UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

CHROMADEX, INC., **Plaintiff,** **v.** **ELYSIUM HEALTH, INC., and MARK MORRIS,** **Defendants.**	**Case No.: SACV 16-02277-CJC(DFMx)** **ORDER DENYING ELYSIUM'S MOTION FOR REVIEW OF THE MAGISTRATE JUDGE'S ORDER MODIFYING THE PROTECTIVE ORDER [Dkt. 398]**
ELYSIUM HEALTH, INC., **Counterclaimant,** **v.** **CHROMADEX, INC.,** **Counter-Defendant.**	

I. INTRODUCTION & BACKGROUND

Under three separate contracts, ChromaDex supplied Elysium with nicotinamide riboside ("NR"), which ChromaDex sold under the trade name Niagen, and pterostilbene ("PT"), which ChromaDex sold under the trade name pTeroPure. (Dkt. 295-1 ¶ 1.) Elysium uses those ingredients in its dietary supplement called Basis. (*Id.* ¶¶ 4–5.) In this case, each party alleges that the other breached the contracts governing the parties' relationships. ChromaDex also asserts claims for trade secret misappropriation, breach of confidentiality agreements, and breach of fiduciary duty related to a former ChromaDex Vice President, Mark Morris, who went to work for Elysium. (*See* Dkt. 369.)

ChromaDex and Elysium (without Mark Morris) are also litigating in New York (the "New York Action"). There, the parties assert false advertising, unfair competition, and deceptive business practices claims against each other, and Elysium also asserts a copyright infringement counterclaim against ChromaDex. (Dkt. 398 [hereinafter "Mot."] at 3.) The claims in the New York Action relate to the same NR-supply relationship between the parties that forms the center of the litigation here. For example, ChromaDex alleges in New York that Elysium falsely advertised that the NR and PT it uses in Basis are FDA-approved, but really only ChromaDex's NR and PT were so approved, and Elysium was not using ChromaDex's NR and PT at the time. (Dkt. 404 [hereinafter "Opp."] at 3.) As another example, Elysium alleges in New York that ChromaDex's NR contained acetamide, a carcinogen, meaning that when Elysium resold that NR in its product Basis, it violated California's Proposition 65. (*Id.*)

The protective order in this case provides that documents produced in this case that are marked Confidential, Highly Confidential – Attorney's Eyes Only, or Outside Counsel Only, "shall be used . . . only for the purpose of this Action (including any appeal), and not for any other purpose." (Dkt. 180 § 13.) ChromaDex sought to modify

that protective order so that documents produced in this case could be used in the New York case as well. (*See* Dkt. 398-4 [ChromaDex's letter brief]; Dkt. 398-3 [Elysium's letter brief].)

At the hearing on ChromaDex's request, it became clear that the principal basis for Elysium's opposition was that Elysium inadvertently produced documents in this case that it does not want to be discoverable in the New York Action. (*See* Dkt. 405-2 at 7.) As to those documents, Magistrate Judge McCormick explained, "We've been around the bend on those documents a number of times before, and . . . there's just no way to clawback documents that shouldn't have been produced in the first place." (*Id.* at 7–8.) He further explained that if the inadvertently-produced documents "are purely harassing" or similar, they will not be found relevant in the New York Action. (*Id.* at 8.)

Judge McCormick found that this case and the New York Action are "related and collateral," and, applying *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122 (9th Cir. 2003), granted ChromaDex's request and entered the Second Amended Protective Order. (*Id.* at 8–10.) The protective order now provides that documents produced in this case that are marked Confidential, Highly Confidential – Attorney's Eyes Only, or Outside Counsel Only, "shall be used . . . only for the purpose of this Action or . . . the New York Action . . . (including any appeals), and not for any other purpose." (Dkt. 395.)

Elysium moves for review of Judge McCormick's decision pursuant to Federal Rule of Civil Procedure 72(a). (Mot.) The Motion is **DENIED.**[1]

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[1] Having read and considered the papers presented by the parties, the Court finds these matters appropriate for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set for January 27, 2020 at 1:30 p.m. is hereby vacated and off calendar.

III. LEGAL STANDARD

A district judge must "consider timely objections and modify or set aside" any part of a magistrate judge's order that "is clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a). "The magistrate's factual determinations are reviewed for clear error, and the magistrate's legal conclusions are reviewed to determine whether they are contrary to law." *Perry v. Schwarzenegger*, 268 F.R.D. 344, 348 (N.D. Cal. 2010). The latter standard is met when the ruling "fails to apply or misapplies relevant statutes, case law, or rules of procedure." *Defazio v. Wallis*, 459 F. Supp. 2d 159, 163 (E.D.N.Y 2006) (citation and quotes omitted). The district court's review of "whether the Magistrate Judge ruled 'contrary to law' is *de novo* rather than deferential." *Coleman v. Diaz*, 2014 WL 1795157, at *3 (C.D. Cal. Mar. 11, 2014); *see Perry*, 268 F.R.D. at 348.

The Ninth Circuit "strongly favors access to discovery materials to meet the needs of parties engaged in collateral litigation." *Foltz*, 331 F.3d at 1131 (*citing Beckman Indus. v. Int'l Ins. Co.*, 966 F.2d 470, 475 (9th Cir. 1992), *cert. denied*, 506 U.S. 868). "Where reasonable restrictions on collateral disclosure will continue to protect an affected party's legitimate interests in privacy, a collateral litigant's request to the issuing court to modify an otherwise proper protective order so that collateral litigants are not precluded from obtaining relevant material should generally be granted." *Id.* at 1132.

Although they are generally granted, such requests are not granted automatically. *Id.* Rather, the court considering modification makes a "rough estimate" of the relevance of the protected discovery to the collateral proceedings, and weighs "the countervailing reliance interest of the party opposing modification against the policy of avoiding duplicative discovery." *Id.* at 1133. This reliance interest is considerably less as to blanket protective orders, since those orders are by their very nature "overinclusive." *Id.* Where a protective order is modified, the court does not decide whether the collateral

litigants will ultimately obtain the discovery materials. *Id.* That determination must be made by the court overseeing the collateral matter. *Id.*

IV. DISCUSSION

A. Review of Judge McCormick's Order

Judge McCormick made a "rough estimate" of the relevance of the protected discovery to the collateral proceedings, and determined that this case and the New York Action are "related and collateral." *See Foltz*, 331 F.3d at 1133; (Dkt. 405-2 at 9). This was correct. There is significant overlap in both the parties involved and the facts and issues between this case and the New York Action. *See Foltz*, 331 F.3d at 1132 (explaining that relevance hinges "on the degree of overlap in facts, parties, and issues between the suit covered by the protective order and the collateral proceedings"); *Cummins-Allison Corp. v. SBM Co.*, 2013 WL 12250448, at *2 (D. Haw. Nov. 8, 2013) (granting modification of protective order where, "[w]hile the Court acknowledges that the actions are not identical, there is significant overlap in facts and issues"). Given that the protective order at issue here was a blanket order, the countervailing reliance interest is low. In addition, the Ninth Circuit has recognized that requests such as this one "should generally be granted." *Foltz*, 331 F.3d at 1132. Judge McCormick's decision to modify the protective order was not clearly erroneous or contrary to law.

Elysium argues that Judge McCormick's order is contrary to *Foltz* and should therefore be vacated. (Mot. at 5.) Specifically, Elysium argues that "[r]ather than merely lifting the protective order as a roadblock to production of documents in the [New York] Action, the Modification Order purports to decide the discovery dispute over whether Elysium must produce in the [New York] Action all the documents it produced in this action." (*Id.* at 5–6.) Elysium reads the Second Amended Protective Order as a "blank

check . . . purporting to authorize the use of the entirety of the discovery in this case in the [New York] Action," "regardless of the [New York] Court's performance of its gatekeeping function under *Foltz*"—i.e. whether the New York court decides the documents are relevant or not. (*Id.* at 6–7.) Accordingly, Elysium proposes that the Second Amended Protective Order read instead that discovery documents "shall be used . . . only for the purpose of this Action or, to the extent stipulated by the producing party or found by the Court to be relevant and discoverable . . . the New York Action." (Dkt. 398-5.)

Elysium misunderstands Judge McCormick's order. Judge McCormick did not order that ChromaDex may use every document produced in discovery in this case in the New York Action. Indeed, he said explicitly that if any of the inadvertently-produced documents "are purely harassing" or similar, the New York court will not find them relevant, and ChromaDex therefore will not be able to use them in the New York Action. (Dkt. 405-2 at 8.) Rather, the Second Amended Protective Order means only that if the parties use any documents produced in this case with the relevant designations, they may use those documents only in this case or in the New York case. Indeed, if Elysium's reading were correct, it would mean that every document produced in this case with the relevant designations may be used in this case. That is not so—only documents that are relevant and otherwise admissible may be used. Nor would it be true, then, of the New York Action. Accordingly, Judge McCormick *did* only "lift[] the protective order as a roadblock to production of documents in the [New York] Action." (Mot at 5–6.) Elysium's Motion is therefore **DENIED.**

B. ChromaDex's Request for Fees

ChromaDex asks the Court to award the fees it incurred filing its opposition because Elysium (1) failed to comply with Local Rule 7-3 in bringing the Motion, instead

relying on the hearing before Judge McCormick to satisfy the pre-filing meet-and-confer requirement, (2) failed to present the entire record, including the hearing transcript to the Court, (3) based the Motion on arguments not expressly presented to Judge McCormick, and (4) failed to address pertinent legal authority cited by ChromaDex before Magistrate Judge McCormick.

As authority for awarding fees, ChromaDex cites Federal Rule of Civil Procedure 26(c), which governs protective orders and states that "Rule 37(a)(5) applies to the award of expenses." Fed. R. Civ. P. 26(c)(3). Rule 37(a), however, appears to govern payment of expenses relating to motions for orders compelling disclosure or discovery, which does not appear to apply here. ChromaDex cites no authority holding otherwise. Indeed, the cases ChromaDex cites relate to district court review under Rule 72(a) of magistrate rulings on motions to compel. *See Blair v. CBE Grp., Inc.*, 2014 WL 4658731, at *3 (S.D. Cal. Sept. 17, 2014); *Schueneman v. Arena Pharm., Inc.*, No. 3:10-CV-1959-CAB-BLM, 2017 WL 3587961, at *1 (S.D. Cal. Aug. 21, 2017).

The Court agrees with Judge McCormick that the disposition of the motion to amend the protective order was "easy," (Dkt. 405-2 at 4), and finds its decision on this motion to be similarly easy. The Court is also concerned with some of the failings ChromaDex points out. However, the Court is not persuaded that an award of fees is appropriate at this time.

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V. CONCLUSION

For the foregoing reasons, Elysium's motion for review of Judge McCormick's December 6, 2019 order is **DENIED**. ChromaDex's request for fees is also **DENIED.**

DATED: January 16, 2020

CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE