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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MEDICINOVA, INC., a Delaware Corporation,

Plaintiff,

v.

GENZYME CORPORATION, a Massachusetts Corporation,

Defendant.

Case No.: 14-CV 2513-JLS (KSC)

ORDER DENYING WITHOUT PREJUDICE MOTION TO FILE DOCUMENTS UNDER SEAL

(ECF No. 68)

Presently before the Court is Defendant Genzyme Corporation’s Motion to File Documents Under Seal, (“MTN,” ECF No. 68). Defendant requests an order authorizing the filing under seal of various documents in support of Defendant’s Motion for Summary Judgment of No Liability. (*Id.* at 2.) Defendant alleges the documents contain highly confidential and proprietary business information regarding the research, development, and clinical trial of Defendant’s AAV2-sFLT01 gene therapy product, and the confidential Avigen-Genzyme Assignment Agreement. (*Id.* at 3.)

Plaintiff opposes Defendant’s request to seal these documents for various reasons.

1 (“Opp’n,” ECF No. 73.) First, Plaintiff argues Defendant did not provide Plaintiff with
2 appropriate notice for an application to seal documents, as per the Parties’ protective order,
3 (ECF No. 42). (Opp’n 4.) Plaintiff also argues its expert Dr. Burger will need to review
4 Defendant’s confidential material in order to prepare his report. (*Id.* at 5.)

5 **LEGAL STANDARD**

6 “[T]he courts of this country recognize a general right to inspect and copy public
7 records and documents, including judicial records and documents.” *Nixon v. Warner*
8 *Commc’ns, Inc.*, 435 U.S. 589, 597 (1978). “Unless a particular court record is one
9 ‘traditionally kept secret,’ a ‘strong presumption in favor of access’ is the starting point.”
10 *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (citing *Foltz*
11 *v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003)). “The presumption
12 of access is ‘based on the need for federal courts, although independent—indeed,
13 particularly because they are independent—to have a measure of accountability and for the
14 public to have confidence in the administration of justice.’” *Ctr. for Auto Safety v. Chrysler*
15 *Grp., LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016) (quoting *United States v. Amodeo*, 71 F.3d
16 1044, 1048 (2d Cir. 1995)).

17 A party seeking to seal a judicial record bears the burden of overcoming the strong
18 presumption of access. *Foltz*, 331 F.3d at 1135. The showing required to meet this burden
19 depends upon whether the documents to be sealed relate to a motion that is “more than
20 tangentially related to the merits of the case.” *Ctr. for Auto Safety*, 809 F.3d at 1102. When
21 the underlying motion is more than tangentially related to the merits, the “compelling
22 reasons” standard applies. *Id.* at 1096–98. When the underlying motion does not surpass
23 the tangential relevance threshold, the “good cause” standard applies. *Id.*

24 “In general, ‘compelling reasons’ sufficient to outweigh the public’s interest in
25 disclosure and justify sealing court records exists when such ‘court files might have
26 become a vehicle for improper purposes,’ such as the use of records to gratify private spite,
27 promote public scandal, circulate libelous statements, or release trade secrets.” *Kamakana*,
28 447 F.3d at 1179 (quoting *Nixon*, 435 U.S. at 598). However, “[t]he mere fact that the

1 production of records may lead to a litigant's embarrassment, incrimination, or exposure to
2 further litigation will not, without more, compel the court to seal its records.” *Id.* (citing
3 *Foltz*, 331 F.3d at 1136). The decision to seal documents is “one best left to the sound
4 discretion of the trial court” upon consideration of “the relevant facts and circumstances of
5 the particular case.” *Nixon*, 435 U.S. at 599.

6 ANALYSIS

7 I. Notice Under the Protective Order

8 Under the Parties’ protective order: “Nothing shall be filed under seal, and the Court
9 shall not be required to take any action, without separate prior order by the Judge before
10 whom the hearing or proceeding will take place, after application by the affected party with
11 appropriate notice to opposing counsel.” (“Protective Order,” ECF No. 42, at 10.) Plaintiff
12 argues Defendant told Plaintiff of its intention to file a motion for summary judgment, part
13 of which would be under seal, on the day it filed the Motion. (Opp’n 7.). Plaintiff argues
14 this is a violation of the protective order’s requirement of “appropriate notice.” (*Id.*)

15 The issue before the Court is whether it is proper to seal the documents requested by
16 Defendant. The issue is not whether Defendant violated the protective order. And even
17 so, under the protective order, Defendant has applied to file documents under seal,
18 requesting an order from the Judge before whom the hearing on the Motion for Summary
19 Judgment will take place. Although Plaintiff argues it did not receive “appropriate” notice
20 and the “day of” notice did not provide it time to “evaluate, confer, and respond” to
21 Defendant’s request, (*id.*), Plaintiff was able to file an opposition to the Motion and express
22 its position to the Court. Even if Defendant had provided Plaintiff with more notice of its
23 intention to file a Motion to Seal, the Court does not see how this would have changed
24 anything.

25 II. Plaintiff’s Expert

26 As factual background, Plaintiff provides that its first expert witness, Dr. Davies,
27 was inadvertently provided confidential materials so Plaintiff required Dr. Davies to
28 destroy all the materials he received, and Plaintiff hired a second expert, Dr. Burger.

1 (Opp'n 8). Plaintiff explains Defendant has refused to agree to Plaintiff retaining Dr.
2 Burger as an expert in this matter. (*Id.*) Plaintiff argues if Defendant's documents are
3 sealed, Dr. Burger will not be able to review them. (*Id.*; *see* Protective Order Section II.6.e
4 (noting the Receiving Party may disclose confidential or highly confidential information
5 to approved experts).)

6 It appears the crux of this issue is the approval of Dr. Berger as an expert witness.
7 The Parties currently have a "Joint" Motion pending before Magistrate Judge Crawford,
8 (ECF No. 61). In this Motion (wherein each party expresses its respective, contrasting
9 positions), Plaintiff notes Defendant has refused to agree to the substitution of Dr. Burger,
10 so Plaintiff cannot disclose any "Confidential" or "Highly Confidential" materials to him.
11 (*Id.* at 5.) Defendant objects to Dr. Burger receiving Defendant's confidential information
12 because Dr. Burger "is in a position to consult companies that directly compete with
13 Genzyme in the gene therapy technology space." (*Id.* at 11.)

14 While the Court understands the Parties' positions and understands they are waiting
15 for Judge Crawford to rule on the expert witness issue, this does not have a place in the
16 Court's analysis here. In determining whether to seal documents, the Court evaluates
17 according to the test outlined above.

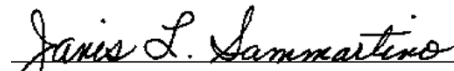
18 **III. Discussion**

19 First, the Court finds the Motion for Summary Judgment (the underlying motion for
20 the present Motion to Seal), is more than tangentially related to the merits of the case.
21 Therefore, the "compelling reasons" standard applies. *Ctr. for Auto Safety*, 809 F.3d at
22 1096–98; *see also Dakota Med., Inc. v. Rehabcare Grp., Inc.*, No. 14-cv-02081-DAD-
23 BAM, 2016 WL 6493896, at *2 (E.D. Cal. Nov. 2, 2016) (holding the "compelling
24 reasons" standard applies for a dispositive motion for summary judgment). Defendant
25 requests to file under seal: 1. Memorandum of Points and Authorities in Support of Motion
26 for Summary Judgment; 2. The Declaration of Abraham Scaria; 3. Exhibits A, B, and C to
27 the Declaration of Abraham Scaria; 4. The Declaration of Dr. Barry J. Bryne; and 5.
28 Exhibits A and B to the Declaration of Dr. Barry J. Byrne. (MTN 2.)

1 The scope of Defendant’s request is very broad. “[G]eneralized information is not
2 likely to meet the compelling reasons standard of sealing, and [a party] must avoid this
3 general information when applying its redactions to propriety information.” *Obesity*
4 *Research Inst., LLC v. Fiber Research Int’l, LLC*, No. 15-cv-595-BAS (MDD), 2017 WL
5 5001287, at *5 (S.D. Cal. Nov. 2, 2017) (collecting cases). The Court finds it is plausible
6 there may be information in one or more of the above documents that warrants sealing, but
7 Defendant has failed to present compelling reasons that the entirety of each of the
8 documents warrant sealing. Thus, the Court **DENIES WITHOUT PREJUDICE**
9 Defendant’s Motion and **GRANTS** Defendant leave to amend its motion to file documents
10 under seal.¹ *See Obesity Research Inst., LLC v. Fiber Research Int’l, LLC*, No. 15-cv-595-BAS
11 (MDD), 2017 WL 3269211, at *2 (S.D. Cal. July 31, 2017) (holding the same).
12 Defendant’s revised Motion must specify portions of the documents that present
13 compelling reasons for sealing. Upon Defendant’s filing of its revised Motion to Seal,
14 Plaintiff **SHALL** file a Response within seven days. If Defendant does not file a revised
15 Motion to Seal by December 19, 2017, the Court will direct the Clerk of Court to return to
16 Defendant the documents for which sealing has been denied.

17 **IT IS SO ORDERED.**

18 Dated: December 5, 2017


19 Hon. Janis L. Sammartino
20 United States District Judge
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27 ¹ The Court is conscious of the briefing schedule that has been set in this matter, wherein Plaintiff must file its opposition to
28 the Motion for Summary Judgment on or before January 25, 2018. (*See* ECF No. 71.) Should it become necessary to reschedule
the hearing on the pending Motion for Summary Judgment and reset the briefing schedule, the Court will do so.