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

CHROMADEx, INC.,)	Case No. SACV 16-2277-CJC (DFMx)
)	
Plaintiff,)	Santa Ana, California
)	Friday, May 31, 2019
v.)	9:36 A.M. to 10:12 A.M.
)	
ELYSIUM HEALTH, INC.,)	
)	
Defendant.)	
)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DOUGLAS F. MCCORMICK
UNITED STATES MAGISTRATE JUDGE.

Appearances:	See Page 2
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1 SANTA ANA, CALIFORNIA, FRIDAY, MAY 31, 2019, 9:36 A.M.

2 (Call to Order of the Court.)

3 THE CLERK: Calling case SACV 16-2277. It's
4 *ChromaDex, Inc. v. Elysium Health, Inc.*

5 Counsel, your appearances, please.

6 BARRETT J. ANDERSON: Good morning, Your Honor. My
7 name is Barrett Anderson, with me is Sophia Rios, on behalf
8 of the Plaintiff, and we have some young associates in the
9 courtroom as well to observe -- Jayme Staten and a summer
10 associated named J. T. Martinez. So thank you for the
11 opportunity for them to be here.

12 THE COURT: Good morning.

13 JOSEPH N. SACCA: Good morning, Your Honor.
14 It's Joe Sacca, and with me is Esterina Giuliani and
15 Kristin Keranen for Elysium Health and Mark Morris.

16 THE COURT: All right, counsel. So I received both
17 sets of five-page letters. Thank you. I will say you've
18 dropped more into my lap than I think I was anticipating, but
19 that's okay. I think there are roughly four issues. Let me
20 tell you what I think they are because, if I don't have the
21 issues right, I probably won't address them appropriately.

22 The first is whether Elysium has produced documents
23 sufficient to show its current financial condition, and
24 there's a dispute about whether end of 2018 or end of quarter
25 one of 2019 documents are necessary.

1 The second is whether adequate documents have been
2 produced to show the costs of Elysium's NR supply. Don't
3 make me say what the abbreviation for "NR" is. I never
4 learned it. There seems, perhaps, to be some additional
5 discussion or some agreement to produce additional document
6 from Elysium on that, and I'm curious as to what that is and
7 whether there's some additional discussion between the
8 parties on that.

9 There also appears to be some dispute about
10 documents related to patent-misuse claims, and those relate
11 to Elysium getting document -- getting NR from Grace as well
12 as Elysium's discussions with Dartmouth about its patents. I
13 understand from an email that there may be some additional
14 discussions on that front as well.

15 And then, finally, there is a dispute about Slack.

16 So have I at least identified the issues,
17 Mr. Anderson?

18 MR. ANDERSON: Yes, Your Honor. I would clarify
19 one issue with respect to the first one you mentioned.
20 ChromaDex hasn't put a time limit or a quarterly requirement.
21 We haven't asked for quarterly updates. We've simply asked
22 for the most current information that there is, and Elysium
23 has responded that they have Q1 information, and so that's
24 kind of where it's come down, but we just want to be able to
25 adequately ask the witness the question. So that's what the

1 first issue is, from our perspective.

2 THE COURT: So, when I frame it in sort of end of
3 2018 versus end of quarter one 2019, that's not -- I mean,
4 when -- I recall in our last discussion there was some
5 fluidity to the parties' trial date. At some point quarter
6 one 2019 might not be the most current information.

7 MR. ANDERSON: That's correct, Your Honor.

8 THE COURT: At some point quarter three of '19
9 might not be the most current information. I mean, we have
10 to --

11 MR. ANDERSON: Yeah.

12 THE COURT: I guess what I'm going to sort of push
13 you on, at some point we have to stop or -- you know, the
14 merry-go-round has to stop spinning at some point.

15 But let's -- before we dive into the deep end of
16 the pool on that one, let's make sure, other than that, have
17 I at least got the right -- the high points correct?

18 MR. ANDERSON: I believe so, Your Honor, yes.

19 THE COURT: Okay.

20 And, Mr. Sacca, did I get the right issues that are
21 before me?

22 MR. SACCA: Yes, Your Honor.

23 THE COURT: Okay. Can we take -- are there -- is
24 there --

25 MR. SACCA: Oh, Your Honor, let me just jump in --

1 THE COURT: Before we get into them one by one --
2 because what I would be inclined to do is just have you each
3 comment on them, and then I can either go back and look at
4 something further, if I need to do that, or give you rulings
5 on some of these issues if that would be better. I presume
6 that, given the lateness, the hour in the case, that probably
7 me sitting around and twiddling my thumbs and trying to sort
8 of decide A or B is probably not terribly helpful. So I
9 don't want to do that.

10 On the NR costs' issue or the issues of documents
11 related to patent misuse, are there some -- is the target
12 still moving somewhat, or should we pin that down?

13 MR. ANDERSON: We're happy to pin it down,
14 Your Honor. I think the target is still a little bit influx,
15 and we can take those one by one if you'd like.

16 THE COURT: Please. Let's start with the NR costs.

17 MR. ANDERSON: Yes, Your Honor. This is part and
18 parcel of the financial condition documents.

19 Now, what's important to understand here is Elysium
20 has already produced financial information showing the
21 specific inventory, the R-and-D costs, the costs of goods,
22 but those documents end in the middle of 2017. Sitting here
23 now, it's been two years since we've got that information
24 that Elysium records for its own purposes of what its costs
25 are, what its R-and-D costs are, what its supply of NR is

1 costing it in terms of profitability. That's the information
2 that we require in order to adequately defend against the
3 patent-misuse claim, in order to contend that ChromaDex
4 doesn't have the market power that Elysium thinks it does.

5 Now, all we're asking is for that updated
6 information, and we know Elysium has it. They've produced it
7 up through the middle of 2017. Now, I'll just preview a
8 little bit what we expect them to say is that that specific
9 spreadsheet that they produced is no longer updated. That's
10 fine. We've indicated to Elysium we don't need that specific
11 spreadsheet. We're just asking for that information, which
12 we know that they have in whatever form that they currently
13 keep it.

14 And I'll preview one other argument, Your Honor.
15 They're -- Elysium has --

16 THE COURT: Well, let me stop there --

17 MR. ANDERSON: Sure.

18 THE COURT: -- before we get too deep into the
19 weeds.

20 On page 4 of the letter from Elysium they say
21 they've agreed to produce further documents.

22 Mr. Sacca, is that right?

23 KRISTIN L. KERANEN: Your Honor, this is
24 Kristin Keranen.

25 We have agreed and have produced our costs for NR

1 in the form of invoices from our manufacturer. We agreed to
2 produce that before they came to the Court, and we, in fact,
3 produced those documents yesterday.

4 Also, just to clarify the record, we have, in fact,
5 produced our updated inventory numbers through February 2019,
6 and counsel has never asked us to update those specific
7 numbers or our sales numbers. They've been focused solely on
8 this other spreadsheet that has a lot of information that's
9 not relevant.

10 THE COURT: So there isn't -- just -- I just want
11 to pin this down. There isn't some sort of additional
12 production that Elysium anticipates making that Mr. Anderson
13 hasn't seen yet?

14 MS. KERANEN: Not in terms of costs. I mean, we
15 produced that -- our -- through, you know, the most recent
16 invoices. Those went out yesterday. And, you know, as
17 Your Honor noted, like, the -- at some point in time we do
18 have to put a stop to the continual updating, and we think
19 that the end of 2018 is sufficient for the current -- the
20 parties' current purposes.

21 THE COURT: All right. Now, what -- you know, I
22 don't want to get -- we -- I have very limited information.
23 You guys have lots of information. You've looked at the
24 documents. You've -- you know your case backwards and
25 forwards. I know the case least well.

1 So what is it that, Mr. Anderson, you need that you
2 have not received? And you made reference to information
3 that goes through middle of 2017, and Ms. Keranen just
4 referenced information that goes through the end of 2018.
5 There seems to be a disconnect there, and I'm eager to flesh
6 it out.

7 MR. ANDERSON: Absolutely, Your Honor, and this
8 does bleed a little bit into the first of the larger issues
9 in the case, the updated information. So forgive me if we
10 kind of tread into that area a bit, but what is at issue here
11 is that in response to our requests, Elysium produced a
12 couple spreadsheets. One of those spreadsheets ends in the
13 middle of 2017, and that has the most-detailed information.
14 They produced a couple other very high-level spreadsheets
15 that have one line that says "Research and Development" for
16 presumably all of Elysium, and one line that says "Cost of
17 Goods" presumably for all of Elysium, and there's no way for
18 us to know what's going into that number -- the methodology,
19 the inputs -- but we know they have that information because
20 an earlier spreadsheet that ends in 2017 does have that
21 information.

22 Now, they're saying they don't keep it in that
23 form, and we're saying, "That's fine. Just give us the
24 information in whatever form you currently keep it."

25 THE COURT: Okay. So Ms. Keranen just said you

1 have received invoices through, I assume, the end of '18, or
2 maybe it's a different timeframe, showing what Elysium -- and
3 I have to pause every time because --

4 MR. ANDERSON: Yeah.

5 THE COURT: -- in my mind the two names don't
6 distinguish themselves -- what Elysium is paying for NR. Why
7 does that -- why do those invoices need to be translated into
8 spreadsheets for them to be useful to you?

9 MR. ANDERSON: Yes, Your Honor. Because we need to
10 understand what Elysium believes that it is paying for its
11 supply of NR. Now, that includes the research and
12 development of moving -- and, Your Honor, I'll represent to
13 you that Elysium has now switched NR suppliers twice. This
14 is the first time we've ever seen any invoices for actual
15 purchases. Those invoices, as far as we know, is -- our
16 initial review, we just got them yesterday -- doesn't --
17 don't have any of those development transition fees. They
18 don't have anything related to what it took Elysium to keep
19 moving to different suppliers.

20 What we need to know and what's easiest for Elysium
21 to produce is just the information about how they recorded
22 their costs, what goes into that number. This is accounting.
23 It's simple accounting that Elysium should have. And when
24 they say that we need all of that information, we haven't
25 asked for all of that information. We've asked for specific

1 inputs and what goes into those inputs. And, again, we know
2 Elysium has it, it wouldn't be difficult to produce, and
3 that's what we need in order to make our defense.

4 THE COURT: Okay. Let's go back -- or let's move,
5 then, to the documents about the patent-misuse claim.

6 MS. KERANEN: Your Honor, before we move to the
7 patent-misuse, I'd just like to point out that the costs for
8 switching to the different NR supplier would be reflected in
9 the invoices and the costs -- the argument here is about the
10 market power for NR. So Elysium's costs to encapsulate that
11 or to package it or to ship it anywhere is not relevant to
12 market power in the market for NR.

13 THE COURT: Okay. What -- I think there was a
14 reference to the fact that the category of documents related
15 to patent misuse that there was some additional
16 representation made by Elysium. What was that, and how does
17 that affect things?

18 MR. ANDERSON: Yes, Your Honor. I'll let you know
19 real quick here. So what Elysium has offered is to search
20 for, collect, produce first -- in the first category
21 documents, communications between Elysium on one hand, and
22 W.R. Grace on the other, relating to any efforts by Elysium
23 to obtain a supply of NR from W.R. Grace. And I'll take
24 these one by one just to simplify things if that's okay,
25 Your Honor.

1 THE COURT: Okay.

2 MR. ANDERSON: You know, while we're sympathetic
3 with that proposal, we do have questions about it. This has
4 been -- that's what Elysium, in our eyes, has already agreed
5 to produce, and we're arguing over what falls within the
6 scope of relating to Elysium's efforts to produce NR.

7 THE COURT: Well, and you've been -- I think you've
8 been pointed in your letter in saying that those would
9 include the nondisclosure agreement, discussions about
10 supplying NR, and Elysium's visit to the facility in Oregon.

11 MR. ANDERSON: Yes.

12 THE COURT: I mean, those would be specific topics
13 that would be within the ambit of the search.

14 MR. ANDERSON: Correct.

15 THE COURT: Okay.

16 MR. ANDERSON: That's our position, Your Honor.

17 THE COURT: All right. Ms. Keranen or others on
18 the phone, is that Elysium's position?

19 MS. KERANEN: Yes, Your Honor. To the extent those
20 documents exist, we will produce them.

21 THE COURT: Okay. And so then I'm going to turn
22 back to Mr. Anderson.

23 What do I need to do, if anything, with respect to
24 that, and if you're not satisfied once they produce it, you
25 know, nothing stops you from coming back and reopening this

1 issue with me.

2 MR. ANDERSON: With that understanding, Your Honor,
3 we're okay on the Grace communications.

4 THE COURT: Okay. Now let's talk about Dartmouth
5 and its patents.

6 MR. ANDERSON: Again, the offer here was
7 communications between Elysium and Dartmouth relating to the
8 patent that ChromaDex licenses from Dartmouth, and,
9 Your Honor, we're, again, with a scope issue here, dealing
10 with the visit to Dartmouth. There might be documents that
11 don't specifically reference the patent but involve their
12 visit. And, Your Honor, our position is Elysium had no other
13 reason to be communicating at all with Dartmouth during this
14 time period unless it related to its efforts to undermine
15 ChromaDex's patents so --

16 THE COURT: Well, you never know. Maybe one of the
17 Elysium executives wanted a child to get into Dartmouth or
18 something like that.

19 MR. ANDERSON: And we don't need those emails,
20 Your Honor, for sure.

21 THE COURT: Okay.

22 MR. ANDERSON: Yeah.

23 THE COURT: All right. Ms. Keranen, are you on
24 board with the representation that was described about your
25 efforts to produce those communications?

1 MS. KERANEN: Yes, Your Honor. I mean, our
2 position here is that we have produced relevant documents,
3 and we're not withholding anything that would be related to
4 that and have run additional searches and not come up with
5 any unproduced documents to, from, cc, or bcc'ing Dartmouth
6 that would be relevant.

7 THE COURT: Okay. So what you're saying is that,
8 notwithstanding Mr. Anderson's concerns, there just aren't
9 any relevant documents to produce?

10 MS. KERANEN: Not any more, Your Honor.

11 THE COURT: Clarify what you mean by "not anymore."
12 You mean, they're not -- there are not any --

13 MS. KERANEN: -- we've produced documents --

14 THE COURT: -- additional documents or there --

15 MS. KERANEN: Yes.

16 THE COURT: "Not anymore" makes --

17 MS. KERANEN: There are no additional documents.

18 THE COURT: -- makes it sounds like they don't
19 exist because something happened to them.

20 (Laughter.)

21 MS. KERANEN: No. No. I'm definitely not implying
22 that. I'm saying that we ran a search for unproduced
23 documents with the to, from, cc, bcc Dartmouth email domain
24 and did not find anything that was relevant.

25 THE COURT: Okay. So there are not any additional

1 documents?

2 MS. KERANEN: No, Your Honor.

3 THE COURT: All right. Mr. Anderson, you know,
4 counsel sort of put that on the record. What else do I need
5 to do with respect to that?

6 MR. ANDERSON: Your Honor, the only other concern
7 we would have is whether Elysium was creating meeting minutes
8 or agendas or anything internally that wouldn't have been
9 sent to Dartmouth but was about their visit to Dartmouth. I
10 think that's something that wouldn't come up in the search
11 that Ms. Keranen just described.

12 THE COURT: Okay. Have you specifically discussed
13 a search for those kinds of documents with Ms. Keranen or
14 anyone else on the Elysium side of things?

15 MR. ANDERSON: Well, we've indicated to them that
16 we think all communications with Dartmouth and dealing with
17 that visit would be responsive to this request.

18 THE COURT: Okay.

19 Ms. Keranen, you just heard some documents that
20 were described. I think it would be helpful if you followed
21 up with Mr. Anderson and said, "Hey, look. We checked on
22 that" -- "for those kinds of documents, and we," either,
23 "found some, and here they are," or "we couldn't find any,
24 and here they are," and then I'm -- I can excise myself from
25 this discussion.

1 MS. KERANEN: Of course, Your Honor. We'll follow
2 up with Mr. Anderson as you directed.

3 THE COURT: Okay.

4 Do you want to talk about Slack, or do you want to
5 talk about what is the most current information?

6 MR. ANDERSON: Well, real quick before we move on,
7 Your Honor, there was also the category of communications
8 with General Catalyst, which is Elysium's largest investor.
9 I think the only concern with their offer on that, which is
10 any communications between those two parties relating to the
11 patent that ChromaDex licenses, is that we would think that
12 any communication about any of ChromaDex's patents would be
13 responsive to the request. So we would just simply ask that
14 that offer include all of ChromaDex's patents, which is what
15 the request is.

16 THE COURT: Okay.

17 Ms. Keranen, you want to respond to that?

18 MS. KERANEN: I guess --

19 THE COURT: I didn't have General Catalyst as a
20 separate category in my notes, but if that's a remaining
21 concern, let's address it.

22 MS. KERANEN: I mean, our searches would have
23 encompassed anything else about ChromaDex's patents, and we
24 don't believe there are any responsive, unproduced documents.

25 THE COURT: Okay.

1 MS. KERANEN: We're happy to discuss further with
2 Mr. Anderson if they have specific concerns about something.

3 THE COURT: All right. Follow up with her,
4 Mr. Anderson, if you have a specific concern about a
5 particular patent or something -- or, I guess, a different
6 patent, and make sure that your searches have adequately
7 addressed that.

8 MR. ANDERSON: We will, Your Honor. Thank you.

9 THE COURT: All right. So let's talk about Slack.
10 I mean, I have an understanding about what Slack is. Maybe
11 it says something about my life and that recently, when I was
12 listening to someone discuss Slack in a different context, I
13 wondered when it would first come up in front of me in a
14 discovery dispute, and here we are. We don't have Slack in
15 the federal judiciary. Email challenges many of my
16 coworkers.

17 Right, Ms. Boehme?

18 It is -- so it is very late in the case for the
19 parties to have a dispute like this, and so I'm concerned
20 about that. You're -- what you're asking, Mr. Anderson, I
21 think, is for basically a reboot of the ESI collection
22 efforts, and I'm loathe to do that. Is there something that
23 you know about Slack that you didn't tell me that would
24 suggest that it's a critical aspect -- it has a critical --
25 it is of critical importance to the case?

1 MR. ANDERSON: Yes, Your Honor, I do, and I'm happy
2 to describe this. Let me go back to the beginning of the
3 case. We filed it the end of 2016. We issued our first RFPs
4 the middle of 2017. Now, we knew -- my client is not as
5 technologically savvy as Elysium. We knew that they were
6 communicating by text message. That's why we asked
7 specifically and negotiated specifically about text messages.

8 Now fast forward, Your Honor. At the end of 2018,
9 Elysium, as they claim, inadvertently produced, as you
10 probably remember from the prior argument, a whole bunch of
11 text messages. We are looking through those text messages,
12 and we're finding material that they had promised to produce,
13 they'd promised to search for it, it hit on search terms, and
14 it wasn't produced except, apparently, accidentally.

15 Now we find out that they've been withholding an
16 entire repository of instant messages. They never once
17 disclosed that Slack existed. They never once disclosed that
18 they used it. This -- and we have information that they
19 shared via Slack numbers related to NR. We know that they
20 were communicating using Slack because their CEO testified
21 about it in their deposition. When we found out about that,
22 Your Honor, I have to admit, we were livid. This is an
23 entire repository of messages that they're using to
24 communicate about facts in this case that they never even
25 told us about.

1 How would we have known to include that in a
2 request in the negotiations about the ESI protocol? And even
3 if we had, Your Honor, they didn't even follow the protocol
4 so we are in a position right now where an enormous amount of
5 potentially relevant information, potentially further sharing
6 of ChromaDex's trade secrets and confidential information
7 happened internally, and we're not in a position to obtain
8 it.

9 And now what they're telling us is that it's too
10 late; it's too late in the day. Well, Your Honor, on one
11 hand, they can't refuse and conceal all these messages and
12 then, on the other hand, say all of a sudden it's too late.
13 That's now how discovery works. That's not what we
14 understand that Slack was used for, and they haven't even --
15 Your Honor, point out in their brief -- they haven't even
16 argued that there isn't any responsive material in Slack.
17 They've refused to even collect it and look, and that really,
18 Your Honor, makes us concerned, especially considering all of
19 that very damaging information that they produced in those
20 inadvertently produced text messages.

21 So, Your Honor, we have a grave concern that
22 there's very relevant, very important information in those
23 Slack messages and that now, at the end of the day, they're
24 trying to use the "too late" card to get out of doing what
25 they were supposed to do from the very beginning.

1 THE COURT: Okay. Do you have some point in the
2 case where you asked about the use of this kind of tool and
3 were told that it didn't exist or that nothing like this was
4 out there?

5 MR. ANDERSON: Your Honor, I point to the ESI
6 order, where it specifically mentions instant messages, and
7 it puts the burden on the party who has control of those
8 instant messages to divulge them, and if that party thinks
9 that it's going to be too burdensome, they have to tell us
10 why they think it's too burdensome.

11 THE COURT: Were they using Slack at the time of
12 that -- of -- I mean, Slack's not a thousand years old.

13 MR. ANDERSON: Your Honor, we have evidence they
14 were using it in 2016, before we even filed this lawsuit. So
15 we know they've been using it, and as we've come to learn
16 recently, they were using it from before the suit was filed.
17 And if they failed to preserve that evidence, Your Honor,
18 that's a whole other kettle of fish that we don't need to get
19 into today if we can just get those messages and review them.

20 THE COURT: Regardless of how this turns out, I
21 mean, everybody, probably, on the phone and here has learned
22 a lesson, which is you need to think about things like --
23 tools like Slack when you're talking about your ESI
24 collection efforts.

25 Elysium counsel, what do we do with Slack? You

1 know, I understand it well enough to know you don't have the
2 communications at Elysium. How do we handle that?

3 MS. KERANEN: I mean, Your Honor, I would like to
4 point out that the parties never contemplated the ESI
5 protocol covering these types of platforms. I mean,
6 ChromaDex also uses some sort of internal-messaging platform,
7 as evident from their production. It's also evident that
8 they never collected it, reviewed it, or produced it
9 independently, and they've never disclosed that platform to
10 us, like, even what it is, when we've raised it in meet-and-
11 confers.

12 So I think it's pretty clear from both sides that
13 we never anticipated the ESI protocol covering either one of
14 these platforms, and as Your Honor knows, like, Slack is a
15 cloud-based platform. It's not stored in Elysium. It's not
16 within its custody or control. We can't collect it by
17 collecting Elysium's email or computers.

18 THE COURT: Well, I agree that it's a cloud-based
19 platform. I'm not clear that it's not in your custody or
20 control. You -- I don't know what your -- I don't -- as I
21 said a couple minutes ago, it's my first encounter with Slack
22 here in this context. I don't know what your ability to
23 obtain your communications from Slack is.

24 MS. KERANEN: Sure, Your Honor. So the way Slack
25 works is that if you pay for their -- as I understand it,

1 having -- not being a personal user of it, you -- their --
2 they store the messages for you on their cloud-based server,
3 and if you want access to them, you have to pay additionally
4 or you have to serve them in a specific way saying that
5 you're in litigation and need to collect these documents, and
6 then at their convenience they will export them to you. So
7 there's no, as I understand it, collection, and, in fact,
8 they advertise this on their website, that they keep all of
9 their -- all of your communications. So there's no concerns
10 about spoliation here.

11 What we don't know is what size of a significant
12 undertaking it would be to process and review this data, and
13 that's the sticking point here. As Your Honor knows, we are
14 very late in the game, and you're loathe to basically reboot
15 the ESI protocol for something that neither party had ever
16 anticipated, which I think is evident from -- excuse me,
17 Your Honor -- ChromaDex's -- excuse me -- production as well.

18 They knew about the existence of Slack, you know,
19 as far back as late August or early September of 2018, when
20 Elysium produced documents that referenced it, and the text
21 messages that counsel references were produced back in
22 December 2018. So they've known about this for a while.
23 They first raised it at the end of March, and we told them
24 that it was not the appropriate time in litigation to process
25

1 and review these documents, and then they basically didn't
2 bring it to the Court until now.

3 We're not sure what size, the amount of data this
4 would end up being because I don't know how familiar you are
5 with how Slack operates, but when you collect from Slack, you
6 get the message streams, and then any attachments are stored
7 elsewhere. So whatever size of data you are exported from
8 Slack is not the final amount of data that is -- has to be
9 collected.

10 THE COURT: All right.

11 MS. KERANEN: I mean, it could be a very
12 significant undertaking.

13 THE COURT: I understand that.

14 Let's circle back to the first issue, then, and
15 talk about the current information

16 MR. ANDERSON: Your --

17 THE COURT: And it might be helpful for me -- just
18 -- and I won't -- you can have the final word in a minute,
19 Mr. Anderson, on Slack or anything else.

20 It might be helpful for me to know where the
21 parties ended up with respect to the trial date. Is that
22 still in the mix?

23 MR. ANDERSON: Your Honor, we have conferred with
24 opposing counsel. We have a proposal out there. We just got
25 it yesterday. We're confirming with our client, and we

1 intend -- my understanding -- based on our discussions, we
2 intend to proceed the way that Your Honor suggested in
3 notifying Judge Carney.

4 THE COURT: And what's the trial date going to be?

5 MR. ANDERSON: Right now the proposal -- and my
6 client hasn't yet confirmed this, that it works for the
7 client, but October 29th would be the date.

8 THE COURT: Okay.

9 MR. SACCA: Your Honor, that was a date that was
10 proposed by ChromaDex; so I do hope it works for them.

11 THE COURT: Okay. The parties -- so the parties
12 are working on what I would describe as a late -- or fourth
13 quarter 2019 date.

14 All right. Additional comments, Mr. Anderson, and
15 then I'll ask --

16 MR. ANDERSON: Yes.

17 THE COURT: -- I'll ask Elysium for any additional
18 comments.

19 MR. ANDERSON: Yes. On the Slack messages,
20 Your Honor, I do feel the need to set the record straight
21 here.

22 Now, first, Ms. Keranen represented that the
23 parties didn't believe that the ESI order would cover these
24 types of messages, but I have to point you, Your Honor,
25 directly to the ESI order which talks about (reading) The

1 parties shall negotiate a search protocol for the collection,
2 review, and production of text messages and instant messages
3 should either party have a reason to believe that relevant
4 ESI will be found in one of its custodians' text messages or
5 instant messages.

6 The burden is, clearly, on Elysium to provide us
7 that information. And, Your Honor, the fact that counsel has
8 indicated that it was never anticipated can't be true. It
9 just can't be true. First of all, Elysium's brief and what
10 Ms. Keranen said on the phone are absolutely true. We did
11 produce all of our instant messages because we understood,
12 based on the plain language of the ESI order, that instant
13 messages should be produced.

14 Now, Elysium makes a number of accusations
15 completely unsupported by any technological understanding of
16 what's going on at ChromaDex about whether our production is
17 complete. Your Honor, I can represent to you right now on
18 the record that every single chat, instant message that was
19 shared in ChromaDex, was shared on the Skype for Business
20 plan, those instant messages are saved in Microsoft Exchange,
21 because they look like emails at that time, and all of them
22 were archived and produced under a reasonable search and
23 review process. We knew that instant messages were included.
24 We searched for them, and we produced them.

25 Now, on the other side, you have Elysium failing to

1 even reveal that they use the system, let alone preserve any
2 of the messages that are in their custody. And, Your Honor,
3 actually, Ms. Keranen's position changes now. In their
4 letter brief they indicated that this was contemplated by the
5 ESI order and we should follow that negotiation, but now
6 they're saying that it wasn't covered so we shouldn't review
7 it. It's all over the map, Your Honor, and, frankly,
8 whatever it is, they failed to abide by their obligations,
9 and we are deprived of very critical information.

10 So that's the last word that I'd like to say on
11 Slack.

12 THE COURT: Okay. Any other comments?

13 MS. KERANEN: I mean, Your Honor, I think this is
14 -- this is the first time we ever heard that they were using
15 Skype for Business so that, if they thought that the ESI
16 protocol required them to disclose that, they would have
17 disclosed it, and I think that counsel is misrepresenting
18 what I said in my letter and what I said here today, and I
19 think that's obvious from the letter and from what I've said,
20 and I don't need to belabor that to Your Honor.

21 THE COURT: Okay. What about the financial
22 condition documents? What -- where do we draw the line, and
23 what's appropriate? And let's ask each side to address that,
24 and then we'll probably be in a position where I can take
25 this back and give you all a short order ruling on these

1 issues.

2 MR. ANDERSON: Yes, Your Honor, I'll start, and I
3 understand that your concern here is kind of at what
4 intervals that we update that information, and, Your Honor,
5 what I proposed to you is what exactly we've proposed to
6 Elysium, which is we want updated information in order to
7 take an accurate, complete, and full deposition of Elysium's
8 company witness, which is next Thursday. We haven't asked
9 for quarterly updates. We haven't asked for regular updates.
10 We haven't asked for any of that regular reporting. We've
11 asked for one update to enable us to use current information
12 with Elysium's company witness. The information we have is
13 five-months old, and practically speaking, Your Honor, you
14 know how you get into a deposition and the witness starts to
15 say, "I don't know. I don't know. I don't remember. Put a
16 document in front of me." Okay. Well, what documents do we
17 have to put in front of them?

18 And, Your Honor, it's important for us to
19 understand what that condition is in order to accurately
20 question on the 30(b)(6), and further, I'd add, Your Honor,
21 given that we're going to have a mediation coming up, it's
22 important for the parties to be completely clear about their
23 position well before trial, before that mediation in order to
24 understand what the scope of the punitive damages might be,
25 and, Your Honor, there's clear case law on this where you

1 need to -- the other party has to produce the information in
2 order to enable an appraisal of the case so that both parties
3 can have a realistic understanding going into mediation.

4 So, you know, current -- and all of Elysium's
5 authority agrees, their promises agree that they're going to
6 provide current information, and we just want it current so
7 that we can ask the questions.

8 THE COURT: All right. Quarter one versus end of
9 2018. Ms. Keranen or other counsel on the phone.

10 MS. KERANEN: Yes, Your Honor. First of all, my
11 client doesn't have updated financial information through the
12 end of Q1 2019. They're not a public company; so they don't
13 update the same way that a company who files with the SEC
14 does.

15 Also, we have never taken the position that we
16 would never update this information. We understand that, as
17 the parties, you know, get close to trial, we would need to
18 update our financial information, and our concern here is
19 that, you know, is counsel going to demand that we update our
20 financials again before our mediation? Are they going to ask
21 that we update the financials again before expert -- rebuttal
22 expert reports are due?

23 And we don't think that counsel needs the past, you
24 know, three months of our financial information in order to
25 examine our 30(b)(6) witness on punitive damages. We've

1 produced our profit and loss statements, our statements of
2 cash flows, and our balance sheets for the past three years.
3 We've updated our costs of NR, which is what they say they
4 need in order to examine us -- relation to market power.
5 We've produced that through 2019 -- all the most relevant --
6 all the most recent invoices. And so we don't think that we
7 should be on the hook to a direct competitor to continually
8 update our financial information at their whim.

9 THE COURT: Okay. Sorry about that. Let me put my
10 microphone back on.

11 Mr. Anderson, a final comment?

12 MR. ANDERSON: Yes, a final comment, Your Honor.

13 Just to be absolutely clear, if you look at

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED], and we need to get them

19 on record, we need their company witness to testify about
20 what is happening with their financial situation, and if we
21 don't have that updated information, we can't properly
22 inquire. And, Your Honor, we haven't said anything about
23 other updating obligations. We've never asked for that, and
24 that's just a strawman that's put out there by Elysium.

25 So given that understanding -- given our

1 understanding of where Elysium might be financially, we would
2 like to be able to adequately inquire.

3 THE COURT: Okay.

4 MR. ANDERSON: So that's it. Thank you.

5 THE COURT: All right. I think I have the
6 information I need. I started with a page of notes. It's
7 now blue writing all over it in my hand. So I need to go
8 back and put that together into something that is sufficient,
9 and it will be, hopefully, done here very shortly, if not
10 later today, first thing on Monday.

11 If there are additional disputes, you are more than
12 welcome to bring them to me in this fashion, or you can -- we
13 can do a more formal fashion if that works for you. I don't
14 have a strong view on that.

15 MR. SACCA: Your Honor, this is Joe Sacca, and with
16 apologies in advance.

17 We and counsel for ChromaDex, I think, had
18 differing interpretations of our discussion last week. We
19 thought that they were alerting Your Honor to the fact that
20 both sides had disputes to raise.

21 THE COURT: Oh, so is there more stuff?

22 MR. SACCA: There is. We have our --

23 THE COURT: Great.

24 MR. SACCA: -- own disputes. When we told
25 ChromaDex earlier this week that we intended to raise them in

1 this hearing, they told us that that was a surprise to them,
2 and so, you know, to avoid a dispute over when we should
3 raise the dispute, we agreed that we would not raise them at
4 this hearing, but we would like, Your Honor, if we could, to
5 schedule another time to bring our disputes before you.

6 THE COURT: When would you like to do that,
7 Mr. Sacca?

8 MR. SACCA: We had proposed to ChromaDex that we do
9 it early next week. Now we've had some internal scheduling
10 issues. So if we could do it next Friday at the same time?

11 THE COURT: Ms. Boehme is nodding her head yes. I
12 unfortunately didn't bring out my calendar, and I'm trying to
13 sort of juggle a few things next week. I think -- can we do
14 it at 10:30? I think that would be better.

15 MR. SACCA: That would be fine.

16 THE COURT: Okay?

17 Mr. Anderson?

18 MR. ANDERSON: Yes, Your Honor.

19 THE COURT: Okay. 10:30's okay?

20 MR. ANDERSON: Yeah.

21 MR. SACCA: And, Your Honor, could we follow the
22 same protocol with five-page letters the day before?

23 THE COURT: Oh, that would be great. Five-page
24 letters the night before. It gives me something to do on
25 Thursday nights. I don't have enough to do in my --

1 MR. SACCA: Thank you for your tolerance,
2 Your Honor.

3 THE COURT: No problem. Happy to do it.

4 Okay. So let me get you --

5 MR. SACCA: And would you like --

6 THE COURT: -- short order --

7 MR. SACCA: -- to do that, Your Honor, in telephone
8 or by --

9 THE COURT: Mr. Sacca, was I cutting you off? I'm
10 sorry?

11 MR. SACCA: Oh, I'm sorry. I was just asking
12 whether you'd like us to be there in person or telephone is
13 okay?

14 THE COURT: You're more than welcome to be here in
15 person, or you can come -- or you can call in. I know that
16 -- I think you -- a lot of you folks on the Elysium side are
17 back in New York; correct?

18 MR. SACCA: Yes.

19 THE COURT: It's a long way to come just to spend
20 45 minutes with me. So I don't --

21 MR. SACCA: It is, as much as we enjoy it.

22 THE COURT: -- and I'm really happy that
23 Mr. Anderson is here with all his colleagues, but, you know,
24 he didn't gain anything other than just a drive up the
25 5 freeway this morning from it so -- he can now enjoy -- he,

1 actually, probably needs to get going. It's a Friday
2 afternoon. He's going to try to get back to San Diego. It
3 might take about a week and a half. So no -- actually, it
4 might be shorter for him to catch a plane to New York.

5 Anyway, all kidding aside, you don't need to be
6 here, Mr. Sacca. Happy to have you call in.

7 MR. SACCA: Thank you, Your Honor.

8 THE COURT: All right. Thank you, both.

9 MR. ANDERSON: Thank you.

10 THE COURT: Uh-huh.

11 THE CLERK: This court is now in recess.

12 (Proceedings adjourned at 10:12 A.M.)

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CERTIFICATE

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

/s/ Julie Messa
Julie Messa, CET**D-403
Transcriber

May 31, 2019
Date