Kurt G. Calia (CA Bar No. 214300)
Email: kcalia@cov.com
COVINGTON & BURLING LLP
333 Twin Dolphin Drive
Redwood Shores, CA 94065
Telephone: (650) 632-4700
Facsimile: (650) 632-4718

Elena DiMuzio (CA Bar No. 239953)
Email: edimuzio@cov.com
COVINGTON & BURLING LLP
One Front Street
San Francisco, CA 94111-5356
Telephone: (415) 591-6000
Facsimile: (415) 591-6091

George F. Pappas (admitted *pro hac vice*)
Email: gpappas@cov.com
Jessica Parezo (admitted *pro hac vice*)
Email: jparezo@cov.com
Allison Kerndt (admitted *pro hac vice*)
Email: akerndt@cov.com
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
Telephone: (202) 662-6000
Facsimile: (202) 662-6291

Attorneys for Defendant ALZA CORPORATION

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

DR. JAMES M. SWANSON, an individual

Plaintiff,

v.

ALZA CORPORATION, a corporation,

Defendant.

Civil Case No. 4:12-cv-04579-PJH

ALZA CORPORATION'S NOTICE OF MOTION, CORRECTED MOTION, AND MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS THE FIRST AMENDED COMPLAINT PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) & 12(b)(6)

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NOTICE OF MOTION AND CORRECTED[1] MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on February 13, 2013 at 9 a.m., Defendant ALZA Corporation ("ALZA") will, and hereby does, move to dismiss the First Amended Complaint ("Amended Complaint") in *Swanson v. ALZA Corp.,* Case No. 4:12-cv-04579-PJH, in its entirety pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

This Motion is made on two separate grounds. *First*, ALZA moves to dismiss under Federal Rule of Civil Procedure 12(b)(1) because Plaintiff James M. Swanson ("Swanson") lacks standing to bring the federal claims presented here. He lacks standing to bring the correction of inventorship claim because he agreed to assign any alleged interest in the inventions claimed in the patents-in-suit to either his former employer, the University of California, or to ALZA, and he therefore lacks any monetary interest in the patents. Swanson also lacks standing to bring the request for declarations of invalidity and unenforceability because he has not alleged that he engaged in infringing activity, or that he has any plans to do so. Lacking jurisdiction over any federal claim, the court cannot exercise supplemental jurisdiction over the state claims and they should be dismissed, as well. *Second*, ALZA separately moves to dismiss the breach of fiduciary duty, fraudulent concealment, unfair competition, unjust enrichment, declaration of ownership, and constructive trust claims under Federal Rule of Civil Procedure 12(b)(6). Even after having the opportunity to file an Amended Complaint, Swanson still fails to allege sufficient facts to support the claims, or he has pleaded claims that are preempted by federal patent law or simply do not exist under California law.

This Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities below, and such other submissions presented before or at the Motion's hearing.

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[1] ALZA previously submitted this Motion with a request to seal some of its contents. *See* Docket Number 36. ALZA has now withdrawn the sealing request, and submits this unredacted Motion for public filing. The only changes in this Corrected Motion are its public filing in entirely unredacted form, the signature date, and the updated hearing date for the Corrected Motion.

I. INTRODUCTION

Plaintiff Swanson filed an initial Complaint in this case on August 30, 2012. ALZA moved to dismiss several counts of that complaint based on Swanson's failure to state a claim. Motion to Dismiss, hereinafter "Mot.," Dkt. No. 22. Swanson filed a non-opposition to ALZA's Motion, thereby conceding that ALZA was correct in seeking to dismiss his claims. At the same time, Swanson filed the Amended Complaint. However, despite having the benefit of ALZA's explanations as to why his original Complaint was deficient, Swanson's latest complaint fares no better. Indeed, Swanson's revised allegations reveal a fatal flaw: Swanson lacks standing to bring his correction of inventorship claim, the claim upon which his entire case is based. As in the original Complaint, all the claims in the Amended Complaint are based on the argument that Swanson, a former consultant to ALZA, should have been named as an inventor on three ALZA patents (the '129, '373, and '798 Patents, as defined in the Amended Complaint).

There are two independent reasons that these claims should be dismissed. *First*, Swanson lacks standing to assert the federal claims in the Amended Complaint. Specifically, Swanson lacks standing to assert the correction of inventorship claim because, based on his own allegations, he agreed to assign any interest in the patents to the University of California ("UC"). And while his Amended Complaint does not attach it, Swanson also alleges that he signed a consulting agreement with ALZA in which he agreed that any inventions created relating to the consultation would be the property of ALZA. Therefore, even if Swanson is correct that he should have been named as an inventor on the patents (which ALZA disputes), he has no concrete financial interest in those patents, and therefore no standing to assert his correction of inventorship claim. Because this Court has no jurisdiction to hear those claims, they must be dismissed under Rule 12(b)(1).

As for the remaining two federal claims, Swanson's challenge to the validity and enforceability of the patents must be dismissed for lack of declaratory judgment jurisdiction. The Amended Complaint fails to plead any facts showing that there is an actual controversy between the parties relating to the validity or enforceability of the patents-in-suit. Swanson does

not allege that he is practicing the claimed invention or that ALZA has taken any action to enforce the patents against him. As such, there is no declaratory judgment jurisdiction over those claims. Because Swanson lacks standing to bring any federal claim, the Court cannot exercise jurisdiction over the co-pending state law claims. Accordingly, all of Swanson's claims should be dismissed for lack of jurisdiction pursuant to Rule 12(b)(1).

Second, Swanson has failed to state a claim for breach of fiduciary duty, fraudulent concealment, unfair competition, unjust enrichment, declaration of ownership, or constructive trust under Federal Rule of Civil Procedure 12(b)(6). As pleaded, each of these claims lack one or more required elements. For example, Swanson's fiduciary duty claim fails to allege facts that would support any kind of fiduciary relationship, express or implied, as between Swanson and ALZA. Swanson's fraudulent concealment claim must fail because he cannot allege that ALZA effectively hid the patents-in-suit when, in fact, they were made public by the U.S. Patent and Trademark Office in 2005. Swanson's claim for unfair competition under California law must fail because he alleges no harm to himself as a result of the complained-of acts, and therefore has no standing to bring that claim. Swanson's claim for unjust enrichment should also be dismissed since the growing weight of authority holds that there is no separate "unjust enrichment" claim under California law. Finally, with respect to Swanson's request for a declaration of ownership and constructive trust, because the question of ownership turns on Swanson's inventorship claim, these claims are preempted by federal patent law and should be dismissed as well. Accordingly, the breach of fiduciary duty, fraudulent concealment, unfair competition, unjust enrichment, declaration of ownership, and constructive trust claims should be dismissed.

II. LEGAL STANDARD

A. Lack of Jurisdiction Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

ALZA makes a "factual" motion to dismiss the entire Complaint due to Swanson's lack of standing to pursue his federal claims, and a resulting lack of jurisdiction over both federal and state claims. *See Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1040 n.2 (9th Cir. 2003).

A factual 12(b)(1) motion challenges a court's jurisdiction. *Id.* "Unless the jurisdictional issue is inextricable from the merits of a case, the court may determine jurisdiction on a motion to dismiss for lack of jurisdiction under Rule 12(b)(1) . . . [N]o presumptive truthfulness attaches to plaintiff's allegations." *Robinson v. U.S.*, 586 F.3d 683, 685 (9th Cir. 2009) (internal citations and quotation marks omitted). Because it affects a court's power to decide a case, a "lack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties," and if the parties do not raise the issue themselves, a court has a duty to examine it *sua sponte*. *United Investors Life Ins. Co. v. Waddell & Reed, Inc.*, 360 F.3d 960, 966-967 (9th Cir. 2004) (citation omitted).

Once the defendant has raised a question about the court's jurisdiction, the plaintiff bears the burden of showing that jurisdiction is proper. *Robinson*, 586 F.3d at 685. The court should presume a lack of jurisdiction until the party asserting jurisdiction proves otherwise. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Federal Circuit precedent governs the jurisdictional analysis in patent suits. *See Cisco Sys., Inc. v. Alberta Telecomm. Research Centre*, No. C 12–3293 PJH, 2012 WL 3791454, at *2 (N.D. Cal. Aug. 31, 2012) (citing *Minnesota Mining & Mfg. Co. v. Norton Co.,* 929 F.2d 670, 672 (Fed. Cir. 1991)). *See also MedImmune, Inc. v. Centocor, Inc.*, 409 F.3d 1376, 1378 (Fed. Cir. 2005) ("Whether an actual case or controversy exists so that a district court may entertain an action for a declaratory judgment of non-infringement and/or invalidity is governed by Federal Circuit law."), *overruled on other grounds, MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 130-31.

B. Failure to State a Claim Pursuant to Federal Rule of Civil Procedure 12(b)(6).

Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, (2007). This "facial plausibility" standard requires the plaintiff to allege facts that add up to "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949

(2009). While courts do not require "heightened fact pleading of specifics," for claims other than fraud, a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 547, 555.

C. Heightened Standard for Claims Sounding in Fraud.

Federal Rule of Civil Procedure Rule 9(b) provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Accordingly, to satisfy Rule 9(b), a pleading alleging fraud must identify "the who, what, when, where, and how of the misconduct charged," as well as "what is false or misleading about [the purportedly fraudulent] statement, and why it is false." *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010) (internal quotation marks and citations omitted).

III. ARGUMENT

A. The First Amended Complaint Should Be Dismissed Under Rule 12(b)(1), Because Swanson Lacks Standing to Bring This Suit.

As a threshold matter, the Amended Complaint should be dismissed in its entirety because Swanson lacks standing to bring the federal claims presented, and the Court therefore has no jurisdiction over them, and no supplemental jurisdiction over the state law claims. The Amended Complaint alleges that Swanson assigned "all rights to his inventions" to his former employer, UC. Amended Compl. ¶ 8. Somewhat inconsistently, the Amended Complaint also alleges that Swanson was a consultant and that, prior to his first meeting with ALZA, he signed a consulting agreement that would purportedly "unfairly benefit ALZA with respect to the control of any intellectual property that Dr. Swanson *provided or would provide* to ALZA." Amended Compl. ¶ 123 (emphasis added). If, as Swanson alleges, UC owns all rights and interest in the patents-in-suit, then Swanson has no financial interest in the ownership of the patents, and therefore lacks standing to seek correction of inventorship. If instead his consulting agreement with ALZA required him to assign all inventions that he provided or would provide to ALZA, as Swanson has pleaded, then ALZA owns them. To be clear, ALZA disputes that Swanson invented anything. But in any event, as pleaded, Swanson makes clear that any

ownership interest he may have held was assigned to either UC or to ALZA, and thus he has no financial interest and his claims must be dismissed.

For a different reason, Swanson also lacks standing to bring the other two federal-law claims, Counts 7 and 8 (challenging the validity and enforceability of the patents). The Amended Complaint fails to allege that there is any controversy between the parties involving the validity or enforceability of these patents. Swanson does not allege that he is engaged in any allegedly infringing behavior, or that ALZA has acted to enforce the patents against him. Without allegations establishing that there is a dispute between the parties which will be resolved by a determination of patent validity or enforceability, Swanson lacks standing to challenge the validity and enforceability of the patents.

1. Without a Pecuniary Interest in the Patents, Swanson Lacks Standing to Correct Inventorship.

Swanson lacks standing to seek correction of inventorship of the patents because his own allegations reveal that he has no financial interest in the patents-in-suit. The law is clear that in order to have standing to correct inventorship under 35 U.S.C. § 256, alleged inventors must have a concrete financial interest in the relevant patents. *Larson v. Correct Craft Inc.*, 569 F.3d 1319, 1326-7 (Fed. Cir. 2009). In *Larson*, the plaintiff (alleged inventor) worked for Correct Craft, and contributed to the design of a tow line attachment that Correct Craft claimed in several patents. *Id*. at 1322. During patent prosecution, the plaintiff assigned all of his interest in the invention to Correct Craft. *Id*. He later claimed that the named co-inventors were not true inventors, and that he had been misled into assigning the invention. He sued for correction of inventorship, invalidity based on incorrect inventorship, and a number of state law claims including fraud. *Id*. Although the district court did not address jurisdiction as the case progressed through summary judgment, on appeal, the Federal Circuit concluded that due to the assignments, the plaintiff had "no financial interest in the patents" and therefore no interest "sufficient for him to have standing to pursue a § 256 claim." *Id*. at 1327. As a result, there was no Article III case or controversy, and therefore no supplemental jurisdiction over the asserted state law claims. *Id*. at 1325-26.

If an inventor can show a personal and "concrete financial interest" in a patent despite an assignment of rights, this may be sufficient to establish standing to bring a correction of inventorship claim. *Chou v. Univ. of Chi. & Arch Dev. Corp.*, 254 F.3d 1347, 1356-1357 (Fed. Cir. 2001). In *Chou*, the Federal Circuit held that the inventor's promise to assign invention rights to her employer, defendant University of Chicago, extinguished her ownership interest in the patents. However, in addition to requiring the assignment, her employment agreement stated that she would receive 25% of any royalties obtained by licensing the patent, and 25% of any stock of new companies formed around the patents. Based on this "concrete financial interest" in the patents, the inventor had standing to pursue her inventorship claims.

Like the alleged inventor in *Larson*, Swanson alleges that he assigned "*all* rights to his inventions" to another (in Swanson's case, to UC). Amended Compl. ¶ 8 (emphasis added). In the same paragraph, Swanson alleges, very vaguely, that "[i]n return for his assignment, [he] was entitled to receive a royalty for his inventions." *Id.* He does not specify if this was a percentage running royalty, a lump-sum royalty, or a *de minimus* payment of $1 for all inventions. To the extent that Swanson's vague assertion that he was owed a royalty by UC is an attempt to establish that despite his assignment, he (like Chou) retained a concrete financial interest in his inventions, it is undermined by his contradictory statements found elsewhere in the Amended Complaint. For example, he asserts that he (not UC) owns his rights to the patents-in-suit (*Id.* at ¶ 12), and that he has agreed to provide UC "a certain percentage of any recovery from this action" in return for his ownership of the inventorship rights. (*Id.* at ¶ 13). These allegations are inconsistent: UC and Swanson cannot simultaneously own "all title and interest" in Swanson's inventions. Moreover, if UC owes Swanson a "royalty for his inventions," it makes no sense that Swanson would pay UC a portion of any recovery from this suit, as alleged in the Amended Complaint.

Indeed, throughout the Amended Complaint, Swanson's claims of harm are suspiciously vague and inconsistent. In his claim for fraudulent concealment, he states that ALZA's acts harmed him because he "should have benefitted from his inventions," while in his unfair competition claim, he states that the same acts by ALZA denied "[t]he [UC] Regents the benefit

of receiving compensation from ALZA"—but does not allege any harm to himself. *Id.* at ¶¶ 209, 214.

Moreover, putting aside any alleged ownership of the relevant inventions by Swanson or UC, his Amended Complaint refers to his 1993 consulting agreement with ALZA, which Swanson alleges gives ALZA control of "any intellectual property that Dr. Swanson *provided or would provide* to ALZA." *Id.* at ¶ 123. This is a reference to Swanson's Consulting Agreement, which he executed on December 1, 1993 (prior to his initial meeting with ALZA on December 6, 1993, *id*. at ¶¶ 38-39). *See* Ex. 1 to Declaration of Elena DiMuzio in Support of Motion ("DiMuzio Decl.").[2] Paragraph 6 of his Consulting Agreement states, in relevant part: "All inventions, know-how, data and information conceived, generated or made, as the case may be, by Consultant which arise out of or relate to this consultancy shall be the property of ALZA." DiMuzio Decl. at ¶ ; Ex. 1. It is thus clear that whatever inventions Swanson believes he brought to ALZA are ALZA's property if they *relate* to the consultancy—which Swanson concedes focused on "the treatment of ADHD in children" (Amended Compl. ¶ 109). Therefore, any such inventions are ALZA's property.

While Swanson's allegations about ownership and interest in his invention rights are, at best, contradictory and vague, it is clear that Swanson himself retained no such rights. Indeed, any such alleged rights had been assigned to UC, as he concedes, or they belong to ALZA. Accordingly, there is a gaping hole in the foundation of this case. And, as noted above, because the question of whether or not Swanson has a financial interest in the patents-in-suit determines whether or not he has standing to bring his central inventorship claim, this question must be

[2] ALZA respectfully requests that the Court take judicial notice of the attached Consulting Agreement. Because the claims in the Amended Complaint necessarily rely on the Consulting Agreement as the basis for the relationship between ALZA and Swanson, the Court may take judicial notice of it for purposes of the 12(b)(6) portion of this Motion without converting it to a motion for summary judgment. *See* Amended Compl. ¶¶ 47-50; *Harris v. County of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012). Regarding the 12(b)(1) portion of this Motion, the Court need not take the pleadings as true, and may examine extrinsic facts when determining if jurisdiction is present. *Robinson*, 586 F.3d at 685.

resolved now. Because Swanson lacks a concrete financial interest in the patents, there is no standing and no jurisdiction and thus all claims which rest on alleged improper inventorship must be dismissed.[3]

2. Because Swanson Has No Standing to Seek Declarations that the Patents are Invalid or Unenforceable, the Court Lacks Jurisdiction Over These Claims and They Must Be Dismissed.

Swanson brings two claims seeking declaratory relief. In Count 7, Swanson argues that the patents are invalid because they fail to name him as an inventor. Amended Compl. ¶¶ 237-239. In Count 8, he alleges that the patents are unenforceable as a result of inequitable conduct by ALZA failing to name him as an inventor during patent prosecution. Id. at ¶¶ 240-263. Both claims depend on a determination of Swanson's inventorship status, and thus should be dismissed because he lacks standing to bring an inventorship claim, as demonstrated above. However, these counts should be dismissed for the additional reason that Counts 7 and 8 seek to invalidate the patents, or render them unenforceable. As to these counts, the law is clear: Swanson has no legal interest in a determination that the patents are invalid or unenforceable, and therefore no standing to bring these claims.

In order to establish that the Court has declaratory judgment jurisdiction to invalidate the patents, or hold that they are unenforceable, Swanson's complaint must "show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007). This requires Swanson to allege facts demonstrating a substantial likelihood of future injury if his requested relief is not granted, in order to ensure that he has standing to bring his claims. *Id*. at 128 n.8 (explaining that standing is one component of

[3] At a minimum, ALZA has raised a serious question about whether Swanson has standing to bring these claims, and the burden thus shifts to Swanson to establish that jurisdiction is proper. *Robinson*, 586 F.3d at 685. Unless he can establish that he has a concrete financial interest in the patents-in-suit, like the plaintiff in *Larson*, Swanson's inventorship claim must be dismissed.

the "justiciability problem" posed by claims for declaratory relief). The Federal Circuit has held that in order to establish standing to invalidate a patent, a declaratory judgment plaintiff "must allege both (1) an affirmative act by the patentee related to the enforcement of his patent rights, and (2) meaningful preparation to conduct potentially infringing activity." *Ass'n for Molecular Pathology v. Myriad Genetics*, 689 F.3d 1303, 1318 (Fed. Cir. 2012) (internal citation omitted) (finding that declaratory judgment plaintiffs and potential infringers lacked standing because they failed to allege an affirmative act by the patentee).

The Amended Complaint fails to allege any facts showing that Swanson has standing to bring declaratory judgment claims concerning the patents-in-suit. He does not allege that ALZA has said or done anything to indicate that it will enforce the patents-in-suit against him, and therefore fails the "affirmative act by the patentee" requirement. Likewise, he does not allege that he has taken any step toward infringing the patents, let alone completing "meaningful preparation" to infringe. Thus, the Amended Complaint does not even attempt to establish that Swanson has standing to seek the relief requested in Counts 7 and 8.

For similar reasons, district courts routinely dismiss declaratory judgment claims for patent invalidity or unenforceability when brought alongside complaints for correction of inventorship, if there are no allegations of infringing activity by the alleged inventor. *See FMC Corp. v. Guthery*, No. 07-5409 (JAP), 2009 U.S. Dist. LEXIS 32950, at *23-25 (D.N.J. Apr. 17, 2009) (dismissing counterclaim for a declaratory judgment of invalidity and unenforceability brought by alleged inventor); *Sensitron, Inc. v. Wallace*, 504 F. Supp. 2d 1180, 1185 (D. Utah 2007) ("Congress has conferred no jurisdiction on the federal courts to adjudicate a patent's validity in a Section 256 action to correct inventorship") (internal citation omitted); *Maxwell v. Stanley Works*, No. 3:06-0201, 2006 U.S. Dist. LEXIS 98913 at *9-10 (M.D. Tenn. July 11, 2006) (finding no declaratory judgment jurisdiction over patent invalidity claim by alleged inventor under the pre-*Medimmune* standard for declaratory judgment of patent invalidity). Accordingly, Swanson's Claims 7 and 8 should be dismissed with prejudice, because Swanson has no standing to bring these claims and, as a result, the Court lacks jurisdiction to hear them.

3. Dismissal of the Federal Claims Mandates Dismissal of the California Claims.

Without an Article III case or controversy providing jurisdiction over any federal claim, the Court cannot exercise supplemental jurisdiction over the state claims. *See Larson*, 569 F.3d at 1325-26. Accordingly, dismissal of Swanson's claims based on patent law (inventorship, invalidity and inequitable conduct) requires dismissal of his California law claims and requests for relief (fraud, breach of fiduciary duty, fraudulent concealment, unfair competition, unjust enrichment, declaration of ownership and constructive trust claims).

B. The Amended Complaint Suffers From Additional Pleading Deficiencies.

For the separate reasons set forth below, each count should be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

1. Swanson's Breach of Fiduciary Duty Claim (Count 3) Should Be Dismissed.

Like the fiduciary duty breach claim asserted in his original Complaint, the breach of fiduciary duty claim in the Amended Complaint (Count 3) is deficient for failing to allege all of the elements of the cause of action. To state a claim for breach of fiduciary duty, the complaint must allege sufficient facts that, if true, show: the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach. *Roberts v. Lomanto*, 112 Cal. App. 4th 1553, 1562 (2003). Swanson fails to plead facts making it plausible that ALZA owed him any duty, or that ALZA breached any duty to him. Because ALZA pointed out these deficiencies in its Motion to Dismiss the original Complaint, and Swanson was unable to cure these fatal defects in his amended pleading, this claim should also be dismissed with prejudice. *See* Mot. 9-11.

Swanson does not allege sufficient facts to plead a plausible fiduciary duty between ALZA and Swanson under California law. "[B]efore a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law. *Comm. on Children's Television, Inc. v. Gen. Foods Corp.*, 35 Cal. 3d 197, 221 (1983) (finding no

fiduciary relationship between a buyer and seller despite seller's superior knowledge of product and expertise in nutrition) (superseded by statute on other grounds). Thus, in certain relationships, California law automatically imposes a fiduciary duty, requiring the fiduciary to subordinate his own interests in favor of the beneficiary. *Id*. at 222; *See, e.g.,* Cal. Corp. Code § 309 (listing fiduciary duties of directors to corporations). "In the commercial context, traditional examples of fiduciary relationships include those of trustee/beneficiary, corporate directors and majority shareholders, business partners, joint adventurers, and agent/principal. Inherent in each of these relationships is the duty of undivided loyalty the fiduciary owes to its beneficiary, imposing on the fiduciary obligations far more stringent than those required of ordinary contractors." *Gilman v. Dalby,* 176 Cal. App. 4th 606, 614 (Cal. App. 3d Dist. 2009) (internal citations and quotation marks omitted).

A contractual consulting relationship, such as the one between Swanson and ALZA, does not automatically impose a fiduciary duty to the parties of the contract. *Id.* ("[A] plaintiff cannot turn an ordinary breach of contract into a breach of fiduciary duty based solely on the breach of the implied covenant of good faith and fair dealing contained in every contract."). Nor is ALZA aware of any authority holding that when a company offers to provide counsel to represent a consultant for the limited purpose of responding to discovery or preparing for a deposition, as Swanson claims ALZA did, a fiduciary duty is automatically imposed on the company. Accordingly, the pleadings state no basis to find that an automatic or express fiduciary duty arose between ALZA and Swanson.

Nor does the Amended Complaint contain any basis to imply a fiduciary duty. Under California law, an implied duty arises only under special, narrow circumstances inapplicable to the present situation. "A fiduciary or confidential relationship can arise when confidence is reposed by persons in the integrity of others, and if the latter voluntarily accepts or assumes to accept the confidence, he or she may not act so as to take advantage of the other's interest without that person's knowledge or consent." *Pierce v. Lyman*, 1 Cal. App. 4th 1093, 1101-1102 (1991) (finding a breach of fiduciary duty claim against an attorney who induced trustees to breach their fiduciary obligations to former trustees) (overruled by statute on other grounds).

A fiduciary "assumes duties beyond those of mere fairness and honesty . . . he must undertake to act on behalf of the beneficiary, giving priority to the best interest of the beneficiary." *Children's Television*, 35 Cal. 3d at 222.

Swanson's Complaint fails to allege the elements required to raise an inference that an informal fiduciary relationship existed between ALZA and himself. Falling short of the pleading requirement, he simply concludes that "ALZA, Sidley and Ashby assumed a fiduciary duty towards Dr. Swanson based on, among other things, representing Dr. Swanson in ALZA's case against Kremers Urban, LLC." Amended Compl. ¶ 160. Thus, Swanson contends that because ALZA offered to provide representation for Swanson in responding to discovery in a case relating to ALZA's Concerta® product, ALZA took on duties that an attorney might owe to a client, including a "fiduciary duty toward Dr. Swanson to advise him about his inventorship rights, advise him about a potential conflict with ALZA, and to advise him to seek his own counsel." *Id.* at ¶ 163.

Swanson's argument fails to raise an inference that an informal fiduciary duty was owed to him by ALZA for at least two reasons. *First*, Swanson does not and cannot allege that ALZA itself is an attorney. As a result, Swanson's pleading fails to allege that *ALZA*, the named defendant, formed an attorney-client relationship with him. *Second*, Swanson fails to allege the required elements for implying an informal fiduciary duty from ALZA to himself: he does not allege that he placed any special confidence in *ALZA* (or, for that matter, ALZA's counsel) to give him legal advice concerning his alleged inventions, that he relied on ALZA to honor this confidence, that he communicated his confidence to ALZA, or that ALZA knowingly accepted any duty toward him concerning his patent rights. Because ALZA is undisputedly not itself legal counsel, there is no way Swanson could allege facts meeting the facial plausibility standard of *Twombly* to state a claim that he reasonably relied on ALZA to give him legal advice. *Twombly*, 550 U.S. at 570. Therefore, the Amended Complaint does not assert sufficient facts to plausibly suggest that ALZA owed him any duty.

Swanson's allegations regarding breach of the alleged fiduciary duty are also insufficient because they are inconsistent and therefore implausible. Swanson claims that ALZA breached

its fiduciary duty to him "by willfully concealing the omission of Dr. Swanson's inventorship from the '129 patent from [him]." Amended Compl. ¶ 165. As discussed in the following section (Section III.B.2) regarding Swanson's claim for fraudulent concealment, a party cannot willfully conceal public facts like those contained in a published patent. The '129 patent issued on August 16, 2005, more than five years before Swanson alleges that ALZA's fiduciary duty to him arose. *Id.* at ¶¶ 160, 165. The patent does not name Swanson as an inventor, and claims "achieving a 'substantially ascending methylphenidate plasma drug concentration,'" which Swanson now claims were "his own ideas." *Id.* at ¶ 33. Thus, even taken as true (which ALZA disputes), Swanson's claim makes no sense. ALZA could not breach a duty by willfully concealing information in 2011 that was published to the world in 2005 when the '129 patent issued.

Swanson's threadbare factual allegations do not allege "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1940 (quoting *Twombly*, 550 U.S. at 570). There is no formal fiduciary duty under the facts alleged, and, despite having a second chance to do so, Swanson has failed to allege sufficient facts to show the elements required to imply a fiduciary duty between ALZA and himself, or to plausibly state a breach of any duty by ALZA. Finally, Swanson's amendments have only further obscured his fiduciary duty claims, even though their deficiencies were detailed in ALZA's earlier Motion to Dismiss, not opposed by Swanson and granted in its entirety by this Court. Order dated Nov. 2, 2012, Dkt. No. 30. Because Swanson has been unable to resolve these deficiencies even with the benefit of ALZA's first Motion to Dismiss, which pointed them out in detail, his fiduciary duty claim should be dismissed with prejudice. *See*, *e.g.*, *Goyal v. Capital One, N.A.*, No. C-12-02759 RMW, 2012 U.S. Dist. LEXIS 127048, at *6 (N.D. Cal. Sept. 6, 2012) (dismissing borrower's fiduciary duty breach claim against lender for failure to allege sufficient facts showing that a duty existed or was breached).

2. Swanson's Fraudulent Concealment Claim (Count 4) Likewise Should Be Dismissed.

Swanson's fraudulent concealment claim fails to sufficiently allege a duty by ALZA to disclose information about prosecution of the patents-in-suit to him, and rests on the false premise that a person can deceive by withholding public information. As a result, this claim should be dismissed. Under California law, the elements of a cause of action for fraudulent concealment are: "(1) the defendant concealed a material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant concealed or suppressed the fact with an intent to defraud; (4) the plaintiff was unaware of the fact and would have acted if he or she had known about it; and (5) the concealment caused the plaintiff to sustain damage." *Johnson v. Lucent Techs. Inc.,* 653 F.3d 1000, 1011-12 (9th Cir. 2011). The duty to disclose can arise in four different ways: (1) through a fiduciary relationship between the parties; (2) if the defendant has exclusive knowledge of material facts unknown to the plaintiff; (3) if the defendant actively conceals a material fact from the plaintiff; or (4) if the defendant makes a partial representation to the plaintiff while suppressing other material facts. *See LiMandri v. Judkins,* 52 Cal. App. 4th 326, 336 (1997). Because this claim sounds in fraud, it must meet the 9(b) heightened pleading standard. *Gerawan Farming, Inc. v. Rehrig Pac. Co.,* No. 1:11-cv-01273 LJO BAM, 2012 U.S. Dist. LEXIS 28017, at *25 (E.D. Cal. Mar. 2, 2012).

Regarding the "fiduciary relationship" duty requirement, as in his claim for breach of fiduciary duty, Swanson has failed to plead facts plausibly suggesting that ALZA owed him any duty to disclose information about prosecution of its patents to him. He has stated no facts establishing or even suggesting that a fiduciary relationship existed between ALZA and himself. As discussed in Section III.B.1, there is no presumptive fiduciary duty between parties to a contract, and Swanson has offered no basis to imply a duty from ALZA to himself. *Gilman*, 176 Cal. App. 4th at 614. In the absence of a fiduciary duty to disclose, Swanson must establish one of the other three routes to a duty: exclusive knowledge, active concealment, or partial representation of a material fact. Here, however, the undisputed fact that the patents-in-suit (and predecessor applications) were all publicly available as of 2005 makes it impossible for

Swanson to establish that ALZA concealed anything from him, or misled him about anything (material or not).[4] These public documents, published by the United States Patent and Trademark Office, made clear that ALZA claimed the invention that Swanson now argues was his own, and plainly do not name him as an inventor. As a result, Swanson simply cannot plead facts establishing that ALZA had exclusive knowledge of this information, that it actively concealed it, or that it made effective partial representations about it, since this information was freely available to him starting, at the latest, in 2005 (when the '129 and '373 patents issued, and the 2005/0025832 A1 application leading to the '798 patent published). To the extent he claims harm based on events that occurred before the patent applications were public (before 2005), his claims are untimely because the statute of limitations for fraud-based claims (like fraudulent concealment) is three years. Cal. Civ. Proc. 338(d).

In a very similar case, a court in the Eastern District of California dismissed a fraudulent concealment claim in a correction-of-inventorship case based on a failure to sufficiently allege a duty from the defendant to the plaintiff. *Gerawan Farming,* 2012 U.S. Dist. LEXIS 28017, at *24-29. The plaintiff in *Gerawan Farming* alleged a contractual relationship between himself, an alleged inventor, and the defendant patent owner. The court found that the complaint did not allege sufficient facts in part because "recording a patent with the U.S. Patent Office constitutes notice to the world of its existence." *Id*. As a result, the court found that the defendant could not have had exclusive knowledge of the patent, or actively concealed the patent. In *Gerawan*,

[4] The application leading to the '129 patent was published on August 9, 2001 as 2001/0012847 A1, and the '129 patent issued on August 16, 2005. DiMuzio Decl., Ex. 2 (2001/0012847A1 Application). The application leading to the '798 patent was published on February 3, 2005 as 2005/0025832 A1. *Id*. at Ex. 3. The '373 patent issued on July 19, 2005. These published applications and patents were publicly available more than seven years ago, and all included limitations of substantially ascending methylphenidate release rates or plasma drug concentrations over an extended period of time. *See id*., Ex. 2 at Claim 16, Ex. 3 at Claim 35, '373 Patent (Ex. C to Amended Compl.), Claim 1. ALZA respectfully requests that the Court take judicial notice of the published applications, as they are matters of public record. *See* Fed. R. Evid. 201; *Lee v. County of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001) (court may take judicial notice of matters of public record).

the court dismissed the fraudulent concealment claim because the plaintiff failed to establish that the defendant owed him any duty of disclosure.

The same reasoning applies here. Swanson cannot allege facts showing that ALZA had exclusive knowledge of, actively concealed, or effectively misrepresented the subject matter of the '129, '373 or '798 patents after the applications leading to the patents were published, or after the patents issued, because the claims were public as of that time. Swanson's allegations do not plausibly suggest that ALZA had exclusive knowledge, concealed, or made material, partial representations about these patents; in fact, the facts as alleged by Swanson reveal that he was on notice that the patents were being prosecuted and that they had issued from the very beginning. *See* Amended Compl. ¶¶ 64 ("At this time [1995], ALZA indicated to Dr. Swanson that the patent applications would cover a modification to the OROS® device."); ¶ 204 (stating that that patents-in-suit "were going to be the subject of [Swanson's] deposition" in 2006). Accordingly, the Court should dismiss Swanson's claim of fraudulent concealment. Because the claim is based on a legal impossibility—concealment of public facts—this dismissal should be with prejudice.

3. Swanson's Unfair Competition Claim (Count 5) Also Fails.

Swanson's unfair competition law (UCL) claim is deficient because he has failed to allege facts showing that he has standing to bring this claim. In order to establish standing to bring a UCL claim, the plaintiff must show that he personally has "suffered injury in fact and has lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204; *Degelmann v. Advanced Med. Optics Inc.*, 659 F.3d 835, 839 (9th Cir. 2011). This provision "requires [the plaintiff] to show that she has lost 'money or property' sufficient to constitute an 'injury in fact' under Article III of the Constitution." *Rubio v. Capital One Bank,* 613 F.3d 1195, 1203-1204 (9th Cir. 2010). In *Degelmann*, the Ninth Circuit found that the named plaintiffs had suffered "injury in fact" because they purchased contact lens cleaning products that allegedly did not disinfect contact lenses; if they had known that the products were defective, they would have spent money on effective products instead. Therefore, they lost money by purchasing defective and useless products. *Degelmann*, 659 F.3d at 839. Likewise,

in *Rubio*, the plaintiff had suffered injury in fact because she was forced to choose between paying off a debt immediately, or paying a higher annual interest rate; either choice would result in a monetary loss. *Rubio*, 613 F.3d at 1204.

Unlike the plaintiffs in *Degelmann* and *Rubio*, Swanson makes no allegation that he lost any money or property as a result of the complained-of activities by ALZA. Although the Amended Complaint alleges that California consumers and UC have been harmed by the complained-of activity (*see* Amended Compl. ¶¶ 210-214), it fails to allege that Swanson, personally, was economically harmed by ALZA's acts. This failure is fatal to Swanson's UCL claim. Therefore, this claim should be dismissed.

4. Swanson's Previously-Dismissed Unjust Enrichment Claim (Count 6) Must Again Be Dismissed.

As ALZA argued in its Motion to Dismiss the original complaint, Swanson's unjust enrichment claim is duplicative of his inventorship, fraud, and fiduciary duty claims. *See* Mot. at 11-12; Amended Compl. ¶¶ 215-236. He claims that because he was not named as an inventor on the patents-in-suit, he and UC were denied the "rights and privileges of ownership" of those patents. *Id*. As ALZA argued in its previous Motion,[5] this claim should be dismissed because the growing weight of authority holds that "[u]njust enrichment is not a cause of action." *Hill v. Roll Int'l Corp.,* 195 Cal. App. 4th 1295, 1307 (2011); *accord Levine v. Blue Shield of Cal.*, 189 Cal. App. 4th 1117, 1138 (2010); *Durell v. Sharp Healthcare,* 183 Cal. App. 4th 1350, 1370 (2010); *Melchior v. New Line Prods., Inc.*, 106 Cal. App. 4th 779, 793 (2003). These cases recognize that a claim for unjust enrichment identifies no "actionable wrong" and

[5] Because there is no legal basis for Swanson's Unjust Enrichment claim, ALZA moved to dismiss this claim with prejudice. *See* Mot. at 12. ALZA's prior Motion was based on the legal insufficiency of the unjust enrichment claim, and not whether it was pleaded with sufficient particularity. Therefore, no amendment to that claim could cure the original defect. Swanson did not oppose ALZA's Motion, and the Court granted it. *See* Dkt. Nos. 29 (Statement of Non-Opposition), 30 (Nov. 2, 2012 Order Granting Motion to Dismiss). Accordingly, this claim has already been dismissed with prejudice from the case, and res judicata bars the re-assertion of this claim.

therefore no basis for relief. *Hill*, 195 Cal. App. 4th at 1307. Although some decisions have held that unjust enrichment can be a proper claim, the growing balance of authority is against such claims. *See Hirsch v. Bank of America, N.A.*, 107 Cal. App. 4th 708, 722 (2003). This Court has adopted the *Hill* line of reasoning and dismissed unjust enrichment claims because "there is no cause of action for unjust enrichment under California law." *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1075 (N.D. Cal. 2012) (Koh, J.) (internal quotation marks and citation omitted); *see also Robinson v. HSBC Bank USA,* 732 F. Supp. 2d 976, 987 (N.D. Cal. 2010) (Illston, J.); *Vann v. Wells Fargo Bank*, No. C 12-1181 PJH, 2012 U.S. Dist. LEXIS 72760, at *40 (N.D. Cal. May 24, 2012); *Sprint Nextel Corp. v. Thuc Ngo*, No. C -12-02764 CW (EDL), 2012 U.S. Dist. LEXIS 137376, at *21 (N.D. Cal. Sept. 17, 2012); *Ward v. Mitchell*, No. C 12-03932 WHA, 2012 U.S. Dist. LEXIS 153793, at *18-*19 (N.D. Cal. Oct. 25, 2012). Because there is no separate cause of action for unjust enrichment, this claim should be dismissed with prejudice.

5. Swanson's Declaration of Ownership Claim (Count 9) Is Preempted By Federal Law.

Swanson alleges that the "inventorship and ownership rights in the '129, '798, and '373 patents belong to Dr. Swanson" and "[i]n return for Dr. Swanson's ownership of his inventorship rights, Dr. Swanson has agreed to provide The Regents with a certain percentage of any recovery from this action." Amended Compl. ¶¶ 266-267. Without expressly stating a cause of action in Count 9, he seeks a declaration that "as between Dr. Swanson and ALZA, Dr. Swanson is at least a legal and equitable co-owner" of the patents. *Id.* at ¶ 268. Additionally, he seeks an order "that ALZA must execute any necessary documents to confirm formally Dr. Swanson's ownership" of the patents. *Id.* at ¶ 269.

Claims that are dependent on a determination of patent inventorship, such as a misappropriation of patent rights, are preempted by federal patent law. *Univ. of Colo. Found, Inc. v. Am. Cyanamid Co.*, 196 F.3d 1366, 1372 (Fed. Cir. 1999) ("[T]he field of federal patent law preempts any state law that purports to define rights based on inventorship."); *Smith v. Healy*, 744 F. Supp. 2d 1112, 1130 (D. Or. 2010) ("Plaintiffs' proposed conversion claim does

not concern Plaintiffs' tangible property but rather their intangible idea . . . therefore . . . Plaintiffs' proposed conversion claim would be preempted by [federal] patent law.").

Here, Swanson's ownership claim depends exclusively on the allegation that he should have been named as an inventor. Because the ownership dispute as alleged can only be resolved with a determination of inventorship, Swanson's claim is preempted by federal patent law. *See Gen. Elec. Co. v. Wilkins*, 1:10-cv-00674-OWW-JLT, 2011 U.S. Dist. LEXIS 81479, at *26-28 (E.D. Cal. July 26, 2010) (finding claim preempted where the counter-claimant alleged that the counter-defendant wrongfully interfered with counter-claimant's ownership interest as an inventor in certain patents). Accordingly, this Court should dismiss for failure to state a claim upon which relief can be granted. Count 9, at best, identifies the desired relief related to another claim; it is not itself a cognizable cause of action.

6. Likewise, Swanson's Constructive Trust Claim (Count 10) Should Be Dismissed.

Swanson alleges that "[b]y reason of ALZA's fraudulent and otherwise wrongful conduct" and "the fraudulent manner in which ALZA obtained their alleged right, claim or interest in . . . the '129, '798, and '373 patents, ALZA is an involuntary trustee holding said patents and profits therefrom in constructive trust for Dr. Swanson with the duty to convey the same to Dr. Swanson." Amended Compl. ¶ 269. In other words, Swanson seeks the imposition of a constructive trust as remedy for ALZA's alleged fraudulent conduct.

Under California law, a constructive trust is "an equitable remedy that compels the transfer of wrongfully held property to its rightful owner." *Mattel v. MGA Entm't*, 616 F.3d 904, 908-09 (9th Cir. 2010). *See also* Cal. Civ. Code § 2223 ("One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner."). A plaintiff seeking the imposition of a constructive trust must show: (1) the existence of a property right; (2) the right to that property; and (3) the wrongful acquisition or detention of the property by another party that is not entitled to it. *Communist Party of U.S. v. 552 Valencia, Inc.*, 41 Cal. Rptr. 2d 618, 623-24 (Cal. Ct. App. 1995).

As pleaded, Swanson's request for the imposition of a constructive trust is based on his substantive claims of fraud and fraudulent concealment. If this Court dismisses the underlying alleged fraud and fraudulent concealment claims, unless there is a remaining substantive claim for which a constructive trust could be imposed, Swanson's constructive trust count must be dismissed, as well. *See, e.g., Boynton v. Headwaters, Inc.*, 243 Fed. App'x. 610, 617 (Fed. Cir. 2007).

Moreover, to the extent that his constructive trust theory rests on his status as a purported inventor, it is preempted by federal patent law. *Univ. of Colo.*, 196 F.3d at 1372. For the same reasons advanced above, the constructive trust claim should be dismissed for failure to state a claim upon which relief can be granted.

IV. CONCLUSION

For the foregoing reasons, ALZA respectfully requests that the First Amended Complaint be dismissed in its entirety under Rule 12(b)(1), because Swanson lacks standing to bring his federal claims and the Court therefore has no supplemental jurisdiction over his state law claims. ALZA further asks the Court to dismiss Counts 2 (Breach of Fiduciary Duty), 3 (Fraudulent Concealment), 4 (Unfair Competition), 5 (Unjust Enrichment), 8 (Declaration of Ownership) and 9 (Constructive Trust), for the additional reason that such counts fail to state a claim under Rule 12(b)(6).

DATED: December 21, 2012

COVINGTON & BURLING, LLP

By: */s/ Kurt G. Calia*
KURT G. CALIA (kcalia@cov.com)

COVINGTON & BURLING LLP
333 Twin Dolphin Drive, Suite 700
Redwood Shores, CA 94065
Tel. (650) 632-4700

ELENA DIMUZIO (edimuzio@cov.com)
COVINGTON & BURLING LLP
One Front Street, 35th Floor
San Francisco, California 94111
Tel. (415) 591-6000

GEORGE PAPPAS (gpappas@cov.com)
(admitted *pro hac vice*)
Jessica Parezo (jparezo@cov.com)
(admitted *pro hac vice*)
Allison Kerndt (akerndt@cov.com)
(admitted *pro hac vice*)
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
Tel. (202) 662-6000

Attorneys for ALZA CORPORATION

Lisa Gomes

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Case Name: Swanson v. Alza Corporation
Case Number: 4:12-cv-04579-PJH
Filer: Alza Corporation
Document Number: 45

Docket Text:
MOTION to Dismiss *the First Amended Complaint [CORRECTED]* filed by Alza Corporation. Motion Hearing set for 2/13/2013 09:00 AM in Courtroom 3, 3rd Floor, Oakland before Hon. Phyllis J. Hamilton. Responses due by 12/28/2012. Replies due by 1/9/2013. (Attachments: # (1) Declaration of Elena DiMuzio, # (2) Exhibit 1 to Declaration of Elena DiMuzio, # (3) Exhibit 2 to Declaration of Elena DiMuzio, # (4) Exhibit 3 to Declaration of Elena DiMuzio, # (5) Proposed Order)(Calia, Kurt) (Filed on 12/21/2012)

4:12-cv-04579-PJH Notice has been electronically mailed to:

Allison Elizabeth Kerndt akerndt@cov.com

Elena Maria DiMuzio edimuzio@cov.com

George Frank Pappas gpappas@cov.com

Gerald P. Dodson jdodson@carrferrell.com, bbathurst@carrferrell.com, bboyle@carrferrell.com, cblaufus@carrferrell.com, lgomes@carrferrell.com, vleghorn@carrferrell.com

Jessica Parezo jparezo@cov.com

Kent Brian Bathurst kbathurst@carferrell.com

Kurt G. Calia kcalia@cov.com, jlieu@cov.com, mcanalita@cov.com

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