

1 COOLEY LLP
 2 MICHAEL ATTANASIO (151529)
 3 (mattanasio@cooley.com)
 4 BARRETT J. ANDERSON (318539)
 5 (banderson@cooley.com)
 6 CRAIG E. TENBROECK (287848)
 7 (ctenbroeck@cooley.com)
 8 SOPHIA M. RIOS (305801)
 9 (srios@cooley.com)
 10 JAYME B. STATEN (317034)
 11 (jstaten@cooley.com)
 12 4401 Eastgate Mall
 13 San Diego, CA 92121-1909
 14 Telephone: (858) 550-6000
 15 Facsimile: (858) 550-6420

16 *Attorneys for Plaintiff and Counter-Defendant*
 17 *ChromaDex, Inc.*

18 *Counsel continued on following page*

19
 20
 21
 22
 23
 24
 25
 26
 27
 28

**UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA
 (WESTERN DIVISION)**

17 ChromaDex, Inc.,
 18
 19 Plaintiff,
 20
 21 v.
 22 Elysium Health, Inc., and Mark Morris
 23
 24 Defendants.

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

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

**CHROMADEx, INC.’S APPLICATION FOR
 LEAVE TO FILE UNDER SEAL PORTIONS
 OF ITS MOTION FOR PARTIAL SUMMARY
 JUDGMENT AND SUPPORTING EXHIBITS**

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

Pretrial Conference: Sept. 18, 2019
 Trial: October 15, 2019

1 COVINGTON & BURLING LLP
MITCHELL A. KAMIN (202788)
2 (mkamin@cov.com)
1999 Avenue of the Stars, Suite 3500
3 Los Angeles, CA 90067-4643
Telephone: (424) 332-4800
4 Facsimile: (424) 332-4749

5 COVINGTON & BURLING LLP
PHILIP A. IRWIN (*admitted Pro Hac Vice*)
6 (pirwin@cov.com)
620 Eighth Avenue
7 New York, NY 10018-1405
Telephone: (212) 841-1000
8

9 *Attorney for Plaintiff and Counter-Defendant*
ChromaDex, Inc.
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. STATEMENT OF FACTS	1
III. LEGAL STANDARD	2
IV. ARGUMENT.....	3
A. There Are Compelling Reasons to Protect ChromaDex’s Limited and Narrow Trade Secrets and Other Confidential Information that Are at Issue in ChromaDex’s Motion for Partial Summary Judgment.	3
B. ChromaDex Moves to Seal Elysium’s Designated Material Because It Is Required By the Protective Order.	6

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page(s)

Cases

AFL Telecomms. LLC v. SurplusEQ.com Inc.,
946 F. Supp. 2d 928 (D. Ariz. 2013) 5

Apple, Inc. v. Samsung Elecs. Co.,
727 F.3d 1214 (Fed. Cir. 2013) 4

Biovail Labs., Inc. v. Anchen Pharm., Inc.,
463 F. Supp. 2d 1073 (C.D. Cal. 2006) 6

In re Elec. Arts, Inc.,
298 Fed. App’x 568 (9th Cir. 2008) 4

Fitzhenry-Russel v. Dr. Pepper Snapple Grp., Inc.,
326 F.R.D. 592 (N.D. Cal. 2018) 3, 5

Foltz v. State Farm Mut. Auto. Ins. Co.,
331 F.3d 1122 (9th Cir. 2003) 2, 3, 6

Kamakana v. City & Cty. of Honolulu,
447 F.3d 1172 (9th Cir. 2006) 2, 4, 6, 7

Nixon v. Warner Commc’ns, Inc.,
435 U.S. 589 (1978)..... 2

Selling Source, LLC v. Red River Ventures, LLC,
2011 WL 1630338 (D. Nev. Apr. 29, 2011) 4

Valley Broad. Co. v. U.S. Dist. Court,
798 F.2d 1289 (9th Cir. 1986) 2

Velasco v. Chrysler Grp. LLC,
2017 WL 445241 (C.D. Cal. Jan. 30, 2017)..... 6

Other Authorities

Fed. R. Civ. P. 26(c)(1)(G) 3

1 **I. INTRODUCTION**

2 Pursuant to Local Rule 79-5 and Section 21 of the First Amended Stipulated
3 Protective Order (the “Protective Order”) (Dkt. 180), Plaintiff and Counter-Defendant
4 ChromaDex, Inc. (“ChromaDex”) submits this Application for Leave to File Under Seal
5 Portions of Its Motion for Partial Summary Judgment and Supporting Exhibits (“the
6 Application”). ChromaDex’s Application consists of two requests:

7 *First*, ChromaDex seeks leave to redact limited, but highly sensitive, information
8 from four out of 80 exhibits supporting its Motion concerning (a) the purchasing
9 histories of its ingredient customers, including those customers’ volumes and prices; (b)
10 the price it pays to its contract manufacturer, W.R. Grace & Co. (“Grace”), for
11 nicotinamide riboside (“NR”); and (c) details of an internal ChromaDex regulatory team
12 meeting regarding confidential projects and initiatives beyond the scope of this case.
13 As explained below, much of this trade secret information is what ChromaDex alleges
14 was misappropriated by Defendants Elysium Health, Inc. (“Elysium”) and Mark Morris
15 (together, “Defendants”), and consistent with its strong policy of protecting such
16 information from public disclosure, ChromaDex seeks to protect it here as well. For
17 that purpose, and others discussed below, there are compelling reasons to seal this
18 competitively sensitive, trade secret information.

19 *Second*, although ChromaDex moves to seal information designated by Elysium
20 as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
21 ONLY,” it only does so because of the technical, pre-discovery strictures in the
22 Protective Order. ChromaDex does not believe that there are compelling reasons to seal
23 from public scrutiny all of the information Elysium designated, and therefore registers
24 its objections below.

25 **II. STATEMENT OF FACTS**

26 On August 13, 2016, ChromaDex and Elysium exchanged lists of documents the
27 parties intended to attach to their respective motions for summary judgment which had
28 been designated “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –

1 ATTORNEYS’ EYES ONLY” under the Protective Order by the opposing party. (Rios
2 Declaration in Support of ChromaDex’s Application for Leave to File Under Seal
3 (“Rios Decl.”) ¶ 8.) Pursuant to Local Rule 79-5.2.2, counsel for ChromaDex and
4 Defendants met and conferred on August 14, 2016, to discuss the designated materials
5 that the parties believed need to be filed under seal. (*Id.*)

6 Of the ChromaDex information that Defendants intend to file with the Court,
7 ChromaDex identified four narrow categories of trade secret and highly confidential
8 information for which it believes limited redactions are warranted. (*Id.* ¶ 9.) Much of
9 this trade secret information is the same as that alleged by ChromaDex to have been
10 misappropriated by Elysium and Morris. (*Id.*) Elysium on the other hand identified a
11 large universe of documents and information that it requests that ChromaDex move to
12 seal on its behalf. (*Id.*) ChromaDex informed Elysium that it does not believe much of
13 this information meets the standard for sealing on motions for summary judgment, but
14 Elysium has maintained its position. (*Id.*)

15 **III. LEGAL STANDARD**

16 A motion to seal documents implicates the “general right to inspect and copy
17 public records and documents, including judicial records and documents.” *Nixon v.*
18 *Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978). In the Ninth Circuit, there is “a
19 strong presumption in favor of access to court records.” *Foltz v. State Farm Mut. Auto.*
20 *Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). This presumption “applies fully to
21 dispositive pleadings, including motions for summary judgment and related
22 attachments” because “the resolution of a dispute on the merits, whether by trial or
23 summary judgment, is at the heart of the interest in ensuring the ‘public’s understanding
24 of the judicial process and of significant public events.’” *Kamakana v. City & Cty. of*
25 *Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (quoting *Valley Broad. Co. v. U.S. Dist.*
26 *Court*, 798 F.2d 1289, 1294 (9th Cir. 1986)). Thus, a party must show compelling
27 reasons to seal a dispositive motion or the attachments thereto. *Foltz*, 331 F.3d at 1136.

28 In determining whether there are compelling reasons to seal, courts consider:

[T]he public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets After taking all relevant factors into consideration, the district court must base its decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture.

Id. at 1135. The trial court “has broad discretion to permit sealing of court documents for, among other things, the protection of ‘a trade secret or other confidential research, development, or commercial information.’” *Fitzhenry-Russel v. Dr. Pepper Snapple Grp., Inc.*, 326 F.R.D. 592, 617 (N.D. Cal. 2018) (citing Fed. R. Civ. P. 26(c)(1)(G)).

IV. ARGUMENT

A. There Are Compelling Reasons to Protect ChromaDex’s Limited and Narrow Trade Secrets and Other Confidential Information that Are at Issue in ChromaDex’s Motion for Partial Summary Judgment.

ChromaDex understands that this Court has repeatedly admonished the parties that “[a]ny further request to file documents under seal based on the parties’ protective order is **strongly disfavored.**” (Dkt. 108 at 2 (emphasis in original); *see also* Dkt. 224.) That is why ChromaDex only seeks to file under seal very specific and narrow categories of highly sensitive information concerning (a) the purchasing histories of its ingredient customers, including volumes and prices; (b) the price it pays Grace for nicotinamide riboside (“NR”); and (c) details of an internal ChromaDex regulatory team meeting regarding confidential projects and initiatives. Only four of the 80 exhibits to ChromaDex’s Motion for Summary Judgment contain this sensitive information, and even then only at a few specific spots: Exhibits 24, 55, 77, and 78. (Rios Decl. ¶¶ 3, 7)¹ The documents require only specific and limited redactions. The Ninth Circuit has explained “compelling reasons” that justify sealing court records generally exist “when such ‘court files might have become a vehicle for improper purposes,’ such as the use

¹ These four exhibits are attached to the Declaration of Barrett J. Anderson submitted in connection with ChromaDex’s Motion for Partial Summary Judgment.

1 of records to gratify private spite, promote public scandal, circulate libelous statements,
2 or release trade secrets.” *Kamakana*, 447 F.3d at 1179. That is true with ChromaDex’s
3 information here.

4 Exhibits 77 and 78 are the Opening Expert Report of Dr. Iain Cockburn and the
5 Rebuttal Expert Report of Dr. Randal Heeb, respectively. (Rios Decl. ¶ 4.) Both experts
6 analyze and express opinions on issues related to Elysium’s patent misuse counterclaim.
7 (*Id.*) Each expert closely examined and investigated particular trade secret information
8 about ChromaDex’s NR sales, including using that information to calculate average
9 prices and total volumes given to specific customers. (*Id.*) ChromaDex still sells NR
10 as an ingredient, and revealing the prices and volumes at which it has transacted across
11 multiple customers could give current and future suppliers, customers, and competitors
12 an advantage over ChromaDex, both in market positioning and contract negotiations.
13 (Declaration of Frank L. Jaksch Jr. in Support of ChromaDex’s Application for Leave
14 to File Under Seal (“Jaksch Decl.”) ¶ 4.A.) Further, one limited part of Dr. Heeb’s
15 report also discusses ChromaDex’s incremental profit rate, which, if publicly disclosed,
16 would cause the same problems. (Rios Decl. ¶ 4; Jaksch Decl. ¶ 4.B.) Allowing that
17 information to be public would harm both ChromaDex the company and its
18 shareholders, to whom ChromaDex owes a duty. (Jaksch Decl ¶ 4.B.)

19 It is well-established by the Ninth Circuit and other courts that it is proper to
20 redact competitively sensitive information of this nature. *In re Elec. Arts, Inc.*, 298 Fed.
21 App’x 568, 569 (9th Cir. 2008) (finding “pricing terms, royalty rates, and guaranteed
22 minimum payment terms” are “the precise sort of information” that might harm a
23 party’s competitive standing); *see also Apple, Inc. v. Samsung Elecs. Co.*, 727 F.3d
24 1214, 1216 (Fed. Cir. 2013) (access to “profit [] [and] cost” data “could give [] suppliers
25 an advantage in contract negotiations”); *Selling Source, LLC v. Red River Ventures,*
26 *LLC*, No. 2:09-cv-01491-JCM-GWF, 2011 WL 1630338, at *6 (D. Nev. Apr. 29, 2011)
27 (“Where the material includes information about . . . a company’s business model or
28 agreements with clients, there are compelling reasons to seal the material because

1 possible infringement of trade secrets outweighs the general public interest in
 2 understanding the judicial process.”). The Court should therefore allow ChromaDex to
 3 file Exhibits 77 and 78 with limited redactions of that precise information.

4 The third exhibit, Exhibit 24, is a large packet of text messages between Mark
 5 Morris and Daniel Alminana, Elysium’s COO, that contains a disclosure by Morris to
 6 Elysium of the price per kilogram that ChromaDex paid to Grace for manufacturing
 7 NR, as well as a response from Alminana that reflects that price. (Rios Decl. ¶ 5.) The
 8 price that ChromaDex paid to Grace is a closely guarded trade secret. (Jaksch Decl.
 9 ¶ 4.B.) “The Ninth Circuit adopted the definition of ‘trade secrets’ set forth in the
 10 Restatement of Torts, finding that ‘[a] trade secret may consist of any formula, pattern,
 11 device, or compilation of information which is used in one’s business, and which gives
 12 him an opportunity to obtain an advantage over competitors who do not know or use
 13 it.’ *Fitzhenry-Russell*, 326 F.R.D. at 617. ChromaDex’s price for NR “is the sort of
 14 business information that might harm [a party’s] competitive standing because a
 15 competitor could use it to strategically price its units to [the party’s] detriment or a
 16 customer could use it to effectively negotiate a desired price.” *AFL Telecomms. LLC v.*
 17 *SurplusEQ.com Inc.*, 946 F. Supp. 2d 928, 946 (D. Ariz. 2013).² That specific
 18 information should be redacted.

19 Lastly, ChromaDex seeks to partially redact Exhibit 55, the minutes of an internal
 20 ChromaDex regulatory team meeting that contain details on confidential ChromaDex
 21 projects and initiatives unrelated to the issues in this case, the identities of ChromaDex’s
 22 consultants and researchers for those projects, and strategies for achieving
 23 ChromaDex’s regulatory goals. (Rios Decl. ¶ 6.) “[D]istrict Courts in this Circuit have
 24 sealed records containing ‘information about proprietary business operations, a
 25

26 ² In *AFL Telecommunications*, although the court found that margin data is “the precise
 27 sort of information” appropriate for sealing under the compelling reasons standard, it
 28 declined to do so because the exact information was also contained in an expert report,
 which the party did not move to seal. *Id.* at 946. By contrast, ChromaDex seeks to
 redact all references to its margin data, including in the expert reports. (Jaksch Decl. ¶
 4.B.)

1 company’s business model or agreements with clients,’ ‘internal policies and
2 strategies,’ and ‘manufacturing information.’” *Velasco v. Chrysler Grp. LLC*, No. CV
3 13-08080 DDP (VBK), 2017 WL 445241, at *2 (C.D. Cal. Jan. 30, 2017) (internal
4 citations omitted) (sealing documents that “are the product of [a party’s] economic
5 efforts” when “public disclosure could allow competitors” to replicate without the same
6 investment of resources (alterations added)). The research and development projects
7 noted in the meeting minutes, if publicly disclosed, could allow competitors to pursue
8 the same opportunities, and possibly create competing intellectual property or achieve
9 competing regulatory certifications. (Jaksch Decl. ¶ 5.) That would harm ChromaDex
10 by depriving it of the value of its efforts. (*Id.*) Therefore, that information—which is
11 irrelevant to any issue in this case (Rios Decl. ¶ 6)—should be redacted. *Biovail Labs.,*
12 *Inc. v. Anchen Pharm., Inc.*, 463 F. Supp. 2d 1073, 1083 (C.D. Cal. 2006) (finding
13 compelling reasons to keep sealed manufacturing “trade secrets, the disclosure of which
14 to a competitor . . . (or the public) would be extremely damaging to [the party’s]
15 interests” (alterations added)).

16 ChromaDex’s redactions are narrowly tailored to shield only trade secret and
17 otherwise competitively sensitive material. (Rios Decl. ¶ 7.) They therefore meet the
18 standard that any sealed information be sufficiently particularized to protect the public
19 interest. *Foltz*, 331 F.3d at 1130. Moreover, sealing the redacted information will not
20 interfere with the “public interest in understanding the judicial process,” because the
21 information is ancillary to deciding the issues before the Court on summary judgment.
22 *Kamakana*, 447 F.3d at 1179 (citation omitted). For these compelling reasons,
23 ChromaDex respectfully requests that the Court grant the Application to redact from
24 Exhibits 24, 55, 77, and 78 the specified information.

25 **B. ChromaDex Moves to Seal Elysium’s Designated Material Only**
26 **Because It Is Required By the Protective Order.**

27 At Elysium’s request, ChromaDex also moves to seal a bloated and
28 undifferentiated number of documents that by any measure—and certainly under the

1 Ninth Circuit standard—should not be secretly filed. ChromaDex moves only because
2 it is required to by the Protective Order. (Protective Order ¶ 21.) Elysium asserts that
3 the 26 Exhibits and/or documents identified in Paragraph 17 of the Rios Declaration,
4 summarize or reflect information contained in documents that Elysium produced during
5 discovery and designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –
6 ATTORNEYS’ EYES ONLY” under to the Protective Order, and which counsel for
7 Elysium indicated should be filed under seal. (*See* Protective Order ¶¶ 5, 6.)

8 ChromaDex disagrees that much of the information that Elysium identified meets
9 the “compelling reasons” standard for sealing on a dispositive motion. *Kamakana*, 447
10 F.3d at 1179. During the meet and confer on August 14, 2019, ChromaDex sought to
11 minimize the number of documents and scope of information that each party would
12 require the other to file under seal. (Rios Decl. ¶ 10.) For example, Elysium proposed
13 to file under seal the entirety of Exhibit 24, the compilation of text and instant messages
14 between Alminana and Morris that is discussed above. (*Id.*) Elysium’s proposal was
15 based on its belief that the Exhibit contains “personal identifying information,” such as
16 phone numbers, email addresses, and physical addresses. (*Id.*) Counsel for Elysium
17 was unable to identify any other information in that Exhibit that might warrant
18 redaction. (*Id.*) ChromaDex’s lawyers thus redacted the phone numbers and addresses
19 identified by Elysium’s counsel, and filed a redacted version of the document rather
20 than filing the entire document under seal. (*Id.*)

21 Additionally, ChromaDex objects to Elysium’s demand that it file information
22 under seal that is already publicly available. In one key instance, Elysium insists that
23 ChromaDex redact—from every brief, declaration, exhibit, and other submission—the
24 identity of its former NR contract manufacturer, with which Elysium no longer has a
25 commercial relationship, including the names of all employees of that company. (*Id.*
26 ¶ 11.) The resulting burden on ChromaDex and the Court’s clerk is unjustified where
27 Elysium’s association with that manufacturer has been public knowledge since the
28 beginning of this year, when Elysium publicly filed a new patent application related to

1 NR that plainly named an employee of the manufacturer as an inventor. (*Compare* Rios
2 Decl. Ex. A (listing employee as an inventor on patent application) *with* Ex. B
3 (disclosing same person’s place of employment at Elysium’s manufacturer on LinkedIn
4 profile).)³ ChromaDex’s counsel raised that obvious public disclosure to Elysium’s
5 lawyers during the call on August 14, but Elysium maintains that ChromaDex must
6 redact even the name of that employee specifically. (*See* Rios Decl. ¶ 11 & Ex. 59.)
7 Given that Elysium’s alternate source of NR, the timing of its availability, and Elysium
8 and Morris’s transmission of ChromaDex trade secrets and confidential information to
9 the manufacturer are key issues in this action, the manufacturer’s identity and
10 involvement is both relevant to this case and important for the public to know in order
11 to understand the judicial process.

12 There are many more examples of information that Elysium has demanded be
13 sealed that likely does not meet the “compelling reasons” standard. (Rios Decl. ¶ 11.)
14 Nor does Elysium’s effort to conceal wide-ranging and non-particularized categories of
15 documents and information comport with the Court’s clear command that “[a]ny further
16 request to file documents under seal based on the parties’ protective order is **strongly**
17 **disfavored.**” (Dkt. 108 at 2 (emphasis in original); *see also* Dkt. 224.) Consequently,
18 while ChromaDex moves to seal this information in accordance with its obligations
19 under the Protective Order, it also believes much of this information should be filed
20 openly. It is time for the public to see whatever it is Elysium is trying to hide.

21 **RELIEF REQUESTED**

22 For the foregoing reasons and those set out in the accompanying Declarations of
23 Sophia Rios and Frank L. Jaksch Jr. in Support of ChromaDex’s Application for Leave
24 to File Portions of its Motion for Partial Summary Judgment Under Seal, ChromaDex
25 requests leave to file an unredacted version of the Motion under seal. A proposed Order
26 granting that relief is submitted herewith.

27 _____
28 ³ The manufacturer has recently changed names. (Rios Decl. Ex. C; *see* Rios Decl. Ex. B (reflecting both the old and new names of the manufacturer).)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: August 16, 2019

COOLEY LLP
MICHAEL A. ATTANASIO (151529)
BARRETT J. ANDERSON (318539)
CRAIG E. TENBROECK (287848)
SOPHIA M. RIOS (305801)
JAYME B. STATEN (317034)

/s/ Michael A. Attanasio
Michael A. Attanasio (151529)

*Attorneys for Plaintiff and Counter-Defendant
ChromaDex, Inc.*