



LTL ATTORNEYS LLP
300 S. GRAND AVENUE, 14TH FLOOR
LOS ANGELES, CALIFORNIA 90071
TEL: 213-612-8900 | FAX: 213-612-3773
WWW.LTLATTORNEYS.COM

LOS ANGELES | SAN FRANCISCO | NEW YORK | ORANGE COUNTY

VIA ECF

August 10, 2020

Honorable Lewis J. Liman, United States District Judge

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

Dear Judge Liman,

We write on behalf of Plaintiff ChromaDex, Inc., pursuant to Your Honor’s Individual Practices and FRCP 37(a), to raise a discovery dispute. The parties have engaged in extensive meet-and-confer efforts, but are at an impasse as to the three core document production issues below.¹

I. Advertising Containing At-Issue Messages

The Second Amended Complaint (“SAC”), ECF No. 139, alleges that Elysium disseminated false or misleading messages regarding its Basis product and identifies exemplars of advertising that contained those messages. In its First Set of Requests For Documents, ChromaDex sought documents relating to Elysium’s advertising, marketing, and/or promotional materials. Ex. A (Requests 11-20).² Elysium initially objected to these requests primarily as overbroad. *Id.*

ChromaDex explained that these requests seek documents central to its claims and defenses, but agreed to narrow the scope of these requests to only published or draft advertising, marketing, or promotional materials (and related documents and communications) that contain the same or similar messages as advertising attached to the SAC. Ex. B at 2-3; Ex. D at 5. Nonetheless, Elysium has taken the position that it “will not produce any documents that are publicly available,” a limitation Elysium extends even to discontinued advertisements, incorrectly asserting that ChromaDex has “access to such materials . . .” Ex. C at 9; Ex. E at 3. ChromaDex explained why this limitation is unjustified, but Elysium has largely repeated its position, stating it will not produce documents related to discontinued advertising because they were supposedly “publicly available to ChromaDex.” Ex. H at 3-4. Elysium has recently also stated that it does “not have a readily available means to search for publicly available statements that have been discontinued, such as historical social media posts that no longer exist.” Ex. J at 2.

First, Elysium predominantly—if not exclusively—advertises via Internet webpages and social media targeted to specific audiences. Thus, although Elysium advertisements are disseminated publicly, such advertisements are not readily accessible to ChromaDex. Additionally, unlike advertisements in newspapers or magazines, which may be accessed by reviewing copies in wide circulation, Elysium alone has information about the sites in which it advertises. The problem is compounded for discontinued advertisements, which Elysium also refuses to produce, because

¹ Meet-and-confer efforts remain ongoing as to additional issues not raised in this letter.

² A list of all attachments referenced herein is included at the end of the letter.

once an online advertisement is removed, it is no longer publicly accessible. For example, Facebook permits advertisers to maintain copies of all active and inactive advertising published on a Facebook platform (*i.e.*, Facebook, Instagram, Audience Network, and Messenger) in an Ads Manager. *See* Ex. K. However, the public is only allowed access to active advertising and inactive advertising that is related to social issues, elections, or politics in Facebook’s “Ad Library.” *See, e.g.*, Ex. L. ChromaDex cannot access inactive or deleted Elysium advertising. Nor is it reasonable to require ChromaDex to scour the Internet to identify advertising in current circulation when the information is in Elysium’s possession.

Second, Elysium’s claim that it does not have a “readily available” means for searching discontinued advertisements is without merit. Elysium has had an obligation to preserve all documents related to at-issue advertising messaging at least since the initiation of this suit in 2017. If it failed to appropriately preserve documents, that raises serious concerns about spoliation. Further, Elysium offers no explanation for why it cannot search for at-issue messages in: (1) its Facebook Ads Manager or equivalent social media accounts; (2) emails of marketing employees; or (3) shared drive folders and archives. If Elysium has truly made discontinued advertisements inaccessible, ChromaDex is entitled to an appropriate adverse inference.

Third, contrary to Elysium’s characterization, this is not a fishing expedition. As Elysium readily acknowledges, ChromaDex has asserted discrete, identifiable “allegedly actionable misstatements or assertions,” which Elysium refers to as the “Pleaded Misstatements.” Ex. J at 1. “Pleaded Misstatements” can of course appear in multiple advertisements. As just one example, the SAC identifies Elysium’s false statement that “Basis is revolutionary because it’s the first product to come out of really good aging research.” SAC ¶ 63(b)(iv); *id.*, Ex. I. Through Internet searches, ChromaDex identified another advertisement with slightly different graphics that contains the *exact same message* that has since been deleted from Facebook. Ex. M. Yet, Elysium has not produced the latter or documents related thereto. Far from being a fishing expedition, the scope and prevalence of advertising containing at-issue messaging is relevant to causation and damages. Thus, Elysium must produce responsive advertisements and documents related thereto.

II. Customer Communications (Zendesk)

Elysium uses a customer communications database called Zendesk to store “[a]ll emails to and/or from care@elysiumhealth.com, Facebook messages, and text messages to Elysium’s customer service number (888-220-6436).” Ex. E at 1. Elysium agreed to produce Zendesk records, *id.*, but has failed to do so.

ChromaDex raised this deficiency in March 2020. Ex. F at 4. During a subsequent telephonic conference, Elysium’s counsel stated that Zendesk records were collected, but Elysium was unable to process them, and that Elysium was in the process of evaluating time and cost to produce. *See* Ex. G at 2. Around one month later, Elysium stated that its e-discovery vendor “may require direct access to the ZenDesk software.” Ex. H at 4. ChromaDex again inquired about the status of Zendesk records on July 15, 2020. Ex. I at 2. Elysium responded that because its vendor cannot physically access Elysium’s New York City office to retrieve the data due to

COVID-19 restrictions, such data would be produced when “it is readily accessible consistent with official regulations and public health guidelines.” Ex. J at 2.

Elysium has failed to explain its failure to collect Zendesk records before the parties’ initial production of documents in February 2020, prior to the implementation of any COVID-19 restrictions. Given the October 11, 2020 deadline to complete fact discovery, Elysium’s response is inadequate and inappropriately seeks to shift the burden to ChromaDex. This case involves claims of false advertising and deceptive acts and practices directed at consumers. Responsive communications between Elysium and customers are critical because they are potentially probative of the effect on the marketplace resulting from Elysium’s conduct.

III. Elysium’s Deficient Search and Production of Custodian Records

After Elysium’s initial document production, ChromaDex informed Elysium that only a negligible number of records were produced for the majority of its agreed-upon custodians (individuals who are central to this case), indicating a shortcoming in Elysium’s compliance with its discovery obligations. Ex. F at 1-4. Likewise, ChromaDex noted its similar concern with respect to the lack of documents and communications involving third-party marketing and advertising entities. *Id.* at 4. It strains credulity to believe that Elysium employed third-party marketers and advertisers, but did not correspond with them by email.

Elysium stated that it “was not surprised [] by the quantity of responsive documents connected to these individuals and entities,” but nonetheless agreed to make a supplemental production. Ex. H at 2. However, the supplemental production failed to address ChromaDex’s concerns. The deficiencies in Elysium’s search and production protocols have now been confirmed by records received from third-party marketing and manufacturing entities pursuant to subpoenas. Not only do the number of emails produced by these relatively few third-parties far exceed the number of emails in Elysium’s own productions for numerous custodians,³ we have identified several examples of highly-relevant and responsive documents that go to the heart of the case that are missing from Elysium’s productions. As just a few examples, which are attached hereto as Exhibit N, Elysium failed to produce: (1) instructions to its manufacturer to reduce the purity of its product (to substantially below the purity of ChromaDex’s competing product); (2) communications about [REDACTED]; and (3) communications about [REDACTED].

⁴ These communications are undoubtedly relevant to Pleaded Misstatements, including Elysium’s claims touting the purity of its product and the supposedly extensive clinical studies supporting its products and claims. Critically, although third-party productions highlight the deficiencies in Elysium’s compliance with its discovery obligations, ChromaDex has no way of accessing Elysium’s internal communications or all third-party communications relevant to these topics. ChromaDex requests that the Court order Elysium to produce all non-privileged internal and external communications by agreed-upon custodians that relate to the Pleaded Misstatements.

³ By way of example, Elysium produced a total of 182 emails to or from Elysium’s Vice President of Marketing, Katie Iles. The third-party productions include 705 such emails.

⁴ We are contemporaneously filing a motion to seal concerning Exhibit N and the portion of this letter-motion describing Exhibit N.



PAGE 4 OF 4

Sincerely,

s/
Joe H. Tuffaha

Attachments:

- Ex. A: Relevant portion of Elysium's Responses and Objections to ChromaDex's First Set of Document Requests (Requests 11-20)
- Ex. B: ChromaDex's 7/31/2019 Letter
- Ex. C: Elysium's 11/15/2019 Letter
- Ex. D: ChromaDex's 12/10/2019 Letter
- Ex. E: Elysium's 2/7/2020 Letter
- Ex. F: ChromaDex's 3/16/2020 Letter
- Ex. G: ChromaDex's 4/1/2020 Letter
- Ex. H: Elysium's 4/20/2020 Letter
- Ex. I: ChromaDex's 7/15/2020 Letter
- Ex. J: Elysium's 7/27/2020 Letter
- Ex. K: Facebook Ads Manager article
- Ex. L: Elysium's Facebook Ad Library
- Ex. M: Screenshot of deleted Facebook advertisement and video
- Ex. N: Third-Party documents not produced by Elysium

cc: Via ECF to Counsel of Record

Roberta A. Kaplan, Esq.
Sean Hecker, Esq.
Gabrielle E. Tenzer, Esq.
David Shieh, Esq.
John C. Quinn, Esq.
Craig B. Whitney, Esq.
Tiffany Caterina, Esq.