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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
(SOUTHERN DIVISION)**

ChromaDex, Inc.,

Plaintiff,

v.

Elysium Health, Inc.,

Defendant.

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

**CHROMADEx, INC.’S MEMORANDUM
OF POINTS AND AUTHORITIES 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

Elysium Health, Inc.,

Counterclaimant,

v.

ChromaDex, Inc.,

Counter-Defendant.

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1 **I. INTRODUCTION**

2 On September 26, 2017, the Court directed defendant and counterclaimant
3 Elysium Health, Inc. (“Elysium”) to amend its counterclaim for declaratory judgment
4 of patent misuse to “clarify whether Elysium seeks any relief beyond ChromaDex’s
5 covenant not to sue for royalties under” the parties’ Trademark License and Royalty
6 Agreement (“TLRA”). (ECF 63 at 2.) Instead of following the Court’s instructions,
7 Elysium filed a Second Amended Counterclaim (ECF 65 (“SACC”)) that attempts to
8 allege a new injury and a new cause of action purportedly giving rise to the Court’s
9 jurisdiction. However, Elysium’s new theory is directly contrary to binding Federal
10 Circuit precedent, which holds that damages are not recoverable in a patent misuse
11 declaratory relief claim, and further that interest, lost opportunity costs, and attorneys’
12 fees are not available. Moreover, Elysium relies on a non-existent “implied” threat that
13 ChromaDex will sue it for patent infringement, which is insufficient as a matter of law
14 to invoke this court’s Article III jurisdiction. (SACC ¶ 99.) Contrary to Elysium’s
15 rhetoric, the SACC allegations show that ChromaDex has never accused Elysium of
16 patent infringement, let alone taken any affirmative acts indicating that it will
17 imminently file such a suit.

18 Elysium’s SACC also exceeds the Court’s directive and disregards Federal Rule
19 of Civil Procedure 15, by adding a new counterclaim for unjust enrichment, which is
20 merely a remedy in California, and not a cognizable cause of action. The alleged
21 predicate of this phantom claim are the royalties Elysium paid to ChromaDex under the
22 Trademark License Agreement (“TLRA”) and that ChromaDex already bound itself
23 with this Court to return as a credit against the \$3 million that Elysium owes
24 ChromaDex for failing to pay for product it purchased. Both of Elysium’s claims would
25 require the Court to litigate the relief that ChromaDex has already covenanted to provide
26 in this proceeding. Both of Elysium’s latest creative attempts should fail.

27 First, Elysium’s SACC does not allege sufficient facts demonstrating an actual
28 Article III case or controversy to support Elysium’s claim for a declaratory judgment of

1 patent misuse. Elysium does not allege that it seeks any legally cognizable relief beyond
2 the withdrawal with prejudice of ChromaDex’s claim to enforce the TLRA, which
3 ChromaDex already did in response to the Court’s order on ChromaDex’s motion to
4 dismiss Elysium’s First Amended Counterclaims (“FACC”). Stated another way, the
5 relief now sought in the SACC was already given by ChromaDex in response to the
6 Court’s order on ChromaDex’s first motion to dismiss, and was given to directly address
7 the Court’s subject matter jurisdiction concern. As to Elysium’s new claim that there
8 is an “inferred” dispute regarding patent infringement, Elysium alleges no affirmative
9 acts by ChromaDex showing that there is an actual case or controversy, let alone one of
10 sufficient immediacy and reality to invoke and support this Court’s limited jurisdiction.

11 Second, Elysium’s new “counterclaim” for unjust enrichment is a nullity because
12 unjust enrichment is only a remedy in California and not an independent cognizable
13 cause of action. Even if it was a viable claim, Elysium would lack standing to assert it
14 given ChromaDex’s covenant to return the TLRA royalties as a credit against
15 ChromaDex’s damages in this case.

16 Finally, if the Court does not dismiss Elysium’s unjust enrichment counterclaim,
17 it should strike as immaterial all patent misuse allegations from the claim. The
18 enforceability of the TLRA due to alleged patent misuse is immaterial because
19 ChromaDex made its binding covenant not to enforce the TLRA’s royalty provisions.
20 Elysium’s patent misuse allegations in this context are fictional, extending the theory
21 beyond any other decided cases and thus present the exact situation for which Rule 12(f)
22 was designed—streamlining litigation to the issues which must actually be decided,
23 rather than asking the court to make advisory rulings.

24 **II. FACTUAL AND PROCEDURAL BACKGROUND**

25 ChromaDex sells NIAGEN in bulk, a trademarked name for nicotinamide
26 riboside (“NR”), and other health supplement ingredients to retail facing customers
27 across the country, one of which was Elysium. (ECF 48 ¶ 11 (ChromaDex’s Third
28 Amended Complaint (“TAC”)).) Elysium sells one product, “Basis,” which combines

1 NIAGEN and pTeroPure, a trademarked name for pterostilbene, also sold by
2 ChromaDex. (TAC ¶ 2.) ChromaDex sold—and Elysium promised to pay for—
3 NIAGEN and pTeroPure pursuant to three contracts: (1) the “NIAGEN Supply
4 Agreement” (as amended); (2) the “pTeroPure Supply Agreement, (together with the
5 NIAGEN Supply Agreement, the “Supply Agreements”); and (3) a Trademark License
6 and Royalty Agreement (“TLRA”). (TAC ¶ 16.) The NIAGEN Supply Agreement and
7 the Trademark License and Royalty Agreement were terminated effective February 3,
8 2017, when in late 2016, long after the expiration of Elysium’s 60-day period to pay
9 had expired and after Elysium in multiple discussions with several ChromaDex
10 representatives refused to settle the dispute over the unpaid orders without injecting
11 other, extraneous conditions, ChromaDex notified Elysium in writing that, as permitted
12 by the NIAGEN Supply Agreement, following the expiration of the agreement on
13 February 3, 2017, ChromaDex would not renew the agreement. (TAC ¶¶ 16, 55.)

14 Elysium failed to pay for nearly \$3 million worth of NIAGEN and pTeroPure
15 that it ordered and received in 2016. (TAC ¶¶ 31, 38.) Accordingly, on December 29,
16 2016, ChromaDex filed its Complaint against Elysium for breach of contract. (ECF 1.)
17 In its third cause of action, ChromaDex sought damages under the TLRA for unpaid
18 royalties by Elysium. In response, Elysium counterclaimed against ChromaDex for,
19 among other things, a declaratory judgment of patent misuse. (ECF 11; ECF 31
20 (Elysium’s First Amended Counterclaims (“FACC”)).) Elysium contended that
21 ChromaDex misused its NR patent rights by “tying of access to its patent rights to a
22 royalty-bearing trademark license” in the TLRA. (FACC ¶ 113.) Elysium sought a
23 declaratory judgment of patent misuse and a judgment “[e]njoining ChromaDex from
24 enforcing the [Trademark] License and Royalty Agreement.” (FACC at 24).

25 ChromaDex moved to dismiss Elysium’s declaratory judgment for patent misuse
26 claim as frivolous and unsupported as a viable claim in these circumstances. (ECF 34.)
27 ChromaDex pointed out that patent misuse is not a cognizable affirmative claim, but
28 rather only an affirmative defense to patent infringement, and, regardless, that its

1 conduct did not constitute misuse as a matter of law. (ECF 34-1 at 11–15.) In its
2 Opposition, Elysium argued that the claim was legally cognizable because
3 ChromaDex’s claim to enforce the royalty provisions of the TLRA created a case or
4 controversy supporting the Court’s jurisdiction over its claim. Elysium stated:

5 A case or controversy plainly exists here. ChromaDex, in Count 3 of its
6 Complaint, seeks to enforce the royalty requirement in the parties’
7 Trademark Agreement. Elysium seeks to enjoin enforcement of the
8 Trademark Agreement’s royalty requirement due to ChromaDex’s patent
9 misuse.

10 (ECF 38 at 15.) The Court agreed with Elysium, although ChromaDex believes that
11 was error. On May 10, 2017, the Court denied ChromaDex’s motion to dismiss the
12 declaratory judgment counterclaim, finding that “[a] case or controversy exists here
13 because ChromaDex seeks to enforce the royalty requirement in the parties’ Agreement,
14 and Elysium contends that the royalty requirement is unenforceable due to patent
15 misuse.” (ECF 44 at 17 (emphasis added).)

16 Rather than contesting the Court’s conclusion, ChromaDex practically addressed
17 the concern on May 25, 2017, by filing a Second Amended Complaint (“SAC”) that
18 explicitly omitted, renounced, and abandoned its claim for unpaid royalties under the
19 TLRA. (ECF 45). In the SAC, ChromaDex made a binding statement and covenant
20 that

21 to eliminate an issue from this litigation, to conserve the parties’ and the
22 Court’s resources and to streamline this action, and without prejudice to
23 ChromaDex’s arguments and contentions, ChromaDex restates that it has
24 already terminated the Trademark License and Royalty Agreement on
25 February 2, 2017 and further, hereby unequivocally renounces any rights
26 to collect, charge, or obtain royalties under the [agreement] with Elysium.

27 (SAC ¶ 91.) ChromaDex further stated:

28 Pursuant to Section 14.1 of the Trademark License and Royalty Agreement
and ChromaDex’s notice sent to Elysium on October 31, 2016, the
Trademark License and Royalty Agreement was permanently terminated
along with the NIAGEN Supply Agreement, effective February 2, 2017.
Accordingly, the allegedly offending terms of the Trademark License and
Royalty Agreement as alleged by Elysium are no longer of any operative
effect.

(SAC ¶ 91). ChromaDex further represented in a binding statement that ChromaDex

1 “will provide a credit to Elysium for all past royalties against the damages owed by
2 Elysium in this case, including for the failure to pay for product purchased.” (SAC
3 ¶ 93.)

4 On June 7, 2017, ChromaDex filed its TAC, voluntarily withdrawing a previously
5 asserted trade secret misappropriation claim, to simplify this case, and asserting only
6 two causes of action for Elysium’s breach of the parties’ supply contracts by failing to
7 pay for \$3 million of NIAGEN and pTeroPure. The TAC included the identical
8 covenants and statements permanently renouncing the claim for unpaid royalties under
9 the TLRA. (*Compare* SAC ¶¶ 91, 93 *with* TAC ¶¶ 62, 64.) Elysium answered the TAC
10 and restated the FACC, still including its claim for a declaratory judgment of patent
11 misuse despite the fact that ChromaDex no longer (1) sought to enforce the royalty
12 provision in the TLRA, (2) renounced all rights under it, and (3) bound itself to credit
13 Elysium for all past royalties paid against damages owed to ChromaDex for Elysium’s
14 non-payment of product. (ECF 51.)

15 On August 14, 2017, ChromaDex filed a motion for partial judgment on the
16 pleadings on Elysium’s declaratory judgment counterclaim, arguing that the Court did
17 not have subject matter jurisdiction to decide the claim given ChromaDex’s binding
18 judicial covenant not to enforce the TLRA. (ECF 56.) Elysium opposed the motion,
19 arguing it had not received “all” the relief it was entitled to and presenting, for the first
20 time, a theory that the Court’s jurisdiction over the claim was premised on an unstated
21 threat of a future dispute between the parties regarding patent infringement. (ECF 60.)
22 On September 26, 2017, the Court denied ChromaDex’s motion without prejudice, but
23 directed Elysium to file an amended patent misuse counterclaim to “clarify whether
24 Elysium seeks any relief beyond ChromaDex’s covenant not to sue for royalties under
25 the TLRA.” (ECF 63 at 2.)

26 On October 11, 2017, Elysium far exceeded the Court’s order by filing a SACC
27 amending its declaratory judgment of patent misuse counterclaim *and* adding an
28 additional new claim for unjust enrichment seeking restitution of the royalties paid

1 under the TLRA, but already conceded by ChromaDex with its judicial covenant to
2 credit them against what Elysium owes ChromaDex in this case. Elysium’s amended
3 declaratory judgment counterclaim alleges that, because it “sells Basis using NR that is
4 not sourced from ChromaDex” (SACC ¶ 95) and ChromaDex has made “public
5 statements” that “impliedly threaten” Elysium with patent litigation (SACC ¶¶ 96–99),
6 “ChromaDex has created a reasonable apprehension of imminent patent litigation
7 against Elysium” (SACC ¶ 99). Elysium further baldly alleges, without any factual basis
8 whatsoever, that ChromaDex has not purged the alleged patent misuse. (SACC ¶¶ 101–
9 09.) Moreover, in the new unjust enrichment claim, Elysium asserts the TLRA was
10 “unlawful and unenforceable” because its terms “constituted patent misuse,” and it “is
11 entitled to restitution of royalties paid” under the TLRA, “plus interest and attorneys’
12 fees.” (SACC ¶¶ 145, 147, 150.) Elysium’s claims are tautological and fail to state
13 viable claims.

14 **III. LEGAL STANDARDS**

15 **A. FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6)**

16 Rule 12(b)(6) requires dismissal when a plaintiff has failed to present a
17 cognizable legal theory or to allege sufficient facts supporting a cognizable legal theory.
18 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). While a court resolving a motion
19 to dismiss must accept as true “all the allegations in the complaint,” it need not accept
20 “labels and conclusions” or “a formulaic recitation of the elements of a cause of action.”
21 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). A court must
22 identify and disregard unreasonable inferences, unwarranted deductions of fact, or legal
23 characterizations in the complaint. *Spewell v. Golden State Warriors*, 266 F.3d 979,
24 988 (9th Cir. 2001). After accepting only the well-pleaded allegations as true, a court
25 then determines whether a complaint alleges a “plausible” claim to relief. *Ashcroft v.*
26 *Iqbal*, 556 U.S. 662, 677–79 (2009).

1 **B. FEDERAL RULE OF CIVIL PROCEDURE 12(B)(1)**

2 Rule 12(b)(1) requires dismissal where a plaintiff has not established standing to
3 sue under Article III of the United States Constitution. *See Steel Co. v. Citizens for a*
4 *Better Env't*, 523 U.S. 83, 101–02 (1998). When evaluating a motion under Rule
5 12(b)(1), “[n]o presumptive truthfulness attaches to plaintiff’s allegations, and the
6 existence of disputed facts will not preclude the trial court from evaluating for itself the
7 merits of jurisdictional claims.” *Id.* (quoting *Thornhill Publ’g Co. v. Gen. Tel. & Elec.*
8 *Corp.*, 594 F.2d 730, 733 (9th Cir. 1979)). A plaintiff bears the burden of alleging facts
9 sufficient to establish (1) an injury in fact, (2) that the injury was caused by the
10 challenged conduct, and (3) that a favorable decision will redress the injury. *Spokeo,*
11 *Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). To satisfy the “injury in fact” requirement,
12 a plaintiff must show they “have suffered . . . an invasion of a legally protected interest
13 which is (a) concrete and particularized, . . . and (b) actual or imminent, not conjectural
14 or hypothetical.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citation and
15 internal quotation marks omitted).

16 **C. FEDERAL RULE OF CIVIL PROCEDURE 12(F)**

17 A defendant may move to strike from a complaint “any redundant, immaterial,
18 or impertinent and scandalous matter.” Fed. R. Civ. P. 12(f). “In the Ninth Circuit,
19 motions to strike are proper, even if the material is not prejudicial to the moving party,
20 if granting the motion would make trial less complicated or otherwise streamline the
21 ultimate resolution of the action.” *Ganley v. Cnty. of San Mateo*, No. C06-3923 TEH,
22 2007 WL 902551, at *2 (N.D. Cal. Mar. 22, 2007) (citing *Fantasy, Inc. v. Fogerty*, 984
23 F.2d 1524, 1527 (9th Cir. 1993), *rev’d on other grounds*, 510 U.S. 517 (1994)).

24 **D. SUBJECT MATTER JURISDICTION**

25 Federal courts are, of course, courts of limited jurisdiction. “A federal court is
26 presumed to lack jurisdiction in a particular case unless the contrary affirmatively
27 appears.” *A–Z Int’l v. Phillips*, 323 F.3d 1141, 1145 (9th Cir. 2003) (citation omitted).
28 Therefore “[o]nce challenged, the party asserting subject matter jurisdiction has the

1 burden of proving its existence.” *Rattlesnake Coal. v. U.S. E.P.A.*, 509 F.3d 1095, 1102
2 n.1 (9th Cir. 2007). “If the court determines at any time that it lacks subject matter
3 jurisdiction, the court must dismiss the action.” Fed. R. Civ. P. 12(h)(3); *see also Steffel*
4 *v. Thompson*, 415 U.S. 452, 459 n.10 (1974) (“[A]n actual controversy must be extant
5 at all stages of review . . .”).

6 “The limitations that Article III imposes upon federal court jurisdiction are not
7 relaxed in the declaratory judgment context.” *Gator.com Corp. v. L.L. Bean, Inc.*, 398
8 F.3d 1125, 1129 (9th Cir. 2005). The Declaratory Judgment Act provides that “[i]n a
9 case of actual controversy within its jurisdiction . . . any court of the United States . . .
10 may declare the rights and other legal relations of any interested party seeking such
11 declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a).
12 The phrase “case of actual controversy” in the Act refers to the type of “Cases” and
13 “Controversies” that are justiciable under Article III. *Aetna Life Ins. Co. v. Haworth*,
14 300 U.S. 227, 239–40 (1937); *see* U.S. Const. art. III, § 2, cl. 1.

15 **IV. ELYSIUM’S FOURTH AND FIFTH COUNTERCLAIMS SHOULD BE**
16 **DISMISSED WITH PREJUDICE.**

17 **A. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER**
18 **ELYSIUM’S FOURTH COUNTERCLAIM FOR A DECLARATORY JUDGMENT**
OF PATENT MISUSE.

19 Despite being given another chance to allege facts supporting the Court’s subject
20 matter jurisdiction, Elysium failed to plead a justiciable case or controversy for patent
21 misuse regarding the assertion or enforceability of ChromaDex’s patent rights. No
22 actual dispute regarding ChromaDex’s patent rights presently exists between these
23 parties and no potential controversy is of sufficient immediacy to warrant a declaratory
24 judgment. Elysium is asking for a pure advisory opinion where no case or controversy
25 exists.

26 **1. CHROMADDEX’S BINDING JUDICIAL COVENANT NOT TO ENFORCE**
27 **THE TRADEMARK LICENSE AND ROYALTY AGREEMENT**
PERMANENTLY ELIMINATED THE CASE OR CONTROVERSY
ALLEGED BY ELYSIUM.

28 As confirmed by this Court, subject matter jurisdiction over Elysium’s original

1 declaratory judgment counterclaim rested on ChromaDex’s claim for breach of the
2 TLRA. (ECF 44 at 17 (“A case or controversy exists here because ChromaDex seeks
3 to enforce the royalty requirement in the parties’ Agreement, and Elysium contends that
4 the royalty requirement is unenforceable due to patent misuse.”).) The SACC does not
5 contend that ChromaDex’s claim for breach of the TLRA is still at issue and indeed,
6 concedes that ChromaDex “unequivocally renounce[d] any rights to collect, charge, or
7 obtain royalties under the [agreement] with Elysium.” (SACC ¶ 101 (quoting TAC
8 ¶ 62).) Accordingly, it is clearly established that Elysium’s “only legally cognizable
9 injury” under its declaratory relief claim is now gone and, given the breadth of the
10 covenant, cannot reasonably be expected to recur. *Already, LLC v. Nike, Inc.*, 568 U.S.
11 85, 100 (2013); *Seven Words LLC v. Network Sols.*, 260 F.3d 1089, 1098–99 (9th Cir.
12 2001) (A court has jurisdiction over a declaratory judgment action “only when the
13 challenged . . . activity . . . has not evaporated or disappeared, and, by its continuing and
14 brooding presence, casts what may well be a substantial adverse effect on the interests
15 of the . . . parties.” (citation omitted)).

16 The only grounds Elysium falsely asserts for finding that a case or controversy
17 remains as to the TLRA, is that the claim is still live because “ChromaDex has not . . .
18 actually returned any royalties paid by Elysium under the [TLRA] and, on information
19 and belief, has not repaid any other customers. ChromaDex has not paid interest on
20 those monies or for the opportunity cost to Elysium . . . , and it has not repaid the costs
21 and attorneys’ fees incurred by Elysium due to ChromaDex’s attempts to enforce its
22 unlawful [TLRA].” (SACC ¶ 137.)

23 These alleged failings by ChromaDex do nothing to preserve the former case or
24 controversy. Elysium’s claim is moot because (1) a declaratory judgment of patent
25 misuse provides none of the relief Elysium seeks; (2) none of the actions Elysium
26 alleges ChromaDex has failed to take are necessary to purge the alleged patent misuse;
27 and (3) whether ChromaDex has purged the patent misuse is only relevant to the extent
28 that the substantive merits of the declaratory judgment of patent misuse (enforcing the

1 TLRA) claim is still live, which it is clearly not. ChromaDex has unequivocally
2 renounced the enforcement of the TLRA as a practical means of streamlining this case.

3 Elysium has already obtained all relief potentially available to it under a
4 declaratory judgment counterclaim—the cessation of the enforcement of the TLRA.
5 Patent misuse is only an affirmative defense which “simply renders the patent
6 unenforceable.” *B. Braun Med., Inc. v. Abbott Labs.*, 124 F.3d 1419, 1428 (Fed. Cir.
7 1997). The binding Federal Circuit precedent clearly holds and teaches that “*monetary*
8 *damages may not be awarded ‘under a declaratory judgment counterclaim based on*
9 *patent misuse.’”* *Id.* (emphasis added). Thus, Elysium’s new allegations that it has not
10 received monetary damages—consisting of past royalties paid, interest, and lost
11 opportunity costs—are insufficient as a matter of law and do not support federal court
12 jurisdiction. Elysium must be aware of this Federal Circuit precedent, yet it creatively
13 pleads the SACC, apparently seeking to misdirect the Court into committing error.
14 Nor does a baseless claim for costs and attorney’s fees support the Court’s subject
15 matter jurisdiction. “[I]nterest in attorney’s fees is, of course, insufficient to create an
16 Article III case or controversy where none exists on the merits of the underlying claim.”
17 *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 480 (1990); *see also Steel Co.*, 523 U.S. at
18 107 (“Obviously, however, a plaintiff cannot achieve standing to litigate a substantive
19 issue by bringing suit for the cost of bringing suit.”). As a matter of law, Elysium’s
20 new allegations are directly contrary to binding Federal Circuit precedent.

21 Second, the allegations regarding ChromaDex’s purported failure to purge the
22 alleged misuse do not, and cannot, support the Court’s jurisdiction. None of the actions
23 that Elysium now alleges ChromaDex failed to take are necessary to purge patent
24 misuse. Fundamentally, damages and restitution are not part of the purge analysis. *See,*
25 *e.g., Sylvania Indus. Corp. v. Visking Corp.*, 132 F.2d 947, 958 (4th Cir. 1943) (holding
26 that plaintiff had purged the patent misuse after finding that “it is the policy of the
27 executive officers of the plaintiff to no longer conduct its business in the manner which
28 the court criticized”); *L-3 Commc’ns Corp. v. Jaxon Eng’g & Maint., Inc.*, No. 10-CV-

1 02868-MSK-KMT, 2013 WL 1231875, at *5 (D. Colo. Mar. 27, 2013) (“A successful
2 invocation of the doctrine of patent misuse results in the patent being rendered
3 unenforceable until the misuse is purged (*i.e. the abusive licensing term or contract*
4 *condition is withdrawn*), *but does not give rise to an award of damages to the accused*
5 *infringer.*” (emphasis added)).

6 Moreover, the issue of whether any alleged patent misuse was purged
7 presupposes that the Court has Article III jurisdiction to consider Elysium’s declaratory
8 relief claim in the first instance, which it does not in this case. By renouncing the TLRA,
9 ChromaDex removed the basis for the exercise of the Court’s limited jurisdiction. The
10 question of “purge” would only come up in a subsequent dispute, if ChromaDex sued
11 Elysium for patent infringement, and if Elysium alleged that patent misuse is an
12 equitable affirmative defense to the infringement allegation. In that extremely
13 hypothetical scenario a court would have to decide whether ChromaDex’s actions were
14 sufficient to moot Elysium’s affirmative defense. Here, there is no actual live
15 controversy as to the enforcement of ChromaDex’s patent rights. Further, as addressed
16 below, Elysium has not adequately alleged an actual case or controversy of sufficient
17 immediacy or reality regarding patent infringement to support this court’s exercise of
18 Article III jurisdiction.

19 There is no further relief for the Court to provide on Elysium’s declaratory relief
20 claim because no damages, restitution, or attorney’s fees are available under the claim—
21 which Elysium knew before filing its SACC. The only relief available would have been
22 a declaration that ChromaDex’s claim for breach of the TLRA with respect to royalties
23 was unenforceable, but that claim is now irrevocably gone because ChromaDex
24 conceded the point to streamline the case.

25 **2. ELYSIUM FAILS TO ALLEGE A CONTROVERSY OF SUFFICIENT**
26 **IMMEDIACY REGARDING A POTENTIAL PATENT INFRINGEMENT**
27 **SUIT TO CREATE ARTICLE III JURISDICTION.**

28 Given that ChromaDex’s covenant not to enforce the TLRA nullified the original
underlying controversy supporting its declaratory judgment counterclaim, Elysium

1 alleges that a potential dispute regarding patent infringement is “of sufficient
2 immediacy and reality to warrant relief with respect to a determination of the
3 enforceability of ChromaDex’s patent rights.” (SACC ¶ 143.) However, the allegations
4 concerning both Elysium’s conduct and ChromaDex’s conduct fail to support Elysium’s
5 conclusory assertion. *See Bell Atl. Corp.*, 550 U.S. at 555 (the court need not accept as
6 true “labels and conclusions” or “a formulaic recitation of the elements of a cause of
7 action”).

8 To establish the Court’s subject matter jurisdiction for a declaratory judgment,
9 Elysium must allege *facts* showing there is a “substantial controversy, between parties
10 having adverse legal interests, of sufficient immediacy and reality to warrant the
11 issuance of a declaratory judgment.” *MedImmune, Inc. v. Genentech, Inc.*,
12 549 U.S. 118, 127 (2007). “This ‘immediacy and reality’ inquiry can be viewed through
13 the lens of standing.” *Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1338 (Fed.
14 Cir. 2008) (citation omitted).

15 Elysium does not allege that it currently suffers *any* injury from a potential patent
16 infringement suit. Instead, it alleges the threat of a *hypothetical future* injury adequately
17 gives rise to the Court’s present jurisdiction over the claim. But the Supreme Court has
18 emphasized that “it is the *reality* of the threat of . . . injury that is relevant to the standing
19 inquiry, not the plaintiff’s subjective apprehensions.” *City of L.A. v. Lyons*, 461 U.S.
20 95, 107 n.8 (1983) (emphasis in original). Elysium must show “this threat [is] real,
21 imminent, and traceable to [ChromaDex].” *Prasco*, 537 F.3d at 1339. To demonstrate
22 sufficient “reality” of the alleged threat, Elysium must establish (1) “that it engages in
23 or has sufficiently concrete plans to engage in [infringement],” *Already*, 568 U.S. at 94–
24 95; and (2) “some affirmative act” by ChromaDex to enforce its patent rights. *SanDisk*
25 *Corp. v. STMicroelectronics, Inc.*, 480 F.3d 1372, 1380–81 (Fed. Cir. 2007). Elysium
26 fails to establish either required element.

27 As to its own conduct, Elysium’s two vague allegations are insufficient to
28 establish that it fears a patent infringement suit. First, Elysium states that “[d]espite the

1 termination of the NR Supply Agreement, Elysium in fact does intend to continue, and
2 has continued, to supply its customers with Basis, both now and in the future.” (SACC
3 ¶ 94.) Second, Elysium states that “Elysium sells Basis using NR that is not sourced
4 from ChromaDex.” (SACC ¶ 95.) These statements lack a crucial element necessary to
5 show an existing dispute—they do not admit or even state that Elysium’s sales *infringe*
6 ChromaDex’s patents. *Cf. Already*, 568 U.S. at 95 (holding the Court did not have
7 jurisdiction because the declaratory judgment plaintiff “never stated that these shoes
8 would arguably infringe Nike’s trademark”). Elysium failed to allege the crucial
9 element—the *sine quo non* of the claim—and accordingly, there are no grounds to
10 assume, let alone conclude, that Elysium’s conduct subjects it to the risk of a patent
11 infringement lawsuit.

12 Elysium’s allegations are even weaker with respect to any alleged conduct by
13 ChromaDex. Elysium fails to identify *any* affirmative acts by ChromaDex evidencing
14 an imminent intent to sue Elysium for patent infringement. Elysium concludes that
15 “ChromaDex’s public statements” have “impliedly threaten[ed] Elysium with the
16 assertion of ChromaDex’s patent estate.” (SACC ¶ 99.) To support its conclusion,
17 Elysium only alleges that, on an August 2017 earnings call, ChromaDex’s CEO stated
18 that “ChromaDex has a comprehensive global patent portfolio of 16 patents and
19 applications spanning the processing use and composition of nicotinamide riboside. We
20 will vigorously *defend* this estate.” (SACC ¶ 97 (emphasis added).)¹ Elysium further
21

22 ¹ A general statement that a company would defend its intellectual property rights does
23 not give rise to subject matter jurisdiction here. Dartmouth College will be *defending*
24 its rights to two patents (which it exclusively licenses to ChromaDex) by responding to
25 two petitions for *inter partes* review requested by Elysium at the United States Patent
26 and Trademark Office. “*Inter partes* review is a trial proceeding conducted at the
27 [USPTO] to review the patentability of one or more claims in a patent only on a ground
28 that could be raised under §§ 102 or 103, and only on the basis of prior art consisting of
patents or printed publications.” See [https://www.uspto.gov/patents-application-
process/appealing-patent-decisions/trials/inter-partes-review](https://www.uspto.gov/patents-application-process/appealing-patent-decisions/trials/inter-partes-review); 35 U.S.C. § 311.
Because of the limited grounds considered in an *inter partes* review, Elysium’s patent

1 alleges that on the same call ChromaDex’s President and Chief Strategy Officer stated
2 that Elysium was “try[ing] to copy the ingredient and manufacture it who knows where
3” (SACC ¶ 98.)

4 Black letter law instructs that Elysium’s allegations are insufficient to create a
5 case or controversy regarding patent infringement. In particular, Elysium’s allegations
6 do not show an affirmative act by ChromaDex to enforce its patent rights, or even an
7 accusation that Elysium is infringing any of ChromaDex’s patents, and therefore cannot
8 support subject matter jurisdiction. *Ass’n for Molecular Pathology v. U.S. Patent &*
9 *Trademark Office*, 653 F.3d 1329, 1348 (Fed. Cir. 2011) (reversing a finding of standing
10 where “[t]he district court failed to limit its jurisdictional holding to affirmative acts by
11 the patentee directed at [the specific declaratory judgment plaintiff]”), *vacated on other*
12 *grounds*, 467 Fed. Appx. 890 (Fed. Cir. 2012); *see also Innovative Therapies, Inc. v.*
13 *Kinetic Concepts, Inc.*, 599 F.3d 1377, 1382 (Fed. Cir. 2010) (holding that general acts
14 by the patentee do not “in the absence of any act directed toward [the declaratory
15 judgment plaintiff], meet the minimum standard discussed in *MedImmune.*”).

16 In *Prasco, LLC v. Medicis Pharm. Corp.*, the Federal Circuit considered a
17 declaratory judgment plaintiff’s similar allegations that the threat of future patent
18 litigation gave rise to declaratory judgment jurisdiction. 537 F.3d at 1339. Considering
19 the totality of the circumstances, the court clearly found the allegations insufficient:

20 defendants have not accused [plaintiff] of infringement or asserted any
21 rights to [plaintiff’s product], nor have they taken any actions which imply
22 such claims. . . . The defendants’ lack of any “concrete claim of a specific
23 right” is an important factor weighing against a finding of an actual
24 controversy, particularly given that there has been no actual injury. The
25 lack of any evidence that the defendants believe or plan to assert that the
26 plaintiff’s product infringes their patents creates a high barrier to proving
27 that [plaintiff] faces an imminent risk of injury. Moreover, not only have
28 the defendants not taken a concrete position adverse to [plaintiff’s], but
29 they ***also have taken no affirmative actions at all related to [plaintiff’s]
current product.***

30 *Id.* at 1340 (emphasis added). Similarly, the facts alleged by Elysium show that, while

31 _____
32 misuse allegations are irrelevant to that dispute as well.

1 ChromaDex is aware that Elysium is selling NR from another source (SACC ¶ 97), it
2 *has not* accused Elysium of patent infringement, it *has not* taken any actions which
3 imply such a claim, it *has not* made plans to assert that Basis infringes its patent rights,
4 and it *has not* taken any affirmative action to enforce its patent rights against Elysium.
5 There are, therefore, ***no facts*** to support a finding that the alleged threat of future harm
6 is “of sufficient immediacy and reality to warrant the issuance of a declaratory
7 judgment.” *MedImmune*, 549 U.S. at 127.

8 The *Prasco* court also considered—and rejected—an allegation that a failure to
9 provide a covenant not to sue for patent infringement created an Article III case or
10 controversy, another argument Elysium makes here. The Federal Circuit found that “a
11 defendant’s failure to sign a covenant not to sue . . . is ***not sufficient*** to create an actual
12 controversy—some affirmative actions by the defendant will also generally be
13 necessary.” 537 F.3d at 1341 (emphasis added). Accordingly, Elysium’s allegation that
14 “ChromaDex has not provided Elysium with any covenant not to sue . . . to enforce
15 ChromaDex’s patent estate against Elysium,” is also not probative of an actual
16 controversy in the absence of any alleged affirmative conduct. (SACC ¶ 142.)

17 Elysium’s amended counterclaims thus fail to provide an alternate ground on
18 which the Court could find subject matter jurisdiction over Elysium’s declaratory
19 judgment counterclaim and the counterclaim should be dismissed with prejudice.

20 **B. THE COURT SHOULD DISMISS ELYSIUM’S FIFTH COUNTERCLAIM FOR**
21 **UNJUST ENRICHMENT.**

22 **1. UNJUST ENRICHMENT IS NOT AN INDEPENDENT CAUSE OF ACTION**
23 **UNDER CALIFORNIA LAW.**

24 Courts in this circuit have applied the rule that “under California law, there is no
25 cause of action for unjust enrichment. Rather, unjust enrichment is a legal theory that
26 permits recovery on other recognized causes of action.” *Glob. Med. Sols., Ltd v. Simon*,
27 No. CV12-04686MMM(JCX), 2013 WL 12065418, at *38 (C.D. Cal. Sept. 24, 2013)
28 (emphasis added); *see also CYBERSitter, LLC v. Google Inc.*, 905 F. Supp. 2d 1080,
1088 (C.D. Cal. Oct. 24, 2012) (dismissing unjust enrichment claim after finding that

1 “federal courts in California have ruled that unjust enrichment is not an independent
2 cause of action” (citing *Vicuna v. Alexia Foods, Inc.*, No. C 11–6119 PJH, 2012 WL
3 1497507 at *3 (N.D. Cal. April 27, 2012)); *Melchior v. New Line Prods., Inc.*, 106 Cal.
4 App. 4th 779, 793 (2003) (“The phrase ‘unjust enrichment’ does not describe a theory
5 of recovery, but an effect: the result of a failure to make restitution under circumstances
6 where it is equitable to do so” (quoting *Lauriedale Assocs. Ltd. v. Wilson*, 7 Cal. App.
7 4th 1439, 1448 (1992))).

8 This Court should not be distracted or confused by some federal courts’ incorrect
9 musings that “California courts ‘appear to be split on whether unjust enrichment can be
10 an independent claim or merely an equitable remedy.’” *Baggett v. Hewlett-Packard*
11 *Co.*, 582 F. Supp. 2d 1261, 1270 (C.D. Cal. 2007) (quoting *Falk v. Gen. Motors Corp.*,
12 496 F. Supp. 2d 1088, 1099 (N.D. Cal. 2007)). There is no actual split. *Global Medical*
13 *Solutions, Ltd. v. Simon* examined the purported split and found that in reality there is
14 no split at all. 2013 WL 12065418, at *38. The court found that the California case
15 often cited to stand for the proposition that unjust enrichment is an independent cause
16 of action, *Ghirardo v. Antonioli*, 14 Cal. 4th 39 (1996), did “not address whether unjust
17 enrichment is a cognizable cause of action.” 2013 WL 12065418, at *38. After
18 analyzing the relevant case law, the court held and accurately confirmed “that under
19 California law, there is no cause of action for unjust enrichment. Rather, unjust
20 enrichment is a legal theory that permits recovery on other recognized causes of action.”
21 *Id.* Elysium’s “cause of action” for unjust enrichment was filed without an adequate
22 legal basis and obviously is an effort to save its patent misuse theory through legal
23 gymnastics and contrived opaqueness. This Court should dismiss Elysium’s fifth claim
24 for unjust enrichment for failure to state a claim under Rule 12(b)(6) because it is not a
25 cognizable cause of action under California law.

26 **2. ELYSIUM LACKS STANDING TO BRING A CLAIM FOR ROYALTIES**
27 **PAID UNDER THE TRADEMARK LICENSE AND ROYALTY**
28 **AGREEMENT.**

Moreover, even if unjust enrichment was a viable standalone cause of action in

1 California, Elysium would lack standing to assert it. Elysium claims it “is entitled to
2 restitution of royalties paid under the unlawful License and Royalty Agreement, plus
3 interest and attorneys’ fees.” (SACC ¶ 150.) However, ChromaDex has already
4 covenanted to “provide a credit to Elysium for *all past royalties* against the damages
5 owed by Elysium in this case.” (TAC ¶ 64 (emphasis added).) Elysium has thus
6 disregarded Federal Rule of Civil Procedure 15, by adding a counterclaim seeking relief
7 which ChromaDex has already bound itself before this Court to provide.

8 ChromaDex does not contest Elysium’s entitlement to the funds it seeks and has
9 already covenanted to return the monies to Elysium. In other words, a determination
10 by the Court of Elysium’s unjust enrichment claim “is no longer necessary to compel
11 that result, and could not serve to prevent it.” *DeFunis v. Odegaard*, 416 U.S. 312, 317
12 (1974) (finding no jurisdiction because case was moot). Elysium has shown no “injury
13 to [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). “Absent such a showing, exercise of its
15 power by a federal court would be gratuitous and thus inconsistent with the Art. III
16 limitation.” *Id.*

17 Elysium’s allegation that “ChromaDex has not reimbursed Elysium for any
18 royalties paid under the License and Royalty Agreement,” does not take Elysium over
19 the necessary jurisdictional hurdle and is insufficient to create standing. (SACC ¶ 149.)
20 Premising its injury on the fact that it has not *actually received* the funds would elevate
21 form over substance where, as here, Elysium admits to not paying ChromaDex nearly
22 \$3 million for product Elysium ordered and ChromaDex shipped. (ECF 51 ¶¶ 31
23 (admitting that “The total amount ChromaDex invoiced Elysium for the Past Due
24 Invoices is \$2,983,350.”) and 38 (admitting that “Elysium has not paid what
25 ChromaDex has demanded.”); *see also* TAC ¶¶ 31, 38.) In this situation, ChromaDex’s
26 statements to the Court have created a lasting and binding obligation to refund the much
27 smaller royalty amount, as an offset or credit to the damages for which Elysium is liable
28 in this collection case. *Cf. Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 666 (2016)

1 (finding “an unaccepted settlement offer” did not moot the case only because there was
2 “no lasting right or obligation.”).

3 Neither does Elysium’s request for interest give it standing. (SACC ¶ 150.)
4 ChromaDex does not contest Elysium’s right to interest on the royalties paid. Indeed,
5 ChromaDex’s commitment to refund past royalty payments as credit against the
6 damages owed by Elysium, which also bear interest, necessarily includes interest.
7 ChromaDex hereby represents to the Court and to Elysium that interest should be
8 included when calculating the credit due to Elysium for past royalties in the Court’s
9 ultimate judgment, just as interest will be due on the \$3 million owed to ChromaDex.

10 Further, even if there was a viable cause of action for unjust enrichment in
11 California, which there is not, a successful action would not entail an award of
12 attorney’s fees. *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2164 (2015)
13 (stating that the Supreme Court will “recognize[] departures from the American Rule
14 only in ‘specific and explicit provisions for the allowance of attorneys’ fees under
15 selected statutes.’” (citation omitted)). Even if attorney’s fees were available, such an
16 interest is insufficient to support the Court’s continuing jurisdiction over an otherwise
17 moot claim. *See Lewis*, 494 U.S. at 480 (“interest in attorney’s fees is, of course,
18 insufficient to create an Article III case or controversy where none exists on the merits
19 of the underlying claim”).

20 Elysium cannot show that it continues to suffer an actual injury regarding the
21 royalty payments—ChromaDex does not contest that Elysium is entitled to the relief
22 which it seeks and has already relinquished its right to enforce the TLRA and has
23 committed to credit any such royalties against Elysium’s liability in this case. In short,
24 even if unjust enrichment was a viable standalone claim in California, Elysium would
25 lack standing because there is no injury to litigate and no further relief for the Court to
26 grant. The claim should be dismissed under Rule 12(b)(1).

27
28

1 **V. MOTION TO STRIKE PATENT MISUSE ALLEGATIONS RELATED TO**
2 **ELYSIUM’S UNJUST ENRICHMENT COUNTERCLAIM.**

3 If the Court does not dismiss Elysium’s unjust enrichment counterclaim, it should
4 nonetheless strike the allegations of patent misuse as immaterial to the unjust
5 enrichment claim under Rule 12(f) and streamline the resolution of this action.

6 **A. ELYSIUM’S ALLEGATIONS OF PATENT MISUSE ARE IMMATERIAL TO THE**
7 **CLAIMS AND DEFENSES IN THIS ACTION.**

8 Elysium would unnecessarily have the Court decide whether the TLRA is
9 unenforceable due to patent misuse in order to determine if Elysium is entitled to
10 restitution of royalties that ChromaDex has already covenanted to refund. (SAC
11 ¶¶ 145–50.) Specifically Elysium alleges that ChromaDex’s requirement that Elysium
12 “pay royalties for ChromaDex’s trademarks, in exchange for access to ChromaDex’s
13 supply of NR and to ChromaDex’s patent rights, was unlawful and constituted patent
14 misuse.” (SACC ¶ 145.) Elysium thus claims that “ChromaDex is and was unjustly
15 enriched by retaining royalties paid under an unlawful and unenforceable agreement.”
(SACC ¶ 148.)

16 The Court should strike these allegations as immaterial. The Ninth Circuit has
17 defined “immaterial” matter under Rule 12(f) as “that which has no essential or
18 important relationship to the claim for relief or the defenses being pleaded.” *Fantasy*,
19 984 F.2d at 1527 (internal quotation marks and citation omitted). Here, Elysium alleges
20 that the TLRA is unenforceable due to patent misuse. However, the enforceability of
21 the royalty provisions of the TLRA, and the patent rights allegedly asserted therein, is
22 a moot point—ChromaDex renounced any right to enforce the agreement, now or in the
23 future. (TAC ¶ 62.) There is no reason for the Court to delve further into *why* it is
24 unenforceable, so the issue of patent misuse has “no essential or important relationship”
25 to Elysium’s claim for unjust enrichment. In other words, the patent misuse allegation
26 is moot and immaterial under Rule 12(f). *See Derry v. Jackson Nat’l Life Ins. Co.*, No.
27 SACV 11-0343 DOC (RNBx), 2011 WL 7110571, at *11 (C.D. Cal. Oct. 5, 2011) (“a
28

1 claim made without standing is immaterial because it [] can no longer be considered
2 essential to Plaintiffs’ claim for relief”); *see also Bureerong v. Uvawas*, 922 F. Supp.
3 1450, 1479 (C.D. Cal. 1996) (striking allegations that “add[ed] nothing to the material
4 allegations” of the complaint). Striking the patent misuse allegations is therefore
5 proper.

6 Furthermore, Elysium’s expected insistence that its unjust enrichment
7 counterclaim entitles it to a determination of whether there was patent misuse, should
8 not be given any credence. A party has no legal or equitable interest in an admission or
9 finding of liability. *See Already*, 568 U.S. 85 (2013) (holding a covenant not to sue
10 mooted a counterclaim of trademark invalidity, notwithstanding the lack of an
11 admission or finding of liability); *McCauley v. Trans Union, LLC*, 402 F.3d 340, 342
12 (2d Cir. 2005) (holding a plaintiff “is not entitled to keep litigating his claim simply
13 because [the defendant] has not admitted liability”). Thus, because ChromaDex does
14 not contest whether the TLRA is enforceable with respect to the royalties at issue, and
15 since the TLRA has expired, Elysium has no real or legitimate interest in a judgment
16 finding the TLRA is unenforceable.

17 **B. THE PATENT MISUSE ALLEGATIONS SHOULD BE STRICKEN BECAUSE**
18 **THEY ARE PREJUDICIAL AND WILL UNNECESSARILY COMPLICATE**
19 **DISCOVERY AND TRIAL.**

20 Not only are Elysium’s patent misuse allegations proper to strike, the
21 circumstances here present the exact situation for which Rule 12(f) was designed. The
22 “function of a 12(f) motion to strike is to avoid the expenditure of time and money that
23 must arise from litigating spurious issues by dispensing with those issues prior to trial.”
24 *Sidney Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). While “motions
25 to strike are proper, even if the material is not prejudicial to the moving party,” *Ganley*,
26 2007 WL 902551, at *2, prejudice to the moving party weighs in favor of striking the
27 allegations, *see Fantasy*, 984 F.2d at 1528.

28 Striking the patent misuse allegations will streamline the issues before the Court,
conserving party and Court resources. Litigating the patent misuse allegations would

1 entail a significant burden on the parties and the Court, which is perhaps Elysium’s
2 improper objective. Evidence going to the question of patent misuse in this case would
3 be the subject of extensive fact discovery and expert testimony, covering antitrust-like
4 issues such as defining the relevant market in which ChromaDex operates, determining
5 whether ChromaDex has market power, and determining if ChromaDex’s conduct
6 actually hurt competition in that market. *Cf. Ill. Brick Co. v. Illinois*, 431 U.S. 720, 764
7 (1977) (noting the “extended nature of antitrust actions, often involving years of
8 discovery”). If the allegations are not stricken, the parties would also litigate
9 ChromaDex’s defense that it has purged the alleged misuse—further extending the
10 scope of the inquiry. The extensive nature of the issue is demonstrated by Elysium’s
11 first set of requests for production. Twenty-nine of the eighty requests are directed at
12 the patent misuse counterclaim. (Declaration of Jon F. Cieslak ¶ 3.) Further, sixty-one
13 of 150 paragraphs in the SACC are directed solely at this issue. (*See* SACC ¶¶ 5–6, 21,
14 28–41, 55–60, 90–109, 132–143, 145.) Neither ChromaDex nor the Court should be
15 required to litigate these immaterial phantom issues when they have no bearing on any
16 claims in the action. *Fantasy*, 984 F.2d at 1528 (finding that “the stricken allegations
17 would have unnecessarily complicated the trial of the copyright claim by requiring the
18 introduction of extensive evidence of the tax plan agreements and a mass of related
19 documents, potentially adding weeks to the trial”).

20 All this information and testimony, targeted at a single uncontested element of
21 Elysium’s (unviable) unjust enrichment claim, would distract from the real issues in this
22 case: the alleged breaches of contract. Instead of focusing on the contracts between
23 Elysium and ChromaDex, litigating patent misuse and ChromaDex’s purge of any
24 alleged misuse might require the examination of evidence concerning ChromaDex’s
25 historical and present contractual arrangements with other parties and the related
26 negotiations. *See, e.g., Koratron Co. v. Lion Unif., Inc.*, 409 F. Supp. 1019, 1031–32
27 (N.D. Cal. 1976) (examining the defendant’s agreements and amendments to those
28 agreements with twenty-one licensees). ChromaDex’s agreements with other

1 customers have nothing to do with the alleged breaches of the contracts at issue in this
2 case but would be an expensive sideshow for the lawyers, and perhaps further Elysium’s
3 objective of using litigation as an economic tool to cause its adversary to spend
4 resources on immaterial and irrelevant issues.

5 The patent misuse allegations should also be stricken because they create a risk
6 of prejudice to ChromaDex. For example, Elysium’s patent misuse allegations,
7 incorporated into the unjust enrichment counterclaim (SACC ¶ 144), allege that
8 ChromaDex: “forced Elysium to pay” royalties (SACC ¶ 6); “exploited” its market
9 power (SACC at 6); “dictates” prices to its customers (SACC ¶ 32); “coerced customers
10 into paying” for a trademark license (SACC ¶ 41); and “extract[ed] higher prices”
11 (SACC ¶ 59). These allegations of prior alleged misconduct are prejudicial to
12 ChromaDex, especially given their irrelevance to the matters before the Court. *See IV*
13 *Sols., Inc. v. CIGNA Healthcare of Cal. Inc.*, No. 215-CV-05730-SVW-FFM, 2016 WL
14 6902457, at *5 (C.D. Cal. Jan. 7, 2016) (striking “references to Defendants alleged prior
15 misconduct [that was] immaterial or impertinent to the present action”).

16 Ultimately, Elysium’s allegations that the TLRA is unenforceable due to patent
17 misuse in its unjust enrichment counterclaim are spurious: the unjust enrichment
18 “claim” is not cognizable under California law and ChromaDex does not seek to enforce
19 the royalty provisions of the TLRA. (TAC ¶ 62.) Indeed, the inclusion of patent misuse
20 allegations in the new counterclaim is a transparent bid to resurrect Elysium’s now-
21 defunct declaratory judgment of patent misuse counterclaim and unnecessarily raise the
22 stakes in this litigation. The Court should exercise its discretion and strike the
23 allegations regarding patent misuse from Elysium’s unjust enrichment claim to
24 streamline the issues in this case.

25 VI. CONCLUSION

26 For the reasons set forth above, ChromaDex requests that the Court (1) dismiss
27 Elysium’s fourth counterclaim for lack of subject matter jurisdiction; and (2) dismiss
28 Elysium’s fifth counterclaim for failure to state a claim and/or for lack of standing, or

1 (3) in the alternative, strike the patent misuse allegations related to Elysium’s fifth
2 counterclaim as immaterial.

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