics from natural milk,” *id.* 1284, it deemed the claims invalid under 35 U.S.C. § 101. Applicants are considering

seeking this Court's review of that decision, which conflicts with other rulings of the Federal Circuit on the same question. *See, e.g., Natural Alternatives Int'l, Inc. v. Creative Compounds, LLC*, 918 F.3d 1338 (Fed. Cir. 2019).

4. There is good cause to grant a 30-day extension of Applicants' time to file a petition for a writ of certiorari. *First*, Appellants' counsel has numerous filing obligations in other matters, including (i) a Respondent-Intervenor brief in *Sinclair Wyoming Refining Co. v. EPA*, No. 22-1210 (D.C. Cir.), due on August 11, 2023; (ii) a motion for summary judgment in *Janssen Pharmaceuticals, Inc. v. Becerra*, No. 3:23-cv-03818 (D.N.J.), due on August 16, 2023; (iii) a certiorari-stage reply brief in *74 Pinehurst, LLC v. New York*, No. 22-1130 (U.S.), due following service of the briefs in opposition in that case on August 21, 2023; and (iv) a motion for summary judgment in *Gibson v. Washington Humane Society*, No. 2023-CAB-000387 (D.C. Super. Ct.), due on August 2, 2023. *Second*, no meaningful burden or prejudice would arise from Applicants' proposed extension. The Federal Circuit's mandate affirming the district court's decision issued on May 17, 2023. The underlying district court action is unaffected, as briefing on Elysium's motion for attorneys' fees is ongoing. Additionally, parallel litigation involving the '807 patent is currently stayed pending the outcome of Applicants' appeal and any petitions filed with this Court. *See Order, Thorne Research, Inc. v. Trustees of Dartmouth College*, No. 23-1055 (Fed. Cir. June 22, 2023), ECF No. 21; *ChromaDex, Inc. v. Thorne Research, Inc.*, No. 1:21-CV-4241 (S.D.N.Y. Aug. 20, 2021), ECF No. 26. As a result, Applicants' proposed extension would impose no additional burden or prejudice on the parties.

CONCLUSION

For the reasons stated above, Applicants respectfully request that the time to file a petition for writ of certiorari be extended 30 days to and including September 7, 2023.

Respectfully submitted,

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July 28, 2023

CORPORATE DISCLOSURE STATEMENT

Applicant ChromaDex, Inc. is a wholly owned subsidiary of ChromaDex Corporation. Applicant Trustees of Dartmouth College has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

July 28, 2023

/s/ Kevin F. King
Kevin F. King