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CENTRAL DISTRICT OF CALIFORNIA
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DR. NIRA SCHWARTZ dba Jaffa OptroniX,

Plaintiff,

v.

UNITED STATES OF AMERICA OFFICE OF THE US ATTORNEY; MIT LINCOLN LABORATORY; LAWRENCE LIVERMORE NATIONAL LABORATORY; AEROSPACE CORPORATION,

Defendants.

Case No. CV 06-04010 DDP (JCx)

ORDER GRANTING THE MOTION TO DISMISS FILED BY DEFENDANTS MIT LINCOLN LABORATORY, LAWRENCE LIVERMORE NATIONAL LABORATORY, AND THE AEROSPACE CORPORATION; ALSO GRANTING THE UNITED STATES' MOTION TO DISMISS

[Motions filed on September 5, 2006, and September 6, 2006, respectively]

This matter comes before the Court on the government's motion to dismiss for lack of subject matter jurisdiction and on the other defendants' motion to dismiss for failure to state a claim. After reviewing the papers submitted by the parties, the Court grants the motions.

I. BACKGROUND[1]

In the 1990s, Dr. Nira Schwartz worked for a limited time at TRW, Inc., the subcontractor developing software an Exoatmospheric Kill Vehicle ("EKV") for the government's National Missile Defense

[1] The Court grants the defendants' requests for judicial notice in support of their motions to dismiss.

29

Program. After her employment was terminated, she filed a qui tam action against TRW, Boeing North American, Inc., and Nichols Research Corporation, pursuant to the False Claims Act, 31 U.S.C. § 3729 et seq.[2] In that action, she alleged that the defendants had committed fraud in the process of choosing contractors to develop the EKV. She also alleged that TRW had wrongfully terminated her employment in violation of whistleblower statutes. In 2001, she filed a similar suit against Raytheon Company.

The United States initially declined to intervene in either case, and Dr. Schwartz moved forward with the litigation on her own. However, the United States eventually moved to intervene in both cases in order to assert the state secret privilege and to move to dismiss the FCA claims. The district court granted the government's motion to intervene and dismissed both FCA claims. Dr. Schwartz appealed, and the Ninth Circuit affirmed the dismissal.

Following dismissal of the qui tam cause of action, Dr. Schwartz's employment case against TRW went to trial. The jury returned a special verdict in TRW's favor and judgment was entered on January 13, 2005. TRW and Dr. Schwartz then stipulated that in exchange for TRW's agreement not to enforce a judgment for costs in its favor, Dr. Schwartz waived her rights to file post-trial motions, and waived her right to appeal any order, verdict or judgment in the case, including the order of dismissal entered on

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[2] The False Claims Act imposes civil liability upon any person who "knowingly presents, or causes to be presented, to . . . the United States . . . a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a). FCA litigation may be initiated by private citizens who bring that actions for themselves and the United States.

March 26, 2003, granting the government's motion to dismiss the false claims allegations against TRW. This stipulation was approved as a court order on February 9, 2005.

In response to the government's action in the qui tam cases, on January 8, 2003, Dr. Schwartz filed a complaint in the Court of Federal Claims. In her complaint, she alleged that the Department of Justice ("DOJ") trial attorney assigned to represent the Government in the qui tam action entered into, and later breached, an oral agreement with Dr. Schwartz to intervene in her qui tam action and to pay her to work as an "expert consultant" on the qui tam case. On December 29, 2003, the Court of Federal Claims dismissed portions of the complaint for lack of subject matter jurisdiction, and dismissed the remainder for failure to state a claim upon which relief can be granted.

In April 2003, Dr. Schwartz filed suit in the Court of Claims against the Department of Defense, the Department of Justice, and the Army, alleging, *inter alia*, that the Government had improperly had declined to intervene in the TRW action. Judgment in that action was entered in favor of the United States on February 18, 2004.

In this action, Dr. Schwartz alleges eight causes of action for: (1) declaratory judgment and injunctive relief; (2) specific performance; (3) replevin; (4) breach of trust; (5) accounting; (6) money had and received; (7 conversion and trade secret misappropriation; and (8) unfair competition. Dr. Schwartz seeks general and specific damages, disgorgement and restitution, double damages, preliminary and permanent injunctive relief, and punitive damages.

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1 Although it is not entirely clear from the complaint, it
2 appears that Dr. Schwartz's claims against Defendants MIT Lincoln
3 Laboratory, Lawrence Livermore National Laboratory, and Aerospace
4 Corporation arise from their involvement in her first qui tam case
5 against TRW. During that case, the United States assembled a
6 "Phase One Engineering Team" ("POET") to evaluate Dr. Schwartz's
7 claims concerning TRW's EKV software, and the defendant companies
8 provided personnel for POET. The plaintiff alleges that POET wrote
9 "counter-reports" that wrongfully used her "intellectual
10 property."[3]

11 Similarly, it appears that Dr. Schwartz's allegations against
12 the government are based upon the government's investigation and
13 litigation of the qui tam action. Among other things, Dr. Schwartz
14 alleges that the United States fraudulently convened POET as an
15 independent evaluator of her claims, declined to intervene in her
16 qui tam action based on false information provided by POET and
17 later dismissed the qui tam action without the Attorney General's
18 written consent. (Compl. ¶¶ 26, 27, 57, and 64.) Dr. Schwartz
19 further alleges that the United States falsely classified her
20 intellectual property, discriminated against her vis a vis POET,
21
22

23 [3] The plaintiff defines her intellectual property as follows:
24 13 reports, computer diskettes with her developed software and algorithms, source code and in object code form,
25 presentations, viewgraphs, lectures, technologies, know how, trade secrets, Intellectual Property, technologies,
26 Copyrights information, confidential and proprietary information, test procedures, test results, test
27 validations, flight tests analysis and validations, thousands of pages of fine and detailed analysis and
28 recommendations related to NMD/EKV POET technologies.
(Compl. ¶ 18.)

and refused to pay her for intellectual property which she provided to the government. (Id. ¶¶ 33, 43, 47, 64.)

On September 5, 2006, Defendants MIT Lincoln Laboratory, Lawrence Livermore National Laboratory, and Aerospace Corporation filed a motion to dismiss for failure to state a claim under which relief can be granted.[4] On September 6, 2006, the government filed a motion to dismiss for lack of subject matter jurisdiction.

II. GOVERNMENT'S MOTION TO DISMISS

A. Sovereign Immunity

No suit or request for relief may be brought against the United States in any court unless there has been an express waiver of sovereign immunity. As a sovereign, the United States and its agencies may not be sued without its consent, and the terms of its consent define the Court's jurisdiction. United States v. Dalm, 494 U.S. 596, 608 (1990); Gilbert, 756 F.2d at 1458. Only Congress can waive the sovereign immunity of the United States by enacting statutes consenting to suit. See United States v. Sherwood, 312 U.S. 584, 587 (1941); Midwest Growers Co-op Corp. V. Kirkemo, 533 F.2d 455, 465 (9th Cir. 1976). In determining whether Congress has waived the immunity of the United States, courts must construe statutory waivers strictly in favor of the sovereign and must not enlarge the waiver beyond what the statutory language requires. See Library of Congress v. Shaw, 478 U.S. 310 (1986).

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[4] The defendants also moved the Court to dismiss the complaint on the grounds that it violates the "short and plain" statement of the claims requirement of Federal Rule of Civil Procedure 8. The Court recognizes that the complaint could probably be dismissed on those grounds. However, the Court will review the merits of each claim.

1. Federal Tort Claims Act

The Federal Tort Claims Act is a limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment. United States v. Orleans, 425 U.S. 807, 813 (1976). Prior to filing a suit in district court under the FTCA, the plaintiff must first file an administrative claim, and then either the claim must be denied or six months must elapse after filing. 28 U.S.C. § 2675(a). The Ninth Circuit has held that this administrative claim requirement is jurisdictional. Jerves v. United States, 966 F.2d 517, 519 (9 th Cir. 1992)(internal citations omitted). Thus, if the plaintiff files suit in district court without having exhausted her administrative remedies, the court lacks subject matter jurisdiction to hear the claim and the action must be dismissed. Brady v. United States, 211 F.3d 499, 502-03 (9th Cir. 2000).

The Government has submitted a declaration that Schwartz has not filed an administrative claim. Schwartz has not submitted evidence that would contradict the declaration. Accordingly, the Court finds that Dr. Schwartz has not exhausted her administrative remedies and thus her FTCA claim must be dismissed for lack of subject matter jurisdiction.

2. Contract Claim

28 U.S.C § 1491(a)(1) states: "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States." For claims in excess of $10,000, this jurisdiction is exclusive. Marceau v. Blackfeet

1 Housing Authority, 455 F.3d 974, 986 (9th Cir. 2006). Thus, any
2 express or implied contract claim Schwartz has made against the
3 United States in excess of $10,000 must be dismissed.[5]

4 3. Copyright Claim

5 28 U.S.C. § 1498(b) states: "Hereafter, whenever the
6 copyright in any work protected under the copyright laws of the
7 United States shall be infringed by the United States . . . the
8 exclusive action which may be brought for such infringement shall
9 be an action by the copyright owner against the United States in
10 the Court of Federal Claims . . ." Accordingly, any copyright
11 claims Schwartz has made against the United States must be
12 dismissed.

13 B. Res Judicata and Collateral Estoppel

14 A claim is barred from re-litigation by res judicata and
15 collateral estoppel where the prior litigation: (1) involved the
16 same parties of their privies; (2) was terminated by a final
17 judgment on the merits; and (3) involved the same claim or cause of
18 action as the later suit. Hydranautics v. Filmtec Corp., 204 F.3d
19 880, 888 (9th Cir. 2002)(internal citations omitted).

20 Here, Dr. Schwartz seeks the right to reinstate her qui tam
21 action for a variety of reasons, including her claims of conflicts
22 of interest, "false declination," and dismissal of the qui tam
23 without the written consent of the Attorney General, and alleged
24 fraudulent payment of TRW's attorneys' fees. However, Dr.
25 Schwartz's previous qui tam action against TRW was resolved against
26
27 [5] The Court notes that Dr. Schwartz has not requested a specific amount of damages in her complaint. However, throughout
28 the complaint she refers to her "intellectual property," which she values at $1.61 million.

1 her with prejudice. Moreover, the Court of Federal Claims
2 dismissed her breach of contract claims on substantive grounds.
3 Accordingly, she is barred from re-litigating the qui tam action or
4 her breach of contract claim.

5 C. Conclusion

6 For the foregoing reasons, the Court dismisses Schwartz's
7 claims against the United States for lack of subject matter
8 jurisdiction.

9 **III. MOTION TO DISMISS BY DEFENDANTS MIT LINCOLN LABORATORY,**
10 **LAWRENCE LIVERMORE NATIONAL LABORATORY, AND AEROSPACE**
11 **CORPORATION**

12 A. Legal Standard

13 Dismissal under Federal Rule of Civil Procedure 12(b)(6) is
14 appropriate "if it is clear that no relief could be granted under
15 any set of facts that could be proved consistent with the
16 allegations." See Newman v. Universal Pictures, 813 F.2d 1519,
17 1521-22 (9th Cir. 1987) (quoting Hison v. King & Spaulding, 467
18 U.S. 69, 73 (1984)). The Court must "accept all factual
19 allegations of the complaint as true and draw all reasonable
20 inferences in favor of the nonmoving party." Arpin v. Santa Clara
21 Valley Transp. Agency, 261 F.3d 912, 923 (9th Cir. 2001). While
22 complaints by plaintiffs in pro per are liberally read, the Court
23 need not accept as true unreasonable inferences or allegations of
24 fact. See, e.g., Sprewell v. Golden State Warriors, 266 F.3d 979,
25 988 (9th Cir. 2001).

26 B. Analysis

27 As an initial matter, the Court notes that it is difficult to
28 discern the nature of the plaintiff's allegations and claims by

reading her complaint. For example, the Court cannot readily determine what claims are made against which defendants. However, the Court will still review each of the plaintiff's claims in determining whether to grant the defendants' motion to dismiss pursuant to Rule 12(b)(6).

1. Count I: Declaratory and Injunctive Relief[6]

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

In California, the subject of declaratory relief must pertain to the legal rights and duties of the respective parties under a contract, statute, or order. See Brownfield v. Daniel Freeman Marina Hospital, 208 Cal.App.3d 405, 410 (1989). The essence of the Count I allegations appear to be the following: that the plaintiff was retained by the government to provide expert analyses to defendants in the original qui tam action; that the defendants issued a report to the government disagreeing with the plaintiff's allegations; that as a result, the government, declined to intervene. Not only do these allegations fail to pertain to the legal rights and duties of the respective parties under a contract,

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[6] The Court also notes that the plaintiff's joinder of two sets of claims in both Counts I and VII is inappropriate under Federal Rule of Civil Procedure 10(b).

statute, or order; they are foreclosed by the dismissal of the TRW action.[7]

Accordingly, the Court finds that the plaintiff's claims are not cognizable at law or in equity and thus there is no justiciable controversy capable of supporting a claim for declaratory and injunctive Relief.

2. Count II: Specific Performance

A party may be entitled to specific performance of a contract where: (1) its terms are sufficiently definite; (2) consideration is adequate; (3) there is substantial similarity of the requested performance to the contractual terms; (4) there is mutuality of remedies; and (5) plaintiff's legal remedy is inadequate. Blackburn v. Charnley, 117 Cal.App.4th 758, 766 (2004). Here, the plaintiff has not alleged that she and the defendants had entered into a binding contract. Although the complaint refers to a consulting agreement, it indicates that the agreement involved the government, and not the POET defendants. Accordingly, the Court finds that the plaintiff cannot plead a claim for specific performance.

3. Count III: Replevin

A replevin cause of action involves "the concept of interference with possession of, or damage to, some specific tangible property and [is] not concerned with intangible or incorporeal rights which may exist in connection with, or entirely apart from any particular piece of physical property." Italiani v.

[7] The plaintiff appears to be seeking a declaration that her qui tam case was improperly dismissed. However, this Court does not have the authority to review the merits of the dismissal.

Metro-Goldwyn-Mayer Corp., 45 Cal.App.2d 464, 467 (1941). Here, the plaintiff has not alleged what specific, tangible property she is entitled to, or how the defendants have interfered or damaged that property. She refers to her "intellectual property" that she created as a result of the consulting agreement, but the Court cannot determine the nature of that property. Therefore, the Court finds that the plaintiff cannot bring a replevin cause of action.

4. Count IV: Breach of Trust and Confidence and Abuse of Power[8]

In California, a plaintiff can prevail on a breach of confidence claim when she establishes that "an idea, whether or not protectable, is offered to another in confidence, and is voluntarily received by the offeree in confidence with the understanding that it is not to be disclosed to others, and is not to be used by the offeree for purposes beyond the limits of the confidence without the offeror's permission." Faris v. Enberg, 97 Cal.App.3d 309, 323 (1979). Here, it does not appear that the plaintiff offered her intellectual property to the government or defendants with the understanding that it would be held in confidence. The plaintiff does not offer facts indicating that her "intellectual property" was provided with restrictions. Therefore, the Court finds that she has failed to state a breach of confidence claim.

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5. Count V: An Accounting

[8] The Court is uncertain what type of claim the plaintiff intends to assert with her "abuse of power" claim.

An accounting is a remedy ancillary to a contract claim; it is not an independent cause of action. See, e.g., Jefferson v. J.E. French Co., 54 Cal.2d 717, 719 (1960). Thus, the plaintiff can not plead an accounting cause of action.

6. Count VI: Money Had and Received

To state a cause of action for money had and received, the plaintiff must allege a contract, implied-in-fact contract, or quasi-contract basis for the claim. See, e.g., Kawasho Int'l. (U.S.A.), Inc. v. Lakewood Pipe Serv., Inc., 152 Cal.App.3d 785, 793 (1983). Here, there is no alleged contract between the defendants and the plaintiff, nor were there any federal funds received by the defendants pursuant to a contractual relationship with the plaintiff. Thus, this claims also fails

7. Count VII: Conversion of "Intellectual Property" or Trade Secret Misappropriation

The Ninth Circuit applies a three-part test to determine whether a property right will support a claim for conversion under California law: (1) there must be an interest capable of precise definition; (2) it must be capable of exclusive possession or control; and (3) the putative owner must have established a legitimate claim to exclusivity. Kremen v. Cohen, 337 F.3d 1024, 1030 (9th Cir. 2003). As discussed above, the complaint does not define the plaintiff's alleged intellectual property or trade secret with the requisite specificity , nor does it allege any facts showing that the plaintiff had the exclusive right to possess or control that property. Thus, it fails to state a claim for conversion.

To state a cause of action for misappropriation of trade secrets, a plaintiff must plead the existence of a trade secret and describe the subject matter with sufficient particularity. See, e.g., Cal. Civ. Code 3426.1(b); Whyte v. Schlage Lock Co., 101 Cal.App.4th 1443 (2002). It appears from the complaint that the plaintiff's "trade secret" is the "intellectual property" she has failed to describe with particularity. Therefore, the Court finds that she also failed to state a claim for misappropriation of a trade secret.

8. Count VIII: Unfair Competition

To state a claim under California's Unfair Competition statute, California Business & Professions Code §§ 17200 et seq., a plaintiff must allege either that the defendant's activities harmed competition or that the defendant engaged in an "unlawful" business practice. Here, the plaintiff has failed to identify any injury to competition or unlawful business activity. Thus, Count VIII also fails.

9. Punitive Damages[9]

Conclusory allegations do not suffice for punitive damages claims; the plaintiff must allege the specific acts that meet the statutory threshold for oppression, fraud, or malice. See, e.g., G.D. Searle & Co. v. Superior Court, 49 Cal.App.3d 22, 29 (1975). Here, the plaintiff has failed to allege any specific fact that would show malice, oppression, or fraud on the part of the

[9] The Court interprets the plaintiff's claims for "double damages" and "exemplary damages" as additional punitive damages claims.

defendants. Accordingly, the plaintiff's claims for punitive damages must be dismissed.

C. Conclusion

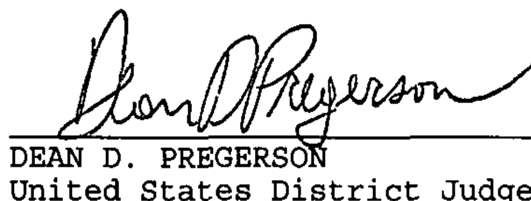
For the foregoing reasons, the Court finds that, even if it construes the complaint in the light most favorable to the plaintiff, the complaint fails to state any claim upon which relief can be granted. Moreover, it appears that leave to amend any of the plaintiff's claims would be futile. Therefore, the Court grants the defendants' motion and dismisses the complaint with prejudice.

IV. CONCLUSION

For the foregoing reasons, the Court grants both motions to dismiss.

IT IS SO ORDERED.

Dated: 12-13-06



DEAN D. PREGERSON
United States District Judge

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