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

15 ChromaDex, Inc.,
16 Plaintiff,
17 v.
18 Elysium Health, Inc. and Mark
19 Morris,
20 Defendants.
21 Elysium Health, Inc.,
22 Counterclaimant,
23 v.
24 ChromaDex, Inc.,
25 Counter-Defendant.
26
27
28

Case No.: 8:16-cv-02277-CJC-DFM
[Assigned to the Hon. Cormac J. Carney]
**[PROPOSED] REPLY
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 Elysium Health,
Inc.'s Request for Consideration]
Action Filed: December 29, 2016
[DISCOVERY DOCUMENT: REFERRED
TO MAGISTRATE JUDGE DOUGLAS F.
MCCORMICK]

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REPLY MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff ChromaDex, Inc. (“ChromaDex”) violated the Court’s Discovery Order¹ (ECF No. 64) when it refused to comply with Defendant and Counterclaimant Elysium Health, Inc.’s (“Elysium”) clawback demand covering three inadvertently produced native Excel files which contain privileged information, and ChromaDex continues to violate that Order today. Based on ChromaDex’s repeated refusal to relinquish possession and use of those documents, Elysium sought this Court’s immediate intervention by bringing an *ex parte* application for an order compelling ChromaDex to comply with the Court’s Discovery Order. (ECF No.185). In its filings opposing Elysium’s *Ex Parte* Application, ChromaDex tries to justify its misconduct by relying on core misstatements of law and fact and by raising issues outside the scope of the single issue before the Court – ChromaDex’s continued violation of the Discovery Order. (ECF Nos. 188, 188-01). Elysium therefore submits this short reply memorandum of points and authorities under Local Rule 7-19 to correct the record.

I. CHROMADDEX ESSENTIALLY CONCEDES IN ITS OPPOSITION THAT IT IS VIOLATING THE COURT’S DISCOVERY ORDER AND RAISES ISSUES OUTSIDE THE SCOPE OF THE *EX PARTE* APPLICATION.

The Discovery Order’s clawback procedure leaves no room for debate: upon receipt of Elysium’s clawback notice, ChromaDex “*shall not use, and shall immediately cease any prior use of, such information,*” and “*shall confirm to the producing Party the destruction of all copies of the document, ESI, or information not returned to the producing Party.*” (Discovery Order, Section V.2.E) (emphasis added). Elysium’s February 6, 2019 clawback notice to ChromaDex triggered these unambiguous obligations. Elysium sought the Court’s intervention because of ChromaDex’s continuing violation of the Discovery Order. The sole issue before the

¹ Unless otherwise noted, all defined terms have the same meaning as in Elysium’s Memorandum of Points and Authorities in support of its *Ex Parte* Application (ECF No. 185-01).

1 Court is whether ChromaDex must comply with the Discovery Order’s clear
2 commands – not whether Elysium’s assertion of privilege is warranted.
3 ChromaDex’s arguments on the merits of Elysium’s assertion of privilege are
4 premature, and inappropriately raised in this context. Once it has complied with the
5 Discovery Order, ChromaDex can then seek re-production of the clawback material,
6 and as part of that process will be free to challenge Elysium’s assertion of privilege.

7 ChromaDex attempts to deflect the Court’s attention from its violation of its
8 obligations under the Court-ordered clawback procedure by quibbling over the
9 timing and the text of the clawback notice, ignoring the fact that Elysium’s clawback
10 notice is nearly identical to ChromaDex’s own prior clawback notice (*see* ECF No.
11 185-2, Giuliani Decl. Ex. B) and forgetting that the only *real* difference between the
12 two notices is that ChromaDex’s notice came almost *five* months after its asserted
13 inadvertent disclosure, Elysium’s less than two. Bearing that fact in mind,
14 ChromaDex’s decision to harp on the interlude between Elysium’s production and
15 its clawback notice is revealing of the bad faith in which ChromaDex has approached
16 its obligations under the Discovery Order. Moreover, the length of time between
17 disclosure and clawback is irrelevant here: the Discovery Order does not set a
18 deadline for clawback demands, nor does it vest the receiving party with any
19 discretion in the matter.

20 ChromaDex’s argument is best refuted by its own conduct in clawing back
21 documents – it waited almost five months to send its clawback notice to Elysium and
22 yet made no showing in its notice as to why its asserted privilege was not waived.
23 ChromaDex understood then that a showing of non-waiver is irrelevant to the
24 clawback notice. By raising the waiver argument as a defense of its conduct now,
25 ChromaDex implicitly argues that while its conduct in fact constitutes a violation of
26 the Discovery Order, the violation is harmless because it claims the privilege was
27 waived. But the Discovery Order (as well as ChromaDex’s prior notice under it)
28 make clear that the obligation to comply with the Discovery Order does not turn on

1 the receiving party's evaluation of the merits of the privilege assertion.
2 ChromaDex's position to the contrary would eviscerate the clawback procedure by
3 entitling the receiving party to ignore a clawback demand based on whatever
4 argument against privilege the receiving party could muster.

5 Also telling is ChromaDex's misrepresentation about the parties' treatment of
6 text messages, which is flatly refuted by the parties' correspondence.² ChromaDex's
7 false claim is little more than a sideshow to distract from the fact that ChromaDex
8 has arrogated to itself the authority to evaluate the merits not just of Elysium's
9 clawback notice but of Elysium's claim of privilege as well. ChromaDex apparently
10 deems itself entitled to rely on its own determination of what is and is not privileged
11 and demands that Elysium and the Court take ChromaDex at its word that it will not
12 review portions it deems privileged. Yet it cites no authority for its position that
13 Elysium's privilege determinations should be delegated to opposing counsel.
14 ChromaDex's demand that Elysium identify the privileged portions of the material
15 would require ChromaDex to go into the documents and specifically review that
16 privileged material in order to remove it, thus defeating the purpose of Elysium's
17 assertion of privilege. And ChromaDex's exceedingly narrow conception of the
18 scope of the privilege Elysium may assert proves Elysium's point that it is
19 inappropriate for ChromaDex to demand the right to make Elysium's privilege
20 determinations for it. (ECF No. 188-01 at 19). ChromaDex cannot invent a self-
21 serving process and then refuse to comply with its Court-ordered obligations because
22 Elysium won't play along.

23 Under the express terms of the Discovery Order, ChromaDex is not entitled to
24 argue the merits of the opposing party's privilege determination with the privileged
25 material in hand. Instead, ChromaDex must immediately comply with its obligations
26 under the Discovery Order. Once Elysium re-produces the documents with the
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28 ² Elysium did not agree to designate text messages on an individual basis except in a limited circumstance with respect to confidential designations on a handful of documents. (*see* ECF No. 185-02, Giuliani Decl. Ex. G at 2).

1 privileged material removed, ChromaDex is free to challenge Elysium’s claims of
2 privilege, as provided for under the Discovery Order. *Crissen v. Gupta*, No. 2:12-
3 CV-00355-JMS, 2014 WL 1431653, at *5–6 (S.D. Ind. Apr. 14, 2014) (“Whether it
4 agreed with Banco Popular or not, Mr. Crissen's counsel should have returned the
5 disk right away, and sought Court assistance in resolving the issue. Instead, counsel
6 perhaps decided it was easier to ask forgiveness than to ask permission, and did not
7 immediately return the disk, but demanded that Banco Popular identify the recalled
8 documents and then reviewed them. This violated the Protective Order. ... the Court
9 awards Banco Popular its fees and costs in connection with the motion, to be paid by
10 Mr. Crissen's counsel.”).

11 **II. BECAUSE CHROMADEx REFUSES TO COMPLY WITH THE**
12 **DISCOVERY ORDER, IMMEDIATE RELIEF IS WARRANTED.**

13 Elysium’s moving papers amply demonstrate that (1) Elysium’s case will be
14 “irreparably prejudiced if the underlying motion is heard according to regularly
15 noticed motion procedures,” and (2) that Elysium is “without fault in creating the
16 crisis that requires *ex parte* relief.” *Mortg. Grader, Inc. v. LenderFi, Inc.*, No. SACV-
17 1001521-CJCMLGX, 2012 WL 13014970, at *1 (C.D. Cal. June 22, 2012) (Carney,
18 J.) (*citing Mission Power Eng’g Co. v. Cont’l Cas. Co.*, 883 F. Supp. 488, 492 (C.D.
19 Cal. 1995)). Elysium’s *Ex Parte* Application and accompanying documents show
20 that Elysium is being prejudiced and is suffering irreparable harm because
21 ChromaDex is in direct violation of the terms of the Discovery Order and has
22 affirmatively stated (in several letters) that it will continue to use and will not return
23 or destroy privileged information relating to this ongoing litigation. (*see* ECF No.
24 185-2, Giuliani Decl. Ex. E, F, and I). The emergency justifying *ex parte* relief
25 therefore arises not from Elysium’s inadvertent disclosure, but rather from
26 ChromaDex’s flagrant violation the Discovery Order to which it stipulated.

27 ChromaDex cannot retain and continue to rely on privileged information and
28 then credibly wonder what all the fuss is about. ChromaDex continues to violate the

1 Discovery Order by reviewing information it unilaterally decided is not subject to
2 any protection from disclosure, effectively vetoing Elysium’s assertion of privilege
3 and usurping the court’s role in resolving the dispute. *That* is the fire drill, and *that*
4 is why Elysium had no choice but to seek *ex parte* relief from this Court. Indeed,
5 ChromaDex *admits* that it continues its case preparations based on the very
6 documents at issue: “ChromaDex’s counsel nevertheless purposely ceased further
7 review of the text messages *while maintaining, in its case preparations and other*
8 *work product, the relevant and non-privileged messages it had already identified.*”
9 (ECF No. 188-1 at 8) (emphasis added). By ChromaDex’s own admission, it is
10 continuing case preparations based on material Elysium has clawed back on the basis
11 of privilege. The Discovery Order requires that ChromaDex “shall not use, and shall
12 immediately cease any prior use of, such information.” (Discovery Order, Section
13 V.E.2). ChromaDex suggests that none of the material it has yet reviewed contains
14 privileged information, but ChromaDex cannot substitute its own judgement for
15 Elysium’s in this matter.

16 Elysium did not create this crisis; this matter arises solely from ChromaDex’s
17 refusal to return and/or destroy privileged material. The parties have both had
18 instances where they inadvertently produced documents that were protected from
19 disclosure, but this is a unique situation because ChromaDex obstinately refuses to
20 comply with its obligations under the Clawback Provision of the Discovery Order.
21 And ChromaDex’s claim that its ongoing and willful retention of Elysium’s
22 privileged information does not present an emergency is at odds with precedent
23 recognizing that protection of such material warrants immediate relief. *See, e.g.,*
24 *Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Arizona*, 881 F.2d 1486, 1491 (9th
25 Cir. 1989) (granting mandamus to review order directing disclosure of privileged
26 information).

27 ChromaDex’s willful and bad faith retention of documents Elysium has clawed
28 back renders the regular noticed motion procedure insufficient here. In support of

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1 the regular noticed motion procedure, ChromaDex claims that Elysium faces no
2 irreparable injury and specifically references the “clawback process” it refuses to
3 comply with – a process that is plainly inadequate when a party determinedly clings
4 to privileged material on the basis of trivial objections to the supposed sufficiency of
5 the clawback notice. Indeed, the very “clawback process” ChromaDex cites provides
6 for *immediate* relief (destruction of the documents and cessation of review) followed
7 by certification of such *within five days of the clawback notice*. (Discovery Order,
8 Section V.E.2) (emphasis added). That truncated timeline and the immediate relief
9 the clawback process sets forth is inconsistent with the leisurely “regular noticed
10 motion procedure” ChromaDex prefers. The ongoing and egregious nature of
11 ChromaDex’s conduct here renders the meet and confer process inappropriate –
12 immediate court intervention is warranted and necessary.

13 **III. CONCLUSION**

14 For the foregoing reasons, and for those stated in Elysium’s *Ex Parte*
15 Application and accompanying documents, Elysium respectfully requests that its *Ex*
16 *Parte* Application be granted.

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18
19 Dated: February 18, 2019

Respectfully submitted,

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21 By: /s/ Esterina Giuliani
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23 ELYSIUM HEALTH, INC.