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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

OBESITY RESEARCH INSTITUTE,
LLC,

Plaintiff,

v.

FIBER RESEARCH
INTERNATIONAL, LLC, *et al.*,

Defendants.

Case No. 15-cv-595-BAS(MDD)

**OMNIBUS ORDER RE:
PARTIES' MOTIONS TO FILE
DOCUMENTS UNDER SEAL**

AND RELATED COUNTERCLAIM.

Presently before the Court are a number of motions by the parties to file documents under seal. (*See* ECF No. 190, 193, 208, 216, 221, 223, 231, 234, 236, 242, 247, 250, 276, 280, 303, 312.) The motions were filed with many of the substantive briefs filed by the parties, including, but not limited to, briefs related to Plaintiff Obesity Research Institute, LLC's ("ORI") motion to exclude expert testimony, Defendant Fiber Research International, LLC's ("FRI") motion for summary judgment, and Defendant Shimizu Chemical Corporation's ("Shimizu")

1 motion to dismiss. To date, none of the motions are opposed.

2 Due to the volume of the parties' requests, the Court will refer to each motion
3 by its Electronic Case Filing number ("ECF No.") on the docket for the purposes of
4 this order.

5
6 **I. LEGAL STANDARD**

7 "[T]he courts of this country recognize a general right to inspect and copy
8 public records and documents, including judicial records and documents." *Nixon v.*
9 *Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978). "Unless a particular court record
10 is one 'traditionally kept secret,' a 'strong presumption in favor of access' is the
11 starting point." *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir.
12 2006) (citing *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir.
13 2003)). "The presumption of access is 'based on the need for federal courts, although
14 independent—indeed, particularly because they are independent—to have a measure
15 of accountability and for the public to have confidence in the administration of
16 justice." *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1096 (9th Cir.
17 2016) (quoting *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995)).

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

26 "In general, 'compelling reasons' sufficient to outweigh the public's interest
27 in disclosure and justify sealing court records exists when such 'court files might
28 have become a vehicle for improper purposes,' such as the use of records to gratify

1 private spite, promote public scandal, circulate libelous statements, or release trade
2 secrets.” *Kamakana*, 447 F.3d at 1179 (quoting *Nixon*, 435 U.S. at 598). However,
3 “[t]he mere fact that the production of records may lead to a litigant’s embarrassment,
4 incrimination, or exposure to further litigation will not, without more, compel the
5 court to seal its records.” *Id.* (citing *Foltz*, 331 F.3d at 1136). The decision to seal
6 documents is “one best left to the sound discretion of the trial court” upon
7 consideration of “the relevant facts and circumstances of the particular case.” *Nixon*,
8 435 U.S. at 599.

9 Federal Rule of Civil Procedure 26(c), generally, provides the “good cause”
10 standard for the purposes of sealing documents. *See Kamakana*, 447 F.3d at 1179.
11 The test applied is whether “‘good cause’ exists to protect th[e] information from
12 being disclosed to the public by balancing the needs for discovery against the need
13 for confidentiality.” *Pintos v. Pac. Creditors Ass’n*, 605 F.3d 665, 678 (9th Cir. 2010)
14 (quoting *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213
15 (9th Cir. 2002)). Under Rule 26(c), only “a *particularized showing* of ‘good cause’ .
16 . . is sufficient to preserve the secrecy of sealed discovery documents[.]” *In re*
17 *Midland Nat. Life Ins. Co. Annuity Sales Practices Litig.*, 686 F.3d 1115, 1119 (9th
18 Cir. 2012) (emphasis added); *see also Kamakana*, 447 F.3d at 1180 (requiring a
19 “particularized showing” of good cause). “Broad allegations of harm, unsubstantiated
20 by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.”
21 *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992). Moreover,
22 a blanket protective order is not itself sufficient to show “good cause” for sealing
23 particular documents. *See Foltz*, 331 F.3d at 1133; *Beckman Indus.*, 966 F.2d at 476;
24 *San Jose Mercury News, Inc. v. U.S. District Court, N. Dist.*, 187 F.3d 1096, 1103
25 (9th Cir. 1999).

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1 **II. ANALYSIS**

2 **A. ECF No. 190**

3 In ECF No. 190, FRI seeks leave to file under seal portions of its memorandum
4 in support of its motion to exclude Dr. Laura Lerner’s report and testimony in
5 addition to portions of Exhibit 3 to the Flynn Declaration. The crux of FRI’s
6 argument is as follows:

7 Fiber Research believes there are probably sufficiently
8 “compelling reasons” to redact some information, namely
9 that identifying the precise viscosity of Lipozene, as in
10 some of Dr. Lerner’s headers, and possibly information
11 about its supplier, Nutralliance, which appears on page 6
12 of Dr. Lerner’s Report[.] [¶] In addition, Fiber Research
13 has continued to redact Obesity Research’s testing
14 (attached as exhibits to Dr. Lerner’s Report), and
15 information derived from the testing in Dr. Lerner’s
16 Report. But Fiber Research believes there is not a
17 sufficiently “compelling reason” to redact this
18 information[.]

19 (FRI’s ECF No. 190 at 3:6-17.)

20 Having reviewed FRI’s explanation, the Court finds that FRI fails to carry its
21 burden to demonstrate that sealing the requested information is appropriate under the
22 compelling-reasons standard. *See Kamakana*, 447 F.3d at 1179. Therefore, the Court
23 **DENIES** FRI’s motion to file documents under seal. (ECF No. 190.)

24 **B. ECF No. 193**

25 In ECF No. 193, FRI seeks leave to file under seal Exhibit 11, which is a one-
26 page Certificate of Analysis for Shimizu’s Propol KW product, to the Persinger
27 Declaration in support of FRI’s motion to exclude ORI’s non-retained expert
28 witnesses. FRI argues that the information contained in Exhibit 11 is “highly
confidential proprietary information about the characteristics of glucomannan that
could allow a competitor to attempt to reverse engineer Shimizu’s glucomannan,”
and that the Court has already determined that the certificate is “extremely sensitive”

1 in a protective order. No further explanation is provided by FRI regarding how the
2 information contained in the certificate could be used in the manner purported.

3 Having reviewed FRI's incomplete explanation, the Court finds that FRI fails
4 to carry its burden to demonstrate that sealing the requested information is
5 appropriate under the compelling-reasons standard. *See Kamakana*, 447 F.3d at 1179.
6 Therefore, the Court **DENIES** FRI's motion to file documents under seal. (ECF No.
7 193.)

8 9 **C. ECF No. 208**

10 In ECF No. 208, Shimizu seeks leave to file under seal certain information
11 contained in Exhibit 1, which is the distribution and assignment agreement between
12 FRI and Shimizu, to the Shimizu Declaration, which Shimizu argues could be used
13 to gain a competitive advantage. Shimizu contends, for example, that the exhibit
14 contains pricing and shipping information for Propol products that could be
15 improperly used.

16 Having reviewed Shimizu's request, the Court finds that Shimizu fails to carry
17 its burden to demonstrate that sealing the terms of the distribution and assignment
18 agreement is appropriate under the compelling-reasons standard. *See Kamakana*, 447
19 F.3d at 1179. However, the Court finds that sealing the pricing and shipping
20 information contained on the page identified as "FRO 170" is appropriate. Therefore,
21 the Court **GRANTS IN PART** and **DENIES IN PART** Shimizu's motion to file
22 documents under seal. (ECF No. 208.)

23 24 **D. ECF No. 216**

25 In ECF No. 216, ORI seeks leave to file under seal portions of its memorandum
26 in support of its motion to exclude Dr. Fahey in addition to Exhibits 3-6 and 9-11 to
27 the Flaherty Declaration. Specifically, ORI argues that the "Confidential" or
28 "HIGHLY CONFIDENTIAL" designations, which are all made pursuant to the

1 protective order, justifies sealing the aforementioned documents. Though ORI
2 invokes the good-cause standard, because admissibility of expert testimony is “more
3 than tangentially related to the merits of the case,” the appropriate standard applied
4 to the circumstances is the compelling-reasons standard. *See Ctr. for Auto Safety*, 809
5 F.3d at 1102.

6 Having applied the wrong standard, ORI’s request is properly denied. *See Ctr.*
7 *for Auto Safety*, 809 F.3d at 1102. It is also properly denied because ORI fails to make
8 a particularized showing demonstrating that sealing the requested documents is
9 appropriate. *See Kamakana*, 447 F.3d at 1179. However, even if the Court applied
10 the good-cause standard, a blanket protective order is not itself sufficient to show
11 “good cause” for sealing particular documents. *See Foltz*, 331 F.3d at 1133; *Beckman*
12 *Indus.*, 966 F.2d at 476; *San Jose Mercury News, Inc. v. U.S. District Court, N. Dist.*,
13 187 F.3d 1096, 1103 (9th Cir. 1999). Accordingly, the Court **DENIES** ORI’s motion
14 to file documents under seal. (ECF No. 216.)

15
16 **E. ECF No. 221**

17 In ECF No. 221, ORI seeks leave to seal portions of its opposition to FRI’s
18 motion to exclude Dr. Lerner’s report and testimony because “[t]he redacted portion
19 of the publicly filed Opposition contains information regarding the nature of ORI’s
20 product, Lipozene, and the sources of the materials used in Lipozene which has been
21 deemed “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” by ORI
22 given the extremely sensitive nature of the information.” ORI’s conclusory assertion
23 that the aforementioned information is “extremely sensitive” is wholly inadequate.

24 Having reviewed ORI’s request, the Court finds that ORI fails to carry its
25 burden to demonstrate that sealing the requested information is appropriate under the
26 compelling-reasons standard. *See Kamakana*, 447 F.3d at 1179. Therefore, the Court
27 **DENIES** ORI’s motion to file documents under seal. (ECF No. 221.)

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1 **F. ECF No. 223**

2 In ECF No. 223, ORI seeks leave to seal portions of its opposition to FRI’s
3 motion to exclude ORI’s non-retained witnesses in addition to portions of Exhibits
4 4, 6, and 7 to the Flaherty Declaration. To justify its request, ORI presents the same
5 conclusory arguments asserted in support of its request to file documents under seal
6 in ECF No. 221, which the Court denied above. The Court **DENIES** this request
7 (ECF No. 223) for the same reasons it denied ECF No. 221. *See Kamakana*, 447 F.3d
8 at 1179.

9
10 **G. ECF No. 231**

11 In ECF No. 231, FRI seeks leave to file portions of its reply in support of its
12 motion to exclude Dr. Lerner’s report and testimony in addition to Exhibits 2 and 3
13 to the Flynn Declaration. FRI indicates that it does not believe these materials are
14 appropriate for sealing, but has nonetheless made the request to do so pursuant to the
15 protective order. However, the precise request is for a show-cause order for ORI to
16 demonstrate that sealing the aforementioned documents is appropriate. ORI has not
17 responded FRI’s request. Ultimately, neither standard for sealing documents has been
18 met by either party, and as a result, the Court **DENIES** FRI’s motion to file
19 documents under seal. (ECF No. 231.)

20
21 **H. ECF No. 234**

22 In ECF No. 234, FRI seeks leave to seal Exhibits 1 and 2 to the Persinger
23 Declaration, submitted in support of its motion to exclude non-retained expert
24 witnesses. This request is made under the same circumstances as ECF No. 231, and
25 ORI has not responded to FRI’s request. Accordingly, the Court **DENIES** FRI’s
26 request to file documents under seal. (ECF No. 234.)

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1 **I. ECF No. 236**

2 In ECF No. 236, ORI seeks leave to seal portions of its opposition to Shimizu’s
3 motion to dismiss, and Exhibit 3 through 5 to the Index of Exhibits. ORI argues that
4 sealing is appropriate pursuant to the protective order. To justify its position, ORI
5 only provides conclusory assertion that aforementioned documents contain “sensitive
6 business information” without any explanation regarding how or why that
7 information is sensitive in nature.

8 Having reviewed ORI’s request, the Court finds that ORI fails to carry its
9 burden to demonstrate that sealing the requested information is appropriate under the
10 compelling-reasons standard. *See Kamakana*, 447 F.3d at 1179. Therefore, the Court
11 **DENIES** ORI’s motion to file documents under seal. (ECF No. 236.) ORI is
12 reminded that a blanket protective order is not itself sufficient to show “good cause”
13 for sealing particular documents. *See Foltz*, 331 F.3d at 1133; *Beckman Indus.*, 966
14 F.2d at 476; *San Jose Mercury News, Inc. v. U.S. District Court, N. Dist.*, 187 F.3d
15 1096, 1103 (9th Cir. 1999).

16
17 **J. ECF No. 242**

18 In ECF No. 242, FRI seeks leave to seal Exhibits 2 and 4 to the Fitzgerald
19 Declaration, submitted in support of its opposition to ORI’s motion to exclude Dr.
20 Fahey. Though FRI appears to base its request on the protective order, FRI explains
21 that the exhibits contain Shimizu’s “proprietary testing methodologies, testing
22 results, certificates of analysis containing testing results for Shimizu’s Propol, and
23 Propol product specifications,” adding that “the disclosure of which to the general
24 public could irreparably damage Shimizu as the owner of those underlying
25 proprietary testing methodologies, test results, and trade secrets, and thereby its
26 assignee, licensee, and distributor, Fiber Research.” FRI’s explanation appears to be
27 consistent with the Court’s assessment of the relevant exhibits.

28 //

1 Having reviewed FRI’s request, and the relevant documents, the Court finds
2 that FRI provides compelling reasons to seal the aforementioned documents. *See*
3 *Kamakana*, 447 F.3d at 1179. Therefore, the Court **GRANTS** FRI’s motion to file
4 documents under seal. (ECF No. 242.)

5
6 **K. ECF No. 247**

7 In ECF No. 247, ORI seeks leave to seal Exhibits 5 and 8 of the Flaherty
8 Declaration in connection with its motion for reconsideration of an April 8, 2016
9 order striking portions of the supplemental disclosures. To justify its request, ORI
10 presents similar arguments asserted in support of its request to file documents under
11 seal in ECF Nos. 216 and 221, which the Court denied above. The Court **DENIES**
12 this request (ECF No. 247) for the same reasons it denied ECF Nos. 216 and 223. *See*
13 *Kamakana*, 447 F.3d at 1179; *Foltz*, 331 F.3d at 1133; *Beckman Indus.*, 966 F.2d at
14 476.

15
16 **L. ECF No. 250**

17 The Court **DENIES** this request for the same reasons it denied ECF No. 216.
18 (ECF No. 250.) ORI is reminded that a blanket protective order is not itself sufficient
19 to show “good cause,” let alone compelling reasons, for sealing particular documents.
20 *See Foltz*, 331 F.3d at 1133; *Beckman Indus.*, 966 F.2d at 476; *San Jose Mercury*
21 *News, Inc. v. U.S. District Court, N. Dist.*, 187 F.3d 1096, 1103 (9th Cir. 1999).

22
23 **M. ECF No. 276**

24 The Court **DENIES** this request for the same reasons it denied ECF No. 216.
25 (ECF No. 276.) ORI is reminded that a blanket protective order is not itself sufficient
26 to show “good cause,” let alone compelling reasons, for sealing particular documents.
27 *See Foltz*, 331 F.3d at 1133; *Beckman Indus.*, 966 F.2d at 476; *San Jose Mercury*
28 *News, Inc. v. U.S. District Court, N. Dist.*, 187 F.3d 1096, 1103 (9th Cir. 1999).

1 **N. ECF No. 280**

2 In ECF No. 280, ORI seeks leave to seal portions of its memorandum in
3 support of its objection to the magistrate judge’s October 23, 2015 order regarding
4 whether portions of the Beaton supplemental report should be stricken. Though ORI
5 appears to base its request on the protective order, ORI explains that the
6 memorandum contains sensitive financial information, including revenues and costs
7 information. ORI’s explanation appears to be consistent with the Court’s assessment
8 of the relevant information.

9 Having reviewed ORI’s request, and the relevant information, the Court finds
10 that ORI provides good cause to seal the aforementioned documents. *See Kamakana*,
11 447 F.3d at 1179. Therefore, the Court **GRANTS** ORI’s motion to file documents
12 under seal. (ECF No. 280.)

13
14 **O. ECF No. 303**

15 The Court **DENIES** this request for the same reasons it denied ECF No. 216.
16 (ECF No. 303.) ORI is reminded that a blanket protective order is not itself sufficient
17 to show “good cause,” let alone compelling reasons, for sealing particular documents.
18 *See Foltz*, 331 F.3d at 1133; *Beckman Indus.*, 966 F.2d at 476; *San Jose Mercury*
19 *News, Inc. v. U.S. District Court, N. Dist.*, 187 F.3d 1096, 1103 (9th Cir. 1999).

20
21 **P. ECF No. 312**

22 The Court **DENIES** this request for the same reasons it denied ECF No. 216.
23 (ECF No. 312.) ORI is reminded that a blanket protective order is not itself sufficient
24 to show “good cause” for sealing particular documents. *See Foltz*, 331 F.3d at 1133;
25 *Beckman Indus.*, 966 F.2d at 476; *San Jose Mercury News, Inc. v. U.S. District Court*,
26 *N. Dist.*, 187 F.3d 1096, 1103 (9th Cir. 1999).

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1 **Q. ECF No. 318**

2 The Court **DENIES** this request for the same reasons it denied ECF No. 216.
3 (ECF No. 318.) ORI is reminded that a blanket protective order is not itself sufficient
4 to show “good cause” for sealing particular documents. *See Foltz*, 331 F.3d at 1133;
5 *Beckman Indus.*, 966 F.2d at 476; *San Jose Mercury News, Inc. v. U.S. District Court,*
6 *N. Dist.*, 187 F.3d 1096, 1103 (9th Cir. 1999).

7
8 **III. CONCLUSION & ORDER**

9 In light of the foregoing, the Court **GRANTS** FRI’s motion to file documents
10 under seal in ECF No. 242 and ORI’s request to file documents under seal in ECF
11 No. 280; **GRANTS IN PART** and **DENIES IN PART** Shimizu’s request to file
12 documents under seal in ECF No. 208; and **DENIES WITHOUT PREJUDICE** the
13 remaining requests in ECF Nos. 190, 193, 216, 221, 223, 231, 234, 236, 247, 250,
14 276, 303, 312, and 318.

15 If the parties wish to re-file any denied request, addressing the defects
16 identified in this order, it may do so no later than **March 27, 2017** after the issuance
17 of this order. Otherwise, the parties are instructed to file the unredacted versions of
18 the aforementioned documents on the public docket no later than **March 27, 2017**
19 after the issuance of this order. When filing the documents on the public docket, the
20 parties must strictly adhere to the relevant Federal Rules of Civil Procedure, this
21 district’s Civil Local Rules, this Court’s Standing Order for Civil Cases, and this
22 district’s Electronic Case Filing Administrative Policies & Procedures Manual. Non-
23 compliance with this order or any relevant rules may result in sanctions pursuant to
24 Civil Local Rule 83.1

25 **IT IS SO ORDERED.**

26
27 **DATED: March 17, 2017**

28

Hon. Cynthia Bashant
United States District Judge