

1 MICHAEL R. MATTHIAS, Bar No. 057728
mmathias@bakerlaw.com
2 ELIZABETH M. TRECKLER, Bar No. 282432
etreckler@bakerlaw.com
3 **BAKER & HOSTETLER LLP**
11601 Wilshire Boulevard, Suite 1400
4 Los Angeles, California 90025-0509
Telephone: (310) 820-8800
5 Facsimile: (310) 820-8859

6 JOSEPH N. SACCA, (admitted *pro hac vice*)
jsacca@bakerlaw.com
7 **BAKER & HOSTETLER LLP**
45 Rockefeller Plaza
8 New York, New York 10111-0100
Telephone: (212) 589-4290
9 Facsimile: (212) 589-4201

10 *Counsel continued on following page*

11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**
13 **WESTERN DIVISION**

14 ChromaDex, Inc.,
15 Plaintiff,
16 v.
17 Elysium Health, Inc. and Mark
18 Morris,
19 Defendants.

Case No.: 8:16-cv-02277-CJC-DFM
[Assigned to the Hon. Cormac J. Carney]

**ELYSIUM HEALTH, INC.'S AND
MARK MORRIS'S MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT OF THEIR MOTION FOR
REVIEW OF THE MAGISTRATE
JUDGE'S ORDER MODIFYING THE
PROTECTIVE ORDER**

20 Elysium Health, Inc.,
21 Counterclaimant,
22 v.
23 ChromaDex, Inc.,
24 Counter-Defendant.

Hearing
Date: January 27, 2019
Time: 1:30 pm
Ctm: 7C

Pre-Trial Conference: TBD
Trial: TBD

BAKER & HOSTETLER LLP
ATTORNEYS AT LAW
LOS ANGELES

1 DONALD R. WARE (admitted *pro hac vice*)
dware@foleyhoag.com
2 MARCO J. QUINA (admitted *pro hac vice*)
mquina@foleyhoag.com
3 JULIA HUSTON (admitted *pro hac vice*)
jhuston@foleyhoag.com
4 RACHEL DAVIDSON (admitted *pro hac vice*)
rdavidson@foleyhoag.com
5 **FOLEY HOAG LLP**
155 Seaport Boulevard
6 Boston, Massachusetts 02210
Telephone: (617) 832-1000
7 Facsimile: (617) 832-7000

8 *Attorneys for Defendant and Counterclaimant*
9 **ELYSIUM HEALTH, INC.**

10 *Attorneys for Defendant*
11 **MARK MORRIS**

BAKER & HOSTETLER LLP
ATTORNEYS AT LAW
LOS ANGELES

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **A. Preliminary Statement**

2 Pursuant to Rule 72(a) of the Federal Rules of Civil Procedure and Local Civil
3 Rule 72-2.1, Elysium Health, Inc. (“Elysium”) and Mark Morris (“Morris,” together,
4 “Defendants”) object to Magistrate Judge McCormick’s December 6, 2019 order
5 modifying the First Amended Stipulated Protective Order in this action. The
6 December 6, 2019 order (the “Modification Order,” ECF No. 396) is contrary to
7 controlling Ninth Circuit law as set forth in *Foltz v. State Farm Mutual Auto*
8 *Insurance Co.* 331 F.3d 1122 (9th Cir. 2003). In particular, the Modification Order
9 purports to allow the use of *all* discovery from this action in an unrelated action now
10 pending in the United States District Court for the Southern District of New York
11 (the “SDNY Action”), without regard to the discovery material’s relevance to or
12 discoverability in that action. The Magistrate Judge does not have the authority to
13 govern discovery in the SDNY Action or to control the scope and content of
14 discovery in that case.

15 Under *Foltz*, on a motion to modify a protective order to allow use of discovery
16 in collateral litigation, “the only issue [the Court] determines is whether the
17 protective order will bar the collateral litigants from gaining access to the discovery
18 already conducted,” *id.* at 1132-33, while “the courts overseeing the collateral
19 litigation can settle any dispute as to whether particular documents are discoverable
20 in the collateral litigation.” *Id.* at 1334. This division of labor between sister courts
21 “serves to prevent the subversion of limitations on discovery in the collateral
22 proceedings,” allowing the collateral court to “freely control the discovery processes
23 in the controversies before them without running up against the protective order of
24 another court.” *Id.* at 1133.

25 ChromaDex’s attempted “subversion of limitations on discovery in the”
26 SDNY Action is readily apparent. *Id.* In its very first document request to Elysium
27 in the SDNY Action, ChromaDex sought “[a]ll Documents produced by the
28 defendants or a third party in the action *ChromaDex, Inc. v. Elysium Health, Inc. &*

1 *Mark Morris*, No. SAVC 16-02277-CJC (C.D. Ca.)” (Exhibit D.)¹ Because the
2 request inarguably sweeps up tens of thousands of documents that are irrelevant to
3 the SDNY Action, Elysium objected on the grounds of relevance. Months into the
4 meet and confer process in New York, and recognizing that the SDNY Court would
5 never compel the voluminous production of such irrelevant documents, ChromaDex
6 decided to bypass establishing relevancy before the SDNY Court by instead turning
7 to the Magistrate Judge in this action. Under the guise of a routine modification of a
8 protective order under *Foltz*, ChromaDex in fact sought permission to use all of the
9 California discovery material—both relevant and irrelevant alike—in the SDNY
10 Action.

11 ChromaDex’s forum shopping paid off when Magistrate Judge McCormick
12 modified the protective order, preempting the dispute resolution process in the SDNY
13 Action and purporting to authorize ChromaDex to use all of the discovery from this
14 action in the SDNY Action, without regard to the relevance and discoverability
15 threshold mandated by *Foltz*.

16 The reason ChromaDex sought permission to use irrelevant documents in the
17 SDNY Action is not to save costs, because such a baseless enlargement of the scope
18 of discovery does no such thing, but because it seeks to use documents that are
19 concededly irrelevant that were inadvertently produced in California and will not be
20 produced in New York. *Foltz*, however, is not intended to circumvent the forum
21 court’s authority to “settle any disputes as to whether particular documents are
22 discoverable in the collateral litigation.” *Id.* at 1134. To the contrary, the Ninth
23 Circuit has decreed that “collateral litigants not be allowed to gain access to
24 underlying discovery materials merely to subvert limitations on discovery in
25 collateral litigation.” *In re Dynamic Random Access Memory (DRAM) Antitrust*
26 *Litig.*, 2008 WL 4191780, at *2 (N.D. Cal. Sept. 10, 2008).

27 _____
28 ¹ All references to “Exhibit” are to the exhibits filed with the December 20, 2019
Declaration of Kristin L. Keranen in support of Defendants’ motion.

1 Because this would be the effect of the Modification Order, the Modification
2 Order is contrary to law, violates the clear guidance of the Ninth Circuit in *Foltz*, and
3 should be vacated. In its place, Elysium urges the Court follow the example set by
4 other cases in this Circuit and simply forbid use of the protective order as a shield to
5 discovery in the collateral litigation, while preserving the SDNY Court’s proper
6 authority over the conduct of litigation in the action before it, including its ability to
7 adjudicate relevance and discoverability issues. Elysium has attached as Exhibit C a
8 proposed order which achieves these goals, consistent with *Foltz*.

9 **B. Background**

10 In its most recent submission to this Court, ChromaDex asserted that “[t]he
11 heart of this case is Defendant Mark Morris’s breaches of fiduciary duty and the
12 aiding and abetting of those breaches by Eric Marcotulli and Dan Alminana, the co-
13 founders of Defendant Elysium Health, Inc.” (ECF No. 385-1 at 1.) *None* of those
14 claims is at issue in the litigation pending in the SDNY, and Mark Morris is not even
15 a party in that case. Rather, ChromaDex has asserted the following claims against
16 Elysium in the SDNY Action: (i) false advertising pursuant to federal law, (ii) unfair
17 competition pursuant to federal law, and (iii) deceptive business practices under NY
18 General Business Law. Elysium has filed the following counterclaims against
19 ChromaDex: (i) false advertising pursuant to federal law, (ii) unfair competition
20 pursuant to federal law, (iii) deceptive business practices under NY General Business
21 Law, and (iv) copyright infringement.²

22
23
24 ² By contrast, in the litigation currently before this Court, ChromaDex has filed the
25 following claims against Elysium: (i) breach of contract, (ii) misappropriation of
26 trade secrets under state and federal law, and (iii) aiding and abetting breach of
27 fiduciary duty claims. Additionally, ChromaDex has filed the following claims
28 against Mark Morris: (i) misappropriation of trade secrets under state and federal law,
(ii) breach of contract, and (iii) breach of fiduciary duty. Elysium’s counterclaims
against ChromaDex include (i) breach of contract, (ii) fraudulent inducement, and
(iii) patent misuse.

1 The parties served their respective First Sets of Requests for Production in the
2 SDNY Action on March 19, 2019 and served their respective responses and
3 objections on April 18, 2019. Request 1 served by ChromaDex was for “All
4 Documents produced by the defendants or a third party in the action *ChromaDex,*
5 *Inc. v. Elysium Health, Inc. & Mark Morris*, No. SAVC 160-02277-CJC (C.D. Ca.)”
6 (Ex. D.) Elysium properly objected to the Request, including on the grounds that this
7 Central District of California action (the “California Action”) “involves different
8 claims and defenses, an entirely separate defendant, and third parties who have no
9 relation to the claims or defenses at issue in the current litigation. The California
10 Action relates to the parties’ relationship as ingredient customer and supplier,
11 whereas [the SDNY Action] relates to the parties’ direct-to-consumer sales.” (Ex.
12 E.) The parties began a series of meet and confers regarding their respective
13 document requests, which are continuing. During an April 11, 2019 conference with
14 the SDNY Court, counsel to ChromaDex acknowledged that the California Action is
15 a “very different case” from the SDNY Action, a position reiterated by counsel to
16 ChromaDex during the parties’ July 9, 2019 meet and confer, and again during a call
17 on August 6, 2019.

18 Paragraph 23 of this Court’s First Amended Stipulated Protective Order (the
19 “Protective Order”) already provided that the Protective Order cannot bar the
20 production of documents pursuant to a subpoena or court order. Rather than bring
21 the parties’ dispute over Request 1 before the SDNY Court, which is the proper forum
22 to litigate the discoverability and relevance of these documents and before whom
23 ChromaDex had already made statements that would damage any such motion to
24 compel, ChromaDex instead asked this Court to modify the Protective Order as an
25 “end-run” in order to use tens of thousands of documents in the SDNY Action for
26 which it could not issue a proper document request. By ChromaDex’s own
27 admission, the vast majority of the document requests issued by the parties in the
28 California Action do not overlap with the document requests issued by the parties in

1 the SDNY Action.³ Nor did ChromaDex notify the 29 third parties subpoenaed in
2 the California Action—virtually none of whom are relevant to the claims or defenses
3 at issue in the SDNY Action—that it now sought to use their documents in the SDNY
4 Action. Nevertheless, ChromaDex moved to modify the Protective Order to use all
5 California discovery in the SDNY Action. During oral argument on the motion to
6 modify the Protective Order, and over Defendants’ objection, the Magistrate Judge
7 granted ChromaDex’s motion and subsequently entered the Modification Order.
8 (ECF Nos. 395-396.)⁴

9 **C. The Modification Order Violates Controlling Ninth Circuit Law**

10 Under Federal Rule of Civil Procedure 72(a), the district court must “modify
11 or set aside any part of the [magistrate judge’s non-dispositive] order that is clearly
12 erroneous or is contrary to law.” Fed. R. Civ. P. 72(a). “[T]he ‘contrary to law’
13 standard permits independent review of purely legal determinations by the magistrate
14 judge.” *Green v. Baca*, 219 F.R.D. 485, 489 (C.D. Cal. 2003) (citation and marks
15 omitted). *See also Franco-Gonzalez v. Napolitano*, No. CV1002211DMGDTBX,
16 2011 WL 13318185, at *2 (C.D. Cal. Sept. 23, 2011) (finding magistrate judge’s entry
17 of protective order to be contrary to law). The Modification Order here is contrary
18 to controlling Ninth Circuit law and should therefore be vacated.

19 In *Foltz*, the Ninth Circuit articulated the framework for modification of a
20 protective order when documents are sought for use in collateral litigation. The Ninth

21 ³ Elysium issued 528 requests for production to ChromaDex in the California Action
22 and 80 requests for production to ChromaDex in the SDNY Action. ChromaDex
23 alleges only that 15 requests issued by Elysium in the SDNY Action have *any* degree
24 of overlap—leaving 513 requests that do *not* overlap. Similarly, ChromaDex issued
25 210 requests for production to Elysium in the California Action, and 45 requests for
26 production to Mark Morris. ChromaDex issued 74 requests for production to
27 Elysium in the SDNY Action, and of course none to Morris. ChromaDex alleges
28 only that 10 of those requests overlap, and includes in that 10 a request that
ChromaDex has withdrawn—leaving 245 requests for production that do *not* overlap.
(Exhibit A at Appendices A & B.)

⁴ The transcript of the oral argument is only available through an electronic service.
If the Court so requires, Defendants will order the transcript and provide it to the
Court and ChromaDex.

1 Circuit explained that, when faced with such a motion, “the only issue [the district
2 court that issued the protective order] determines is whether the protective order will
3 bar the collateral litigants from gaining access to the discovery already conducted.”
4 *Foltz* at 1132-33. But in modifying a protective order, the court “must refrain from
5 embroiling itself in the specific discovery disputes applicable only to the collateral
6 suits.” *Id.* at 1133. Instead, a modification of a protective order should simply
7 remove the protective order as a barrier to discovery in the collateral litigation,
8 allowing the collateral courts to “freely control the discovery processes in the
9 controversies before them without running up against the protective order of another
10 court.” *Id.*

11 District courts of the Ninth Circuit faithfully apply *Foltz* to enter or modify
12 protective orders so that they “may not be used as a shield by [parties] to prevent
13 access to *otherwise discoverable material*.” *Shalaby v. Irwin Indus. Tool Co.*, No.
14 07CV2107-MMA (BLM), 2018 WL 500948, at *6 (S.D. Cal. Jan. 20, 2018)
15 (emphasis added). But those courts are careful to protect the collateral court’s
16 jurisdiction over issues of relevance and discoverability in the collateral proceeding,
17 recognizing that “[w]hether the protected material is discoverable in [the collateral
18 cases] is a question for those courts.” *Id.* at *6. *See also Siefe v. Unum Grp.*, 2018
19 WL 6340751, at *4 (C.D. Cal. June 11, 2018) (rejecting proposed protective order
20 that would allow use of documents without allowing the collateral courts “to first
21 resolve any disputes which may arise with respect to discoverability of the materials
22 in the collateral cases.”). To rule otherwise “risks colliding with the Ninth Circuit’s
23 decree that collateral litigants not be allowed to gain access to underlying discovery
24 materials merely to subvert limitations on discovery in collateral litigation.” *In re*
25 *Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 2008 WL 4191780, at
26 *2.

27 The Modification Order here went beyond what is authorized under *Foltz* and
28 subverted clear limitations on discovery in the SDNY Action. Rather than merely

1 lifting the protective order as a roadblock to production of documents in the SDNY
2 Action, the Modification Order purports to decide the discovery dispute over whether
3 Elysium must produce in the SDNY Action all the documents it produced in this
4 action. *See Goro v. Flowers Foods, Inc.*, 2019 WL 6252499 (S.D. Cal. Nov. 22,
5 2019) (“Asking for all documents produced in another matter is not generally
6 proper.”). As a result, on the face of the modified Protective Order, all of the
7 California discovery—approximately 92,500 of the parties’ documents, 3200 third-
8 party documents, and 22 deposition transcripts—would appear to now be able to be
9 used in the SDNY Action regardless of the SDNY Court’s performance of its
10 gatekeeping function under *Foltz*. *See Bioavail Labs, Inc. v. Anchen Pharma., Inc.*,
11 463 F. Supp. 2d 1073, 1084 (C.D. Cal. 2006) (finding request to use documents from
12 litigation in proceedings before the FDA “to be an improper attempt to circumvent
13 the FDA’s policies and regulations, [thus] Bioavail is not entitled to a modification
14 of the Protective Order.”). The Modification Order is therefore contrary to
15 controlling Ninth Circuit law and should be vacated. The blank check provided by
16 the Magistrate Judge in purporting to authorize the use of the entirety of the discovery
17 in this case in the SDNY Action also is contrary to Federal Rule 26, which limits
18 discovery in the SDNY Action to “matter that is relevant to any party’s claim or
19 defense and proportional to the needs of the case.” Fed. R. Civ. P. 26(b)(1).

20 The Court must therefore sustain Defendants’ objections and vacate the
21 Modification Order. In its place, and consistent with *Foltz* and its progeny,
22 Defendants urge this Court to adopt Elysium’s proposed order, which modifies the
23 protective order “*only for the limited purpose* of securing a ruling from this court to
24 the effect that the protective order cannot be used . . . as a bar to any discovery
25 already conducted in the present action,” provided that the producing party first has
26 the opportunity to raise any relevance and discoverability objections before the
27 SDNY Court. *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 2008
28 WL 4191780, at *3. *See also Shalaby*, 2018 WL 500948 at *6 (“The Court finds

BAKER & HOSTETLER LLP
ATTORNEYS AT LAW
LOS ANGELES

1 good cause to modify the Protective Order so that it may not be used as a shield by
2 Defendant to prevent access to otherwise discoverable material . . . Whether the
3 protected material is discoverable in Plaintiff’s other cases is a question for those
4 courts.”). The proposed order, attached as Exhibit C, allows confidential discovery
5 material from this Action to be used in the SDNY Action only to the extent stipulated
6 by the producing party or found by the SDNY Court to be relevant and discoverable.
7 This procedure complies with *Foltz* by ensuring that the protective order in this case
8 is no bar to discovery in the collateral action, it protects the SDNY Court’s authority
9 over discoverability in that action, complies with Rule 26’s limits on the scope of
10 discovery, and it protects the interests of the dozens of third parties who produced
11 discovery material in this case. *See In re Static Random Access Memory (SRAM)*
12 *Antitrust Litig.*, No. 07-MD-01819 CW, 2011 WL 5193479, at *6 (N.D. Cal. Nov. 1,
13 2011) (recognizing the burden that “[t]he need to police dissemination of their
14 confidential information in” collateral litigation imposes on third parties who
15 produced documents in the underlying litigation).

16 **D. Conclusion**

17 Defendants therefore respectfully request that the Court grant Defendants’
18 motion for review, vacate the Modification Order and enter Defendants’ Proposed
19 Order.

20
21 Dated: December 20, 2019
22
23
24
25
26
27
28

Respectfully submitted,
BAKER & HOSTETLER LLP

By: /s/ Joseph N. Sacca
JOSEPH N. SACCA
*Attorneys for Defendant and
Counterclaimant ELYSIUM HEALTH,
INC. and Defendant
MARK MORRIS*