

No. 07-55091

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DR. NIRA SCHWARTZ dba Jaffa OptioniX,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA Office of the US Attorneys; MIT LINCOLN
LABORATORY, also known as MIT/LLL; LAWRENCE LIVERMORE
NATIONAL LABORATORY, also known as LLNL; and AEROSPACE
CORPORATION, also known as AERO,

Defendants- Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
District Court No. CV-06-04010 DDP

**ANSWERING BRIEF OF APPELLEES MIT LINCOLN LABORATORY,
LAWRENCE LIVERMORE NATIONAL LABORATORY and
AEROSPACE CORPORATION TO APPELLANT'S INFORMAL BRIEF**

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellees MIT LINCOLN LABORATORY, LAWRENCE LIVERMORE NATIONAL LABORATORY, and AEROSPACE CORPORATION, by and through their counsel of record, certify that the following listed parties have a direct, pecuniary interest in the outcome of this case:

MIT Lincoln Laboratory is a federally funded research and development center (“FFRDC”) owned by the Massachusetts Institute of Technology.

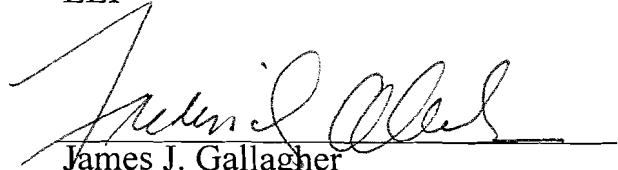
Lawrence Livermore National Laboratory is a FFRDC owned by the University of California.

Aerospace Corporation is a California corporation headquartered in El Segundo, California. Aerospace Corporation is also a FFRDC.

Dated: July 23, 2007

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "James J. Gallagher", written over a horizontal line.

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I. STATEMENT OF JURISDICTION

In her Complaint, Appellant Dr. Nira Schwartz lists several statutes that she alleges provide a jurisdictional basis for her claims. (Appellees' Supplemental Excerpts of Record, "Supp. E.R.", 3/6 at ¶11.) Among those, the only one that arguably provides subject matter jurisdiction for any of her claims against defendants MIT Lincoln Laboratory, Lawrence Livermore National Laboratory, and Aerospace Corporation is 28 U.S.C. §1338, which gives the United States District Courts original and exclusive jurisdiction over copyright cases.¹ Plaintiff does not allege a claim for copyright infringement in her Complaint. The closest she comes is Count VII for Conversion and Trade Secret Misappropriation where she makes passing reference to defendants' "infringement" of her intellectual property. Notwithstanding her failure to meet the requirement of Rule 8(a) that her Complaint "contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends," it is clear that her jurisdictional reference to 28 U.S.C. §1338 is not "borne out by a well pleaded claim" as federal jurisdiction requires. *Jewell v. City of Covington*, 425 F.2d 459-460 (5th Cir. 1970). See also *McNutt v. General Motors Acceptance Corporation*, 298 U.S. 178 (1936).

¹ *Transgro, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001 (9th Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986).

Because Plaintiff's Complaint fails to set forth "the basic facts necessary to support the conclusion that there is Federal jurisdiction," the Court should dismiss Plaintiff's Complaint for lack of subject matter jurisdiction.² *Fountain v. New Orleans Public Service, Inc.*, 265 F.Supp. 630, 632 (E.D. La. 1967) ("The general rule governing pleading Federal jurisdiction requires more than a simple allegation that jurisdiction exists or citation of a Federal statute. Rather, it is required that the complaint clearly set out the basic facts necessary to support the conclusion that there is Federal jurisdiction.").

II. INTRODUCTION

This is the fifth lawsuit filed by Appellant (referred to variously as "Appellant," "Plaintiff" or "Dr. Schwartz") over the last decade seeking damages for various claims relating to the Exoatmospheric Kill Vehicle ("EKV"), a component of a missile defense system developed for the United States Government's Missile Defense Agency in the mid-1990s. Like this case, Appellant's previous four lawsuits all have been dismissed at the pleading stage. As discussed below, the factual allegations made in this action either have been adjudicated adversely to Appellant by other courts, or do not support any legal claim made in this case.

² Lack of subject matter jurisdiction may be raised at any time. *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). See Rule 12(h)(3), Fed.R.Civ.P.

In 1996, after Dr. Schwartz was terminated by TRW, Inc. (“TRW”), she sued that company pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3729 *et seq.*, (1996) and for wrongful termination, *United States ex rel. Schwartz v. TRW, Inc. et al.*, No. CV 96-3065 (C.D. Cal. April 29, 1996) (“TRW litigation”). TRW had been the software subcontractor under the Missile Defense Agency’s EKV contract. The *qui tam* portion of the TRW litigation was dismissed at the request of the United States in 2003.³ Plaintiff appealed the dismissal of the *qui tam* action to the United States Court of Appeals for the Ninth Circuit, which dismissed the appeal for lack of jurisdiction. *United States ex rel Schwartz v. TRW, Inc. et al*, No. 03-55495 (9th Cir May 15, 2003). In 2001, Dr. Schwartz filed a *qui tam* suit against another Missile Defense Agency EKV contractor, Raytheon Company. *United States ex rel Schwartz v. Raytheon Co.*, No. CV 01-4937 (C.D. Cal. June 4, 2001). This suit also was dismissed at the Government’s request. Plaintiff appealed that decision to the Ninth Circuit Court of Appeals, *United States ex rel Schwartz v. Raytheon Co*, No. 03-55571 (9th Cir. April 8, 2003), which dismissed the appeal on September 26, 2005.

In 2003, Dr. Schwartz filed two successive actions against the Government in the United States Court of Federal Claims. The first action, filed on January 8,

³ Plaintiff’s wrongful termination suit against TRW resulted in a jury verdict in favor of TRW in December, 2004. (Supp. E.R. 19/217-225)

2003, claimed that the Government had breached an alleged contract to compensate Dr. Schwartz for her purported work as an expert consultant in the TRW qui tam litigation, and had reneged on an alleged promise to intervene in the TRW litigation. *Schwartz et al v. United States*, No 03-37 (Fed. Ct. Claims 2003). Judge Bush granted the Government's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim on December 29, 2003. Plaintiff filed her second action against the United States on April 16, 2003, Case No. 03-786 C. In that case, she alleged that during the TRW litigation, the Government had negotiated a settlement with TRW's co-defendant, The Boeing Company, but concealed those negotiations from Plaintiff to deprive her of her right to participate in the litigation and to receive a portion of the settlement as a relator under the False Claims Act.⁴ Dr. Schwartz also claimed that the Government had defamed and discriminated against her. The Court of Claims dismissed that action pursuant to the Government's motion, and entered a judgment of dismissal in February 2004. (Supp. E.R. 19/146)

⁴ There was no factual basis for this allegation because, as discussed below, The Boeing Company was dismissed from the litigation along with TRW at the Government's request.

In the Complaint at issue in this appeal, Dr. Schwartz now has targeted Defendants MIT Lincoln Laboratory,⁵ Lawrence Livermore National Laboratory, and Aerospace Corporation, federally funded research and development centers, which provided a team of senior scientists for a 1998 “Phase One Engineering Team” (“POET”), assembled at the Government’s request during the TRW litigation, to evaluate Dr. Schwartz’s claims concerning TRW’s EKV software (the “POET Defendants”). The Complaint alleges, in various claims for relief, that the POET wrote “counter-reports” that wrongfully used what Appellant characterizes as her “*intellectual-property.*” (Supp. E.R. 3/10 at ¶24.)

Notwithstanding the deficiencies in Appellant’s Complaint, the District Court reviewed “the merits of each claim,” and decided that, construed in “the light most favorable to the Plaintiff, the complaint fails to state any claim upon which relief can be granted . . . , and that leave to amend any of the plaintiff’s claims would be futile.” The Court therefore dismissed the Complaint with prejudice. (Supp. E.R. 29/242.)

The District Court was not required to accept Appellant’s conclusory allegations as true, and properly granted the POET Defendants’ motion to dismiss. *Balistreri v. Pacifica Police Dep’t.*, 901 F.2d 696, 699 (9th Cir. 1988) (“dismissal

⁵ Lincoln Laboratory is not an independent legal entity, but rather is part of the Massachusetts Institute of Technology.

can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.”) On appeal, the Ninth Circuit reviews *de novo* dismissals for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), and applies the same legal standard as the District Court.⁶

When Appellant’s Complaint is stripped of excess verbiage and conclusory allegations for which there are no supporting factual allegations, it is clear that the District Court properly decided that the Complaint fails to state a claim upon any viable legal theory, that amendment would be futile and that Appellees’ motion to dismiss was properly granted.

III. APPEAL OF ORDERS ENTERED IN THE DISTRICT COURT SUBSEQUENT TO ITS DISMISSAL OF THE COMPLAINT

Dr. Schwartz has appealed not only dismissal of her Complaint, but also the Court’s subsequent denial of her motions for reconsideration and “motion to open case and rule,” which were her multiple efforts to convince the District Court to reinstate her Complaint. (See Appellant’s Informal Brief at pp. 1-6.) The District Court correctly rejected as groundless those motions which had no procedural or substantive basis. (Supp. E.R. 31; 33; 34; 36; 37; 40; 41; 46.)

⁶ See *Trerice v. Pedersen*, 769 F.2d 1398, 1400 (9th Cir. 1985).

IV. FACTS RELATING TO DISMISSAL OF APPELLANT'S COMPLAINT

Dr. Schwartz's claims against the POET Defendants arise out of her work at TRW's Space and Technology Development Division in September 1995 that lead to her filing the TRW litigation. TRW's Space and Electronics Group was a subcontractor on a development contract between the United States and Rockwell International, which later became part of Boeing North America. The Government initially declined to intervene in this or the similar action that Plaintiff filed against Raytheon Company, but subsequently intervened in both actions to assert the state secrets privilege and moved to dismiss the False Claims Act allegations in both cases. (Supp. E.R. 19/186.) The District Court dismissed the False Claims Act counts of both actions, and the Ninth Circuit affirmed. (Supp. E.R. 19/121, 211.)

In the TRW litigation, Appellant alleged that the defendants had misrepresented the effectiveness of the EKV software to the Government. (Supp. E.R. 19/5.) During the Government's investigation of Dr. Schwartz's allegations, the National Missile Defense Joint Program Office requested that the POET Defendants evaluate Dr. Schwartz's findings and allegations concerning the EKV software. (Supp. E.R. 19/97 at n. 5.) Plaintiff alleges in this action that during the evaluation process in the TRW litigation, the POET Defendants wrote "counter-reports" that wrongfully used her "intellectual property," defined in her Complaint as:

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

(Supp. E.R. 3/8, at ¶ 18; emphasis in original.) Although the Complaint alleges that this “intellectual property” is proprietary, Dr. Schwartz concedes that this material is classified and that she does not have access to it. (Supp. E.R. 3/9 at ¶ 20.)

Appellant made other factual admissions in her Complaint that were fatal to her claims. For example, in her Complaint she admits (1) that in the United States Court of Federal Claims Case No. 03-37, Judge Bush ruled in that “the government did not enter into an enforceable agreement with Dr. Schwartz that would provide compensation for the use of Dr. Schwartz’s works” (Supp. E.R. 3/7-8 at ¶17); (2) that she delivered her “intellectual property” to DCIS (Defense Criminal Investigative Service) during 1997 to 1999 (*id*); (3) that the Government “partnered/appointed/retained/sponsored/assembled” the POET Defendants to independently evaluate the EKV technologies and to analyze and evaluate Appellant’s “intellectual property” and her allegations that the EKV “technologies” built by TRW and Boeing “will never work” (Supp. E.R. 3/9 at ¶21); and (4) that

the POET Defendants dedicated 18 months to this effort and “produced several counter-reports” as a response to Plaintiff’s “intellectual property” (*id.*).

These allegations establish that the Court of Federal Claims has ruled that Appellant’s alleged “Consulting Agreement” with the Government was unenforceable, and that Appellant turned her alleged “intellectual property” over to the Government knowing that it would be used by the POET scientists in evaluating her claims against the TRW/Boeing EKV technology. It is a reasonable inference from these allegations that Appellant knew that POET would prepare reports either supporting or critical of her work. Under these circumstances, Plaintiff’s allegation that she was “informed and believed a market and a buyer were in the NMD/EKV program for Plaintiff’s intellectual property and her expertise[,] such as POET,” the Missile Defense Agency, TRW, Boeing and other Government agencies, is inconsistent with other allegations that she restricted its use or otherwise safeguarded it from review by the POET. (Supp. E.R. 3/8 at ¶ 19; emphasis omitted.) Dr. Schwartz’s allegations defy logic and the District Court properly disregarded them as conclusory and unsupported by the facts alleged.⁷

⁷ Appellant states in her Informal Brief (¶¶L at p. 13) that the supporting allegations to this effect are set forth in her Complaint at ¶¶ 24, 25 and 73. A review of these paragraphs shows that Appellant’s claims that she placed restrictions on the use of her intellectual property are based on alleged instructions that she and Special Agent Sam Reed of the DCIS allegedly gave to POET in September and October, 1998 to “safeguard” Appellant’s intellectual property. She does not allege whether

(footnote continued on next page)

Further, Plaintiff alleges no facts that support her claim that the POET defendants misused her “intellectual property” or that it had any use beyond Appellant’s vain efforts to make a case for her *qui tam* claims.

This case and its predecessors, all of which arise out of the same conduct or occurrences and make similar allegations, clearly demonstrate that there is no substance to Appellant’s claims regardless whether the target is the Government, defense contractors TRW, Boeing and Raytheon, or the POET Defendants. Dr. Schwartz’s claims have all been addressed at length by a variety of courts, always with the same result. Indeed, but for the fact that Dr. Schwartz filed the TRW action more than seven years before she filed this case, Plaintiff would fall within the definition of a vexatious litigant under California law, which applies to *pro se* litigants who file five or more actions within a seven-year period that have been “finally determined adversely to the person.” Cal. Code of Civil Procedure §391. *et seq.*

(footnote continued from previous page)

these instructions were written or oral, how the “intellectual property” was identified or to whom the instructions were communicated. Her allegations of misappropriation consist of statements that POET “pasted” her “intellectual property” into the reports that POET allegedly issued evaluating this same intellectual property and then “disseminated” it to “hundreds of people.” (Supp. E.R. 3/9-11 at ¶¶21, 24, 25)

V. ARGUMENT

Appellant's Informal Brief does not address in a meaningful way the POET Defendants' legal arguments, which the District Court found to be dispositive in granting their motion to dismiss Plaintiff's Complaint. Appellees discuss Appellant's legal arguments in the order in which she makes them in Appellant's Informal Brief.

A. The District Court Properly Dismissed Appellant's Claim for Breach of Trust and Confidence and Abuse of Power

In addressing the deficiencies in her claim for "Breach of Trust and Confidence and Abuse Of Powers" (Appellant's Informal Brief ¶¶F, at pp. 6-7; Supp. E.R. 3/23-25), Plaintiff makes no arguments that suggest that the District Court improperly dismissed this claim, which is a variant of her claim that the POET Defendants misappropriated her intellectual property. (See discussion at pp. 13-15, below.)

Although California recognizes a claim for breach of confidence in limited circumstances not present here (*see e.g., Faris v. Enberg*, 97 Cal. App. 3d 309 (1979)), such a claim has strict requirements. A plaintiff cannot prevail on a breach of confidence claim unless 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." *Id.* at 323. Plaintiff's Complaint shows that she cannot meet this stringent test. Dr. Schwartz does not allege that she offered her "intellectual property," however defined, to the Government with the understanding that it would be held in confidence. To the contrary, she alleges that she produced 13 reports, and a long list of other ill-defined information, pursuant to her alleged Consulting Agreement with various agencies of the Federal Government, including the Department of Justice, "ARMY, BMDO, DSS AND GBI," and that she delivered 79 invoices for that work. (Supp. E.R. 3/7-8 at ¶¶17, 18.) These allegations admit that Plaintiff voluntarily transferred her "intellectual property" to the Government, allegedly for compensation, without restriction on its uses.⁸ No promise of confidentiality can reasonably be inferred from Appellant's allegation that she "believed" there was a "market" for her "intellectual property," including the Government agencies to whom she delivered this information, and the defense contractor defendants. (Supp. E.R. 3/8-9 at ¶19.) Dr. Schwartz has not met the pleading requirements for a breach of confidence claim.

⁸ Appellant claims she provided this "intellectual property" pursuant to a Consulting Agreement with the Government that provided she would be paid for her work, but acknowledges that Judge Bush in Court of Claims case No. 03-37C" found that "the government did not enter into an enforceable agreement with Dr. Schwartz that would provide compensation for the use of Dr. Schwartz's works." (Supp. E.R. 3/7 at ¶17.)

As to the “abuse of power” claim alleged in the same count, there is no authority suggesting that a private right of action lies for an abuse of power. Accordingly, this Court should affirm the District Court’s dismissal of Plaintiff’s claim for breach of trust and confidence and abuse of power.

B. Appellant’s Claim for Conversion of Intellectual Property or Trade Secret Misappropriation Does Not, and Cannot Meet the Elements of Either Claim for Relief

In addressing her dismissed claim for conversion of “intellectual property” or trade secret misappropriation (Appellant’s Informal Brief ¶¶G. and H. at pp. 7-8), Plaintiff again argues that she adequately identified her intellectual property, that she supplied the Court with accurate copies of her certificates of registration for the copyrighted intellectual property, that the POET Defendants prepared “counter reports” to her intellectual property and so must have known the contents of the intellectual property, that defendants made use of her intellectual property, and that the POET Defendants did not contest her authorship. (*Id.*)

Appellant did not allege and cannot establish the requisite elements of a claim for conversion of her “intellectual property.” Those elements are: (1) Plaintiff’s ownership or right to possession of the property at the time of the conversion; (2) defendant’s conversion by a wrongful act or disposition of the

property, and (3) damages.⁹ *Farmers Insurance Exchange v. Zerlin* 53 Cal. App. 4th 445, 451 (1997). Essential to the first element of the claim is establishing a legitimate claim to ownership or exclusive right to possession. *Kremen v. Cohen*, 337 F.3d 1024, 1030 (9th Cir. 2003). Appellant’s Complaint makes it clear that she cannot meet this requirement. Dr. Schwartz admits that she voluntarily provided her reports and alleged proprietary information to the Government pursuant to the “Consulting agreement.” (Supp. E.R. 3/8 at ¶ 18.) Plaintiff also admits that the information comprising her “intellectual property” has been classified and that the Court ordered her to return it. (Supp. E.R. 3/9 at ¶20.) Accordingly, Plaintiff has no rights in the “Intellectual Property,” much less a legitimate claim to exclusivity.

Plaintiff coupled her conversion claim with a claim for misappropriation of trade secrets. Because Dr. Schwartz voluntarily provided her alleged intellectual property to the Government, she cannot meet the definitional requirements for a misappropriation claim under the California Uniform Trade Secrets Act, Cal. Civil

⁹ As with Appellant’s replevin claim (see discussion at pp. 22-24), intellectual property such as that allegedly contained in her reports, is treated as “intangible and incorporeal in nature” and “cannot be the subject of an action for ‘conversion’ in the strict sense of the term. Therefore, when a pleading alleges, in substance, . . . that a party ‘*did deliberately and unlawfully appropriate and convert*’ a literary composition, the action sounds in tort for the taking or depriving another of an intangible incorporeal right.” *King Bros. Productions, Inc. v. RKO Teleradio Pictures, Inc.*, 208 F.Supp. 271, 277 (S.D.N.Y. 1962) (citation omitted)

Code § 3426 et seq. (Supp. E.R. 3/7-8 at ¶¶ 17-18.) She has not, and cannot allege that the intellectual property was used by the POET Defendants knowing that the Government “had utilized improper means to acquire it” or that it was obtained under circumstances such that the Government owed a duty “to maintain its secrecy or limit its use.” Cal. Civil Code § 3426.1(b)(2)(B)(i)(ii). The allegations of the Complaint also make it clear that the “intellectual property” was not “the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” Cal. Civil Code § 3426.1(d)(2).

For the reasons stated, the District Court properly dismissed Appellant’s claim for conversion of intellectual property and misappropriation of trade secrets.

C. **Appellant Does Not Have a Federal Tort Claims Act Claim Against the POET Appellees**

Appellant asserts for the first time on appeal that she has a valid Federal Tort Claims Act claim against the POET Defendants as well as the Government.

Appellant did not assert a claim against the POET Defendants for violation of the Federal Tort Claims Act in the District Court. It is a general rule that a federal appellate court will not consider an issue for the first time on appeal. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Furthermore, the Federal Tort Claims Act does not provide a basis for a claim against a private party. As the District Court properly noted, the 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).” (Supp. E.R. 29/234.) Appellant’s invocation of the Federal Tort Claim Act as a basis for a substantive claim against private parties such as the POET Defendants is unavailing.

D. **Appellant Cannot Plead a Valid Copyright Infringement Claim Against the POET Defendants**

Appellant next asserts that she has a copyright infringement claim (“claim to compel Copyright”) against all defendants. (Appellant’s Informal Brief ¶¶K at p.11-12.) Although Plaintiff makes passing references in her Complaint to “infringement of Plaintiff’s intellectual-property” (Count VII, Conversion and Trade Secret Misappropriation), she did not assert a copyright infringement claim in the District Court. Not only is this claim therefore procedurally deficient (*Singleton v. Wulff, supra*), it has no legal merit.

The essential elements of a copyright infringement claim are Plaintiff’s ownership of the copyright and defendant’s copying of protected elements of the work. *Shaw v. Lindheim*, 919 F2d 1353, 1356 (9th Cir. 1990). Plaintiff’s Complaint is vague and uncertain as to what part of her alleged intellectual property is subject to copyright protection or which elements of the allegedly copyrighted material she claims were wrongfully copied. She alleges that the POET Defendants improperly “pasted” her alleged intellectual property into “POET’s counter-reports,” failed to identify her as the author, and falsely

represented it as authored by DCIS. (Supp. E.R. 3/10 at ¶24.) In the context of Plaintiff's allegations that she turned her "intellectual property" over to DCIS for evaluation of her qui tam allegations, her claim that the POET Defendants improperly "pasted information" regarding Plaintiff's findings into their "counter-reports" cannot form the basis of a copyright infringement claim. Further, the defendant's use of the Plaintiff's intellectual property in their evaluation of her claims regarding the EKV technology is arguably subject to the "fair use" doctrine which confers a privilege on people other than the copyright owner "to use the copyrighted material in a reasonable manner without his consent, . . ." *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1151 (9th Cir. 1986).

Congress incorporated this common law doctrine into Section 107 of the Copyright Act of 1976, 17 U.S.C. §§101, *et seq.*:

Notwithstanding the provisions of section 106 and 106A, the fair use of a copyrighted work . . .for purposes such as criticism, comment, [or] news reporting is not an infringement of copyright.

17 U.S.C. § 107.

E. **Appellant's Claim for Money Had and Received Fails to Allege the Existence of a Contractual Obligation**

The District Court properly rejected Appellant's Money Had and Received claim. To support a claim for money had and received against the POET Defendants, Plaintiff was required to allege that there was a contract between her

and the POET Defendants. *See, e.g., Kawasho Int'l. (U.S.A.), Inc. v. Lakewood Pipe Serv., Inc.*, 152 Cal. App. 3d 785, 793 (1983). The Complaint makes no such allegation. In her Sixth Count, Plaintiff alleges on information and belief that the POET Defendants benefited unjustly from the receipt of federal funds in connection with the use of her “intellectual property” which they had a obligation “in equity” to turn over to her. (Appellant’s Informal Brief, ¶88 at p. 25.) Dr. Schwartz does not, however, allege that the POET Defendants had a contractual obligation to pay any of those funds to her. Appellant argues on appeal that “I was forced and threatened by the Defendants and their attorney to have implied-in-fact contract between me and all of the Defendants” (Appellant’s Informal Brief ¶20 at pp. 12-13), but there is no such allegation in her Complaint. Appellant also cites to specific paragraphs of her Complaint, none of which provides factual support for the claim that there was any kind of a contractual relationship between her and the POET Defendants. (Appellant’s Informal Brief, ¶L at p. 13, citing Complaint, ¶¶24, 25 and 73.)

F. **Appellant is Not Legally Entitled to Punitive Damages**

Contrary to Appellant’s arguments (Appellant’s Informal Brief ¶N. at pp. 13-14), the District Court correctly ruled that her claims for punitive damages should be dismissed because of her failure to allege any specific facts that would show that the POET defendants engaged in any acts directed at the Plaintiff that

constitute malice, oppression or fraud. *See, e.g., G.D. Searle & Co. v. Superior Court*, 49 Cal. App. 3d 22, 29 (1975) (conclusory ultimate facts are insufficient to set forth a claim for punitive damages). The alleged facts that arguably come closest are nonsensical contradictory allegations -- that the POET created two sets of “counter-reports,” one “in bad faith” to cause the Government “not to intervene” in the TRW litigation, and the other that “falsely and knowingly were not used as a reason to intervene” (Supp. E.R. 3/11 at ¶26.) Even *pro se* plaintiffs are subject to the requirements of Rule 8(a), Fed.R.Civ.P, which provides that a complaint must contain a “short and plain statement . . . of a claim showing that the pleader is entitled to relief.” *Prezzi v. Schelter*, 469 F.2d 691, 692 (2^d Cir. 1972).

G. **Appellant Does Not Have a Claim for Specific Performance Against the POET Appellees**

The District Court properly ruled that the Plaintiff had not stated a claim for specific performance against the POET defendants because her Complaint does not allege that they were parties to the alleged Consulting Agreement between her and the Government. (Supp. E.R. 29/238.) Appellant now argues in support of her specific performance claim that there “was in-fact an agreement and accepted instructions between the Poet and I [sic] not to disseminate my IP.” (Appellant’s Informal Brief ¶¶O. at pp. 14-15.) This belated conclusory contention does not support a claim for specific performance. Specific performance of a contract may be decreed only 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). Even giving the Appellant the benefit of every inference, it is clear that she has not and cannot meet these elements.

H. **The District Court Properly Rejected Appellant's Unfair Competition Law Claim**

As the District Court properly determined, there is no substance to Appellant's Unfair Competition Law ("UCL") claim. The District Court found that "plaintiff has failed to identify any injury to competition or unlawful business activity." (Supp. E.R. 29/241.) In her Complaint, Plaintiff suggests that she was harmed by the anticompetitive conduct of the defendants. (Supp. E.R. 3/31, 32 at ¶¶110, 116.) To state a competitor claim for an unfair business practice, a plaintiff must allege

conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 187 (1999). Plaintiff has not and cannot make any such allegation.

To the extent that Appellant's claim for unfair competition is grounded on copyright infringement, her exclusive remedy is under the Copyright Act, 17

U.S.C. § 301. Although, for the reasons stated above (see section V.D., supra), Appellant’s copyright infringement claim is fatally flawed, the rights which Plaintiff claims the defendants violated in her Unfair Competition Count are based on her rights under the Copyright Act and therefore her claims are not qualitatively different from a copyright infringement claim. *See Xerox Corp. v. Apple Computer, Inc.*, 734 F.Supp. 1542, 1550 (N.D. Cal. 1990). *See also Entous v. Viacom International, Inc.*, 151 F.Supp. 2d 1150, 1158-59 (C.D. Cal. 2001). The District Court properly dismissed Appellant’s unfair competition claim.

I. **Appellant’s Replevin Claim Does Not Plead the Requisite “Specific, Tangible Property”**

Finally, appellant argues that she has a “valid Replevin cause of action.” (Appellant’s Informal Brief ¶¶Q. at pp. 16-17) A replevin cause of action (and its statutory counterpart, claim and delivery) 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. Metro-Goldwyn-Mayer Corp.*, 45 Cal. App. 2d 464, 467 (1941). The District Court recognized this principle and dismissed Plaintiff’s replevin claim on the ground that she had “not alleged what specific, tangible property she is entitled to or how defendants interfered [with] or damaged that property.” (Supp. E.R. 29/239.) The *Italiani* case establishes that under California law, literary property is

treated as intangible and incorporeal in nature, existing separate and apart from the physical form in which it is embodied. *King Bros. Productions, Inc. v. RKO Teleradio Pictures, Inc.*, 208 F.Supp. 271, 277 (S.D.N.Y. 1962). *See also Kirsch v. Barnes*, 263 F.2d 692, 694-95 (9th Cir. 1959).

To the extent that Appellant is claiming that the POET Defendants interfered with her intellectual property rights as reflected in her reports on the EKV technology, because the property with which the POET Defendants allegedly interfered is intangible and incorporeal in nature, it is not subject to a replevin claim. The District Court properly dismissed Plaintiff's replevin claim on this basis, and, other than restating her oft-repeated argument that her "Intellectual Property" is well defined, Plaintiff says nothing in her Informal Brief to change that conclusion.

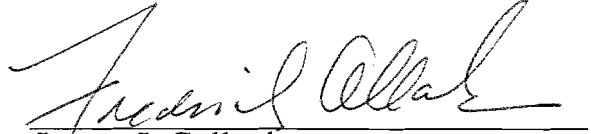
VI. CONCLUSION

The District Court properly dismissed with prejudice each of Appellant's claims against the POET Appellees. Dr. Schwartz now has made her claims in five separate suits, and each has resulted in an order of dismissal. The POET Appellees respectfully request that this Court put an end to these claims, and affirm the District Court's order dismissing this action with prejudice.

Dated: July 23, 2007

Respectfully submitted,

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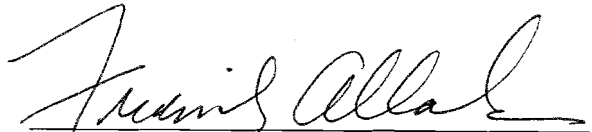
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**CERTIFICATE OF COMPLIANCE PURSUANT TO FED.R.APP.
32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 07-55091**

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more and contains 5,889 words.

Dated: July 23, 2007

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellant SunTrust Bank states that it is not aware of any related cases pending in this court.

PROOF OF SERVICE BY FEDERAL EXPRESS

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APPELLEES' ANSWERING BRIEF and

APPELLEES' EXCERPTS OF RECORD

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(Original and 15 copies of Brief; 5 copies of Excerpts of Record)

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(2 copies of Brief, 1 copy of Excerpts of Record)

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(1 copy of Brief, 1 copy of Excerpts of Record)

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Executed on July 23, 2007, at Los Angeles, California.


DARLENE F. BARBERIS