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MIT Lincoln Laboratory, Lawrence Livermore
8 National Laboratory and Aerospace Corporation

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA

12 DR. NIRA SCHWARTZ dba JAFFA
OPTRONIX 2550 PCH #68, Torrance,
13 Ca 90505,

14 Plaintiff,

15 v.

16 1) UNITED STATES OF AMERICA
OFFICE OF THE US ATTORNEY,
17 Civil Process Clerk, 7th FL. 300 N. Los
Angeles St., Los Angeles, CA 90012

18 2) MIT LINCOLN LABORATORY
19 known as "MIT/LL", At: 244 Wood
Street, Lexington, MA 02420-9108

20 3) LAWRENCE LIVERMORE
21 NATIONAL LABORATORY known
as "LLNL", At: 7000 East Ave.,
22 Livermore, CA 94550

23 4) AEROSPACE CORPORATION
24 known as "AERO" At: 2350 East El
Segundo Blvd. El Segundo, CA 90245-
4691

25 Defendants.
26
27
28

CASE No. 06-4010 DDP (JCx)

**NOTICE OF MOTION AND
MOTION BY DEFENDANTS MIT
LINCOLN LABORATORY,
LAWRENCE LIVERMORE
NATIONAL LABORATORY AND
AEROSPACE CORPORATION TO
DISMISS COMPLAINT FOR
FAILURE TO STATE A CLAIM
[FRCP 12(b)(6)]; AND FAILURE TO
MAKE A SHORT AND PLAIN
STATEMENT OF THE CASE
[FRCP 8]; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Defendants' Request for Judicial Notice
and Proposed Order Filed Concurrently
Herewith

Date: October 23, 3006
Time: 10:00 a.m.
Place: Courtroom 3 (2d Floor)
Judge: Hon. Dean Pregerson

Complaint Filed: June 30, 2006
Trial Date: None set

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:
2 PLEASE TAKE NOTICE that on Monday, October 23, 2006, at 10:00 a.m.
3 or as soon thereafter as counsel may be heard before the Honorable Dean Pregerson
4 in the above-entitled court, located at 312 North Spring Street, Los Angeles,
5 California 90012, Courtroom 3, Defendants MIT Lincoln Laboratory, Lawrence
6 Livermore National Laboratory and Aerospace Corporation (“Defendants”) will
7 appear and move the Court for an order (1) dismissing the Complaint, and each
8 claim for relief alleged therein; and (2) dismissing Plaintiff’s claims for double
9 damages and punitive damages alleged in the Complaint at paragraphs 92, 106 and
10 107, and in Prayers 3 and 6.

11 The Motion to Dismiss is made pursuant to Rules 8(a), 8(e)(1), 10(b) and
12 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds that (1) the
13 Complaint, and each claim for relief asserted therein, fails to contain a short and
14 plain statement of the claim; (2) the Complaint, and each claim for relief asserted
15 therein, fails to plead each averment simply, concisely and directly; (3) Counts I
16 and VII of the Complaint contain multiple claims; and (4) the Complaint, and each
17 claim for relief asserted therein, fails to state a claim upon which relief can be
18 granted.

19 The Motion to Dismiss Plaintiff’s claims for double damages and punitive
20 damages is made pursuant to Federal Rule of Civil Procedure 12(b)(6), on the
21 grounds that (1) Plaintiff’s Complaint fails to plead any facts on which to base
22 Plaintiff’s allegations that Defendants acted with malice, fraud or oppression;
23 (2) double and punitive damages may not be recovered as a matter of law for the
24 claims alleged in Counts VII and IX; and (3) as to Defendant Lawrence Livermore
25 National Laboratory, California Government Code § 818 precludes recovery of any
26 punitive damages.

27 This Motion is based upon this Notice of Motion and Motion; the
28 Memorandum of Points and Authorities attached hereto; the Request for Judicial

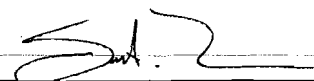
1 Notice filed concurrently herewith; the pleadings and other papers filed in this
2 action; and upon such other argument or authorities as the Court may consider in
3 connection with the Motion.

4
5 Dated: September 5, 2006

Respectfully submitted,

6
7 McKENNA LONG & ALDRIDGE LLP

8
9 By: _____



James J. Gallagher
Susan A. Mitchell
Mana Elihu

10
11 Attorneys for Defendants
12 MIT Lincoln Laboratory, Lawrence
13 Livermore National Laboratory and
14 Aerospace Corporation
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. SUMMARY OF ARGUMENT

3 This is the fifth lawsuit filed by Plaintiff Nira Schwartz over the last decade
4 seeking damages for various claims relating to the Exoatmospheric Kill Vehicle
5 (“EKV”), a component of a missile defense system developed for the Missile
6 Defense Agency in the mid-1990s.¹ In 1996, following termination of
7 Dr. Schwartz’s employment by TRW, Inc., the software subcontractor under the
8 Missile Defense Agency’s EKV contract software subcontractor, Plaintiff filed a
9 *qui tam* action against TRW under the False Claims Act, 31 U.S.C. § 3729 *et seq.*
10 (“TRW Action”). That action was dismissed, at the Government’s request. In
11 2001, Dr. Schwartz filed a second action against Raytheon Company, another
12 Missile Defense Agency EKV contractor; that action was dismissed, again at the
13 Government’s request. In 2003, Dr. Schwartz filed two successive actions against
14 the Government itself in the United States Court of Federal Claims, alleging that
15 the Government improperly had declined to intervene in the TRW and Raytheon
16 *qui tam* actions, had breached a purported contract to compensate her as a
17 consultant in the TRW Action, and had wrongfully taken her “intellectual
18 property.” Those actions both were dismissed.

19 Dr. Schwartz now has targeted Defendants MIT Lincoln Laboratory,²
20 Lawrence Livermore National Laboratory, and Aerospace Corporation (the “POET
21
22
23

24 ¹ The Court properly may take judicial notice of public records, including facts
25 set forth in pleadings and court orders, on a motion to dismiss. See discussion in
Section II *infra*, at pages 3-5.

26 ² Lincoln Laboratory is not a separate legal entity, but a constituent part of the
27 Massachusetts Institute of Technology, like its Chemistry Department. MIT does
28 not raise a misnomer defense, however, and will adopt Plaintiff’s nomenclature for
the purpose of this Memorandum.

1 Defendants”).³ The POET Defendants provided personnel for a 1998 “Phase One
2 Engineering Team” assembled at the Government’s request during Dr. Schwartz’s
3 first *qui tam* case, to evaluate her claims concerning TRW’s EKV software.
4 Plaintiff alleges that the POET wrote “counter-reports” that wrongfully used
5 Plaintiff’s vaguely described “*intellectual-property*” [sic]. Complaint ¶ 24
6 (emphasis in original).

7 The 33-page, 177-paragraph Complaint filed by Dr. Schwartz violates the
8 requirements of Federal Rule of Civil Procedure 8(a) and 8(e)(1) to provide “a short
9 and plain statement of the claim,” and “simple, concise and direct averments.”
10 Plaintiff’s claims for relief are prefaced by 17 pages of “factual background” that
11 do not differentiate between the acts of the Government and the alleged acts of the
12 POET Defendants. Many of the alleged acts by “Defendants” alleged in the
13 Complaint cannot have been done by non-Governmental entities such as the POET
14 Defendants, including allegations that “Defendants” somehow “killed Plaintiff[’s]
15 rights to justice in *qui tam* case;” coded her airline tickets with a yellow “SSSS” to
16 subject her to special security checks; and classified her “*intellectual-property*” to
17 prevent her from copyrighting it. Complaint, ¶¶ 24, 34, 43 (emphasis in original).

18 Even those allegations that might be directed toward the POET Defendants
19 are repetitive and confusing. Her central allegation appears to be misappropriation
20 of “*intellectual-property*,” a term defined to include vague items such as “reports,”
21 “know how,” “technologies” and “tests results.” Complaint ¶ 18. That intellectual
22 property allegedly was delivered to the Government in 2006 (*id.* ¶ 17), or between
23 1997 and 1999 (*id.* ¶ 18). The Complaint intersperses claims that “Defendants”
24 “killed” Plaintiff’s “market,” (*id.*, e.g., ¶ 24) with allegations about prohibiting
25

26 ³ Defendant Lawrence Livermore National Laboratory was not personally
27 served, despite express instructions to Plaintiff’s process server on how to
28 accomplish service.

1 Plaintiff from talking with her lawyers (*id.* ¶ 17), “blackballing” Plaintiff (*id.* ¶ 20),
2 failing to follow some instructions of a Government agent (*id.* ¶ 25), and bribing
3 TRW to win her prior *qui tam* case rather than settle it (*id.* ¶ 38).

4 The Complaint also fails to plead facts sufficient to support any claim for
5 relief under Federal Rule of Civil Procedure 12(b)(6). Nowhere in the Complaint
6 does Plaintiff describe what specifically constitutes her allegedly proprietary
7 “*intellectual-property*,” explain how or when the POET Defendants made the
8 alleged “unauthorized use” of her “technologies,” or allege any discernable

9 “market” for her information, other than admitting that she herself provided it to the
10 Government pursuant to a contract. Plaintiff’s “*intellectual-property*” is defined in
11 such an amorphous manner that no intelligible claim can be based upon it:

12 13 reports, computer diskettes with her developed
13 software and algorithms, source code and in object code
14 form, presentation, viewgraphs, lectures, technologies,
15 know how, trade secrets, Intellectual Property,
16 technologies, Copyrights [*sic*] information, confidential
17 and proprietary information, test procedures, test results,
18 tests validations, flight tests analysis and validations,
19 thousands of pages of fine and detailed analysis and
20 recommendations related to [NMD/EKV POET]
21 *technologies*.

22 Complaint, ¶¶ 18 (emphasis in original).

23 Whatever the legal labels that Plaintiff has attached to her vague claims of
24 misuse of this “*intellectual-property*,” no cognizable claim for relief can be based
25 on such an amorphous description of the allegedly proprietary interest. Plaintiff’s
26 effort to shoehorn her vague allegations into ten different claims for relief
27 consequently fails to result in a single adequately pleaded cause of action. The
28 POET Defendants respectfully request that the Complaint be dismissed.

1 **II. JUDICIALLY NOTICEABLE FACTS FROM PLAINTIFF'S**
2 **PREVIOUS LAWSUITS**

3 In the 1990s, Dr. Schwartz worked for a limited time at TRW, Inc., the
4 subcontractor tasked with **developing software for the EKV.**⁴ After her
5 employment was terminated, she filed a *qui tam* action against TRW, Boeing North
6 American, Inc. and Nichols Research Corporation in April 1996, pursuant to the
7 False Claims Act, 31 U.S.C. § 3730(b) (the "TRW Action"), alleging that the
8 defendants had misrepresented the effectiveness of the EKV **software** to the
9 Government. *See* Request for Judicial Notice filed concurrently herewith, at Ex. 1,
10 **Third Amended Complaint, at p. 5, ¶ 4, lines 7-13.**⁵ During the Government's
11 **investigation of Dr. Schwartz's allegations in the TRW Action, the National Missile**
12 **Defense Joint Program Office requested that the POET Defendants assemble a**
13 **Phase One Engineering Team ("POET") to evaluate Dr. Schwartz's allegations**
14 **concerning EKV software.** *See* Request for Judicial Notice, Ex. 2, at p. 8 & n. 5.

15 In June 2001, Dr. Schwartz filed a second *qui tam* action, in the same court,
16 against Raytheon Company, another Missile Defense Agency contractor associated
17 with development of the EKV. *See* Request for Judicial Notice, Ex. 3, at p. 2
18 (referenceing *United States ex rel. Schwartz v. Raytheon*, No. CV 01-4937 (C.D.
19 Cal. June 4, 2001)). The Government ultimately filed a motion to intervene to move
20 for dismissal and assert the State Secrets Privilege. The Government's motion to
21

22 ⁴ The Court may take judicial notice of official records and reports in
23 connection with a motion to dismiss for failure to state a claim, pursuant to Federal
24 Rule of Evidence 201. *See MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504
25 (9th Cir. 1986). The POET Defendants request that the Court take judicial notice of
the pleadings and orders identified herein, which are attached to the Request for
Judicial Notice filed concurrently herewith.

26 ⁵ Plaintiff's Third Amended Complaint was the operative Complaint at the
27 time that the case was unsealed and served on the defendants. Paragraph 5 of the
28 Third Amended Complaint states that the original Complaint was filed in April
1996.

1 dismiss both the TRW and the Raytheon Actions was granted on February 24,
2 2003. *See* Request for Judicial Notice, Ex. 4.⁶

3 In January 2003, Dr. Schwartz filed an action against the United States in the
4 United States Court of Federal Claims, alleging, *inter alia*, that she was owed \$1.6
5 million under an alleged consulting agreement. *See* Request for Judicial Notice,
6 Ex. 2 at 3, 9. That action was dismissed on December 29, 2003. *Id.*

7 In April 2003, Dr. Schwartz sued the Department of Defense, the Department
8 of Justice, and the Army in the Court of Federal Claims, alleging, *inter alia*, that the
9 Government improperly had declined to intervene in the TRW Action. Schwartz
10 alleged damages of \$422 million. *See* Request for Judicial Notice, Ex. 5;
11 Complaint ¶¶ F, J, K, N. Judgment in that action was entered in favor of the United
12 States on February 18, 2004. *See* Request for Judicial Notice, Exs. 6 & 7.

13 Contrary to Plaintiff's allegations in this action against the POET defendants,
14 the Court of Federal Claims did not "recognize" the existence of her alleged
15 "Consulting Agreement" with the Government, nor her alleged "*intellectual-*
16 *property* research and development cost" of "\$1.61 million dollars."⁷ (Complaint
17 ¶¶ 18, 42.) The Court of Federal Claims dismissed those claims for, *inter alia*,
18 failure to state a claim upon which relief could be granted. *See* Request for Judicial
19 Notice, Ex. 2, Opinion filed December 29, 2003, at 9-12.

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24 ⁶ Dr. Schwartz also made a claim for wrongful termination in the TRW Action.
25 That claim was tried to a jury, which entered judgment in TRW's favor. *See*
26 Request for Judicial Notice, Ex. 11, at 1.

27 ⁷ The Court need not accept as true allegations contradicted by matters of
28 public record, such as papers and orders filed in another action. *See Mack v. South*
Bay Beer Distributors, Inc., 798 F.2d 1279, 1282 (9th Cir. 1986).

1 **III. ARGUMENT**

2 **A. Plaintiff's Complaint Fails To Plead A Short And Plain Statement**
3 **Of Her Claims, As Required By Rule 8**

4 Rules 8(a) and 8(e)(1) of the Federal Rules of Civil Procedure require,
5 respectively, that any claim for relief must contain “a short and plain statement of
6 the claim showing that the pleader is entitled to relief,” and that “[e]ach averment of
7 a pleading shall be simple, concise and direct.” In contrast, the allegations of
8 Plaintiff's Complaint are lengthy, repetitive, confusing, and sometimes nonsensical.

9 The Complaint is unclear as to which allegations are directed toward the
10 United States, and which toward the POET Defendants. *See, e.g.*, Complaint at
11 ¶¶ 17, 35, 52 (with no reference to any specific Defendant, Plaintiff alleges “All
12 injured, damaged, harassed, discriminate and mistreatment or some sort of disparate
13 treatment [*sic*]” threatening Dr. Schwartz's ability to communicate with her
14 attorneys or work as a scientist); ¶¶ 29, 30 (Plaintiff informed “Defendants” of
15 “false technologies”); ¶ 19 (describing the “market” that Defendants “destroyed” as
16 “POET/ARMY/GBI/BMDO/MDA/TRW/Boeing/NRC [Nichols Research
17 Corporation], CSC, NMD, JPO, GBI, NDM, JPO”) (bracketed material in original).

18 Other allegations, by their nature, cannot properly be pled as to non-
19 Governmental entities. For example, Plaintiff alleges that “Defendants”
20 “[c]lassified Plaintiff's *intellectual-property* as ‘secret’ and in mid 1999 it was
21 reclassified as ‘top secret’ along [with] the termination of Plaintiff ‘secret’
22 clearance [*sic*].” Complaint ¶ 20 (emphasis in original). Private persons obviously
23 cannot “classify” information, and the Court need not, and should not, accept this
24 allegation as true. *See Sprewell v. Golden State Warriors*, 266 F. 3d 979, 988 (9th
25 Cir. 2001) (court need not accept as true allegations that are merely conclusory,
26 unwarranted deductions of fact, unreasonable inferences, or allegations contradicted
27 by documents referenced in the complaint). *See also* Complaint ¶ 29 (“Defendants
28 and their agencies took the law into their hands to prevent her[] from going

1 [to] trial with *qui-tam* case”); ¶ 34 (“Defendants” allegedly “printed ‘SSSS’ with
2 yellow background on her airline tickets, causing to have her to be treated with
3 disgrace and humiliation”); *id.* ¶¶ 20, 33 (“Defendants” issued protective
4 orders); ¶23 (“Defendants” told Plaintiff she “had no say” in having the POET
5 review her alleged intellectual property); ¶ 27 (“Defendants” “informed the court of
6 declined intervention”).

7 The Complaint also is replete with vague or nonsensical allegations. See, for
8 example, Complaint ¶¶ 33, 34 (Plaintiff alleges she was “blackballed” with no
9 nexus to any possible conduct by the POET Defendants); *id.* ¶ 38 (“Defendants”
10 bribed TRW into “winning” the wrongful termination action rather than settling it
11 with Plaintiff); *id.* ¶ 38 (“Government Attorney” joined TRW’s team and then
12 returned to the Government); *id.* ¶ 24 (Defendants “pasted” Plaintiff’s alleged
13 “*intellectual-property*” into POET “*counter-reports*” and then disseminated it to
14 “hundreds of people,” all of whom appear to be Government agencies or Missile
15 Defense Agency contractors).

16 The Complaint is so dense with vague, irrelevant and repetitive factual
17 allegations that it falls far short of the requirements of Rules 8(a) and 8(e)(1).
18 Accordingly, Defendants request that the Complaint be dismissed.

19 **B. Plaintiff’s Claims Have A Fundamental Flaw That Cannot Be**
20 **Cured By Amendment**

21 As discussed *infra*, the factual predicate of the Complaint, that Plaintiff has a
22 proprietary interest in her vaguely described “intellectual property,” does not
23 support any of Plaintiff’s alleged claims for relief, or any claim for relief. This
24 deficiency cannot be cured by amendment because Plaintiff admits that what she
25 contends is proprietary to her in fact is (1) classified and (2) not available to her.
26 Complaint, ¶ 20. Only persons with appropriate security clearances may be granted
27
28

1 access to classified information. *See generally* Executive Order 12958 (“Classified
2 National Security Information” dated April 17, 1995), § 4.2.⁸ Plaintiff cannot
3 prosecute a claim for misappropriation of classified information that she cannot
4 even see, much less offer as evidence, under seal or otherwise. Since all of
5 Plaintiff’s claims in her various causes of action are predicated on her alleged
6 ownership interest in this “*intellectual-property*” that is classified and that she
7 cannot see, there is no practical way in which she could proceed with her action,
8 even if she could frame claims that would survive a motion to dismiss, which she
9 cannot.

10 **C. The Complaint Does Not Allege Facts Sufficient To State A Claim**
11 **For Relief Upon Which Relief Can Be Granted**

12 The Complaint alleges 10 claims for relief in 8 counts: (1) Declaratory and
13 Injunctive Relief;⁹ (2) Specific Performance; (3) Replevin; (4) “Breach of Trust and
14 Confidence – Abuse of Power;” (5) Accounting; (6) Money Had and Received;
15 (7) Conversion and Trade Secret Misappropriation; and (8) Unfair Competition
16 [this claim is erroneously numbered as “Count IX”]. None of these counts states a
17 cognizable claim, either because Plaintiff fails to allege one or more essential
18 elements, or because the facts alleged cannot support the claim as a matter of law.

19 **1. Plaintiff Fails To State A Claim For Declaratory Relief**

20 A claim for declaratory relief must allege: (1) a proper subject of declaratory
21 relief; and (2) an actual controversy involving justiciable questions relating to the
22 rights or obligations of a party. 28 U.S.C. § 2201 *et seq.* The “proper subjects” of
23 declaratory relief are governed by state law; justiciability is governed by federal
24

25 ⁸ A copy of Executive Order 12829 is attached to the Request for Judicial
26 Notice as Ex. 8.

27 ⁹ Plaintiff’s joinder of two sets of claims in Counts I and VII is inappropriate
28 under Federal Rule of Civil Procedure 10(b). *See, e.g., Bautista v. Los Angeles*
County, 216 F. 3d 837, 840-841 (9th Cir. 2000).

1 law. *See, e.g., In re Summers*, 325 U.S. 561, 566-69 (1945) (state law determines
2 proper subjects); *Fireman's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1174
3 (3rd Cir. 1976), *cert denied*, 429 U.S. 1053 (1977) (federal law governs existence
4 of an "actual controversy"). The subjects of Plaintiff's claims for declaratory relief
5 in paragraphs 55 through 59 of the Complaint involve neither a proper subject nor
6 an actual controversy; and the remaining claims for declaratory relief are
7 impermissibly vague.

8 California Code of Civil Procedure Section 1060 provides that the subject of
9 declaratory relief must pertain to the legal rights and duties of the respective parties
10 under a contract, statute, or order. *See Brownfield v. Daniel Freeman Marina*
11 *Hospital*, 208 Cal. App. 3d 405, 410 (1989). Most of the subjects of Count I are not
12 legally cognizable "subjects" under any contract, statute or order. Defendants'
13 alleged "obligations" under certain "instructions" allegedly given by a Special
14 Agent of the Defense Criminal Investigation Service (DCIS) in 1998 (Complaint,
15 ¶¶ 25, 55, 59) do not involve a contract or legal order. Plaintiff's purported rights
16 to "reinstate" her False Claims Act case against TRW and Boeing (Complaint, ¶¶ 1
17 and 56-58), and her claim that "Defendants['] false decline intervention in qui-tam
18 case and dismissal of qui-tam case without attorney general consent in writing
19 [sic]" (Complaint, ¶ 57) have no basis in contract, statute or order. Similarly,
20 Plaintiff's claim that "Defendants payments to TRW/Boeing the *fraudulent*
21 *attorneys' fees* in both *qui tam* and *wrongful-Termination* case [sic]" (Complaint,
22 ¶ 58) does not fit within the subjects permitted by Cal. Civ. Proc. Code
23 Section 1060, even if that allegation made any sense.¹⁰ Finally, Plaintiff's
24

25 ¹⁰ While complaints by plaintiffs *in propria persona* are liberally read, the
26 Court need not accept as true unreasonable inferences or allegations of fact. *See,*
27 *e.g., Sprewell v. Golden State Warriors*, 266 F. 3d 979, 988 (9th Cir. 2001);
28 *Transphase Systems, Inc. v. Southern Calif. Edison Co.*, 839 F. Supp. 711, 718
(C.D. Ca. 1993).

1 purported proprietary right to certain unidentified information allegedly designated
2 as “classified” by the Government (Complaint, ¶¶ 20 and 59) does not appear to
3 have any relationship to a contract, statute or order involving the POET Defendants.

4 Plaintiff’s remaining allegation, that Defendants are obligated to cease using
5 or disseminating Plaintiff’s unidentified “intellectual property,” is too vague to be
6 actionable, since no protectable intellectual property interest can be identified from
7 that allegation. *See* Complaint, ¶¶ 60-62, using the term “*intellectual-property*,”
8 defined in ¶ 18 of the Complaint to include such items as “presentations,
9 viewgraphs, lectures, technologies [and] knowledge.” That definition, and
10 Plaintiff’s allegations concerning the “false” technologies, echo her earlier lawsuits,
11 and make it clear that the claim Plaintiff is attempting to allege is not actionable
12 under any legal theory. Plaintiff’s underlying complaint appears to be that she was
13 retained by the Government to provide “expert” analyses to the POET Defendants
14 concerning her claims that TRW’s EKV software had been falsely represented as
15 viable; and those Defendants issued a report to the Government disagreeing with
16 Dr. Schwartz’s allegations, thus causing the Government to decline intervention in
17 the action. Complaint, ¶¶ 18, 21, 23. Such allegations not only fail to state a claim,
18 they would be foreclosed by the dismissal of the TRW Action on State Secrets
19 grounds, since the documents underlying Dr. Schwartz’s claims, and the POET
20 report itself, contain classified information. *See* Request for Judicial Notice, Ex. 9,
21 page 9, 4-9, 13-15; *id.* Ex. 10.

22 Because Plaintiff’s claims are not cognizable at law or in equity, there can be
23 no justiciable controversy under federal law. *See, e.g., Hillblom v. United States*,
24 896 F.2d 426, 430-31 (9th Cir. 1990). Accordingly, the POET Defendants request
25 that the Court dismiss Plaintiff’s Count I Declaratory Relief claim.

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2. Plaintiff’s Claim For Injunctive Relief Fails To Allege Facts Constituting Irreparable Injury To Plaintiff

Plaintiff’s claims for an injunction arise from her state law claim that her “*intellectual-property*” is wrongfully in Defendants’ possession. Complaint, ¶ 2. One essential element of a cause of action for injunctive relief is irreparable injury. Irreparable injury involves “a factual showing that the wrongful act constitutes an actual or threatened injury to property or personal rights which cannot be compensated by an ordinary damage award.” *Brownfield v. Daniel Freeman, supra*, 208 Cal. App. 3d at 410; *see, e.g., DVD Copy Control Assn, Inc. v. Bunner*, 116 Cal App 4th 241, 253-54 (2004). Plaintiff pleads no injury that the law would recognize as irreparable. If the POET Defendants in fact had wrongful possession of Plaintiff’s alleged intellectual property, which they do not, it could be compensable with monetary damages. *See, e.g., Woolley v. Embassy Suites, Inc.*, 227 Cal. App. 3d 1520, 1535 (1991) (basic rule governing equitable relief is that injunctive relief will not be granted when a damage award would afford the plaintiff adequate relief); *Whyte v. Shlage Lock Company*, 101 Cal. App. 4th 1443, 1449 (2002) (injunctions in the area of trade secrets are governed by the principles applicable to injunctions in general).

The POET Defendants request that Plaintiff’s Count I claim for Injunctive Relief be dismissed.

3. Plaintiff’s Second Count For Specific Performance Must Be Dismissed Because Plaintiff Does Not and Cannot Allege A Contract With The POET Defendants

The *sine qua non* of a cause of action for specific performance is a “valid and binding contract” between plaintiff and defendant. *See, e.g., Porporato v. Devincenzi*, 261 Cal. App. 2d 670, 674 (1968); *Spector v. Pete*, 157 Cal. App. 2d 432, 437 (1958). Plaintiff does not, and cannot, allege that any contract exists

1 between herself and the POET Defendants. *See* Request for Judicial Notice, Ex. 2,
2 Opinion at 8, n. 5; *see also* Complaint at ¶ 21.

3 While leave to amend is liberally granted at the pleading stage, the court need
4 not grant leave where amendment would be an “exercise in futility.” *Nissan Motor*
5 *Co., Ltd. v. Nissan Computer Corp.*, 204 F.R.D. 460, 463 (C.D. Cal. 2001). Where
6 it “appears beyond doubt that the plaintiff can prove no set of facts in support of his
7 claim which would entitle him to relief,” leave to amend should be denied. *Conley*
8 *v. Gibson*, 355 U.S. 41, 45-46 (1957); *see Ellingson v. BJN, Inc.*, 653 F.3d 1327,
9 1330 (9th Cir. 1981). The POET Defendants therefore request that Count II of the
10 Complaint be dismissed with prejudice.

11 **4. Plaintiff’s Third Count For Replevin Cannot Be Asserted As**
12 **To “Intellectual Property”**

13 The elements for a cause of action for replevin are: (1) plaintiff’s right to
14 possession of a chattel or tangible property at the time of commencement of the
15 action; and (2) defendant’s wrongful possession of this chattel or tangible property.
16 *See The Stockton Morris Plan Co. v. Mariposa County*, 99 Cal. App. 2d 210, 213
17 (1950). Replevin is an equitable action for recovery of property that is capable of
18 seizure. *Ashton v. Heydenfeldt*, 124 Cal. 14, 18 (1899) (finding that incorporeal,
19 intangible things are not capable of seizure under a writ of replevin). *See also*
20 *Englert v. IVAC Corp.*, 92 Cal. App. 3d 178, 184 (1979) (shares of stock are a
21 person’s intangible ownership interest in a company which cannot be replevied,
22 whereas the tangible certificates of stock which represent those shares can be
23 replevied).

24 Intellectual property by definition is not tangible property, and so is not a
25 proper subject for a replevin action. Moreover, Plaintiff has alleged that her
26 intellectual property has been classified (Complaint ¶ 20), a decision that is the sole
27 prerogative of the Executive Branch. *See Ellsberg v. Mitchell*, 709 F. 2d 51, 56
28 (D.C. Cir. 1983) (citing *United States v. Reynolds*, 345 U.S. 1, 7 (1953)). The

1 Court need not accept Plaintiff’s conclusion that the POET Defendants “classified”
2 her allegedly proprietary information, or have authority to “return” classified
3 documents to someone like Plaintiff who has no security clearance. *See generally*
4 *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004) (the court is
5 not required to accept legal conclusions cast in the form of factual allegations if
6 those conclusions cannot reasonably be drawn from the facts alleged.) No action
7 for replevin can be pled against the POET Defendants, who therefore request that
8 Count III be dismissed with prejudice.

9 **5. Plaintiff’s Fourth Count For “Breach Of Trust And**
10 **Confidence” — “Abuse Of Power” Does Not State A Legally**
11 **Cognizable Claim**

12 Defendants have found no authority to suggest that “Breach of Trust and
13 Confidence” or “Abuse of Power” are cognizable claims for relief, particularly
14 against private parties. Plaintiff’s allegations appear to relate solely to the
15 Government’s “abandonment” of the alleged Consulting Agreement,¹¹ and not to
16 any conduct by the POET Defendants. See Complaint at ¶¶ 72-78. The POET
17 Defendants therefore request that Count IV be dismissed with prejudice.

18 **6. Plaintiff’s Misappropriation Allegations Cannot Support**
19 **Plaintiff’s Fifth And Sixth Counts For An Accounting And**
20 **Money Had And Received**

21 The POET Defendants have located no California statute or case creating an
22 independent action for “Accounting.” An accounting commonly is a *remedy*, but it
23 is not an independent cause of action. *See Jefferson v. J. E. French Co.*, 54 Cal. 2d
24

25 _____
26 ¹¹ The POET Defendants request that the Court take judicial notice of the fact
27 that the Court of Federal Claims previously has found that this alleged Consulting
28 Agreement did not constitute an enforceable contract. *Compare* allegations of
Complaint ¶ 17 with Request for Judicial Notice, Ex. 2, Opinion at 9 – 12.

1 717, 719 (1960) (an accounting is ancillary to the perfection of plaintiff's right
2 under a contract).

3 To state a cause of action for Money Had and Received, a plaintiff must
4 allege a contract, implied-in-fact contract, or quasi-contract basis for the claim.
5 *See, e.g., Kawasho Int'l. (U.S.A.), Inc. v. Lakewood Pipe Serv., Inc.*, 152 Cal. App.
6 3d 785, 793 (1983). As discussed *supra*, no contract, actual or implied, can be
7 alleged between Plaintiff and the POET Defendants. Plaintiff's facts, even though
8 vaguely pleaded, demonstrate that the "federal funds" at issue were not received by
9 the POET Defendants pursuant to any contractual relationship with Plaintiff, or for
10 Plaintiff's benefit; the only reasonable inference to be drawn from her allegations is
11 that "Defendants" received federal funds for their own benefit. *See, e.g., Complaint*
12 *at* ¶ 9. Since Plaintiff cannot plead any factual basis for Accounting or Money Had
13 and Received, the POET Defendants request that Plaintiff's Fifth and Sixth Counts
14 be dismissed with prejudice.

15 **7. Plaintiff's Alleged Intellectual Property Cannot Provide A**
16 **Factual Predicate For Her Seventh Count for Conversion**

17 The Ninth Circuit Court of Appeals applies a three-part test to determine
18 whether a property right will support a claim for conversion under California law:
19 (1) there must be an interest capable of precise definition; (2) it must be capable of
20 exclusive possession or control; and (3) the putative owner must have established a
21 legitimate claim to exclusivity. *Kremen v. Cohen*, 337 F.3d 1024, 1030 (9th Cir.
22 2003). As discussed *supra* in Section III(C)(1), the Complaint does not precisely,
23 or even imprecisely, define Plaintiff's alleged "*intellectual-property*" or "trade
24 secret," nor does she allege facts that would support a claim of a right to exclusive
25 possession and control. To the contrary, Plaintiff admits that she provided her
26 reports, "technologies," and other allegedly proprietary information to the
27 Government pursuant to the alleged "Consulting Agreement," without any alleged
28 restrictions. *See, e.g., Complaint* ¶ 18. Plaintiff's allegation that her "intellectual

1 property” has been classified (Complaint ¶ 20) also is a judicial admission that she
2 has no right to control this information, much less an exclusive right. *See Ellsberg,*
3 *supra*, 709 F. 2d at 56. The Complaint cannot be amended, consistently with these
4 admissions, to state a claim for Conversion, and so the POET Defendants request
5 that Count VII of the Complaint be dismissed with prejudice.

6 **8. The Complaint Fails To Allege Facts Sufficient To State A**
7 **Claim For Misappropriation Of Trade Secret**

8 Misappropriation of trade secrets is a state law claim. *See Stutz Motor Car of*
9 *America, Inc. v. Reebok Intl., Ltd.*, 909 F. Supp 1353, 1359 (C.D. Cal. 1995). To
10 state a cause of action for misappropriation of trade secrets, a plaintiff must plead
11 the existence of a trade secret. *See, e.g.*, Cal. Civ. Code § 3426.1(b).¹² Plaintiff’s
12 definition of her “*intellectual- property*,” alleged in Complaint ¶ 18 and quoted
13 *supra* at page 3, presumably is her “trade secret,” which otherwise is undefined in
14 the Complaint. But this definition does not suffice to describe any interest
15 protected under the Trade Secrets Act.¹³ *See id.* §3426.1(d). *See, e.g., Whyte v.*
16 *Schlage Lock Co.*, 101 Cal. App. 4th 1443 (2002) (a plaintiff must describe the
17 subject matter of the trade secret with sufficient particularity to separate it from
18 matters of general knowledge in the trade or specialized knowledge of persons
19

20 ¹² Since Plaintiff has not alleged where, when or how the misappropriation
21 occurred, nor pled the statute under which she asserts this claim, it is not possible to
22 determine the appropriate choice of law, but most states have adopted the Uniform
23 Trade Secrets Act, including California. California Civil Code §§ 3426 *et seq.*,
24 adopted Stats 1984 ch. 1724.

25 ¹³ Plaintiff’s allegation that “Judge Bush [of the Court of Federal Claims] ruled
26 that the Defendants do not contest Dr. Schwartz authorship of these 13 reports, and
27 that they benefited from it” (Complaint ¶ 18), is contradicted by the COFC’s Order,
28 which dismissed her claims for Misappropriating Intellectual Property and
Copyright Infringement for failure to state a claim and lack of jurisdiction. The
Court simply noted in its opinion that, in supplemental briefings on the adequacy of
Plaintiff’s Complaint, the United States had not contested Dr. Schwartz’ authorship
of “13 reports” and “thousands of pages of analysis and recommendations.” *See*
Request for Judicial Notice at Ex. 2, 18-19.

1 skilled in the trade, and to permit the defendant to ascertain at least the boundaries
2 within which the secret lies).

3 The Complaint also alleges that Plaintiff's trade secret voluntarily was
4 provided to the Government, pursuant to a contract, for use by the POET.
5 Complaint ¶¶ 17-18. Plaintiff fails to plead acquisition or use of the alleged trade
6 secret by the POET Defendants through improper means; and her allegation that the
7 "secret" improperly was "disseminated" by "pasting" it into the POET's "counter-
8 reports," another vaguely described term (Complaint ¶¶ 21, 24) does not suffice to
9 meet the pleading standards of Rule 12(b)(6) for "misappropriation." See Cal. Civ.
10 Code § 3426.1(b). The POET Defendants therefore request that Plaintiff's claim
11 for Misappropriation of Trade Secret in Count VII be dismissed.

12 **9. Plaintiff's Final Count For Unfair Competition Does Not**
13 **Allege An Injury To Competition Or Unlawful Business**
14 **Practice**

15 To state a claim under California's Unfair Competition statute, California
16 Business & Professions Code §§ 17200, *et seq.*, a Plaintiff must allege either that
17 the defendant's activities harmed competition, or that defendant engaged in an
18 "unlawful" business practice. See, e.g., *Cel-Tech Communications, Inc. v. Los*
19 *Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 187 (1999) (defining the statutory
20 prohibition of "unfair" conduct as conduct that "significantly threatens or harms
21 competition"); *Lazar v. Hertz Corp.*, 69 Cal. App. 4th 1494, 1505 (1999) (violation
22 of an underlying statute is a "necessary predicate" to a Section 17200 action for an
23 unlawful business activity.) The Complaint does not, and cannot, identify any
24 injury to competition, or unlawful business activity.¹⁴ Plaintiff's complaint that
25 _____

26 ¹⁴ The "double damages" and punitive damages alleged in the Prayer are not
27 recoverable under Cal. Bus. & Prof. Code § 17200. See *Newport Components, Inc.*
28 *v. NEC Home Electronics (U.S.A.), Inc.*, 671 F. Supp. 1525, 1551 (C.D. Cal. 1987);
Bank of the West v. Superior Ct., 2 Cal. 4th 1254, 1266 (1992).

1 some misappropriation of undefined intellectual property occurred at some unstated
2 point in time, cannot, as a matter of law, support a claim under California's unfair
3 competition law. The POET Defendants therefore request that Count IX of the
4 Complaint be dismissed with prejudice.

5 **IV. PLAINTIFFS' CLAIMS AND PRAYER FOR DOUBLE AND**
6 **PUNITIVE DAMAGES SHOULD BE DISMISSED**

7 Punitive damages are authorized under California law only in extremely
8 limited circumstances involving oppression, fraud or malice by the defendant.

9 Malice is defined as "conduct which is *intended* by the defendant to cause injury to
10 the plaintiff or despicable conduct which is carried on by the defendant with a
11 *willful and conscious disregard* of the rights and safety of others." Cal. Civ. Code
12 § 3294(c) (emphasis added). "Oppression" means *despicable conduct* that subjects
13 a person to cruel and unjust hardship in *conscious disregard* of that person's
14 rights." *Id.* (emphasis added). "Despicable" conduct requires a level of conduct
15 that is nearly criminal before punitive damages may be awarded. *See Mock v.*
16 *Michigan Millers Mut. Ins. Co.*, 4 Cal. App. 4th 306, 328 (1992). Conclusory
17 allegations do not suffice for punitive damages claims; the plaintiff must allege the
18 specific acts that meet the statutory threshold. *See, e.g., G.D. Searle & Co. v.*
19 *Superior Court*, 49 Cal. App. 3d 22, 29 (1975) (conclusory ultimate facts are
20 insufficient to set forth a claim for punitive damages).

21 The Complaint fails to meet these exacting requirements. Plaintiff makes
22 only conclusory allegations of malice and oppression, and fails to allege a single
23 specific fact to support them. Nor does the Complaint contain any facts from which
24 the Court could reasonably infer that the POET Defendants had the requisite intent
25 to act maliciously, fraudulently or oppressively.

26 As to Defendant Lawrence Livermore National Laboratory, a public entity
27 operated by the University of California for the Department of Energy, no claim for
28 punitive damages is permitted by law. California Government Code § 818 ("a

1 public entity is not liable for damages awarded under Section 3294 of the Civil
2 Code or other damages imposed primarily for the sake of example and by way of
3 punishing the defendant”). See *Austin v. Regents of the University of California*, 89
4 Cal. App. 3d 354, 358 (1979). Consequently, Complaint ¶¶ 92, 106 and 107,
5 Prayer 3 for double damages, and Prayer 6 for punitive and exemplary damages
6 should be dismissed pursuant to Rule 12(b)(6).

7 **V. CONCLUSION**

8 For the reasons set forth above, Defendants MIT Lincoln Laboratory,
9 Lawrence Livermore National Laboratory, and Aerospace Corporation respectfully
10 request that the Court dismiss the Complaint, or, in the alternative, (1) dismiss with
11 prejudice Plaintiff’s claims for Specific Performance, Replevin “Breach of Trust
12 and Confidence – Abuse of Power,” Accounting, Money Had and Received,
13 Conversion and Unfair Competition, pursuant to Rule 12(b)(6); (2) dismiss with
14 prejudice Plaintiff’s claims for double and punitive damages against Defendant
15 Lawrence Livermore National Laboratory; (3) dismiss Plaintiff’s remaining claims
16 pursuant to Rule 8 and Rule 12(b)(6); and (4) dismiss Plaintiff’s claims for double
17 damages and punitive damages.

18
19 Dated: September 5, 2006

Respectfully submitted,

McKENNA LONG & ALDRIDGE LLP

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22 By: 

James J. Gallagher
Susan A. Mitchell
Mana Elihu

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25 Attorneys for Defendants
26 MIT Lincoln Laboratory, Lawrence
27 Livermore National Laboratory and
28 Aerospace Corporation

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PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is **444 South Flower Street, Los Angeles, California 90071.**

On September 5, 2006, I served the **NOTICE OF MOTION AND MOTION BY DEFENDANTS MIT LINCOLN LABORATORY, LAWRENCE LIVERMORE NATIONAL LABORATORY AND AEROSPACE CORPORATION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM [FRCP 12(b)(6)]; AND FAILURE TO MAKE A SHORT AND PLAIN STATEMENT OF THE CAS** on the interested parties in this action by placing the **true copy/original** thereof, enclosed in a sealed envelope, postage prepaid, addressed as follows:

**Dr. Nira Schwartz
dba Jaffa Optronix
2550 Pacific Coast Highway #68
Torrance, CA 90505
Plaintiff**

I am readily familiar with the business practice of my place of employment in respect to the collection and processing of correspondence, pleadings and notices for mailing with United States Postal Service.

The foregoing sealed envelope was placed for collection and mailing this date consistent with the ordinary business practice of my place of employment, so that it will be picked up this date with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of such business.

I declare under penalty of perjury that the foregoing is true and correct, and that I am employed at the office of a member of the bar of this Court at whose direction the service was made.

Executed on September 5, 2006, at Los Angeles, California.

Signature

Darlene F. Barberis
Print Name