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12

13 **UNITED STATES DISTRICT COURT**

14 **CENTRAL DISTRICT OF CALIFORNIA**

15 **(WESTERN DIVISION)**

16 ChromaDex, Inc.,	Case No. SACV 16-02277-CJC(DFMx)
17 Plaintiff,	**CHROMADEX, INC.'S OPPOSITION TO ELYSIUM HEALTH, INC.'S MEMORANDUM OF POINTS AND**
18 v.	**AUTHORITIES IN SUPPORT OF *EX PARTE* APPLICATION TO COMPEL**
19 Elysium Health, Inc. and Mark Morris,	**CHROMADEX, INC. TO COMPLY WITH THE COURT'S STIPULATION AND**
20 Defendants.	**ORDER REGARDING DISCOVERY OF ESI**
21	
22 Elysium Health, Inc.,	
23 Counterclaimant,	**Courtroom:** 6B
24 v.	**Judge:** Hon. Douglas F. McCormick
25 ChromaDex, Inc.,	Discovery Cut-Off: April 5, 2019
26	Pretrial Conference: July 1, 2019
27 Counter-Defendant.	Trial: July 9, 2019

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I.   INTRODUCTION

Elysium's *Ex Parte* Application to Compel ChromaDex, Inc., to Comply with the Court's Stipulation and Order Regarding Discovery of ESI (the "*Ex Parte* Submission") (Dkt. 185, *et seq.*) entirely ignores this Court's detailed *ex parte* procedures and requirements.[1] It fares no better on the merits, and should be denied summarily for several independent reasons.

Elysium misapplies the Court's clawback procedure for privileged material in an attempt to retrieve non-privileged text messages from the cell phones of its CEO, Eric Marcotulli, and COO, Dan Alminana, that Elysium produced to ChromaDex nearly two months ago.[2] Elysium's purported clawback "notice"—a letter it sent to ChromaDex on February 6, 2019—failed to identify *any* communications it believes are "privileged." Elysium does no better in its *Ex Parte* Submission, again failing to identify even one specific communication that it asserts is privileged. Instead, Elysium vaguely claims that three compiled text message Excel files, which are enormous spreadsheets containing hundreds of thousands of communications between different people at different times on different topics, "contain privileged material." That non-specific claim is not sufficient to trigger any obligation by ChromaDex to sequester or destroy all of the text messages in those files under Section V.E.2. of the Stipulation and Order Regarding Discovery of ESI ("Discovery Order") (Dkt. 64).

Despite ChromaDex's repeated requests that Elysium simply identify the specific communications it believes are privileged, Elysium has refused to do so. And despite ChromaDex's promise to sequester any text messages that Elysium properly identifies and to cooperate in a fair process to remediate any privileged communication, Elysium has declined. Elysium's suggestion that the compiled files constitute single

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[1] Consistent with the Court's established *ex parte* procedures, ChromaDex is also filing a separate opposition to address Elysium's abuse of those procedures.

[2] As used in this brief, the term "text messages" refers to every individual communication contained in the compiled text message files, regardless of whether those messages were sent via SMS, MMS, iMessage, WhatsApp, Facebook Messenger, SnapChat, or any other social media or messaging platform.

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1   "documents" under the Discovery Order's clawback process merely because they are

2   each stamped with a Bates number is nonsense; neither the real world nor the Discovery

3   Order equates "documents, ESI, or information" with Bates numbers. Nor does

4   Elysium cite any authority for the proposition that a party may assert a single privilege

5   claim over a file without regard to the information within the file simply because the

6   party has labeled it with a single Bates number for production. Bates numbers do not

7   control the scope of a privilege claim, and they do not excuse Elysium's failure to

8   distinguish the text messages it thinks are privileged from the hundreds of thousands

9   that it concedes are not. Because Elysium failed to provide proper notice of its

10 clawback attempt, and stubbornly refuses, even now, to identify a single privileged

11 communication, its *ex parte* application should be denied.

12   The Court should deny the *Ex Parte* Submission for several additional reasons,

13 including Elysium's unreasonable delay. Elysium produced the text messages at issue

14 on December 18, 2018, and delayed for two months before attempting to assert that

15 some of them are privileged. During those two months, ChromaDex reviewed a

16 substantial portion and *found no privileged material*. Elysium's claim of privilege is a

17 mirage; there is nothing to clawback. But even if there were privileged messages,

18 ChromaDex offered to cooperate with Elysium in a fair process to isolate and return

19 them, to no avail.

20   There is no dispute that, even if some of the messages are privileged (an unlikely

21 proposition), the compiled text message files also contain a huge number of non-

22 privileged messages. Elysium concedes in its February 6 letter that the compiled text

23 message files only "contain privileged material," as opposed to asserting privilege over

24 the files in their entirety. Further, during its review of the messages, ChromaDex found

25 numerous examples of non-privileged and relevant messages, many of which are very

26 damaging to Elysium and co-Defendant Mark Morris and which Elysium was obligated

27 to produce many months ago, but inexplicably did not. The Discovery Order does not

28 grant Elysium the unilateral right to demand the return of this non-privileged material,

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1 which ChromaDex has already incorporated into its case preparations and work
2 product. Elysium's effort to retrieve these non-privileged text messages simply
3 because they are in the same electronic file as other, purportedly "privileged" messages
4 is both unreasonable and improper. Nor does Elysium's vague suggestion that it will,
5 at some undefined time, produce "appropriate replacements" suffice to trigger an
6 obligation on ChromaDex, especially given that Elysium failed to produce many of the
7 relevant, non-privileged messages in the first instance.

8   The *Ex Parte* Submission does not even attempt to meet Elysium's burden of
9 showing the privilege exists with respect to the text messages or showing why
10 Elysium's disclosure does not constitute waiver. It is therefore completely meritless
11 under controlling authority and warrants the imposition of attorneys' fees and costs.
12 The Court should recognize the *Ex Parte* Submission for what it is: Elysium's
13 desperate ploy to enlist this Court in its improper effort to retrieve damaging
14 information from its adversary (and then improperly withhold it again) by misusing the
15 clawback process.[3] The Court should summarily deny it and award ChromaDex the
16 fees and costs it incurred to oppose it.

17 **II.   RELEVANT BACKGROUND**

18   A large number of the text messages at issue are non-privileged and relevant to
19 the claims alleged by ChromaDex, as described below. These messages are also
20 responsive to ChromaDex's longstanding discovery requests and Elysium should have
21 produced them long ago. Additionally, because compiled text message files contain
22 myriad different communications between different people at different times on
23 different topics, the parties agreed that they would individually designate text messages

24 _____

25 [3] ChromaDex suspects that Elysium did not appreciate the extent and significance of
the numerous damaging messages it produced in these files until *after* it produced them.
26 The production is a cornucopia of smoking gun communications in which Elysium's
principals discuss—often in colorful and salty language—their conspiracy to drive
27 ChromaDex out of business. The communications also contain relevant messages
between Elysium principals that are likely to be personally embarrassing to them. But
28 the salient fact remains: none of the messages involve a lawyer or legal advice, and
none of them are privileged.

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1 for the purposes of privilege and confidentiality markings. Elysium has violated that

2 agreement as well. The relevant allegations and agreements between the parties are

3 explained below for the benefit of the Court.

A.   The Parties and Current Allegations

5 ChromaDex develops and sells ingredients to customers in the "dietary

6 supplement, food, beverage, skin care, and pharmaceutical markets." (ChromaDex's

7 Fifth Amended Complaint (Dkt. 153) ("FAC") ¶ 13.) In the past, ChromaDex supplied

8 Elysium with nicotinamide riboside ("NR") and pterostilbene, which are sold under

9 the brand names "NIAGEN" and "pTeroPure," respectively. (FAC ¶ 2.) NR and

10 pterostilbene are the two fundamental active ingredients in Elysium's only consumer

11 product, Basis. (FAC ¶ 2.) ChromaDex was the sole United States commercial

12 supplier of NR, until Elysium developed an alternate source of NR by stealing and

13 misappropriating ChromaDex's proprietary information. (FAC ¶¶ 7, 35.) ChromaDex

14 filed this action on December 29, 2016, to recover approximately $3 million that

15 Elysium owes for ingredients it ordered on June 30, 2016, ingredients which Elysium

16 sold to consumers and from which it profited, but for which it has never paid. (FAC

17 ¶¶ 86, 97.) Discovery in this case has revealed that Elysium's theft of $3 million in

18 product was only part of its overarching plan to displace and destroy ChromaDex, all

19 with the aim of controlling the market for NR. (FAC ¶ 48.)

20 Mark Morris, ChromaDex's former Vice President of Business Development,

21 was instrumental to Elysium's plan. Morris was hired by ChromaDex in 2007, and

22 after a short break, returned to ChromaDex in 2011. (FAC ¶ 16.) On November 25,

23 2013, Morris was promoted to Vice President of Sales and Marketing and assumed a

24 role in the management of ChromaDex, obligating him to act in ChromaDex's best

25 interests as a fiduciary. (FAC ¶¶ 17, 18, 27.) Morris executed a confidentiality

26 agreement with ChromaDex on February 26, 2016. (FAC ¶ 19, Ex. A.) In 2016,

27 Elysium recruited Morris and induced him to begin acting as its inside agent at

28 ChromaDex, while simultaneously feeding it ChromaDex's confidential and trade

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1 secret information for months. (FAC ¶ 42.) Morris resigned his position at

2 ChromaDex on July 15, 2016 and began official employment at Elysium the very next

3 day. (FAC ¶¶ 23, 73.)

4   In its FAC, ChromaDex asserts five causes of action against Morris, including:

5 misappropriation of trade secrets under California and federal law (FAC ¶ 192); two

6 causes of action for breach of certain confidentiality agreements between Morris and

7 ChromaDex (FAC ¶ 19, 20, 23-25); and a claim for breach of the fiduciary duty owed

8 by Morris to ChromaDex (FAC ¶ 27, 76). ChromaDex also asserts five claims for relief

9 against Elysium, including: claims for breach of the pTeroPure and NIAGEN Supply

10 Agreements (FAC ¶¶ 150-66, 167-88); misappropriation of trade secrets under

11 California and federal law (FAC ¶¶ 189-209, 210-13); and aiding and abetting Morris's

12 breach of fiduciary duty (FAC ¶¶ 244-51).

13   **B.**   **The Parties' Agreement on Reviewing and Producing Text Messages.**

14   The Court adopted the Discovery Order on September 26, 2017. (Dkt. 64.) It

15 states that "the Parties shall negotiate a search protocol for the collection, review and

16 production of text messages and instant messages, should either Party have reason to

17 believe that relevant ESI will be found in one of its custodian's text messages or instant

18 messages." (Discovery Order § I.A.) ChromaDex served its First Set of Requests for

19 Production of Documents on June 30, 2017, its Second Set on February 23, 2018, and

20 its Third Set on March 20, 2018. (Declaration of Barrett J. Anderson ("Anderson

21 Decl.") ¶ 2.)

22   On March 12, 2018, the parties began negotiating an agreement on the prescribed

23 protocol for reviewing and producing relevant messages, which are contained in large

24 compiled Microsoft Excel files each containing hundreds of thousands of text messages.

25 (*Id.*¶ 3.) The parties agreed to identify relevant text messages using search terms

26 applicable to the person from whose cell phone they were collected. (*Id.* Ex. A at 9.)

27 The parties further agreed "to include as many of the surrounding text messages as

28 necessary to provide context for the texts in which the relevant terms appear." (*Id.* Ex.

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B, at 12-13.) As is germane here, Elysium agreed to apply several search terms to the text messages from the phones of Marcotulli and Alminana that would identify material responsive to ChromaDex's discovery requests, including: CDXC, CDX, ChromaDex, "Frank," "Mark,"[4] "Ryan," "PCI," "NR," "royalties," "patent," "trademark," and "license." The parties produced text messages on May 25, 2018. (*Id.* ¶ 4.) Elysium did not produce a privilege log with the text messages of Marcotulli or Alminana, nor did Elysium affirmatively represent that it was withholding any responsive text messages on the basis of any privilege. (*Id.* ¶ 4.)

C. The Parties' Agreement to Designate on a Message-By-Message Basis and Not Designate Entire Complied Text Message Files.

Elysium produced its first batch of text messages from Marcotulli and Alminana in a single Excel file designated "Highly Confidential – Attorneys' Eyes Only" ("AEO") under the Protective Order ("Protective Order") (Dtk. 180). (Anderson Decl. ¶ 5.) Because the entire file could not be properly designated AEO on the ground that only a few messages contained AEO information, ChromaDex requested on June 29, 2018, that Elysium de-designate it under the Protective Order. (*Id.* Ex. E at 41-42.) Elysium refused. (*Id.* Ex. F at 49.) ChromaDex proposed two alternative solutions: Elysium could (1) produce a new file that redacted only those messages that were properly designated AEO; or (2) designate text messages on a message-by-message basis. (*Id.* Ex. G at 53.) Elysium declined again. (*Id.*) ChromaDex subsequently moved to compel de-designation of the text message file. (*Id.*)

Faced with ChromaDex's motion to compel de-designation, Elysium relented and agreed to ChromaDex's proposal that the parties would designate text messages on an individual basis. (*Id.* Ex. H at 64.) The parties' agreement applies to "all text messages already produced or that will be produced in the future by the parties in this

---

[4] The parties agreed that the terms "Mark" and "Ryan" would be limited to a time period of January 1, 2016 to February 2, 2017, but this same date limitation would not be applied to any other terms in Marcotulli's or Alminana's messages. (*Id.* Ex. A at 9; *id.* Ex. C at 20.)

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action." (*Id.* Ex. P at 87.) The parties exchanged new text message files containing individually designated messages on August 10, 2018. (*Id.* ¶ 6.) Again, Elysium did not produce a privilege log or otherwise affirmatively represent that it was withholding any text message on the basis of privilege. (*Id.*)

On August 28, 2018, Elysium represented it had substantially completed its document production. (*Id.* ¶ 7.) Elysium produced privilege logs on June 1, 2018, September 4, 2018, November 7, 2018, and December 6, 2018; none represented that Elysium was withholding entire text messages. (*Id.*)[5] ChromaDex prepared its FAC based on the newly re-designated text messages, adding Morris as a defendant and a new claim against Elysium. (Dkt. 152 at 2.)

D.   Elysium Produces Additional Text Messages and Then Attempts to Claw Them Back.

Elysium produced a new batch of documents to ChromaDex on December 18, 2018. (Anderson Decl. ¶ 8.) In that production were three Excel files containing hundreds of thousands of text messages from the phones of Marcotulli and Alminana. (*Id.*) In the following weeks, ChromaDex reviewed the text messages, discovering relevant messages that are responsive to ChromaDex's discovery requests, but that Elysium had not previously produced. Some of those never-before-produced messages contain search terms that Elysium agreed to use in its first review. (*Id.* ¶ 9.) Many of the withheld text messages concern Morris's disclosure of ChromaDex's confidential and/or trade secret information. (*Id.*) Given the importance of this new information to its claims, counsel for ChromaDex properly integrated these non-privileged text messages into its work product. (*Id.* ¶ 10.) Counsel for ChromaDex did not see, during the entire review, a single text message that contained privileged material. (*Id.*)

On February 6, 2019—nearly two months after it had produced the additional text messages—Elysium first notified ChromaDex that it had "inadvertently" produced

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[5] ChromaDex, by comparison, included some text messages it redacted on the basis of privilege on a privilege log. (*Id.* ¶ 6.)

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1   the three text message files and sought to retrieve the entirety of the three compiled files

2   under Section V.E.2 of the Discovery Order. (*Id.* Ex. I.) Elysium's letter did not

3   identify any specific privileged material or text message, but rather broadly asserted

4   that the files "contain privileged information throughout." (*Id.* at 67.) ChromaDex

5   disputes that Elysium's notice was sufficient to trigger any clawback obligation under

6   the Discovery Order, but ChromaDex's counsel nevertheless purposely ceased further

7   review of the text messages while maintaining, in its case preparations and other work

8   product, the relevant and non-privileged messages it had already identified. (*Id.* ¶¶ 10-

9   11.)

10   On February 8, 2019, ChromaDex responded to Elysium's letter, stated that the

11   alleged "notice" failed to specify what text messages Elysium supposed are privileged,

12   noted that ChromaDex's review had found no privileged messages, and asserted that

13   the "notice" was insufficient to trigger the clawback procedure in the Discovery Order.

14   (*Id.* Ex. J at 70.) ChromaDex invited a meet and confer regarding "how to fairly

15   remediate any specific text messages over which [Elysium has] a reasonable claim to

16   privilege while also preserving the vast majority, which are unquestionably relevant and

17   nonprivileged." (*Id.* at 71.) The same day, ChromaDex requested that Elysium de-

18   designate the compiled files, which it has improperly designated AEO in violation of

19   the parties' agreement to designate texts on a message-by-message basis. (*Id.* Ex. P.)[6]

20   Elysium's response on February 12, 2019, again failed to specify any text

21   messages that Elysium believes are privileged and reiterated its claim that ChromaDex

22   must immediately destroy all of the text messages without condition, even those that

23   are not privileged. (*Id.* Ex K at 73.) Elysium ignored ChromaDex's offer to meet and

24   confer. On February 14, 2019, ChromaDex again requested that Elysium identify what

25   _____

26   [6] Counsel for ChromaDex only relied on its work product, which analyzed the non-
     privileged and relevant text messages it had identified before February 6, 2019, to draft
27   the de-designation request. (Anderson Decl. ¶¶ 10-11.) Contrary to Elysium's
     arguments, doing so was not a violation of the Discovery Order, because "attorneys
28   cannot unlearn what has been disclosed to them in discovery." *Chase Manhattan Bank,
     N.A. v. Turner & Newall, PLC*, 964 F.3d 159, 165 (2d Cir. 1992).

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1 specific text messages it believes are privileged and affirmed that ChromaDex would

2 sequester those messages "the moment [Elysium] provide[s] adequate notice." (*Id.* Ex.

3 L at 77.) ChromaDex noted that identifying the allegedly privileged text messages

4 "should not be difficult" because Elysium "must have identified the particular text

5 message(s) that [it] think[s] are privileged for some reason or another; how else could

6 [Elysium] in good faith assert that the compilation files 'contain privileged material?'"

7 (*Id.*) ChromaDex also raised that Elysium's unexplained delay of two months before

8 seeking to clawback any text messages was enormously disruptive and prejudicial to

9 ChromaDex. (*Id.* at 78.)

10   Also on February 14, 2019, counsel for Elysium notified counsel for ChromaDex

11 that Elysium intended to move *ex parte* for an order compelling ChromaDex to comply

12 with the clawback procedure in the Discovery Order. (*Id.* ¶ 14.) Elysium did not seek

13 a meet and confer before proceeding with the *Ex Parte* Submission. (*Id.*) Elysium filed

14 the *Ex Parte* Submission at 10:42 PM Pacific time on February 14, 2019. (Dkt. 185, *et*

15 *seq.*)

16 **III.   LEGAL STANDARD**

17   "When deciding whether inadvertently produced documents should be returned

18 a two-step analysis must be done. First, it must be determined if the documents in

19 question are privileged. . . . Second, if privileged documents were inadvertently

20 produced then the three elements of [Federal Rule of Evidence ("FRE")] 502(b) must

21 be satisfied." *Peterson v. Bernardi*, 262 F.R.D. 424, 427 (D.N.J. 2009).

22   At the first step of the analysis, "[i]t is axiomatic that FRE 502 does not apply

23 unless privileged or otherwise protected documents are produced." *Id.* at 427. "[T]he

24 burden of proving that the attorney-client privilege applies rests not with the party

25 contesting the privilege, but with the party asserting it." *Weil v. Inv./Indicators,*

26 *Research & Mgmt., Inc.*, 647 F.2d 18, 25 (9th Cir. 1981). That "burden of proof is not

27 satisfied by [a party's] broad unsupported allegations." *Peterson*, 262 F.R.D. at 428.

28   At the second step of the analysis, the party asserting the privilege must show

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1 that it did not waive the privilege. FRE 502(d) contains a limited exception to the rule

2 that "[g]enerally disclosure of confidential communications or attorney work product

3 to a third party, such as an adversary in litigation, constitutes a waiver of privilege as

4 to those items." *Bd. of Trustees of Leland Stanford Junior Univ. v. Roche Molecular*

5 *Sys., Inc.*, 237 F.R.D. 618, 622 (N.D. Cal. 2006). FRE 502(b) provides that when there

6 is an "inadvertent disclosure" of privileged information "in a federal proceeding . . . ,

7 the disclosure does not operate as a waiver in a federal or state proceeding if: (1) the

8 disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable

9 steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify

10 the error, including (if applicable) following Federal Rule of Civil Procedure

11 [("FRCP")] 26(b)(5)(B)." FRE 502(b) is coextensive with the protections provided by

12 Section V.E.1 of the Discovery Order. "The disclosing party has the burden to prove

13 that the elements of FRE 502(b) have been met." *Peterson*, 262 F.R.D. at 427.

14   In order to demonstrate the third element of FRE 502(b)—that the party asserting

15 the privilege "promptly took reasonable steps to rectify the error"—the disclosing party

16 must satisfy the standard in Federal Rule of Civil Procedure 26(b)(5)(B). "If

17 information produced in discovery is subject to a claim of privilege or of protection as

18 trial-preparation material, the party making the claim may notify any party that

19 received the information of the claim and the basis for it." Fed. R. Civ. P. 26(b)(5)(B).

20   The Discovery Order contains a procedure for the parties to seek the return of

21 privileged information while recognizing that the parties "reserve all rights under the

22 Federal Rules of Civil Procedure." (Discovery Order §§ 1.D, V.E.) The Discovery

23 Order provides that, "[i]n the event that a Party discloses any document, ESI, or

24 information that is subject to a claim of attorney-client privilege, work product

25 protection, or any other privilege, immunity, or protection from disclosure, the

26 producing Party shall promptly upon discovery of such disclosure notify the receiving

27 Party and request the return or destruction of such document, ESI, or information in

28 writing." (Discovery Order § V.E.2.)

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IV.   **ARGUMENT**

At the threshold, Elysium fails to cite or address any of the relevant legal standards for a motion to compel return of privileged material, as described above. Nor does Elysium even attempt to provide the evidence necessary to meet its burden to prove that (1) any of the text messages that Elysium freely produced are privileged and (2) by willingly producing them, Elysium did not waive its claim of privilege under FRE 502(b). That is enough to defeat the *Ex Parte* Submission on its own.

But there are other reasons that the *Ex Parte* Submission must be denied. Elysium failed to provide adequate notice of its clawback attempt. Elysium's claim of privilege is baseless because, by refusing to present any evidence that privileged material exists in the text messages, it has effectively admitted that none are actually privileged. In any event, it is uncontestable that not all of the text messages are privileged, and no rule of law gives Elysium the right to compel the return of willingly produced, non-privileged material. And, finally, through its discovery gamesmanship, Elysium has waived any claim to privilege over any of the text messages at issue.

A.   **Elysium Failed to Provide Adequate Notice Under the Discovery Order and FRCP 26(b)(5)(B) and ChromaDex Has No Obligation to Sequester, Return, or Destroy Any Material.**

Elysium's letter dated February 6, which purports to provide notice to ChromaDex under Section V.E.2 of the Discovery Order, is deficient and did not trigger any clawback obligation for ChromaDex under the Discovery Order and FRCP 26(b)(5)(B). Elysium's *Ex Parte* Submission cannot stand without adequate notice. Elysium's February 6 letter is inadequate for two reasons: (1) it fails to identify the specific text messages that are purportedly privileged and (2) it fails to provide the basis for the claimed privilege.

First, in order for Elysium to seek return of allegedly privileged material, Section V.E.2 of the Discovery Order requires that it identify the "document, ESI, or information that is subject to a claim of" privilege and then "request the return or

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1 destruction of such document, ESI, or information in writing." At best, Elysium's

2 February 6 letter suggests the three compiled text message files "contain privileged

3 information." (Anderson Decl. Ex. I at 67.) But those files each contain hundreds of

4 thousands of individual text messages between different people at different times and

5 on different topics. (*See id.* ¶ 3.) It is not reasonable that a single claim of privilege

6 could apply to all of them collectively. That, of course, was the reason the parties

7 agreed that they would review and designate text messages individually. (*See, e.g.*,

8 Discovery Order § I.A (noting "relevant ESI" could "be found in text messages" and

9 the parties should "make reasonable efforts to collect and produce this ***information***"

10 (emphasis added)); Anderson Decl. Ex. H at 61.)

11   The fact that each file bears one Bates number is immaterial; nowhere does the

12 Discovery Order define the term "document, ESI, or information" as a unit bearing a

13 single Bates number. Elysium offers no authority suggesting that a Bates number has

14 any bearing on the scope of a privilege that a party may assert over certain material.[7]

15 Nor is Elysium's position logical; Bates numbers are purely for identification purposes

16 and have nothing to do with privilege designations. And a Bates number does not

17 necessarily signify that the labeled item is "an integrated whole" (whatever that

18 means). (*Ex Parte* Submission at 6.) For example, if a single email within a chain was

19 privileged, it would be improper for a party to withhold the entire document for

20 privilege, despite the fact the chain was labeled with one Bates number. Here, where

21 each compiled file contains hundreds of thousands of varied text messages, it makes

22 no sense to consider the files "integrated whole[s]" for the purposes of a privilege

23 claim. Instead, it is Elysium's burden to justify a claim of privilege for each individual

24 text message. The Court should reject Elysium's attempt to redefine the term

25 ───────────────

26 [7] Elysium misleadingly argues that Federal Rule of Civil Procedure 34 defines "document" as a "data compilation," (*Ex Parte* Submission at 6), but the Rule actually defines "documents *or electronically stored information*" to include "data

27 compilations." Further, nothing about Rule 34 requires that each data compilation must have a single Bates number, or implies that a Bates number affects the scope of a party's

28 privilege claim over the data included within the compilation.

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1   "document, ESI, or information" as "production number."

2   In contrast, ChromaDex's request that Elysium identify the specific text

3 messages at issue is manifestly reasonable. A real-world example is useful to illustrate;

4 consider a situation when one party produces to another a box of documents in

5 litigation. If the producing party realizes that the box contains a privileged document,

6 it would write to opposing counsel and identify the specific document that it sought to

7 clawback. The producing party could not reasonably demand the return of the entire

8 box of documents, most of which are not privileged, based only on a claim of privilege

9 to one document within it. Nor could the producing party label the box with one Bates

10 number and assert that all of the unrelated documents within it are also suddenly

11 privileged. The same is true here: Elysium cannot clawback hundreds of thousands of

12 non-privileged text messages when it admits that it thinks only a few are privileged and

13 has failed to identify them, nor can Elysium hide behind its Bates numbers.[8]

14   *Second*, before filing the *Ex Parte* Submission, Elysium failed to notify

15 ChromaDex of the basis for its claim, as it was required to do under the Federal Rules.

16 Fed. R. Civ. P. 26(b)(5)(B) (requiring party claiming privilege to notify receiving party

17 "of the claim ***and the basis for it***" (emphasis added)). Elysium contends that

18 "ChromaDex ignore[d] the Clawback Provision," (*Ex Parte* Submission at 7), but that

19 is not true: ChromaDex affirmatively asked for more information about Elysium's

20 privilege claim, but—as with its refusal to identify specific text messages—Elysium

21 declined to provide it. Rather, Elysium relies on broad and unsupported allegations

22 that some message, somewhere in the hundreds of thousands contained in the compiled

23 files, is probably privileged for unknown reasons. That is inadequate to assert a

24 privilege claim and grounds to deny the *Ex Parte* Submission. *See Peterson,* 262

25

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26 [8] ChromaDex's request for de-designation of the compiled text message files is
consistent with this position, contrary to Elysium's suggestion otherwise. (*Ex Parte*
27 Submission at 5-6.) It is Elysium's burden, not ChromaDex's, to identify what (if
anything) about each message warrants confidentiality. Elysium's attempt to designate
28 the files in their entirety as confidential is, as with its privilege claim, improper.

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1   F.R.D. at 427–28 (ruling moving party does not satisfy its threshold burden where

2   "moving papers essentially [make] no attempt to establish that the documents in

3   question [are] privileged or otherwise protected from discovery" because moving

4   party's burden of proof "is not satisfied by . . . broad unsupported allegations").

5   ChromaDex has no interest in reviewing Elysium's attorney-client privileged

6   communications. To that end, in December 2018, ChromaDex willingly sequestered

7   and destroyed two documents following a clawback request from Elysium. (Anderson

8   Decl. Exs. M and N.) And only two days ago, on February 14, 2019, ChromaDex

9   affirmatively notified Elysium that it had recently produced an obviously privileged

10 email chain between Elysium and its lawyers, and that ChromaDex (without the

11 necessity of a clawback notice) destroyed all copies of that document in its possession.

12 (*Id.* Ex. L at 78.) Although Elysium's counsel appears to be quite careless about

13 protecting Elysium's privileged material, ChromaDex takes its obligations seriously

14 and has committed to immediately sequestering and destroying any text messages that

15 Elysium specifically identifies that are reasonably subject to a claim of privilege. (*Id.*

16 at 77.)

17   **B.   Elysium's Attempt to Retrieve Damaging and Non-Privileged Text
                       Messages Is an Abuse of the Discovery Order.**
18

19   The Court should not entertain Elysium's improper effort to compel ChromaDex

20 to return the non-privileged text messages freely produced by Elysium nearly two

21 months ago simply because Elysium nebulously asserts there are some privileged

22 messages in the compiled files. It is Elysium's burden to prove that there are privileged

23 text messages. *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 25 (9th

24 Cir. 1981). Because Elysium has not met its burden, none of the text messages are

25 properly subject to a clawback request. *Peterson*, 262 F.R.D. at 427 ("FRE 502 does

26 not apply unless privileged or otherwise protected documents are produced"); *Callan*

27 *v. Christian Audigier, Inc.,* 263 F.R.D. 564, 566 (C.D. Cal. 2009) (denying motion to

28 enforce clawback procedure in protective order where movants failed to establish the

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1 documents were privileged). Elysium's *Ex Parte* Submission is an abuse of the

2 Discovery Order for three reasons: (1) Elysium's claim of privilege is illusory; (2) there

3 are indisputably non-privileged messages in the files; and (3) many of those messages

4 should have been produced by Elysium long ago and it seeks to cover its discovery

5 violations in the guise of an unfounded assertion of privilege.

6   *First*, Elysium's claim of privilege is a mirage. Despite repeated requests,

7 Elysium could not identify any specific text messages that it believes are subject to a

8 claim of privilege. Identifying any such messages should be simple; how else would

9 Elysium know that the compiled files "contain privileged material" unless it identified

10 specific messages that it believes are privileged? Elysium did not lodge any

11 purportedly privileged text messages with the Court or provide a privilege log to

12 support its claim, rendering its "blanket claim" for privilege "entirely inadequate."

13 *Banister v. Firestone*, 2018 WL 4224444, at *10 (N.D. Ill. Sept. 5, 2018). Elysium has

14 provided no good-faith basis to claim privilege over *any* of the messages, let alone *all*

15 of them at once. Counsel for ChromaDex reviewed a substantial number of those text

16 messages prior to receiving Elysium's February 6 letter and saw no communications

17 between Marcotulli or Alminana on one side and an attorney on the other. (Anderson

18 Decl. ¶ 10.)[9] Nor did ChromaDex's counsel see any communications seeking,

19 receiving, or transmitting legal advice. (*Id.*) Elysium's *Ex Parte* Submission appears

20 to be based on a fantasy.

21   *Second*, there are plainly non-privileged text messages in the files that Elysium

22 seeks to retrieve. During the review, ChromaDex's counsel discovered numerous non-

23 privileged text messages to and from Marcotulli and Alminana that are relevant to

24 ChromaDex's claims and defenses. Many of the messages, which Elysium has never

25

26 [9] Even if there were text messages between Marcotulli or Alminana and a lawyer, "not
all communications between a client and lawyer are privileged." *Peterson*, 262 F.R.D.
27 at 428 (finding party asserting privilege failed to carry burden where "many of the
documents at issue involve communications between plaintiff and the New Jersey
28 Office of the Public Defender and the Innocence Project").

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1   before produced, contain information that is very damaging to Elysium's and Morris's

2   claims and defenses in the action. (*Id.* ¶ 9.) Some of them contain further evidence

3   that Morris and Elysium misappropriated ChromaDex trade secrets. In one text

4   message, for example, ███████████████████████████████████████

5   ██████████████████████████, a closely guarded ChromaDex secret. (*Id.* Ex. O

6   at row 4243.)

7   Other non-privileged messages provide additional instances in which Morris

8   breached his fiduciary duty and contractual obligations of confidentiality to

9   ChromaDex. For example, certain text messages reveal that, while he was still

10   employed by ChromaDex, Morris helped Elysium ████████████████████

11   ██

12   ████████████████████. (*Id.* at rows 4135-36, 4272-76.) Yet more of the never-

13   before-produced text messages show that, in further breach of his fiduciary duty,

14   Morris fed information to Elysium concerning ████████████████████████

15   ██████████████████████████████████. (*Id.* at rows 4306-13, 4353.) Not

16   one of those messages is even arguably privileged, and Elysium has no basis to claw

17   them back.

18   Many of these damaging text messages are obviously relevant to the claims and

19   defenses of the parties at the time that Elysium first collected and reviewed them in

20   April and May of 2018. Elysium apparently withheld these messages in derogation of

21   its discovery obligations under the Federal Rules. For example, ChromaDex has

22   alleged since the beginning of this action that Elysium stockpiled shipments of

23   ChromaDex's NR ingredient that it ordered in June 2016, and that it never paid for

24   those shipments, all in an effort to harm ChromaDex. As is relevant to that allegation,

25   Elysium affirmatively agreed to search its text messages for the term "NR." But, as

26   shown by the new text messages "inadvertently" produced by Elysium, it failed to

27   produce a text message demonstrating that in June 2016 Alminana asked for and

28   received from Morris information on the "████████████████████████████

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1   ██" (*Id.* at row

2 4179.) In a different text message sent on June 28, 2016, the day Elysium first placed

3 the large NR purchase orders, Morris provided an ██████████████████ (*Id.*

4 at rows 4175-77.)   Another text with the term "NR" shows that the day after Elysium

5 re-placed those orders on June 30, 2016, Morris told Elysium ████████████

6 ████████████████████████████. (*Id.* at row 4272.)   Elysium's

7 failure to produce these messages (and its obvious intention never to do so) has

8 materially prejudiced ChromaDex by forestalling its rightful discovery and forcing it

9 to expend enormous amounts of time and money to obtain it. It also raises the serious

10 question of how much other relevant, responsive, and non-privileged material Elysium

11 is improperly withholding.

12   Elysium's demand that ChromaDex return all of the text messages—even those

13 that are not privileged—and await "appropriate replacements" at some uncertain date

14 in the future would severely and unfairly burden ChromaDex's prosecution of its

15 claims, especially in light of imminent fact depositions and the approaching April 5

16 discovery cutoff. In any event, there is no guarantee any "appropriate replacements"

17 would be satisfactory, given that Elysium has refused to promise to re-produce every

18 non-privileged text message currently in ChromaDex's possession, refused to offer a

19 privilege log, and refused to commit to providing those replacements promptly and by

20 a specified date. (*See id.* Exs. I, K.)

21   In the nearly two months between the time Elysium produced the text messages

22 and its February 6 letter, counsel for ChromaDex has integrated the relevant and non-

23 privileged text messages such as those described above into its work product.

24 ChromaDex should not be compelled to shoulder the enormously disruptive and unfair

25 burden of removing all references to those non-privileged messages and seek re-

26 production when Elysium's claim of privilege is so obviously unsupported and its

27 attempt to claw them back so plainly inadequate.

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C.   Elysium Has Waived Any Alleged Claim of Privilege.

"One of the elements that the [party asserting privilege] must prove is that it has not waived the privilege." *Weil*, 647 F.2d at 25 (citations omitted). The "bare assertion that [a disclosing party] did not subjectively intend to waive the privilege is insufficient to make out the necessary element of nonwaiver." *Id.* Again, Elysium does not even cite the governing standard under FRE 502(b). Nor does Elysium submit any evidence to meet its burden of showing that the production of the text messages was inadvertent, that it took reasonable steps to prevent the disclosure, or that it promptly took reasonable steps to rectify its error. The declaration of Elysium's counsel "do[es] not establish or set forth facts showing how [Elysium] reviewed the allegedly privileged documents before producing them to [ChromaDex] or what precautions [it] took to prevent the disclosure of allegedly privileged documents . . . ; thus, [Elysium has] not shown [its] production of any document was 'inadvertent.'" *Callan v. Christian Audigier, Inc.*, 263 F.R.D. 564, 566 (C.D. Cal. 2009). Elysium has therefore waived its claim of privilege.

Elysium has also waived its right to assert privilege because it surreptitiously withheld entire text messages despite the fact that they were responsive to ChromaDex's discovery requests and the search terms that Elysium had agreed to use. *Monco v. Zoltek Corp.*, 317 F. Supp. 3d 995, 1000 (N.D. Ill. 2018). The Court's decision in *Monco* is apt. There, the defendant entirely withheld a document as privileged, but failed to include it in a privilege log; consequently, the plaintiff had no idea it even existed.[10] *Id.* at 999. Plaintiff "only discovered [the document] because Zoltek Corporation produced—'inadvertently,' it claims—an email chain referring to the document." *Id.* at 1000. That email chain "revealed Zoltek Corporation's studied attempt to withhold documents" and thus its production "was definitely a blunder; but it was not an

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[10] Similarly, a "blanket claim for privilege is entirely inadequate" when Defendant does not "produce[] any privilege log for Plaintiff and/or the Court to determine what documents [it] is withholding, and whether the privilege actually applies." *Banister*, 2018 WL 4224444, at *10. Elysium has failed entirely to provide either ChromaDex or the Court with a privilege log, and the *Ex Parte* Submission should be denied on that basis.

1 'inadvertent disclosure,' as the cases define the term." *Id.* at 1000-01. The Court ruled

2 that, "[i]n such an instance, a court should have no qualms about finding the party

3 engaging in such a tactic has waived its privilege as to that document." *Id.* at 1001.

4 Ultimately, the "[d]efendant had multiple opportunities to indicate, even by an

5 unadorned claim, that it was withholding this document from discovery based on

6 privilege or work product. It did nothing. The defendant's silence is telling." *Id.* at

7 1000; *see also Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Ct. for the Dist. of Mont.*,

8 408 F.3d 1142, 1147 (9th Cir. 2005) ("'To withhold materials without such notice is

9 contrary to [Rule 26], subjects the party to sanctions under Rule 37(b)(2), and may be

10 viewed as a waiver of the privilege or protection.'" (quoting Rule 26(b)(5) Advisory

11 Committee's note (1993 Amendments))); *Casale v. Nationwide Children's Hosp.*, 2013

12 WL 122032434, at *2 (S.D. Ohio Sept. 13, 2013) ("[C]ase law recognizes the Court's

13 authority to find waiver for failure to comply with Rule 26(b)(5).").

14   Elysium's conduct with respect to the text messages is just like the Zoltek

15 Corporation's "studied attempt to withhold documents."   As explained above,

16 ChromaDex had no way of knowing the withheld, but responsive, text messages even

17 existed until Elysium "inadvertently" produced them. That alone constitutes waiver.

18 *Burlington*, 408 F.3d at 1149 (affirming trial court's ruling of "waiver where the

19 [privilege] log not only was not filed during the Rule 34 time limit, but was filed *five*

20 *months* later (emphasis in original)); *Casale*, 2013 WL 12203243, at *5-6 (holding

21 waiver was warranted given Defendant's "flagrant" violation of Rule 26 when it

22 "withheld some sixty documents without so much as notifying Plaintiff that they were

23 being withheld, let alone describing the bases for the withholding."). The Court should

24 find that Elysium waived any possible claim of privilege.

25   **D.   Because Elysium's *Ex Parte* Submission is Meritless, the Court Should Grant ChromaDex's Request for Fees.**

26

27 Under Federal Rule of Civil Procedure 37, if Elysium's *Ex Parte* Submission is

28 denied, the court "must, after giving an opportunity to be heard, require the movant, the

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1 attorney filing the motion, or both to pay the party . . . who opposed the motion its

2 reasonable expenses incurred in opposing the motion, including attorney's fees." Fed.

3 R. Civ. P. 37(a)(5)(B). The "court must not order this payment if the motion was

4 substantially justified or other circumstances make an award of expenses unjust." *Id.*

5   Here, Elysium has filed a meritless motion on an *ex parte* basis, forcing

6 ChromaDex to incur substantial fees to oppose it on a drastically shortened timeline.

7 Elysium's *Ex Parte* Submission is meritless because it fails to reference the governing

8 standard for its argument, cite controlling authority, or supply any evidence in support

9 of its burdens of proving that any text message is privileged or that Elysium's conduct

10 does not constitute waiver under FRE 502(b). The court in *Callan v. Christian Audigier,*

11 *Inc.*, 263 F.R.D. 564, 566 (C.D. Cal. 2009), facing nearly the same circumstances as

12 those present here, granted a request for reasonable attorney's fees in favor of the party

13 opposing a similarly meritless motion to compel compliance with a protective order.

14 ChromaDex is ready to submit evidence regarding the fees incurred in responding to

15 Elysium's meritless Application at the Court's request.

16 **V.   CONCLUSION**

17   For the foregoing reasons, ChromaDex requests that the Court deny Elysium's

18 *Ex Parte* Submission and grant ChromaDex's request for costs and fees.

19

20 Dated: February 15, 2019   COOLEY LLP

21   By: */s/ Barrett J. Anderson*
                                            Barrett J. Anderson
22   Attorneys for Plaintiff ChromaDex, Inc.

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