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12 **IN THE UNITED STATES DISTRICT COURT**  
13 **CENTRAL DISTRICT OF CALIFORNIA**

14 ChromaDex, Inc.,  
15 Plaintiff,  
16  
17 v.  
18 Elysium Health, Inc. and Mark  
Morris,  
19 Defendants.

20 Elysium Health, Inc.,  
21 Counterclaimant,  
22 v.  
23 ChromaDex, Inc.,  
24 Counter-Defendant.

Case No.: 8:16-cv-02277-CJC-DFM

[Assigned to the Hon. Cormac J. Carney]

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
ELYSIUM HEALTH, INC.'S *EX PARTE*  
APPLICATION TO COMPEL  
CHROMADEX, INC. TO COMPLY  
WITH THE COURT'S STIPULATION  
AND ORDER REGARDING  
DISCOVERY OF ESI**

[Filed Concurrently with Notice of *Ex Parte*  
Application; Declaration of Esterina  
Giuliani; and (Proposed) Order]

Action Filed: December 29, 2016

[DISCOVERY DOCUMENT: REFERRED  
TO MAGISTRATE JUDGE DOUGLAS F.  
MCCORMICK]

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Defendant and Counterclaimant Elysium Health, Inc. (“Elysium”) brings this *ex parte* application (“*Ex Parte Application*”) to remedy Chromadex, Inc.’s (“ChromaDex”) continuing violation of the Court’s Stipulation and Order Regarding Discovery of ESI (ECF No. 64) (“Discovery Order”).<sup>1</sup> On February 6, 2019, in accordance with the Discovery Order, Elysium provided notice to ChromaDex that it had inadvertently produced three documents containing information that is subject to the attorney-client privilege. (Giuliani Decl. Ex. A). Notwithstanding that the Discovery Order mandates that ChromaDex destroy or return these documents once it has been notified by Elysium that the documents contain privileged information that was inadvertently produced, ChromaDex refuses to do so and continues to review and affirmatively use these documents in violation of the Court’s Discovery Order. Elysium’s application should be granted because Elysium is being irreparably harmed and prejudiced while ChromaDex admittedly continues to review and use information that is protected from disclosure by the attorney-client privilege.

**II. THE COURT’S DISCOVERY ORDER**

On September 27, 2017, the Court entered the Discovery Order, which was proposed and stipulated to by Elysium and ChromaDex, and governs the production of paper documents (“Documents”) and electronically stored information (“ESI”). The parties negotiated the terms of the Discovery Order and specifically included a protocol that governs the inadvertent disclosure of information that is “*subject to a claim of attorney-client privilege,*” or other privilege, immunity or protection from disclosure. (Discovery Order, Section V.E.2 (the “Clawback Provision”)) (emphasis added).

The Clawback Provision states:

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<sup>1</sup> The Discovery Order is attached as Exhibit (“Ex.”) D to the Declaration of Esterina Giuliani (the “Giuliani Decl.”).

1 1. The production or disclosure of privileged or work-product  
2 protected documents, ESI, or information, whether inadvertent or  
3 otherwise, is not a waiver of the privilege or protection from discovery  
4 in this case or in any other federal or state proceeding. This Order shall  
5 be interpreted to provide the maximum protection allowed by Federal  
6 Rule of Evidence 502(d). Nothing contained herein is intended to or  
7 shall serve to limit a Party's right to conduct a review of documents, ESI  
8 or information (including metadata) for relevance, responsiveness  
9 and/or segregation of privileged and/or protected information before  
10 production.

11 2. In the event that a Party discloses any document, ESI, or  
12 information that is subject to a claim of attorney-client privilege, work  
13 product protection, or any other privilege, immunity, or protection from  
14 disclosure, the producing Party shall promptly upon discovery of such  
15 disclosure notify the receiving Party and request the return or  
16 destruction of such document, ESI, or information in writing. Upon  
17 receipt of such request, the receiving Party: (i) *shall* not use, and shall  
18 immediately cease any prior use of, such information; (ii) *shall* take  
19 reasonable steps to retrieve the information from others to which the  
20 receiving Party disclosed the information; and (iii) *shall*, within five (5)  
21 business days of the producing Party's request, return to the producing  
22 Party or destroy all copies thereof; and (iv) *shall* confirm to the  
23 producing Party the destruction of all copies of the document, ESI, or  
24 information not returned to the producing Party. The receiving Party  
25 may thereafter seek re-production of any such material pursuant to  
26 applicable  
27 law.

28 (Discovery Order, Section V.E) (emphasis added).

The procedure set forth in the Discovery Order for clawing back inadvertently produced privileged documents mirrors the procedure outlined in the Federal Rules. Specifically, Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure states:

If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester,

1 or destroy the specified information and any copies it has; must not use  
2 or disclose the information until the claim is resolved; must take  
3 reasonable steps to retrieve the information if the party disclosed it  
4 before being notified; and may promptly present the information to the  
5 court under seal for a determination of the claim. The producing party  
6 must preserve the information until the claim is resolved.

6 **III. ELYSIUM PROVIDED NOTICE TO CHROMADEx IN**  
7 **ACCORDANCE WITH THE COURT’S DISCOVERY ORDER THAT**  
8 **IT INADVERTENTLY PRODUCED THREE PRIVILEGED**  
9 **DOCUMENTS**

9 Just recently, Elysium realized that it inadvertently included three documents  
10 that contain privileged information in a production made to ChromaDex in late  
11 December 2018, and immediately provided ChromaDex with notice in accordance  
12 with Section V.E.2 of the Discovery Order to clawback those documents.

13 Specifically, on February 6, 2019, Elysium provided notice to ChromaDex  
14 that it had inadvertently produced three *documents*, production numbers  
15 ELY\_0085617, ELY\_0085618, and ELY\_0085619 (collectively, the “Clawback  
16 Materials”), which contain attorney-client privileged information, and requested,  
17 among other things, that ChromaDex return or destroy those documents in  
18 accordance with Section V.E.2 of the Discovery Order. (Giuliani Decl. Ex. A).  
19 These three documents are Excel files that were produced to ChromaDex in native  
20 format that contain compilations of hundreds of thousands of messages (text and  
21 instant messages). Interspersed throughout those three Excel files are messages  
22 subject to the attorney-client privilege. Because each of the three Excel files was  
23 produced as a single *document* and each contains messages subject to the attorney-  
24 client privilege throughout, Elysium gave notice to claw back all three Excel files.  
25 In addition, in its February 6, 2019 clawback letter, Elysium stated that it would  
26 provide appropriate replacements for the three documents. (Giuliani Decl. Ex. A).

27 Elysium’s notice was sufficient under the terms of the Discovery Order,  
28 which only requires that the producing Party “promptly upon discovery of such

1 disclosure notify the receiving Party and request the return or destruction of such  
2 document, ESI, or information in writing.” (Discovery Order, Section V.E.2). This  
3 is exactly what Elysium did. In its clawback letter, dated February 6, 2019,  
4 Elysium identified three documents by production number, asserted that they  
5 contain attorney-client privileged materials, and requested ChromaDex, among  
6 other things, return or destroy those documents. (Giuliani Decl. Ex. A).

7 **IV. CHROMADEx VIOLATES THE DISCOVERY ORDER BY**  
8 **REFUSING TO CEASE USING AND TO DESTROY THE**  
9 **CLAWBACK MATERIAL**

10 In response to Elysium’s clawback letter, on February 8 and 14, ChromaDex  
11 sent Elysium three letters that admitted its intent to violate, and violation of, the  
12 Court’s Discovery Order (Giuliani Decl. Exs. E, F and I). Indeed, ChromaDex has  
13 made clear that it is using and will continue to the Clawback Materials, and will not  
14 destroy or return those documents, notwithstanding that Elysium provided notice  
15 under Section V.E.2 of the Discovery Order that those documents contain  
16 privileged materials and should be handled in accordance with the Discovery Order.  
17 (*Id.*). Not only has ChromaDex continued to use and review the documents in  
18 violation of the Court’s Order but it sent Elysium a letter on February 8, 2018,  
19 seeking to remove all confidentiality designations from the three documents, which  
20 Elysium has designated as “Highly Confidential – Attorney’s Eyes Only” (“AEO”).  
21 (Giuliani Dec. Ex. F at 1).

22 In its letters, ChromaDex contended that Elysium did not give sufficient  
23 notice in accordance with Discovery Order and therefore refused to cease using or  
24 otherwise treat the Clawback Material as required by the Clawback Provision.  
25 (Giuliani Decl. Exs. E and I). That argument fails. First, ChromaDex  
26 disingenuously claimed that Elysium’s notice was improper because Elysium “did  
27 not provide the basis for [its] assertion of privilege over them,” (Giuliani Decl. Ex. I  
28 at 1), but Elysium stated in its clawback letter to ChromaDex that it “inadvertently

1 produced attorney-client privileged material” – which is the exact same language  
2 that ChromaDex has used when clawing back materials from Elysium. (Giuliani  
3 Decl. Ex. A; Ex. B). Plainly, ChromaDex recognizes this language is adequate to  
4 invoke the provisions of Section V.E.2 of the Discovery Order.

5 Second, ChromaDex contended that Elysium was required to identify the  
6 “specific text messages” (out of “the hundreds of thousands of individual text  
7 messages”) contained within each of the three documents that are privileged.  
8 (Giuliani Decl. Ex. E at 1). This contention too is without merit. The Discovery  
9 Order requires no such thing. Instead, the Discovery Order only requires that  
10 Elysium identify the *documents* that are being clawed back, and here the relevant  
11 documents are three native Excel files, each produced bearing a single production  
12 number. Attempting to unilaterally modify the Court’s Discovery Order,  
13 ChromaDex argued that, since the parties supposedly agreed to designate text  
14 messages individually for confidentiality purposes, they must do the same when  
15 clawing back inadvertently produced privileged text messages.<sup>2</sup> (Giuliani Decl. Ex.  
16 E). However, any agreement between the parties about the process for designating  
17 documents or text message confidential has no bearing on and does not modify the  
18 Court’s Order concerning clawing back privileged documents. Telling, in  
19 ChromaDex’s letter of February 8 to Elysium seeking to remove the AEO  
20 designations from those same three documents, it sought to remove the  
21 confidentiality designations from the three documents in their “entirety” because it  
22 claimed that each document contains “some” material that does not meet the

23 \_\_\_\_\_  
24 <sup>2</sup> In reality, Elysium did not agree to designate text messages on an individual basis except in a limited circumstance.  
25 (Giuliani Decl. Ex. G at 2) (“It continues to be Elysium’s position that designation of text messages on a message-by-  
26 message basis is neither required nor contemplated by the ‘Protective Order’ and the demand to conduct such a  
27 designation represents yet another diversion by ChromaDex from the positions it took and representations it made  
28 when the parties were negotiating the addition of text messages to the scope of the ESI Protocol a year ago, upon  
which Elysium’s agreement to add text messages to the scope had been based. Nonetheless, to avoid the burden and  
expense of motion practice, Elysium will conduct a message-by-message analysis and re-designation as assessed  
necessary of the text messages reflected at ELY\_ 0063120 and ELY\_ 0063187, contingent upon ChromaDex’s  
agreement to do the same for the text messages reflected at CDXCA\_00289649, CDXCA\_00289645,  
CDXCA\_00289553, CDXCA 00289554, and CDXCA 00289648.”).



1 standards for AEO designations, rather than identify the “specific text messages” it  
2 claimed should be de-designated. (Giuliani Decl. Ex. E). In other words,  
3 ChromaDex itself, when convenient to its own ends, recognized that each of the  
4 three Excel files comprises a single document.

5 ChromaDex further posited that Elysium should “think of the compiled text  
6 message files as a box of documents” and each message as a page in that box, such  
7 that it should identify pages subject to a claim of privilege. (Giuliani Decl. Ex. I at  
8 1). That is a disingenuous attempt to define the dispute and relevant standards.  
9 Each Excel file (which is a compilation of numerous text messages) is a single  
10 *document* identified by a single production number. It is an integrated whole.  
11 Indeed, in ChromaDex’s numerous document requests to Elysium, ChromaDex has  
12 repeatedly incorporated the definition in Rule 34 of the Federal Rules of Civil  
13 Procedure, which defines *document* to include “data compilations.” ChromaDex’s  
14 hypothetical box is not a document; it is a box. Within it are documents, each of  
15 which would have a unique production number, just like the Clawback materials  
16 are. And those are what Elysium identified in its Clawback Notice.

17 ChromaDex’s attempts to circumvent its obligations under the Discovery  
18 Order regarding the protection of attorney-client communications is a serious  
19 matter and its failure to destroy or return these documents a blatant violation of  
20 the Court’s Order.

21 **V. THE COURT SHOULD ORDER CHROMADDEX TO COMPLY WITH**  
22 **ITS DISCOVERY ORDER**

23 Essentially, ChromaDex challenges Elysium’s assertion of privilege. The  
24 Discovery Order sets forth a procedure for ChromaDex to do so. It may, after ceasing  
25 use of the documents and returning all copies of the documents to Elysium or  
26 destroying them, “thereafter seek re-production of any such material pursuant to  
27 applicable law.” (Discovery Order, Section V.E.2). The Discovery Order does not  
28 permit ChromaDex to decide unilaterally that, if it doesn’t agree with Elysium’s



1 claim of privilege, it can simply ignore the Clawback Provision and continue to use  
2 the documents over which Elysium has claimed privilege. That is not what the parties  
3 stipulated to, and not what the Court ordered. Yet that is precisely what ChromaDex  
4 is doing.

5 ChromaDex was required to confirm, by February 13, 2019, that it has stopped  
6 using the Clawback Material and that it returned or destroyed them in accordance  
7 with Section V.E.2 of the Discovery Order. That date has passed and ChromaDex is  
8 now in violation of the Court's Order. Indeed, it has confirmed three times now that  
9 it will continue to violate that Order. (Giuliani Decl. Exs. E, F and I). *See RIPL*  
10 *Corp. v. Google Inc.*, No. 2:12-CV-02050-RSM, 2013 WL 6632040, at \*4 (W.D.  
11 Wash. Dec. 17, 2013) ("Because Google's disclosure was inadvertent and because  
12 Google provided prompt notice of its intent to clawback the privileged documents,  
13 RIPL violated the Protective Order by failing to destroy or return the protected  
14 documents in the manner set forth under Section 9.").

15 **VI. GOOD CAUSE EXISTS BECAUSE ELYSIUM WILL BE**  
16 **IRREPARABLY HARMED AND PREJUDICED BY CHROMADEx'S**  
17 **CONTINUED ACCESS TO INADVERTENTLY PRODUCED**  
18 **PRIVILEGED INFORMATION**

19 Good cause exists because ChromaDex is in direct violation of the terms of the  
20 Court's Discovery Order and has affirmatively stated (in its letters) that it will  
21 continue to use and will not return or destroy the Clawback Materials. Elysium is  
22 being irreparably harmed and prejudiced while ChromaDex is admittedly  
23 continuing to review and use information relating to this ongoing litigation that is  
24 protected from disclosure by the attorney-client privilege.

25 **VII. NAME, ADDRESS, TELEPHONE NUMBER, AND E-MAIL**  
26 **ADDRESS OF COUNSEL FOR CHROMADEx**

27 Pursuant to Civil Local Rule 7-19, the name, address, telephone number, and e-  
28 mail address of counsel for ChromaDex are as follows:

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**VIII. CONCLUSION**

For the foregoing reasons, Elysium respectfully requests that the Ex Parte Application be granted compelling ChromaDex to comply with the Court’s Discovery Order. Specifically, Elysium respectfully requests an Order directing, with respect to the Clawback Material, that ChromaDex, in accordance with Section V.E.2 of the Discovery Order: (i) shall not use, and shall immediately cease any prior use of, the Clawback Materials; (ii) shall take reasonable steps to retrieve the Clawback Materials from others to which it has disclosed the Clawback Materials; (iii) immediately shall return all copies of the Clawback Materials to Elysium or destroy them, and (iv) confirm in writing to Elysium that it has done so. Elysium also requests that the Court grant Elysium costs and attorney’s fees, as well as any further legal and equitable relief as the Court deems just and proper.

Respectfully submitted,

Dated: February 14, 2019

**BAKER & HOSTETLER LLP**

By: /s/ Esterina Giuliani  
ESTERINA GIULIANI

*Attorneys for Defendant and Counterclaimant*  
ELYSIUM HEALTH, INC.