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August 12, 2020

VIA ECF

Hon. Lewis J. Liman, United States District Judge

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

Dear Judge Liman:

ChromaDex, Inc.'s August 10, 2020 letter motion (ECF 152) should be denied because: (1) ChromaDex did not complete the meet-and-confer process with Elysium to resolve the dispute prior to filing its motion, as expressly required under Paragraph 4.B of this Court's Individual Practices; (2) ChromaDex's motion raises new issues and makes new proposals regarding Elysium's document search that ChromaDex *has never previously mentioned* to Elysium, even by letter, in violation of Federal Rule of Civil Procedure 37(a); and (3) ChromaDex's motion, even if procedurally proper, mischaracterizes the record and ultimately has no merit.

First, ChromaDex's motion improperly circumvents the meet-and-confer process required by Paragraph 4.B of this Court's Individual Practices. In recent weeks, the parties have exchanged several letters regarding issues with their respective document productions. On July 27, 2020, Elysium responded to a letter from ChromaDex relating to publicly available advertising and ZenDesk data (as discussed below) and repeatedly invited further discussions. (Ex. J.)¹ Rather than taking up the invitation for further discussion, ChromaDex raced to the Court with a motion that included documents and proposals that the parties never discussed, seemingly to create publicity (as it already has) and gain a tactical advantage as the parties continued to engage in correspondence regarding ChromaDex's own discovery deficiencies (including its failure to produce communications with the FDA and sales information). Unlike ChromaDex, Elysium is actively engaged in the meet-and-confer process to try to resolve ChromaDex's production issues without unnecessarily burdening this Court. ChromaDex should be required to do the same.

Second, and relatedly, ChromaDex's motion is improper because ChromaDex *never raised* with Elysium (by letter or otherwise) the issue presented in Section III of its letter motion: namely, ChromaDex's contention that Elysium's document search and production was insufficient because certain subpoenaed third parties produced certain additional documents. Indeed, prior to filing its motion, ChromaDex never identified the documents in Exhibit N to Elysium. Consequently, Elysium has not had an opportunity to investigate this newly raised issue or determine the veracity of ChromaDex's claims, which appear dubious. (*See infra* § III.) As a result, the relief requested in Section III is not ripe for judicial determination. *See* Fed. R. Civ. P. 37(a).

¹ The exhibits refer to those attached to ChromaDex's letter motion at ECF 152.

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Third, in addition to ChromaDex's disregard for proper procedure, its motion mischaracterizes the discovery record and lacks merit for the reasons discussed below.

I. Advertisements Containing At-Issue Statements

ChromaDex's demands for production of publicly available advertisements reflects a misunderstanding (or misrepresentation) of Elysium's productions to date. Elysium has already produced all non-privileged documents and communications relating to the Pleadings Misstatements² appearing in *any context*, including "discontinued" advertising (to the extent there are any). Moreover, these productions were made following detailed correspondence between the parties, in which the parties reached agreement on appropriate custodians and other sources to search. (*E.g.*, Exs. C, D, E, F.) Throughout that correspondence, Elysium explained that producing troves of public-facing social media posts to which ChromaDex had access, and which ChromaDex had never identified as relevant to its claims despite two rounds of amended pleadings over the past two-and-a-half years, was inconsistent with the requirements of Federal Rule of Procedure 26. *See* Fed. R. Civ. P. 26(b)(2)(C), Adv. Comm. Notes to 2000 Amend. Accordingly, neither party produced public advertisements from their social media posts.

ChromaDex now comes before the Court with new complaints and new proposals. ChromaDex submits Exhibit M (never before shown to Elysium), which it claims is a "deleted" advertisement necessitating new searches. In fact, that exhibit appears to be a screenshot of a video that remains active and accessible to ChromaDex. If ChromaDex nevertheless wishes to meet and confer with Elysium concerning appropriately targeted (and reciprocal) discovery efforts, Elysium is prepared to address that subject in accordance with applicable rules.³

In addition, ChromaDex contends that Elysium should be required to search the email accounts of marketing personnel, as well as shared drives. Elysium has already searched agreed-upon custodians and shared drives for responsive materials. Again, if ChromaDex believes that additional searches would be productive and wishes to propose additional custodian, sources, or search terms, Elysium is prepared to meet and confer on such proposals.

II. ZenDesk

Elysium has no objection to providing ZenDesk documents, and has worked diligently to collect these documents following the parties' February 7, 2020 agreement on that issue. But, at present, such documents are not readily accessible due to COVID-19 restrictions.

² The Pleadings Misstatements refer to over 35 allegedly misstatements pleaded by ChromaDex in its SAC, which occurred in over 24 contexts set forth in Exhibits D-Q, U-Z, and CC-GG (the "Pleadings Advertisements").

³ ChromaDex incorrectly claims that Elysium's statement that there is no readily available means for searching deleted Facebook, Instagram, or Twitter posts "raises serious concerns about spoliation." Elysium has already produced extensive relevant material from appropriate sources, and ChromaDex has not identified, nor is Elysium aware of, a single discontinued advertisement relevant to this dispute that is unavailable to ChromaDex.

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Promptly following the parties' agreement, Elysium exported documents from ZenDesk. The ZenDesk documents export as a .json file, which is not a standardized e-discovery file. Elysium's e-discovery vendor, CDS, attempted to process the .json file using standard processing tools. When that failed, CDS investigated whether it could create a custom specification to process the data. Ultimately, CDS determined that it needed direct access to a computer with the ZenDesk software to create the custom specification. Unfortunately, the government-mandated shut down of New York City on March 14, 2020 prevented CDS from gaining such access. To date, Elysium's offices remain closed to employees as well as third party vendors. Elysium has made clear to ChromaDex that, once Elysium's offices can be safely re-opened consistent with official regulations and public health guidelines (Ex. J), it will promptly process and produce the ZenDesk documents. Until then, such documents are not "reasonably accessible." Fed. R. Civ. P. 26(b)(2)(B) ("A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.") Moreover, despite ChromaDex's protestations, the consumer communication documents on ZenDesk are not "critical" to this case and certainly do not necessitate undue risk to anyone's health.⁴

III. Comparison of Elysium's Productions to Third Party Productions

ChromaDex's final request—for an order that Elysium produce all non-privileged internal and external communications by agreed-upon custodians that relate to the Pleaded Misstatements—is moot. Elysium has already done precisely that. ChromaDex, however, attempts to mislead the Court by making false comparisons. Elysium's document production was expressly limited to documents relating to the Pleaded Misstatements (Exs. E & H); whereas the ChromaDex third-party subpoenas sought "[a]ll Communications with Elysium" without any such limitation (Exs. Q, R). In the absence of any subject matter limitation, it is unsurprising that third parties would produce more communications than Elysium.

ChromaDex also appears to mischaracterize the relevance of the documents newly identified in its Exhibit N. Contrary to ChromaDex's assertion, Elysium did not instruct its manufacturer to reduce the purity of Basis—it merely altered a manufacturing specification. And Elysium produced hundreds of documents showing the actual testing and purity levels of Basis products sold to consumers. In addition, communications from 2016 about the fact that Elysium had not conducted a clinical trial of Basis have nothing to do with the Pleaded Misstatements, which relate, in pertinent part, to alleged statements about a clinical trial conducted by Elysium *in 2017*. (Dkt. 139 at 18-19.)

Accordingly, ChromaDex's procedurally improper letter motion should be denied.

⁴ See *Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GmbH*, No. 14-cv-585 AJN, 2015 WL 4002468, at *21 (S.D.N.Y. July 1, 2015) (even if there are a sufficient number of consumer complaints suggesting actual confusion, "they are of modest weight"); see also *Illinois Tool Works Inc. v. J-B Weld Co., LLC*, 419 F. Supp. 3d 382, 399 (D. Conn. 2019) ("online reviews are 'bimodal' and reflect extreme positions rather than the question at issue in the likelihood of confusion analysis—the view of the average actual consumer").

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Sincerely,

/s/ Craig B. Whitney

Craig B. Whitney

cc: Via ECF to Counsel of Record