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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 ELYSIUM HEALTH, INC.,

4 Plaintiff,

5 v.

17 CV 7394 (LJL)
Telephone Conference

6 CHROMADEX, INC.,

7 Defendant.

8
9 New York, N.Y.
August 20, 2020
9:31 a.m.

10 Before:

11 HON. LEWIS J. LIMAN,

12 District Judge

13 APPEARANCES

14 FRANKFURT KURNIT KLEIN & SELZ PC

15 Attorneys for Plaintiff

16 BY: TIFFANY CATERINA

17 CRAIG BRIAN WHITNEY

-and-

18 KAPLAN HECKER & FINK LLP

19 BY: JOHN CHARLES QUINN

20 LTL ATTORNEYS LLP

21 Attorneys for Defendant

22 BY: JOEDAT H. TUFFAHA

23 OMAR HANI TUFFAHA

24 PRASHANTH CHENNAKESAVAN

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1 (The Court and all parties appearing telephonically)

2 THE COURT: Good morning. This is Judge Liman.

3 Have you had a chance to give the parties the relevant
4 instructions?

5 THE DEPUTY CLERK: Yes, Judge.

6 THE COURT: Who do we have on for the plaintiff?

7 MR. J. TUFFAHA: Good morning, your Honor. This is
8 Joedat Tuffaha. I'm here with my colleagues, Prashanth
9 Chennakesavan and Omar Tuffaha on behalf of ChromaDex, Inc.

10 THE COURT: Good morning, Mr. Tuffaha.

11 Who do we have that will be speaking for defendant?

12 MR. WHITNEY: Good morning, your Honor. You have
13 Craig Whitney, from Frankfurt Kurnit, on behalf of Elysium.
14 With me is Tiffany Caterina from Frankfurt Kurnit, and John
15 Quinn from Kaplan Hecker.

16 THE COURT: Good morning, Mr. Whitney. Good morning,
17 colleagues.

18 So, Mr. Tuffaha is here on your application with
19 respect to discovery. Can you tell me where you stand with
20 respect to that?

21 MR. J. TUFFAHA: Yes, your Honor.

22 So, there are three issues identified in our motion to
23 compel. Actually, on issue one, we had some recent
24 communications with opposing counsel, and related to the issue
25 of advertising, your Honor.

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1 Specifically, I think at the core of our dispute
2 related to discontinued advertising on certain platforms that
3 Elysium used, including Facebook, we actually heard from
4 opposing counsel on Tuesday evening that they have actually
5 determined that they are able to search their archives for
6 deleted ads, and we did have a bit of a back and forth, counsel
7 proposed that we meet and confer regarding search terms so that
8 we can go through those archives, which we're fine with;
9 however, they conditioned that on reciprocity, and doing the
10 same with respect to archives.

11 We objected to that, your Honor. Our client's ads
12 have never been put at issue in any sort of meet-and-confer
13 correspondence. There has never been any deficiency identified
14 regarding our produced ads, so we do not believe it is
15 appropriate to condition the search on reciprocity here. We
16 are willing to, your Honor, pursue that solution.

17 There are other platforms, as well, your Honor, that
18 Elysium advertised on, I believe Instagram, Twitter, there are
19 web pages. So, we would ask that that saved, sort of, search
20 for deleted advertisements be conducted as to those platforms,
21 as well.

22 THE COURT: Okay. What's issue number two?

23 MR. J. TUFFAHA: Issue number two, your Honor, refers
24 to something called Zendesk. It's a database that holds
25 Elysium's customer communications. Those are communications to

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1 customers and from customers. Elysium agreed to produce these
2 prior to our initial document discovery cutoff back in
3 February. When they were not produced, we reached out in March
4 identifying the deficiency.

5 Oposing counsel, at that point, had indicated that
6 there were some issues in terms of downloading that data, and
7 subsequently notified us that, due to the pandemic and the
8 issues they were dealing with regarding the data, they are now
9 unable to retrieve that data because they would have to go into
10 their office, and their offices are closed right now.

11 We think this is key to our case in the sense it's a
12 false advertising case. So, communications from consumers
13 clearly go to consumer confusion. Communications from Elysium
14 would go to *mens rea* and intent, which is relevant to the
15 materiality, it would be relevant to travel, damages, and
16 attorney fees, if we can show some sort of intentionality. So,
17 we do believe that these types of key things are critical to
18 our case, given they should have been produced back in
19 February.

20 We would need to find some solution here, and at a
21 minimum, Elysium moved the Court for some sort of extension
22 here, given the upcoming discovery deadline, because the
23 alternative of them not producing anything --

24 THE COURT: Let me ask you about that. Isn't that
25 issue readily addressed by me granting an extension of the

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1 discovery deadline? Isn't that, in fact, the only thing that I
2 could do, given the assertion that, based on the pandemic,
3 Elysium can't recover the information?

4 MR. J. TUFFAHA: I think that's correct, your Honor.
5 We certainly don't want to force anybody to go into their
6 office during the pandemic. I'm here in LA. I know there are
7 still restrictions. I don't know what the situation is in New
8 York, but, again, we are sympathetic to the pandemic, and that
9 would, I think, be at least one solution.

10 THE COURT: This will be a question for Elysium, also,
11 but in your minds, what kind of an extension would you need
12 with respect to the fact discovery or, put another way, after
13 the date by which Elysium produces the information from
14 Zendesk, how much time would you need to complete fact
15 discovery?

16 MR. J. TUFFAHA: Yes, I think we would want to use
17 that information, at least at the 30(b)(6) deposition, and
18 potentially at the fact witness deposition, depending on what
19 we find. So, I think, I think around 30 days would probably be
20 sufficient.

21 THE COURT: Okay. You want to go to issue number
22 three? Is issue number three still a live issue?

23 MR. J. TUFFAHA: Yes. Issue number three, your Honor,
24 back in March, when we received the production, we noticed
25 there were really low counts for key custodians of Elysium, and

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1 these are senior executives who were responsible for
2 advertising, marketing, and quality assurance, and we had some
3 back and forth.

4 Subsequently, we've received some third-party
5 discovery from PR in marketing entities, and Elysium
6 manufactured it, and it did confirm there is a deficiency here.

7 We attached a few examples to our motion. There are
8 several others that we have. For example, there is one vendor,
9 Brew, who was a PR company that Elysium worked closely with.
10 We have hundreds of communications between that PR firm and an
11 individual named Chris Castro, who was a senior marketing
12 executive at Elysium responsible for getting ad strategy for
13 evaluating the truthfulness of that, including Victoria Davis,
14 who is the head of advertising.

15 We also have, I think, around 189 emails between Brew
16 and Davis, but we only received single emails in Elysium's
17 production related to the communications with Brew. We
18 attached a couple of examples that really go to the heart of
19 our case.

20 One of our allegations is that Elysium marketed their
21 product as being supported by clinical studies, when they have
22 not conducted clinical studies. In the examples we test, we
23 show these key marketing officials that I just described,
24 including communicating with C-level executives, including the
25 CEO, the COO, and the chief scientist, essentially indicating

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1 concern regarding the fact that they have not conducted
2 clinical studies, and finding ways to spin this with respect to
3 any questions they receive in terms of interviews and from the
4 press. So, this is just one issue that goes to the heart of
5 our case, and there has been a clear deficiency.

6 There are other vendors, your Honor, including a
7 company called Gen3, which does affiliate marketing. We have
8 hundreds of emails between that firm and people who are senior
9 marketing and acquisition executives. We actually received no
10 communications in Elysium's production related to this firm.

11 So, we think it's the tip of the iceberg, because,
12 unfortunately, we did subpoena about 19 entities, but only four
13 responded, and we were unable to subpoena another seven. We
14 were unable to serve them due to the pandemic.

15 So, we think that, based on the limited number of
16 entities we have been able to get responses for, clearly, there
17 is a deficiency here, and we think it was a macro issue with
18 the productions. We're happy to discuss potential solutions to
19 that, your Honor, but that issue is still live.

20 THE COURT: So, I understand from Elysium's letter
21 that, at the time that you wrote to me, that was an issue that
22 had not been the subject of meet-and-confers. I'm not sure
23 what relief you're seeking from me now, or if you are seeking
24 relief, but why shouldn't I just let the two of you meet and
25 confer with respect to any deficiencies?

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1 MR. J. TUFFAHA: I think that's fine, your Honor.

2 Just a couple points. We did meet and confer about
3 this dating back to March. Elysium indicates we didn't meet
4 and confer regarding the specific documents, but these
5 documents are just examples. This, essentially, substantiates
6 the concern that we expressed to Elysium back in March
7 regarding the low custodial counts.

8 I think what would facilitate a meet-and-confer on
9 this, your Honor, is, from a preservation perspective, that
10 Elysium produce the whole notices that they sent to their
11 custodians, and produce the number of documents that they
12 collected, so we can make sure there is no spoliation issue
13 here.

14 With respect to the document production itself, I
15 think we would request that Elysium produce their search term
16 reports, because we really think there is an issue here, given
17 the discrepancy between third-party discovery and produced
18 discovery.

19 THE COURT: First of all, that's not a request that
20 you make in your letter. Would you be willing to do the
21 reciprocal for Elysium and produce your whole notices and your
22 hit reports?

23 MR. J. TUFFAHA: Your Honor, that would be fine. We
24 would be fine doing that.

25 THE COURT: Okay. Let me turn to Elysium.

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1 Maybe, Mr. Whitney, just to take the second issue of
2 Zendesk first, maybe that's something we can just get off the
3 table.

4 Is it correct that the only issues with respect to
5 Zendesk is just your being able to access the information,
6 because the office is closed due to the pandemic, and that this
7 is something that I can address by granting an extension of
8 discovery?

9 MR. WHITNEY: Thank you, your Honor.

10 Yes, that's the primary holdup. We just can't
11 actually access it.

12 I would say that, the representation by opposing
13 counsel, that these are the critical documents and these are
14 essential to the case, is not really based on anything. It's
15 very possible that, upon searching these documents, there will
16 be no relevant documents in the production. I mean, this is
17 just a repository of customer communication. There is no
18 evidence, at this point, or reason to believe that any customer
19 communication has anything to do with the at-issue statements
20 in this case. So, I don't know why we would assume that these
21 are somehow the critical documents, but, nevertheless, we agree
22 to search and produce them, along with the other documents in
23 this case, but, unfortunately, we, right now, are unable to.

24 Because of the unique nature of these documents, we
25 can't export them the way we can normal documents. Despite

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1 significant effort, we can't do it remotely because the
2 mechanism keeps timing out when you try to do it remotely
3 because of the nature of the unique file format.

4 So, we have access to the offices, and once they open,
5 we should be able to produce anything that is responsive.

6 THE COURT: Is there an estimate as to when the
7 offices will reopen, when you'll have access, whether it's for
8 business purposes?

9 MR. WHITNEY: I'm not certain on that, your Honor. I
10 think this is all a very fluid situation, as you're probably
11 aware. So, I would have to consult with my client to see if
12 they have any targeted reopening. Even in that regard, as we
13 know, these things keep changing on a moment's notice. So, I
14 just don't have a date for planned reopening when we can say
15 this will definitely happen by that date.

16 THE COURT: So, I would like to extend the fact
17 discovery deadline, and all corresponding deadlines after that,
18 by a certain amount so that, hopefully, you don't need to come
19 back to me.

20 Can you give me a date by which you would request that
21 the discovery deadline be extended?

22 MR. WHITNEY: Well, if we could extend it another
23 month or two to see if we can reopen at that point. I'm
24 hesitant, your Honor, about the reopening, because I have no
25 control over that. If COVID levels increase in New York, the

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1 office might be closed for a more extended period of time.

2 I would submit that I think we can continue with this
3 case without these documents, as these are not critical
4 documents. I don't want to extend the case even longer than it
5 already is, but I understand your Honor wants to try to come up
6 with a solution. So, I would tentatively suggest we could
7 postpone it for another few months with the hope that, if
8 necessary, we would revisit that, or alternatively, your Honor,
9 we can proceed without these documents for now, and whenever
10 they become available, we'll make them available. If they turn
11 out to be somehow more relevant than -- or relevant and
12 critical to this case, we can address it at that time, rather
13 than holding up the whole case for documents that may
14 ultimately not have a lot of significance to the underlying
15 issues here.

16 THE COURT: I'm reluctant to adopt your latter
17 approach. I'd like to move the case along, but I don't think
18 I'm in a position to weigh how important these documents are.
19 I have no way to credit your view, or ChromaDex's view, and I
20 would like to avoid the situation where documents, of both
21 sides have agreed will be produced, get produced late, and the
22 depositions have to be retaken.

23 So, what I'm going to do is extend the discovery
24 deadline by two months, and extend every other deadline after
25 that by two months. I'm going to ask the parties to submit a

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1 revised case management plan, implementing the two-month
2 extension of deadlines. If a deadline falls on a weekend, then
3 the deadline will be moved to the next business day.

4 Is that acceptable to you, Mr. Whitney?

5 MR. WHITNEY: Yes, that's fine, your Honor.

6 THE COURT: Is that acceptable, also, to ChromaDex?

7 MR. J. TUFFAHA: Yes, your Honor.

8 THE COURT: Good. So that takes care of issue number
9 two.

10 Issue number one, Mr. Whitney, I'll hear from you.

11 Just to throw something out for your consideration; if
12 I order, as I've been inclined to do, you to produce documents,
13 even from the social media platforms, and ChromaDex says that
14 it's not going to do the reciprocal, I would probably look
15 dimly on the argument by ChromaDex. I obviously hear both
16 sides, but my instincts would be what's sauce for the goose is
17 sauce for the gander.

18 Let me hear from you, Mr. Whitney, on the issue before
19 me, which is Elysium's obligations.

20 MR. WHITNEY: Yes, your Honor. I think your instincts
21 on this are exactly correct.

22 I would like to clarify a few things that opposing
23 counsel mentioned, just so your Honor understands what we're
24 talking about more specifically.

25 When, Mr. Tuffaha says that they're in Elysium's

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1 archives, that's not really accurate. What we're talking about
2 here are documents that reside on a third-party platform,
3 Facebook, that are not on Elysium's system.

4 The note that the parties had met and conferred on
5 search parameters, on custodians, on sources, neither party
6 agreed, before now, to produce from what is a Facebook ad
7 manager. We are willing to do so and we told ChromaDex that we
8 are, in light of this discussion, and which is also why we
9 would have wanted to have a telephone conversation with them
10 prior to this hearing, so that we didn't have to waste the
11 Court's time with this, but the Facebook ad manager is not
12 necessarily easy to search through it for what ChromaDex wants.

13 I'm not even sure -- there is no readily way to export
14 the information that resides on Facebook's systems, so we would
15 have to figure out how that would happen, or how you would
16 search through videos, or what have you, for one sentence in a
17 video that may or may not arguably be relevant. We would have
18 to watch every video on the Facebook ad manager. With all this
19 being said, I believe we can come up with a set of ground rules
20 with ChromaDex.

21 We believe that ChromaDex, given that none of this was
22 part of the required production that the parties had agreed to
23 ahead of time, that ChromaDex do the same. I feel that, in
24 doing so, you'll find that the parties will come up with much
25 more reasonable parameters if both parties have to abide by

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1 them, rather than it only falling on one party's obligation.

2 So, I think we can find a way to get it done, but I
3 agree with your Honor, it needs to be done reciprocally,
4 because this is not based off of a typical platform to produce
5 from, and we need to find the right way to search and the right
6 way to produce the documents within.

7 THE COURT: So, I'm just addressing Elysium's
8 obligation right now. I gave you thoughts about what I would
9 likely do with respect to ChromaDex, but none of that should be
10 taken as a ruling that any obligation of Elysium would be
11 reciprocal on ChromaDex. They're just muses.

12 With respect to Elysium, what is it that Elysium is
13 willing to do without a court order?

14 MR. WHITNEY: Elysium, which we've told ChromaDex,
15 Elysium is willing to search through the Facebook ad manager,
16 which is Facebook's tool, and I think it also applies to
17 Instagram. For advertisements or statements that are the same
18 or substantially similar to the ones at issue here in this
19 case, with some framework of how that search can occur and how
20 those documents can be produced, we don't yet know how to
21 produce documents from this ad manager, so we need to discuss
22 that with ChromaDex, because it, again, resides on Facebook's
23 platform.

24 The video, I don't know how easily we can export it or
25 download it. If we can take a screenshot of something, we can

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1 do that, but we are willing to search for responsive ads that
2 have been pled or relate to what has been pled.

3 Like I said, your Honor, I think we need to come up
4 with some amount of guidelines as to how we can search for
5 this, what the extent of the search would be. How do you
6 search through videos and how we produce such materials, given
7 the platform is not designed -- it doesn't reside on Elysium's
8 systems, so Facebook doesn't have control over it to produce in
9 a readily-available format. So, we have to come up with some
10 agreement as to how that would occur.

11 THE COURT: Are there other platforms that are
12 relevant? I know the ChromaDex letter refers, really,
13 exclusively, to the Facebook platform, but I think I heard
14 Mr. Tuffaha mention other platforms.

15 MR. J. TUFFAHA: Your Honor, if I can turn to my
16 colleague, Prashanth Chennakesavan, who has found some of the
17 ads that were not produced, I think he can give your Honor a
18 better idea in terms of what platforms are out there and what
19 we're looking for.

20 You want to go ahead, Prashanth.

21 MR. CHENNAKESAVAN: This is Prashanth Chennakesavan on
22 behalf of ChromaDex.

23 So, the focus of our correspondence with Elysium has
24 been over discontinued advertising that Elysium places in the
25 marketplace --

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1 THE COURT: Can you just answer the question for me.
2 Are there platforms, other than the Facebook and
3 Instagram platforms, that are relevant in terms of social
4 media?

5 MR. CHENNAKESAVAN: In terms of social media, we
6 believe Elysium places advertorials and uses some kind of
7 widget to point consumers to advertorials, which are articles
8 written as advertisements on various web pages. There is also
9 the elysiumhealth.com page itself, that we are aware of.

10 THE COURT: Okay. So, Mr. Whitney, did you know what
11 can be done with respect to those platforms?

12 MR. WHITNEY: Not offhand, your Honor. This is the
13 first we've really heard about wanting anything other than
14 Facebook Ads Manager. So, again, I'm happy to look into it,
15 but I can't speak definitively on this call, unfortunately.

16 THE COURT: Okay. So, what I'm going to do with
17 respect to issue one, the one thing that has been raised to me
18 is the Facebook platform, is that I'm going to deny the
19 application for an order compelling production, based upon the
20 representations from Elysium on this telephone call.

21 I'm going to direct the parties to meet and confer
22 with respect to search methodology and with respect to
23 production methodology.

24 I'm going to direct the parties to meet and confer
25 with respect to two other things. One is, other platforms on

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1 which responsive information might appear, including the
2 Elysium web page. Also, to meet and confer with respect to any
3 reciprocal obligation by ChromaDex.

4 If you still have disputes with respect to social
5 media or information about web pages, I'm going to ask you to
6 bring those issues to me altogether, so both ChromaDex issues
7 and Elysium issues.

8 Can we go to issue number three?

9 MR. WHITNEY: Yes, your Honor.

10 THE COURT: Mr. Whitney, why don't you address issue
11 number three. I think the question is, I gather, from what I
12 hear from ChromaDex, that they believe that the right approach
13 with respect to issue number three is meet and confer. They're
14 now making the request to me that I order you to produce hit
15 reports and document retention notices. On the notion that you
16 would get the same thing from them, are you prepared to proceed
17 that way?

18 MR. WHITNEY: Your Honor, again, given this is the
19 first we've heard of this request, I would like to have the
20 opportunity to speak with my client and colleagues about it,
21 but more importantly, I think we can also speak with opposing
22 counsel about this and come up with some reasonable solution.

23 The premise behind this request is flawed, your Honor,
24 as we pointed out. The fact that they received more documents
25 from third parties than they did from Elysium, with regard to

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1 specific communications, is not surprising, given they
2 requested all communications with third parties from the third
3 parties. Elysium had negotiated some more narrow subject
4 matter search, just relating to communications regarding this
5 case search, statements that are at issue in this case.

6 Elysium has collected hundreds of thousands of documents from
7 search terms, produced thousands of documents.

8 The fact that the document production deadline was six
9 months ago, the fact that now, six months later, they have
10 identified all of these documents, I realize they're saying
11 they're representative, but I haven't seen any others that they
12 say Elysium did not produce, which they never identified to us
13 beforehand, is hardly indicative of anything.

14 If anything, given the numbers, I think we did quite a
15 thorough production. If you look at the documents themselves,
16 two of them are emails that predate this case and relate to
17 items about clinical studies that predate the studies that did
18 occur that are at issue here, so they're not even relevant,
19 much less indicative, of any kind of flawed search or
20 spoliation or what have you.

21 So, I'd like to have the opportunity to look into this
22 a little further and to speak with ChromaDex about this, if we
23 can figure something out. The issues that have been teed up by
24 ChromaDex are a little bit of straw man issues here, your
25 Honor. This is not indicative of anything.

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1 THE COURT: So, I don't know that that is true. I
2 also don't know that, what ChromaDex has said, is true. So,
3 I'm not going to credit either of you on that particularly.

4 I do know both parties have agreed that a meet and
5 confer would be useful, and that I don't have the evidence in
6 front of me that would give me a basis to really order
7 anything, other than the parties meet and confer.

8 If it turns out that the document search was
9 insufficient, and there is evidence of that, there is the
10 30(b)(6) depositions, or issues with respect to Elysium not
11 doing something that it's required to do, then I'll address
12 that.

13 So, with respect to issue number three, I'm going to
14 direct you to meet and confer with respect to issue number
15 three.

16 Mr. Tuffaha, is there anything else I should address
17 today, or any response that you want to make to what I'm
18 ordering? If you think I'm making error, now is the time to
19 raise it.

20 MR. J. TUFFAHA: Your Honor, that's fine.

21 I would just object to the characterization of these
22 documents from opposing counsel. He's mischaracterizing our
23 allegations in our complaint. We alleged that Elysium had gone
24 to market without any clinical studies, and represented the
25 contrary to the public. Counsel is limiting this to one study

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1 in 2017 where we alleged that they actually studied our
2 client's ingredients, but this dates back to 2016 in our
3 complaint. They've had no clinical studies. The documents
4 that we have attached to our complaint showed effort to hide
5 this fact.

6 These are only several examples, your Honor. We have
7 other examples.

8 All our subpoenaed documents have also been served on
9 Elysium. We raised the issue of the custodian back in March,
10 so it's a bit curious that counsel is saying this is the first
11 time that he's hearing about this. We think the examples that
12 we've attached show, clearly, there is an issue.

13 We do respect your Honor's decision, and we'll meet
14 and confer, including requesting search terms and that kind of
15 stuff. It can come back to your Honor if we have any further
16 evidence supporting our argument.

17 These are key, your Honor, key entities in shaping
18 Elysium's advertising. This is a Lanham Act case. When you
19 have hundreds of documents from a PR company, Brew, and we only
20 get seven documents or, from another company, we have hundreds
21 of documents, but zero were produced, I think it clearly shows
22 there is a fundamental issue with Elysium's production.

23 THE COURT: So, Mr. Whitney, before you respond to
24 that, let me tell you that you don't need to respond to it,
25 because by the time I have to -- anything that was just said to

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1 me would be particularly relevant to a decision that I would
2 need to make, I would permit you to respond and, frankly, I
3 might not even remember what Mr. Tuffaha just said to me. So,
4 let me direct myself to what I'm ordering today.

5 Is there anything else that I need to address or any
6 error? If so, now is the time.

7 MR. WHITNEY: No, your Honor, that's fine. I agree
8 that any response in that regard is unnecessary here. So, yes,
9 your Honor, thank you. Nothing further from us.

10 THE COURT: So, I ask you to submit the revised case
11 management plan by Monday at 5:00 p.m.

12 Mr. Tuffaha, would you do that?

13 MR. J. TUFFAHA: Yes, your Honor, we'll do that.

14 THE COURT: Mr. Tuffaha, I will also ask you to order
15 a copy of this transcript. It doesn't need to be on an
16 expedited basis, but I would just like to have it available,
17 and I'm sure other parties would like to have it available.
18 That would be helpful for the Court.

19 Anything else from either of you? Mr. Tuffaha?

20 MR. J. TUFFAHA: No, your Honor. We appreciate your
21 time.

22 THE COURT: Mr. Whitney?

23 MR. WHITNEY: No, your Honor. Thank you very much.

24 THE COURT: Thank you, both. Stay safe and stay
25 healthy. * * *