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10 UNITED STATES DISTRICT COURT
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
12 WESTERN DIVISION

13 DR. NIRA SCHWARTZ dba
14 JAFFA OPTRONIX

15 Plaintiff,

16 v.

17 UNITED STATES OF AMERICA;
18 MIT LINCOLN LABORATORY;
19 LAWRENCE LIVERMORE
LABORATORY; and
20 AEROSPACE CORPORATION

21 Defendant.

) No. CV 06-4010 DDP (JCx)

) **DEFENDANT UNITED STATES'**
) **REPLY TO PLAINTIFF'S**
) **OPPOSITION TO MOTION TO**
) **DISMISS COMPLAINT**

) **DATE: December 11, 2006**
) **TIME: 10:00 a.m.**
) **COURTROOM: 3**

) **The Honorable Dean D. Pregerson**

1 **I. ARGUMENT**

2 As before in the Court of Federal Claims, the complaint against the United
3 State in this action, CV 06-4010 DDP (JCx) (“Instant Action”) is based upon the
4 United States’ investigation and litigation of the *qui tam* action. Among other
5 things, Dr. Schwartz alleges that the United States fraudulently convened POET as
6 an independent evaluator of her claims, declined to intervene in her *qui tam* action
7 based on false information provided by POET (*i.e.*, “false declination”) and later
8 dismissed the *qui tam* action without the Attorney General’s written consent. See
9 Instant Action Complaint ¶¶ 26, 27, 57 and 64. Dr. Schwartz further alleges that
10 the United States “falsely” classified her intellectual property, discriminated
11 against Dr. Schwartz *vis a vis* POET, and refused to pay Dr. Schwartz for
12 intellectual property which she claims to have provided to the government
13 pursuant to the alleged unauthorized consulting agreement that was the subject of
14 the litigation in the Court of Federal Claims. (See, e.g., Instant Action Complaint
15 ¶ 33, 43, 47 and 64.)

16 The Instant Action Complaint alleges eight causes of action for: (1)
17 declaratory judgment (Count I, 18:21-20:13.); (2) specific performance (Count II,
18 20:15-21:2.); (3) replevin (Count III, 21:4-9); (4) breach of trust (Count IV, 22:11-
19 24:11); (5) accounting (Count V, 24:12-25:7); (6) money had and received (Count
20 VI, 25:8-26:14); (7) conversion and trade secret misappropriation (Count VII,
21 26:16-30:17; and (8) unfair competition (Count IX [sic], 30:19-32:12.) Dr.
22 Schwartz seeks general and special damages, disgorgement and restitution, double
23 damages, preliminary and permanent injunctive relief, and punitive damages.
24 (Instant Action Complaint, Prayer, 32:14-33:11.)

25 The United States filed its motion to dismiss, pursuant to F.R.Civ.P.
26 12(b)(1), on the grounds that: (1) Dr. Schwartz’s claims relating to her *qui tam*
27 action are barred pursuant to the doctrines of res judicata and collateral estoppel
28 because Dr. Schwartz’s earlier *qui tam* case, arising out of the same facts, was

1 dismissed with prejudice to her in Central District of California Case No. CV 96-
2 3065 RSWL; (2) Dr. Schwartz cannot state a claim under the Federal Tort Claims
3 Act because she has failed to exhaust her administrative remedies before filing
4 suit; (3) exclusive subject matter jurisdiction for Dr. Schwartz's copyright claims
5 against the United States lies, pursuant to 28 U.S.C. § 1498(b), in the Court of
6 Federal Claims; and (4) exclusive subject matter jurisdiction for Dr. Schwartz's
7 express and implied contract claims against the United States, to the extent such
8 claims have been reasserted here, lies in the Court of Federal Claims, pursuant to
9 the Tucker Act, and in any event, that court previously decided that Dr. Schwartz
10 failed to allege a valid contract.¹

11 Dr. Schwartz has failed to show in her Opposition that the Court has subject
12 matter jurisdiction over her claims, or that her claims are not barred by res judicata
13 and collateral estoppel.² For example, she fails to contest the facts set forth
14 in the Declaration of Aleta Bodelay, which shows that Dr. Schwartz has not filed
15 a tort claim with the Department of Justice.³ Nor does Dr. Schwartz show how her
16 claims are not barred by the doctrines of res judicata and collateral estoppel.⁴

19 ¹ Contrary to the statement in Dr. Schwartz's Opposition at 15:11-20, that
20 United States has conceded the validity of her copyright claim, in fact the United
21 States has never conceded, outside of the context of a motion to dismiss, that Dr.
22 Schwartz is the author of certain reports, or that the United States owes her money
on account of those reports, or on account of any other work. To avoid any doubt,
the United States does not concede authorship, distribution, use, or any other
element of copyright liability to Dr. Schwartz.

23 ² The Opposition petitions the Court to answer certain questions. There is
24 no provision in the F.R.Civ.P. or the Local Rules for such a procedure. In addition,
25 it should be noted that a number of Dr. Schwartz's issues involve documents
protected by the state secrets privileges.

26 ³ Dr. Schwarz submits several letters, but none of those letters refer to tort
claims – they all refer to copyright and contract claims.

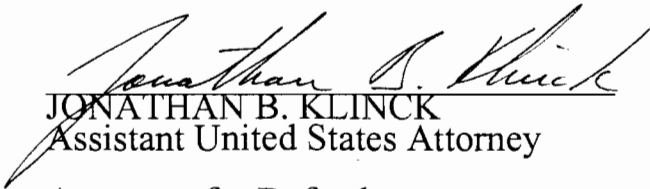
27 ⁴ Dr. Schwartz correctly notes that the *qui tam* action was dismissed
28 without prejudice to the United States. However, that does not affect the point
raised by the United States, that Dr. Schwartz' *qui tam* action was dismissed with
prejudice to her.

1 **II. CONCLUSION**

2 For the foregoing reasons, Plaintiff's complaint should be dismissed for lack of
3 subject matter jurisdiction, and because the claims and issues stated therein are
4 barred by the doctrines of res judicata and collateral estoppel. Since these fatal
5 defects cannot be remedied, Plaintiff's complaint and action should be dismissed
6 with prejudice under the futility doctrine. See Foman v. Davis, 371 U.S. 178, 182,
7 83 S.Ct. 227, 9 L.Ed.2d 222 (1962).

8 DATED: December 4, 2006

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