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13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**
15 **(WESTERN DIVISION)**

17 ChromaDex, Inc.,
18 Plaintiff,
19 v.
20 Elysium Health, Inc., and Mark Morris
21 Defendants.
22 Elysium Health, Inc.,
23 Counterclaimant,
24 v.
25 ChromaDex, Inc.,
26 Counter-Defendant.

Case No. 8:16-cv-2277-CJC (DFMx)

**CHROMADEx, INC.’S REPLY
MEMORANDUM IN SUPPORT OF ITS
MOTION FOR PARTIAL SUMMARY
JUDGMENT AGAINST
COUNTERCLAIMANT ELYSIUM
HEALTH, INC.**

Judge: Hon. Cormac J. Carney
Courtroom: 7C
Date: Sept. 16, 2019
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Trial: October 15, 2019

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TABLE OF AUTHORITIES

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Cases

Advanced Micro Devices, Inc. v. Intel Corp.,
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Alvarez v. Chevron Corp.,
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(continued)

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K & M Joint Venture v. Smith International, Inc.,
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KGM Harvesting Co. v. Fresh Network,
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Scott Paper Co. v. Marcalus Manufacturing Co.,
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Supreme Foodservice GmbH v. Fluor Intercontinental, Inc.,
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TABLE OF AUTHORITIES
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<i>Times-Picayune Publishing Co. v. United States</i> , 345 U.S. 594 (1953).....	4
<i>Tokio Marine & Fire Insurance Co., Ltd. v. McDonnell Douglas Corp.</i> , 617 F.2d 936 (2d Cir. 1980)	12
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<i>USM Corp. v. SPS Technologies, Inc.</i> , 694 F.2d 505 (7th Cir. 1982)	6
<i>Valmont Industries, Inc. v. Yuma Manufacturing Co.</i> , 296 F. Supp. 1291 (D. Colo. 1969)	3
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1 **I. INTRODUCTION**

2 Counterclaimant Elysium Health, Inc. (“Elysium”) fails to raise any genuine
3 dispute of material fact or cite any authority that can save the deficient counterclaims
4 targeted by ChromaDex, Inc. (“ChromaDex”) in its motion for partial summary
5 judgment. Those counterclaims should be dismissed, and the case narrowed for trial,
6 for the following reasons:

7 *First*, Elysium ignores clear authority cited by ChromaDex, cites inapposite cases
8 from a different body of law related to antitrust claims, and bungles the evidentiary
9 record to suggest that ChromaDex somehow misused its patents. The correct legal
10 standard for a tying claim in the patent misuse context requires Elysium to show that
11 ChromaDex “conditioned” access to nicotinamide riboside (“NR”) on the mandatory
12 use of its trademark. Elysium identifies no evidence that ChromaDex did so. To the
13 contrary, there is uncontroverted evidence that most of ChromaDex’s customers
14 voluntarily used the mark and that Elysium itself chose and negotiated not to use it.
15 The record cannot support Elysium’s counterclaim.

16 *Second*, Elysium’s attempt to raise a fact issue to bolster its Product Safety
17 Provision counterclaim fails. Specifically, Elysium contends that the NR sold to it by
18 ChromaDex contained levels of acetamide in excess of the “No Significant Risk Level”
19 (“NSRL”) set by California’s Proposition 65. But Elysium points only to “preliminary
20 results” obtained through pilot testing performed by its third-party NR manufacturer,
21 [REDACTED], which admittedly used an unverified testing method that was
22 “not ready yet” and which [REDACTED] later discontinued using because it generated false
23 positive results. Standing alone, no reasonable jury could rely on these preliminary,
24 unreliable, and unverified results to return a verdict in Elysium’s favor. That is
25 especially true when combined with ChromaDex’s uncontroverted expert testimony
26 confirming [REDACTED] doubts about its testing method and establishing that none of the
27
28

1 product sold to Elysium contained acetamide in excess of the NSRL, an undisputed fact
2 that Elysium never contests by expert opinion, rebuttal report, or deposition testimony.

3 *Third*, Elysium raised no facts or law allowing it to avoid the plain terms of the
4 waiver provision in the supply agreement with respect to its cGMP and Product Safety
5 Provision counterclaims. Nor has Elysium shown that, as a matter of law, it satisfied
6 the notice requirement under California Commercial Code section 2607 as to the
7 purportedly defective NIAGEN that it later sold at full price and profit to consumers.

8 *Fourth*, Elysium fails to raise any facts showing that it is entitled to any damages
9 for three of its counterclaims. Elysium admits that it was not damaged by the alleged
10 breach of the Confidentiality Provision. Elysium did not present any evidence of
11 damages arising from the alleged breach of the Product Safety Provision; the random
12 invoices it cites have no connection to Elysium's purported harm. And Elysium admits
13 that its counterclaim for breach of the implied covenant of good faith and fair dealing
14 "arises from" the alleged breach of the Exclusivity Provision and that damages are the
15 same for both claims; as a matter of law, the entirely duplicative implied covenant
16 counterclaim must be dismissed.

17 *Fifth*, Elysium cites no law permitting it to ask the jury to speculate about how
18 much "lost profits" it could have earned within the "wide bands of uncertainty" it
19 proposes arising from other companies' sales, which its own expert admits cannot be
20 narrowed any further even using his own black-box "analysis." Those wide ranges are
21 not reasonably certain under the law.

22 *Sixth*, in a desperate ploy to save its fraudulent inducement counterclaim,
23 Elysium now points to a *different statement* than the one it both expressly alleged in its
24 pleadings and then unequivocally argued to this Court satisfied Federal Rule of Civil
25 Procedure 9(b) in order to sustain it past ChromaDex's motion to dismiss. The Court
26 accepted Elysium's allegations then, and Elysium cannot now—on the eve of trial—put
27 forward an entirely new claim, especially when Elysium has always been in possession
28 of the "facts" of what it thinks ChromaDex said.

1 **II. ARGUMENT**

2 **A. Elysium Has Not Raised a Genuine Dispute of Material Fact**
3 **Suggesting that ChromaDex Conditioned the Supply of NR on**
4 **Customers' Use or Purchase of the NIAGEN Trademark**

5 **1. Patent Misuse Requires Coercion or Conditioning**

6 Elysium declines to address nearly all of the patent misuse cases cited by
7 ChromaDex holding that patent misuse requires evidence of some form of conditioning
8 or coercion (as courts use those terms interchangeably). (Dkt. 233-1 (“Mot.”) at 12–
9 15.)¹ As those cases establish, it is not the mere sale of both a patented and unpatented
10 product that constitutes tying, it is the act of using market power to condition or compel
11 the sale of the unpatented product—*i.e.*, to make the sale of the unpatented product non-
12 voluntary—that broadens the scope of the patent such that misuse occurs. *Micro Chem.,*
13 *Inc. v. Great Plains Chem. Co.*, 900 F. Supp. 1386, 1404 (D. Colo. 1995), *aff'd in part,*
14 *rev'd in part*, 103 F.3d 1538 (Fed. Cir. 1997) (holding that, to show a tying arrangement,
15 “it must be shown that [the patentee] has actually forced customers to buy both products,
16 and that any appearance of choice was merely a sham”).

17 The cases cited by Elysium do not hold otherwise. Rather, they merely stand for
18 the proposition that conditioning can sometimes be shown on the face of an agreement,
19 typically involving an exclusivity provision, as opposed to through extrinsic evidence
20 of coercion. (See Dkt. 296 (“Opp.”) at 9–11.)² As Elysium’s own authority explains,

21 ¹ The only two cases that Elysium does address are in a footnote, where Elysium argues
22 that *Engel Industries Inc. v. Lockformer Co.*, 96 F.3d 1398, 1408 (Fed. Cir. 1996), and
23 *Valmont Industries, Inc. v. Yuma Manufacturing Co.*, 296 F. Supp. 1291 (D. Colo.
24 1969), were overruled by *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401 (2015),
25 and are immaterial given that they include total-sales royalty provisions. (Opp. at 9
26 n.4.) As explained below, *Kimble* involved a different type of patent misuse in which
27 courts do not require coercion. And while these cases do not expressly discuss tying,
28 they are still applicable because they involve the sale of a patented and unpatented
product for a single price and required a showing of coercion to establish misuse.

² *Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123, 1126 (6th Cir. 1981) (“This litigation
arose because the agreement contained an additional provision requiring Executive to
purchase from Cherokee *all* fuel, maintenance and parts required by Executive’s
airplanes.” (emphasis added)); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 450 (3d Cir.
1977) (containing leasing provisions which required lessee to purchase *all* gasoline
from lessor (emphasis added)); *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36
F.3d 1147, 1180 (1st Cir. 1994) (“Proof of a tying arrangement generally requires

1 “[b]y conditioning his sale of one commodity on the purchase of another, a seller
2 *coerces* the abdication of buyers’ independent judgment as to the ‘tied’ product’s merits
3 and insulates it from the competitive stresses of the open market.” *Times-Picayune*
4 *Publ’g Co. v. United States*, 345 U.S. 594, 605 (1953) (emphasis added).

5 Moreover, the cases cited by Elysium finding conditioning on the face of the
6 agreement are older antitrust cases that do not govern patent misuse. While antitrust
7 law and patent misuse law have certain commonalities, an important difference is that,
8 for patent misuse, tying is not presumed to be anticompetitive. In contrast, under
9 antitrust law, tying was presumed until recently to be anticompetitive (*i.e.*, to constitute
10 a *per se* violation of antitrust laws). *See Ill. Tool Works Inc. v. Indep. Ink*, 547 U.S. 28,
11 40 (2006). Elysium argues, under a *per se* rule, that “market power is evidence that a
12 seller was able ‘to force customers to purchase a second, unwanted product in order to
13 obtain the tying product.’” (Opp. at 12 (citing *Jefferson Par. Hosp. v. Hyde*, 466 U.S.
14 2, 17–18 (1984), *abrogated by Ill. Tool Works*, 547 U.S. 28 (2006)).) But in *Illinois*
15 *Tool Works*, the Supreme Court held that tying allegations in the patent misuse context
16 are not subject to the *per se* doctrine. 547 U.S. at 42–43. Consequently, in this case,
17 there is no legal presumption that ChromaDex has market power or that the alleged
18 activities have an anticompetitive effect. And because the antitrust cases cited by
19 Elysium presumed the seller’s ability to coerce the buyers, they are inapposite here.

20 Elysium fails to cite a single patent misuse case where a court found conditioning
21 based solely on the face of the contract. In any event, the agreements between
22

23 evidence that the supplier's sale of the tying product is *conditioned* upon the *unwilling*
24 purchase of the tied product from the supplier or an *unwilling* promise not to purchase
25 the tied product from any other supplier.” (emphases added), *abrogated by Reed*
26 *Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010); *Krehl v. Baskin-Robbins Ice Cream*
27 *Co.*, 78 F.R.D. 108, 118 (C.D. Cal. 1978) (requiring franchisor to use *only* approved
28 supplies in its ice cream business); *George Lussier Enters., Inc. v. Subaru of New*
England, Inc., 2001 WL 920060, at *9 (D.N.H. Aug. 3, 2001) (explaining that an
express contractual tie is “an agreement that *explicitly conditions* the purchase of one
product on the purchase of another” (emphasis added)); *Waldo v. North Am. Van Lines*,
669 F. Supp. 722, 727 (W.D. Pa. 1987) (noting no explicit conditioning agreement
where there was nothing on the face of the agreement which required the purchase of
insurance specifically through the defendant).

1 ChromaDex and its customers in this case do not contain any indication of tying
2 arrangements like those in the antitrust cases offered by Elysium. For example, there
3 is no contractual provision requiring a buyer to purchase different staple products
4 exclusively from the seller like there was in the *Bell* and *Bogosian* cases (for fuel), or
5 the *Krehl* case (for supplies).³ Instead, the undisputed facts here show a variety of
6 different arrangements between ChromaDex and customers regarding a single
7 trademark. Some customers negotiated a contract with an option to use the trademark;
8 some customers negotiated a contract requiring its use; and some customers did not
9 execute any agreement relating to the trademark. And at no point did ChromaDex
10 restrict or condition its customers' access to NR on their exclusive use of the NIAGEN
11 mark alone: customers were able to freely use their own marks as well, as the record
12 clearly shows. (*E.g.*, Ex. 23; Ex. 81 at 1039–41.)⁴ The facts do not support a finding
13 that there is an illegal tying arrangement based on the contractual provisions alone, and
14 thus Elysium's attempt to save the counterclaim on that basis cannot succeed.

15 Elysium also improperly conflates two different types of patent misuse in its
16 reliance on *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. at 2401 (2015). (Opp. at
17 8–9.) *Kimble* involved an agreement to license a patent beyond the term of the patent.
18 The Supreme Court held that such agreements constitute an impermissible extension of
19 the patent term (and therefore patent misuse) even if the licensee voluntarily agreed to
20 the license. 135 S. Ct. at 2406. But neither *Kimble* nor any of the other cases cited by
21 Elysium involved alleged tying arrangements where there is no illegal tie (and therefore
22 no patent misuse) without some form of conditioning or coercion. *Preformed Line*
23 *Prods. Co. v. Fanner Mfg. Co.*, 328 F.2d 265 (6th Cir. 1964); (Mot. at 12). Elysium's
24

25 ³ *Bell*, 660 F.2d at 1126; *Bogosian*, 561 F.2d at 450; *Krehl*, 78 F.R.D. at 118.

26 ⁴ All citations to “Ex.” refer to those Exhibits attached to the Declaration of Barrett J.
27 Anderson in Support of ChromaDex's Motion for Partial Summary Judgment, (Dkt.
28 Nos. 236, 238, 239, and 240) (Exhibits 1–80), or the consecutively numbered Exhibits
attached to the concurrently filed Declaration of Barrett J. Anderson in Support of
ChromaDex's Reply Memorandum in Support of ChromaDex's Motion for Partial
Summary Judgment, (Exhibits 81–88).

1 citation to *Scott Paper Co. v. Marcalus Manufacturing Co.*, 326 U.S. 249 (1945), fares
2 no better. There, the Court explained that misuse occurs when a patentee attempts to
3 use trademark law to register the “descriptive matter appearing in the specifications,
4 drawings or claims of the expired patent.” *Id.* at 256. Elysium alleges nothing of the
5 sort in this case.

6 Contrary to Elysium’s position, a customer’s voluntary purchase of both a
7 patented and unpatented product is not an illegal tying arrangement. (Mot. at 12–15.)
8 And a patentee does not misuse its patent simply by allowing a customer to purchase
9 both. *See McCullough Tool Co. v. Well Surveys, Inc.*, 343 F.2d 381 (10th Cir. 1965).

10 **2. Elysium Fails to Raise a Genuine Issue of Material Fact as to**
11 **Conditioning or Coercion**

12 For at least five reasons, as discussed below, Elysium fails to identify any
13 evidence of conditioning or coercion:

14 *First*, Elysium points out that ChromaDex has touted its exclusive patent rights
15 for the supply of NR and has warned infringers that it will sue to enforce its patent
16 rights. (Opp. at 11–12.) But enforcing patent rights does not constitute coercion
17 because “there is nothing wrong with trying to make as much money as you can from a
18 patent.” *USM Corp. v. SPS Techs., Inc.*, 694 F.2d 505, 511 (7th Cir. 1982). Courts
19 have repeatedly reaffirmed that patents are a business asset, and it does not constitute
20 misuse to use such assets in the marketplace. *See, e.g., Engel Indus., Inc.*, 96 F.3d at
21 1408 (“Although the record in the instant case indicates that [the patentee] aggressively
22 enforced its rights under the ‘641 patent, there is nothing *per se* illegal about doing
23 that. . . . [The patentee] was doing nothing more than what the ‘641 patent grant gave
24 it a statutory right to do, and [the defendant] predictably was not excited to relinquish
25 profit to its competitor. Nothing is unusual about this scenario.”).

26 *Second*, Elysium cites to *Jefferson Parish* for the proposition that “[a] showing
27 of market power, by itself, can raise a reasonable inference that a tie was forced.” (Opp.
28 at 12 (citing 466 U.S. at 17–18.) But *Jefferson Parish* pre-dates the Supreme Court’s

1 *Illinois Tool Works* decision, which rejected the *per se* doctrine for patent misuse tying
2 claims. Moreover, the Court in *Jefferson Parish* also identified that the *per se* harm in
3 that case was “the sale or lease of a patented item on condition that the buyer make *all*
4 *his purchases* of a separate tied product from the patentee.” *Jefferson Par.*, 466 U.S. at
5 16 (emphasis added). Here, as discussed above, ChromaDex did not require that the
6 NIAGEN mark be its customers’ only participation in the trademark market; they could
7 and did use other marks as well.

8 *Third*, Elysium wrongly argues that the presence of the NIAGEN use provision
9 in a minority of customer agreements is enough evidence to constitute coercion. (Opp.
10 at 12–13.) But, as explained above and in ChromaDex’s opening brief, (Mot. at 13–
11 14), the mere existence of agreements where customers agreed to buy two different
12 products is not enough to show conditioning or coercion. *See, e.g., Senza-Gel Corp. v.*
13 *Seiffhart*, 803 F.2d 661, 669 (Fed. Cir. 1986) (finding sufficient evidence of coercion
14 where record showed purchase of one product was “never available without” purchase
15 of the other, there was no evidence of voluntariness or business justification, and only
16 undisputed testimony that requests to purchase the tying product alone were refused).

17 *Fourth*, Elysium has no answer to the undisputed evidence that at least 75% of
18 ChromaDex’s customers did not enter into agreements with mandatory NIAGEN mark
19 use provisions. Elysium is part of that supermajority of NR customers because, as it
20 concedes, it chose *not* to use the mark and that choice is reflected in its negotiated
21 agreement with ChromaDex. (Dkt. 296-6 ¶ 25.) Elysium’s own experience
22 conclusively demonstrates that ChromaDex provided NR without requiring use of the
23 NIAGEN mark. Elysium also fails to respond to the undisputed evidence that
24 ChromaDex’s business strategy was driven by a branded ingredient strategy, a
25 successful and widely-adopted commercial method. (Mot. at 15.)

26 *Fifth*, Elysium references an alleged statement by Frank Jaksch—ChromaDex’s
27 former CEO—to Elysium that all of ChromaDex’s customers were purportedly required
28 to pay a trademark royalty. (Opp. at 13.) But Elysium has no evidence that Jaksch

1 made that statement. (*See infra* Section II.F; Mot. at 24–25.) Even if he did, there is
2 no basis to infer (as Elysium suggests) that he “made similar representations to others
3 in order likewise to procure their agreement to use the NIAGEN mark.” (Opp. at 13.)

4 It is telling that, among the thousands of documents produced by ChromaDex
5 regarding its negotiations with other customers, Elysium has not identified any proof of
6 coercion. Moreover, the only evidence directly on this issue, now undisputed, is
7 provided by Jaksch, who explained that ChromaDex did not coerce its customers and
8 remained flexible in negotiating acceptable terms to all parties. (Jaksch Decl. ¶ 3.⁵)
9 Further, Jaksch’s alleged statement did not result in Elysium “likewise” agreeing to use
10 the mark, as Elysium wrongly argues; Elysium did not use the mark. (Opp. at 13.) The
11 only reasonable inference a juror could make arising from the Elysium negotiations is
12 that each customer freely negotiated the trademark terms that it wanted. Even if the
13 alleged Jaksch statement were sufficient to raise an issue of fact as to whether Elysium
14 itself was coerced into paying a royalty, there is no evidence in the record that requiring
15 a single party to pay a modest licensing fee has an anticompetitive effect on the market,
16 as required for patent misuse. *See Preformed Line Prods.*, 328 F.2d at 279 (ruling
17 “primary consideration” in patent misuse cases is “to the rights of the public”).

18 For the above reasons, ChromaDex is entitled to summary judgment on
19 Elysium’s patent misuse counterclaim.⁶

20 **B. No Reasonable Jury Could Find that ChromaDex Breached the**
21 **Product Safety Provision**

22 In response to undisputed and un rebutted scientific evidence that there was never
23 an elevated level of acetamide in the NR that Elysium purchased from ChromaDex,
24 Elysium wrongly argues that a jury could rely on “preliminary results” from April 2017
25 that were generated by Elysium’s contract manufacturer, ■■■■, using an unverified
26

27 ⁵ (*See* Anderson Decl. ¶ 2.)

28 ⁶ The counterclaim for unjust enrichment should be dismissed as well. (Mot. at 15.)

1 testing method that was “not ready yet.” (Ex. 82 at 1044; Opp. at 19–20.)⁷ The evidence
2 is not “such that a reasonable jury could return a verdict for” Elysium, *Anderson v.*
3 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), because Elysium’s proposed “dispute”
4 is not genuine or material.

5 As described by Defendant Mark Morris, the initial acetamide testing method
6 developed by █████ in April 2017 generated “inconsistent results” due to “interference.”
7 (Ex. 50 at 680.) And when █████ first internally reported the results of that testing, its
8 employee was careful to state that they were “preliminary” and were obtained using an
9 unverified testing method that was “not yet ready.” (Ex. 82 at 1044.) For that reason,
10 among others, Elysium itself *rejected* the method used to obtain the April 2017 results,
11 (Ex. 50 at 680), and in July 2017, █████ created, on Elysium’s behalf, “an *entirely new*
12 *method*,” (Ex. 83 at 1084 (emphasis added)). After █████ revised the method, (Ex. 84),
13 Morris reported that Elysium was “now analyzing very low levels of acetamide at less
14 than 40ppm in the finished material.” (Ex. 50 at 680.) Elysium’s decision to abandon
15 that testing method has been confirmed by every other source to encounter it. Elysium’s
16 current NR contract manufacturer—████████████████████—reviewed the
17 method and recommended using a different one to “avoid interference and false
18 positives.” (Ex. 50 at 679.) And the conclusion that the method produced “unreliable,
19 inaccurate, and invalid” results was further confirmed by the unrebutted expert opinion
20 of Dr. Carla Kagel, who found that the █████ method “was unable to resolve known test
21 interferences and unable to distinguish acetamide from co-eluting compounds.” (Ex. 79
22 at 1002, 1008.) Given the uniform agreement by all parties that the testing method used
23 to generate the April 2017 results is nothing but junk science and completely unreliable,
24 there is no evidence on which a reasonable jury could rely to find for Elysium. The
25 Product Safety Provision counterclaim should be dismissed on that ground alone.

26
27 ⁷ Elysium incorrectly calls █████ an “independent third party,” (Opp. at 20), but in reality
28 █████ was the manufacturer hired by Elysium to replicate ChromaDex’s process for
manufacturing NR using stolen ChromaDex trade secrets and confidential information.
(Dkt. 295 at 13–14.)

1 Additionally, undisputed testing results obtained using the proper method and
2 equipment, as recommended by both █████ and Dr. Kagel, “clearly show that the
3 NIAGEN lots purchased by Elysium . . . and incorporated into the Basis product do not
4 contain acetamide at levels that would cause Basis to exceed California’s Proposition
5 65 NSRL threshold.” (Ex. 80 at 1034.) It is thus not necessary for the Court to “weigh
6 the evidence and determine the truth of the matter” to reach the simple conclusion that
7 the April 2017 results—Elysium’s only “evidence” that there was a breach of the
8 Product Safety Provision—are insufficient for the counterclaim to survive summary
9 judgment. *Anderson*, 477 U.S. at 249.

10 Elysium also suggests that ChromaDex failed to provide Elysium with
11 information impacting the quality or purity of NIAGEN. (Opp. at 21–22.) Tellingly,
12 nowhere does Elysium *actually identify* the information of which ChromaDex was
13 supposedly “aware,” but failed to share with Elysium. Instead, Elysium argues that
14 ChromaDex had an obligation “to be reasonably informed about its product.” (Opp. at
15 21.) On its face, Elysium’s position is an incorrect interpretation of the Product Safety
16 Provision, which only required ChromaDex to tell Elysium information “of which it
17 becomes aware.” (Ex. 17 at 282.) In any event, it is undisputed that, during the contract
18 term, ChromaDex *was* informed about its product: it was already “confident that there
19 is no detectible amount of acetamide” in NIAGEN. (Ex. 54 at 702.)

20 For those reasons, there is no way that a reasonable juror, even “drawing all
21 inferences in favor of [Elysium],” could view the record and “return a verdict in
22 [Elysium’s] favor.” *See Shokri v. Boeing Co.*, 2019 WL 2775566, at *1 (9th Cir.
23 July 2, 2019). Summary judgment is therefore proper.

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1 **C. Elysium Has Not Raised Any Genuine Dispute of Material Fact that**
2 **Allows It to Escape the Plain Terms of the Contract and California**
3 **Law**

4 **1. Elysium May Not Avoid the Express Terms of the Limited**
5 **Liability Provision**

6 In an effort to confuse the issue before the Court, Elysium mislabels Section 3.7
7 of NR Supply Agreement a “notice provision.” (Opp. at 15–16.) Elysium ignores the
8 actual title of that provision, “Limited Warranty and Disclaimer of all other
9 Warranties.” (Ex. 17 at 282–83 (emphasis in original).) Elysium also overlooks the
10 plain terms of the provision, which expressly state that “CHROMADEx HERE
11 EXPRESSLY DISCLAIMS ANY AND ALL OTHER WARRANTIES” and, further,
12 that “ELYSIUM HEALTH IRREVOCABLY WAIVES AND RELEASES ALL
13 CLAIMS THAT ARE NOT PROPERLY MADE WITHIN [30 DAYS OF
14 DELIVERY].” Elysium is so committed to obscuring the language of the Limited
15 Liability Provision that it avoids using the word “waiver” even once in its brief.

16 The distinction matters. The core of Elysium’s argument is that the purpose of
17 the Limited Liability Provision was to “provide an opportunity to cure” and that
18 Elysium’s compliance therefore would have been futile. (Opp. at 16–17.) But the terms
19 of the Limited Liability Provision explicitly limit ChromaDex’s liability; they do not
20 provide a right to cure after notice. Notice by Elysium was thus necessary for it to
21 preserve any claim with respect to the NIAGEN sold. *Vectren Commc’ns Servs. v. City*
22 *of Alameda*, 2014 WL 554448, at *8 (N.D. Cal. Feb. 7, 2014) (“Section 4.2 shows that
23 the parties intended to limit [plaintiff’s] recovery to Net Series 2002A Revenues, and
24 thus the limitation of liability fulfills its essential purpose rather than contradicting it.”);
25 *Bullseye Telecom, Inc. v. Cisco Sys., Inc.*, 2010 WL 1814669, at *4 (E.D. Mich. May 6,
26 2010) (applying California law and noting that, “[b]y definition, a seller’s warranty with
27 a limited duration leaves the purchaser without a remedy under the express warranty
28 after a certain period of time”).

1 The Limited Liability Provision is also enforceable under California law. *Food*
2 *Safety Net Servs. v. Eco Safe Sys. USA, Inc.*, 209 Cal. App. 4th 1118, 1126 (2012).
3 Elysium wrongly argues that the Limited Liability Provision is a “limited remedy” and
4 therefore Elysium is “not bound to” its terms because that “remedy . . . fails of its
5 essential purpose.” (Opp. at 17.) Again, Elysium elides that the Limited Liability
6 Provision is a *limitation of liability* for ChromaDex, not a “limited remedy” for Elysium.
7 The fact that Elysium’s counterclaim is barred here does not work an injustice; instead,
8 it shows that the Limited Liability Provision is operating as intended. *Vectren*
9 *Commc’ns Servs.*, 2014 WL 554448, at *8 (holding “limitation of liability fulfills its
10 essential purpose rather than contradicting it”). Permitting Elysium to advance claims
11 now—which it already waived under the plain terms of the contract—would deprive
12 ChromaDex of the benefit of the bargain that both parties negotiated and willingly
13 entered. *KGM Harvesting Co. v. Fresh Network*, 36 Cal. App. 4th 376, 382 (1995);
14 *O’Neill v. United States*, 50 F.3d 677, 687 (9th Cir. 1995) (“Where two equal
15 bargainers . . . agree as to the appropriate remedy . . . they should be held to the terms
16 of their bargain.” (quoting *Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp.*,
17 617 F.2d 936, 941 (2d Cir. 1980))).

18 Elysium also incorrectly argues that its Product Safety Provision counterclaim is
19 not subject to the Limited Liability Provision. But by its terms, the Provision applies
20 to limit liability for “ANY CLAIM OF ANY NATURE WHATSOEVER WITH
21 RESPECT TO THE NIAGEN SOLD.” (Ex. 17 at 283 (emphasis in original).) That
22 broad language certainly includes anything about the quality or purity of the product,
23 and Elysium offers no authority for its strange argument that the supposed “gravamen”
24 of its claim allows it to avoid waiver here. (Opp. at 15.)

25 Even if such a “gravamen” argument made any sense (and it does not), Elysium
26 concedes elsewhere in its brief that its Product Safety Provision counterclaim hinges on
27 purported evidence showing that the NIAGEN that it purchased from ChromaDex
28 contained “levels of acetamide in excess of the No Significant Risk Levels set by

1
2 California’s Proposition 65.” (Opp. at 19–20.) Elysium’s position necessarily concerns
3 the “nature” of the “NIAGEN SOLD” and is subject to the Limited Liability Provision.

4 Finally, Elysium suggests that the Limited Liability Provision does not apply
5 because it only learned of the purported acetamide in NIAGEN after the supply
6 agreement was terminated. (Opp. at 15–16.) That argument is easily rejected. Under
7 the plain language of the contract, the limitation of liability went into effect 30 days
8 after delivery of NIAGEN, not 30 days after Elysium learned of the claim. (Ex. 17 at
9 283.) The limitation of liability thus extinguished Elysium’s claims 30 days after it
10 received the corresponding shipment of NIAGEN, all of which it received many months
11 before the agreement was terminated. Elysium cannot now *revive* claims just because
12 the contract is no longer in force.

13 **2. Elysium’s cGMP and Product Safety Provision Counterclaims**
14 **Are Barred by California Commercial Code Section 2607**

15 Elysium incorrectly claims that ChromaDex “received all the notice to which it
16 was entitled” under California Commercial Code section 2607. (Opp. at 18.) Elysium
17 is wrong because it concedes the decisive material fact: Elysium never provided notice
18 as to its cGMP or Product Safety Provision claims before bringing them as
19 counterclaims in this action. Therefore, “the question of whether the notice satisfied
20 the statutory requirement is one of law.” *K & M Joint Venture v. Smith Int’l, Inc.*,
21 669 F.2d 1106, 1111 (6th Cir. 1982) (applying California law).

22 The California “notice requirement is designed to allow the seller the opportunity
23 to . . . reduce damages, . . . and negotiate settlements.” *Cardinal Health 301, Inc. v.*
24 *Tyco Elecs. Corp.*, 169 Cal. App. 4th 116, 135 (2008) (citation omitted). It “also
25 informs the seller of the need to preserve evidence and to be prepared to defend against
26 the suit, and protects against stale claims.” *Id.* (citation omitted). Here, Elysium failed
27 to provide notice of its two claims regarding the condition of the NIAGEN it received
28 for fifteen months (for the cGMP Provision) and seven months (for the Product Safety

1 Provision). (Mot. at 19.) That failure deprived ChromaDex of the “opportunity to
2 preserve any relevant evidence or attempt any form of settlement discussions or
3 negotiations with” Elysium concerning the product itself. *Cardinal Health*, 169 Cal.
4 App. 4th at 137. It also deprived ChromaDex of an opportunity to reduce its damages;
5 for example, had Elysium provided timely notice, ChromaDex could have demanded
6 the return of the product and sold it to a buyer willing to pay full price. (*See Ex. 17 at*
7 *283.*) By hiding its allegations until it sold through all of the product, Elysium unjustly
8 enabled itself to profit from the purportedly “deficient” product, while also preventing
9 ChromaDex from taking steps limit its damages. This is precisely the outcome
10 California Commercial Code section 2607 is designed to prevent. *See Cal. Com. Code*
11 *§ 2607, Uniform Com. Code cmt. 4 (“[T]he rule of requiring notification is designed to*
12 *defeat commercial bad faith.”).*

13 Elysium mistakenly argues that the claims that Elysium raised with ChromaDex
14 in 2016 are sufficient notice of its cGMP and Product Safety Provision counterclaims
15 under California Commercial Code section 2607. (Opp. at 17–18.) But Elysium’s
16 claims in 2016 were entirely focused on *pricing* and *marketing*; specifically, that
17 ChromaDex (1) failed to give it the correct price for its NIAGEN and (2) enabled third
18 parties to sell consumer products containing NIAGEN and pTeroPure (or a substantially
19 similar ingredient). (Opp. at 18.) Elysium did *not* inform ChromaDex in 2016 that it
20 believed that the NIAGEN it purchased was “bad” or “deficient,” and Elysium cites no
21 evidence to the contrary (because there is none). *See Carson Indus., Inc. v. Am. Tech.*
22 *Network, Corp.*, 2015 WL 12661953, at *6 (N.D. Cal. Sept. 26, 2015) (ruling breach of
23 warranty claim failed as a matter under Cal. Com. Code § 2607 because plaintiff did
24 not provide notice that it “found the goods deficient”); *Tasion Commc’ns, Inc. v.*
25 *Ubiquiti Networks, Inc.*, 2014 WL 2916472, at *10 (N.D. Cal. June 26, 2014) (finding
26 plaintiff informed defendant that product it had purchased from defendant “was bad”).
27 Because Elysium’s 2016 claims were entirely unrelated to the condition of the NIAGEN
28 it received, they could not provide adequate “notice” of the cGMP or Product Safety

1 Provision counterclaims that Elysium would belatedly assert many months later.

2 Elysium’s second argument—that the statutory notice requirement does not apply
3 to its claim under the Product Safety Provision because the claim does not relate “to the
4 nature of the goods sold,” (Opp. at 17)—fails for the same reason discussed above: the
5 counterclaim necessarily relates to the “nature” of the “NIAGEN SOLD.” Elysium’s
6 argument also underscores the principle that claims which do not relate “to the nature
7 of the goods sold,” such as Elysium’s pricing and marketing complaints in 2016, cannot
8 satisfy the statutory notice requirement in California Commercial Code section 2607.

9 Elysium has not raised a genuinely disputed material fact showing that the
10 Limited Liability Provision is unenforceable or that Elysium’s (non-existent) notice was
11 sufficient under California Commercial Code section 2607(3)(A). The Court should
12 thus dismiss the cGMP and Product Safety Provision counterclaims as barred both by
13 the contract and by law.

14 **D. Elysium Admits It Has No Evidence of Damages on Three Claims**

15 Three of Elysium’s counterclaims lack evidence of damages and Elysium fails to
16 show otherwise. They should therefore be dismissed. *McGlinchy v. Shell Chem. Co.*,
17 845 F.2d 802, 808 (9th Cir. 1988).

18 *First*, Elysium admits that it has no evidence for damages under its alleged breach
19 of Section 4.2 of the NR Supply Agreement. (Dkt. 296-6 ¶ 72). It should be dismissed.

20 *Second*, Elysium states that its counterclaim for breach of the implied covenant
21 and good faith claim “arises from ChromaDex’s breach of the exclusivity provision.”
22 (Dkt. 206-6 ¶ 72.) Elysium therefore admits that its damages are “the same as its
23 damages for ChromaDex’s breach of the Exclusivity Provision of the NR Supply
24 Agreement and are amply set forth in the Expert Report of Dr. Ian Cockburn.” (Opp. at
25 25.) In California, if the allegations supporting a claim for breach of the implied
26 covenant “do not go beyond the statement of a mere contract breach and, rely[] on the
27 same alleged acts, simply seek the same damages or other relief already claimed in a
28 companion contract cause of action, they may be disregarded as superfluous as no

1 additional claim is actually stated.” *Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*,
2 222 Cal. App. 3d 1371, 1395 (1990). This counterclaim is improper under California
3 law and should be dismissed as a matter of law. *See Alvarez v. Chevron Corp.*, 656 F.3d
4 925, 932 n.6 (9th Cir. 2011) (declining to address claim for breach of the duties of good
5 faith and fair dealing as the claim “fails because it is duplicative of Plaintiffs’ breach of
6 contract claim” (citing *Careau*, 222 Cal. App. 3d at 1395)); *see also Supreme*
7 *Foodservice GmbH v. Fluor Intercontinental, Inc.*, 2012 WL 12883973, at *9 (C.D.
8 Cal. Sept. 25, 2012) (granting defendant’s motion for summary judgment on breach of
9 the implied covenant where that claim was “subsumed under the contract breach alleged
10 in” another claim).

11 *Third*, with regard to its Product Safety Provision counterclaim, Elysium suggests
12 that it was damaged by “the costs of the third-party testing Elysium had to commission”
13 to “uncover the information ChromaDex wrongfully failed to provide,” but does not
14 identify what specific costs it thinks resulted from its counterclaim. (Opp. at 22.)
15 Elysium cites two exhibits which contain hundreds of pages of invoices from two
16 entities that cover all of calendar year 2017 and include a wide range of services
17 provided to Elysium. Exhibit 104 to Defendants’ Opposition, for example, has
18 233 pages of invoices from █████ for activities that relate to Elysium’s development of
19 its new, infringing source of NR, such as two weeks of work in the “kilo lab.”
20 (E.g., Ex. 104 (“█████ Invoices”) at 13499.) There is no mention of specific acetamide
21 testing in the █████ Invoices; the only time the word “acetamide” even appears is in
22 connection to █████ work relating to Elysium’s acetamide specification for that new
23 source of NR. (Ex. 104 at 13820.) And Exhibit 103 to Defendants’ Opposition contains
24 invoices from Gibraltar Labs, Inc. (“Gibraltar”)—which did *not* conduct the testing on
25 which Elysium now relies for its Product Safety Provision counterclaim—related to two
26 rounds of acetamide testing that Elysium ordered on third party consumer products, as
27 well as Elysium’s own product (which, at that time, did not contain ChromaDex’s
28 NIAGEN, but rather Elysium’s new NR, and thus cannot be blamed on ChromaDex).

1 (Ex. 103 (“Gibraltar Invoices”).) Notably, for reasons Elysium does not disclose, it
2 demanded that testing on a “rush” basis at double the normal price. (*E.g.*, Ex. 103 at
3 120901, 121055.) Elysium has not identified which charges in these massive exhibits,
4 if any, resulted from the breach it alleges, and thus has failed to provide competent
5 evidence of its damages.

6 Even if some of these charges actually do relate to Elysium’s testing of NIAGEN,
7 there is no evidence that this testing was conducted for the purpose of “uncover[ing] the
8 information ChromaDex wrongfully failed to provide.” (Opp. at 22.) For the █████
9 Invoices, a company representative for █████ testified that it tested for acetamide in
10 April 2017, not to find out if ChromaDex was withholding information, but instead
11 because acetamide “is a potential impurity in the process” and Elysium asked █████ to
12 complete a specification for its new, infringing source of NR. (Ex. 85 at 194:24–
13 195:5.)⁸ And for the Gibraltar Invoices, Elysium’s Vice President of Quality Assurance,
14 Ramon Padilla, testified that Elysium hired Gibraltar to test the third party products for
15 acetamide for entirely different reasons; namely, because Elysium was “changing
16 suppliers” and therefore “want[ed] a standard” against which to compare its product
17 with its new source of NR so that it could “have the best product out there.” (Ex. 86 at
18 191–93.) Padilla did not say (nor could he) that Elysium tested those *third party*
19 products to discover if the NIAGEN that *Elysium* purchased from ChromaDex more
20 than a year earlier contained elevated levels of acetamide. Because neither the █████ nor
21 Gibraltar Invoices identified by Elysium have a connection to ChromaDex’s purported
22 contract breach, Elysium’s counterclaim must be dismissed.

23 **E. Elysium’s Claimed Damages for Breach of the Exclusivity Provision**
24 **Are Unsupported and Speculative**

25 Elysium’s argument that it is owed lost profits from its allegation of breach of
26 the Exclusivity Provision is unavailing. Loss of prospective profits are only recoverable
27 “where the evidence makes reasonably certain their occurrence and extent.” *Kids’*

28 _____
⁸ Citations to deposition testimony refer to the pagination of the original transcripts.

1 *Universe v. In2Labs*, 95 Cal. App. 4th 870, 883 (2002) (citation omitted) (collecting
2 cases). Here, ChromaDex argued that (1) the occurrence of damages is uncertain
3 because Elysium did not have access to additional NR necessary to make the alleged
4 lost sales, and (2) the extent of damages is uncertain and speculative. Elysium rebuts
5 neither argument.

6 *First*, as to the fact of damages, Elysium admits that it did not have access to a
7 new source of NR until after the end of the claimed damages period. (Dkt. 296-6 ¶ 73.)
8 Elysium argues that “[u]ntil February [3,] 2017, ChromaDex was under an obligation
9 to sell NR to Elysium and Elysium had the discretion to place orders to ChromaDex for
10 as much NR as it required.” (Opp. at 24.) Elysium’s theory, however, requires the
11 Court to ignore the fact that it materially breached the NR Supply Agreement when it
12 induced ChromaDex to ship nearly \$3 million worth of ingredients, then refused to pay
13 for those orders while it sold the ingredients at a profit. No reasonable jury could find
14 that ChromaDex was obligated to continue selling product to Elysium given Elysium’s
15 material breach. Cal. Civ. Code § 1439 (“Before any party to an obligation can require
16 another party to perform any act under it, he must fulfill all conditions precedent thereto
17 imposed upon himself.”).

18 Additionally, the record shows that Elysium purposely decided to stop ordering
19 NIAGEN while it withheld payment and sought its alternative source of NR. (Ex. 87
20 at 1115 (“If the GC money comes in we can always figure out what we actually owe
21 chromadex and then place another order with them.”).) Because Elysium consequently
22 refused access to additional NR from ChromaDex *by choice*, it may not at the same time
23 rely on a theory that it *could* have purchased that NR from ChromaDex to sustain a lost
24 profits claim. Cal. Civ. Code. § 3517 (“No one can take advantage of his own wrong.”);
25 *Advanced Micro Devices, Inc. v. Intel Corp.*, 9 Cal. 4th 362, 387 (1994) (en banc)
26 (holding that party who breached contract cannot benefit from “noncompetitive posture
27 [it] had imposed partly through its deliberate breach of contract”).⁹

28 _____
⁹ Elysium suggests that ChromaDex’s lost profits rest on the same faulty premise as its

1 *Second*, with regard to the extent of damages, Elysium mistakenly focuses on the
2 admissibility of its expert’s analysis; it does not respond to ChromaDex’s argument that
3 the enormous range of possible damages provided by that expert is uncertain and
4 speculative. (Opp. at 23–24.)¹⁰ And while the law does not require “absolute
5 precision,” Elysium is still “obliged to demonstrate its loss with reasonable certainty.”
6 *S.C. Anderson, Inc. v. Bank of Am.*, 24 Cal. App. 4th 529, 536–37 (1994). This burden
7 is not met by Dr. Cockburn, who conceded in his deposition that his opinion rests on
8 “wide bands of uncertainty.” (Ex. 71 at 228:3–229:18). And even if Dr. Cockburn had
9 used “some reasonable basis of computation of damages,” *Sargon Enters., Inc. v. Univ.*
10 *of S. Cal.*, 55 Cal. 4th 747, 774 (2012), Elysium does not and cannot argue that the vast
11 ranges for its damages estimate are reasonably certain. Elysium’s estimate—which is
12 based on ranges from between 10% to 90% or 10% to 75% of the sales of third party
13 companies—shows that damages would “involve numerous variables that [make] any
14 calculation of lost profits inherently uncertain.” *Sargon*, 55 Cal. 4th at 780. Those
15 “wide bands of uncertainty” are by definition not “reasonably certain[.]” enough to go
16 to the jury. *S.C. Anderson*, 24 Cal. App. 4th at 537–38. Elysium should not be permitted
17 to ask the jury to guess at a number that its own expert, even when he “cast modesty . . .
18 to the winds,” (Ex. 71 at 229:10–18), was unable to calculate. The counterclaim should
19 be dismissed.

20 **F. Elysium Has Opportunistically (and Impermissibly) Changed the**
21 **Alleged Fraudulent Statement and Admits No Evidence Supports the**
22 **Statement It Alleged**

23 Elysium’s allegation of the representation underlying its fraudulent inducement
24 counterclaim is plain: “[o]n December 16, 2013, on a phone call between Jaksch,

25 _____

26 own, (Opp. at 24), but it is incorrect; ChromaDex only seeks lost profits from Elysium
27 for harm arising from Elysium’s misconduct, (*e.g.*, Dkt. 295 at 16).

28 ¹⁰ ChromaDex’s *Daubert* Motion to Exclude Certain Opinions of Dr. Iain Cockburn,
 and ChromaDex’s Reply in support of that Motion (filed on the same day as this brief),
 together address Elysium’s admissibility arguments. (Dkt. 262-1.)

1 Marcotulli and Alminana, Jaksch falsely represented that all of ChromaDex’s customers
2 who signed purchase agreements to obtain nicotinamide riboside were also required to
3 sign separate trademark license and royalty agreements, whether they wanted to or
4 intended to use ChromaDex marks or not.” (Dkt. 103 (“TACC”) ¶ 52.) Reversing
5 course, Elysium now argues that this, “of course, is not what [it] alleges.” (Opp. at 14.)

6 Elysium first alleged its fraudulent inducement counterclaim on
7 January 25, 2017, vaguely identifying the purported representation as follows:

8 During negotiations, ChromaDex falsely represented to Elysium that it
9 required ***all of its customers who signed nicotinamide riboside supply***
10 ***agreements*** also to execute license and royalty agreements, under which
11 customers agreed to pay royalties on product sales for use of ChromaDex
marks, in addition to whatever amount they paid per kilogram for
nicotinamide riboside.

12 (Dkt. 11 ¶ 114 (emphasis added).) ChromaDex moved to dismiss that counterclaim on
13 February 15, 2017, arguing *inter alia* that Elysium had not alleged the “who, what,
14 when, where, and how” of the alleged misconduct as required under Federal Rule of
15 Civil Procedure 9(b). (Dkt. 27-1 at 6-7.) In response, on March 6, 2017, Elysium filed
16 its First Amended Counterclaims, adding certain details to that allegation. (Dkt. 31
17 ¶ 106.) ChromaDex again moved to dismiss the counterclaim, arguing that Elysium did
18 not provide sufficient facts to plead (1) that the statement was knowingly false when
19 made or (2) that Elysium plausibly relied on it. (Dkt. 34-1 at 7–11.) Elysium responded
20 by contending that the statement was now specific enough under Rule 9(b):

21 In its First Amended Counterclaims, Elysium alleges that ChromaDex’s
22 CEO, Frank Jaksch, falsely represented to Elysium “that ***all ChromaDex***
23 ***customers who signed purchase agreements to obtain [NR]*** were required
24 to sign separate trademark license and royalty agreements.” (FACC ¶ 48.)
25 Elysium provides not only the content, but also the date of this
misrepresentation (December 16, 2013), the manner in which it was made
(by telephone), the speaker (Jaksch) and the listeners (Elysium’s co-
founders).

26 (Dkt. 38 at 5 (bold emphasis added).)

27 Elysium further argued it had adequately pleaded falsity because it alleged “[a]t
28 least one purchaser of [NR] that ***contracted*** with ChromaDex before Elysium did was

1 not required to sign a license and royalty agreement or pay royalties.” (*Id.* at 9
2 (emphasis added).) The Court declined to dismiss the counterclaim, noting that
3 “ChromaDex argues that Elysium’s fraudulent inducement claim fails under Federal
4 Rule of Civil Procedure 9(b) because Elysium has not alleged facts demonstrating that
5 Jaksch’s representation that *all of ChromaDex’s customers who signed purchase*
6 *agreements to obtain NR* were also required to sign separate trademark license and
7 royalty agreements was false *when made.*” (Dkt. 44 at 14 (citing Dkt. 34-1 at 7–8) (bold
8 emphasis added).)

9 Now, after discovery has closed, Elysium has belatedly realized that this specific
10 statement was not false when it was allegedly made. Elysium thus seeks to it amend it
11 to be *less specific* so that it now applies to “*all NR customers,*” rather than just those
12 that had signed purchase agreements to obtain NR. (Opp. at 14 (emphasis added).) That
13 is not how Rule 9(b) works. “Under [Ninth Circuit] case law, Rule 9(b) serves . . . to
14 give defendants notice of the particular misconduct which is alleged to constitute the
15 fraud charged so that they can defend against the charge.” *United States v. United*
16 *Healthcare Ins.*, 848 F.3d 1161, 1180 (9th Cir. 2016). Elysium’s allegation that the
17 alleged false statement pertained to “all of its customers who signed nicotinamide
18 riboside supply agreements” has been unchanged since it first filed its counterclaims.
19 Elysium could have corrected that allegation when it filed its First Amended
20 Counterclaim (as it did with other details) or at any time since, but instead it expressly
21 argued to this Court that its allegation “provided the content” of the statement. (Dkt. 38
22 at 5 (emphasis in original).) It cannot now, on the eve of trial, informally amend its
23 allegation yet again and try to blame *ChromaDex* for “recast[ing]” it. (Opp. at 14.)
24 “[S]ummary judgment is not a procedural second chance to flesh out inadequate
25 pleadings.” *Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir.
26 2006). The Court should not reward Elysium’s ever-shifting justifications and should
27 dismiss this plainly deficient counterclaim.

28 Further, as Elysium concedes, discovery has also shown that the alleged

1 statement was not false when made: Thorne Research is indisputably the only NR
2 customer who had an executed supply agreement with ChromaDex for the purchase of
3 NR. (Mot. at 25.) Elysium’s only response is to point to an email with Doctor’s Best
4 and a term sheet with High Performance Nutrition, neither of which were *executed*
5 purchase agreements for NR with ChromaDex as of December 16, 2013.¹¹ *See*
6 *Anderson*, 477 U.S. at 248 (ruling a “genuine” dispute arises only where “the evidence
7 is such that a reasonable jury could return a verdict for the nonmoving party”). And
8 Elysium’s attempt to rely on events that occurred after December 16, 2013, are
9 impermissible. “The law is well established that actionable misrepresentations must
10 pertain to *past or existing* material facts. . . . Statements or predictions regarding future
11 events are deemed to be mere opinions which are not actionable.” *Cansino v. Bank of*
12 *Am.*, 224 Cal. App. 4th 1462, 1469 (2014) (emphasis added). Therefore, Elysium’s
13 complaint that Live Cell never signed a trademark license and royalty agreement or paid
14 royalties is irrelevant because Live Cell did not order NR from ChromaDex until May
15 2014, five months after the alleged statement. (Ex. 88.)

16 The shifting sands of this counterclaim has put ChromaDex in the unfair position
17 of having to defend against a moving target, a result that Rule 9(b) is intended to
18 prevent. Elysium has also failed to raise a triable issue of fact regarding whether any
19 statement, false or not, was made on December 16, 2013. (Mot. at 24–25.)¹² The Court
20 should dismiss the counterclaim.

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23 ¹¹ Elysium wrongly contends that “ChromaDex identified” the email with Doctor’s Best
24 as a “Supply Agreement.” (Dkt. 296-6 ¶ 6.) But ChromaDex stated that it was only
25 “identif[ying] . . . *tentative* agreements with partners where there was no executed
26 agreement,” and that it was “not a representation that the tentative agreements were in
27 anyway binding on the relevant parties.” (Ex. 22 at 317 (emphasis added).) And even
28 if the term sheet with High Performance Nutrition (“HPN”) is deemed an executed
supply agreement (and it was not), that term sheet included a royalty provision, (Opp.
Ex. 8 at 51402), and Elysium concedes that HPN ultimately signed a trademark
agreement, (Dkt. 296-6 ¶ 6), again showing that the alleged statement not false.

¹² Notably, the declaration by Dan Alminana, Elysium’s COO—submitted by Elysium
to suggest that there is a dispute of material fact on this issue—does *not* state that any
call occurred on December 16, 2013. (Dkt. 296-3 ¶¶ 7–9.)

1 **III. CONCLUSION**

2 ChromaDex respectfully requests that the Court grant its motion for partial
3 summary judgment and dismiss the counterclaims specified above.

4 Dated: September 4, 2019 COOLEY LLP
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