

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION**

CARA WESSELS WELLS

Plaintiff,

v.

**TEXAS TECH UNIVERSITY,
SAMUEL PRIEN, and LINDSAY
PENROSE,**

Defendants.

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CAUSE NO. 5:23-CV-00060-H

**INDIVIDUAL DEFENDANTS' MOTION TO DISMISS PURSUANT TO
FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6)**

TO THE HONORABLE U.S. DISTRICT JUDGE JAMES WESLEY HENDRIX:

Defendants Dr. Samuel D. Prien (“Dr. Prien”), and Dr. Lindsay Penrose (“Dr. Penrose”), collectively “Individual Defendants,” jointly file this Motion to Dismiss (“Motion”) pursuant to Federal Rule of Civil Procedure 12(b)(6), requesting the Court to dismiss all claims pleaded against them in Plaintiff’s Original Complaint and Demand for Jury Trial (“Complaint”). Plaintiff’s claims against the Individual Defendants should be dismissed (1) because the mandatory dismissal provision of Tex. Civ. Prac. & Rem. Code § 101.106(e) requires automatic dismissal of the tort claims; (2) because all the claims are barred by official immunity; and (3) because the trade secret misappropriation and breach of contract claims fail to state a claim as a matter of law.

INTRODUCTION

Plaintiff's Complaint arises out of Plaintiff's student and employment relationships with TTU, and allegedly involves TTU professors, Drs. Prien and Penrose. Plaintiff allegedly worked as a graduate assistant of Drs. Prien and Penrose until graduating with her Ph.D. in 2017. Once she graduated, Plaintiff no longer had either a student or an employment relationship with TTU. Plaintiff's only subsequent involvement with TTU was a short, unpaid volunteer position with the TTU Accelerator Hub, which ended in June 2022.

Nearly six years after she left the employment of TTU, Plaintiff filed this lawsuit against both TTU and the Individual Defendants, alleging discrimination on the basis of sex, retaliation, and a host of intentional tort and other claims under federal and state law. Specifically, Plaintiff's "everything but the kitchen sink" complaint alleges causes of action under Title VII for sexual harassment, hostile work environment, and retaliation; Title IX of the Education Amendments of 1972 for sexual harassment; sexual harassment and retaliation under Chapter 21 of the Texas Labor Code; correction of inventorship under 35 U.S.C. § 256; declaratory judgment of patent invalidity under 28 U.S.C. § 2201; tortious interference with contractual relations; trade secret misappropriation; breach of contract; intentional infliction of emotional distress ("IIED"); unjust enrichment; breach of fiduciary duty; fraudulent concealment; negligent supervision and retention; and defamation *per se*.

Specifically, against the Individual Defendants, Plaintiff alleges tortious interference with contractual relations (Count 10), trade secret misappropriation (Count 11), breach of contract (Count 12), IIED (Count 13), unjust enrichment (Count 14), breach of fiduciary duty (Count 15), fraudulent concealment (Count 17), and defamation *per se* (Count 19).

As discussed in detail below, Plaintiff's claims against the Individual Defendants should be dismissed in their entirety because: (1) the mandatory dismissal provision of Tex. Civ. Prac. & Rem. Code § 101.106(e) requires automatic dismissal of Plaintiff's tort claims; (2) all Plaintiff's claims against the Individual Defendants are barred by official immunity; and (3) the trade secret misappropriation and breach of contract claims fail to state a claim as a matter of law.

BACKGROUND

Plaintiff alleges she was a student of Drs. Prien and Penrose at TTU from 2009 until graduating with her Ph.D. in 2017. *See* Dkt. 1 ¶¶ 32, 33, 65. Plaintiff alleges that she worked as a graduate assistant for Dr. Prien while at TTU. *Id.* ¶¶ 7, 34. Plaintiff also alleges that she participated in an Accelerator Hub mentorship program at TTU during May and June of 2022. *Id.* ¶¶ 108, 110, 111.¹ Plaintiff does not allege that she had an employment relationship with TTU during her brief time as a mentor with the Accelerator Hub program, nor does she allege that she received any type of compensation or benefits as part of that program. Plaintiff's last date of employment with TTU was in 2017 when she graduated with her Ph.D. *Id.* ¶¶ 65-66.

As a graduate assistant at TTU, Plaintiff conducted research. *Id.* ¶¶ 3, 7. Plaintiff alleges that she did not receive credit for her contributions to technological innovations, patents, and academic research. *Id.* ¶ 7. Plaintiff claims she was an inventor of patents for which TTU did not list her as an inventor, *id.* ¶¶ 102, 103, 114, 115, 162, and she is requesting this Court to correct inventorship and/or declare the patent invalid.

¹ Defendants request the Court to take judicial notice of the TTU Innovation Hub at Research Park website page showing that mentors are experienced in their trade and offer their experience as "mentors" to the TTU Innovation Hub: depts.ttu.edu/research/research-park/meet/iTTUmentors.php. *See* Fed. R. Evid. 201(b)(2) (permitting the Court to take judicial notice of "a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned").

STANDARD OF REVIEW

“To survive a Rule 12(b)(6) motion, the plaintiff must plead ‘enough facts to state a claim to relief that is plausible on its face.’” *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (citations, quotations, and brackets omitted). “Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Katrina Canal*, 495 F.3d at 205 (quoting *Twombly*, 550 U.S. at 555). The Court is not required to conjure up unpled allegations in order to save a complaint, and “conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice . . .” *Fernandez-Montes v. Allied Pilots Ass’n*, 987 F.2d 278, 284 (5th Cir. 1993).

When reviewing a motion to dismiss for failure to state a claim, “[t]he court’s review is limited to the complaint, any documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint.” *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010); *see also Sullivan v. Leor Energy, LLC*, 600 F.3d 542, 546 (5th Cir. 2010). The Court may also consider facts subject to judicial notice under Federal Rule of Evidence 201. *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 735 (5th Cir. 2019).

ARGUMENT

Plaintiff alleges several claims against either Dr. Prien, Dr. Penrose, or both Individual Defendants. For the multiple, alternative reasons set forth below, the Court should dismiss all of those claims.

I. Section 101.106(e) of the Texas Tort Claims Act requires immediate dismissal of all Plaintiff's tort claims against the Individual Defendants.

Most of Plaintiff's claims against the Individual Defendants are tort claims. The Texas Tort Claims Act ("TTCA") applies generally to tort claims against governmental entities and their employees. *See* Tex. Civ. Prac. & Rem. Code § 101.001, *et seq.* The Election of Remedies provision states: "If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit." *Id.* § 101.106(e); *see also Bustos v. Martini Club Inc.*, 599 F.3d 458, 464 (5th Cir. 2010) ("Since the suit is against 'both a governmental unit and any of its employees, § 101.106(e) applies. Accordingly, because the City moved to dismiss the Officers, the district court was required by § 101.106(e) to dismiss the state law claims against them."); *Univ. of Tex. Health Sci. Ctr. at Houston v. Rios*, 542 S.W.3d 530, 537 (Tex. 2017) ("When a plaintiff sues both a governmental unit and its employees in tort, as [plaintiff] did here, section 101.106(e) requires that 'the employees shall immediately be dismissed on the filing of a motion by the governmental unit.'").

Plaintiff has sued TTU for a litany of tort and other claims arising out of the same facts as her claims against the Individual Defendants. *See* Dkt. 1. TTU requests the Court to dismiss Plaintiff's tort claims against the Individual Defendants, who are employees of TTU, pursuant to section 101.106. Pursuant to the mandatory dismissal provision of section 101.106(e), this Court should dismiss Plaintiff's claims against the Individual Defendants for tortious interference with

contractual relations (Count 10), trade secret misappropriation (Count 11), IIED (Count 13), unjust enrichment (Count 14), breach of fiduciary duty (Count 15), fraudulent concealment (Count 17), and defamation *per se* (Count 19).

II. All of Plaintiff's claims against the Individual Defendants are barred by official immunity.

The official immunity doctrine governs suits against state officials who are sued in their individual capacities for alleged violations of state law. *See, e.g., Dupont v. Linden*, 81 F.3d 155, 1996 WL 101418, at *2 (5th Cir. 1996) (per curiam) (applying Texas' official immunity doctrine to claims brought pursuant to state law against a state official in his individual capacity); *Brown v. Wilson Cnty.*, No. SA-97-CA-1473-OG, 1999 WL 33290666, at *2 (W.D. Tex. Mar. 31, 1999) (same). As the Fifth Circuit has observed, "Texas' law of qualified or official immunity is substantially the same as federal immunity law," with the exception that Texas' official immunity doctrine does not include the "clearly established law" element that federal qualified immunity doctrine includes. *Cantu v. Rocha*, 77 F.3d 795, 808-09 (5th Cir. 1996).

Under Texas' official immunity doctrine, "Government employees are entitled to official immunity from suit arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority." *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). A state employee bears the burden to establish these elements. *Id.*

On the face of Plaintiff's own factual allegations, the Individual Defendants' only interactions with Plaintiff when she was a student and employee at TTU were in their official capacities as professors and advisors at TTU. Plaintiff's own allegations make clear that all of those interactions were squarely within the scope of the Individual Defendants' authority and discretionary duties as professors at TTU. Further, Plaintiff alleges nothing that would support

an inference of bad faith on the part of the Individual Defendants. Accordingly, the Individual Defendants are entitled to official immunity on the face of Plaintiff's pleadings as a matter of law.

III. Plaintiff fails to state a claim for trade secret misappropriation under Fed. R. Civ. P. 12(b)(6).

While Plaintiff does not identify whether her claim for trade secret misappropriation is a federal claim under Defend Trade Secrets Act ("DTSA") or the Texas Uniform Trade Secrets Act ("TUTSA"), Plaintiff's claim fails to state a claim for relief under either statute.

Plaintiff alleges that her "data from her research as part of Embryotics and EmGenisys constituted a trade secret." *See* Dkt. 1 ¶ 172. She further alleges that this data was given to Dr. Prien pursuant to a non-disclosure agreement, and that Dr. Prien used the data for his own benefit. *Id.* ¶ 173.

First, Plaintiff fails to identify how the alleged "data from her research" is a trade secret. Under both DTSA and TUTSA, the trade secret must be used by the owner, the owner must take reasonable measures to keep it secret, and it must derive economic value from not being generally known by others in competition with the trade secret holder. 18 U.S.C. § 1839(3); Tex. Civ. Prac. & Rem. Code § 134A.002(6). Under the DTSA, it also must be used in commerce. 18 U.S.C. § 1839(3).

Plaintiff fails to allege how the alleged research data belongs or belonged to her, given that one of the companies she worked for (Embryotics) dissolved in the spring of 2019. *See* Dkt. 1 ¶ 83. She also fails to allege how the non-disclosure agreement was a reasonable measure to keep that data secret, or how it derived economic value from not being generally known by others in competition. She further fails to show that the research data was used in commerce.

Similarly, Plaintiff fails to identify how Dr. Prien allegedly misappropriated the data through improper means. Under TUTSA, for example, misappropriation means disclosure or use of a trade secret of another without express or implied consent and the use of improper means to acquire knowledge of the trade secret. *See* Tex. Civ. Prac. & Rem. Code § 134A.002(2)-(3). In fact, Plaintiff specifically acknowledges that “Dr. Wells shared the data with [Dr. Prien].” *Id.* ¶ 97. She further alleges that the non-disclosure agreement is actually between Dr. Prien and the Accelerator Program—not Dr. Wells. *Id.* (“... this was in violation of the Accelerator Program’s non-disclosure agreement with its mentors.”). Plaintiff has no standing to assert claims for a breach of a non-disclosure agreement in which she is not a party. *See, e.g., Eskridge v. Fed. Home Loan Mortg. Corp.*, No. W-10-CA-285, 2011 WL 2163989, at *5 (W.D. Tex. Feb. 24, 2011) (holding Plaintiff had no standing to challenge contract because she was not a party to the contract); *Woods v. Bank of Am., N.A.*, 3:11-CV-1116-B, 2012 WL 1344343, at *5 (N.D. Tex. Apr. 17, 2012) (same). Finally, although Plaintiff alleges that there was a non-disclosure agreement between Embryotics and a third party at the time, she also admits that Embryotics had dissolved by spring of 2019, Dkt. 1 ¶ 17, and she does not allege that Dr. Prien was a party to that agreement. Because Plaintiff fails to state a legally sufficient claim for trade secret misappropriation, the Court should dismiss this claim (Count 11).

IV. Plaintiff fails to state a claim for breach of contract under Fed. R. Civ. P. 12(b)(6).

Plaintiff fails to state a claim for breach of contract against Dr. Prien, and this claim should be dismissed. Plaintiff alleges that Dr. Prien breached a “valid non-disclosure agreement” that existed. Dkt. ¶ 176. Plaintiff further alleges that she performed under the contract and that Dr. Prien “breached the contract by sharing confidential data to third parties” and that she suffered damages as a result. *Id.* ¶ 178.

To state a breach of contract claim, a plaintiff must plead: ““(1) a valid contract; (2) the plaintiff performed or tendered performance; (3) the defendant breached the contract; and (4) the plaintiff was damaged as a result of the breach.”” *Brooks v. Excellence Mortg., Ltd.*, 486 S.W.3d 29, 36 (Tex. App.—San Antonio 2015). A party lacks standing to challenge a contract if she is not a party to the contract. *Eskridge*, No. W-10-CA-285, 2011 WL 2163989, at *5; see also *Woods*, 3:11-CV-1116-B, 2012 WL 1344343, at *5.

Here, because Plaintiff alleges that the non-disclosure is between Dr. Prien and the Accelerator Program, and not between Plaintiff and Dr. Prien, Plaintiff is not a party to the contract. Dkt. 1 ¶ 97. As a non-party to the non-disclosure agreement, Plaintiff lacks standing and therefore, fails to state a claim of breach of contract. Accordingly, Plaintiff’s breach of contract claim (Count 12) fails and should be dismissed.

CONCLUSION

For the foregoing reasons, Defendants Dr. Prien and Dr. Penrose respectfully request that this Court dismiss all of Plaintiff’s claims against the Individual Defendants in their entirety.

Dated: May 18, 2023

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2023, the foregoing *Individual Defendants' Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(6)* was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to the following counsel of record:

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