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12  
13 **UNITED STATES DISTRICT COURT**  
14 **CENTRAL DISTRICT OF CALIFORNIA**  
15 **(WESTERN DIVISION)**  
16

17 ChromaDex, Inc.,  
18 Plaintiff,  
19 v.  
20 Elysium Health, Inc., and Mark Morris  
21 Defendants.

22 Elysium Health, Inc.,  
23 Counterclaimant,  
24 v.  
25 ChromaDex, Inc.,  
26 Counter-Defendant.  
27  
28

Case No. 8:16-cv-2277-CJC (DFMx)

**CHROMADEx, INC.’S OPPOSITION TO  
DEFENDANTS’ MOTION FOR REVIEW OF  
THE MAGISTRATE JUDGE’S ORDER  
MODIFYING THE PROTECTIVE ORDER**

Judge: Hon. Cormac J. Carney  
Courtroom: 7C  
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Trial: TBD

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1 **I. INTRODUCTION**

2 Magistrate Judge Douglas F. McCormick issued the Second Amended Protective  
3 Order after applying Ninth Circuit precedent and finding that the same parties  
4 represented by the same attorneys should be allowed to use discovery already produced  
5 in this case in a collateral litigation that involves overlapping facts and issues.  
6 Defendants Elysium Health, Inc. and Mark Morris (collectively, “Defendants”) now  
7 raise new arguments that they never presented to the Magistrate Judge to demand that  
8 this Court reverse his well-supported decision. (Dkt. 398-1 (“Motion”).) Magistrate  
9 Judge McCormick did not abuse his discretion, the Motion should be denied, and  
10 ChromaDex should be awarded its fees because the Motion is not substantially justified.

11 Under the standard established in *Foltz v. State Farm Mutual Automobile*  
12 *Insurance Company*, the Ninth Circuit “strongly favors access to discovery materials to  
13 meet the needs of parties engaged in collateral litigation.” 331 F.3d 1122, 1131–32 (9th  
14 Cir. 2003). *Foltz* instructs lower courts to “[a]llow[] the fruits of one litigation to  
15 facilitate preparation in other cases” in order to “advance[] the interests of judicial  
16 economy by avoiding the wasteful duplication of discovery.” *Id.* at 1131. That is  
17 precisely what Magistrate Judge McCormick allowed by adopting the Second Amended  
18 Protective Order. *Foltz* and the cases applying it in similar situations to this one are as  
19 plain as day; so plain, in fact, that Magistrate Judge McCormick found this matter  
20 “easy” to decide. For that reason, and others discussed below, Defendants’ objection  
21 should be rejected and their Motion denied.

22 **II. RELEVANT BACKGROUND**

23 ChromaDex and Elysium Health, Inc. (“Elysium”) are both parties to the  
24 litigation before this Court (“California Action”) and are also parties to a collateral case  
25 in the Southern District of New York captioned *In re Elysium Health–ChromaDex*  
26 *Litigation*, No. 1:17-cv-07394 (CM) (“New York Action”). Both parties have retained  
27 the same law firms to represent them, and the same attorneys are involved in discovery,  
28 in both litigations. The legal claims asserted by the parties in the New York Action—



1 for false advertising, deceptive business practices, and copyright infringement—arise  
2 out of the same former commercial relationship between ChromaDex and Elysium, and  
3 thus involve the same set of facts and issues, as the claims in the California Action.

4 ChromaDex, among other things, is a company that supplies ingredients for  
5 dietary supplements. Elysium is a company that, until recently, sold only one  
6 commercial product: a dietary supplement called “Basis.” (CDXC Ex. E ¶ 5; CDXC  
7 Ex. G ¶ 1 at 95.<sup>1</sup>) Basis is comprised of two ingredients—nicotinamide riboside (“NR”) and  
8 pterostilbene—which ChromaDex originally supplied to Elysium under the terms  
9 of various agreements, but which Elysium now obtains from different suppliers. (Dkt.  
10 153 ¶ 34; CDXC Ex. E ¶ 63(b)(vii).) Facts and issues concerning ChromaDex’s NR  
11 and pterostilbene, the agreements under which ChromaDex supplied them to Elysium,  
12 Elysium’s new NR and pterostilbene, the circumstances under which Elysium sought  
13 and obtained those new ingredient supplies, and the entire history of the parties’  
14 interactions and commercial relationship are all central to both parties’ claims in the  
15 California Action. (Dkt. 153 ¶ 35; Dkt. 103 ¶¶ 1–4, 21.)

16 Those same facts and issues are also central to the parties’ allegations in the New  
17 York Action. For example, ChromaDex alleges in the New York Action that “Elysium  
18 misappropriated every aspect of ChromaDex’s pedigree in its marketing materials for  
19 the purpose of deceiving consumers about its Basis product.” (CDXC Ex. E ¶ 12.) One  
20 way in which Elysium stole ChromaDex’s scientific pedigree is that Elysium falsely  
21 advertised that the NR and pterostilbene it uses in Basis are approved by the U.S. Food  
22

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23 <sup>1</sup> Curiously, Defendants did not submit the December 6 hearing record or the exhibits  
24 attached to each party’s letter brief to Magistrate Judge McCormick, even though the  
25 Court “must confine itself to the record before the magistrate judge at the time she made  
26 factual determinations under 28 U.S.C. § 636(b)(1)(A).” *UMG Recordings, Inc. v. Glob.  
27 Eagle Entm’t, Inc.*, 2015 WL 12752881, at \*9 (C.D. Cal. Aug. 27, 2015). ChromaDex  
28 therefore provides the Court with the omitted documents attached to the concurrently  
filed Declaration of Barrett J. Anderson (“Anderson Decl.”). The exhibits attached to  
ChromaDex’s letter brief are included in Exhibit 2 and are referred to with the original  
exhibit lettering as “CDXC Ex.” The relevant exhibits attached to Defendants’ letter  
brief are included as Exhibit 3 and are referred to with the original exhibit lettering as  
“Defs. Ex.”

1 and Drug Administration (“FDA”), when in fact only ChromaDex’s NR and  
2 pterostilbene (which Elysium no longer used by that time) were so approved. (*Id.*  
3 ¶ 63(c).) Those same FDA approvals are part of the California Action because (as  
4 alleged by ChromaDex) Elysium stole and misused them in other ways. (CDXC Ex. F  
5 ¶¶ 108–11, 136–41.) ChromaDex also alleges in the New York Action that Elysium  
6 deceived the public by improperly advertising ChromaDex’s scientific achievements as  
7 if they are Elysium’s in order to market its product. (CDXC Ex. E ¶¶ 63(a)–(b).)  
8 Elysium’s wrongful use of ChromaDex’s scientific pedigree overlaps in time and  
9 substance with its theft of ChromaDex’s confidential information, as alleged in  
10 California. (CDXC Ex. F ¶¶ 7, 141.) Therefore, as alleged by ChromaDex, the facts  
11 and issues surrounding the parties’ failed commercial relationship and the pervasive  
12 misconduct by Elysium and its agents at issue in California will also be critical to the  
13 resolution of the New York Action. (CDXC Ex. E ¶¶ 9–11, 53–57.)

14 Elysium’s allegations also evince a substantial overlap between the litigations.  
15 For example, Elysium avers in the New York Action that ChromaDex was “interested  
16 in supplying Elysium with NR only long enough for Elysium to build a consumer base.  
17 Once it had, ChromaDex organized a campaign to influence consumers away from  
18 Elysium (and other competitors) and eliminate Elysium.” (CDXC Ex. G ¶ 2 at 95.)  
19 Elysium alleges the same thing in support of its patent misuse counterclaim in  
20 California. (*E.g.*, Dkt. 103 ¶ 142.) Elysium further alleges in New York that  
21 ChromaDex’s ingredient “contained acetamide in such substantial quantities that it  
22 caused virtually all of ChromaDex’s customers who re-sold its NR into California to  
23 violate... Proposition 65.” (CDXC Ex. G ¶ 25 at 102; *see also id.* ¶¶ 105–07 at 120–  
24 21.) Similarly, Elysium alleges in California that the ingredient that ChromaDex “sold  
25 to Elysium contained [acetamide] in levels that far exceeded the Safe Harbor Limit” set  
26 by Proposition 65. (CDXC Ex. I ¶ 97; *see also id.* ¶ 101.)

27 The above facts and issues have already been the subject of extensive document  
28 discovery totaling over 90,000 documents produced by both parties and third parties,

1 many hours of testimony from 22 separate fact depositions, three expert depositions,  
2 and no less than seven expert reports in the California Action. (Anderson Decl. ¶ 2; *see*  
3 *also, e.g.*, Dkts. 398-4 at 4–8, 262, 265, 266.) The parties invested enormous amounts  
4 of time and money into these discovery efforts. (Anderson Decl. ¶ 2.) In the New York  
5 Action, both parties have served discovery requests, but neither has yet produced  
6 documents. (*Id.* ¶ 3.) A side-by-side comparison of several of the document requests  
7 issued in both cases further shows the high degree of overlap in the facts and issues.  
8 Appendix A attached to ChromaDex’s letter brief to Magistrate Judge McCormick  
9 provides examples of the overlap in Elysium’s requests and Appendix B shows  
10 examples of the overlap in ChromaDex’s requests. (Dkt. 398-4 at 4–8.)

### 11 **III. PROCEEDINGS BEFORE MAGISTRATE JUDGE MCCORMICK**

#### 12 **A. ChromaDex Proposes the Second Amended Protective Order to** 13 **Facilitate Discovery in the New York Action.**

14 The presiding judge in the New York Action—Chief Judge Colleen McMahan—  
15 has set an ambitious discovery schedule, ordering that all document discovery between  
16 the parties be completed by February 24, 2020. (CDXC Ex. B at 27, 29.) A large  
17 proportion of the discovery in California has been designated by the parties as  
18 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEY’S EYES  
19 ONLY,” which under the First Amended Protective Order meant that the designated  
20 information “shall be used by a Receiving Party only for the purpose of [the California]  
21 Action (including any appeal), and not for any other purpose.” (Dkt. 180 ¶ 13.) The  
22 parties were therefore prohibited from using the voluminous discovery they already  
23 possessed in the California Action for any purpose in the New York Action.

24 Given the fast-approaching deadline in New York, as well as the presence of the  
25 same parties and counsel and the substantially overlapping facts and issues in both  
26 cases, ChromaDex proposed on November 8, 2019, that the parties stipulate to the  
27 Second Amended Protective Order. (Defs. Ex. L.) Defendants refused. (Defs. Ex. M.)  
28 The parties conferred on November 18, 2019, to no avail. (Anderson Decl. ¶ 5.) Until

1 they filed this Motion, Defendants never proposed alternative language for an amended  
2 protective order. (*See* Defs. Exs. M, N at 7; Dkt. 398-3 at 2; Anderson Decl. ¶ 7.)

3 **B. Magistrate Judge McCormick Grants ChromaDex’s Motion to**  
4 **Amend the Protective Order.**

5 ChromaDex notified Magistrate Judge McCormick that it would move to amend  
6 the protective order pursuant to his informal discovery resolution procedure, and the  
7 parties filed informal letter briefs with his chambers on December 5, 2019. (Dkts. 398-  
8 3, 398-4.) ChromaDex argued that, under *Foltz* and later cases applying the *Foltz*  
9 standard in contexts similar to this one (where the same parties and their lawyers already  
10 possessed discovery on overlapping facts and issues), a modification was appropriate  
11 to eliminate unnecessary duplicative discovery. (Dkt. 398-4.) Defendants argued two  
12 points in opposition. First, they asserted that they opposed modification because  
13 Elysium believed that some subset of the documents it produced in California may be  
14 irrelevant in New York. (Dkt. 398-3 at 2.) Second, Defendants asserted that  
15 ChromaDex could not make the required showing of relevance under *Foltz* because the  
16 legal claims in the two cases were different. (*Id.*) Defendants did not argue that *Foltz*  
17 was distinguishable or would not authorize the proposed modification. (*Id.*)

18 Magistrate Judge McCormick heard ChromaDex’s motion on December 6, 2019.  
19 At the outset, he stated that, based on review of the letter briefs, he believed that “the  
20 protective order issue is fairly easy.” (Exhibit 1 (“Hearing Tr.”) at 4:10–13.) He  
21 nonetheless provided Defendants an opportunity to persuade him otherwise.  
22 Defendants argued that Elysium would produce documents in New York that they have  
23 designated under the protective order in California only if ordered to do so by the New  
24 York court, and that the two cases are different because there is one additional defendant  
25 in California and the document requests and legal claims are not identical. (*Id.* at 5:2–  
26 6:5.) Defendants admitted that the primary reason for their opposition to the proposed  
27 modification was their concern about non-privileged documents “that were  
28

1 inadvertently produced by Elysium,” an issue that Defendants conceded the parties had  
2 “previously litigated before your Honor back in February.” (*Id.* at 6:6–19.)

3 Magistrate Judge McCormick was not persuaded. He first rejected Defendants’  
4 attempt to re-litigate the “inadvertent” production issue, stating “[w]e’ve been around  
5 the bend on those documents a number of times before . . . there’s just no way to  
6 clawback documents that shouldn’t have been produced in the first place.” (*Id.* at 6:21–  
7 7:2.)<sup>2</sup> He stated that, if documents produced in California had not been designated  
8 under the protective order, “[t]hey would simply be documents that ChromaDex had,  
9 and they would be free to do what they could with them, you know, subject to the SDNY  
10 Court thinking they were relevant at the time of trial . . . in New York.” (*Id.* at 7:3–12.)  
11 He also noted that “it is not like that litigation there is some different species of case;  
12 it’s part of what is essentially a litigation battle between the parties.” (*Id.* at 7:21–23.)  
13 For those reasons, he stated that “I don’t see why the Ninth Circuit’s guidance and  
14 [*Foltz*] shouldn’t be enough here, and we should modify the protective order to permit  
15 the use of the documents that were produced here in what is at the very least collateral  
16 litigation in New York.” (*Id.* at 7:17–21.) He therefore ruled that “if ChromaDex  
17 submits to me a modified protective order, I will sign it.” (*Id.* at 7:24–25.)

18 Defendants’ counsel then requested permission to argue an entirely new point not  
19 contained in Defendants’ letter brief: that *Foltz* is distinguishable because it involved  
20 “litigation that was already closed, and a new party trying to obtain those documents.”  
21 (*Id.* at 8:16–20.) Magistrate Judge McCormick stated that he “understood  
22 [Defendants’] concerns” and that he did not “dismiss them without some  
23 consideration,” but that his ruling was “that the cases are related and collateral, and will  
24 handle it thus.” (*Id.* at 9:11–14.)

25 \_\_\_\_\_  
26 <sup>2</sup> As ChromaDex argued in prior motions both to Magistrate Judge McCormick and to  
27 this Court, it believes that many of these “inadvertently produced” documents at issue  
28 in the prior dispute are both relevant and admissible in the California Action. (Dkts.  
188-1, 285.) ChromaDex also believes that they will be relevant and admissible in the  
New York Action, and will argue thus to Chief Judge McMahon at the appropriate time.

1 Later in the hearing, Defendants’ counsel tried again to raise arguments not in  
2 Defendants’ letter brief; specifically, counsel again sought to argue that *Foltz* was  
3 distinguishable because it did not “implicate[] the Rules of Discovery in a different  
4 forum” and there was a “recent case on privacy and claw-back of inadvertently-  
5 produced documents in the Central District” that counsel wanted to submit. (*Id.* at 14:8–  
6 16.) Magistrate Judge McCormick declined to allow Defendants to submit a second  
7 brief, ruling: “I’m going to modify the protective order. I don’t need additional briefing.  
8 You know, it’s my protective order; I can modify it. . . . [W]e need to move that issue  
9 ahead.” (*Id.* at 14:21–24.)

10 Magistrate Judge McCormick entered the Second Amended Protective Order on  
11 December 9, 2019. (Dkt. 395.) The Second Amended Protective Order is the same  
12 version as the one that ChromaDex first proposed to Defendants on November 8, 2019.  
13 (Anderson Decl. ¶ 6.) It now provides that the discovery in California “shall be used  
14 by a Receiving Party only for the purpose of” the California and New York Actions,  
15 “and not for any other purpose.” (Dkt. 395 ¶ 13.) Otherwise, the same restrictions on  
16 use and disclosure apply to the parties and their counsel in the California Action as did  
17 under the First Amended Protective Order.

18 **C. Defendants Object to the Second Amended Protective Order.**

19 On December 20, 2019, Defendants filed their Motion to Review “[p]ursuant to  
20 Rule 72(a) of the Federal Rules of Civil Procedure.” (Mot. at 1.) Defendants object on  
21 only one ground: that Magistrate Judge McCormick’s modification is “contrary to  
22 controlling Ninth Circuit law” because it “went beyond what is authorized under *Foltz*.”  
23 (Mot. at 5–6.) Defendants request that the ruling be vacated and that this Court adopt  
24 new protective order language. (*Id.* at 8.)

25 Defendants did not inform ChromaDex that they intended to move this Court for  
26 review of Magistrate Judge McCormick’s modification, did not provide ChromaDex  
27 with a copy of their newly-proposed protective order beforehand, and did not request a  
28 conference of counsel under Local Rule 7-3. (Anderson Decl. ¶ 8.) Defendants instead



1 certify that Local Rule 7-3 was satisfied by the discovery hearing “before Magistrate  
2 Judge McCormick on December 6, 2019, via telephonic conference.” (Dkt. 398 at 1.)

3 **IV. STANDARD OF REVIEW**

4 Rule 72(a) provides that a magistrate judge’s ruling on a non-dispositive matter  
5 should not be disturbed unless the objecting party can show that it is “clearly erroneous  
6 or contrary to law.” *Winz–Byone v. Metro. Life Ins. Co.*, 2007 WL 4276751, at \*1 (C.D.  
7 Cal. Nov. 16, 2007) (quoting Fed. R. Civ. P. 72(a)). Under Rule 72(a), a factual finding  
8 is clearly erroneous only when it is “dead wrong,” for the standard aims to “protect both  
9 [the] court and parties against the burdens of repeated reargument by indefatigable  
10 diehards.” *Hullinger v. Anand*, 2016 WL 7444623, at \*6 (C.D. Cal. Oct. 12, 2016)  
11 (alteration in original) (quoting *Alaimalo v. United States*, 645 F.3d 1042, 1060 (9th  
12 Cir. 2011) (Korman, J., dissenting)). And a legal ruling is contrary to law only if the  
13 court “applies an incorrect legal standard or fails to consider an element of the  
14 applicable standard.” *Lovell v. United Airlines, Inc.*, 728 F. Supp. 2d 1096, 1100 (D.  
15 Haw. 2010) (quotation marks omitted).

16 But rulings on discovery matters are “difficult[]” to fit “into neat categories of  
17 rulings on law or rulings on fact.” *St. Paul Mercury Ins. Co. v. Hahn*, 2014 WL  
18 12588631, at \*2 (C.D. Cal. July 25, 2014). Therefore, because discovery rulings are  
19 “committed to the discretion of magistrate judges,” *id.*, district courts often apply the  
20 more deferential “implicit abuse of discretion standard,” *EEOC v. Peters’ Bakery*, 301  
21 F.R.D. 482, 484–85 (N.D. Cal. 2014); *see also Stanwood v. Mary Kay, Inc.*, 2013 WL  
22 12132033, at \*1 n.1 (C.D. Cal. June 11, 2013) (Carney, J.) (collecting cases and noting  
23 “[m]any courts hold that the standard of review for questions regarding relevance is the  
24 more deferential abuse of discretion [standard]”). “An abuse of discretion is a plain  
25 error, discretion exercised to an end not justified by the evidence, a judgment that is  
26 clearly against the logic and effect of the facts as are found.” *Rabkin v. Or. Health Scis.*  
27 *Univ.*, 350 F.3d 967, 977 (9th Cir. 2003) (quotation marks omitted).

28

1 **V. ARGUMENT**

2 Defendants' objection to Magistrate Judge McCormick's Second Amended  
3 Protective Order should be overruled, and their Motion denied, for two primary reasons:  
4 (1) Defendants waived their central arguments by failing to raise them before  
5 Magistrate Judge McCormick, and (2) Defendants fail to show, as is their burden, that  
6 Magistrate Judge McCormick abused his discretion in modifying the protective order.  
7 Because Defendants' Motion is not substantially justified, the Court should award  
8 ChromaDex its fees for being required to oppose it.

9 **A. Defendants Waived Their Arguments By Not Raising Them Before**  
10 **Magistrate Judge McCormick.**

11 “[P]arties who litigate before a Magistrate Judge must raise any and all  
12 arguments before the Magistrate Judge, or waive their right to assert the arguments  
13 before the district court on appeal.” *UMG Recordings*, 2015 WL 12752881, at \*9  
14 (quoting *Cooper Hosp./Univ. Med. Ctr. v. Sullivan*, 183 F.R.D. 135, 142 (D.N.J. 1998)).  
15 “The purpose of the Federal Magistrate’s Act is to relieve courts of unnecessary work.  
16 It would defeat this purpose if the district court was required to hear matters anew on  
17 issues never presented to the magistrate.” *Borden v. Sec’y of Health & Human Servs.*,  
18 836 F.2d 4, 6 (1st Cir. 1987) (citations and quotation marks omitted). Consequently,  
19 “absent compelling reasons,” courts “do[] not allow parties to raise at the district court  
20 stage new arguments or issues that were not presented to the magistrate.” *Murr v.*  
21 *United States*, 200 F.3d 895, 902 n.1 (6th Cir. 2000); *see also UMG Recordings*, 2015  
22 WL 12752881, at \*9 (“[T]he Court ordinarily will not consider arguments, case law  
23 and/or evidentiary material which could have been, but were not, presented to the  
24 magistrate judge in the first instance.” (quotation marks omitted)).

25 Defendants argue for the first time in their Motion that Magistrate Judge  
26 McCormick “does not have the authority” under *Foltz* to modify the protective order.  
27 (Mot. at 1.) Despite having numerous opportunities—in letters to ChromaDex, the  
28 meet-and-confer of November 18, the informal letter briefs, the December 6 hearing, or



1 at any time before this Motion—Defendants never asserted that argument until now.  
2 (Anderson Decl. ¶ 9; *see also* Dkt. 398-3 at 2; Defs. Exs. M, N at 7; *see generally*  
3 Hearing Tr. at 4:25–6:16, 8:16–9:10, 14:8–16.) Rather, Defendants argued in their letter  
4 brief that the *Foltz* standard applied, but that ChromaDex did not satisfy it. (Dkt. 398-  
5 3 at 2.) Defendants later asserted at the December 6 hearing that *Foltz* “is  
6 distinguishable here.” (Hearing Tr. at 8:16–20.) Neither is sufficient to preserve  
7 Defendants’ third (and newest) position: that Magistrate Judge McCormick’s  
8 modification is “contrary to controlling Ninth Circuit law” in *Foltz*. (Mot. at 7.)  
9 Defendants have therefore waived this argument. *See, e.g., Birch v. Polaris Indus., Inc.*,  
10 812 F.3d 1238, 1248 (10th Cir. 2015) (affirming district court ruling under Rule 72(a)  
11 because “Appellants neglected to make [an] argument to the magistrate judge” and  
12 “therefore waived” it); *Guzman-Ruiz v. Hernandez-Colon*, 406 F.3d 31, 36 (1st Cir.  
13 2005) (“[P]laintiffs did not make this argument to the magistrate, and it is therefore  
14 waived.”); *Gullick v. Bock*, 2010 WL 457483, at \*1 (D. Ariz. Feb. 5, 2010) (“By failing  
15 to raise these arguments before the magistrate judge petitioner has waived them.”), *aff’d*,  
16 423 F. App’x 762 (9th Cir. 2011).<sup>3</sup> And because Defendants’ objection is based entirely  
17 on that waived argument, (Mot. at 5), it must be rejected and the Motion denied.

18 Similarly, Defendants propose for the first time in their Motion that the Court  
19 adopt new language in the protective order. (Mot. at 7–8; Dkt. 398-5.) Defendants did  
20 not provide Magistrate Judge McCormick or ChromaDex that language before filing  
21 their Motion and never proposed an alternative to the Second Amended Protective  
22 Order. (Anderson Decl. ¶ 7.) Thus, the Court should refuse to consider the new  
23 language submitted by Defendants. *See UMG Recordings*, 2015 WL 12752881, at \*9.

24  
25  
26 <sup>3</sup> Defendants compounded their error by failing to meet and confer with ChromaDex  
27 before filing this Motion, as required by Local Rule 7-3. The December 6 hearing  
28 cannot satisfy the Local Rule because Defendants did not present the new positions they  
take in their Motion. Therefore, “[t]he Court may decline to consider a motion unless  
it meets the requirements of L.R. 7-3 through 7-8.” L.R. 7-4. This is not the first time  
that Defendants have failed to comply with Local Rule 7-3. (*See* Dkt. 112 at 8–10.)

1 Defendants can point to no compelling reason for why they should be permitted  
2 to argue these new positions for the first time now. They have been aware of *Foltz* from  
3 the start of this dispute and ChromaDex provided the language of the Second Amended  
4 Protective Order a month before both parties submitted their letter briefs and Magistrate  
5 Judge McCormick considered the dispute. (*See* Defs. Ex. L.) There was nothing  
6 preventing Defendants from asserting either argument then. They did not, and the Court  
7 should thus decline to consider those arguments now. *United States v. Boyce*, 2014 WL  
8 7507240, at \*7 (C.D. Cal. May 2, 2014) (declining to consider arguments on Rule 72(a)  
9 motion that were not raised before magistrate judge).

10 **B. Defendants Fail to Show that that Magistrate Judge McCormick**  
11 **Abused His Discretion or Otherwise Erred.**

12 Even if the Court considers Defendants’ waived arguments, Defendants fail to  
13 show—as is their burden—that Magistrate Judge McCormick abused his discretion or  
14 that his modification was otherwise improper. He applied the Ninth Circuit’s guidance  
15 in *Foltz* and concluded “that the cases are related and collateral.” (Hearing Tr. at 9:11–  
16 14.) He was well within his discretion to do so.<sup>4</sup>

17 **1. Magistrate Judge McCormick Properly Applied *Foltz*.**

18 Federal Rule of Civil Procedure 26(c), which governs protective orders in  
19 discovery, confers “broad discretion on the trial court to decide when a protective order  
20 is appropriate and what degree of protection is required.” *Seattle Times Co. v.*  
21 *Rhinehart*, 467 U.S. 20, 36 (1984). *Foltz* contains the standard for modifying existing  
22 protective orders, under which the Ninth Circuit “strongly favors access to discovery  
23

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24 <sup>4</sup> Defendants attempt to obtain the more favorable “contrary to law” standard by  
25 asserting that Magistrate Judge McCormick’s ruling was legal error. (Mot. at 5.) But  
26 *Foltz* requires a court to both “make [a] relevance assessment” and “weigh the  
27 countervailing reliance interest.” 331 F.3d at 1132–33. Those are quintessentially  
28 factual determinations; in any event, they are certainly not “purely legal.” *St. Paul*,  
2014 WL 12588631, at \*1 (quotation marks omitted). The Court should thus review  
the ruling below for abuse of discretion. *EEOC*, 301 F.R.D. at 484–85. But even if the  
Court applies the “clearly erroneous or contrary to law” standards, Defendants’ Motion  
fails for the same reasons. *See Stanwood*, 2013 WL 12132033, at \*1 n.1.

1 materials to meet the needs of parties engaged in collateral litigation.” 331 F.3d at 1131.  
2 Thus, “[w]here reasonable restrictions on collateral disclosure will continue to protect  
3 an affected party’s legitimate interests in privacy, a collateral litigant’s request to the  
4 issuing court to modify an otherwise proper protective order so that collateral litigants  
5 are not precluded from obtaining relevant material *should generally be granted.*” *Id.*  
6 at 1132 (emphasis added).

7 Under *Foltz*, a court considering a collateral litigant’s request to modify a  
8 protective order must (1) make a “rough estimate” of the relevance of the information  
9 protected by the protective order in the collateral suit, and (2) “weigh the countervailing  
10 reliance interest of the party opposing modification against the policy of avoiding  
11 duplicative discovery.” *Id.* at 1132–33. Courts have applied the *Foltz* test a bit  
12 differently when, as here, the party requesting the modification “is not merely a  
13 collateral litigant,” but is also “a primary party here and in all actions deemed related to  
14 the instant case.” *Cummins-Allison Corp. v. SBM Co.*, 2013 WL 12250448, at \*2 (D.  
15 Haw. Nov. 8, 2013). In these circumstances, “no concerns exist regarding unfettered  
16 dissemination to unknown third parties.” *Id.*; see also *BGC Partners, Inc. v. Avison*  
17 *Young (Canada), Inc.*, 2017 WL 3468557, at \*5 (D. Nev. Aug. 11, 2017). Magistrate  
18 Judge McCormick faithfully applied the law and issued the Second Amended Protective  
19 Order, finding that it was an “easy” matter to decide. (Hearing Tr. at 4:10-13.)

20 **Relevance.** Under the first part of the *Foltz* test, “the court that entered the  
21 protective order should satisfy itself that the protected discovery is sufficiently relevant  
22 to the collateral litigation that a substantial amount of duplicative discovery will be  
23 avoided by modifying the protective order.” 331 F.3d at 1132. “Such relevance hinges  
24 ‘on the degree of overlap in facts, parties, and issues between the suit covered by the  
25 protective order and the collateral proceedings.’” *Id.* The lawsuits need not be exactly  
26 alike in order to satisfy this factor. *Cummins-Allison*, 2013 WL 12250448, at \*2  
27 (modifying protective order even though “the actions are not identical” because “there  
28 is significant overlap in facts and issues”).

1 Defendants did not object to Magistrate Judge McCormick’s factual finding that  
2 the facts, parties, and issues overlap such that the protected discovery in California is  
3 sufficiently relevant to the New York Action. (Hearing Tr. at 7:13–23; 9:11–14.) Any  
4 argument on that point is thus waived. *Bazuaye v. I.N.S.*, 79 F.3d 118, 120 (9th Cir.  
5 1996) (“Issues raised for the first time in the reply brief are waived.”). Regardless, the  
6 record contains ample evidence to support his relevance determination, including  
7 excerpts from the pleadings and papers in the California Action, (CDXC Exs. F, H, &  
8 I), the pleadings in the New York Action, (CDXC Exs. E & G), examples of document  
9 requests in both actions, (Dkt. 398-4 at 4–8<sup>5</sup>), and the parties’ letter briefs, (Dkts. 398-  
10 3, 398-4). That evidence is sufficient to show a “rough estimate of relevance” such that  
11 “a substantial amount of duplicative discovery”—including tens of thousands of  
12 documents (including from third-party subpoenas), 25 depositions (including multiple  
13 third-party witnesses), and seven expert reports—could be avoided by modifying the  
14 protective order. *Foltz*, 331 F.3d at 1132. From that evidence, he concluded that the  
15 two cases are “related and collateral” because “it is not like [the New York Action] is  
16 some different species of case; it’s part of what is essentially a litigation battle between  
17 the parties.” (Hearing Tr. at 7:21–23; 9:13–14.) There is no basis to disturb that ruling.

18 **Reliance.** Under the second part of *Foltz*, the court “weigh[s]” any “reliance  
19 interest” on the part of the party opposed to the modification. 331 F.3d at 1133. But a  
20 party cannot claim reliance on a “blanket protective order” to defeat a modification; it  
21 must have specific reliance interests at stake. *Id.* And concerns about admissibility of  
22 the evidence in a collateral litigation is not a “reliance interest” under *Foltz*; rather,  
23 admissibility is a “determination [that] can and should be made by the court[]” in the  
24 collateral case. *BGC Partners*, 2017 WL 3468557, at \*5; *see also Cummins-Allison*,

25 \_\_\_\_\_  
26 <sup>5</sup> Defendants are incorrect when they contend that the discovery requests listed in the  
27 Appendices to ChromaDex’s letter brief are the only requests that “have *any* degree of  
28 overlap.” (Motion at 5 n.3 (emphasis in original).) Those Appendices include only a  
sampling; namely, those requests that are nearly word-for-word identical. There are  
dozens of additional requests that seek the same documents as those already requested,  
produced, and designated under the protective order in California.

1 2013 WL 12250448, at \*2 (ruling “the ultimate admissibility of the confidential  
2 information is a matter that would be decided by the Korean court”).

3 Defendants also did not object to Magistrate Judge McCormick’s ruling with  
4 respect to any possible reliance interest. That argument is thus also waived. *Bazuaye*,  
5 79 F.3d at 120. In any event, Defendants’ reliance interest here is quite minimal, if it  
6 exists at all. Magistrate Judge McCormick properly concluded that the protected  
7 discovery from California includes “documents that ChromaDex ha[s]” already and,  
8 absent the protective order, that ChromaDex “would be free to do what they could with  
9 them.” (Hearing Tr. at 7:7–8.) Under his modification, ChromaDex and Elysium are  
10 the only “collateral litigants” who are entitled to use that discovery in New York;  
11 “[t]hus, Defendant[s] cannot legitimately raise concerns about disclosure to unknown  
12 collateral litigants.” *Cummins-Allison Corp.*, 2013 WL 12250448, at \*3. Moreover,  
13 the Second Amended Protective Order maintains all other restrictions on the use and  
14 disclosure of designated information, further reducing any possible reliance argument  
15 by Defendants. *Id.* at \*2–3; (see also CDXC Ex. A ¶¶ 13–16).

16 Nor does Defendants’ apparent concern about certain documents that they  
17 “inadvertently produced” months ago provide a ground to challenge Magistrate Judge  
18 McCormick’s ruling. (Mot. at 2.) He specifically addressed those documents,  
19 informing Defendants that “there’s just no way” to claw them back after they have been  
20 produced. (Hearing Tr. at 7:1–2.) He further found that all California discovery,  
21 including those documents, would be “subject to the SDNY Court thinking [it] was  
22 relevant at the time of trial . . . in New York.” (*Id.* at 7:9–10.)<sup>6</sup> He plainly did not abuse  
23 his discretion in this regard. See *BGC Partners*, 2017 WL 3468557, at \*5.

24 Defendants also suggest that third parties in the California Action have a reliance  
25 interest that weighs against modification. (Mot. at 8.) But no third parties have joined

26 \_\_\_\_\_  
27 <sup>6</sup> Defendants have already shown that they are capable of moving to exclude a subset  
28 of those “inadvertently produced” documents in this case. (Dkt. 269-1.) And while  
ChromaDex is confident that those messages will also be admissible in the New York  
Action, that will be an issue for the New York court to decide, when and if it arises.



1 Defendants’ Motion, and Defendants do not have standing to argue for them. *See, e.g.,*  
2 *Doe v. Hamburg*, 2013 WL 3783749, at \*7 (N.D. Cal. July 16, 2013) (holding party  
3 “failed to identify any obstacles that prevent[ed] [third party] from bringing suit on his  
4 own behalf”). Regardless, the same reasoning as above applies: ChromaDex and  
5 Elysium already possess the third-party discovery, no other party has gained access to  
6 it through the modification, and the parties are still bound by the same terms of the  
7 protective order as before. In contrast, by allowing the parties to use discovery in New  
8 York under the terms of the Second Amended Protective Order, third parties who might  
9 have been required to respond to duplicative subpoenas from the parties in the New  
10 York Action will not be so burdened. That is exactly the balance that the Ninth Circuit  
11 desired in *Foltz*. Defendants thus failed to carry their heavy burden of showing that  
12 Magistrate Judge McCormick abused his discretion. *See Rich v. Shrader*, 2013 WL  
13 12188592, at \*5 (S.D. Cal. Oct. 9, 2013).

14 **2. Defendants Are Incorrect that Magistrate Judge McCormick’s**  
15 **Ruling is Contrary to Controlling Ninth Circuit Precedent.**

16 Defendants’ sole objection is that Magistrate Judge McCormick’s modification  
17 of the protective order was not “authorized under *Foltz*” and thus it is “contrary” to that  
18 controlling authority. (Mot. at 5–7.) They are wrong for myriad reasons. For one thing,  
19 Defendants ignore the public policy and repeated admonitions of the Ninth Circuit in  
20 *Foltz* that judicial efficiency “strongly favors” modifications like the one at issue here  
21 and urges that such modifications “should generally be granted.” 331 F.3d at 1131–32.  
22 For another, Defendants do not address the cases cited by ChromaDex in its letter brief  
23 to Magistrate Judge McCormick, which demonstrate that courts in this exact situation  
24 have applied *Foltz* exactly as he did. (Dkt. 398-4 at 2 (citing *BGC Partners*, 2017 WL  
25 3468557; *Cummins-Allison*, 2013 WL 12250448).) Defendants’ failure to even  
26 mention that pertinent authority in their Motion paints a misleading picture of how  
27 courts have applied the *Foltz* standard in this exact same situation.

1 On top of that, Defendants misread *Foltz* by improperly conflating the concept of  
2 “discoverability,” as discussed in *Foltz*, with the word “use,” as in the protective order.  
3 (Mot. at 6.) They are not the same thing. “Discoverability” concerns “gaining access  
4 to” or “obtain[ing] the discovery materials.” *Foltz*, 331 F.3d at 1132–33; *see also* Fed.  
5 R. Civ. P. 26(b)(1). “Use,” on the other hand, is what parties may do with discovery  
6 that they *already possess*; for example, a party “uses” a document to identify other  
7 discoverable material, depose a witness, or bolster an expert report, or ultimately by  
8 offering it as evidence (subject to the Rules of Evidence and the relevant court’s  
9 determination of admissibility). The Ninth Circuit directly acknowledged this  
10 difference in *Foltz*. *Compare* 331 F.3d at 1133 (ruling “discoverability” in collateral  
11 courts concerns “production of any otherwise properly protected materials”), *with id.* at  
12 1134 (finding collateral litigant, once it obtained material, could be placed “under the  
13 same use and disclosure restrictions contained in the original protective order”).

14 In *Foltz*, that distinction meant that the collateral litigants—who did not already  
15 possess the documents in question—were required to seek production of the material in  
16 the collateral litigation. *Id.* at 1133. The Ninth Circuit cautioned district courts that are  
17 considering modifying a protective order from addressing that kind of discovery  
18 dispute, which “must be resolved by the collateral courts.” *Id.* But in cases like this  
19 one, where the parties already possess the discovery, there is no need to burden the  
20 parties by requiring them to produce material again. That is exactly what *Foltz* seeks  
21 to prevent by “eliminat[ing] the potential for duplicative discovery.” *Id.*; *see also*  
22 *Oracle Corp. v. SAP AG*, 2010 WL 545842, at \*2 (N.D. Cal. Feb. 12, 2010) (allowing  
23 use in another proceeding because, *inter alia*, “Plaintiffs already obtained the discovery  
24 at issue in the regular course of litigating their case against Defendants in this Court”).

25 Defendants are therefore far from the mark when they contend that Magistrate  
26 Judge McCormick “went beyond” his “authoriz[ation]” and “subverted clear limitations  
27 on discovery in the SDNY Action” or “purport[ed] to decide the discovery dispute over  
28 whether Elysium must produce in the SDNY Action all the documents it produced in

1 this action.” (Mot. at 6–7.) Both parties’ discovery requests and objections in the New  
2 York Action remain intact, so any “limitations”—such as they presently exist—also  
3 remain intact. And Magistrate Judge McCormick did not resolve any dispute in another  
4 court; he simply modified the protective order to remove a barrier blocking the parties  
5 from using discovery they already had in a collateral action, which was well within his  
6 authority under both the Federal Rules and *Foltz*.<sup>7</sup> That both parties have already  
7 produced, and thus already possess, many of the documents that they seek does not  
8 undermine the modification here, but rather supports it, as numerous other courts agree.  
9 *Cummins-Allison*, 2013 WL 12250448, at \*2; *Oracle*, 2010 WL 545842, at \*2–3; *see*  
10 *also INVISTA N. Am. S.a.r.l. v. M & G USA Corp.*, 2013 WL 1867345, at \*2 (D. Del.  
11 Mar. 28, 2013) (holding “reason for the proposed disclosure is both legitimate and one  
12 that would promote efficiency—it is meant to allow INVISTA to obtain informed and  
13 coordinated legal advice both from its counsel in this case, as well as from the counsel  
14 that it and its affiliates have hired in related litigation”); *Infineon Techs. AG v. Green*  
15 *Power Techs. Ltd.*, 247 F.R.D. 1, 3–4 (D.D.C. 2005) (finding good cause to modify  
16 protective order to allow sharing of confidential documents with foreign counsel in  
17 related foreign litigation between the parties, in part because “it is more efficient to  
18 permit discovery to be shared in a forum litigating similar issues”).

19 Defendants cite no authority to the contrary. The cases that Defendants do cite  
20 are distinguishable, or do not support their arguments, or both. For example, *Shalaby*  
21 *v. Irwin Industrial Tool Co.*, 2018 WL 500948, at \*5–6 (S.D. Cal. Jan. 20, 2018), and  
22 *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 2008 WL  
23 4191780, at \*3 (N.D. Cal. Sept. 10, 2008), are inapposite because both cases involved  
24 movants who did not lawfully possess the discovery they sought and thus were required  
25 to seek production of it from the collateral court.<sup>8</sup> Moreover, both of those courts

26 \_\_\_\_\_  
27 <sup>7</sup> For the same reason, Defendants’ cite to *Goro v. Flowers Foods, Inc.*, 2019 WL  
28 6252499 (S.D. Cal. Nov. 22, 2019), a case about discoverability, is inapt.

<sup>8</sup> *In re Static Random Access Memory (SRAM) Antitrust Litigation* is inapplicable for  
the same reason; the movants in that case were non-parties who did not already possess



1 applied *Foltz*, found it satisfied, and granted modification of a protective order, just like  
2 Magistrate Judge McCormick did here. *Shalaby*, 2018 WL 500948, at \*6–7; *In re*  
3 *Dynamic*, 2008 WL 4191780, at \*2–3. The court in *In re Dynamic* even ordered that  
4 the provision that prohibited the “use” of protected discovery in other suits be  
5 “construed to exclude both collateral actions.” *Id.* at \*3. Those cases thus cannot  
6 establish that Magistrate Judge McCormick’s ruling was contrary to law.

7 Similarly, in *Siefe v. Unum Group*, the court declined the plaintiff’s request to  
8 allow it to share protected discovery with “unspecified collateral litigants” who did not  
9 already have the protected material at issue because the court would need to apply *Foltz*  
10 to each of them, which it could not do if they had not yet been identified. 2018 WL  
11 6340751, at \*4 (C.D. Cal. June 11, 2018). Here, all collateral litigants are known. And  
12 *Biovail Laboratories, Inc. v. Anchen Pharmaceuticals, Inc.* does not apply; the court in  
13 that case denied the plaintiff’s request to use a competitor’s regulatory submissions to  
14 the FDA because such use would undermine agency rules and regulations that are part  
15 of the statutory scheme of the Hatch-Waxman Act. 463 F. Supp. 2d 1073, 1083–84  
16 (C.D. Cal. 2006) (citing *In re Gabapentin Litig.*, 312 F. Supp. 2d 653, 667 n.7 (D.N.J.  
17 2004)).<sup>9</sup> There are no similar statutory concerns present in this instance.<sup>10</sup>

18 Finally, Defendants’ requested relief is unworkable, would add enormous burden  
19 on the parties’ discovery efforts in New York, and would “embroil[]” this Court “in the  
20 specific discovery disputes applicable only to the collateral suits.” *Foltz*, 331 F.3d at  
21

22 the discovery they sought. 2011 WL 5193479, at \*6 (N.D. Cal. Nov. 1, 2011).

23 <sup>9</sup> The court in *Bioavail* also expressed doubt that the *Foltz* standard even applied because  
24 it was an “unlikely proposition that [Plaintiff’s] correspondence with the FDA can be  
25 considered ‘collateral litigation.’” 463 F. Supp. 2d at 1083 (quoting *Foltz*, 331 F.3d at  
26 1083).

27 <sup>10</sup> Even if the Court believes that some of Defendants’ cases are persuasive, when  
28 considered with the cases cited by ChromaDex, they (at best) merely establish that there  
is a “split of authority,” and therefore cannot establish that Magistrate Judge  
McCormick erred here. *S.E.C. v. Schroeder*, 2009 WL 1635202, at \*3 (N.D. Cal. June  
10, 2009); see also *Kinkeade v. Bear*, 2017 WL 2813037, at \*1 (E.D. Cal. June 29,  
2017) (“[A] magistrate judge’s order simply cannot be contrary to law when the law  
itself is unsettled.” (quotation marks omitted)).

1 1133. For example, if this Court reverses Magistrate Judge McCormick’s ruling  
2 modifying the protective order, ChromaDex would be forced to move to compel in New  
3 York discovery that it already possesses. That would require ChromaDex to return to  
4 this Court to obtain leave to “use” protected material in order to inform the New York  
5 court about the existence and prior production of every document or deposition  
6 transcript or expert report that it seeks. It would also create a minefield of potential  
7 ethical issues for counsel on both sides. “Because of the involvement of the same  
8 parties and attorneys in all of the cases, it is not feasible to prevent confidential  
9 information produced in this case from being possessed and known by the same parties  
10 and attorneys in the related cases.” *BCG Partners*, 2017 WL 3468557, at \*5. Given  
11 that it was Elysium that chose to initiate the New York Action, when it could just as  
12 easily have levied its claims in the already-filed California Action instead, it would be  
13 manifestly unfair to allow it to impose such enormous and unnecessary discovery  
14 burdens on ChromaDex here. Defendants’ Motion should therefore be denied.

15 **C. The Court Should Award Fees.**

16 Federal Rule of Civil Procedure 26(c) requires the Court to award attorney’s fees  
17 when a party prevails on or defeats a motion relating to the entry of a protective order,  
18 with few exceptions. Fed. R. Civ. P. 26(c)(3) (“Rule 37(a)(5) applies to the award of  
19 expenses”); Fed. R. Civ. P. 37(a)(5)(B) (requiring movant, with narrow exceptions, to  
20 “pay the party . . . who opposed the motion its reasonable expenses incurred in opposing  
21 the motion, including attorney’s fees” if motion is denied); *Blair v. CBE Grp., Inc.*,  
22 2014 WL 4658731, at \*2–3 (S.D. Cal. Sept. 17, 2014) (awarding attorneys’ fees  
23 incurred in opposing Rule 72(a) objections that were “were not substantially justified”).  
24 Such an award is proper if the motion was not “substantially justified” or if “other  
25 circumstances” do not make an award of expenses “unjust.” Fed. R. Civ. P. 37(a)(5)(B);  
26 *Ewing v. K2 Prop. Dev., LLC*, 2018 WL 4846649, at \*1 (S.D. Cal. Oct. 4, 2018).

27 Here, even if Defendants’ position before Magistrate Judge McCormick was  
28 substantially justified (which ChromaDex strongly disputes, especially in light of the

1 fact that Magistrate Judge McCormick found the modification was “easy” to grant),  
2 Defendants’ hasty Motion before this Court is both legally meritless and factually  
3 unsupported. *See Schueneman v. Arena Pharms., Inc.*, 2017 WL 3587961, at \*2 (S.D.  
4 Cal. Aug. 21, 2017); *Ewing v. K2 Prop. Dev., LLC*, 2018 WL 3436970, at \*3 (S.D. Cal.  
5 July 17, 2018), *modified in part*, 2018 WL 4846649 (S.D. Cal. Oct. 4, 2018) (awarding  
6 fees where plaintiff “had no legal basis to bring either motion” and “brought them  
7 hastily”). Here, Defendants (1) failed to comply with the Local Rules in bringing the  
8 Motion, (2) failed to present the entire record to the Court, (3) base the Motion on  
9 waived arguments, and (4) failed to address pertinent legal authority cited by  
10 ChromaDex before Magistrate Judge McCormick. In these circumstances, Defendants’  
11 Motion is certainly not substantially justified, and there are no present circumstances  
12 that would make an award of fees unjust. ChromaDex therefore requests that the Court  
13 award ChromaDex its fees in connection with filing this Opposition.

14 **VI. CONCLUSION**

15 For the reasons stated above, ChromaDex respectfully requests that the Court  
16 overrule Defendants’ objection, deny Defendants’ Motion, and order Defendants to pay  
17 attorneys’ fees.

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19  
20 Dated: January 6, 2020

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