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18 **UNITED STATES DISTRICT COURT**
19 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
20 **(SOUTHERN DIVISION)**

21 CHROMADEX, INC.,) Case No. 8:16-cv-02277-CJC-DFM
22)
23 Plaintiff,) **OPPOSITION TO CHROMADEX’S**
24 v.) **MOTION TO DISMISS ELYSIUM’S**
25 ELYSIUM HEALTH, INC.,) **THIRD, FOURTH AND FIFTH**
26 Defendant.) **COUNTERCLAIMS**
27) Hearing Date: April 24, 2017
Time: 1:30 p.m.
Courtroom: 9B
Judge: Hon. Cormac J. Carney

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I. INTRODUCTION

Defendant and Counterclaimant Elysium Health, Inc. (“Elysium”) sells Basis™, a groundbreaking dietary supplement that combines nicotinamide riboside (or “NR”), pterostilbene (“PT”) and other ingredients. Plaintiff and Counter-Defendant ChromaDex, Inc. (“ChromaDex”) supplied NR and PT to Elysium pursuant to supply agreements between the parties. In the course of the parties’ relationship, Elysium discovered that ChromaDex had secretly violated key contractual provisions governing the supply and pricing of NR. Not only that, but ChromaDex attempted to deceive Elysium and conceal its misconduct by sending a manipulated spreadsheet (the “Fraudulent Spreadsheet”) that contained falsified data engineered to give the impression that ChromaDex was complying with its contractual obligation. Elysium then learned that, at the outset of the parties’ relationship, ChromaDex fraudulently induced Elysium into executing one of the agreements, a trademark agreement under which Elysium paid substantial royalties, on the false premise that all ChromaDex’s NR customers were required to sign substantially identical agreements.

When ChromaDex inadvertently exposed its deception, Elysium confronted it and sought to resolve the issue with ChromaDex by obtaining information necessary to determine the size of the refund or audit ChromaDex owed Elysium. Instead of honoring its promises and engaging in good faith efforts to resolve the parties’ issues, ChromaDex instead brought this lawsuit. ChromaDex’s complaint seeks, among other things, enforcement of the trademark license agreement that ChromaDex had forced Elysium to sign to obtain NR (and thus access ChromaDex’s patent rights).

Elysium counterclaimed, seeking rescission or damages on account of fraudulent inducement (Count 3) and a declaratory judgment that ChromaDex’s tying of its patent rights to an unwanted and unneeded trademark license constituted patent misuse (Count 4). It also alleged that ChromaDex’s patent misuse and its

1 fraudulent and deceptive attempts to conceal its breaches of the parties’ supply
2 agreement violated California’s Unfair Competition Law (“UCL”) (Count 5).

3 Seeking to escape the consequences of its wrongdoing, ChromaDex moves to
4 dismiss Counts 3, 4 and 5. However, accepting Elysium’s allegations as true, as the
5 Court must, Elysium has stated claims for fraudulent inducement, declaratory
6 judgment of patent misuse and violation of the UCL.

7 ChromaDex first contends that Elysium fails to allege that one of
8 ChromaDex’s lies – that every customer was required to sign a trademark license
9 agreement and pay royalties – was false when made, or that Elysium relied on the
10 misrepresentation to its detriment. ChromaDex’s contentions are without merit.
11 Elysium pleads specific facts demonstrating that ChromaDex’s misrepresentation
12 was false at the time it was made and that, in reliance on it, Elysium signed the
13 trademark license agreement and paid royalties rather than insisting on a more
14 favorable arrangement. Elysium pleads the fraud with the requisite particularity –
15 including who made the statement; when, how and to whom it was made; and why it
16 was false.

17 With respect to Elysium’s declaratory judgment claim, ChromaDex contends
18 that courts will not recognize a claim that they routinely do – one for declaratory
19 judgment of patent misuse. In fact, both the Federal Circuit and this Court have
20 sustained claims for declaratory judgment of patent misuse. ChromaDex’s other
21 arguments also fail. As alleged in the First Amended Counterclaims, ChromaDex
22 conditioned its supply of patented NR on Elysium’s purchase of a trademark license.
23 Further, ChromaDex’s patent rights and its NIAGEN® trademark are not the same
24 products under patent misuse law as courts have applied it.

25 ChromaDex’s arguments seeking dismissal of the unfair competition
26 counterclaim also fail, because Elysium has provided ChromaDex with sufficient
27 notice of claims permitted under the UCL. Patent misuse violates both court-made
28 and statutory law, as does ChromaDex’s deceitful attempt to conceal its breaches.

1 ChromaDex’s patent misuse and related conduct also were “unfair” under the UCL.
2 The UCL unfair prong proscribes misconduct, like the patent misuse at issue here,
3 that affects the general public by violating the letter or the spirit of antitrust laws.

4 ChromaDex’s motion should be denied in its entirety.

5 **II. BACKGROUND**

6 ChromaDex supplied NR and PT to Elysium. (First Amended Counterclaims,
7 Docket No. (“D.N.”) 11 (“FACC”) ¶ 53.) Three different contracts govern the
8 parties’ business relationship: an NR Supply Agreement, originally dated February 3,
9 2014 (as amended, the “NR Supply Agreement”) (*id.* ¶ 1, First Amended Complaint,
10 D.N. 26 (“FAC”) Exs. A, B), a PT Supply Agreement, dated June 26, 2014 (the “PT
11 Supply Agreement”) (*id.*; FAC Ex. C); and a Trademark License and Royalty
12 Agreement, dated February 3, 2014 (the “Trademark Agreement”) (*id.*; FAC Ex. D).

13 ChromaDex is the sole commercial supplier of NR, which it sells under the
14 trademark NIAGEN. *Id.* ¶¶ 27-29. ChromaDex has market power in the supply of
15 NR; it has no competitors and every NR product in the global market today is
16 supplied by ChromaDex. *Id.* ¶¶ 27-29, 32. ChromaDex leverages its market power
17 to impose conditions on its supply of NR (and thus access to its patents). *Id.* ¶ 39. In
18 particular, ChromaDex has conditioned its sale of NR on the purchaser’s agreement
19 to license ChromaDex’s trademarks. *Id.* This practice has substantial
20 anticompetitive effects. *Id.* ¶ 40. By conditioning access to NR on the purchase of a
21 license to ChromaDex’s trademarks, ChromaDex incentivizes its customers to use
22 ChromaDex’s marks and, when they do, the effect is to strengthen the association of
23 NR with ChromaDex. This improperly extends ChromaDex’s market power and
24 patent leverage in the supply of NR even beyond the expiration of ChromaDex’s
25 patent estate. *Id.*

26 Elysium was one of the ChromaDex customers required to purchase a
27 trademark license. During the negotiation of the parties’ business relationship,
28 ChromaDex’s CEO informed Elysium that *all* customers who enter into supply

1 agreements with ChromaDex must also sign trademark license and royalty
2 agreements regardless of whether they intend to use ChromaDex's marks, *id.* ¶ 48, a
3 representation that Elysium later learned to be false, *id.* ¶ 68. In December 2013,
4 ChromaDex told Elysium that it would grant licensing rights to the NIAGEN
5 trademark in a separate agreement and emphasized that ChromaDex would require a
6 "Niagen TM Agreement" that would require the payment of royalties. *Id.* ¶¶ 47, 49.
7 In reliance on the false representation that all ChromaDex customers must sign
8 trademark license and royalty agreements, Elysium concluded that the issue was
9 non-negotiable and that it had no choice but to sign the Trademark Agreement and
10 pay royalties. *Id.* ¶¶ 51-52.

11 On February 3, 2014, the parties entered into both the NR Supply Agreement
12 and the Trademark Agreement. *Id.* ¶ 1.¹ Under the Trademark Agreement, Elysium
13 must pay royalties on all sales of any product containing an ingredient supplied by
14 ChromaDex, regardless of whether Elysium uses the licensed ChromaDex
15 trademarks. *Id.* ¶ 56. The Trademark Agreement grants no rights to Elysium other
16 than trademark rights.

17 The NR Supply Agreement contained a "most favored nation" provision
18 providing that if ChromaDex supplied NR to anyone for less than Elysium had paid,
19 Elysium would be refunded or promptly credited the difference. *Id.* ¶¶ 60-61. On
20 May 29, 2016, Elysium requested that ChromaDex's CEO disclose the prices at
21 which ChromaDex supplied NR to other customers. *Id.* ¶ 64. ChromaDex
22 responded by transmitting a fraudulent "blinded" spreadsheet, which ostensibly
23 showed prices at which ChromaDex supplied NR to each of its customers. *Id.* ¶¶ 65-
24 66. However, in additional tabs, ChromaDex mistakenly included "unblinded"
25 sheets, which revealed that other customers omitted from the fraudulent "blinded"
26 tab had received NR on more favorable terms than Elysium. *Id.* ¶ 67. The

27 _____
28 ¹ The parties entered into the PT Supply Agreement in June 2014. *Id.* ¶ 1.

1 spreadsheet also confirmed that, contrary to ChromaDex’s earlier representation to
2 induce Elysium to sign the Trademark Agreement, not all purchasers of NR had been
3 required to sign trademark license agreements or pay royalties. *Id.* ¶ 68.

4 Despite Elysium’s several attempts to resolve these issues with ChromaDex,
5 in December 2016, ChromaDex filed this lawsuit alleging, among other things, that
6 Elysium breached the Trademark Agreement by “refusing to pay royalties owed
7 based on its net sales of products containing NIAGEN.” (FACC ¶ 85, FAC, Count
8 3.) Elysium’s counterclaims allege that ChromaDex committed fraud (Count 3) by
9 inducing Elysium to enter into the Trademark Agreement based on knowingly false
10 statements that ChromaDex required such an agreement from all customers.
11 Elysium also seeks a declaration (Count 4) that ChromaDex engaged in patent
12 misuse by conditioning its supply of NR, and thus access to its patent rights, on
13 Elysium’s purchase of a license to ChromaDex’s trademarks. Lastly, the
14 counterclaims allege that ChromaDex’s patent misuse, as well as its fraudulent and
15 deceptive attempts to conceal ChromaDex’s breaches of the NR Supply Agreement,
16 violate California’s Unfair Competition Law (the “UCL”).

17 III. ARGUMENT

18 A. Elysium Has Stated a Claim for Fraud

19 In its First Amended Counterclaims, Elysium alleges that ChromaDex’s CEO,
20 Frank Jaksch, falsely represented to Elysium “that all ChromaDex customers who
21 signed purchase agreements to obtain [NR] were required to sign separate trademark
22 license and royalty agreements.” (FACC ¶ 48.) Elysium provides not only the
23 content, but also the date of this misrepresentation (December 16, 2013), the manner
24 in which it was made (by telephone), the speaker (Jaksch) and the listeners
25 (Elysium’s co-founders). *Id.* Elysium further alleges that, in reliance on that
26 misrepresentation, it “concluded that the issue was non-negotiable,” “focused its
27 efforts on negotiating [other contractual provisions aside from the Trademark
28 Agreement],” and “determined it had no choice but to agree to ChromaDex’s

1 requirement that it also license ChromaDex’s trademarks, and agree to pay
2 substantial royalties on Elysium product sales under the trademark license if it
3 wished to obtain access to [NR].” *Id.* ¶¶ 51-52. The Fraudulent Spreadsheet
4 subsequently revealed that “Jaksch’s representation was false when made,” because
5 it disclosed that at least one NR purchaser whose relationship with ChromaDex pre-
6 dated Elysium’s “was not required to sign [a] license and royalty agreement[] or pay
7 royalties.” *Id.* ¶¶ 68, 107. Elysium was damaged not only by forfeiting its right to
8 negotiate whether (or on what terms) to agree to the Trademark Agreement, but also
9 by paying substantial royalties pursuant to the agreement. *Id.* ¶¶ 52, 88, 108, 110.
10 These allegations are more than sufficient to state a fraud claim.

11 In reality, ChromaDex’s motion to dismiss the fraud claim is less about a lack
12 of particularity under Federal Rule of Civil Procedure 9(b)’s heightened pleading
13 standard for fraud claims – the amount of detail in the allegations is not contested –
14 than it is about an asserted failure to state a claim. Indeed, many of the cases cited
15 by ChromaDex did not involve Rule 9(b) at all. ChromaDex frames its arguments
16 under Rule 9(b) perhaps to avoid acknowledging the cardinal rule – cited in every
17 12(b)(6) case but not always featured prominently in 9(b) cases – that Elysium’s
18 facts are taken as true and inferences are drawn in Elysium’s favor. But this
19 legerdemain is fruitless, because Rule 9(b) does not alter the settled rule that, on a
20 motion to dismiss, the court accepts the non-movant’s allegations as true and draws
21 inferences in its favor. *See, e.g., G.U.E. Tech, LLC v. Panasonic Avionics Corp.*,
22 2015 WL 12696203, at *5 (C.D. Cal. Sept. 15, 2015) (accepting allegations as true
23 under Rule 9(b)); *see also In re Boeing Sec. Litig.*, 40 F. Supp. 2d 1160, 1166 (W.D.
24 Wash. 1998) (collecting cases).

25 1. Elysium Adequately Pleads Falsity

26 ChromaDex first contends that Elysium has failed to allege facts
27 demonstrating that Jaksch’s misrepresentation was false when made. Numerous
28 ways exist to adequately plead that a statement was false when made; the question is

1 not *how*, but *whether* the facts as pled, and inferences drawn from them, convey why
 2 the statement was false. *Fecht v. Price Co.*, 70 F.3d 1078, 1082 (9th Cir. 1995). For
 3 example, a party alleging fraud may proffer “direct evidence of fraud, *i.e.*,
 4 “[inconsistent] facts that had existed all along and were later revealed.” *Id.*
 5 (alterations in original). Alternatively, a party may allege “circumstantial evidence
 6 [that] explains how and why the statement was misleading when made.” *Id.* at
 7 1083.²

8 In this case, Elysium pleads direct evidence of fraud. The First Amended
 9 Counterclaims allege that, before the parties had signed their contracts, Jaksch
 10 represented to Elysium that all ChromaDex customers were required to sign
 11 trademark and license agreements “under which customers agreed to pay royalties on
 12 product sales” for NR. (FACC ¶¶ 48, 105.) Elysium then points to specific evidence
 13 of fraud: the Fraudulent Spreadsheet detailed that, in fact, *not* all customers “were
 14 required to sign license and royalty agreements or pay royalties.” (FACC ¶ 68.) At
 15 least one ChromaDex customer who had not been required to sign a license or pay
 16 royalties formed its relationship with ChromaDex before Elysium did, confirming
 17 the falsity of Jaksch’s December 16, 2013 representation when it was made. (FACC
 18 ¶ 68.)³

19 ChromaDex arguments that Elysium’s pleading purportedly is insufficient are
 20 not persuasive. First, ChromaDex contends that the Fraudulent Spreadsheet “says
 21

22 ² As ChromaDex suggests (MTD 7-8), another way to allege fraud sufficiently –
 23 though most often in securities cases – is to identify “inconsistent contemporaneous
 24 statements or information (such as internal reports) which were made by or available
 25 to the defendants.” *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1549 (9th Cir.
 26 1994). As the court noted in *GlenFed*, a securities fraud case that ChromaDex cites
 27 for this proposition, a party may need to allege falsity this way when, unlike here,
 28 “some more or less catastrophic event” intervenes between the time the
 representation is made and the time the truth is revealed. *Id.* at 1548-49. *See also*
Fecht, 70 F.3d at 1083 (inconsistent contemporaneous statements used principally in
 cases involving a known intervening event).

³ These are facts, not conclusions, and ChromaDex’s contention that Elysium’s fraud
 claim is “conclusory” (MTD 8) is entirely without merit.

1 nothing about” the terms that ChromaDex customers had in 2013, before Elysium
2 and ChromaDex formed their relationship. (MTD 8.) Not so. Although Jaksch may
3 have sent the Fraudulent Spreadsheet in 2016, it reveals “[inconsistent] facts that *had*
4 *existed all along*,” *Fecht*, 70 F.3d at 1082 (alterations in original) (emphasis added),
5 namely that ChromaDex customers who pre-dated Elysium were not required to sign
6 license and royalty agreements or pay royalties, making Jaksch’s assertion false
7 when made. And, contrary to ChromaDex’s suggestion, it is well-settled that “when
8 no catastrophic event intervened between the time of the complained-of statements
9 and the revelation of the truth,” a party may show falsity “by pointing to later
10 inconsistent statements or conditions.” *Id.* at 1084.

11 Only by impermissibly drawing inferences in its *own* favor can ChromaDex
12 attack the sufficiency of Elysium’s claim. ChromaDex suggests that the historical
13 facts on the Fraudulent Spreadsheet about other customers may have changed over
14 time, such that Jaksch’s statement might have been literally true at the moment he
15 uttered it. No rule permits ChromaDex to defeat well-pled allegations of fraud by
16 inferring an alternative factual universe, especially one so implausible.
17 ChromaDex’s tactic turns well-settled pleading standards on their head and should be
18 rejected.

19 To the extent ChromaDex believes further detail about the fraud is required
20 (and Elysium respectfully submits that it is not), that information is peculiarly within
21 ChromaDex’s knowledge, and Elysium cannot be faulted for failing to plead it. *See*,
22 *e.g.*, *Estate of Migliaccio v. Midland Nat’l Life Ins. Co.*, 436 F. Supp. 2d 1095, 1106
23 (C.D. Cal. 2006) (Rule 9(b) is relaxed where the “facts supporting the allegation of
24 fraud [by the accused] are exclusively within the [accused’s] possession”).

25 ChromaDex’s other arguments are equally infirm. ChromaDex contends that
26 the Fraudulent Spreadsheet “says nothing about” Jaksch’s scienter in December
27 2013. (MTD 8.) However, Elysium explicitly pleads that Jaksch knew that his
28 statement was false when made (FACC ¶ 107) and that he made the statement “with

1 the intent to deceive Elysium and induce it to enter into the License and Royalty
 2 Agreement.” *Id.* ¶¶ 107, 109. Elysium’s allegations are more than sufficient at this
 3 stage. Fed. R. Civ. P. 9(b) (scienter “may be alleged generally”); *see, e.g., Fecht*, 70
 4 F.3d at 1082 n.4 (allegations that defendants “knew the impression created by this
 5 conduct and these statements . . . was false” and that company was aware the reports
 6 were false and misleading “clearly meet[s]” pleading standards); *GlenFed*, 42 F.3d
 7 at 1547 (scienter may be pled “generally . . . simply by saying that scienter existed”).

8 Finally, ChromaDex contends that Elysium “fails to plead that any customer
 9 did not have a *royalty obligation*” (MTD 8.) To the contrary, Elysium pleads
 10 precisely what ChromaDex claims is missing. (*See, e.g., FACC* ¶ 68 (“some
 11 purchasers of [NR] were not required to sign license and royalty agreements *or pay*
 12 *royalties*” (emphasis added)); ¶ 107 (“at least one purchaser of [NR] that contracted
 13 with ChromaDex before Elysium did was not required to sign a license and royalty
 14 agreement *or pay royalties*” (emphasis added)).) Ironically, ChromaDex admits that
 15 not all customers are required to pay royalties and, for this proposition, cites to the
 16 very counterclaims it says are missing that allegation. (*See* MTD 5 (citing FACC ¶
 17 68 to clarify that “not all customers are required to pay royalties”).)

18 2. Elysium Adequately Pleads Reliance

19 ChromaDex then contends that Elysium fails to plead reliance, relying on a
 20 rule it suggests was adopted by the Supreme Court of California requiring the injured
 21 party to show that “in all reasonable probability” he would not have engaged in the
 22 injury-producing conduct but for the misrepresentation. (MTD 9 (purporting to
 23 quote *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1111 (1993)).) What ChromaDex
 24 overlooks is that the language it quotes is from a partial concurrence that relies on a
 25 case addressing what a plaintiff must show to survive summary judgment under the
 26 state’s procedural rules, not to survive a motion to dismiss under the Federal Rules.
 27 *See Mirkin*, 5 Cal. 4th at 1111 (Kennard, J., concurring in part and dissenting in part)
 28 (quoting *Molko v. Holy Spirit Ass’n*, 46 Cal. 3d 1092, 1108 (1988)).

1 Under the prevailing rule in federal court, a party alleging fraud under
2 California law withstands dismissal so long as he alleges that he “would have . . .
3 behaved differently” had he known the truth. *Peel v. BrooksAmerica Mortg. Corp.*,
4 788 F. Supp. 2d 1149, 1162 (C.D. Cal. 2011) (citation omitted); *cf. Urica, Inc. v.*
5 *Pharmaplast, S.A.E.*, 2013 WL 12123305, at *12 (C.D. Cal. Jan. 10, 2013)
6 (“Pharmaplast succinctly pleads, moreover, that it would not have entered into the
7 agreement had Medline not made the misrepresentation. This adequately pleads
8 reliance.”); *Maffei v. Allstate Ins. Co.*, 2006 WL 2585560, at *3 (E.D. Cal. Sept. 8,
9 2006) (finding that “allegations in the Second Amended Complaint plead a
10 cognizable theory of detrimental reliance because Plaintiffs allege they would not
11 have participated in the mileage band practices had Defendants not assured them the
12 practices were legal and/or proper”). Moreover, “[t]he question of whether . . .
13 reliance is reasonable is a question of fact, not of law, unless ‘the undisputed facts
14 leave no room for a reasonable difference of opinion.’” *Dolan v. CMTC*, 2013 WL
15 12139355, at *2 (C.D. Cal. May 1, 2013) (citation omitted).

16 *Johnson v. Wal-Mart Stores, Inc.*, 544 F. App’x 696 (9th Cir. 2013), is
17 instructive. In *Johnson*, Wal-Mart allegedly misrepresented that it was legally
18 required to collect a nine dollar “recycling fee” from each customer who purchased a
19 car battery. *Id.* at 697. In reality, California law did not require collection of such a
20 fee. *Id.* Johnson alleged that she would not have paid the fee “if she had known that
21 California law did not require her to pay it.” *Id.* Reversing the district court’s
22 dismissal, the Ninth Circuit held that these allegations “permit a reasonable inference
23 that Johnson paid more ‘than she otherwise would have’ if Wal-Mart had not
24 engaged in the alleged misrepresentation.” *Id.*; *cf. Kwikset Corp. v. Superior Court*,
25 51 Cal. 4th 310, 330 (2011) (“extra money paid” establishes both transaction
26 causation – that is, reliance – and economic injury); *Ehret v. Uber Techs., Inc.*, 68 F.
27 Supp. 3d 1121, 1137 (N.D. Cal. 2014) (allegations of fraud were sufficient where
28 plaintiffs alleged that Uber misrepresented the amount of gratuity it remitted to the

1 driver and plaintiffs, who agreed to the gratuity under that false pretext, “expended
2 more money than they otherwise would have but for the misrepresentation”).

3 In this case, Elysium alleges that it would have proceeded differently absent
4 the misrepresentation. In the First Amended Counterclaims, Elysium alleges that
5 “[i]n reliance on ChromaDex’s false representation . . . Elysium concluded that the
6 issue was non-negotiable” and ceased expending effort negotiating the Trademark
7 Agreement. (FACC ¶ 51.) Further, “*given ChromaDex’s representation* that all
8 customers who obtained [NR] were required to pay royalties on sales under a
9 trademark license agreement, *Elysium determined it had no choice* but to agree to
10 ChromaDex’s requirement that it also *license ChromaDex’s trademarks, and agree*
11 *to pay substantial royalties* on Elysium product sales under the trademark license if it
12 wished to obtain access to [NR].” *Id.* ¶ 52 (emphases added). “In view of
13 ChromaDex’s false claim,” Elysium thus “believed ChromaDex’s demand for a
14 license and royalty agreement was non-negotiable Elysium *therefore forwent*
15 *the opportunity to negotiate an agreement with ChromaDex that did not require the*
16 *payment of royalties.*” (FACC ¶ 108 (emphasis added).) Elysium’s damages include
17 all royalties paid under the contract it was fraudulently induced into signing. *Id.* ¶
18 110. These allegations suffice under federal pleading standards. *Cf. Johnson*, 544 F.
19 App’x at 697 (customer sufficiently plead fraud by alleging, among other things, that
20 she paid a fee when falsely led into believing that it was required).

21 ChromaDex’s arguments for dismissal are meritless. First, ChromaDex
22 contends that the parties had unequal bargaining power and thus Elysium was in any
23 case powerless to resist the Trademark Agreement so long as it wanted to purchase
24 NR. (MTD 9.) ChromaDex again asks the Court to draw inferences in its favor
25 regarding the parties’ bargaining position, which is utterly improper on a motion to
26 dismiss. ChromaDex’s contention also is inconsistent with its admission that the
27 parties in fact *did* negotiate other terms of the contracts. *See id.* 9-10. More
28 troubling is that, taking the argument to its logical end, ChromaDex is proposing that

1 it has an unfettered license to defraud as a matter of law. Under ChromaDex's
2 position, it could make any number of fraudulent statements about the requirement of
3 a trademark license or other customers' royalty payments and be immune from suit
4 so long as it has market power in NR. ChromaDex's argument is irrational, contrary
5 to public policy and internally inconsistent.

6 Second, ChromaDex contends that Elysium's reliance was not "plausible"
7 because Elysium highlights one particular misrepresentation by ChromaDex, as
8 opposed to many different misrepresentations. (MTD 10.) The case law contradicts
9 ChromaDex's claim that a party cannot be defrauded by a single statement. *See, e.g.,*
10 *Stone v. Farnell*, 239 F.2d 750, 753 (9th Cir. 1956) (in action for fraud under
11 California law, a single material misrepresentation is sufficient); *cf. Cortez v.*
12 *Weymouth*, 235 Cal. App. 2d 140, 149 (1965) (finding reliance and noting that "[o]ne
13 material misrepresentation is sufficient"). To the extent ChromaDex suggests that
14 Elysium may not have relied on the misrepresentation, ChromaDex raises an issue of
15 fact improper for resolution at this stage. *See Dolan*, 2013 WL 12139355, at *2.

16 Finally, ChromaDex argues that "Elysium does not allege that it would not
17 have entered the agreement but for the alleged false statement, or even that it would
18 have been able to negotiate a deal that did not contain a royalty payment." (MTD
19 10.) It then renews its argument that, given ChromaDex's allegedly supreme
20 position, Elysium might have failed in endeavoring to avoid a trademark agreement.
21 In so arguing, ChromaDex again resorts to drawing inferences in its own favor,
22 rather than Elysium's, and then using those improper inferences to urge dismissal.
23 ChromaDex's argument that Elysium inevitably would have succumbed to
24 ChromaDex's demands fails to give proper deference to Elysium's factual
25 allegations, which are taken as true and need only raise a plausible right to relief.
26 Viewed in the proper light, Elysium's pleading alleges precisely what ChromaDex
27 asserts is lacking – that Elysium was worse off as a result of the fraud. (MTD 10.)
28 (*See* FACC ¶ 52 ("Elysium determined that it had no choice but to agree to [the

1 Trademark Agreement] and to pay substantial royalties,” ¶ 108 (“Elysium therefore
 2 forwent the opportunity to negotiate an agreement with ChromaDex that did not
 3 require the payment of royalties”). ChromaDex does not, and cannot, explain how
 4 these allegations are insufficient to state a fraud claim.⁴

5 **B. Elysium Properly Seeks a Declaratory Judgment of Patent Misuse**

6 1. The Broad, Remedial Scope of the Declaratory Judgment Act
 7 Embraces a Judicial Declaration of Patent Misuse

8 Elysium’s request for declaratory judgment of patent misuse falls comfortably
 9 within the broad scope of the Declaratory Judgment Act, 28 U.S.C. § 2201, a statute
 10 that is given “a liberal interpretation because it is remedial in character.” *Gillette Co.*
 11 *v. ‘42’ Prods.*, 435 F.2d 1114, 1118 (9th Cir. 1970). ChromaDex’s argument that
 12 claims for *damages* for patent misuse are not always recognized is a sleight-of-hand.

13 Numerous courts, including both this Court and the Federal Circuit, have
 14 sustained claims requesting a declaratory judgment of patent misuse. As this Court
 15 has explained, although “patent misuse developed as an equitable defense to an
 16 infringement action[,] . . . [i]t is a defense that may be raised by way of an action for

17 _____
 18 ⁴ ChromaDex’s cited cases are not to the contrary. *Conrad v. Bank of Am.*, 45 Cal.
 19 App. 4th 133 (1996), which involved the sufficiency of *evidence* and not pleadings,
 20 merely found that a plaintiff did not prove consequential damages where she offered
 21 no evidence of any detriment. Elysium alleges that it suffered damage as a direct
 22 result of the misrepresentation. In *Cadlo v. Owens-Illinois, Inc.*, 125 Cal. App. 4th
 23 513 (2004), the plaintiff failed to allege that he was aware of, much less that he
 24 relied on, the misrepresentation, and thus could not state a fraud claim in state court.
 25 *Engalla v. Permanente Med. Group, Inc.*, 938 P.2d 903, 919 (Cal. 1997), supports
 26 *Elysium’s* position. In that case, the court *found* reliance by acknowledging a
 27 “presumption” of reliance “wherever there is a showing that a misrepresentation was
 28 material,” and further held that materiality is a question of fact not to be decided
 even at summary judgment, much less on a motion to dismiss. Finally, the portion of
Crews v. Wachovia Mortg. Corp., 2010 U.S. Dist. LEXIS 77660 (C.D. Cal. July 23,
 2010), cited by ChromaDex involved whether a plaintiff had shown a likelihood of
 success on the merits of a fraud claim for purposes of a preliminary injunction, not
 whether allegations of reliance were sufficient to withstand a motion to dismiss. In
 any event, the plaintiff in *Crews* could not show a detrimental change in position. *Id.*
 at *9. In contrast, Elysium – which had been “arduously negotiating” (MTD 10) –
 relied to its detriment on ChromaDex’s misrepresentation by capitulating to its
 demands, ceasing negotiations and remitting substantial royalty payments under the
 contract it was induced to sign (FACC ¶ 108).

1 declaratory relief.” *Inamed Corp. v. Kuzmak*, 275 F. Supp. 2d 1100, 1124 (C.D. Cal.
2 2002). Ample authority supports this Court’s interpretation. *B. Braun Med. Inc. v.*
3 *Abbott Labs.*, 124 F.3d 1419, 1428 (Fed. Cir. 1997) (district court could enter a
4 declaratory judgment that patent was unenforceable due to misuse); *Glitsch, Inc. v.*
5 *Koch Eng’g Co.*, 216 F.3d 1382, 1386 (Fed. Cir. 2000) (patent misuse may be
6 asserted as “a request for declaratory relief”); *Linzer Prods. Corp. v. Sekar*, 499 F.
7 Supp. 2d 540, 552-53 (S.D.N.Y. 2007) (holding that the law does “not proscribe
8 claims seeking declaratory judgment of patent misuse” and stating that arguments to
9 the contrary were “without merit”); *In re Gabapentin Patent Litig.*, 649 F. Supp. 2d
10 340, 349 (D.N.J. 2009) (“courts have found patent misuse . . . to be a proper basis for
11 declaratory relief”). *See also Matsushita Elec. Indus. Co. v. CMC Magnetics Corp.*,
12 2006 U.S. Dist. LEXIS 101358 (N.D. Cal. Nov. 13, 2006) (denying motion to
13 dismiss patent misuse counterclaim.

14 In *B. Braun*, which ChromaDex misleadingly and incompletely quotes in a
15 footnote, the Federal Circuit did not hold that a claim seeking declaratory relief of
16 patent misuse was improper. To the contrary, it specifically allowed such a claim to
17 proceed and remanded the case to the district court to adjudicate it. *Id.* at 1429. The
18 Federal Circuit merely observed the district court could, but was not required to,
19 award damages after entering its declaratory judgment. *Id.* at 1428. In this context
20 the Federal Circuit stated that patent misuse “may not be converted to an affirmative
21 claim for damages simply by restyling it as a declaratory judgment counterclaim.”
22 *Id.* This statement has no application here. Likewise, in *Enercon GmbH v. ErdMan*,
23 13 F. App’x 651 (9th Cir. 2001) (unpublished)⁵, the Ninth Circuit did not address,
24 much less reject, a declaratory judgment claim.

25

26

27 ⁵ Contrary to ChromaDex’s suggestion, *Enercon*, even if it were relevant, is not
28 “binding” on this Court and “may not be cited to [by] the courts of this circuit,”
except in limited circumstances that do not apply here. *See* Ninth Circuit Rule 36.3.

1 All that courts require for a declaratory judgment claim is the existence of a
 2 case or controversy. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007).
 3 A case or controversy plainly exists here. ChromaDex, in Count 3 of its Complaint,
 4 seeks to enforce the royalty requirement in the parties' Trademark Agreement.
 5 Elysium seeks to enjoin enforcement of the Trademark Agreement's royalty
 6 requirement due to ChromaDex's patent misuse. FACC, Prayer for Relief, ¶ 8.
 7 Even the case law cited by ChromaDex acknowledges the propriety of declaratory
 8 judgments finding royalty provisions unenforceable. *See Zila, Inc. v. Tinnell*, 502
 9 F.3d 1014, 1019 (9th Cir. 2007) (upholding declaratory judgment claim asserting
 10 post-patent-expiration royalty obligation unenforceable due to patent misuse); *see*
 11 *also Kimble v. Marvel Entertainment*, 135 S. Ct. 2401, 2411 (2015) (same); *Miotox*
 12 *LLC v. Allergan, Inc.*, 2015 U.S. Dist. LEXIS 58896 (C.D. Cal. May 5, 2015)
 13 (denying motion to dismiss patent misuse counterclaim brought in response to breach
 14 of license claim). Moreover, as discussed below, patent misuse can also constitute
 15 an unlawful or unfair act under California's Unfair Competition Law.

16 2. Elysium Has Stated a Claim for a Declaratory Judgment of Patent
 17 Misuse

18 a. *The Counterclaims Sufficiently Allege Tying*

19 ChromaDex's merits challenge also fails. The counterclaims, taken as true
 20 and construed in the light most favorable to Elysium, sufficiently allege that
 21 ChromaDex: (1) conditioned access to its patent rights⁶ on (2) the purchase from
 22

23 ⁶ In a footnote, ChromaDex claims that Elysium's allegation that it receives an
 24 implied sublicense to ChromaDex's patents is "conclusory." Not so. The
 25 counterclaims allege that ChromaDex has exclusively licensed certain patents related
 26 to nicotinamide riboside from Dartmouth, *see* FACC ¶ 32, and that ChromaDex then
 27 agreed to supply material to Elysium, *id.* ¶ 53. It is well-settled that a licensed
 28 manufacturer who then supplies product to third parties pursuant to the
 manufacturer's license grants an implied license to its customers to use that product
 for all purposes. *See Zenith Elecs. Corp. v. PDI Commc'n. Sys. Inc.*, 522 F.3d 1348,
 1360-62 (Fed. Cir. 2008); *Jacobs v. Nintendo of Am., Inc.*, 370 F.3d 1097, 1099-
 1102 (Fed. Cir. 2004).

1 ChromaDex of a trademark license. *See* FACC ¶¶ 6, 38-40, 47-48, 112. That is
2 sufficient to allege the existence of a tie. ChromaDex’s argument that the Trademark
3 Agreement does not require Elysium to use the licensed trademarks is irrelevant.
4 Tying does not require both purchase and use of the tied product, but only its
5 required purchase, as even ChromaDex concedes in its brief. *See* MTD at 12-13,
6 quoting *Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 593 F. Supp. 1506, 1515-16
7 (N.D. Cal. 1984) (claim requires “demonstrat[ing] that the purchase of the tying
8 product is conditioned on the purchase of the tied product”) (emphasis added); *see*
9 *also Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 461-62 (1992) (a tying
10 arrangement is one where a party agrees “to sell one product but only on the
11 condition that the buyer also purchases a different (or tied) product”) (emphasis
12 added); *see also Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 139-40
13 (1969) (“We think . . . patent misuse inheres in a patentee’s insistence on a . . .
14 royalty, regardless of use, and his rejection of licensee proposals to pay only for
15 actual use.”).

16 ChromaDex’s claim that there was no “purchase” of a trademark license
17 ignores the language of the Trademark Agreement. The agreement is titled
18 “Trademark License and Royalty Agreement,” and the only right it grants is a
19 trademark license. *See* FAC, Ex. D. at Title and § 2. Under the Trademark
20 Agreement’s terms, Elysium pays substantial consideration for those rights: a
21 continuing royalty based on product sales. *Id.* §§ 2, 9. That is a purchase, by any
22 definition.

23 ChromaDex asserts in its motion that the real purpose of the royalties was
24 “deferred compensation” for product supply. There is certainly nothing in the
25 Trademark License that so states. Moreover, if what ChromaDex really means is
26 that Elysium is paying royalties not for the use of ChromaDex’s trademarks but
27 rather for Elysium’s use of ChromaDex’s patent rights when Elysium purchases
28 supply of NR, ChromaDex would face a different problem, because those patents are

1 licensed from Dartmouth, and ChromaDex would then owe Dartmouth a percentage
2 of its sublicensing revenue. If the real reason that ChromaDex insisted on separating
3 the royalty from the supply agreement was to disguise the payments as trademark
4 royalties and avoid paying patent sublicensing revenue to its licensor Dartmouth,
5 ChromaDex would at a minimum be guilty of unclean hands and this Court should
6 deny relief. In any case, ChromaDex's litigation-inspired characterization of the
7 Trademark Agreement should not be accepted, and no inferences should be drawn in
8 its favor at the pleading stage on a motion to dismiss.

9 b. *The Supply of Patented Products and the Granting of a*
10 *Trademark License Constitute Separate Products*

11 ChromaDex's argument that its patent rights and trademark rights do not
12 constitute separate products is incorrect. ChromaDex argues that, under the Supreme
13 Court's antitrust analysis in *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 24
14 (1984), Elysium must show two distinguishable markets based on the nature of
15 consumer demand for the two items. ChromaDex is wrong, because patent misuse is
16 not as limited as antitrust claims. It is a claim that a patent holder has unlawfully
17 extended the exclusionary right of its patent, regardless of whether it also results in
18 violation of the antitrust laws.

19 In *Senza-Gel Corp. v. Siffhart*, 803 F.2d 661, 670 (Fed. Cir. 1986), the Federal
20 Circuit explained that "[e]ffort[s] to equate the determination of product separability
21 for misuse purposes with product separability for antitrust purposes must fail." *Id.* at
22 670. In particular, "[t]he law of patent misuse in licensing need not look to
23 consumer demand (which may be non-existent) but need look only to the nature of
24 the claimed invention as the basis for determining whether a product is a necessary
25 concomitant of the invention or an entirely separate product." *Id.* at n.14. The
26 antitrust separability test is "tailored for situations that may or may not involve a
27 patent," and thus involves a different analysis. *Id.*; see also *C.R. Bard, Inc. v. M3*
28 *Sys.*, 157 F.3d 1340, 1372 (Fed. Cir. 1998) ("Patent misuse is viewed as a broader

1 wrong than antitrust violation because of the economic power that may be derived
2 from the patentee's right to exclude.”).

3 Here, the patents, and the supply of nicotinamide riboside, are entirely
4 different products from ChromaDex's NIAGEN trademark. The trademark is not, of
5 course, a “necessary concomitant of the invention”; indeed, trademarks or their use
6 are not part of the inventions at all. *See, e.g.*, FACC ¶¶ 33-34. If the tying product
7 in *Senza-Gel* (a method patent license) and the tied product (a machine used to carry
8 out one step of the method) were separate products, then the patents and trademarks
9 here surely are as well. *See Senza-Gel*, 803 F.2d at 667-68, 670. *See also Jack*
10 *Winter Inc. v. Koratron Co., Inc.*, 375 F. Supp. 1, 71-72 (N.D. Cal. 1974) (finding
11 patent misuse where company tied the right to practice the patent to a requirement
12 that the patentee affix the trademark to all garments produced by the process).

13 Further, even under the *Jefferson Parish* antitrust consumer demand test,
14 under the facts as pled by Elysium, the patents and trademarks at issue here are
15 separate products in different markets.⁷ Indeed, in the prior version of ChromaDex's
16 motion to dismiss, ChromaDex agreed (in language now deleted from its current
17 brief) that the counterclaims support an inference that some customers who want
18 access to supply of nicotinamide riboside do not want access to ChromaDex's
19 NIAGEN marks. *See D.N. 27* at 18. The NIAGEN mark is not essential to the sale,
20 supply or use of NR; a seller could call NR by many names, including different
21 brand names or just the chemical name, using “NR” or “nicotinamide riboside” to
22 describe the product. *See FACC ¶¶ 40, 68, 122.*

23 ⁷ ChromaDex cites to several franchise cases in its argument regarding Elysium's
24 tying claims. Those cases are inapposite. In the franchise context, the franchisor's
25 trademark and the franchisor's product are both “essential” elements of the
26 franchising business model. *See Mozart Co.*, 593 F. Supp. at 1514-15. In
27 ChromaDex's case, there is no franchising arrangement, the trademark and patent
28 rights need not be sold together, and Elysium had no interest in the NIAGEN
trademark. *See id.* (car and replacement car parts were separate products as any
other state of affairs would allow a “franchisor to require its franchisees to distribute
any product . . . whether or not those products were essential to the purpose of a
franchise”).

1 **C. Elysium Has Stated a Claim for Violation of California’s Unfair**
2 **Competition Law**

3 1. Elysium’s UCL Claim Satisfies the Notice Requirements of Rule
4 8

5 ChromaDex’s arguments that Elysium’s UCL claim does not provide it
6 sufficient notice because it does not “specifically identify a statute” and includes the
7 words “and/or” fundamentally misunderstands modern pleading requirements. All
8 Rule 8 requires is that a party allege a “short and plain statement of the claim.” Fed.
9 R. Civ. P. 8(a). This is satisfied when a party gives the defendant fair notice of a
10 plausible claim against him. *Id.* at 8(b). As ChromaDex’s own motion
11 demonstrates, ChromaDex had no trouble understanding that the Counterclaims
12 alleged three business acts or practices, and that those acts or practices violated
13 either or both of the unlawful and unfair prongs of the UCL. MTD at 15-16. *See*
14 *Alvarez v. Hill*, 518 F.3d 1152, 1158 (9th Cir. 2008) (moving party’s own brief
15 “conclusively establish[ed] that they had fair notice” of the claim).

16 ChromaDex’s claim that a party “must specifically identify the particular
17 statutes that it alleges the defendant violated,” MTD at 17, has been emphatically
18 rejected by both the Supreme Court and the Ninth Circuit. In *Johnson v. City of*
19 *Shelby*, 135 S. Ct. 346 (2014), the Court recently summarily reversed the Fifth
20 Circuit for making the same fundamental error that ChromaDex urges here.
21 *Johnson*, 135 S.Ct. 346 at 347 (per curiam) (“[N]o heightened pleading rule requires
22 plaintiffs seeking damages for violations of constitutional rights to invoke § 1983
23 expressly in order to state a claim.”). The Court observed that requiring a pleading
24 specifically to identify a particular statute contravened modern pleading, which was
25 designed to avoid these types of “battles over mere form of statement” and “civil
26 cases turning on technicalities.” *Id.* (citations omitted). The Ninth Circuit likewise
27 “long ago rejected the argument that a specific statute must be named [in a
28 complaint], describing it as an ‘attempt to evoke wholly out-moded technical
pleading rules.’” *Sagana v. Tenorio*, 384 F.3d 731, 737 (9th Cir. 2004) (quoting

1 *Bowers v. Campbell*, 505 F.2d 1155, 1157 n.2 (9th Cir. 1974)); *see also Alvarez*, 518
2 F.3d 1152 at 1157 (“A complaint need not identify the statutory or constitutional
3 source of the claim raised in order to survive a motion to dismiss”).

4 Given that the UCL itself does not require a statutory violation, it is baffling
5 why ChromaDex insists to this Court that the recitation of a statute is required. As
6 case law ChromaDex cites recognizes, UCL violations can encompass court-made
7 law. *See* MTD at 17-18 (“Under the UCL, ‘unlawful’ practices are practices
8 ‘forbidden by law, be it civil or criminal, federal, state, municipal, statutory,
9 regulatory, or court-made.”) (quoting *Saunders v. Superior Court*, 27 Cal. App. 4th
10 832, 838-39 (1994) (emphases added).

11 Elevating pleading hypertechnicality to new heights, ChromaDex also urges
12 that Elysium’s claim should be dismissed because it includes the words “and/or.” In
13 particular, ChromaDex says that Elysium cannot allege conduct that was unlawful
14 “and/or” unfair, and instead must elect, at the pleading stage, the specific prong
15 under which it will proceed. But the Federal Rules expressly permit pleading in the
16 alternative. Parties may pursue overlapping, multiple, and even inconsistent theories
17 of a claim, and the rules expressly state that the pleading “is sufficient if any one of
18 them is sufficient.” Fed. R. Civ. P. 8(d); *see PAE Gov’t Servs. v. MPRI, Inc.*, 514
19 F.3d 856, 858-59 (9th Cir. 2007) (“At the time a complaint is filed, the parties are
20 often uncertain about the facts and the law; and yet, prompt filing is encouraged and
21 often required In recognition of these uncertainties, . . . we allow pleadings in
22 the alternative As the litigation progresses, and each party learns more about its
23 case and that of its opponents, some allegations fall by the wayside as legally or
24 factually unsupported [W]e call [this process] litigation.”); *Parino v. Bidrack,*
25 *Inc.*, 838 F. Supp. 2d 900, 908 (N.D. Cal. 2011) (“[P]laintiff may properly assert
26 claims based on both existence and absence of a binding agreement between the
27 parties.”).

28

1 2. ChromaDex’s Patent Misuse Constitutes Unlawful Conduct
2 Under the UCL

3 California’s UCL prohibits business activity that is “unlawful, unfair or
4 fraudulent.” Cal. Bus. & Prof. Code § 17200, et seq. ChromaDex’s patent misuse, as
5 pled, qualifies as unlawful business activity under the UCL.

6 The “unlawful” prong of the UCL allows parties to bring suit based on a wide
7 variety of unlawful business practices. As this Court has observed, “[v]irtually any
8 law or regulation — federal or state, statutory or common law — can serve as a
9 predicate for a [section] 17200 ‘unlawful’ violation.” *Epicor Software Corp. v. Alt.*
10 *Tech. Sols., Inc.*, 2013 U.S. Dist. LEXIS 79125, at *16-17 (C.D. Cal. May 9, 2013)
11 (Carney, J.) (second alteration in original) (citation omitted). As the California
12 Supreme Court has explained, “the unfair competition law’s scope is broad [and]
13 [i]ts coverage is sweeping, embracing anything that can properly be called a business
14 practice and that at the same time is forbidden by law.” *Cel-Tech Commc’ns., Inc. v.*
15 *Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999) (citation omitted).

16 There can be no doubt that the law proscribes patent misuse. As cases cited
17 above show, patent misuse violates at least court-made law and thus can constitute
18 an unlawful act under the UCL. Courts have specifically found patent-trademark ties
19 to be a form of patent misuse. *See, e.g., Jack Winter*, 375 F. Supp. 1 at 71-72.
20 Patent misuse also satisfies ChromaDex’s invented requirement of identifying a
21 statute. The doctrine of patent misuse is expressly recognized by statute,
22 specifically, 35 U.S.C. § 271(d), which outlines, in part, some of the parameters for
23 making a claim.

24 ChromaDex also argues that if Elysium’s patent misuse declaratory judgment
25 claim fails, then so too must a UCL claim based on unlawful patent misuse. This is a
26 false syllogism. Even if ChromaDex were correct (and it is not) that patent misuse
27 cannot be asserted under the Declaratory Judgment Act, that does not mean that
28 patent misuse cannot be a predicate for a UCL claim. An unlawful act under the

1 UCL need not be independently actionable. *See Rose v. Bank of Am., N.A.*, 57 Cal.
2 4th 390, 393 (2013) (plaintiffs alleged a claim under the unlawful prong even though
3 underlying statute had been amended to remove private right of action); *Saunders*, 27
4 Cal. App. 4th at 839 (“It is not necessary that the predicate law provide for private
5 civil enforcement.”).

6 Moreover, tying is not the only problem with the Trademark Agreement. By
7 its terms, it requires the continued payment of royalties long after ChromaDex’s
8 patents have expired, so long as the NR Supply Agreement remains in effect. This
9 itself is a form of patent misuse, and it also constitutes an unlawful act for purpose of
10 the UCL. ChromaDex concedes that a licensor cannot require a royalty that extends
11 “beyond the expiration date of the patent.” *Brulotte v. Thys Co.*, 379 U.S. 29, 32
12 (1963); *see also Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2411 (2015) (“A
13 court need only ask whether a licensing agreement provides royalties for post-
14 expiration use of a patent . . . if so, no dice.”); *Zila*, 502 F.3d at 1019. ChromaDex’s
15 argument that the Trademark Agreement does not violate *Brulotte* is misplaced. The
16 Trademark Agreement remains “in full force and effect until the termination of the
17 Supply Agreement.” FAC, Ex. D, at §14. The Supply Agreement, under its terms,
18 was capable of continuing indefinitely. After its initial 3-year term, the Supply
19 Agreement renews “automatically for successive additional one year periods” until it
20 is terminated by a party. FAC, Ex. A, at § 5.1. Thus, Elysium’s royalty obligation
21 under the terms of the Trademark Agreement unlawfully continued after the
22 expiration of all patents covering NR supplied by ChromaDex.

23 3. ChromaDex’s Breach of Contract Coupled with Deceptive and
24 Misleading Activity Constitutes Unlawful Conduct in Violation
25 of the UCL

26 In its counterclaims, Elysium alleges that ChromaDex not only breached the
27 Supply Agreement, but fraudulently attempted to conceal that breach by sending
28 Elysium false data, in an attempt to convince Elysium that ChromaDex was in
compliance with its obligations. This conduct also violated the UCL.

1 ChromaDex cites to cases in which courts have rejected garden variety breach
2 of contract claims alone as a predicate for the UCL. *See, e.g., Shroyer v. New*
3 *Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1044 (9th Cir. 2010). ChromaDex
4 omits, however, that even *Shroyer* held that “a violation of common law can support
5 a § 17200 claim, provided that the conduct is also unlawful, unfair, or fraudulent.”
6 *Id.* at 1044 (citing *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 319 F. Supp. 2d
7 1059, 1074-75 (C.D. Cal. 2003)). Here, Elysium alleges not just a run-of-the-mill
8 breach of contract, but a breach coupled with intentional concealment of the breach
9 and calculated attempts to deceive the counterparty regarding compliance. That is
10 sufficient to raise a claim under the UCL’s unlawful prong. *See* Cal. Civ. Code §
11 1572 (defining “actual fraud” in connection with a contract as including “[t]he
12 suggestion, as a fact, of that which is not true, by one who does not believe it to be
13 true” and “[t]he suppression of that which is true, by one having knowledge or belief
14 of the fact”); Cal Civ. Code § 1709 (“One who willfully deceives another with intent
15 to induce him to alter his position to his injury or risk, is liable . . .”). *See also, e.g.,*
16 *Blizzard Entm’t Inc. v. Ceiling Fan Software LLC*, 28 F. Supp. 3d 1006, 1017 (C.D.
17 Cal. 2013) (“A claim under the UCL unlawful prong may be premised upon the
18 unlawful actions that constitute tortious interference with contractual relations.”);
19 *Cortez v. Glob. Ground Support, LLC*, 2009 WL 4282076, at *3-4 (N.D. Cal. Nov.
20 25, 2009) (common law torts can provide basis for UCL claims).

21 4. ChromaDex’s Patent Misuse Is Also Actionable Under the UCL
22 “Unfair” Prong

23 Patent misuse also is actionable under the “unfair” prong of the UCL, which
24 proscribes conduct that “threatens an incipient violation of an antitrust law, or
25 violates the policy or spirit of one of those laws because its effects are comparable to
26 or the same as a violation of the law, or otherwise significantly threatens or harms
27 competition.” *Cel-Tech Commc’ns, Inc.*, 20 Cal. 4th at 187 (1999).

28

1 Patent misuse undoubtedly meets this test. As a leading patent law treatise
2 explains, “The relationship between the misuse doctrine and the federal antitrust
3 laws is a complex one Nevertheless, a close relationship clearly exists between
4 the misuse doctrine and the antitrust laws.” 6A-19 Chisum on Patents § 19.04. *See*
5 *also Miotox LLC v. Allergan, Inc.*, 2015 U.S. Dist. LEXIS 58896, at *15 (C.D. Cal.
6 May 5, 2015) (patent misuse is a “broader wrong than antitrust violation because of
7 the economic power that may be derived from the patentee’s right to exclude”).

8 Thus, in alleging that ChromaDex has misused its patents, Elysium has alleged
9 an antitrust-like unfair business practice. Notwithstanding ChromaDex’s efforts to
10 contort the holding of *Linear Technology Corp. v. Applied Materials*, that decision
11 specifically permits suits under the unfairness prong “involving . . . the public in
12 general.” 152 Cal. App. 4th 115, 135 (2007). Tellingly, ChromaDex does not
13 identify any case rejecting a UCL claim brought by a corporate plaintiff that raised
14 antitrust concerns.⁸ If ChromaDex’s argument were true – and anticompetitive
15 contracts could never be challenged under the UCL – then the UCL’s unfairness
16 prong would be a dead letter. Such narrow application would undermine the
17 “sweeping” and “intentionally broad” scope of the UCL. *See In re First Alliance*
18 *Mortg. Co.*, 471 F.3d 977, 995 (9th Cir. 2006).

19 ChromaDex’s argument that Elysium’s unfair prong UCL claim should be
20 dismissed because it “fail[ed] to plead damages” is nonsensical. MTD at 23-24.
21 “[A] UCL action is equitable in nature [and] damages cannot be recovered.” *Korea*
22 *Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144 (2003). Thus,

23
24 ⁸ The moving brief asserts that Elysium’s counterclaims do not allege harm to
25 competition or plead an incipient violation of antitrust law. (MTD 21.) In fact, they
26 do. *See* FACC ¶ 120, 121. *See Imperial Irrigation Dist. v. Cal. Indep. Sys. Operator*
27 *Corp.*, 2016 U.S. Dist. LEXIS 101258, at *38 (S.D. Cal. Aug. 1, 2016) (denying
28 motion to dismiss UCL claim alleging monopolistic conduct that threatens
competition); *Silicon Image, Inc. v. Analogix Semiconductor, Inc.*, 2007 WL
1455903, at *19 (N.D. Cal. May 16, 2007) (dismissal of UCL claim brought by
corporation alleging claim of harm to competition was inappropriate).

1 damages cannot be an element of the claim. A party has standing to bring a UCL
2 claim if it “has suffered an injury in fact and has lost money or property as a result of
3 the unfair competition.” Cal. Bus. & Prof. Code § 17204. The California Supreme
4 Court has expressly “decline[d] . . . to turn this facially simple threshold condition
5 into a requirement that plaintiffs prove compensable loss at the outset.” *Clayworth v.*
6 *Pfizer, Inc.*, 49 Cal. 4th 758, 789 (2010).

7 Here, Elysium’s counterclaim specifically alleges that “Elysium has suffered
8 injury in fact and has lost money or property as a result of ChromaDex’s unfair
9 competition. In order to obtain a supply of nicotinamide riboside, Elysium has been
10 required to pay substantial royalties for a license of ChromaDex’s trademark rights,
11 which Elysium did not want and has not used.” FACC ¶ 122. That allegation more
12 than suffices to satisfy the UCL’s standing requirement. ChromaDex’s argument
13 that Elysium “misrepresent[s]” the facts and that the royalty payments are really
14 “deferred compensation” for the supply of NIAGEN raises issues of disputed fact
15 that are inappropriate for resolution on a motion to dismiss.

16 **IV. CONCLUSION**

17 For the foregoing reasons, Elysium respectfully requests that the motion to
18 dismiss be denied.

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20 DATED: April 3, 2017

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