

1 COOLEY LLP
ANTHONY M. STIEGLER (126414)
2 (astiegler@cooley.com)
EAMONN GARDNER (310834)
3 (egardner@cooley.com)
JON F. CIESLAK (268951)
4 (jcieslak@cooley.com)
SOPHIA M. RIOS (305801)
5 (srios@cooley.com)
4401 Eastgate Mall
6 San Diego, CA 92121
Telephone: (858) 550-6000
7 Facsimile: (858) 550-6420

8 *Attorneys for Plaintiff and Counter-Defendant*
ChromaDex, Inc.
9

10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**
12 **(SOUTHERN DIVISION)**
13

14 ChromaDex, Inc. ,
15 Plaintiff,
16 v.
17 Elysium Health, Inc.,
18 Defendant.

Case No. SACV 16-02277-CJC(DFMx)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
TO DISMISS THE THIRD, FOURTH, AND
FIFTH AMENDED COUNTERCLAIMS**

Date: April 24, 2017
Time: 1:30 p.m.
Judge: Hon. Cormac J. Carney

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

Table of Contents

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

	Page
I. INTRODUCTION	1
II. STATEMENT OF FACTS	3
A. ChromaDex and NIAGEN	3
B. Elysium Agrees to Purchase NIAGEN from ChromaDex in a February 3, 2014 “NIAGEN Supply Agreement”	3
C. ChromaDex’s Complaint and Elysium’s Counterclaim	5
III. LEGAL STANDARDS	6
A. Rule 12(b)(6)	6
B. Rule 9(b)	6
IV. ARGUMENT	7
A. Elysium’s Fraud Claim Should Be Dismissed with Prejudice Because It Is Not, and Cannot Be, Pled with Particularity (Third Counterclaim)	7
1. Elysium Fails to Plead Falsity with Particularity	7
2. Elysium Fails to Plausibly Plead Reliance with Particularity	8
B. Elysium’s Patent Misuse Claim Is Not a Cognizable Claim and Would Fail Even It Were (Fourth Counterclaim)	11
1. Binding Federal and Ninth Circuit Law Holds that Patent Misuse Is Not a Cognizable Affirmative Cause of Action	11
2. A Patent Misuse Claim Would Fail Anyway Because ChromaDex’s Conduct Does Not Constitute “Tying”	12
3. There Is No Tying Because the Patent and Trademark Licenses Are Not Separate Products	14
C. Elysium Fails to Plead a Violation of the UCL (Fifth Counterclaim)	15
1. Elysium’s UCL Claim Does Not Provide Adequate Notice of the Allegedly Offending Conduct	16
2. Elysium Fails to Plead a Violation of Any Law As Required to State a Claim Under the UCL’s “Unlawful” Prong	17
a. Patent Misuse Is Not an Unlawful Predicate for a UCL Claim	18
b. Elysium’s Allegation that ChromaDex Fraudulently Breached the NIAGEN Supply Agreement Is Not an Unlawful Predicate	19
3. Elysium Fails to Plead a Violation of the UCL’s “Unfair” Prong	21
a. Elysium’s Claims Concerning Unfair Contract Terms Are Not Cognizable Under the UCL	22

Table of Contents
(continued)

	Page
b. Elysium Fails to Plead Damages Resulting from the Alleged Practice of Requiring Customers to Enter Trademark Licenses.....	23
D. Leave to Amend the Third, Fourth, and Fifth Counterclaims Should Be Denied	24
V. CONCLUSION	25

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

Aleksick v. 7-Eleven, Inc.,
205 Cal. App. 4th 1176 (2012) 17

Almasi v. Equilon Enters., LLC,
2012 WL 3945528 (N.D. Cal. Sept. 10, 2012)..... 21

Ashcroft v. Iqbal,
556 U.S. 662 (2009)..... 6

B. Braun Med., Inc. v. Abbott Labs.,
124 F.3d 1419 (Fed. Cir. 1997) 12

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007)..... 6

Bonin v. Calderon,
59 F.3d 815 (9th Cir. 1995)..... 24

Brulotte v. Thys,
379 U.S. 29 (1964)..... 18, 19

Cadlo v. Owens-Illinois, Inc.,
125 Cal. App. 4th 513 (2004) 10

Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047 (9th
Cir. 2011)..... 6, 8

Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co.,
20 Cal. 4th 163 (1999)..... 15, 21

Conrad v. Bank of Am.,
45 Cal. App. 4th 133 (1996) 11

Cont’l Auto. GmbH v. iBiquity Digital Corp.,
2015 WL 859569 (N.D. Ill. Feb. 26, 2015)..... 12

Crews v. Wachovia Mortg. Corp.,
2010 U.S. Dist. LEXIS 77660 (C.D. Cal. July 23, 2010) 11

**Table of Authorities
Continued**

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

	Page(s)
<i>Dollar Tree Stores Inc. v. Toyama Partners LLC</i> , 875 F. Supp. 2d 1058 (N.D. Cal. 2012).....	23
<i>Enercon GmbH v. Erdman</i> , 13 F. App’x 651 (9th Cir. 2001).....	2, 12
<i>Engalla v. Permanente Med. Grp., Inc.</i> , 15 Cal. 4th 651 (1997).....	10
<i>Fox Hollow of Turlock Owners’ Ass’n v. Sinclair</i> , 2007 WL 987873 (E.D. Cal. Mar. 30, 2007).....	16
<i>Gidding v. Anderson</i> , 2009 WL 666954 (N.D. Cal. Mar. 13, 2009).....	25
<i>Glen Holly Entm’t, Inc. v. Tektronix, Inc.</i> , 100 F. Supp. 2d 1086 (C.D. Cal. 1999).....	7, 20
<i>In re GlenFed Inc. Sec. Litig.</i> , 42 F.3d 1541 (9th Cir. 1994).....	7
<i>Gonzalez v. Wilmington Trust</i> , 2015 WL 12081028 (S.D. Cal. Sept. 28, 2015).....	17
<i>Graham v. VCA Antech, Inc.</i> , 2016 WL 5958252 (C.D. Cal. Sept. 12, 2016).....	20
<i>Hoganas A.B. v. Dresser Indus.</i> , 9 F.3d 948 (Fed. Cir. 1993).....	19
<i>Illinois Tool Works Inc. v. Indep. Ink, Inc.</i> , 547 U.S. 28 (2006).....	14
<i>IV Sols., Inc. v. Conn. Gen. Life Ins. Co.</i> , 2015 WL 12843822 (C.D. Cal. Jan. 29, 2015).....	22, 23
<i>Janda v. T-Mobile USA, Inc.</i> , 378 F. App’x 705 (9th Cir. 2010).....	22, 23
<i>Jefferson Par. Hosp. Dist. No. 2 v. Hyde</i> , 466 U.S. 2 (1984).....	14, 15

**Table of Authorities
Continued**

Page(s)

1
2
3 *Ketab Corp. v. Mesriani & Assocs.*,
2015 WL 8022874 (C.D. Cal. Dec. 4, 2015)..... 17
4
5 *Linear Tech. Corp. v. Applied Materials, Inc.*,
152 Cal. App. 4th 115 (2007) 15, 22, 23
6
7 *Mirkin v. Wasserman*,
5 Cal. 4th 1082 (1993) 9
8
9 *Mozart Co. v. Mercedes-Benz of N. Am., Inc.*,
593 F. Supp. 1506 (N.D. Cal. 1984)..... 13, 14
10
11 *N. Pac. Ry. Co. v. United States*,
356 U.S. 1 (1958)..... 12
12
13 *Navarro v. Block*,
250 F.3d 729 (9th Cir. 2001) 6, 12
14
15 *Park-Kim v. Daikin Indus., Ltd*,
2016 WL 6744764 (C.D. Cal. Nov. 14, 2016) 16
16
17 *People v. McKale*,
25 Cal. 3d 626 (1979) 18
18
19 *Rick-Mik Enters., Inc. v. Equilon Enters. LLC*,
532 F.3d 963 (9th Cir. 2008) 15
20
21 *Roots Ready Made Garments Co., W.L.L. v. Gap, Inc.*,
405 F. App'x 120 (9th Cir. 2010)..... 22
22
23 *Rosenbluth Int'l Inc. v. Superior Court*,
101 Cal. App. 4th 1073 (2002), *as modified* (Sept. 11, 2002) 19
24
25 *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*,
72 Cal. App. 4th 861 (1999) 21
26
27 *Samura v. Kaiser Found. Health Plan, Inc.*,
17 Cal. App. 4th 1284 (1993) 22
28
29 *Saunders v. Superior Court*,
27 Cal. App. 4th 832 (1994) 18

**Table of Authorities
Continued**

Page(s)

1

2

3 *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*,

4 806 F.2d 1393 (9th Cir. 1986) 24

5 *ScripsAmerica, Inc. v. Ironridge Glob. LLC*,

6 119 F. Supp. 3d 1213 (C.D. Cal. 2015) 8

7 *Shroyer v. New Cingular Wireless Servs., Inc.*,

8 622 F.3d 1035 (9th Cir. 2010) 19

9 *Sonoma Foods, Inc. v. Sonoma Cheese Factory, LLC*,

10 634 F. Supp. 2d 1009 (N.D. Cal. 2007)..... 17

11 *Spiegler v. Home Depot U.S.A., Inc.*,

12 2008 WL 2699787 (C.D. Cal. June 30, 2008)..... 23

13 *Sprewell v. Golden State Warriors*,

14 266 F.3d 979 (9th Cir. 2001) 6

15 *In re Stac Elecs. Sec. Litig.*,

16 89 F.3d 1399 (9th Cir. 1996) 7

17 *Stevenson Real Estate Servs., Inc. v. CB Richard Ellis Real Estate*,

18 138 Cal. App. 4th 1215 (2006) 19

19 *Sumitomo Mitsubishi Silicon Corp. v. MEMC Elec. Materials, Inc.*,

20 2007 WL 2318903 (N.D. Cal. Aug. 13, 2007), *aff'd*, 301 F. App'x 959

21 (Fed. Cir. 2008)..... 12

22 *Sybersound Records, Inc. v. UAV Corp.*,

23 517 F. 3d 1137 (9th Cir. 2008) 18

24 *Tenzer v. Superscope, Inc.*,

25 39 Cal. 3d 18 (1985) 21

26 *Vaccarino v. Midland Nat. Life Ins., Co.*,

27 2011 WL 5593883 (C.D. Cal. Nov. 14, 2011) 16

28 *Vess v. Ciba-Geigy Corp. USA*,

317 F.3d 1097 (9th Cir. 2003) 6, 7, 20, 21

VP Racing Fuels, Inc. v. Gen. Petroleum Corp.,

673 F. Supp. 2d 1073 (E.D. Cal. 2009) 18

**Table of Authorities
Continued**

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

Page(s)

Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc.,
178 F. Supp. 2d 1099 (C.D. Cal. 2001)..... 15, 21

Williams v. Oberon Media, Inc.,
2010 WL 1644888 (C.D. Cal. Mar. 4, 2010)2, 16

Windsurfing Int’l Inc. v. AMF, Inc.,
782 F.2d 995 (Fed. Cir. 1986) 11

Zila, Inc. v. Tinnell,
502 F.3d 1014 (9th Cir. 2007) 18, 19

Statutes

Cal. Bus. & Prof. Code § 17200, *et seq.*.....*passim*

Other Authorities

Federal Rules of Civil Procedure

8*passim*

9(b)..... 6

12(b)(6)..... 6

1 **I. INTRODUCTION**

2 Plaintiff and Counter-Defendant ChromaDex, Inc. (“ChromaDex”) is the only
3 U.S. commercial supplier of nicotinamide riboside, a vitamin B₃ metabolite covered
4 by ChromaDex’s patent estate and sold under the brand name NIAGEN. Defendant
5 and Counterclaimant Elysium Health, Inc. (“Elysium”) is one of ChromaDex’s
6 customers. Elysium purchases NIAGEN and another ChromaDex product,
7 pTeroPure, and combines them with inactive ingredients in a consumer health
8 supplement named “Basis.” Basis is Elysium’s only product and source of revenue.

9 ChromaDex filed its Complaint against Elysium for breach of contract and
10 fraud, and supplemented its allegations in a First Amended Complaint (“FAC”),
11 adding trade secret misappropriation claims. In 2016, Elysium tried to cheat
12 ChromaDex by (1) fraudulently inducing ChromaDex to fill extraordinarily large
13 purchase orders of NIAGEN and pTeroPure, but never paying for, or intending to pay
14 for, the upfront purchase price or the back end royalties for the products; and
15 (2) simultaneously poaching two ChromaDex employees and conspiring with them to
16 steal certain of ChromaDex’s proprietary trade secret data and information. Elysium
17 currently owes ChromaDex over \$4 million on the breach of contract claims alone.

18 In response, Elysium filed a Counterclaim and then a First Amended
19 Counterclaim (“FACC”) disputing the amount owed and—in a case of buyer’s
20 remorse—retroactively complaining about the parties’ negotiated agreements.
21 Elysium contends through five causes of action that ChromaDex breached the parties’
22 agreements, fraudulently induced Elysium to enter a Trademark License and Royalty
23 Agreement, misused its patents through an unlawful tying arrangement, and violated
24 California’s Unfair Competition Law (“UCL”). ChromaDex now moves to dismiss
25 Elysium’s fraudulent inducement (third), patent misuse (fourth), and UCL (fifth)
26 counterclaims for failure to state a claim upon which relief can be granted, with
27 prejudice.

28 Elysium’s third claim for fraudulent inducement should be dismissed with

1 prejudice because it does not, and cannot, comply with the heightened pleading
2 requirements of Federal Rule of Civil Procedure 9(b), which require it to plausibly
3 allege reasonable reliance on the alleged misrepresentation that all ChromaDex
4 customers paid royalties. However, because Elysium alleges and concedes that “it had
5 no choice but to agree to ChromaDex’s [royalty] requirement” if it wanted a supply of
6 NIAGEN (FACC ¶ 5), it cannot plead reliance. Elysium’s only product, Basis, is
7 dependent on ChromaDex supplying Elysium with its proprietary products, and
8 Elysium concedes that without with them Elysium would have had no product at all.
9 Elysium, therefore, does not plead, and cannot plead, that it reasonably relied on the
10 alleged misrepresentation that all NIAGEN purchasers paid royalties to induce
11 Elysium into purchasing the necessary supply for its only product.

12 Elysium’s fourth claim for patent misuse should be dismissed with prejudice
13 because it is *only* an equitable defense to patent infringement, and not a cognizable
14 affirmative cause of action. Indeed, the Ninth Circuit has found that asserting an
15 affirmative patent misuse claim is frivolous and sanctionable. *Enercon GmbH v.*
16 *Erdman*, 13 F. App’x 651, 652 (9th Cir. 2001). Even if the patent misuse claim were
17 cognizable, moreover, Elysium fails to plead an unlawful tying arrangement.

18 Elysium’s fifth cause of action for violation of the UCL should be dismissed
19 with prejudice because Elysium fails to plead and specify which acts or practices it
20 contends are unlawful, which statutes the acts or practices allegedly violate, and which
21 acts or practices it contends are unfair. *Williams v. Oberon Media, Inc.*, 2010 WL
22 1644888, at *5 (C.D. Cal. Mar. 4, 2010). Even if the FACC did provide the required
23 specificity, however, the claim would still fail because (1) ChromaDex has not
24 violated any underlying law and (2) the UCL’s unfairness prong does not protect
25 corporate plaintiffs who—like Elysium and ChromaDex—were not competitors at the
26 time of the alleged conduct.

27 For all of these reasons ChromaDex moves the Court to dismiss Elysium’s
28 third, fourth, and fifth counterclaims with prejudice.

1 **II. STATEMENT OF FACTS**

2 **A. ChromaDex and NIAGEN**

3 ChromaDex is the exclusive commercial supplier of nicotinamide riboside, a
4 naturally occurring form of vitamin B₃ that promotes healthy metabolic processes.
5 (FACC ¶¶ 25–28). ChromaDex sells nicotinamide riboside under the trademarked
6 brand name NIAGEN. (FACC ¶ 26.) ChromaDex in-licensed several patents
7 regarding nicotinamide riboside, giving it lawful exclusive control in the United States
8 over its production and supply. (FACC ¶ 32.) ChromaDex supplies NIAGEN as an
9 ingredient to several direct-to-consumer sales companies, like Elysium, who include
10 NIAGEN as an ingredient in their health supplements. (FACC ¶¶ 2–3.)

11 **B. Elysium Agrees to Purchase NIAGEN from ChromaDex in a**
12 **February 3, 2014 “NIAGEN Supply Agreement”**

13 Elysium is one of ChromaDex’s customers. (FACC ¶ 3.) Elysium sells a single
14 product: a dietary supplement called “Basis” which combines NIAGEN and
15 pterostilbene, another health supplement ingredient supplied by ChromaDex under the
16 brand name pTeroPure. (FACC ¶¶ 2, 41.)

17 ChromaDex and Elysium robustly bargained for the terms of the February 3,
18 2014 NIAGEN Supply Agreement, first engaging in discussions for the supply of
19 NIAGEN in the summer of 2013. (FACC ¶ 42.) Both parties respectively wanted
20 different things, desired certain terms and the negotiations were protracted, extending
21 through the beginning of 2014. (FACC ¶¶ 43–53.) Elysium sought an express patent
22 license “permitting Elysium to make, use, sell, offer to sell or import products”
23 containing NIAGEN, which ChromaDex was unwilling to give, as well as a most
24 favored nation (“MFN”) pricing clause, which ChromaDex ultimately agreed to.
25 (FACC ¶¶ 45, 60.) ChromaDex wanted “upfront cash payments, minimum purchase
26 commitments, royalties and even [an] equity position[.]” in Elysium. (FACC ¶ 43.)
27 Elysium had “limited resources” and could not meet all of ChromaDex’s
28 requirements, but still wanted to purchase NIAGEN from ChromaDex. (FACC ¶ 44.)

1 In particular, Elysium did not want to agree to either (1) the full upfront asking price
2 for NIAGEN, or (2) to pay a lower upfront price supplemented by a deferred product
3 sales royalty as compensation. Because ChromaDex is the sole supplier of
4 nicotinamide riboside in the United States, however, Elysium “had no choice” but to
5 pay in order to secure its supply. (FACC ¶ 52.) Nevertheless, both parties
6 compromised on many issues. Elysium successfully negotiated for the MFN pricing
7 clause and a lower upfront purchase price, but did not obtain a patent license;
8 ChromaDex compromised by accepting a lower than desired upfront purchase price
9 and foregoing equity in Elysium, but instead negotiated successfully for product sales
10 royalties as deferred compensation for supplying NIAGEN. (See FAC Exs. A, D.)

11 The highly negotiated final terms were memorialized in two agreements signed
12 effective February 3, 2014: the “NIAGEN Supply Agreement” and the “Trademark
13 License and Royalty Agreement.” (FACC ¶ 53; FAC Exs. A, D.) The NIAGEN
14 Supply Agreement contains most of the terms for Elysium’s bulk purchase of
15 NIAGEN (FAC Ex. A), while the Trademark License and Royalty Agreement
16 contains independent provisions covering (1) Elysium’s downstream product sale
17 royalty obligations and (2) Elysium’s optional license to ChromaDex’s trademarks, if
18 Elysium uses them. The optional trademark license also covers the terms for use of
19 ChromaDex’s “trademarks, logos, patent numbers” as well as “advertising,
20 promotional, and/or merchandising materials” that ChromaDex may provide from
21 time to time, and which Elysium could choose to use, or not. (FAC Ex. D § 1.) The
22 trademark license is 100% optional—Elysium is not required to use any of
23 ChromaDex’s trademarks or other licensed materials. (*Id.* § 3.1.)

24 Separately and independently under the Trademark License and Royalty
25 Agreement, Elysium is obligated to pay royalties on its downstream sales of products
26 containing NIAGEN, which is the deferred portion of Elysium’s purchase price for
27 NIAGEN. (*Id.* § 9.3 (determining royalty rate based on average price of NIAGEN
28 supplied to Elysium in a calendar year); FACC ¶ 56.) The parties agreed that the

1 royalty rate may increase in two circumstances: (1) as Elysium’s total sales increase,
2 and (2) if ChromaDex reduces the bulk price of NIAGEN and thereby permits
3 Elysium to shift more of its payment obligation from upfront payments to deferred
4 royalty payments. (FAC Ex. D §§ 9.2, 9.3; FACC ¶ 57–58.) These provisions were
5 negotiated to support and assist Elysium as a cash-strapped start-up company, by
6 providing Elysium with relief from having to pay the full product purchase price at the
7 time of purchase and essentially extending Elysium credit.

8 The terms of the NIAGEN Supply Agreement and Trademark License and
9 Royalty Agreement differ from the terms ChromaDex has with some other customers.
10 Unlike Elysium, not all customers take a trademark license. (FACC ¶ 39.) While
11 Elysium’s trademark license is optional, some customers are required to use
12 ChromaDex’s trademarks associated with their downstream sales, which is of value to
13 ChromaDex for branding purposes. (FACC ¶ 40.) Similarly, not all customers enjoy
14 a “Most Favored Nations” pricing clause, like Elysium does. (See FACC ¶ 67.)
15 Similarly not all customers are required to pay royalties like Elysium does, nor do all
16 enjoy deferred purchase price relief, like Elysium does. (FACC ¶ 68.) These
17 differences result naturally from the arm’s-length negotiations between ChromaDex
18 and Elysium and the parties’ interests, compared to ChromaDex’s other customers and
19 prospects.

20 C. ChromaDex’s Complaint and Elysium’s Counterclaim

21 On December 29, 2016 ChromaDex filed its Complaint against Elysium,
22 alleging that Elysium fraudulently ordered and refused to pay for approximately \$3
23 million worth of NIAGEN and pTeroPure, and had further defaulted on its royalty
24 obligations. (ECF 1.) In response, Elysium answered the Complaint and filed its
25 Counterclaim. (ECF 11.) On February 15, 2017 ChromaDex filed and served its FAC
26 adding state and federal claims against Elysium for misappropriation of trade secrets.
27 (ECF 26.) On March 6, 2017 Elysium filed a FACC which generally added details to
28 its fraud allegations. (ECF 31.)

1 In the FACC Elysium alleges that ChromaDex (1) breached the MFN and
2 certain exclusivity provisions in the NIAGEN Supply Agreement; (2) fraudulently
3 induced Elysium to enter the Trademark License and Royalty Agreement by
4 misrepresenting that all of ChromaDex’s customers entered such agreements; (3)
5 misused its patents by requiring royalty payments; and (4) violated California’s UCL
6 through this conduct.

7 **III. LEGAL STANDARDS**

8 **A. Rule 12(b)(6)**

9 Rule 12(b)(6) requires dismissal when a plaintiff has failed to present a
10 cognizable legal theory or to allege sufficient facts supporting a cognizable legal
11 theory. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). While a court resolving
12 a motion to dismiss must accept as true “all the allegations in the complaint,” it need
13 not accept “labels and conclusions” or “a formulaic recitation of the elements of a
14 cause of action.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations
15 omitted). A court must identify and disregard unreasonable inferences, unwarranted
16 deductions of fact, or legal characterizations in the complaint. *Sprewell v. Golden*
17 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). After accepting only the well-
18 pleaded allegations as true, a court then determines whether a complaint alleges a
19 “plausible” claim to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 677–79 (2009).

20 **B. Rule 9(b)**

21 In addition to the requirements of Rule 8, in actions alleging fraud or mistake,
22 Rule 9(b) requires a plaintiff to “state with particularity the circumstances constituting
23 fraud or mistake.” Rule 9(b)’s heightened pleading requirement “safeguards
24 defendant’s reputation and goodwill from improvident charges of wrongdoing.” *Vess*
25 *v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1104 (9th Cir. 2003) (citation omitted)). To
26 meet this standard, plaintiffs must “identify the who, what, when, where, and how of
27 the misconduct charged, as well as what is false or misleading about [the purportedly
28 fraudulent statement], and why it is false.” *Cafasso, U.S. ex rel. v. Gen. Dynamics C4*

1 Sys., Inc., 637 F.3d 1047, 1055 (9th Cir. 2011) (internal quotation marks omitted). In
2 the Ninth Circuit, Rule 9(b) applies to all averments of fraud, “regardless of the cause
3 of action in which they appear.” *Vess*, 317 F.3d at 1104.

4 IV. ARGUMENT

5 A. Elysium’s Fraud Claim Should Be Dismissed with Prejudice Because 6 It Is Not, and Cannot Be, Pled with Particularity (Third 7 Counterclaim)

8 While the substantive elements of a fraud claim are determined by state law, the
9 procedural requirements are governed by Rule 9(b)’s heightened pleading standard.
10 Thus to maintain a claim for fraud, a plaintiff must plead with particularity: (1) a false
11 representation as to a material fact; (2) knowledge of its falsity; (3) intent to defraud;
12 (4) actual and justifiable reliance; and (5) resulting damages. *Glen Holly Entm’t, Inc.*
13 *v. Tektronix, Inc.*, 100 F. Supp. 2d 1086, 1093 (C.D. Cal. 1999).

14 Elysium bases its fraud claim on the assertion that, on December 16, 2013,
15 Frank Jaksch, ChromaDex’s CEO, “falsely represented that all of ChromaDex’s
16 customers who signed purchase agreements to obtain nicotinamide riboside were also
17 required to sign separate trademark license and royalty agreements” (FACC ¶
18 48; *see also* FACC ¶ 105.) Elysium’s second effort to allege fraud fail to satisfy Rule
19 9(b) because they omit (1) facts showing the statement was knowingly false when
20 made and (2) facts showing that Elysium plausibly relied on the alleged false
21 statement. The Court may, and should, therefore, dismiss the fraudulent inducement
22 counterclaim with prejudice.

23 1. Elysium Fails to Plead Falsity with Particularity

24 Elysium fails to comply with Rule 9(b)’s requirement that “the statement or
25 omission must be shown to have been false or misleading *when made.*” *In re Stac*
26 *Elects. Sec. Litig.*, 89 F.3d 1399, 1404 (9th Cir. 1996). “[T]he most direct way for a
27 plaintiff to demonstrate the falseness of the charged statements is to plead
28 ‘inconsistent contemporaneous statements or information which were made by or
available to the defendants.’” *Glen Holly Entm’t*, 100 F. Supp. 2d at 1094 (quoting *In*

1 *re GlenFed Inc. Sec. Litig.*, 42 F.3d 1541, 1549 (9th Cir. 1994)). Elysium pleads no
2 such facts, and cannot do so.

3 Instead, Elysium relies only on a spreadsheet purportedly containing a
4 contradictory statement that it received *two and a half years after* the alleged false
5 statement. The alleged misrepresentation—that all ChromaDex customers
6 purportedly signed both trademark license and royalty agreements—allegedly
7 occurred during a phone call on December 16, 2013. (FACC ¶ 48.) Elysium alleges
8 that it learned inconsistent facts two and half years later, on June 13, 2016, when it
9 received a so-called “Fraudulent Spreadsheet” purportedly showing that “at least one”
10 of ChromaDex’s customers which “pre-dates Elysium” did not sign a trademark
11 license and royalty agreement. (FACC ¶ 68.) Reliance on this spreadsheet, however,
12 is insufficient for three reasons. First, the spreadsheet identifies the facts as they stood
13 in 2016 and says nothing about the terms any customer had in 2013. Second, Elysium
14 fails to plead any facts suggesting that Mr. Jaksch was aware that the unspecified
15 customer had allegedly not signed a license and royalty agreement at the time he
16 allegedly spoke—the belated spreadsheet says nothing about Mr. Jaksch’s state of
17 mind or scienter over two and half years earlier. Third, Elysium conflates the separate
18 concepts of a trademark license and a royalty payment obligation, *see* Section IV.B.2,
19 and fails to plead that any customer did not have a *royalty obligation*, rather than just
20 a trademark license, in 2013. Thus, Elysium’s FACC—like its predecessor—fails to
21 plead falsity with the required specificity and makes only conclusory allegations,
22 which renders the claim insufficient under Rule 9(b).

23 **2. Elysium Fails to Plausibly Plead Reliance with Particularity**

24 Elysium also fails to plead reliance plausibly or with particularity. *See Cafasso*,
25 637 F.3d at 1055 (“claims of fraud or mistake . . . must, in addition to pleading with
26 particularity, also plead plausible allegations”); *ScriptsAmerica, Inc. v. Ironridge Glob.*
27 *LLC*, 119 F. Supp. 3d 1213, 1252 (C.D. Cal. 2015) (“Rule 9(b) requires that reliance
28 be pleaded with particularity.”). Elysium only alleges that, after the alleged

1 misrepresentation, it simply “concluded that the issue was non-negotiable” and
2 “forwent the opportunity to negotiate an agreement with ChromaDex that did not
3 require the payment of royalties.” (FACC ¶¶ 51, 108.) However, “[i]n an action for
4 fraud, reliance is proved by showing that the defendant’s misrepresentation or
5 nondisclosure was ‘an immediate cause’ of the plaintiff’s injury-producing conduct,”
6 meaning the plaintiff “‘in all reasonable probability’ would not have engaged in the
7 injury-producing conduct.” *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1111 (1993)
8 (citation omitted). The FACC falls completely short of this standard.

9 Indeed, Elysium’s allegations regarding its negotiations with ChromaDex
10 directly *contradict* that Elysium plausibly relied on the alleged misrepresentation.
11 Negotiations regarding the NIAGEN Supply Agreement were protracted, beginning in
12 August 2013—four months before the alleged misrepresentation—and not concluded
13 until early 2014. (FACC ¶¶ 43, 53.) Elysium concedes that at this time it was a start-
14 up company with no sales and “limited resources.” (FAC Ex. A at 1; FACC ¶ 44.)
15 During this time ChromaDex allegedly “leverage[ed] its market power in the supply
16 of nicotinamide riboside to impose conditions on its customers,” such as the condition
17 that Elysium pay royalties. (FACC ¶ 6; *see also* FACC ¶¶ 28, 31, 38, 39.) Royalty
18 payments were just one of the many terms that the parties were negotiating over,
19 including “upfront cash payments, minimum purchase commitments, royalties and
20 even equity positions.” (FACC ¶ 43.) Further, ChromaDex repeatedly stated that it
21 would require Elysium to pay royalties and enter a trademark license agreement
22 before the alleged false statement *and* afterwards, without reference to the terms given
23 to any other customer. (FACC ¶¶ 6 (ChromaDex “conditioned its execution of the
24 [NIAGEN] Supply Agreement on Elysium’s simultaneous execution of the License
25 and Royalty Agreement”), 43 (ChromaDex stated it “sought to require . . . royalties”),
26 46 (ChromaDex stated it “would require Elysium . . . to enter into . . . a brand license
27 agreement” which “would include royalty obligations”), 49 (ChromaDex stated after
28 the alleged false statement that it “would require” a trademark license and royalty

1 agreement).) Although unsuccessful in negotiating away the royalty obligation,
2 Elysium successfully rebuffed ChromaDex’s request for equity, negotiated a favorable
3 preferred pricing MFN provision, obtained a form of exclusivity, and secured other
4 negotiation “wins” in the parties’ robust negotiation. (FACC ¶¶ 8–10.) Against this
5 backdrop, Elysium’s claim that, after arduously negotiating for over *four months*, it
6 simply dropped its resistance to paying royalties based on the single alleged statement,
7 which Elysium alleges was made after ChromaDex repeatedly told Elysium that if it
8 wanted a deal it would have to pay royalties, is not plausible.¹ Ultimately, Elysium
9 pleads, and concedes, that it entered the Trademark License and Royalty Agreement
10 because “it had no choice but to agree to ChromaDex’s requirement,” and because it
11 wanted and needed NIAGEN as an ingredient for its only product, and not because it
12 relied on the alleged misrepresentation. (FACC ¶ 52.)

13 Nor has Elysium pleaded with particularity that its alleged reliance was an
14 “immediate cause” of its damages. Elysium does not allege that it would not have
15 entered the agreement but for the alleged false statement, or even that it would have
16 been able to negotiate a deal that did not contain a royalty payment. (See FACC ¶¶
17 51–52, 108.) See *Cadlo v. Owens-Illinois, Inc.*, 125 Cal. App. 4th 513, 519 (2004)
18 (“Actual reliance occurs when . . . absent such representation, the plaintiff would not,
19 in all reasonable probability, have entered into the transaction.” (citing *Engalla v.*
20 *Permanente Med. Grp., Inc.*, 15 Cal. 4th 651, 976 (1997)). To the contrary, given
21 ChromaDex’s position as the sole United States commercial supplier of nicotinamide
22 riboside, Elysium’s start-up status, lack of sales, lack of any other products, and
23 ChromaDex’s repeated statements that it required Elysium to pay royalties as part of
24 the deferred purchase price in order to supply Elysium with NIAGEN, the FACC
25

26 ¹ Nor is it plausible that ChromaDex, if it truly did have the intent of fraudulently
27 inducing Elysium to pay royalties, would wait to make such a statement after
28 negotiating royalty payments for over four months and even exchanging draft
agreements. (FACC ¶ 43.)

1 pleads no facts with particularity or otherwise which establish that Elysium “in all
2 reasonable probability” could and would have refused to pay royalties or enter a
3 trademark license agreement and still obtain a supply of NIAGEN. The claim
4 independently fails on that basis. *See Crews v. Wachovia Mortg. Corp.*, 2010 U.S.
5 Dist. LEXIS 77660, at *9-11 (C.D. Cal. July 23, 2010) (concluding that plaintiff failed
6 to show reasonable reliance because she failed to show that “but for the alleged
7 fraudulent promise to modify the loan, Plaintiff would and could have satisfied her
8 mortgage obligations”) (emphasis omitted); *Conrad v. Bank of Am.*, 45 Cal. App. 4th
9 133, 159–60 (1996) (dismissing fraud claim because “[m]isrepresentation, even
10 maliciously committed, does not support a cause of action [for fraud] unless the
11 plaintiff suffered consequential damages”).

12 **B. Elysium’s Patent Misuse Claim Is Not a Cognizable Claim and**
13 **Would Fail Even It Were (Fourth Counterclaim)**

14 The FACC’s fourth claim is for “Declaratory Judgment of Patent Misuse,” in
15 which Elysium contends that ChromaDex’s “tying of access to its patent rights to a
16 royalty-bearing trademark license impermissibly broadens the scope of those patent
17 rights, with anticompetitive effect.” (FACC ¶¶ 38, 113.) This claim should be
18 dismissed, with prejudice, for three independent reasons: (1) patent misuse is only an
19 equitable defense to patent infringement, not an affirmative claim; (2) ChromaDex has
20 not tied its trademark license to its patent rights, as the Trademark License and
21 Royalty Agreement demonstrates; and (3) even if patent and trademark rights in
22 NIAGEN were linked, it would not constitute a tying arrangement because there are
23 no separate markets for the two.

24 **1. Binding Federal and Ninth Circuit Law Holds that Patent**
25 **Misuse Is Not a Cognizable Affirmative Cause of Action**

26 Patent misuse is an equitable defense to a patent infringement claim (which
27 ChromaDex has not asserted), not an affirmative cause of action. *See, e.g.,*
28 *Windsurfing Int’l Inc. v. AMF, Inc.*, 782 F.2d 995, 1001 (Fed. Cir. 1986) (referring to

1 patent misuse as an affirmative defense). “The doctrine of patent misuse is an
2 extension of the equitable doctrine of unclean hands, ‘whereby a court of equity will
3 not lend its support to enforcement of a patent that has been misused.’” *Sumitomo*
4 *Mitsubishi Silicon Corp. v. MEMC Elec. Materials, Inc.*, 2007 WL 2318903, at *15
5 (N.D. Cal. Aug. 13, 2007), *aff’d*, 301 F. App’x 959 (Fed. Cir. 2008) (citation omitted).

6 Elysium’s attempt to assert patent misuse as an affirmative claim also violates
7 binding Ninth Circuit precedent. In *Enercon GmbH v. Erdman*, the court upheld the
8 imposition of sanctions against a party for filing an affirmative patent misuse claim.
9 13 F. App’x at 652. The Ninth Circuit held that “patent misuse is an affirmative
10 defense to a suit for patent infringement, not an independent cause of action,” and
11 therefore upheld the district court’s decision that the plaintiff’s complaint was
12 frivolous and sanctionable.² Accordingly, Elysium’s patent misuse counterclaim lacks
13 a cognizable legal theory, has been held sanctionable by other courts, and should be
14 dismissed with prejudice. *See Navarro*, 250 F.3d at 732.

15 2. A Patent Misuse Claim Would Fail Anyway Because 16 ChromaDex’s Conduct Does Not Constitute “Tying”

17 Tying is “an agreement by a party to sell one product but only on the condition
18 that the buyer also purchases a different (or tied) product, or at least agrees that he will
19 not purchase that product from any other supplier.” *N. Pac. Ry. Co. v. United States*,
20 356 U.S. 1, 5–6 (1958). It therefore requires both a “tying product” and a distinct

21
22 ² Elysium can point to several district court cases from outside this Circuit which
23 permitted affirmative counterclaims for patent misuse where the validity of the patent
24 was at issue. *See Cont’l Auto. GmbH v. iBiquity Digital Corp.*, 2015 WL 859569, at
25 *7 (N.D. Ill. Feb. 26, 2015) (collecting cases). These cases—which are non-binding
26 and distinguishable in any event—rely on a misinterpretation of a Federal Circuit
27 case, and have been disapproved. *Id.* at *7 (“after considering the various cases, this
28 Court concludes that patent misuse cannot be brought as a stand-alone cause of
action”); *see also B. Braun Med., Inc. v. Abbott Labs.*, 124 F.3d 1419, 1427–28 (Fed.
Cir. 1997) (“the defense of patent misuse may not be converted to an affirmative
claim for damages simply by restyling it as a declaratory judgment counterclaim”).

1 “tied product” that must also be purchased. Elysium creatively claims that
2 ChromaDex’s patent rights³ covering NIAGEN are the tying product, and that
3 ChromaDex’s trademark rights in the NIAGEN trademark are the tied product. (*See*
4 FACC ¶ 112.) However, the theory does not bear any scrutiny and the claim would
5 fail anyway because the trademark rights are wholly *optional* under the express terms
6 of the Trademark License and Royalty Agreement—Elysium need not use
7 ChromaDex’s trademarks. Elysium pays royalties on product sales to compensate
8 ChromaDex for that portion of the product purchase price that Elysium claimed it
9 could not afford to pay upfront, when it placed a purchase order. Elysium does not
10 pay royalties for the use of a trademark license—*i.e.*, it does not purchase the
11 allegedly tied product—and accordingly, there can be no tying. *Mozart Co. v.*
12 *Mercedes-Benz of N. Am., Inc.*, 593 F. Supp. 1506, 1515–16 (N.D. Cal. 1984) (“No
13 tying arrangement exists, . . . unless it is . . . demonstrated that the purchase of the
14 tying product is conditioned on the purchase of the tied product.”). The lack of a tied
15 product fundamentally defeats Elysium’s theory.

16 Section 9 of the Trademark License and Royalty Agreement memorializes
17 Elysium’s obligation to pay royalties. (FAC Ex. D § 9.) Specifically, Section 9.2
18 states that “Elysium Health shall pay to ChromaDex . . . royalties (‘Base Royalty
19 Rate’) on cumulative worldwide Net Sales of all Qualifying Products by Elysium
20 Health, and its Affiliates.” (*Id.*) “Qualifying Products” are defined in Section 1 as “a
21 dietary supplement under [Elysium’s] brand, model or SKU which contain [an
22 ingredient supplied by ChromaDex],” *e.g.*, NIAGEN. (*Id.* § 1.) The royalties are,
23 therefore, specifically tied to the supply and resale of the NIAGEN product (“Basis”),
24

25 ³ Elysium alleges in only conclusory fashion that it receives “an implied sublicense to
26 ChromaDex’s patents under principles of patent exhaustion and other applicable law.”
27 (FACC ¶ 54.) At the same time, Elysium admits that it does not have an express
28 patent sublicense—indeed, it was unsuccessful in its attempts to negotiate for one.
(FACC ¶¶ 47, 49.) This conclusory allegation is also insufficient to support Elysium’s
purported patent misuse counterclaim.

1 and expressly not tied to the use of ChromaDex’s trademarks.

2 Indeed, there is no requirement in Section 9—or anywhere else in the
3 Trademark License and Royalty Agreement—that Elysium must use ChromaDex’s
4 trademarks on the “Qualifying Products” at all. Instead, the Trademark License and
5 Royalty Agreement provides Elysium with the discretion to use ChromaDex’s
6 trademarks and other “Licensed Materials” if it wants to, but Elysium pays nothing
7 more if it does and nothing less if it does not. (*Id.*) Accordingly, and as specifically
8 alleged and conceded by Elysium, the obligation to pay royalties is completely
9 unrelated to its optional right to use ChromaDex’s trademarks. (FACC ¶¶ 56, 57
10 (“Not only is the royalty obligation unconnected to use of ChromaDex’s trademarks
11 . . .”).) This does not, and cannot, as a matter of established hornbook law, constitute
12 a tying arrangement. *See Mozart Co.*, 593 F. Supp. at 1515–16. Elysium’s attempt to
13 welch on its royalty obligation by asserting a non-cognizable, rejected, sanctionable,
14 patent misuse offensive claim is unsupportable under binding Federal and Ninth
15 Circuit law and the claim should be dismissed, with prejudice.

16 **3. There Is No Tying Because the Patent and Trademark**
17 **Licenses Are Not Separate Products**

18 Elysium’s patent misuse claim also fails because, even if ChromaDex’s patent
19 and trademark rights were linked, it would not constitute an unlawful tying
20 arrangement because the trademark license is not a “separate product” from the patent
21 rights. “[T]here is nothing inherently anticompetitive about packaged sales.”
22 *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 24-25 (1984), *abrogated on*
23 *other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006). To
24 comprise an unlawful tying arrangement, there must be “two distinguishable product
25 markets” involved. *Id.* at 21. The existence of distinct products capable of being
26 unlawfully tied depends “not on the functional relation between them, but rather on
27 the character of the demand for the two items.” *Id.* at 19. There must be “a sufficient
28 demand for the purchase of [the tied product] separate from [the tying product] to

1 identify a distinct product market.” *Id.* at 21-22; *see also Rick-Mik Enters., Inc. v.*
2 *Equilon Enters. LLC*, 532 F.3d 963, 975 (9th Cir. 2008).

3 Thus, in this case, “no tying arrangement can exist unless there is a sufficient
4 demand for the purchase of [a trademark license for NIAGEN] separate from [the
5 supply of NIAGEN] to identify a distinct product market in which it is efficient to
6 offer [the trademark license] separately from [NIAGEN].” *Jefferson Par. Hosp. Dist.*
7 *No. 2*, 466 U.S. at 21–22. Elysium has not alleged, and could not allege, that there is
8 independent demand for a NIAGEN trademark license such that there are distinct
9 product markets. Moreover, Elysium cannot plead distinct product markets—the only
10 way a purchaser would have any use for the NIAGEN trademark would be if it was
11 actually selling a product that contained NIAGEN. Accordingly, because Elysium
12 cannot plead a tying arrangement, its patent misuse claim fails as a matter of law and
13 the claim should be dismissed with prejudice.

14 **C. Elysium Fails to Plead a Violation of the UCL (Fifth Counterclaim)**

15 Elysium’s fifth counterclaim is under the California UCL. Cal. Bus. & Prof.
16 Code § 17200, *et seq.* The UCL provides that “unfair competition shall mean and
17 include any unlawful, unfair or fraudulent business act or practice.” *Id.* “The UCL
18 was enacted ‘to protect both consumers and competitors by promoting fair
19 competition in commercial markets for goods and services.’” *Linear Tech. Corp. v.*
20 *Applied Materials, Inc.*, 152 Cal. App. 4th 115, 135 (2007). Elysium alleges three
21 purportedly “unlawful and/or unfair acts or practices”⁴ under the UCL:

22 _____
23 ⁴ Elysium does not appear to assert a claim under the fraudulent prong of the UCL.
24 *Cf. Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999)
25 (“Because [the UCL] is written in the disjunctive, it establishes three varieties of
26 unfair competition—acts or practices which are unlawful, or unfair, or fraudulent.”)
27 To the extent that it does, the claim would be subject to Rule 9(b) and would fail for
28 the same reasons explained in Section IV.C.2.b *infra*, and because Elysium does not
allege the public would be deceived by ChromaDex’s alleged conduct. *Watson Labs.,*
Inc. v. Rhone-Poulenc Rorer, Inc., 178 F. Supp. 2d 1099, 1121 (C.D. Cal. 2001)
 (“[T]here is no case authority that ‘fraudulent’ business acts are separately actionable

- 1 1. “conditioning its supply of nicotinamide riboside on the purchaser’s
- 2 agreement to license ChromaDex’s trademarks” (FACC ¶ 117);
- 3 2. “stepping up the royalty rates tied to its supply of nicotinamide riboside as
- 4 its patent and market power decreases” (FACC ¶ 118); and
- 5 3. ChromaDex’s “breaches of the NR Supply, its active and deliberate
- 6 concealment of those breaches from Elysium, and its attempt to defraud
- 7 Elysium by its presentation to Elysium of the Fraudulent Spreadsheet”
- 8 (FACC ¶ 119).

9 None of these alleged acts violate either of the UCL prongs at issue.

10 **1. Elysium’s UCL Claim Does Not Provide Adequate Notice of**

11 **the Allegedly Offending Conduct**

12 As a preliminary matter, the FACC is deficient because it fails to specify which

13 acts or practices it contends are unlawful and which acts or practices it contends are

14 unfair. Instead, Elysium improperly lumps these two prongs of the UCL together,

15 alleging that ChromaDex engaged in three acts or practices that are “unlawful *and/or*

16 unfair.” Courts routinely dismiss claims using the same “and/or” language, similarly

17 followed by a list of theories on which a plaintiff bases its claim, because they are

18 “vague and conclusory” and fail “to provide adequate notice of which of [the]

19 practices is unfair [and] which is unlawful.” *Vaccarino v. Midland Nat. Life Ins., Co.*,

20 2011 WL 5593883, at *8 (C.D. Cal. Nov. 14, 2011); *see also Williams*, 2010 WL

21 1644888, at *5 (dismissing UCL claim because “[p]laintiffs fail[ed] to specify which

22 acts or practices they contend are unlawful [and] which acts or practices they contend

23 are unfair . . . ”); *Park-Kim v. Daikin Indus., Ltd*, 2016 WL 6744764, at *14 (C.D.

24 Cal. Nov. 14, 2016) (dismissing claims under the unfair prong because plaintiffs did

25 “not specifically plead which alleged acts were unfair”); *see also Fox Hollow of*

26

27 _____

28 by business competitors absent a showing that the public, rather than merely the plaintiff, is likely to be deceived.”).

1 *Turlock Owners' Ass'n v. Sinclair*, 2007 WL 987873, at *5 (E.D. Cal. Mar. 30, 2007)
2 (granting motion for a more definite statement where “the second amended complaint
3 does not explain whether Plaintiffs are alleging an ‘unfair’ business act or practice, an
4 ‘unlawful’ one or a ‘fraudulent’ one”). The UCL claim should be dismissed in its
5 entirety based on this failure alone.

6 In addition, the FACC does not provide adequate notice of the UCL claim
7 because it fails to identify any statute or other law that has been violated. In order to
8 state a claim under the unlawful prong of the UCL, a plaintiff must specifically
9 identify the particular statutes that it alleges the defendant violated. *See, e.g., Ketab*
10 *Corp. v. Mesriani & Assocs.*, 2015 WL 8022874, at *4 (C.D. Cal. Dec. 4, 2015)
11 (dismissing claim under the unlawful prong where counterclaimants “fail[ed] to
12 identify in the [complaint] any specific law violated by Plaintiff’s alleged activity”);
13 *Gonzalez v. Wilmington Trust*, 2015 WL 12081028, at *2 (S.D. Cal. Sept. 28, 2015)
14 (dismissing unlawful claim where plaintiffs did not identify any statute defendants
15 violated in their complaint); *Sonoma Foods, Inc. v. Sonoma Cheese Factory, LLC*, 634
16 F. Supp. 2d 1009, 1022 (N.D. Cal. 2007) (granting motion to dismiss counterclaim,
17 because counter-claimants failed to specify any statute they allege was violated).
18 Elysium identifies no statute or regulation which ChromaDex has allegedly violated
19 and a claim under the UCL’s unlawful prong should be dismissed on this basis.
20 ChromaDex, and the Court, should not be “required to guess the predicate for the
21 UCL cause of action.” *Aleksick v. 7-Eleven, Inc.*, 205 Cal. App. 4th 1176, 1185-86
22 (2012) (dismissing unlawful claim where the complaint did not allege any statutory
23 predicate for the UCL cause of action).

24 **2. Elysium Fails to Plead a Violation of Any Law As Required to**
25 **State a Claim Under the UCL’s “Unlawful” Prong**

26 Even if the FACC adequately identified what conduct was allegedly unlawful,
27 Elysium pleads no facts showing that ChromaDex violated any law. Under the UCL,
28 “unlawful” practices are practices “forbidden by law, be it civil or criminal, federal,

1 state, or municipal, statutory, regulatory, or court-made.” *Saunders v. Superior Court*,
2 27 Cal. App. 4th 832, 838–39 (1994) (citing *People v. McKale*, 25 Cal. 3d 626, 632
3 (1979)). Accordingly, “[t]o state a cause of action based on an ‘unlawful’ business act
4 or practice under the UCL, a plaintiff must allege facts sufficient to show a violation
5 of some underlying law.” *VP Racing Fuels, Inc. v. Gen. Petroleum Corp.*, 673 F.
6 Supp. 2d 1073, 1086 (E.D. Cal. 2009).

7 **a. Patent Misuse Is Not an Unlawful Predicate for a UCL**
8 **Claim**

9 Elysium claims that the alleged practices “violated patent law and policy” by
10 “committing patent misuse.” (FACC ¶ 120.) If Elysium bases this claim on its tying
11 allegations, the claim fails along with its patent misuse cause of action. *See* Section
12 IV.B, *supra*. Because Elysium has failed to allege facts sufficient to show
13 ChromaDex unlawfully misused its patent rights through tying, patent misuse cannot
14 support its UCL counterclaim. *See Sybersound Records, Inc. v. UAV Corp.*, 517 F. 3d
15 1137, 1153 (9th Cir. 2008) (dismissing claim under the unlawful prong of the UCL
16 where plaintiff failed to state a claim under any other statutes).

17 To the extent Elysium contends that ChromaDex misused its patents by
18 “stepping up the royalty rates tied to its supply of nicotinamide riboside as its patent
19 and market power decreases,” that claim fails as well. (FACC ¶ 118.) The bargained-
20 for terms of the Trademark License and Royalty Agreement are binding on the parties,
21 and cannot constitute patent misuse except in very narrow circumstances. *See Zila,*
22 *Inc. v. Tinnell*, 502 F.3d 1014, 1020 (9th Cir. 2007). The Supreme Court created
23 those narrow circumstances in *Brulotte v. Thys*, 379 U.S. 29 (1964), in which the
24 Court held that royalty agreements are unenforceable to the extent that they extend
25 “beyond the expiration date of the patent.” *Id.* at 32. *Brulotte*, however, has no
26 application here because the Trademark License and Royalty Agreement—which
27 shares a three-year renewable term with the Supply Agreement (FAC Exs. A § 5.1, D
28 § 14.1)—does not extend past the validity of ChromaDex’s patents—which expire no

1 earlier than 2025.⁵ *See Zila*, 502 F.3d at 1023 (“*Brulotte* renders unenforceable only
2 that portion of a license agreement that demands royalty payments beyond the
3 expiration of the patent for which the royalties are paid.”). Indeed, Elysium does not
4 even make such an allegation. Accordingly, the royalties charged by ChromaDex as
5 part of the purchase price of the NIAGEN product cannot constitute patent misuse,
6 and Elysium’s claim should be dismissed with prejudice.

7 **b. Elysium’s Allegation that ChromaDex Fraudulently**
8 **Breached the NIAGEN Supply Agreement Is Not an**
9 **Unlawful Predicate**

10 Elysium alleges that ChromaDex breached the MFN and exclusivity clauses of
11 the NIAGEN Supply Agreement (as amended). (FACC ¶¶ 89–97.) It further alleges
12 that ChromaDex attempted to conceal these breaches by sending a “Fraudulent
13 Spreadsheet” that contained “blinded” and inaccurate information about ChromaDex’s
14 other customers. (FACC ¶ 66.) However, Elysium’s allegations that ChromaDex
15 breached the NIAGEN Supply Agreement cannot be a predicate “unlawful act” under
16 the UCL because it is black letter law that plaintiffs may not transform contract and
17 tort claims into UCL claims. *See Shroyer v. New Cingular Wireless Servs., Inc.*, 622
18 F.3d 1035, 1044 (9th Cir. 2010) (“a common law violation such as breach of contract
19 is insufficient” to establish a claim under the unlawful prong of the UCL); *Stevenson*
20 *Real Estate Servs., Inc. v. CB Richard Ellis Real Estate*, 138 Cal. App. 4th 1215,
21 1224–25 (2006); *see also Rosenbluth Int’l Inc. v. Superior Court*, 101 Cal. App. 4th
22 1073, 1077-78 (2002), *as modified* (Sept. 11, 2002) (noting inappropriateness of UCL

23 ⁵ The Court can take judicial notice of the patents at issue, *Hoganas A.B. v. Dresser*
24 *Indus.*, 9 F.3d 948, 954 n.27 (Fed. Cir. 1993) (taking judicial notice of a patent as it
25 was “publicly accessible”), which are incorporated by reference into Elysium’s
26 Counterclaim. (*See* FACC ¶¶ 33–37.) The patents are available from the United
27 States Patent and Trademark Office website here:

- 28
- <http://pdfpiw.uspto.gov/.piw?Docid=8383086>;
 - <http://pdfpiw.uspto.gov/.piw?Docid=8197807>;
 - <http://pdfpiw.uspto.gov/.piw?Docid=8106184>;
 - <http://pdfpiw.uspto.gov/.piw?Docid=8114626>; and
 - <http://pdfpiw.uspto.gov/.piw?Docid=777632>.

1 action “where the public in general is not harmed by the defendant’s alleged unlawful
2 practices” and the defendant’s “only customers are sophisticated corporations . . . each
3 of which negotiates contracts individually with [the defendant] and each of which
4 presumably has the resources to seek damages or other relief from [defendant] should
5 it choose to do so.”).

6 To the extent Elysium contends that the breach is actionable under the UCL
7 because the act of sending the spreadsheet itself was allegedly fraudulent, the claim
8 also fails because it has not been pled with particularity as required by Rule 9(b). Fed.
9 R. Civ. P. 9(b); *Vess*, 317 F.3d at 1104 (“Fraud allegations may damage a defendant’s
10 reputation regardless of the cause of action in which they appear, and they are
11 therefore properly subject to Rule 9(b) in every case.”). First, the “Fraudulent
12 Spreadsheet” is nothing of the sort, and Elysium cannot plead that it reasonably relied
13 on its purported misrepresentations. Even if the “blinded” tab of the spreadsheet was
14 a misrepresentation as Elysium alleges, Elysium concedes that the *correct* information
15 was also included in the very same document. (FACC ¶ 67.) Elysium does not allege,
16 nor can it, that it relied on the purported misrepresentation that was corrected in the
17 very same spreadsheet, or that it harmed Elysium in any way. *Graham v. VCA*
18 *Antech, Inc.*, 2016 WL 5958252, at *5 (C.D. Cal. Sept. 12, 2016) (“California courts
19 have held that when the ‘unfair competition’ underlying a plaintiff’s UCL claim
20 consists of a defendant’s misrepresentation, a plaintiff must have actually relied on the
21 misrepresentation” (citation omitted)).

22 Elysium does not identify with particularity any other alleged
23 misrepresentations. For example, in regards to the alleged concealment of a breach of
24 the Exclusivity Provision in the NIAGEN Supply Agreement, Elysium alleges that
25 “despite ChromaDex’s many prior statements to the contrary,” ChromaDex had been
26 breaching the Exclusivity Provision. (FACC ¶ 77.) Elysium does not identify who
27 made such statements, when and where they were made, and how they were false
28 when made—failing to meet Rule 9(b)’s heightened pleading standard. *See Glen*

1 *Holly Entm't*, 100 F. Supp. 2d at 1094; *Vess*, 317 F.3d at 1106. The same flaws doom
2 Elysium's allegations that ChromaDex "was actively recommending to other
3 customers that they create . . . products to compete with Elysium's Basis"—there are
4 zero well-pleaded facts to support this statement. (See FACC ¶ 78.) Thus, to the
5 extent Elysium's counterclaim under the "unlawful" prong of the UCL is premised on
6 ChromaDex's allegedly fraudulent breaches of contract, the claim fails.⁶

7 **3. Elysium Fails to Plead a Violation of the UCL's "Unfair"**
8 **Prong**

9 Whether a business practice constitutes unfair competition under the UCL
10 "involves an examination of [that practice's] impact on its alleged victim, balanced
11 against the reasons, justifications and motives of the alleged wrongdoer."⁷ *S. Bay*
12 *Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App. 4th 861, 886 (1999).
13 Elysium cannot plead a violation of the unfair prong for two reasons: (1) the UCL's
14 unfair prong does not apply to contracts between corporations; and (2) Elysium fails
15 to allege any harm that flows from the allegedly unfair conduct.

16
17
18

⁶ Should Elysium attempt to argue that ChromaDex fraudulently omitted to disclose
19 its alleged violations, it will not save its claim as the law requires more than simply
20 "proof that a promise was made and that it was not fulfilled" to sustain a fraud claim.
Tenzer v. Superscope, Inc., 39 Cal. 3d 18, 30 (1985).

21 ⁷ While this balancing test is "commonly applied in consumer cases," *Almasi v.*
22 *Equilon Enters., LLC*, 2012 WL 3945528, at *9 (N.D. Cal. Sept. 10, 2012), the test is
23 the most apt since the alternate test under the UCL is only applied where plaintiff and
24 defendant are direct competitors and plaintiff alleges competitive harm. The test
25 articulated in *Cel-Tech Commc'ns*, 20 Cal. 4th at 186, defines an "unfair" act as one
26 which "threatens an incipient violation of an antitrust law, or violates the policy or
27 spirit of one of those laws because its effects are comparable to or the same as a
28 violation of the law, or otherwise significantly threatens or harms competition."
Elysium's UCL claim would also fail to meet this standard for two reasons: the FACC
does not (1) allege any harm to competition or (2) identify or plead an incipient
violation of an antitrust law. *Watson Labs., Inc.*, 178 F. Supp. 2d at 1119.

1 **a. Elysium’s Claims Concerning Unfair Contract Terms**
2 **Are Not Cognizable Under the UCL**

3 To the extent Elysium bases its claim under the unfair prong on practices which
4 are based on the parties’ contracts, the claim should also be dismissed with prejudice.
5 Indeed, “where a UCL action is based on contracts not involving either the public in
6 general or individual consumers who are parties to the contract, a corporate plaintiff
7 may not rely on the UCL for the relief it seeks.” *Linear Tech*, 152 Cal. App. 4th at
8 135; *see also IV Sols., Inc. v. Conn. Gen. Life Ins. Co.*, 2015 WL 12843822, at *17
9 (C.D. Cal. Jan. 29, 2015) (finding that “*Linear Tech* essentially withdraws UCL
10 standing from non-competitor corporate plaintiffs seeking to bring a UCL action
11 based on contracts ‘not involving either the public in general or individual
12 consumers’” (citation omitted)). “[T]he statute simply was never meant to reach non-
13 competitor, business-to-business disputes flowing from negotiated agreements.” *Id.*
14 Further, the unfair prong of the UCL “does not give the courts a general license to
15 review the fairness of contracts.” *Samura v. Kaiser Found. Health Plan, Inc.*, 17 Cal.
16 App. 4th 1284, 1299 n.6 (1993).

17 Here, the first two alleged business practices concern the terms of the contracts
18 between ChromaDex and Elysium. (*See* FACC ¶¶ 117 (concerning ChromaDex’s
19 alleged requirement that to contract for a supply of NIAGEN, all customers must
20 license ChromaDex’s trademarks), 118 (concerning the royalty rate structure in the
21 Royalty and Trademark License Agreement).) These were highly negotiated terms
22 between two arm’s length businesses. Elysium may not now ask this Court under the
23 guise of the UCL to find that it has been harmed by the terms of the contract it
24 willingly and freely negotiated and agreed to. *Janda v. T-Mobile USA, Inc.*, 378 F.
25 App’x 705, 708 (9th Cir. 2010) (holding that “[u]nder the balancing test, plaintiffs
26 [did] not plausibly allege[] a harm to them because they [did] not show[] an actionable
27 misrepresentation” where contract terms were explicitly disclosed); *Roots Ready*
28 *Made Garments Co., W.L.L. v. Gap, Inc.*, 405 F. App’x 120, 122–23 (9th Cir. 2010)

1 (affirming dismissal of UCL claim under the unfair prong because complained of
2 “conduct was permitted by the plain terms of the contract”). Further, despite the fact
3 that Elysium may now have buyer’s remorse and not like the deal it struck, “the UCL
4 cannot be used to rewrite [the] contracts or to determine whether the terms of [the]
5 contracts are fair.” *Spiegler v. Home Depot U.S.A., Inc.*, 2008 WL 2699787, at *7
6 (C.D. Cal. June 30, 2008).

7 Likewise, the third alleged “practice” concerning ChromaDex’s allegedly
8 fraudulent breaches of contract cannot form the basis of a claim under the unfair
9 prong. The “claim is based on a breach of a contract that does not implicate the public
10 in general or individual consumers,” and therefore the claim fails under the UCL.
11 *Dollar Tree Stores Inc. v. Toyama Partners LLC*, 875 F. Supp. 2d 1058, 1083 (N.D.
12 Cal. 2012). Further, as explained in Section IV.C.2.b *supra*, Elysium’s allegations of
13 a fraudulent breach of contract fail to sustain its claim due to Elysium’s failure to
14 plead fraud with particularity.

15 In sum, Elysium cannot state a UCL claim by repackaging contractual terms,
16 which do not affect the public at large or consumers generally, as alleged business
17 practices and its claim under the UCL’s unfair prong should be dismissed with
18 prejudice. *IV Sols., Inc.*, 2015 WL 12843822, at *18 (“[A]t the end of the day, this is
19 a non-competitor business-to-business contract dispute. *Linear Tech* forecloses relief
20 in this scenario.”)

21 **b. Elysium Fails to Plead Damages Resulting from the**
22 **Alleged Practice of Requiring Customers to Enter**
23 **Trademark Licenses**

24 Elysium’s allegation that ChromaDex’s practice of conditioning its supply of
25 NIAGEN on its customer’s agreement to license ChromaDex’s trademarks
26 independently fails because the practice did not harm Elysium. *Cf. Janda*, 378 F.
27 App’x at 708 (affirming dismissal where “[u]nder the balancing test, plaintiffs [did]
28 not plausibly allege[] a harm”). The FACC states that “[in] exchange for the
trademark license, Elysium is required to pay a substantial royalty on all products

1 containing any ingredients supplied by ChromaDex . . . upon any sale of those
2 products.” (FACC ¶ 56 (emphasis added).) These allegations, however, misrepresent
3 the express terms of the parties’ agreements and cannot support Elysium’s UCL claim.

4 As explained in Section IV.B.2 *supra*, and as Elysium itself concedes,
5 Elysium’s “royalty obligation [is] unconnected to use of ChromaDex’s trademarks.”
6 (FACC ¶ 57. *See also* FAC Ex. D § 9.) Indeed, Elysium is not required to use
7 ChromaDex’s trademarks at all. (*See* FAC Ex. D § 3.1 (“to the extent [it] desires to
8 use ChromaDex Marks . . .).) It pays royalties as deferred compensation for the
9 NIAGEN product that it purchases, but which it said it could not afford to pay for
10 upfront. Thus any claim of damages from the alleged practice is illusory—the simple
11 fact that the two independent provisions are contained in the same agreement does not
12 enable Elysium to plausibly claim that the trademark license damaged it in the form of
13 royalty payments, especially where that allegation is directly contradicted by the
14 express terms of the agreement. Allegations regarding this alleged practice should,
15 therefore, be dismissed with prejudice for failure to plead any resulting harm.

16 **D. Leave to Amend the Third, Fourth, and Fifth Counterclaims Should**
17 **Be Denied**

18 If a complaint is dismissed for failure to state a claim, leave to amend may be
19 granted “unless the court determines that the allegation of other facts consistent with
20 the challenged pleading could not possibly cure the deficiency.” *Schreiber Distrib.*
21 *Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986); *see also Bonin v.*
22 *Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) (“Futility of amendment can, by itself,
23 justify the denial of . . . leave to amend.”). For each of the third, fourth and fifth
24 claims, Elysium can allege no further consistent facts to plead the claims, and
25 accordingly, they should be dismissed with prejudice.

26 1. Regarding Elysium’s third claim for fraudulent inducement, the FACC pleads
27 facts demonstrating that Elysium did not plausibly rely on the alleged
28 misrepresentation when entering the Trademark License and Royalty

1 Agreement. Specifically, the FACC demonstrates that (1) the parties engaged
2 in robust negotiations before and after the alleged misrepresentation; and (2)
3 Elysium entered the Trademark License and Royalty Agreement because
4 ChromaDex is the sole commercial supplier of nicotinamide riboside in the
5 United States, not because of any alleged misrepresentation. See Section
6 IV.A.2.

7 2. Regarding Elysium's fourth claim for patent misuse, leave to amend should be
8 denied because patent misuse is not a cognizable cause of action, and Elysium
9 can allege no facts that will make it so. See Section IV.B.1.

10 3. Regarding Elysium's fifth claim for violation of the UCL, the predicate claims
11 for both the unlawful and unfair prongs (the third and fourth claims) have
12 incurable defects. In addition, since Elysium's grounds for its claim under the
13 unfair prong are all based on a contract which does not affect the public at large
14 or consumers generally, relief under the UCL from these alleged practices is
15 unavailable. See Section IV.C.

16 For these reasons, any further amendment to the third, fourth, and fifth amended
17 counterclaims would be futile and the Court should dismiss them with prejudice.
18 *Gidding v. Anderson*, 2009 WL 666954, at *9 (N.D. Cal. Mar. 13, 2009).

19 **V. CONCLUSION**

20 For the foregoing reasons, ChromaDex respectfully requests that the Court
21 grant its motion to dismiss Elysium's third, fourth, and fifth amended counterclaims
22 with prejudice for failure to state a claim upon which relief can be granted.
23
24
25
26
27
28

1 Dated: March 20, 2017

COOLEY LLP
ANTHONY M. STIEGLER (126414)
EAMONN GARDNER (310834)
JON F. CIESLAK (268951)
SOPHIA M. RIOS (305801)

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

/s/ Anthony M. Stiegler

Anthony M. Stiegler (126414)
Attorneys for Plaintiff and Counter-
Defendant ChromaDex, Inc.