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9 United States of America

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.)

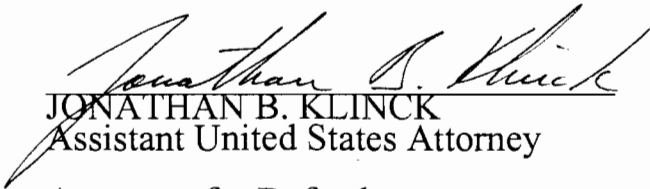
25 The United States filed its motion to dismiss, pursuant to F.R.Civ.P.
26 12(b)(1), on the grounds that: (1) Dr. Schwartz’s claims relating to her *qui tam*
27 action are barred pursuant to the doctrines of res judicata and collateral estoppel
28 because Dr. Schwartz’s earlier *qui tam* case, arising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

1 **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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