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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION

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|---------------------------------------|---|---|
| CHROMADEx, INC., |) | Case No.: SACV 16-02277-CJC (DFMx) |
| |) | |
| Plaintiff, |) | |
| v. |) | |
| |) | ORDER DENYING CHROMADEx'S |
| ELYSIUM HEALTH, INC., and MARK |) | MOTION FOR SANCTIONS [Dkt. 413] |
| MORRIS, |) | |
| |) | |
| Defendants. |) | |
| |) | |
| |) | |
| |) | |
| ELYSIUM HEALTH, INC., |) | |
| |) | |
| Counterclaimant, |) | |
| v. |) | |
| |) | |
| CHROMADEx, INC., |) | |
| |) | |
| Counter-Defendant. |) | |
| |) | |
| |) | |

I. INTRODUCTION

1
2 In this 2016 case, Plaintiff ChromaDex, Inc. (“ChromaDex”) and Defendant
3 Elysium Health, Inc. (“Elysium”) each allege that the other party breached 3 of the
4 parties’ contracts. Two of Elysium’s executives recently filed declarations with the Court
5 admitting that they lied in their depositions about one of the executive’s cocaine use.
6 ChromaDex now moves for terminating sanctions on 3 of Elysium’s counterclaims based
7 on the deception. Both parties also move to file under seal certain evidence and briefing
8 related to this motion. For the following reasons, ChromaDex’s motion for sanctions and
9 both parties’ applications to file under seal are **DENIED**.

10 11 **II. BACKGROUND**

12 13 **A. Case Background**

14
15 ChromaDex supplied Elysium with nicotinamide riboside (“NR”), which
16 ChromaDex sold under the trade name Niagen, and pterostilbene (“PT”), which
17 ChromaDex sold under the trade name pTeroPure. (Dkt. 295-1 ¶ 1.) Elysium used the
18 NR and PT it bought from ChromaDex in its dietary supplement called “Basis.” (*Id.*
19 ¶¶ 4–5.) Eric Marcotulli and Daniel Alminana are the co-founders and principal
20 executives of Elysium. Marcotulli is CEO, and Alminana is COO.

21
22 After the Court’s summary judgment order, (Dkt. 413), only certain of the parties’
23 claims remain. As relevant to this motion, Elysium’s third, fourth, and fifth
24 counterclaims remain for trial. Elysium’s third counterclaim alleges that ChromaDex
25 fraudulently induced Elysium to sign the Trademark License and Royalty Agreement,
26 dated February 3, 2014 (the “TLRA”), by falsely representing that, in order to purchase
27 Niagen, Elysium was required to pay royalties on product sales for use of ChromaDex
28 marks. (Dkt. 103 [Third Amended Counterclaims] ¶¶ 162–69.) Elysium’s fourth

1 counterclaim seeks a declaratory judgment of patent misuse based on the allegation that
2 ChromaDex conditions some customers' ability to purchase NR on their agreement to use
3 ChromaDex's trademarks. (*Id.* ¶¶ 170–81.) Relatedly, Elysium's fifth counterclaim
4 seeks restitution for ChromaDex's alleged unjust enrichment due to its patent misuse. In
5 other words, Elysium alleges that by requiring entities to use the Niagen mark,
6 ChromaDex unlawfully strengthened the Niagen mark and decreased brand competition
7 among NR products.

8
9 What the parties said during the negotiation of the TLRA is disputed and important
10 to the resolution of Elysium's third, fourth, and fifth counterclaims. Most critical to the
11 third counterclaim is a December 16, 2013 phone call between Frank Jaksch
12 (ChromaDex's former CEO), Marcotulli (Elysium's CEO), and Alminana (Elysium's
13 COO). (*See id.* ¶¶ 52, 165.) Marcotulli and Alminana testified that Jaksch falsely
14 represented that ChromaDex customers were required to sign separate trademark license
15 and royalty agreements, whether or not they wanted or intended to use ChromaDex
16 marks. (Dkt. 306-1, Ex. 12 at 93:6–9 [Marcotulli testifying that Jaksch told Elysium
17 “that all customers pay a royalty and that was their way of doing business, given their
18 ownership of the NR supply chain”]; *id.*, Ex. 13 at 168:1–3 [Alminana testifying that
19 Elysium was “told that everyone has to sign this,” that “[e]veryone pays a royalty,” and
20 “[t]his is the standard royalty”].) Jaksch, on the other hand, testified that he made no
21 such statement. (Dkt. 240-2, Ex. 72 at 134:23–25 [Jaksch testifying that he did not tell
22 Elysium that all ChromaDex customers must execute a license and royalty agreement to
23 do business with ChromaDex]; *see* Dkt. 233-2 ¶ 5 [Jaksch stating that trademark
24 licensing was never a requirement for purchasing NR].) At summary judgment, the
25 Court cited this factual dispute and concluded that summary judgment was not warranted
26 on Elysium's third, fourth, and fifth counterclaims.

27
28 **B. Text Messages**

1
2 The facts relevant to this motion begin on December 18, 2018, when Elysium
3 produced text messages from Marcotulli’s phone showing that he—from September 29,
4 2015 through October 15, 2016—frequently purchased cocaine (referred to in the
5 messages as “fire white,” “fire shit,” “white,” and “the special,” among other terms),
6 including having it delivered to the Elysium office. (Dkt. 284-7.) The messages also
7 show Marcotulli confiding in January 2016 to a friend he met on a dating application that
8 he had been “do[ing] too many drugs,” specifically “[c]oke,” and drinking a lot, for
9 “maybe 6 months,” and how he wanted to stop but has not been able to. (Dkts. 284-8,
10 284-9; Dkt. 473-6 at 149–50.)

11
12 The text messages also suggest that Alminana knew about Marcotulli’s drug use.
13 For example, on November 25, 2015, at around 10:00 AM, Alminana asked Daniel
14 Fabricant, a former Elysium board member, “[w]hat time did you two assholes finish up
15 last night.” (Dkt. 284-14 at 14.) Fabricant reported it was “330 I think,” and added,
16 “[t]here are no drugs left in Manhattan.” (*Id.*) Alminana laughed and joked, “Wow early
17 night. I bet Eric [Marcotulli] wakes up around 6pm today.” (*Id.*)

18
19 On February 14, 2019, Elysium filed an *ex parte* application attempting to claw
20 back the text messages. Magistrate Judge Douglas F. McCormick denied the application.
21 (Dkt. 194.)

22 23 **C. Depositions**

24
25 At his March 27, 2019 deposition, Marcotulli lied under oath about the text
26 messages. (Dkt. 473-6 [Transcript of Deposition of Eric Marcotulli].) He stated that he
27 did not recall buying drugs from the dealer, and could not recall who the dealer was or
28 why he had agreed to meet up with the dealer multiple times, including at Elysium’s

1 office. (*Id.* at 128–35.) He stated that he did not know what “fire white” was, or what
2 “coke” was. (*Id.* at 129, 152.) He repeated multiple times that he did not recall buying
3 any illegal drugs from September 2015 to March 2016. (*Id.* at 130, 132, 145.) He stated
4 that he had never used cocaine, never used cocaine while working at Elysium, and that he
5 had never to his recollection drugs for personal use. (*Id.* at 144, 147, 155–56.)

6
7 On March 29, 2019, Alminana also lied under oath at his deposition, stating that he
8 was not aware that Marcotulli had used illegal drugs during his time at Elysium.
9 (Dkt. 473-6 [Transcript of Deposition of Daniel Alminana] at 30.)

10 11 **D. Events Between the False Testimony and the Corrections**

12
13 On June 3, 2019, Elysium produced an errata sheet for Marcotulli’s deposition,
14 outlining 10 typographical errors, transcription errors, and clarifications (none having to
15 do with the text messages), and a copy of the transcript with Marcotulli’s signature.
16 (Dkt. 472, Exs. 8, 9.) Marcotulli signed the errata sheet on May 30, 2019 with this
17 statement:

18
19 I, ERIC MARCOTULLI, having appeared for my deposition on
20 March 27, 2019, do this date declare under penalty of perjury
21 that I have read the foregoing deposition, I have made any
22 corrections, additions or deletions that I was desirous of making
23 in order to render the within transcript true and correct.

24 (Dkt. 472, Ex. 10.) On August 7, 2019, Elysium produced an errata sheet and signed
25 transcript for Alminana’s deposition, which contained the same statement. (Dkt. 472,
26 Exs. 11–13.) Alminana also did not make any corrections related to the text messages.

27 On August 22, 2019, Elysium filed a motion in limine to exclude the text messages
28 and Marcotulli’s and Alminana’s testimony about them. (Dkt. 269-1 at 1, 7.)

1 ChromaDex argued in opposition that Marcotulli and Alminana had committed perjury in
2 their depositions. (Dkt. 284-1 at 9–11.) In reply, Elysium called “ChromaDex’s
3 irresponsible and inflammatory accusations of perjury . . . a collateral sideshow on a
4 collateral issue that fails to address the merits of the admissibility of the evidence,” and
5 described the perjury accusation as “hyperbolic charges [that] are factually, logically, and
6 legally baseless.” (Dkt. 344-1 at 12 n.8.) Elysium repeatedly denied that Marcotulli used
7 drugs. (*See generally* Dkt. 344-1.) The Court denied without prejudice all motions in
8 limine because many of the issues to be resolved in the motions in limine overlapped
9 with the pending summary judgment motions, and stated that it would set a new deadline
10 for motions in limine after ruling on summary judgment. (Dkt. 369 at 10.)
11

12 The text messages came up again in December 2019 when ChromaDex sought to
13 modify the protective order to allow the parties to use discovery from this case in a New
14 York case between them involving overlapping facts and issues. (*See* Dkt. 398-4
15 [ChromaDex’s letter brief]; *see also* Dkt. 398-3 [Elysium’s letter brief].) At the hearing
16 on ChromaDex’s motion, it became clear that Elysium opposed ChromaDex’s motion
17 principally because it did not want the text messages that it “inadvertently produced” in
18 this case to be discoverable in the New York Action. (*See* Dkt. 405-2 at 7.) As to the
19 text messages, Magistrate Judge McCormick explained, “We’ve been around the bend on
20 those documents a number of times before, and . . . there’s just no way to clawback
21 documents that shouldn’t have been produced in the first place.” (*Id.* at 7–8.) On
22 December 6, 2019, Magistrate Judge McCormick granted ChromaDex’s proposed
23 modification to the protective order. (Dkt. 405-2 at 4.) Elysium asked this Court to
24 reverse Magistrate Judge McCormick’s decision, and this Court refused, concluding that
25 the decision was not clearly erroneous or contrary to law. (Dkt. 412.)
26

27 On January 21, 2020, the Court granted Elysium’s request for new counsel.
28

1 **E. Notices of Correction of Depositions**

2
3 On December 11, 2020, Elysium filed a “Notice of Correction of Depositions.”
4 (Dkt. 453.) Elysium stated that it “and its current counsel believe it is appropriate to file
5 this Notice of Correction of Depositions with the Court, to ensure that the Court is
6 apprised of the changes and corrections to the deposition testimony.” (*Id.*) It further
7 advised that it planned “to file a new motion in limine before trial concerning the subject
8 matter of the changed and corrected deposition testimony and the related text messages.”
9 (*Id.*)

10
11 With the Notice of Correction of Depositions, Elysium filed declarations from
12 Marcotulli and Alminana. (Dkts. 455-1 [Declaration of Eric Marcotulli, hereinafter
13 “Marcotulli Decl.”], 455-2 [Declaration of Daniel Alminana, hereinafter “Alminana
14 Decl.”].) In Marcotulli’s declaration, he explained that he came to the deposition
15 prepared and “expect[ing] to answer questions relating to Elysium’s contracts with
16 ChromaDex,” not to face questions “about sensitive and wholly personal matters relating
17 to the personal text messages that, without my knowledge, had been produced
18 inadvertently.” (Marcotulli Decl. ¶ 5.) He stated that when he was asked questions about
19 his cocaine use, he “was caught by surprise, unprepared, and embarrassed, and [he] gave
20 answers that were not truthful.” (*Id.* ¶ 6.)

21
22 Among the lies Marcotulli identified were his denials that he regularly bought and
23 used cocaine during the period of his employment with Elysium and certain contract
24 negotiations with ChromaDex, that he bought cocaine from the dealer identified in the
25 text messages, that he used cocaine at work at Elysium, that he used cocaine before going
26 to work at Elysium, that he used cocaine while participating in his role as Elysium CEO,
27 and that he used cocaine before communicating with ChromaDex employees. (*Id.* ¶¶ 7,
28 9.) “In truth,” Marcotulli admitted, “I had used and purchased cocaine on a regular basis

1 in the period between late 2015 and early 2017.” (*Id.* ¶ 7.) He also stated that his
2 “answers were untruthful as to [his] past history and recollection of past cocaine use.”
3 (*Id.* ¶ 8.) Marcotulli stated that he “sincerely” and “deeply regret[s] giving testimony
4 denying or expressing an inability to remember” issues about his cocaine use and
5 purchase history, and therefore came forward with the declaration. (*Id.* ¶ 13.)
6

7 Similarly, in Alminana’s declaration, he explained that his answer regarding
8 whether Marcotulli had used illegal drugs “was not truthful, as at that time I understood
9 and believed that Mr. Marcotulli had used illegal drugs during his time with Elysium.”
10 (Alminana Decl. ¶ 6.) Alminana stated that he “deeply regret[s] that [his] answer was
11 untruthful and inaccurate.” (*Id.*)
12

13 ChromaDex now seeks terminating sanctions on Elysium’s third, fourth, and fifth
14 counterclaims for Marcotulli and Alminana’s lies. (Dkt. 413.)
15

16 **III. LEGAL STANDARD**

17

18 District courts have inherent power to impose sanctions to manage their cases and
19 courtrooms effectively, ensure the orderly administration of justice, and to enforce
20 compliance with their orders. *Int’l Union, United Mine Workers of Am. v. Bagwell*,
21 512 U.S. 821, 831 (1994); *Aloe Vera of Am., Inc. v. United States*, 376 F.3d 960, 965
22 (9th Cir. 2004); *Halaco Eng’g Co. v. Costle*, 843 F.2d 376, 380 (9th Cir. 1988)
23 (“Dismissal under a court’s inherent powers is justified . . . in response to abusive
24 litigation practices . . . and to insure the orderly administration of justice and the integrity
25 of the court’s orders.”). Indeed, “courts cannot function efficiently unless they can
26 effectively require compliance with reasonable rules. Absence of meaningful power to
27 require that compliance would make for disorder and preclude effective judicial
28 administration.” *Chism v. Nat’l Heritage Life Ins. Co.*, 637 F.2d 1328, 1332 (9th Cir.

1 1981), *overruled on other grounds by Bryant v. Ford Motor Co.*, 832 F.2d 1080 (9th Cir.
2 1987).

3
4 In extreme circumstances, a court may use its inherent power to enter terminating
5 sanctions (e.g. striking a party’s pleading in whole or in part and entering default
6 judgment against the party or dismissing the action) against a party that repeatedly and
7 willfully violates the district court’s orders. Fed. R. Civ. P. 16(f)(1); *Leon v. IDX Sys.*
8 *Corp.*, 464 F.3d 951, 958 (9th Cir. 2006). Dismissing or entering default is appropriate
9 only where a court finds that the party’s conduct demonstrates willfulness, fault, or bad
10 faith. *Leon*, 464 F.3d at 958 (citing *Anheuser–Busch v. Natural Beverage*
11 *Distribs.*, 69 F.3d 337, 348 (9th Cir. 1995)). For example, a terminating sanction is
12 available where “a party has engaged deliberately in deceptive practices that undermine
13 the integrity of judicial proceedings” or “willfully deceived the court and engaged in
14 conduct utterly inconsistent with the orderly administration of justice.” *Id.* (quoting
15 *Anheuser–Busch*, 69 F.3d at 348).

16
17 To determine whether awarding terminating sanctions is just, courts consider five
18 factors: (1) the public’s interest in expeditious resolution of litigation, (2) the district
19 court’s need to manage its docket, (3) the risk of prejudice to the party seeking sanctions,
20 (4) the public policy favoring disposition of cases on their merits, and (5) the availability
21 of less drastic sanctions. *Leon*, 464 F.3d at 958 n.4; *Computer Task Grp., Inc. v. Brotby*,
22 364 F.3d 1112, 1115 (9th Cir. 2004).

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27 **IV. DISCUSSION**

28

1 Marcotulli and Alminana lied under oath. Marcotulli denied or stated that he did
2 not recall buying or using cocaine dozens of times when the truth was that he did
3 regularly buy and use cocaine during the period about which he was asked. Alminana
4 stated that he was not aware of Marcotulli's cocaine use when the truth was that he was
5 aware of it.

6
7 But the Court is not persuaded that sanctions—much less terminating sanctions—
8 are an appropriate remedy for these lies. Dismissal “is so harsh a penalty it should be
9 imposed as a sanction only in extreme circumstances.” *Thompson v. Hous. Auth. of City*
10 *of Los Angeles*, 782 F.2d 829, 831 (9th Cir. 1986). It is a “drastic substitute for the
11 adversary process of litigation” and should only be used when absolutely necessary to
12 protect the orderly administration of justice and integrity of judicial proceedings.
13 *Halaco*, 843 F.2d at 382. Dismissal is appropriate only when the complained-of activity
14 is a “pattern of deception” that “threaten[s] to interfere with the rightful decision of the
15 case” or makes it impossible to conduct a trial “with any reasonable assurance that the
16 truth would be available.” *Valley Eng'rs Inc. v. Elec. Eng'g Co.*, 158 F.3d 1051, 1057
17 (9th Cir. 1998).

18
19 This standard is not met here. Although Marcotulli and Alminana's lies are
20 troubling, especially since their credibility is important in this case, the lies do not in the
21 Court's judgment “threaten to interfere with the rightful decision of the case” or make it
22 impossible to conduct a trial “with any reasonable assurance that the truth would be
23 available.” *Valley Eng'rs*, 158 F.3d at 1057. Instead, the ordinary adversary process of
24 litigation is an adequate remedy for Marcotulli and Alminana's lies. *See Halaco*,
25 843 F.2d at 382. Significantly, some text messages and some of Marcotulli and
26 Alminana's testimony about the text messages will be admissible at trial. Both are
27 relevant to Marcotulli and Alminana's credibility—an important issue, especially on the
28 third counterclaim—and Marcotulli's ability to perceive and remember events during

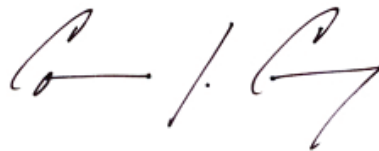
1 critical contract negotiations between the parties. The prejudice to Elysium from
2 admitting the text messages and related testimony does not substantially outweigh the
3 significant probative value of the evidence, and a jury will be able to evaluate the import
4 of the evidence without making a decision on an improper basis. Nor will the Court
5 permit a mini-trial on the issue.

6
7 Because some of the text messages and testimony will be admissible at trial,
8 ChromaDex will be able to show the jury that Marcotulli and Alminana lied under oath.
9 The jury will be allowed to draw inferences from Marcotulli and Alminana's lies in
10 assessing their credibility, and will be able to decide how much weight to give their
11 testimony accordingly. This is sanction enough to protect the orderly administration of
12 justice and the integrity of these proceedings. *See Halaco*, 843 F.2d at 382.

13
14
15 **V. CONCLUSION**

16
17 For the foregoing reasons, the Court **DENIES** ChromaDex's motion for sanctions.¹

18
19 DATED: April 27, 2021



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HON. CORMAC J. CARNEY

23 UNITED STATES DISTRICT JUDGE

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¹ The parties ask the Court to seal much of the briefing and evidence in support of these motions. (Dkts. 472 [Application to Seal Related to Motion], 480 [Application to Seal Related to Opposition], 484 [Application to Seal Related to Reply].) The motions are **GRANTED**.