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

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

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

**REPLY IN SUPPORT OF CHROMADEx
INC.'S MOTION TO DISMISS THE
THIRD, FOURTH, AND FIFTH AMENDED
COUNTERCLAIMS**

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

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

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1 **I. INTRODUCTION**

2 Defendant and Counterclaimant Elysium Health, Inc.’s (“Elysium”) Opposition
3 (“Opposition” or “Opp.”) (ECF 38) to Plaintiff and Counter-Defendant ChromaDex,
4 Inc.’s (“ChromaDex”) Motion to Dismiss (“Motion” or “Mot.”) (ECF 34), fails to
5 change the analysis of whether the Court should dismiss Elysium’s fraud, patent
6 misuse, and California’s Unfair Competition Law, Bus. & Prof. Code § 17200
7 (“UCL”), claims, with prejudice. Elysium’s third counterclaim for fraudulent
8 inducement, fourth counterclaim for patent misuse, and fifth counterclaim for unfair
9 competition are all infirm as a matter of law, and only evidence a buyer’s remorse
10 over a deal that it freely struck.

11 Regarding Elysium’s third counterclaim for fraudulent inducement, Elysium
12 attempts to downplay its burden under Rule 9(b) by minimizing the fact that it relies
13 on a spreadsheet, drafted in 2016, to purportedly show the falsity of a statement
14 allegedly made in 2013. Elysium cites no cases where a court, without more, has
15 inferred falsity based on such attenuated circumstantial evidence. Given the strictures
16 of Rule 9(b), this failing is no surprise. Moreover, Elysium provides no explanation
17 for its failure to allege reasonable or actual reliance: the First Amended Counterclaim
18 (“FACC”) does not even allege that Elysium paid more, or would not have entered the
19 transaction, but for the alleged misstatement. Instead, Elysium only argues that it
20 might have negotiated differently but for the alleged misrepresentation. The law does
21 not recognize this as reliance.

22 Elysium’s fourth counterclaim for declaratory judgment of patent misuse is also
23 wholly deficient and has been rejected before as a matter of law. An assertion of
24 patent infringement is a necessary predicate to a claim of patent misuse, and no such
25 assertion of patent infringement is made in this case. Indeed, Elysium cites no case
26 where a declaratory relief patent misuse claim was allowed to proceed as an
27 affirmative cause of action in the absence of a claim or assertion of patent
28 infringement, because no such cases exist. Elysium’s counterclaim for patent misuse

1 is not a cognizable cause of action and should be dismissed with prejudice.

2 Elysium’s fifth counterclaim for violation of the UCL is also infirm. Elysium
3 does not attempt to support the FACC’s failure to specify which practices are
4 allegedly unlawful and which are allegedly unfair with even a single cite to a case
5 considering the UCL, and Elysium’s patent misuse counterclaim cannot constitute the
6 basis for its UCL claim. Elysium further fails to address and refute clear California
7 law holding that a party cannot bring a claim under the UCL based on a contract
8 which does not affect the public at large, and instead concerns a mere “business to
9 business dispute,” as is the case here.

10 For all of these reasons, the Court should grant ChromaDex’s Motion and
11 dismiss Elysium’s third, fourth, and fifth counterclaims, with prejudice.

12 **II. ARGUMENT**

13 **A. Elysium’s Opposition Improperly Minimizes the Burden of Pleading**
14 **Fraud under Rule 9(b) and Elysium Has Not Met the Heightened**
15 **Pleading Standard.**

16 **1. Elysium Fails to Plead Falsity with Particularity.**

17 Elysium incorrectly argues that it has alleged falsity with particularity by
18 misconstruing its burden under Rule 9(b). No matter what evidence Elysium pleads,
19 at bottom Elysium “must ‘set forth, as part of the circumstances constituting fraud, an
20 explanation as to why the disputed statement was untrue or misleading *when made.*”
21 *Fecht v. Price Co.*, 70 F.3d 1078, 1082 (9th Cir. 1995) (quoting *In re GlenFed Inc.*
22 *Sec. Litig.*, 42 F.3d 1541, 1549 (9th Cir. 1994)) (emphasis in original). The only fact
23 Elysium pleads supporting the alleged falsity of the alleged 2013 statement is a
24 spreadsheet created two-and-half years later, in 2016. This later-arising document
25 does not support a plausible inference that a statement made in 2013 was false.

26 While Elysium argues that the spreadsheet “reveals ‘[inconsistent] facts that
27 *had existed all along,*” (Opp. at 8 (citing *Fecht*, 70 F.3d at 1082)), the FACC fails to
28 allege such facts with particularity. For the alleged statement to be false *when made*,

it was necessary for Elysium to allege that a ChromaDex customer was not required to

1 sign license and royalty agreements or pay royalties *in 2013*. The FACC makes no
2 such allegation: it fails to allege any facts, let alone with particularity, suggesting that
3 the “at least one” customer on the spreadsheet who “pre-dates Elysium” had the same
4 business arrangement with ChromaDex in 2013 as that which was purportedly
5 displayed on the spreadsheet in 2016. (*See* FACC ¶ 68.)

6 However, even if the Court finds that Elysium facially alleged that the
7 statement was false when made, under Rule 9(b) the Court is required to evaluate
8 Elysium’s alleged “evidentiary facts and . . . to consider what inferences these facts
9 will support.” *Fecht*, 70 F.3d at 1082. Elysium relies on *Fecht* to argue that the
10 spreadsheet, drafted two-and-a-half years after the alleged statement, is sufficient
11 evidence of falsity because “no catastrophic event intervened between the time of the
12 complained-of statements and the revelation of the truth.” *Id.* at 1084 (citing
13 *GlenFed*, 42 F.3d at 1549)). *Fecht*, however, does not help Elysium’s case. First, the
14 timeframe found in *Fecht* to be circumstantial evidence of falsity was three months—
15 not two-and-half years. *Id.* at 1083 (analyzing whether statements made in January
16 1992 were properly alleged to be false based on revelations in April 1992). Second,
17 the absence of an intervening event did not reduce the burden of pleading fraud, but
18 merely gave “more weight” to the fact that inconsistent statements were “made very
19 shortly” after the alleged false statement. *Id.* at 1083–84. *Fecht* does nothing to
20 bridge the two-and-a-half-year gap at issue here and Elysium’s reliance on *Fecht* does
21 nothing to save the FACC under Rule 9(b).¹

22 Moreover, the concept of a “catastrophic event” changing underlying
23 circumstances is inapposite. Elysium alleges that ChromaDex misrepresented the
24 terms of its past business deals. But deals are modified and adjusted to fit changing
25 circumstances, and Elysium knows nothing of ChromaDex’s agreements with third

26 _____
27 ¹ For these same reasons, combined with a lack of allegations, the spreadsheet is
28 insufficient evidence that Mr. Jaksch knowingly made a false statement, if the
statement was false when made.

1 parties in the intervening two-and-half-year gap. Elysium and ChromaDex’s
 2 relationship, for example, was modified twice in two years: once when the parties
 3 decided to enter the pTeroPure Supply Agreement four months after entering the
 4 NIAGEN Supply Agreement, and second when the parties entered the Amended
 5 NIAGEN Supply Agreement. (See FAC Exs. A–D.) Thus, in no way is it
 6 “implausible” that the business arrangement Elysium points to as evidence of fraud
 7 changed between 2013 and 2016. (Opp. at 8.) This state of flux, when combined with
 8 the two-and-a-half year intervening timeframe, are not the sort of facts which
 9 plausibly support an inference that the spreadsheet is sufficient under Rule 9(b) to
 10 allege the falsity of the statement.

11 **2. Elysium Further Fails to Plausibly Plead Reliance with**
 12 **Particularity.**

13 Elysium fails to plausibly plead reliance because (1) its alleged reliance was not
 14 reasonable, and (2) it fails to allege that an allegedly false statement was the
 15 immediate cause of the injury producing conduct, *i.e.*, its decision to enter the
 16 Trademark License and Royalty Agreement. (Mot. at 7–9.) Elysium’s Opposition
 17 cites no authority in which a court has found reliance in similar circumstances.

18 ***Elysium Fails to Plausibly Plead “Reasonable Reliance.”*** This is a case where
 19 “the question of whether a plaintiff’s reliance is reasonable” is appropriate for
 20 resolution as a matter of law. (See Opp. at 10, 12.) The basic facts are that Elysium
 21 and ChromaDex, two sophisticated business entities,² negotiated the terms of their
 22 relationship over nearly five months. The single alleged false statement, regarding the
 23 same topic the parties had already been negotiating (and continued to negotiate after),
 24 was made four months into the negotiation process. (Mot. at 9.)

25 _____
 26 ² The reasonableness of a plaintiff’s reliance “is calibrated to the plaintiff’s own
 27 intelligence and information . . . [and] does not bind a court to assume a plaintiff has
 28 the minimum knowledge of a hypothetical, reasonable man.” *United Guar. Mortg.*
Indem. Co. v. Countrywide Fin. Corp., 660 F. Supp. 2d 1163, 1189 (C.D. Cal. 2009).

1 The cases Elysium relies on do not establish that its alleged reliance was
2 reasonable in these circumstances. Elysium relies heavily on *Dolan v. CMTC*, 2013
3 WL 12139355, at *2 (C.D. Cal. May 1, 2013), where the court found that plaintiff’s
4 reliance was reasonable because defendant “repeatedly misrepresented to [plaintiffs]
5 over several months.” Here, on the other hand, Elysium only pleads a single alleged
6 false statement regarding why ChromaDex would require Elysium to enter a
7 Trademark License and Royalty Agreement, made amongst many other statements
8 that are also pled in the FACC, that consistently state that ChromaDex would require
9 Elysium to sign a royalty agreement in any case. (*See* Mot. at 9:20–10:1.) Courts
10 considering similar facts have found that reliance was not reasonable in those
11 circumstances. For example, in a case similar to this one, where multiple
12 representations contradicted the alleged false statement, the Ninth Circuit affirmed the
13 dismissal of plaintiff’s fraud claims because as a matter of law, plaintiff “could not
14 have relied on the alleged misrepresentations.” *Block v. eBay, Inc.*, 747 F.3d 1135,
15 1140 (9th Cir. 2014). Thus, because Elysium admits and pleads that it was told many
16 times that a royalty agreement would be required if Elysium wanted to purchase
17 NIAGEN from ChromaDex, independent of whether other parties were required to
18 sign a royalty agreement with ChromaDex, there is “no room for a reasonable
19 difference of opinion” as to whether Elysium’s alleged reliance was reasonable and its
20 fraud claim should be dismissed. *Dolan*, 2013 WL 12139355, at *2.

21 ***Elysium Fails to Plead “Immediate Cause.”*** The Ninth Circuit holds that to
22 allege actual reliance in California a plaintiff must allege that “the defendant’s
23 misrepresentation or nondisclosure was ‘an immediate cause’ of the plaintiff’s injury-
24 producing conduct . . . [such that] in its absence the plaintiff ‘in all reasonable
25 probability’ would not have engaged in the injury-producing conduct.” *Block*, 747
26 F.3d at 1140 (quoting *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1111 (1993) (Kennard,
27 J., concurring in part)); *see also GlenFed*, 60 F.3d at 592 (plaintiffs must allege actual
28 reliance “as required by *Mirkin v. Wasserman*”).

1 Elysium does not allege that it would have not entered the transaction but for
2 the alleged false statement, and indeed, instead alleges that it understood that it had to
3 accept ChromaDex’s terms if Elysium desired to purchase product from ChromaDex
4 at all. (FACC ¶¶ 28, 30, 44, 52 (“Elysium determined it had no choice but to agree to
5 ChromaDex’s requirement . . . if it wished to obtain access to nicotinamide riboside”),
6 53.) Elysium cites no case law where allegations that a party would have negotiated
7 “differently” was sufficient to plead justifiable reliance. *See Peel v. BrooksAmerica*
8 *Mortg. Corp.*, 788 F. Supp. 2d 1149, 1162 (C.D. Cal. 2011) (“The Peels allege that,
9 had the Loan Documents disclosed the omitted information, they *would not have*
10 *entered* into the subject loans.” (emphasis added)); *Urica, Inc. v. Pharmaplast,*
11 *S.A.E.*, 2013 WL 12123305, at *12 (C.D. Cal. Jan. 10, 2013) (“Pharmaplast succinctly
12 pleads, moreover, that it *would not have entered into the agreement* had Medline not
13 made the misrepresentation.” (emphasis added)).

14 Elysium also cites *Johnson v. Wal-Mart Stores, Inc.*, 544 F. App’x 696 (9th Cir.
15 2013), which is a consumer fraud case—not a buyer’s remorse business-to-business
16 dispute like this one. Even accepting the inapt analogy of a consumer fraud case here,
17 the plaintiff in *Johnson* alleged that she “paid more because of Wal–Mart’s challenged
18 conduct.” *Id.* at 698. However, Elysium’s FACC does not allege that Elysium paid
19 more than it would have absent the alleged false statement, much less allege facts
20 demonstrating so with particularity.³ (*See, e.g.*, FACC ¶¶ 51, 108 (alleging that in
21 reliance on the alleged false statement Elysium “concluded that the issue was non-
22 negotiable” and “forwent the opportunity to negotiate an agreement with ChromaDex
23 that did not require the payment of royalties”).) Courts have consistently held that
24 plaintiffs alleging such vague changes in behavior, without more, fail to allege
25 reliance. *See, e.g., Bower v. AT & T Mobility, LLC*, 196 Cal. App. 4th 1545, 1554
26

27 ³ *ScripsAmerica, Inc. v. Ironridge Glob. LLC*, 119 F. Supp. 3d 1213, 1252 (C.D. Cal.
28 2015) (“Rule 9(b) requires that reliance be pleaded with particularity.”).

1 (2011) (dismissing claims where plaintiff characterized her injury as being “denied
2 any opportunity [to] shop around for retailers that do not charge consumers this
3 discretionary fee”).

4 The FACC pleads no facts with particularity or otherwise which establish that
5 Elysium “in all reasonable probability” could and would have refused to pay royalties
6 or enter a license agreement and still obtain a supply of NIAGEN. The claim
7 independently fails on that basis.

8 **B. Elysium’s Patent Misuse Claim Is Not a Cognizable Claim in the**
9 **Absence of an Assertion of Patent Infringement and Would Fail**
10 **Even It Were (Fourth Counterclaim).**

11 **1. Binding Federal and Ninth Circuit Law Holds that Patent**
12 **Misuse Is Not a Cognizable Affirmative Cause of Action in the**
13 **Absence of a Patent Infringement Assertion.**

14 Elysium’s patent misuse claim has no legs because there has been no assertion
15 of patent infringement in this case. In an attempt to save its patent misuse
16 counterclaim, Elysium merely sets up and then blows down a straw-man argument,
17 contending that it is somehow meaningful that Elysium only seeks declaratory relief.
18 But ChromaDex does not dispute that a valid patent misuse claim can be asserted by
19 declaratory relief. The actual question, however, is whether Elysium has a patent
20 misuse claim at all, in the absence of a patent infringement assertion by ChromaDex.
21 It does not, and Elysium’s argument essentially asks the court to assume that Elysium
22 has standing to allege patent misuse in the absence of an infringement assertion.
23 Elysium’s contention is flatly wrong.

24 Elysium’s Opposition incorrectly argues that its patent misuse claim is proper
25 because “[n]umerous courts, including both this Court and the Federal Circuit, have
26 sustained claims requesting a declaratory judgment of patent misuse.” (Opp. at 13.)
27 But Elysium ignored and failed to address the central issue: whether a patent misuse
28 claim can even be asserted where there is no allegation of patent infringement,
whether it be by legal claim or a demand assertion letter, neither of which exist in this
case. Black letter law clearly answers that question “no”: A patent misuse claim is

1 available only “as an equitable defense to an infringement action.” *Inamed Corp. v.*
 2 *Kuzmak*, 275 F. Supp. 2d 1100, 1124 (C.D. Cal. 2002) (case involving claim of patent
 3 infringement).

4 Indeed, none of the cases Elysium relies on stands for the proposition that a
 5 patent misuse claim can be asserted where there is no assertion of patent infringement,
 6 and no such case law exists. *See B. Braun Med., Inc. v. Abbott Labs.*, 124 F.3d 1419,
 7 1421 (Fed. Cir. 1997) (patent misuse asserted as defense to patent infringement
 8 claim); *Glitsch, Inc. v. Koch Eng’g Co.*, 216 F.3d 1382, 1384 (Fed. Cir. 2000)
 9 (considering whether plaintiff “had waived its right to litigate the affirmative defense
 10 of misuse in the principal [patent infringement] action because it had failed to raise
 11 that defense on a timely basis”); *Linzer Prod. Corp. v. Sekar*, 499 F. Supp. 2d 540,
 12 560 (S.D.N.Y. 2007) (assertion of patent infringement); *In re Gabapentin Patent*
 13 *Litig.*, 649 F. Supp. 2d 340, 343 (D.N.J. 2009) (patent misuse asserted as defense to
 14 patent infringement claim); *Matsushita Elec. Indus. Co. v. CMC Magnetics Corp.*,
 15 2006 WL 3290413, at *1 (N.D. Cal. Nov. 13, 2006) (patent misuse asserted as defense
 16 to patent infringement claim); *Jack Winter, Inc. v. Koratron Co.*, 375 F. Supp. 1, 14
 17 (N.D. Cal. 1974) (patent misuse asserted as defense to patent infringement claim),
 18 *supplemented sub nom. Koratron Co. v. Lion Unif., Inc.*, 409 F. Supp. 1019 (N.D. Cal.
 19 1976).

20 Elysium’s patent misuse counterclaim fails as a matter of law, lacks a well-pled,
 21 researched, and cognizable legal theory, has been held sanctionable by other courts
 22 under Rule 11, and should be dismissed by this court with prejudice. *See Navarro v.*
 23 *Block*, 250 F.3d 729, 732 (9th Cir. 2001).

24 **2. The Patent Misuse Claim Would Fail Anyway Because**
 25 **ChromaDex’s Conduct Cannot Constitute “Tying.”**

26 Elysium argues that it has sufficiently alleged tying under its patent misuse
 27 theory because it alleges that “ChromaDex (1) conditioned access to its patent rights
 28 on (2) the purchase from ChromaDex of a trademark license.” (Opp. at 15–16.)

1 Elysium’s allegations, however, again fail to plead facts supporting its claim.

2 First, as ChromaDex said in its Motion, Elysium’s creative theory that
3 ChromaDex’s “patent rights” are the tying product does not bear scrutiny. Elysium,
4 by virtue of purchasing the NIAGEN product, did not acquire a license to
5 ChromaDex’s patent rights and, indeed, Elysium was expressly denied a patent
6 sublicense during the parties’ negotiations in 2013 and 2014. (FACC ¶¶ 47, 49, 50.)
7 Elysium has no rights under ChromaDex’s patents to make, manufacture, or import
8 NIAGEN, and only has the limited right to resell the NIAGEN that ChromaDex sells
9 to Elysium under the “first sale” patent exhaustion doctrine and the NIAGEN Supply
10 Agreement. *See Quanta Comput., Inc. v. L.G. Elecs., Inc.*, 553 U.S. 617 (2008).

11 Second, the Agreements between the parties do not bear out Elysium’s assertion
12 that it had to purchase a trademark license.⁴ The Trademark License and Royalty
13 Agreement does not state or suggest that there has been any consideration given by
14 Elysium for a trademark license. (FAC Ex. D §§ 1–8.) Instead, the license is directed
15 to protecting the integrity of ChromaDex’s marks if Elysium optionally uses those
16 marks, by reserving to ChromaDex a “right of prior approval” and providing “Brand
17 Usage Guidelines.” (*Id.* §§ 1, 3.) Whether Elysium actually uses the ChromaDex
18 trademark is entirely at Elysium’s option and the trademarks are simply not a
19 “required product.”

20 Further, the royalty portion of the agreement does not tie royalty payments to
21 use of ChromaDex’s trademarks and does not even mention the trademark license.
22 Rather as described in ChromaDex’s Motion, the royalty payments are a form of
23 deferred product purchase consideration to accommodate Elysium’s plea that it could

24 ⁴ The Court can interpret the contracts—which are incorporated into the FACC by
25 reference—on this motion to dismiss, and need not credit Elysium’s allegations about
26 them. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (A “district court
27 may treat [a document incorporated by reference] as part of the complaint, and thus
28 may assume that its contents are true for purposes of a motion to dismiss under Rule
12(b)(6).” (emphasis added)).

1 not pay the full purchase price upfront, and the royalties are accordingly measured
 2 based on the Elysium’s resale of the NIAGEN product (“Basis”)—not the use of
 3 ChromaDex’s trademarks. (*Id.* § 9.) Accordingly, the agreements support the
 4 conclusion that Elysium pays royalties on product sales as part of its payment for
 5 NIAGEN—not as consideration for the optional trademark license. The agreement
 6 further gives Elysium the right to use and display ChromaDex’s “Licensed Materials”
 7 which is a defined term under the Agreement, including “advertising, promotional
 8 and/or merchandising materials and artwork prepared and provided to You by
 9 ChromaDex.” (*Id.* §§ 1, 3.) There can be no tying as a matter of law because Elysium
 10 does not purchase the allegedly tied product (trademarks), and is not required to
 11 purchase or use the allegedly tied product (trademarks). *Mozart Co. v. Mercedes-Benz*
 12 *of N. Am., Inc.*, 593 F. Supp. 1506, 1515–16 (N.D. Cal. 1984) (“No tying arrangement
 13 exists, . . . unless it is . . . demonstrated that the purchase of the tying product is
 14 conditioned on the purchase of the tied product.”).

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

17 Elysium’s patent misuse claim fails for a third reason: ChromaDex’s patent and
 18 trademark rights are not “separate products” capable of being unlawfully tied.
 19 Elysium’s reliance on *Senza-Gel Corp. v. Seiffhart*, 803 F.2d 661 (Fed. Cir. 1986) to
 20 argue the opposite is misplaced. In that case the Federal Circuit stated that patent
 21 misuse “may serve . . . as a defense to a charge of patent infringement” or “as an
 22 element in a complaint charging antitrust violation.” *Id.* at 668. As discussed above,
 23 Elysium does not raise its claim of patent misuse as a defense to a charge of patent
 24 infringement, and its claim is not viable on that ground (*see* Section II.B.1), nor is
 25 there an antitrust claim pled in the FACC. Further, and as Elysium concedes, the
 26 court in *Senza-Gel* noted the different standards applied to claims of patent misuse
 27 depending on whether it is used “as a defensive shield” or an “offensive sword.”
 28 When used as a shield, “the patentee’s act may constitute patent misuse without rising

1 to the level of an antitrust violation.” 803 F.2d at 668 (citation omitted). Here,
 2 however, Elysium seeks to use patent misuse as an offensive sword under the standard
 3 used for evaluating whether the claim can be used as a defensive shield. The case law
 4 does not support this, the allegation was made without a reasonable basis in law, and
 5 the claim should be rejected by the Court.

6 Elysium’s analysis of the test in *Jefferson Parish Hospital District No. 2 v.*
 7 *Hyde*, 466 U.S. 2 (1984) for separate products is also faulty. (Opp. at 18.) The test
 8 asks whether there is “a sufficient demand for the purchase of [the tied product]
 9 separate from [the tying product] to identify a distinct product market.” 466 U.S. at
 10 21–22. In this case, Elysium alleges that the “tied product” is the trademark license
 11 and the “tying product” is NIAGEN and its patent rights. (*See e.g.*, Opp. at 16.)
 12 Elysium however, reverses the *Jefferson Parish* analysis to ask whether there is
 13 demand for NIAGEN (the tying product) separate from the demand for the NIAGEN
 14 trademark license (the tied product). (Opp. at 18 (“some customers who want access
 15 to supply of [NR] do not want access to ChromaDex’s NIAGEN marks”).) This is the
 16 wrong inquiry. Instead, Elysium ignores the correct inquiry and fails to even argue
 17 that there is a demand for the NIAGEN trademarks separate from demand for
 18 NIAGEN. Accordingly, Elysium cannot plead a tying arrangement as a matter of law,
 19 its patent misuse claim fails as a matter of law, and the claim should be dismissed with
 20 prejudice.

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

23 **1. Elysium Cites No UCL Case Excusing Elysium’s Failure to**
 24 **Provide Adequate Notice of the Allegedly Offending Conduct.**

25 When addressing the sufficiency of its UCL claims, Elysium again sidesteps the
 26 true matter at issue: actually stating a claim *under California’s UCL*. Bus. & Prof.
 27 Code § 17200 et seq. (*See* Opp. at 19–20 (citing no UCL cases).) It is no “invented
 28 requirement” (Opp. at 21)—but well settled law—that to state a UCL claim a plaintiff

1 must “provide adequate notice of which of [the] practices is unfair [and] which is
2 unlawful,” and identify the allegedly violated statutes if proceeding under the
3 unlawful prong. *Vaccarino v. Midland Nat. Life Ins., Co.*, 2011 WL 5593883, at *8
4 (C.D. Cal. Nov. 14, 2011); *Sonoma Foods, Inc. v. Sonoma Cheese Factory, LLC*, 634
5 F. Supp. 2d 1009, 1022 (N.D. Cal. 2007) (granting motion to dismiss counterclaim,
6 because counter-claimants failed to specify any statute they alleged was violated).

7 As described above, Elysium’s claim for patent misuse is deficient as a matter
8 of law and cannot be the basis for an UCL claim. If Elysium intended to plead
9 unlawful and unfair claims for each of the three challenged practices, or only for some
10 of them, the FACC makes no such distinction, and completely fails to make the claim
11 clear to ChromaDex or the Court. Elysium does not even address this fundamental
12 case law, and its UCL claim should be dismissed with prejudice.

13
14 **2. Elysium Fails to Plead a Violation of Any Law as Required to
State a Claim Under the UCL’s “Unlawful” Prong.**

15 **a. Elysium’s UCL Claim Cannot Be Based on Elysium’s
16 Allegation of Patent Misuse.**

17 Even assuming that patent misuse—an equitable defense—could serve as a
18 predicate for a UCL claim (which it cannot), Elysium fails to allege that ChromaDex
19 violated the UCL’s unlawful prong by committing patent misuse. Elysium does not,
20 and cannot, plead in good faith or prove that ChromaDex misused its patents in any
21 way. First, as discussed in Section IV.B, *supra*, Elysium’s tying allegations fail to
22 show any violation. Second, Elysium’s argument that its “royalty obligation . . .
23 unlawfully continues after the expiration of all patents covering NR supplied by
24 ChromaDex, so long as the NR Supply Agreement remains in effect” (Opp. at 22:6–
25 10 (emphasis added)), rests only on speculation and conjecture, and is certainly not
26 ripe or actionable now—the patents are nowhere close to expiration. ChromaDex’s
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28

1 patent estate will not expire until at least 2025 at the earliest.⁵ Even if the patent
2 misuse claim was actionable, which it is not, there would be no case or controversy
3 unless and until ChromaDex attempted to collect a patent royalty *after* its patents
4 expired.

5 To accurately portray the facts at issue here, Elysium’s argument would have
6 had to state that its “royalty obligation *might* unlawfully continue after the expiration
7 of all patents covering NR supplied by ChromaDex *if the parties renewed the terms of*
8 *their agreement every three years until 2025 and did not modify the terms of the*
9 *royalty obligation before that date.”* But, of course, no such allegation exists or could
10 even plausibly be made. Elysium’s claim does not present an actual case or
11 controversy for the Court to decide and should be dismissed because it rests on totally
12 speculative and uncertain events years in the future.

13 **b. Elysium’s Fails to Plead Any Fraudulent Conduct with**
14 **Particularity as Required for Such Conduct to Support a**
UCL Cause of Action.

15 In its Opposition, Elysium argues that it has stated a UCL claim under the
16 unlawful prong because it alleges “not just a run-of-the-mill breach of contract,” but a
17 fraudulent breach of contract. (Opp. at 23 (citing Cal. Civ. Code §§ 1572, 1709).)
18 However, the Opposition does not even attempt to argue that these allegations satisfy
19 Rule 9(b), as they must. Fed. R. Civ. P. 9(b); *Vess v. Ciba-Geigy Corp. USA*, 317
20 F.3d 1097, 1104 (9th Cir. 2003) (In the Ninth Circuit, Rule 9(b) applies to all
21 averments of fraud, “regardless of the cause of action in which they appear.”). As
22 discussed in ChromaDex’s Motion, Elysium’s allegation regarding a fraudulent breach
23 of contract does not meet the heightened pleading standard and should be dismissed.
24 (Mot. at 19–21.)

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27 _____
28 ⁵ (See Mot. at 19 n.5 (requesting judicial notice of the publically available patents
which expire in 2025).)

1 **3. Elysium Fails to Plead a Violation of the UCL’s “Unfair”**
 2 **Prong.**

3 Elysium’s Opposition misconstrues the applicable test under the UCL’s
 4 “unfair” prong by applying the test that only applies to direct competitors. *See Nat’l*
 5 *Rural Telecomm. Co-op. v. DIRECTV, Inc.*, 319 F. Supp. 2d 1059, 1075 (C.D. Cal.
 6 2003), *on reconsideration in part* (June 5, 2003) (“The test announced in *Cel-Tech*,
 7 however, applies only to cases between direct competitors.” (emphasis added) (citing
 8 *Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163 (1999)). (*See*
 9 Elysium’s Motion to Dismiss the Fourth, Fifth, and Sixth Claims of the First
 10 Amended Complaint at 3 (stating and conceding that Elysium and ChromaDex are not
 11 competitors), ECF 30-1.) Indeed, ChromaDex and Elysium are not competitors: as
 12 bulk supplier and customer, they have a vertical—not a horizontal—relationship.
 13 Nonetheless, even if the Court were to apply the *Cel-Tech* test for unfairness,
 14 Elysium’s claim would still fail.

15 To establish a claim under the “unfair” prong of the UCL using the *Cel-Tech*
 16 test, a plaintiff must show a significant threat of harm to competition, not merely harm
 17 to the plaintiff’s own commercial interests. *Watson Labs., Inc. v. Rhone-Poulenc*
 18 *Rorer, Inc.*, 178 F. Supp. 2d 1099, 1119 (C.D. Cal. 2001). That is because “[i]njury to
 19 a competitor is not equivalent to injury to competition; only the latter is the proper
 20 focus of antitrust laws.” *Cel-Tech*, 20 Cal. 4th at 186; *see also Cargill, Inc. v.*
 21 *Monfort of Colo., Inc.*, 479 U.S. 104, 110 (1986) (“antitrust laws . . . were enacted for
 22 the protection of competition, not competitors” (citation omitted)).

23 While in its Opposition Elysium claims that the FACC alleges harm to
 24 competition (Opp. at 24 n.8 (citing FACC ¶¶ 120, 121)), these allegations, and others
 25 sprinkled throughout the FACC, are purely conclusory. (*See, e.g.*, FACC ¶¶ 6 (listing
 26 conduct with an alleged “anticompetitive effect”), 38 (same), 40 (alleging “substantial
 27 anticompetitive effects”), 59 (claiming conduct “adversely affect[s] competition”).)
 28 Elysium fails to allege facts showing that competition, not just its own commercial

1 interests, was harmed or significantly threatened. *Cf. TreeFrog Devs., Inc. v. Seidio,*
2 *Inc.*, 2013 WL 4028096, at *5 (S.D. Cal. Aug. 6, 2013) (dismissing unfair claim
3 where “Defendant allege[d] harm to itself as a competitor, [but] fail[ed] to assert harm
4 to competition and therefore fail[ed] to allege the requisite violation of the ‘policy or
5 spirit’ of an antitrust law.”); *Asahi Kasei Pharma Corp. v. CoTherix, Inc.*, 204 Cal.
6 App. 4th 1, 19–20 (2012) (finding that voluminous evidence of harm suffered by a
7 competitor fails to support an antitrust claim requiring evidence of harm to
8 competition instead). Elysium’s UCL counterclaim should be dismissed with
9 prejudice because it fails to make this required showing of harm to competition.

10 Further, none of Elysium’s arguments change the fact that Elysium improperly
11 seeks to repackage a “business to business dispute” over agreed contractual terms for
12 which Elysium apparently now has buyer’s remorse, which do not affect the public at
13 large or consumers generally, as alleged business practices under the UCL’s unfair
14 prong. While Elysium half-heartedly argues that *Linear Tech* permits suits based on
15 contracts “involving . . . the public in general” (Opp. at 24 (citing *Linear Tech. Corp.*
16 *v. Applied Materials*, 152 Cal. App. 4th 115, 135 (2007))), Elysium fails to specify
17 how the contracts between ChromaDex and Elysium involve the public. They do not
18 and this is a pure business to business commercial dispute. Elysium’s weak effort to
19 save its claim was already considered by courts in California, is foreclosed under
20 California law, and should be dismissed here with prejudice. *IV Sols., Inc. v. Conn.*
21 *Gen. Life Ins. Co.*, 2015 WL 12843822, at *18 (C.D. Cal. Jan. 29, 2015) (“[A]t the
22 end of the day, this is a non-competitor business-to-business contract dispute. *Linear*
23 *Tech* forecloses relief in this scenario.”)

24 III. CONCLUSION

25 For the reasons discussed herein, Elysium’s third counterclaim for fraudulent
26 inducement, fourth counterclaim for declaratory judgment of patent misuse and fifth
27 counterclaim for violation of the UCL should all be dismissed with prejudice. All of
28

1 the counterclaims are legally and/or factually deficient, and cannot be saved in a
2 further amended pleading.

3
4 Dated: April 10, 2017

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