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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)

**CHROMADEx, INC.’S REPLY IN
SUPPORT OF MOTION TO DISMISS
ELYSIUM’S FOURTH AND FIFTH
COUNTERCLAIMS AND/OR STRIKE
PATENT MISUSE ALLEGATIONS
RELATED TO ELYSIUM’S FIFTH
COUNTERCLAIM**

Date: December 4, 2017
Time: 1:30 p.m.
Judge: Hon. Cormac J. Carney

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

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1 **I. INTRODUCTION**

2 Elysium's Opposition overreaches by arguing that ChromaDex "effectively
3 admits" its conduct "constituted unlawful patent misuse." ChromaDex makes no
4 such admission. To the contrary, ChromaDex has consistently denied any suggestion
5 its conduct constituted patent misuse, and ChromaDex only agreed to refund
6 Elysium's royalty payments as a means to substantially streamline this litigation by
7 eliminating a dispute. Elysium resists the opportunity and instead insists on litigating
8 phantom patent misuse issues as part of both its declaratory judgment claim and
9 unjust enrichment claim. The Court should dismiss these claims for multiple reasons.

10 First, Elysium fails to carry its burden to show that it has standing to bring
11 either its declaratory judgment or unjust enrichment claim. With respect to the
12 declaratory judgment claim, Elysium does not, and cannot, satisfy the U.S. Supreme
13 Court's test for declaratory judgment jurisdiction articulated in *MedImmune, Inc. v.*
14 *Genentech, Inc.*, 549 U.S. 118 (2007) because it critically fails to allege any
15 affirmative acts by ChromaDex specifically directed against Elysium or its current
16 product, which objectively give rise to a fear of imminent future harm. *Innovative*
17 *Therapies, Inc. v. Kinetic Concepts, Inc.*, 599 F.3d 1377, 1382 (Fed. Cir. 2010). With
18 respect to the unjust enrichment claim, Elysium cannot establish that under current
19 law the Court could order any further relief beyond the restitution of royalties that
20 Elysium says it seeks, and which ChromaDex has already committed to credit to
21 Elysium in a binding judicial covenant.

22 Second, Elysium's unjust enrichment claim based on patent misuse is clearly
23 not a viable claim under California law. In an attempt to save its claim, Elysium
24 makes a new 90 degree turn, now arguing for the first time that its "Restitution for
25 Unjust Enrichment" counterclaim is actually a claim for quasi-contractual restitution.
26 Notably, Elysium does not, and cannot, explain its alleged basis for a quasi-contract
27 cause of action where an express contract already exists. Instead, Elysium
28 overreaches again by falsely accusing ChromaDex of misleading the Court about

1 California law on unjust enrichment, citing an inapposite case which itself
2 demonstrates that Elysium’s claim should be dismissed.

3 Finally, if the Court chooses not to dismiss the patent misuse counterclaim (as
4 it should), at a minimum, the patent misuse allegations should be stricken from the
5 unjust enrichment claim because of ChromaDex’s binding judicial commitment to
6 credit the disputed royalties or deposit them into the Court’s registry for disposition
7 by court order. Elysium’s insistence that the Court decide a fictional patent misuse
8 claim is grounded in an improper contention that it is entitled to an advisory opinion.
9 No such right exists. The Court should, therefore, strike the immaterial allegations to
10 streamline this litigation to the actual issues in dispute.

11 **II. THE COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION OVER**
12 **ELYSIUM’S COUNTERCLAIM FOR A DECLARATORY JUDGMENT OF PATENT**
13 **MISUSE.**

14 In support of its strained argument that there is subject matter jurisdiction for
15 its declaratory judgment counterclaim, Elysium fails to cite a single case where a
16 court found subject matter jurisdiction based on allegations similar to those alleged in
17 the Second Amended Counterclaim (“SACC”). Nor does Elysium even attempt to
18 distinguish the on point cases with directly analogous facts on which ChromaDex
19 relies. *E.g.*, *Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329 (Fed. Cir. 2008);
20 *Innovative Therapies*, 599 F.3d 1377; *Ass’n for Molecular Pathology v. U.S. Patent*
21 *& Trademark Office*, 653 F.3d 1329 (Fed. Cir. 2011), *vacated on other grounds*, 467
22 Fed. Appx. 890 (Fed. Cir. 2012) (“AMP”). The law is clearly on ChromaDex’s side.
23 The burden of establishing subject matter jurisdiction was Elysium’s and its failure is
24 dispositive of this motion. *Rattlesnake Coalition v. U.S. EPA*, 509 F.3d 1095, 1102
25 n.1 (9th Cir. 2007).

26 **A. No Jurisdiction Exists to Litigate Patent Misuse as an Affirmative**
27 **Defense to Breach of Contract.**

28 Elysium does an about-face in its Opposition, now essentially abandoning its
original argument that jurisdiction over its declaratory relief claim exists because

1 ChromaDex was enforcing the royalty provisions of the Trademark License and
2 Royalty Agreement (“TLRA”). Instead, Elysium now relies on *Already, LLC v. Nike,*
3 *Inc.*, 568 U.S. 85, 91 (2013) to argue that ChromaDex has not mooted the claim
4 (Opp. at 13), but fails to note that *Already* explicitly holds that a declaratory
5 judgment claim can be mooted exactly as ChromaDex did here with respect to the
6 TLRA royalty provision, by covenanting not to enforce it. 568 U.S. at 95. *Already*
7 accordingly is of no help to Elysium’s argument and, in fact, confirms that
8 jurisdiction was mooted by ChromaDex’s conduct and covenant.

9 ChromaDex has taken two unequivocal steps to definitively moot the patent
10 misuse declaratory relief claim. First, it “unequivocally renounce[d] any rights to
11 collect, charge, or obtain royalties under the [agreement] with Elysium.” (SACC ¶
12 101 (quoting TAC ¶ 62)). Second, it ceased all alleged efforts to enforce the TLRA
13 royalty provisions. Elysium responds by arguing that “ChromaDex has provided
14 Elysium no relief whatsoever” and then simply misstates the relief available under a
15 declaratory judgment claim: Elysium, incorrectly alleges injuries it purportedly
16 suffers, like interest and attorney’s fees, which are not recoverable damages or
17 remedies in a declaratory judgment action. (Opp. at 12-14.) It is black letter law that
18 patent misuse is only an affirmative defense which “simply renders the patent
19 unenforceable.” *B. Braun Med., Inc. v. Abbott Labs.*, 124 F.3d 1419, 1428 (Fed. Cir.
20 1997). Notably, Elysium concedes that no monetary relief is available in a stand-
21 alone declaratory judgment claim and that damages “may be ordered incident to
22 declaratory relief *if supported by other substantive law.*” (Opp. at 15 (emphasis
23 added).) No other substantive law provides a basis for the ancillary damages in the
24 patent misuse declaratory relief claim asserted here and no further acts by
25 ChromaDex are required to afford Elysium the complete relief available under its
26 claim. Thus, Elysium’s “only legally cognizable injury” under its declaratory
27 judgment claim no longer exists because, given the breadth of ChromaDex’s
28 covenant not to enforce the royalty provision of the TLRA, there is no room left for

1 the conduct which Elysium alleged was the basis for declaratory relief. Accordingly,
2 this court is devoid of jurisdiction over the declaratory judgment patent misuse
3 counterclaim. *Already*, 568 U.S. at 100.

4 **B. There Is No Jurisdiction to Litigate Patent Misuse as a Defense to a**
5 **Non-Asserted and Never-Threatened Patent Infringement Claim.**

6 Elysium dedicates the majority of its Opposition to falsely arguing that the
7 Court has subject matter jurisdiction based on a threat of imminent future harm from
8 a patent litigation suit under the *MedImmune* test. (Opp. at 6-12.) However, Elysium
9 does not cite a single case finding jurisdiction based on a similar dearth of affirmative
10 acts by a patentee specifically directed at the declaratory judgment plaintiff.
11 *Innovative Therapies*, 599 F.3d at 1382 (holding that general acts by the patentee do
12 not “in the absence of any act directed toward [the declaratory judgment plaintiff],
13 meet the minimum standard discussed in *MedImmune*.”); *see also Prasco*, 537 F.3d
14 at 1339 *and SanDisk Corp. v. STMicroelectronics, Inc.*, 480 F.3d 1372, 1381 (Fed.
15 Cir. 2007) (“[J]urisdiction generally will not arise merely on the basis that a party
16 learns of the existence of a patent owned by another or even perceives such a patent
17 to pose a risk of infringement, *without some affirmative act by the patentee.*”
18 (emphasis added)).

19 **1. ChromaDex Has Not Threatened Patent Litigation Against**
20 **Elysium.**

21 To argue that ChromaDex has taken at least one affirmative act to create an
22 implied threat of patent litigation, Elysium tries to rewrite the history of the parties’
23 NIAGEN Supply Agreement. Changing its story yet again, Elysium now asserts that
24 “ChromaDex terminated its license to Elysium” with the effect of “throwing Elysium
25 into the very peril that the Supreme Court stated entitles a licensee to declaratory
26 relief.” (Opp. at 7.)

27 This is not, however, a license termination case. The only alleged license
28 Elysium ever had from ChromaDex was an “implied license” under the patent

1 exhaustion doctrine limited to using or reselling the ingredients Elysium ordered
2 from ChromaDex. (*See Opp.* at 7 n.1; SACC ¶ 5 (alleging only that Elysium has an
3 implied license under patent exhaustion doctrine).) ChromaDex has never revoked
4 any license to practice ChromaDex’s patents—and, indeed, Elysium never had a
5 license to practice ChromaDex’s patents—only to sell through the ingredients that it
6 ordered from ChromaDex pursuant to the “exhaustion doctrine.” *Quanta Computer,*
7 *Inc. v. LG Elecs., Inc.*, 553 U.S. 617, 625 (2008) (“The longstanding doctrine of
8 patent exhaustion provides that the initial authorized sale of a patented item
9 terminates all patent rights to that item.”).

10 When Elysium refused to pay for \$3M of ingredients that it ordered and
11 received from ChromaDex, and ChromaDex thereafter refused to sell anything else to
12 Elysium, ChromaDex did not revoke Elysium’s implied license. Such an implied
13 license still exists for Elysium to sell through any product that it lawfully purchased
14 from ChromaDex. However, no implied license from ChromaDex would ever extend
15 to an ingredient purchased from a third party. Elysium’s argument obviously glosses
16 over this critical distinction, intentionally conflating the two concepts with
17 deliberately loose language in what can only be viewed as an attempt to mislead the
18 Court. ChromaDex’s decision to cut off future deliveries to a delinquent customer
19 says nothing about whether ChromaDex has grounds to, or ever intends to sue
20 Elysium for patent infringement based on an ingredient that it purchased from a third
21 party.¹ *Prasco*, 537 F.3d at 1340 (holding that where patentee “[has] taken no

22
23 ¹ Elysium also does not allege that it is infringing ChromaDex’s patents. To justify
24 its failure to take any position adverse to ChromaDex, Elysium obliquely argues that
25 requiring “a party seeking a declaration of non-infringement” to allege it infringes is
26 “nonsensical.” *Opp.* at 11. But Elysium does not seek a declaration of non-
27 infringement, its patent misuse declaratory judgment claim seeks a declaration of
28 patent unenforceability. The Federal Circuit clearly holds that “[a] plaintiff may (and
should when the facts warrant) admit infringement, while seeking a liability-escaping
declaration of invalidity or *unenforceability*.” *Arrowhead Indus. Water, Inc. v.*
Ecolochem, Inc., 846 F.2d 731, 738 n.10 (Fed. Cir. 1988) (emphasis added).

1 affirmative actions at all related to [the declaratory judgment plaintiff's] *current*
2 *product*" it weighs against declaratory judgment jurisdiction (emphasis added)).
3 Elysium's argument and authorities regarding license termination are, therefore,
4 completely inapposite. (*See Opp.* at 10.)

5 All of the other cases cited by Elysium are likewise completely distinguishable
6 because they involve affirmative acts alleging infringement, which are simply not
7 present in this case. Each case relies on additional affirmative acts taken by the
8 patentee specifically directed toward the declaratory judgment plaintiff. For example,
9 in *Micron Tech., Inc. v. Mosaid Techs., Inc.*, 518 F.3d 897, 899-900 (Fed. Cir. 2008),
10 the patentee (1) sent four warning letters "strongly suggesting" that the declaratory
11 judgment plaintiff license the patentee's technology, (2) publicly stated that all
12 companies engaging in plaintiff's business were infringing, and (3) actually filed an
13 infringement action against plaintiff on related patents. In *3M Co. v. Avery Dennison*
14 *Corp.*, 673 F.3d 1372, 1379-80 (Fed. Cir. 2012), the patentee (1) expressly stated to
15 plaintiff that its product "may infringe" its patents, (2) offered a license, and (3) after
16 that offer was rejected, advised that patent infringement claim charts would be
17 forthcoming. Likewise, in *SanDisk Corp. v. STMicroelectronics, Inc.*, 480 F.3d at
18 1382, the patentee (1) asserted its right to a royalty from plaintiff based on specific
19 identified infringing activity, (2) had seasoned litigation experts present a thorough
20 infringement analysis to plaintiff, (3) emphasized the need for plaintiff to license its
21 patents, and (4) provided reverse engineering reports for plaintiff's products
22 supporting its infringement case. There are no such equivalent acts here and all three
23 cases are, therefore, off point with the facts here.

24 2. **There Is No Objective Reason for Elysium to Fear Imminent** 25 **Injury.**

26 Since Elysium cannot allege that ChromaDex has taken any affirmative actions
27 towards Elysium giving rise to declaratory relief jurisdiction, Elysium instead relies
28 on ChromaDex's public statements about Elysium or its NR patent rights in general

1 as surrogate evidence to support jurisdiction. (Opp. at 8.) In its belabored effort to
 2 create the appearance of an imminent dispute, Elysium quotes ChromaDex’s
 3 innocuous statements regarding its proprietary interest in its NR patent rights and a
 4 general business strategy that focuses “on NIAGEN as ingredient technology.” (Opp.
 5 at 8; Cieslak Decl. Ex. A at 15.²) These general statements to investors, which do not
 6 suggest anything about patent enforcement litigation, cannot create an *objective*
 7 threat of future injury from patent enforcement. *Prasco*, 537 F.3d at 1339; *Innovative*
 8 *Therapies*, 599 F.3d at 1382; *AMP*, 653 F.3d at 1348 (reversing a finding of standing
 9 where “[t]he district court failed to limit its jurisdictional holding to affirmative acts
 10 by the patentee directed at [the specific declaratory judgment plaintiff]”). Elysium
 11 also mischaracterizes ChromaDex’s public statements about Elysium as “thinly-
 12 veiled public threats.” (Opp. at 8.) However, when read in context, these statements
 13 do not come close to supporting Elysium’s characterizations. For example, according
 14 to Elysium, when ChromaDex’s CEO Frank Jaksch purportedly “specifically targeted
 15 Elysium and its alternative sourcing of NR” (Opp. at 8), he raised several concerns
 16 about the safety of Elysium’s new product, none of which were allegations of patent
 17 infringement. Instead, Elysium quotes this passage from Mr. Jaksch:

18 Elysium has stated that they have incorporated a new source of NR into
 19 their basis product. Only ChromaDex’s nicotinamide riboside has been
 20 proven safe, supported by a robust safety and toxicology dossier and
 21 earning it FDA’s regulatory status of NDIN and GRAS. Additionally,
 22 they continue to [s]ell the efficacy and performance of their product
 23 based off previously completed but unpublished clinical trial, which was
 24 conducted with ChromaDex and are in pterostilbene [sic].

23 ² Exhibit A to the Declaration of Jon F. Cieslak, as well as Exhibits B and C, contain
 24 documents or excerpts of documents that are quoted in the SACC and are therefore
 25 proper for the Court to consider on ChromaDex’s motion under the incorporation by
 26 reference doctrine. *In re Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d 970, 986 (9th
 27 Cir. 1999) (The doctrine “permits a district court to consider documents ‘whose
 28 contents are alleged in a complaint and whose authenticity no party questions, but
 which are not physically attached to the [plaintiff’s] pleading.’”), *abrogated on other
 grounds by South Ferry, LP, #2 v. Killinger*, 542 F.3d 776, 784 (9th Cir. 2008).

1 Cieslak Decl. Ex. B at 29.

2 Elysium further misrepresents that Mr. Jacksch threatened Elysium with patent
3 infringement when Mr. Jacksch said that ChromaDex would “vigorously defend” its
4 global patent portfolio. *Id.* However, supporting its licensors’ patent portfolio from
5 attack, such as defending against Elysium’s *inter partes review* challenges (*see*
6 *Elysium v. Trustees of Dartmouth College*, IPR2017-01795 (PTAB July 17, 2017)
7 *and Elysium v. Trustees of Dartmouth College*, IPR2017-01796 (PTAB July 17,
8 2017)) is not tantamount to ChromaDex offensively accusing Elysium of infringing
9 those patents. On the one hand, ChromaDex may help Dartmouth University defend
10 the validity of its patents against Elysium’s invalidity attacks at the U.S. Patent and
11 Trademark Office, but on the other hand, there is no evidence whatsoever that
12 ChromaDex has offensively threatened Elysium with patent infringement litigation.
13 A statement of defense is not objectively probative of an intent or willingness to
14 institute offensive patent infringement litigation, especially where Elysium has acted
15 as the aggressor and itself filed *inter-partes* patent reviews against ChromaDex’s
16 licensor, which the licensor is defending. (*See* Mot. at 13 n.1.)

17 Elysium cites *ABB Inc. v. Cooper Indus., LLC*, 635 F.3d 1345 (Fed. Cir. 2011)
18 to argue the phrase “vigorously defend” is somehow sufficient to create an Article III
19 injury. (Opp. at 8 n.2.) However, in that case the patentee sent a letter to the
20 declaratory judgment plaintiff and its supply chain partner making clear they did not
21 have the right to manufacture a certain product, that such conduct was a breach of the
22 parties’ agreement, and that the patentee would “vigorously defend its rights should
23 [the supply chain partner] attempt to make products covered by one or more of
24 [defendant’s] patents.” 635 F.3d at 1347. Context matters. Here, the context of
25 ChromaDex’s general statement was not to allege infringement or to threaten a suit—
26 no declaratory relief jurisdiction has ever been exercised on facts like those in this
27 case and doing so would be error.

28 Elysium next resorts to arguing that ChromaDex’s statements “infect the

1 competitive environment of the business community with uncertainty and
2 insecurity” while Elysium has been forced “to stand by impotently.” (Opp. at 9
3 (quoting *Arrowhead*, 846 F.2d at 735).) This argument fails to support jurisdiction for
4 two reasons. First, the Federal Circuit has already held that “[a]llegations of a
5 subjective ‘chill’ are not an adequate substitute for a claim of specific present
6 objective harm or a threat of specific future harm.” *Prasco*, 537 F.3d at 1339 (quoting
7 *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972)); see also *Innovative Therapies*, 599 F.3d
8 at 1382 (holding that general acts related to the business community are not sufficient
9 to confer declaratory judgment jurisdiction); *AMP*, 653 F.3d at 1348 (same). Indeed,
10 no chill has even occurred—Elysium continues to sale Basis with another source of
11 NR. (SACC ¶ 95.) Second, Elysium does not allege that ChromaDex has engaged in
12 any of the “scare-the-customer-and-run tactics” decried in *Arrowhead*. There, the
13 patentee first, actually sent threatening letters to the plaintiff’s customers, causing
14 those customers to demand indemnity from plaintiff, second, sent a letter directly to
15 plaintiff “express[ing] intent to enforce its patent rights by litigation,” and third,
16 asked another court to find that plaintiff’s process infringed its patent in litigation
17 against a third party. *Id.* at 732-74, 737. None of those factors exist here and
18 *Arrowhead* is therefore, off point.

19 3. ChromaDex Need Not Provide a Covenant Not to Sue for 20 Patent Infringement.

21 “A patentee has no obligation to spend the time and money to test a
22 competitors’ product nor to make a definitive determination, at the time and place of
23 the competitors’ choosing, that it will never bring an infringement suit. And the
24 patentee’s silence does not alone make an infringement action or other interference
25 with the plaintiff’s business imminent.” *Prasco*, 537 F.3d at 1341. Elysium cites
26 several cases that found the lack of a covenant not to sue probative of future harm,
27 but each involved both explicit allegations of infringement and further affirmative
28 acts by the patentee against the declaratory judgment plaintiff that do not exist here.

1 *See Danisco U.S. Inc. v. Novozymes A/S*, 744 F.3d 1325, 1331 (Fed. Cir. 2014)
 2 (patentee alleged infringement and had previously filed patent litigation against
 3 plaintiff); *Asia Vital Components Co. v. Asetek Danmark A/S*, 837 F.3d 1249, 1253
 4 (Fed. Cir. 2016) (patentee sent demand letter to plaintiff, accusing infringement and
 5 referencing pending lawsuits); *Arris Grp., Inc. v. British Telecommunications PLC*,
 6 639 F.3d 1368, 1376-77 (Fed. Cir. 2011) (patentee accused plaintiff's customer of
 7 infringement and presented 118-page presentation on its infringement contentions
 8 which "explicitly and repeatedly singled out [plaintiff's] products"); *Revolution*
 9 *Eyewear, Inc. v. Aspex Eyewear, Inc.*, 556 F.3d 1294, 1295 (Fed. Cir. 2009)
 10 (patentee's covenant did not cover future sales of the same products accused of
 11 infringement). These cases are all off point and not helpful to Elysium's position. The
 12 law is clear that ChromaDex need not go through the effort of an infringement and
 13 patent claim analysis or provide an unequivocal covenant never to sue for
 14 infringement merely because Elysium wants one.

15 **III. THE COURT SHOULD DISMISS ELYSIUM'S COUNTERCLAIM FOR UNJUST** 16 **ENRICHMENT.**

17 **A. No Unjust Enrichment Claim Exists Because Elysium Did Not Plead** 18 **a Quasi-Contractual Restitution Claim and One Cannot Exist** **Where There Is an Express Contract.**

19 Elysium alleges a new theory in its Opposition—that a *quasi-contract* claim
 20 exists which supports its unjust enrichment claim. But Elysium's cantilevered
 21 argument collapses under its own weight because no *quasi-contract* claim can exist
 22 where an express contract exists covering the same subject matter. With virtually
 23 nothing in its pleading for support, Elysium argues now out of whole cloth that its
 24 claim for "Restitution for Unjust Enrichment" is actually a *quasi-contract* cause of
 25 action seeking restitution. (Opp. at 15-16.) The SACC however, does not allege, or
 26 even mention, any *quasi-contract* and the argument is the proverbial effort to pull a
 27 rabbit out of a hat.

28 First, California law is crystal clear that an unjust enrichment claim based on a

1 quasi-contract cannot exist in the presence of an express contract, like the TLRA
2 here. *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1370 (2010) (“As a matter
3 of law, an unjust enrichment claim does not lie where the parties have an enforceable
4 express contract.”); *see also California Medical Assn v. Aetna U.S. Healthcare of*
5 *Cal., Inc.*, 94 Cal. App. 4th 151, 172 (2001). Just as in *Durell* an unjust enrichment
6 theory is inapplicable because there are express contracts between Elysium and
7 ChromaDex covering the same subject matter as the alleged *quasi-contract*, including
8 the two product supply contracts and the TLRA which are expressly at issue in this
9 case. Indeed, Elysium itself relies on provisions of the TLRA to support its
10 arguments in the Opposition. (Opp. at 15.) As a matter of law, Elysium’s unjust
11 enrichment claim is dead on arrival.

12 Elysium goes so far as to accuse ChromaDex of making a “highly misleading”
13 argument (Opp. at 16), but that is certainly not the case. Indeed, *ESG Capital*
14 *Partners, LP v. Stratos*, 828 F.3d 1023 (9th Cir. 2016), which Elysium cites, is
15 instructive on why Elysium has *not* alleged a quasi-contractual claim for restitution.
16 There, the plaintiff provided funds to the defendant in exchange for a promise that
17 they would be placed in a certain trust account and would be refundable. *Id.* at 1039.
18 The defendant broke this promise by placing the funds in a different trust account,
19 and then distributed some of the funds to itself. *Id.* The court permitted the plaintiff
20 to seek restitution on a quasi-contract theory because there was no express contract
21 between the parties. *Id.* The court construed California common law only as
22 “allow[ing] an unjust enrichment cause of action *through quasi-contract*” but did
23 not, as Elysium suggests, permit an independent cause of action for unjust enrichment
24 where—as here—express contracts exist which carry their own contractual, basis of
25 the bargain measurement of damages. *Id.* at 1038 (emphasis added).

26 This case is analogous to *Glob. Med. Sols., Ltd v. Simon*, 2013 WL 12065418
27 (C.D. Cal. Sept. 24, 2013). There, the parties had a contract which the plaintiff
28 alleged was unenforceable. *Id.* at *39. The court held that even if the contract was

1 unenforceable, the plaintiff “would be able to recover restitution based on a theory of
 2 unjust enrichment *only if he proved some other non-contractual, non-quasi-*
 3 *contractual claim*, e.g., a claim for fraudulent inducement.” *Id.* (emphasis added).
 4 Elysium has not alleged “some other non-contractual, non-quasi-contractual claim,”
 5 as the basis for its unjust enrichment claim, and accordingly its claim for “Restitution
 6 for Unjust Enrichment” is not cognizable as a matter of California law.

7 **B. Elysium Lacks Standing to Bring a Claim to Recover Funds**
 8 **ChromaDex Has Already Bound Itself to Return.**

9 Elysium does not address its problem that it does not have standing to bring a
 10 claim for restitution of royalties which ChromaDex has already covenanted to return,
 11 and instead simply argues that its unjust enrichment claim has not been mooted.
 12 (Opp. at 12.) Elysium ignores the case law regarding its failure to allege an “injury to
 13 [itself] that is likely to be redressed by a favorable decision.” *Simon v. E. Kentucky*
 14 *Welfare Rights Org.*, 426 U.S. 26, 38 (1976). Instead of addressing the pertinent
 15 legal arguments, Elysium cherry-picks from ChromaDex’s public filings to insinuate
 16 that ChromaDex will renege on its binding covenant to credit the royalties to
 17 Elysium.³ (Opp. at 13.) However, Elysium omits that in the same public filing,
 18 ChromaDex “incurred a write-off of approximately \$746,000 in gross trade
 19 receivable from Elysium Health, Inc. related to royalties.” (Cieslak Decl. Ex. C at
 20 47.) Further, the statement Elysium cites—that ChromaDex “may be forced to pay
 21 compensatory and punitive damages and restitution for any royalty payments that [it]
 22 received” from Elysium “if unsuccessful in resolving the litigation on favorable
 23 terms”—is entirely consistent with the royalties being credited against the \$3 million

24 _____
 25 ³ The Court should not accept Elysium’s allegations as true when evaluating a motion
 26 under Rule 12(b)(1). *See Kingman Reef Atoll Investments, L.L.C. v. United States*,
 27 541 F.3d 1189, 1195 (9th Cir. 2008) (“no presumptive truthfulness attaches to
 28 plaintiff’s allegations, and the existence of disputed material facts will not preclude
 the trial court from evaluating for itself the merits of jurisdictional claims.” (citation
 omitted)).

1 Elysium owes ChromaDex. (*Id.* at 48.)

2 Further, if the Court believes that ChromaDex’s covenant to credit the disputed
3 royalties is insufficient, ChromaDex hereby commits that it will, upon order of the
4 Court, deposit the royalties and interest it has promised to credit to Elysium into the
5 Court’s depository and unconditionally relinquish its entire interest in the deposited
6 funds, pending further Court order.⁴ As recognized in *Chen v. Allstate Ins. Co.*,
7 “[u]nder the common law doctrine of tender, . . . the deposit of money in court could
8 be ‘treated as the equivalent of an actual payment to and acceptance by the plaintiff’
9 . . . when the defendant unconditionally relinquishe[s] its entire interest in the
10 deposited funds.” 819 F.3d 1136, 1145 (9th Cir. 2016). While it is ChromaDex’s
11 position that this is unnecessary to establish that Elysium does not have standing to
12 bring an unjust enrichment claim, it will do so if the Court finds that it is necessary to
13 eliminate this dispute.

14 **IV. THE COURT SHOULD EXERCISE ITS DISCRETION TO STRIKE THE PATENT**
15 **MISUSE ALLEGATIONS.**

16 ChromaDex’s motion to strike presents a simple question that Elysium fails to
17 answer in its Opposition. Why should the Court and the parties litigate whether
18 alleged patent misuse entitles Elysium to restitution of royalties when ChromaDex
19 has already agreed to provide the restitution? Elysium’s answer is to ask for an
20 advisory opinion.

21 Elysium only argues that the Court must decide whether the TLRA is
22 unenforceable to determine whether Elysium is entitled to a return of the royalties it
23 paid under the TLRA. But ChromaDex rendered that issue moot by already
24 covenanting not to enforce the royalty provisions of the TLRA and to credit those
25 royalties back to Elysium. Elysium ignores the effects of ChromaDex’s binding

26 ⁴ See Rule 67(a) (“If any part of the relief sought is a money judgment or the
27 disposition of a sum of money or some other deliverable thing, a party—on notice to
28 every other party and by leave of court—may deposit with the court all or part of the
money or thing, whether or not that party claims any of it.”).

1 judicial covenant and instead remarkably and falsely contends that its patent misuse
2 “allegations are central to an element that Elysium is required to prove: that the
3 [TLRA] is unlawful and unenforceable.” (Opp. at 17-18.) But Elysium need not
4 prove that because it has achieved the remedy it seeks—the return of the royalties.
5 And, indeed, Elysium’s patent misuse counterclaim only may lawfully seek to render
6 ChromaDex’s patents unenforceable—not the TLRA. In fact, the TLRA includes
7 many obligations and rights that are wholly unrelated to the royalties, like
8 confidentiality and the right to use ChromaDex’s trademarks and advertising
9 material. The enforceability of the TLRA is not at issue in the patent misuse
10 counterclaim, nor could it be.

11 ChromaDex has repeatedly stated in its filings and pleadings before this Court
12 that it will never seek to enforce the royalty provisions of the TLRA that are the
13 subject matter of Elysium’s patent misuse and unjust enrichment claims. ChromaDex
14 will further never be able to contend that it has any right to retain Elysium’s past
15 royalty payments. These statements by ChromaDex were “deliberate, clear, and
16 unequivocal” and the enforceability of the TLRA’s royalty provisions and the return
17 of the royalties to Elysium has thus been “withdrawn from issue.” *See Miramontes v.*
18 *Mills*, 2015 WL 7566491, at *3 n.25 (C.D. Cal. Nov. 24, 2015). The Court may, and
19 should, therefore properly strike the allegations concerning *whether* the TLRA is
20 enforceable. *See Cal. Dep’t of Toxic Substances Control v. Alco Pac., Inc.*, 217 F.
21 Supp. 2d 1028, 1033 (C.D. Cal. 2002).

22 Elysium’s repeated insistence that the patent misuse allegations “go to the core
23 of [Elysium’s] theory of liability” is inapposite to the Court’s consideration of
24 ChromaDex’s motion to strike. Contrary to Elysium’s repeated assertions,
25 ChromaDex does not admit any liability for patent misuse. (Opp. at 19). However,
26 that fact is not sufficient to create a case or controversy regarding the enforceability
27 of the TLRA and make Elysium’s allegations material to its restitution claim. *Cf.*
28 *McCauley v. Trans Union, L.L.C.*, 402 F.3d 340, 341 (2d Cir. 2005) (“It is clear that

1 [defendant’s] unwillingness to admit liability is insufficient, standing alone, to make
2 this case a live controversy.”)

3 Elysium also fails entirely to address ChromaDex’s arguments that striking
4 Elysium’s patent misuse allegations is not only proper, but the exact situation for
5 which Rule 12(f) was designed. “The possibility that issues will be unnecessarily
6 complicated or that superfluous pleadings will cause the trier of fact to draw
7 ‘unwarranted’ inferences at trial is the type of prejudice that *is sufficient* to support
8 the granting of a motion to strike.” *Cal. Dep’t of Toxic Substances Control*, 217 F.
9 Supp. 2d at 1033 (emphasis added). ChromaDex has shown that litigating patent
10 misuse will unnecessarily complicate discovery and trial, impose significant burdens
11 on the parties and the Court, distract the trier of fact from the real issues in this case,
12 i.e., the contracts between the parties, and would improperly permit Elysium to
13 attempt to prove ChromaDex engaged in prior alleged misconduct that is irrelevant to
14 the issues in dispute. The Court should exercise its discretion and strike the
15 allegations regarding patent misuse from Elysium’s unjust enrichment claim to
16 streamline the issues in this case.

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1 **V. CONCLUSION**

2 For the reasons set forth above, ChromaDex requests that the Court (1) dismiss
3 Elysium’s fourth counterclaim for lack of subject matter jurisdiction; and (2) dismiss
4 Elysium’s fifth counterclaim for failure to state a claim and/or for lack of standing, or
5 (3) in the alternative, strike the patent misuse allegations related to Elysium’s fifth
6 counterclaim as immaterial.

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Dated: November 20, 2017

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