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15 Elysium Health, Inc. and Mark Morris

16 **UNITED STATES DISTRICT COURT**
17 **CENTRAL DISTRICT OF CALIFORNIA – SOUTHERN DIVISION**
18

19 ChromaDex, Inc.,
20
21 Plaintiff,
22
23 v.
Elysium Health, Inc. and Mark Morris,
24
25 Defendants.

Case No. 8:16-cv-02277-CJC-DFM

**APPLICATION BY DEFENDANTS
AND COUNTER-CLAIMANTS
ELYSIUM HEALTH, INC. AND
MARK MORRIS FOR LEAVE TO
FILE UNDER SEAL**

[Declarations and (Proposed) Order filed
concurrently herewith]

26
27 And Related Counterclaims
28

1 On this date, Defendant and Counterclaimant Elysium Health, Inc. (“Elysium”) and
 2 Defendant Mark Morris filed a Notice of Correction of Depositions in this action. (ECF
 3 453.) The Notice of Correction of Depositions provides notice of changes and corrections to
 4 the depositions of Eric Marcotulli and Daniel Alminana taken in this action. (ECF 284-3
 5 [Marcotulli deposition]; ECF 284-4 [Alminana deposition].) The changes and corrections
 6 are set forth in Declarations signed by Mr. Marcotulli and Mr. Alminana. Pursuant to L.R.
 7 79-5.2.2(a), Elysium and Mr. Morris respectfully apply for an order permitting them to file
 8 under seal portions of the Declarations of Mr. Alminana and Mr. Marcotulli that concern
 9 highly sensitive aspects of Mr. Marcotulli’s personal life, which will be the subject of a
 10 *motion in limine* that Elysium and Mr. Morris intend to file before trial in this action –
 11 specifically paragraphs 6 through 13 of Mr. Marcotulli’s Declaration and paragraphs 6
 12 through 8 of Mr. Alminana’s Declaration. At a minimum, Elysium and Mr. Morris request
 13 that the Court permit them to file the portions of the Declarations under seal until the Court
 14 rules on Elysium’s forthcoming *motion in limine*; if the Court denies the *motion in limine*,
 15 the Declarations can be unsealed.

16 This Application is based on the attached Memorandum of Points and Authorities, the
 17 Declarations of Mr. Marcotulli and Mr. Alminana (concurrently filed in redacted and
 18 unredacted form under L.R. 79-5.2.2(a)), all files and records in this case, and any additional
 19 evidence and argument that may be presented to this Court prior to ruling on this Application.

20 Pursuant to L.R. 79-5.2.2(a), counsel for Elysium and Mr. Morris contacted counsel
 21 for Plaintiff and Counter-Defendant ChromaDex, Inc. (“ChromaDex”) to determine whether
 22 ChromaDex opposes this Application. Counsel for ChromaDex indicated by email that
 23 ChromaDex will oppose this Application.

24
 25 Dated: December 11, 2020
 26
 27
 28

Respectfully Submitted,
KAPLAN HECKER & FINK LLP
 By: /s/ Roberta A. Kaplan
 Roberta A. Kaplan
 David Shieh
 Gabrielle E. Tenzer

1 Dated: December 11, 2020

COHEN WILLIAMS LLP

2 By: /s/ Marc S. Williams
3 Marc S. Williams
4 Reuven L. Cohen

5 *Attorneys for Defendants and Counter-*
6 *Claimants, Elysium Health, Inc. and Mark*
7 *Morris*

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Mr. Marcotulli is the CEO of Elysium. Mr. Alminana is Elysium’s COO. Both Mr. Marcotulli and Mr. Alminana have signed declarations to change and correct certain testimony about Mr. Marcotulli’s personal life that they gave at their depositions in this action. (ECF 284-3 [Marcotulli deposition]; ECF 284-4 [Alminana deposition].) The subject matter of that testimony and related text messages produced in discovery were the subject of a *motion in limine* filed in this action by Elysium’s prior counsel. (ECF 264.)¹ Elysium and its current counsel believe it is appropriate to file a Notice of Correction of Depositions with the Court, to ensure that the Court is apprised of the changes and corrections to the deposition testimony. The changed and corrected testimony of Mr. Marcotulli and Mr. Alminana nonetheless concerns highly sensitive aspects of Mr. Marcotulli’s personal life, and it is appropriate for the Court, under the applicable “good cause” standard, to grant Elysium and Mr. Morris leave to file under seal the redacted portions of the Declarations of Mr. Marcotulli and Mr. Alminana, which concern Mr. Marcotulli’s personal life. Accordingly, Elysium and Mr. Morris respectfully request that the Court grant this Application. Alternatively, they request that the Court permit the redacted portions of the Declarations to be filed under seal at least until the Court rules on Elysium’s forthcoming renewed *motion in limine* concerning evidence about Mr. Marcotulli’s personal life.

II. FACTUAL AND PROCEDURAL BACKGROUND

Mr. Marcotulli’s deposition in this action took place on March 27, 2019. Mr. Alminana’s deposition was on March 29, 2019. Prior to their depositions, and without their knowledge or consent, Elysium’s prior counsel, Baker & Hostetler LLP (“Baker”), inadvertently produced spreadsheets containing the complete message history of the cell

¹ Elysium previously filed an Application for Leave to File Under Seal portions of the *motion in limine* papers that concerned Mr. Marcotulli’s personal life. (ECF 268, 269.) The Court denied that Application without prejudice because it concurrently denied without prejudice Elysium’s *motion in limine*, along with all of the other *motions in limine* filed by the parties, given then-pending motions for summary judgment. (ECF 369.)

1 phone that Mr. Marcotulli used between 2012 and 2017 for both personal and business
2 matters, as well as the entire message contents of two cell phones used by Mr. Alminana.
3 (Marcotulli Decl., ¶3; Alminana Decl., ¶3.)

4 At the time of their depositions, Mr. Marcotulli and Mr. Alminana each expected to
5 answer questions regarding the subject matter of the above-captioned case – specifically,
6 questions relating to Elysium’s contracts with ChromaDex, including negotiations and
7 performance of those contracts; patent issues; and trade secret allegations. (Marcotulli Decl.,
8 ¶5; Alminana Decl., ¶5.) At his deposition, however, Mr. Marcotulli was presented with
9 certain text messages concerning highly sensitive aspects of his personal life. (Marcotulli
10 Decl., ¶¶5-6.) Mr. Marcotulli was caught by surprise, unprepared, and embarrassed. (*Id.*)
11 Consequently, and regrettably, he gave answers that require correction. (*Id.*)

12 During Mr. Alminana’s deposition, in the midst of a line of questions about the
13 development of Elysium and its product Basis, Mr. Alminana was asked suddenly about
14 certain highly sensitive aspects of Mr. Marcotulli’s personal life. (Alminana Decl., ¶¶5-6.)
15 Mr. Alminana was likewise caught by surprise and unprepared. (*Id.*) He too regrettably gave
16 answers that require correction. (*Id.*)

17 Mr. Marcotulli and Mr. Alminana have each signed a Declaration setting forth changes
18 and corrections to their respective deposition testimony. (Marcotulli Decl., ¶¶6-13;
19 Alminana Decl., ¶¶6-8.) Significantly, both Mr. Marcotulli and Mr. Alminana provided
20 truthful and accurate testimony regarding the substantive issues in the case.

21 **III. LEGAL STANDARD**

22 Under Local Rule 79-5.2.2(a), a party seeking an order sealing a record must file a
23 declaration “establishing good cause or demonstrating compelling reasons why the strong
24 presumption of public access in civil cases should be overcome, with citations to the
25 applicable legal standard.”

26 The “good cause” standard applies here because it applies to “‘private materials
27 unearthed during discovery,’ as such documents are not part of the judicial record.” *Pintos*
28 *v. Pac. Creditors Ass’n*, 605 F.3d 665, 678 (9th Cir. 2010) (quoting *Kamakana v. City &*

1 *County of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006)). “Rule 26(c) of the Federal Rules
2 of Civil Procedure governs here, providing that a trial court may grant a protective order ‘to
3 protect a party or person from annoyance, embarrassment, oppression, or undue burden or
4 expense.’” *Pintos*, 605 F.3d at 678 (quoting Rule 26(c)).

5 “The relevant standard for purposes of Rule 26(c) is whether good cause exists to
6 protect the information from being disclosed to the public by balancing the needs for
7 discovery against the need for confidentiality.” *Pintos*, 605 F.3d at 678 (internal quotation
8 marks and citations omitted). “This ‘good cause’ standard presents a lower burden for the
9 party wishing to seal documents than the ‘compelling reasons’ standard.” *Id.* “The
10 cognizable public interest in judicial records that underlies the ‘compelling reasons’ standard
11 does not exist for documents produced between private litigants.” *Id.*

12 “The ‘good cause’ standard is not limited to discovery. *Pintos*, 605 F.3d at 678. It
13 also applies to materials accompanying a nondispositive motion: “Nondispositive motions
14 are often unrelated, or only tangentially related, to the underlying cause of action, and, as a
15 result, the public’s interest in accessing dispositive materials does not apply with equal force
16 to non-dispositive materials.” *Id.* (internal quotation marks and citations omitted). “In light
17 of the weaker public interest in nondispositive materials, we apply the ‘good cause’ standard
18 when parties wish to keep them under seal. Applying the ‘compelling interest’ standard
19 under these circumstances would needlessly undermine a district court’s power to fashion
20 effective protective orders.” *Id.* (internal quotation marks and citations omitted).²

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23
24 ² The “compelling reasons” standard applies to most judicial records but not to the testimony
25 that is the subject of this Application. *Pintos*, 605 F.3d at 677-678 (citing *Kamakana*, 447
26 F.3d at 1178. “This standard derives from the common law right ‘to inspect and copy public
27 records and documents, including judicial records and documents.’” *Pintos*, 605 F.3d at 678
28 (quoting *Kamakana*, 447 F.3d at 1178 (citation and internal quotation marks omitted)). “To
limit this common law right of access, a party seeking to seal judicial records must show that
‘compelling reasons supported by specific factual findings . . . outweigh the general history
of access and the public policies favoring disclosure.’” *Pintos*, 605 F.3d at 678 (quoting
Kamakana, 447 F.3d at 1178-79 (internal quotation marks and citations omitted)).

1 **IV. THE COURT SHOULD GRANT DEFENDANTS’ APPLICATION TO**
2 **FILE UNDER SEAL**

3 The Declarations of Mr. Marcotulli and Mr. Alminana are subject to a lesser
4 presumption of public access because they pertain to discovery material and their relationship
5 to the ultimate disposition of this case is so attenuated that it borders on nonexistent. Thus,
6 the Declarations are subject to the lesser “good cause” standard to overcome the presumption
7 of public access. *Pintos*, 605 F.3d at 677-78; *Kamakana*, 447 F.3d at 1178-80.

8 While on their face the Declarations may appear to be judicial documents, they are
9 discovery material because they singularly address, change, and correct testimony taken *at*
10 *deposition* during the course of discovery proceedings in this case. Moreover, the portions
11 of the Declarations that are the subject of this Application relate to Mr. Marcotulli’s personal
12 life and do not concern any dispositive motion or other dispositive aspect of this case. None
13 of the claims for relief in this action concern Mr. Marcotulli’s personal life. At most, his
14 personal life bears on evidentiary issues in this case, although, as noted, Elysium intends to
15 renew its *motion in limine* to exclude argument and evidence concerning Mr. Marcotulli’s
16 personal life on grounds that it is not relevant, or, at a minimum, should be excluded under
17 Federal Rules of Evidence 402, 403, 404, and 608.

18 Under the “good cause” standard, the Court has considerable “flexibility in balancing
19 and protecting the interests of private parties,” *Kamakana*, 447 F.3d at 1180, and it “may
20 grant a protective order to protect a party or person from annoyance, embarrassment,
21 oppression, or undue burden or expense,” *Pintos*, 605 F.3d at 678 (internal quotation marks
22 and citations omitted). Here, good cause exists to file unredacted versions of the Declarations
23 under seal. As explained more thoroughly in the Declarations, the testimony that Mr.
24 Marcotulli and Mr. Alminana have changed and corrected concerns highly sensitive aspects
25 of Mr. Marcotulli’s personal life that is private and not the subject of any claim in this action.
26 His privacy interests clearly outweigh any value of public access to the information.
27 *Compare Gordon v. Nexstar Broadcasting, Inc.*, 2019 WL 2615753, at *2 (E.D.Ca. June 26,
28 2019) (in connection with summary judgment, applying “compelling reasons” standard and

1 granting motion to seal materials that “consist[ed] largely of text messages among various
2 parties to this action, many of which are of a private and personal nature” and which
3 “frequently include[d] discussions of intimate activities” and were therefore of “little value
4 to the public”); *Valley Broadcasting Co. v. U.S. Dist. Court*, 798 F.2d 1289, 1294 (9th Cir.
5 1986) (Factors that may overcome the presumptive right to access “would be the likelihood
6 of an improper use, ‘including publication of scandalous, libelous, pornographic, or trade
7 secret materials.’”).

8 **V. CONCLUSION**

9 Given the highly sensitive and personal subject matter of the testimony changed and
10 corrected by the Declarations of Mr. Marcotulli and Mr. Alminana, coupled with the lack of
11 any material connection of that subject matter to the claims in this action, there is good cause,
12 and even compelling reason, to grant this Application and permit Elysium and Mr. Morris to
13 file the redacted portions of the Declarations under seal. At a minimum, Elysium and Mr.
14 Morris submit that the Court should permit them to file the portions of the Declarations under
15 seal until the Court rules on Elysium’s forthcoming *motion in limine*.

16 Respectfully Submitted,

17 Dated: December 11, 2020

KAPLAN HECKER & FINK LLP

18 By: /s/ Roberta A. Kaplan

19 Roberta A. Kaplan
20 David Shieh
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