

Frankfurt Kurnit Klein + Selz PC

Craig B. Whitney

28 Liberty Street, New York, New York 10005

T (212) 826-5583 F (347) 438-2106

cwhitney@fkks.com

March 31, 2021

VIA ECF

Hon. Lewis J. Liman
United States District Judge
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007

RE: *In re Elysium Health-ChromaDex Litigation*, No. 17 Civ. 7394 (LJL)

Dear Judge Liman:

We write on behalf of Elysium Health Inc., pursuant to Federal Rule of Civil Procedure (“Rule”) 37(a) and Rule 4.B. of the Court’s Individual Practices, to request that the Court compel ChromaDex, Inc. to produce all computer spreadsheets and any other work papers (“Requested Materials”) relied upon by its damages expert, Lance Gunderson, in formulating the opinion set forth in his expert report (the “Damages Report”).¹

I. The Background of the Dispute

ChromaDex served the Damages Report on March 4, 2021. The Damages Report contains approximately thirteen schedules that appear to be excerpted and converted from Microsoft Excel format into a static PDF, thereby concealing the underlying calculations that are critical to understanding, verifying, and analyzing Mr. Gunderson’s alleged damages analysis. ChromaDex did not provide the Excel spreadsheets themselves nor the underlying data that form the basis of the schedules.

On March 10, 2021, Elysium requested that ChromaDex produce the Excel spreadsheets and any other work papers that are the basis of Mr. Gunderson’s calculations, which in counsel’s experience is a routine request. ChromaDex refused. Instead, ChromaDex took the position that that spreadsheets and other work papers prepared by Mr. Gunderson and shared with counsel are protected from disclosure. Elysium attempted to convince ChromaDex of the impropriety of its

¹ The parties, in good faith, conferred by telephone on March 16, 2021, but were unable to resolve the dispute.

Hon. Lewis J. Liman
March 31, 2021
Page 2

position during a telephonic meet-and-confer on March 16, 2021 and in subsequent emails. ChromaDex continues to refuse to produce the requested materials.

II. Elysium is Entitled to the Requested Materials Because They Contain Facts and Data That Are the Basis of Mr. Gunderson's Calculations and Opinions

Rule 26(a)(2) requires a party who retains an expert witness to submit an accompanying written report containing, *inter alia*, “(i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) *the facts or data considered by the witness in forming them*; (iii) any exhibits that will be used to summarize or support them.” Fed. R. Civ. P. 26(a)(2)(B) (emphasis added). The phrase “facts or data” is to be “interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients.” *Howard Univ. v. Borders*, No. 20-cv-4716 (LJL), 2021 U.S. Dist. LEXIS 18817, *3 (S.D.N.Y. Feb. 1, 2021) (quoting Fed. R. Civ. P. 26(a) Advisory Committee Notes to the 2010 Amendment).²

The Requested Materials that form the basis for Mr. Gunderson's calculations are undoubtedly materials that contain “factual ingredients” that were considered by an expert. Indeed, they contain the math used by Mr. Gunderson to formulate his opinion on damages. ChromaDex does not dispute this conclusion. Instead, beyond asserting privilege, it argues that it has already produced some of the underlying documents that Mr. Gunderson used to create additional spreadsheets that form the basis of the Damages Report, and therefore does not have to produce Mr. Gunderson's spreadsheets themselves. This is plainly insufficient.

First, ChromaDex is not entitled to produce only a handpicked selection of spreadsheets and data that form the basis of Mr. Gunderson's analysis. Elysium is entitled to all such facts and data. *See* Fed. R. Civ. P. 26(a)(2)(B).

Second, Elysium is entitled to the full electronic version of the Microsoft Excel spreadsheets created by Mr. Gunderson, not just PDF copies. *See U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, No. 97 CIV. 6124JGKTHK, 2002 WL 15652, at *9 (S.D.N.Y. Jan. 7, 2002) (requiring production of “all materials provided to [plaintiffs'] experts that have not already been produced,” including “the index and OCR (optical character recognition) created in connection with the electronic database”); *Jones v. Nat'l Council of Young Men's Christian Associations of the U.S.*, No. 09 C 6437, 2011 WL 3273868, at *2 (N.D. Ill. July 28, 2011) (requiring production of the requested information in “a computer-searchable format,” even if “Defendants previously produced the same information in a different document or format”).

Finally, ChromaDex's refusal to produce the Requested Materials is particularly dubious given that the parties previously exchanged electronic Excel versions of the data underlying the

² This opinion is attached as Exhibit A in accordance with Rule 2.I. of the Court's Individual Practices.

Hon. Lewis J. Liman
March 31, 2021
Page 3

parties' survey expert reports. There is no reason for ChromaDex to apply a different rationale to its Damages Report.

III. ChromaDex's Assertion of Attorney Work Product is Foreclosed by the Federal Rules and Legal Precedent

Materials that contain facts, data, or assumptions that a testifying expert considered are not protected work product. Rules 26(b)(4)(C)(ii) and (iii) expressly exempt from claims of privilege any documents that “identify facts or data that the party’s attorney provided and that the expert considered in forming the opinions to be expressed” and/or “identify assumptions that the party’s attorney provided and that the expert relied on in forming the opinions to be expressed.” Indeed, “[t]here is ample authority that any facts provided to an expert, even if provided by an attorney, are required to be disclosed.” *B.C.F. Oil Ref., Inc. v. Consol. Edison Co. of New York*, 171 F.R.D. 57, 63 (S.D.N.Y. 1997); *see also Howard Univ.*, 2021 U.S. Dist. LEXIS 18817, *3. Consequently, “a majority of courts that have considered the issue have held that even the work product doctrine must give way to the requirements of expert discovery.” *U.S. Fid. & Guar. Co.*, 2002 WL 15652, at *6.

To be clear, Elysium is not requesting draft reports or spreadsheets that were not relied on by Mr. Gunderson or reproduced in static form in the Damages Report. ChromaDex’s claim that the Excel versions of Mr. Gunderson’s spreadsheets and other work papers he considered in forming his opinions constitute protected work product is, therefore, incorrect.³ Elysium is seeking spreadsheets underlying Mr. Gunderson’s final, produced report.

Accordingly, Elysium respectfully requests the Court grant its motion to compel the Requested Materials well in advance of Mr. Gunderson’s scheduled deposition on April 15, 2021.

Respectfully submitted,

/s/ Craig B. Whitney

Craig B. Whitney

cc: Via ECF to Counsel of Record

³ The only case from this circuit that ChromaDex cited to Elysium in support of its position is one that held work product protection applied to draft expert reports from *another litigation* and that relied on facts and data *that were already produced* in the relevant action. *See Subramanian v. Lupin Inc.*, No. 17CV5040RAKHP, 2020 WL 4707268, at *2-4 (S.D.N.Y. Aug. 13, 2020). That case is irrelevant to the parties’ dispute here.

EXHIBIT A



Neutral

As of: March 30, 2021 7:09 AM Z

Howard Univ. v. Borders

United States District Court for the Southern District of New York

February 1, 2021, Decided; February 1, 2021, Filed

20-cv-4716 (LJL)

Reporter

2021 U.S. Dist. LEXIS 18817 *

HOWARD UNIVERSITY, Plaintiff, -v- LARRY BORDERS and VIRGINIA BORDERS, Defendants, and CENTRALIA MADONNA, a DRAWING, Defendant-in-rem.

Core Terms

documents, pages, expert report, inspect, expert testimony, disclosure, includes, campus, request for production, photocopies, discovery, personnel, proponent, gather, travel

Counsel: [*1] For Howard University, Plaintiff: Erik Haas, LEAD ATTORNEY, Clinton Wells Morrison, Peter C. Harvey, Patterson, Belknap, Webb & Tyler LLP, New York, NY.

For Larry Borders, Virginia Borders, Defendants: Paul Cossu, Olsoff Cahill Cossu LLP, New York, NY.

For Virginia Borders, Larry Borders, Counter Claimants: Paul Cossu, Olsoff Cahill Cossu LLP, New York, NY.

For Howard University, Counter Defendant: Clinton Wells Morrison, Peter C. Harvey, Patterson, Belknap, Webb & Tyler LLP, New York, NY.

Judges: LEWIS J. LIMAN, United States District Judge.

Opinion by: LEWIS J. LIMAN

Opinion

ORDER

LEWIS J. LIMAN, United States District Judge:

Defendants and Counterclaim-Plaintiffs Larry Borders and Virginia Borders (the "Borders") seek an order requiring Plaintiff and Counterclaim-Defendant Howard University (the "University") to produce photocopies of the approximately 50 pages from the Annual Reports cited in the expert report by the University's expert, Russell Panczenko ("Panczenko"), as well as any other documents that contain facts that Panczenko relied upon in preparing his report. Dkt. No. 34. The University opposes this production on the grounds that the Court already decided this issue at the September 3, 2020 initial pretrial [*2] conference and in its September 4, 2020 order when the Court required the University to produce the Annual Reports by making them available for the Borders' inspection at the University in person. Dkt. No. 35; see Dkt. No. 25.

The University's contention that the Court already decided the issue is incorrect. At the time of the Court's order, the Borders sought discovery pursuant to their request for production of documents. Dkt. No. 21. In that request for production of documents, and at that stage of the litigation, the Borders defined the relevance and scope of the discovery they needed, and it was appropriate for them to bear the burden.

Now, the University intends to introduce Panczenko's expert report that relies on pages from various Annual Reports and to call Panczenko to provide expert testimony at trial. See Dkt. No. 35 at 3 (the report "includes direct quotations from and references to the

2021 U.S. Dist. LEXIS 18817, *2

content of these Annual Reports" and "includes detailed footnotes . . . with specific pages of the Annual Reports that Mr. Panczenko relied upon in his report"). [Federal Rule of Civil Procedure 26\(a\)\(2\)](#) requires a party who retains a witness to provide expert testimony in the case to disclose the identity of that witness and to [*3] submit an accompanying written report containing, *inter alia*, "(i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the facts or data considered by the witness in forming them; (iii) any exhibits that will be used to summarize or support them." [Fed. R. Civ. P. 26\(a\)\(2\)\(B\)](#). That rule contemplates that the proponent of the expert testimony is responsible for disclosure and that such disclosure includes the underlying facts or data. See [Fed. R. Civ. P. 26\(a\)](#) Advisory Committee Notes to the 2010 Amendment ("[T]he intention is that 'facts or data' be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients."); [Aniero Concrete Co., Inc. v. N.Y.C. School Const. Authority, 2002 U.S. Dist. LEXIS 2892, 2002 WL 257685, at *3 \(S.D.N.Y. Feb. 22, 2002\)](#) ("[F]acts or data considered" by a testifying expert include "documents relied on by an expert" and "any documents 'that were provided to and reviewed by the expert'" (citing cases); see also [B.C.F. Oil Refining, Inc. v. Consolidated Edison Co. of New York, 171 F.R.D. 57, 62-63 \(S.D.N.Y. 1997\)](#) ("There is ample authority that any facts provided to an expert, even if provided by an attorney, are required to be disclosed.").

As the proponent of Panczenko's testimony and expert report, the University, not the Borders, shall be required to produce such documents and to do so in the manner that it [*4] made such documents available for Panczenko. The University's letter demonstrates that it has the capacity to make the documents available either by photocopy or by other electronic means, as it did when it made the documents available for Panczenko. Dkt. No. 35 at 3. The University also has not identified a burden in requiring it, as opposed to the Borders, to travel to the University to review the documents. The volume of production is not particularly high, with the expert report citing to approximately 50 pages from the Annual Reports. Dkt. No. 34 at 1. And regardless of whether the University or the Borders is ordered to physically handle the documents, the University's personnel would nonetheless be required to be present at the University and to gather the Annual Reports, which the University offered to do in the event that the Borders inspect the documents in person. See Dkt. No. 35 at 1 (describing that when "the University's campus was closed, Howard personnel traveled to campus,

gathered the relevant years' Annual Reports, organized them chronologically, and placed them in a room for Defendants' counsel to inspect them"); *id.* at 3 ("The University remains willing to make arrangements [*5] for Defendants' counsel to return to campus for further inspection and copying.").

Accordingly, the motion to compel at Dkt. No. 34 is GRANTED. The University shall make the pages available for the Borders in accordance with this Order by February 11, 2021.

SO ORDERED.

Dated: February 1, 2021

New York, New York

/s/ Lewis J. Liman

LEWIS J. LIMAN

United States District Judge

End of Document