

Exhibit 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION - SANTA ANA

CHROMADEx, INC,)	CASE NO: 8:16-CV-02277-CJC-DFM
)	
Plaintiff,)	CIVIL
)	
vs.)	Santa Ana, California
)	
ELYSIUM HEALTH, INC,)	Friday, December 6, 2019
)	
Defendant.)	(9:33 a.m. to 9:53 a.m.)

TELEPHONIC DISCOVERY CONFERENCE

BEFORE THE HONORABLE DOUGLAS F. MCCORMICK,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES: SEE PAGE 2

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Plaintiff:

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Defendant:

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1 Santa Ana, California; Friday, December 6, 2019; 9:33 a.m.

2 (Courtroom and Telephonic Appearances)

3 (Call to Order)

4 **THE CLERK:** We're on the record on Case SACV16-02277;
5 it's *ChromaDex, Inc. versus Elysium Health, Inc.*

6 Counsel, your appearances please.

7 **MR. ANDERSON:** This is Barrett Anderson and Sophia
8 Rios from Cooley LLP for ChromaDex, Inc., the Plaintiff.

9 **MS. KERANEN:** This is Kristin Keranen, Baker
10 Hostetler LLP, for Defendants Elysium Health, Inc. and Mark
11 Morris.

12 **MS. TRECKLER:** And also Elizabeth Treckler, Baker
13 Hostetler, for Defendants Elysium Health, Inc. and Mark Morris.

14 **MR. QUINA:** And Marco Quina, Foley Hoag LLP, for
15 Defendants.

16 **THE COURT:** All right, Counsel, this is Judge
17 McCormick. I have read the letters you've submitted to me. It
18 appears to me that you have agreed to submit two different
19 disputes to me under my informal procedure which you-all have,
20 I think, some experience with.

21 The first issue involves, or at least the way I'm
22 going to handle it, the first issue involves the request to
23 modify the protective order in this matter to permit the use of
24 discovery in this action in the proceeding in SDNY.

25 The second involves a couple of documents that

1 ChromaDex asserts are protected by the attorney-client
2 privilege and Elysium contends otherwise.

3 Is that an adequate or fair summary of the two
4 issues?

5 **MR. ANDERSON:** Yes, your Honor.

6 **MS. KERANEN:** Yes, your Honor.

7 **THE COURT:** Okay. So, maybe it will surprise you,
8 maybe it won't surprise you; I think one is easy and one is
9 hard. And so, I'm happy -- let's take the easy one first.

10 I think the protective order issue is fairly easy,
11 and unless you have anything else to say about it, I would just
12 give you a ruling, and then we would dispose of that, and then
13 we could talk about the more difficult issue.

14 **MS. KERANEN:** Your Honor, this is Kristin Keranen for
15 Defendants. I think that we would like to be heard on this
16 issue. I think that the true scope of it is not adequately
17 briefed in the parties' two submissions.

18 **THE COURT:** Well, I want to know that. If you think
19 we've got problems, if you have more to say on it, and you'd
20 like to submit more briefing, that's always an option. You
21 know, I don't want to do something unless both sides have had a
22 chance to tell me everything they need to know -- I mean,
23 everything I need to know.

24 What else do you want to tell me, Ms. Keranen?

25 **MS. KERANEN:** There's I think a couple of issues

1 here, your Honor.

2 First is that we actually don't need to modify the
3 protective order; that this dispute is properly before the
4 FDNY. If the FDNY Court orders Elysium to produce these
5 documents, there's a paragraph in the protective order,
6 Paragraph 23, that would allow for compliance with that order.

7 That -- the case law that ChromaDex relies on is
8 distinguishable and then opposite, and that despite ChromaDex's
9 representations to your Honor, these cases are not similar.
10 They have different parties. Like, there's a Defendant in
11 California that's not a Defendant in New York; there's 29 third
12 parties who were subpoenaed in California that don't have any
13 relevance to the New York action; and most importantly, your
14 Honor, you know, Defendants -- or Plaintiff has cherry-picked a
15 series of discovery requests, but ignored the total scope.

16 So, they've picked out 15 requests, for example, that
17 they say are similar that Elysium has served in both California
18 and New York, but they don't tell your Honor that there's 513
19 other document requests Elysium served in California that are
20 not similar to the ones served in New York.

21 And they don't tell your Honor that of the ten
22 document requests they served on Elysium, that they claim are
23 similar to California and New York, one of those they have
24 withdrawn in New York and they've ignored the 245 other
25 document requests they served in California on Elysium and Mark

1 Morris that are not similar to the New York case.

2 And they completely ignore the fact that there are
3 entirely different federal and state statutes in play in
4 California and the New York actions, and the only overlap is
5 between the two parties, not the claims being brought.

6 So, this is really an attempt by them to get a series
7 of documents that were inadvertently produced by Elysium that
8 we previously litigated before your Honor back in February.
9 They know those documents are not responsive; they know they
10 will not be produced in the FDNY, and this was an -- an attempt
11 to modify the protective order and get those documents in the
12 FDNY action so they can continue to harass our clients with
13 them without going before the FDNY to actually argue a motion
14 to compel what the FDNY Court has said quite expressly that
15 these cases are very different and they will not be litigating
16 the California issues in New York.

17 **THE COURT:** It's all about those documents, isn't it?

18 **MS. KERANEN:** It is exactly about those documents,
19 your Honor.

20 **THE COURT:** I mean, we've been around the -- I'm not
21 sure what we've been around. We've been around the bend on
22 those documents a number of times before, and as I told, I
23 don't remember if it was you or, I don't think it was you, as I
24 told someone from Defendants' counsel months ago; you said,
25 "February", that sounds like probably was about right. I mean,

1 there's just no way to clawback documents that shouldn't have
2 been produced in the first place.

3 Now, the question is, I don't know whether they were
4 -- presumably they were designated as confidential or highly
5 confidential under the terms of the protective order. I mean,
6 if they weren't, then we wouldn't have anything to talk about.
7 They would simply be documents that ChromaDex had, and they
8 would be free to do what they could with them, you know,
9 subject to the SDNY Court thinking they were relevant at the
10 time of trial or what not in New York. I mean, obviously, if
11 they're documents that are purely harassing, et cetera, then
12 they presumably wouldn't be relevant.

13 We have a protective order here. I don't have the
14 protective order in front of me. You guys gave it to me; it
15 was given to me electronically so it's on my screen back in my
16 office, but I'm inclined to modify the protective order. I
17 don't see why we should -- I don't see why the Ninth Circuit's
18 guidance and bolts (phonetic) shouldn't be enough here, and we
19 should modify the protective order to permit the use of the
20 documents that were produced here in what is at the very least
21 collateral litigation in New York. I mean, it is not like that
22 litigation there is some different species of case; it's part
23 of what is essentially a litigation battle between the parties.

24 So, if ChromaDex submits to me a modified protective
25 order, I will sign it.

1 Let's turn then to the attorney-client privilege
2 issues which I think are harder; not that that issue is easy,
3 that's the wrong word.

4 **MS. KERANEN:** Your Honor.

5 **THE COURT:** Uh-huh.

6 **MS. KERANEN:** Respectfully, may I be heard on Fultz
7 (phonetic)?

8 **THE COURT:** Well, I want to talk about the attorney-
9 client privilege issue.

10 **MS. KERANEN:** Okay.

11 **THE COURT:** What do you want to -- when you say,
12 "both", what do you mean both?

13 **MS. KERANEN:** No, no. *Fultz*; the *Fultz* case. I'm
14 sorry.

15 **THE COURT:** Sure.

16 **MS. KERANEN:** I mean, I think that the *Fultz* case is
17 distinguishable here and not because that was the
18 (indiscernible) litigation that was already closed, and a new
19 party was trying to obtain those documents, so they didn't have
20 to start the discovery process from scratch.

21 Respectfully, your Honor, they issued this document
22 request to us in March. We've been meeting and conferring
23 about it. Our discovery process is ongoing and will not end
24 until the end of February.

25 So, the cases are not similar, and that issue between

1 the cases are not similar. The custodians that each party is
2 producing from case to case are different. The amount of
3 documents that have produced in California, they're simply not
4 relevant to New York, is tens of thousands of documents.

5 If ChromaDex wants to cross-designate documents it
6 has produced that it says are responsive to Elysium document
7 requests, we have no objection to that, but we don't think that
8 ChromaDex has the right to decide what Elysium's responsive
9 documents are in the New York action and propagate and
10 integrate production on down the line.

11 **THE COURT:** Okay. I understand. I understand your
12 concerns, and I don't dismiss them -- I don't dismiss them
13 without some consideration, but I think that the cases are
14 related and collateral, and will handle it thus.

15 Let's talk about the attorney-client privilege
16 issues. So, two issues.

17 Number one, I'm not clear whether we should be
18 applying federal law or state law to the dispute. It's a
19 diversity action in the main, and that would normally suggest
20 to me that we should be applying California law. At the same
21 time, I see that Elysium has cited federal law, and federal law
22 runs counter to what my instincts were, which was my instincts
23 were that this kind of communication should be privileged.

24 And so, I don't know that I have gotten from you
25 folks the best information I have on what law should apply and

1 whether we should apply either the federal doctrine as set
2 forth by the Second Circuit in that line of cases going all the
3 way back to before I was born, 1961, the Kovel (phonetic) case,
4 or whether we should be looking at some different line of cases
5 in California. But I want you-all to tell me if I've missed
6 something.

7 **MR. ANDERSON:** Your Honor, this is Barrett Anderson
8 from Cooley.

9 We agree that that was an issue we confronted when
10 this was first brought to our attention based on the same
11 reasoning. The fact that this was a diversity case brought in
12 diversity at first instance, we proceeded under the idea that
13 state's privilege law applied, and we thought that the state
14 privilege issue was pretty straightforward.

15 You know, I think in our mind that is the right law
16 to apply, but I think our position is that even if you apply
17 federal privilege law, you still come to the same conclusion.
18 I think if you look at the Kovel case, it's really concerned
19 with the idea that a party is hiring an accountant and later
20 hiring a lawyer to try to claim privilege over that
21 accountant's analysis, and that's not at all what happened
22 here.

23 This is a legal analysis from the very get-go offered
24 in pursuit of preparing a legally-required filing, and you've
25 got lawyers involved at every step of the way and the agent

1 simply translating --

2 **THE COURT:** The fact it's a legally-required filing
3 doesn't get you there. I mean, and I'm surprised there's not
4 more, maybe there is. I'm surprised there are not more cases
5 out there dealing with a situation very similar to this.

6 It seems to me that writing to your outside
7 accountant and saying, "Here's a number we used for this, and
8 we used it because, dot to dot to dot to dot, was told to us by
9 our lawyers". You know, like I said, my first instinct was,
10 well, that should be -- that kind of communication should
11 retain its privilege character, but this distinction made by
12 these cases like Chevron (phonetic) and *Kovel*, and so forth,
13 suggest that, you know, perhaps what the parties should be
14 doing in these circumstances is saying, you know, "I picked
15 this number based on what my lawyer told me", and period.

16 Or you run the risk of waiving the privilege by
17 disclosing it to your outside accountant to get that number
18 blessed.

19 It's hard for me to believe, I guess it's a little
20 hard for me to accept, but that's the distinction these cases
21 are drawing, and I think it's pretty -- a pretty uniform
22 distinction, so if we're having to apply federal law, you're
23 not going to get the documents. If -- well, you're not going
24 to get the privilege; I misspoke.

25 If we're going to state law, then I don't know that

1 -- I'm surprised again we don't have some discussion of the
2 distinction.

3 So, like I said, I think the question is harder, and
4 I just may need the parties to do some more digging for me. We
5 were starting to do that ourselves, and I thought, well, hold
6 on; that's not how this works.

7 **MS. TRECKLER:** Your Honor, Elizabeth Treckler here,
8 if I can just add in a bit of commentary for Defendants.

9 Obviously, we have taken the opposite position;
10 although there is diversity, there is also federal question in
11 this case. There's Uniform Trade Secrets Act at issue, there's
12 attendant state law claims, and from our position, the federal
13 law would apply in this instance.

14 That being said, I still don't think that Plaintiffs
15 get there with state law, and I don't think that the cases
16 support them. There's not any client-accountant privilege, and
17 in this case, they were not telling their accountant, Marcum
18 (phonetic), what their attorney said to then have Marcum pounce
19 upon it, get back to their wares, make certain decisions
20 internally about that. It wasn't that.

21 It was exactly as you said, your Honor, which was
22 they were saying, you know, "We're coming to this conclusion
23 based on our attorneys' advice", but they chose to go the extra
24 step and say, "Here's what our attorney said". And I mean, to
25 the extent that they're saying that, you know, the creation of

1 those legally-required documents involve these confidential
2 transmissions, I mean, they're only trying to claw-back this
3 small portion of the documents. So, clearly, they don't see
4 all their communications with Marcum to prepare this 10-Q to be
5 privileged, and so I think that either under federal or state,
6 you're just not getting there and that there is a waiver.

7 And we're happy to brief that further, your Honor.

8 **THE COURT:** All right. I think that's what I'm going
9 to order. I'm going to order the parties to submit to me by
10 Friday, December 13th, briefing on the attorney-client
11 privilege issues that I think are touched on in your letters
12 and that we've discussed here today.

13 Obviously, I'm first, as a threshold matter,
14 concerned about whether we should be applying federal or state
15 privilege law. It seems like there's some disagreement about
16 that.

17 And then it sounds like both parties have different
18 positions about whether the outcome should be different under
19 federal and state law, and so ultimately, I'm going to have to
20 make two decisions. One is whether to go federal or state, and
21 second is who's right under the applicable doctrine. And I
22 want to make sure we get both of those right.

23 Is a week enough time for you to do that, or would
24 you like additional time?

25 **MR. ANDERSON:** Your Honor, from ChromaDex's

1 perspective, a week is enough time.

2 **THE COURT:** Okay. Elysium?

3 **MS. TRECKLER:** And --

4 **MS. KERANEN:** Your Honor --

5 **MS. TRECKLER:** -- oh, go ahead, Kristin.

6 **MS. KERANEN:** A week will also be enough time on that
7 issue.

8 I would like, your Honor, to submit additional
9 briefing on modification of the protective order since
10 Plaintiff got additional briefing on there. I don't think that
11 *Fultz* implicates the Rules of Discovery in a different forum.
12 The brunt of discovery issue is in New York, and there's also a
13 recent case on privacy and the claw-back of inadvertently-
14 produced documents in the Central District, or allowed the
15 *Horbo Skuff* (phonetic) case that we'd like to bring to your
16 attention.

17 **MR. ANDERSON:** Your Honor, I have to decline, or say
18 that ChromaDex does not support that. We're under a very tight
19 deadline in New York, and this is a pretty straightforward
20 issue, so we think that we need to get going --

21 **THE COURT:** I'm going to modify the protective order.
22 I don't need additional briefing. You know, it's my protective
23 order; I can modify it. And if you -- we need to move that
24 issue ahead.

25 The privilege issue is less -- I don't want to say

1 less urgent; I don't think maybe it is less urgent, but it --
2 it is no less urgent, but we can -- we should make sure we get
3 the privilege issue correct.

4 I don't like the way that sounded either. I want to
5 make sure we get the privilege issue correct as well.

6 Okay. So, we'll look for those supplemental briefs
7 next week on Friday, and then I will have you get on the phone
8 with me again if necessary; if not, we'll just have a ruling
9 for you.

10 I appreciate your help today. Thank you very much.

11 **MS. KERANEN:** Thank you, your Honor.

12 **MR. ANDERSON:** Thank you, your Honor.

13 Sorry, your Honor, can I say one more quick thing
14 before we get off the line?

15 **THE COURT:** Go ahead.

16 **MR. ANDERSON:** One of -- my client is very, very
17 interested in this issue, so I wanted to bring it to your
18 attention.

19 We have been told by Baker Hostetler that they will
20 be withdrawing (indiscernible) very formal notice of
21 withdrawal. We tried to understand if that's going to happen.
22 If that's going to happen in the New York case, it could have
23 very dramatic consequences. It could lead to a delay in the
24 case. It has resulted in us -- in ChromaDex being ready for
25 and prepared for some sort of mediation, but we're not aware

1 of, and we've reached out several times, we're not aware of any
2 attempt to come back on that. So, because of that uncertainty,
3 my client is very concerned, and we just wanted to bring it to
4 your attention that we've been seeking clarification on that,
5 and it could have really big consequences.

6 **THE COURT:** I saw the reference in the letters, and I
7 saw the email giving you notice under whatever that rule was; I
8 assume it was a local rule here that there might be a motion in
9 the -- in the offing.

10 I don't know what to tell you in terms of whether
11 it's happening or not. If it's filed, it's filed; if it's not
12 -- I mean, until it's filed, I think you -- it's incumbent upon
13 you and ChromaDex to proceed as if it hasn't been filed yet.
14 And until that shoe drops, I really don't know that I can -- I
15 mean, I guess if I was Judge Carney or Judge McMahon, I could
16 do something a bit more proactive, but I'm not comfortable
17 given my limited scope here to do that.

18 So, you know, you've got to wait for that,
19 Mr. Anderson.

20 **MR. ANDERSON:** Okay. Thank you, your Honor.

21 **THE COURT:** Thank you.

22 **THE CLERK:** This court is now in recess.

23 **(This proceeding was adjourned at 9:53 a.m.)**

24

25

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.



December 29, 2019

Signed

Dated

TONI HUDSON, TRANSCRIBER