

Omar Tuffaha

From: Omar Tuffaha
Sent: Thursday, March 18, 2021 12:11 PM
To: Samet, Matthew
Cc: Whitney, Craig; Caterina, Tiffany; Joe Tuffaha; Prashanth Chennakesavan
Subject: RE: In re: Elysium Health-ChromaDex Litigation (17cv07394)
Attachments: 2021-03-18.zip

Hi Matt,

ChromaDex's position, conveyed on Tuesday's call, is that spreadsheets and other "work papers" prepared by Mr. Gunderson and shared with counsel in connection with drafts are protected from disclosure. FRCP 26 protects from disclosure communications with counsel and draft reports, including drafts in any form, such as charts, graphs, and tables, an expert prepares and shares with counsel. *See Davita Healthcare Partners, Inc. v. United States*, 128 Fed. Cl. 584, 590-92 (2016) (explaining that under FRCP 26 and the 2010 Advisory Committee Notes, documents reflecting a preliminary analysis are protected whether viewed as a "preliminary expert report" or as a communication from expert to counsel reflecting their joint effort to develop strategy). Spreadsheets, graphs, and analyses created by an expert in consultation with counsel—which are protected—are separate and distinct from the underlying facts and data themselves, which are not protected. *Id.* (noting that the defendant mistakenly equated "interpretations of data that reflect counsel's mental impressions and result from the expert's and counsel's collaborative efforts to organize and present data" with the facts and data themselves).

Here, any workpapers and spreadsheets Mr. Gunderson created in consultation with counsel for purposes of this litigation are protected from disclosure. *See, e.g., Subramanian v. Lupin Inc.*, No. 17 Civ. 5040 (RA) (KHP), 2020 WL 4707268, at *4 (S.D.N.Y. Aug. 13, 2020) ("There is no question that Lupin's attorneys' communications with its experts . . . including any draft reports exchanged, were work product. But for that litigation, the communications would never have occurred. The communications were solely had because of the litigation."). That includes Excel spreadsheets Mr. Gunderson created to aid his work and in order to consult with counsel. Mr. Gunderson's final conclusions are reflected in the report and attached schedules.

To the extent Elysium's request is only for non-privileged documents, including spreadsheets, that Mr. Gunderson reviewed and relied upon in forming his opinion, those are identified in Schedule 3. We have also determined that Appendix 1 and Appendix 2 reproduce ChromaDex documents, which are produced concurrently. Please note these documents are designated as Highly Confidential-Attorneys' Eyes Only.

Thank you,
Omar

Omar H. Tuffaha

LTL ATTORNEYS

Los Angeles | San Francisco | New York | Orange County

LTL ATTORNEYS LLP

Direct: 332-206-0205 | Fax: 213-612-3773

omar.tuffaha@ltlattorneys.com | www.ltlattorneys.com

CONFIDENTIALITY NOTICE

The information in this e-mail (including attachments, if any) is confidential information intended only for the use of the individual or entity to whom it is addressed, and may be privileged. The information herein may also be protected by the Electronic Communications Privacy Act, 18 USC Sections 2510-

2521. Any review, use, disclosure, distribution, or copying of this e-mail is prohibited except by or on behalf of the intended recipient. If you have received this email in error, please notify the sender immediately by reply email, delete this email, and do not disclose its contents to anyone. Thank you.



From: Samet, Matthew <MSamet@fkks.com>
Sent: Tuesday, March 16, 2021 11:31 PM
To: Omar Tuffaha <omar.tuffaha@ltlattorneys.com>
Cc: Joe Tuffaha <joe.tuffaha@ltlattorneys.com>; Prashanth Chennakesavan <Prashanth.Chennakesavan@ltlattorneys.com>; Whitney, Craig <CWhitney@fkks.com>; Caterina, Tiffany <TCaterina@fkks.com>
Subject: RE: RE: In re: Elysium Health-ChromaDex Litigation (17cv07394)

Hi Omar,

I understand from Tiffany that, during your conversation this afternoon, ChromaDex took the position that it would not produce documents in response to my March 10, 2021 request because they reflect the mental impressions of counsel. To clarify, our request only seeks documents, such as underlying spreadsheets and other workpapers, that Mr. Gunderson considered in forming his opinions. Rule 26(b)(4)(C)(ii) and (iii) expressly exempt from claims of privilege any documents that “identify facts or data that the party’s attorney provided and that the expert considered in forming the opinions to be expressed” and/or “identify assumptions that the party’s attorney provided and that the expert relied on in forming the opinions to be expressed.”

Please confirm that ChromaDex will produce the Excel versions and underlying raw data of the schedules in Mr. Gunderson’s report, as well as all documents, spreadsheets, and other work papers (other than those previously produced in the case) that Mr. Gunderson relied upon in forming his opinions.

Thanks,
Matt

Matthew Samet | Frankfurt Kurnit Klein & Selz PC
2029 Century Park East Suite 2500N | Los Angeles, CA 90067
t: (310) 579-9633 | | MSamet@fkks.com

From: Samet, Matthew
Sent: Wednesday, March 10, 2021 9:07 AM
To: omar.tuffaha@ltlattorneys.com
Cc: joe.tuffaha@ltlattorneys.com; Prashanth.Chennakesavan@ltlattorneys.com; Whitney, Craig <CWhitney@fkks.com>; Caterina, Tiffany <TCaterina@fkks.com>
Subject: RE: In re: Elysium Health-ChromaDex Litigation (17cv07394)

Hi Omar,

For ChromaDex’s Expert Report of Lance Gunderson, can you please provide us the underlying spreadsheets and other work papers that form the basis of Mr. Gunderson’s calculations and opinions (including the excel spreadsheets used to create the Schedules)?

Thanks,
Matt

Matthew Samet | Frankfurt Kurnit Klein & Selz PC
2029 Century Park East Suite 2500N | Los Angeles, CA 90067
t: (310) 579-9633 | | MSamet@fkks.com