United States Court of Federal Claims

No. 09-558 T
(Filed February 16, 2010)
NOT FOR PUBLICATION

JOHN DACOSTA AND N.B. SALTY MILLER,	)
Plaintiffs,	)
v.	)
THE UNITED STATES,	)
Defendant.	)

John DaCosta, Miami, Florida, and N.B. Salty Miller, Nashville, Tennessee, each appearing *pro se*.

Joseph B. Syverson, Attorney of Record, Tax Division, Court of Federal Claims Section, G. Robson Stewart, Assistant Chief, Steven I. Frahm, Chief, Court of Federal Claims Section, John A. DiCicco, Acting Assistant Attorney General, United States Department of Justice, Washington, D.C., for defendant.

OPINION AND ORDER

GEORGE W. MILLER, Judge

This is plaintiffs' second complaint before this Court arising from the same underlying facts. Defendant has moved pursuant to Rule 12(b)(1) of the Rules of the Court of Federal Claims ("RCFC") to dismiss the complaint on the ground that the doctrine of issue preclusion bars plaintiffs from relitigating the Court's subject matter jurisdiction. Alternatively, defendant argues that plaintiffs have not established that this Court has subject matter jurisdiction over their complaint in this action. Plaintiffs have cross-moved for summary judgment. For the reasons stated below, defendant's motion to dismiss is **GRANTED** and plaintiffs' motion for summary judgment is **DENIED**.

I. Background

Plaintiffs each filed an Application for Reward for Original Information with the Internal Revenue Service ("IRS") in 2003 as a result of having supplied information to the IRS concerning the alleged violation of internal revenue laws by a certain taxpayer. *DaCosta v. United States*, 82 Fed. Cl. 549 (2008) ("*DaCosta I"*); Compl. Ex. 17 (docket entry 1, Aug. 24, 2009); *see* I.R.C. § 7623. Plaintiffs claim that, as a result of the information they provided, the IRS collected in excess of two million dollars. *DaCosta I*, 82 Fed. Cl. at 551. Based on their Applications for Reward, plaintiffs each received a reward of $139,321.01 from the IRS on March 21, 2007. *Id.*

A. DaCosta I

On November 19, 2007, plaintiffs filed their first complaint in this court. *Id.* Plaintiffs alleged that the amount of the reward received for the information they provided to the IRS was less than the amount to which they were entitled under I.R.C. § 7623, and they sought damages in the amount of the difference. *Id*. Plaintiffs also claimed that, on or around March 1, 2007, IRS Special Agent Evan Garrett submitted a document to them that indicated the appropriate reward due each plaintiff and then told them the appropriate reward due was 15% of the total amount collected by the IRS from the taxpayer. *Id.*

Defendant moved to dismiss the complaint for lack of subject matter jurisdiction, and the Court granted that motion on July 11, 2008. *Id.* at 558. The Court held that it lacked subject matter jurisdiction over plaintiffs' claims regarding the information plaintiffs provided to the IRS after the 2006 amendments to I.R.C. § 7623[1] because jurisdiction over such claims resides

[1] I.R.C. § 7623 concerns the payment of rewards to informants who report violations of tax laws. Congress amended this section as part of the Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 406(a), 120 Stat. 2958 (2006). *DaCosta I*, 82 Fed. Cl. at 552. As amended, section 7623(b)(1) now provides:

> **In General.—**If the Secretary proceeds with any administrative or judicial action described in subsection (a) based on information brought to the Secretary's attention by an individual, such individual shall, subject to paragraph (2), receive as an award at least 15 percent but not more than 30 percent of the collected proceeds (including penalties, interest, additions to tax, and additional amounts) resulting from the action (including any related actions) or from any settlement in response to such an action. The determination of the amount of such award by the

exclusively in the United States Tax Court. *Id.* at 555. The Court also rejected plaintiffs' alternate theory that they were entitled to a reward for information submitted prior to the 2006 amendments[2] because Agent Garrett's statement and the document created an implied contract between plaintiffs and the Government. *Id.* at 556-57. This Court found that plaintiffs "failed to meet their burden of alleging facts sufficient to establish jurisdiction . . . based on a contract implied in fact, even construing their allegations liberally." *Id.* at 557. Specifically, the Court found that plaintiffs did not allege the "essential elements of a contract implied in fact," since plaintiffs failed to allege that they negotiated with the IRS and agreed upon a specific amount for a reward. *Id*. In addition, Agent Garrett did not have the authority to bind the Government and his alleged statement and report were insufficient to create a contract implied in fact. *Id*. Thus, the Court lacked subject matter jurisdiction over plaintiffs' claims with respect to information submitted prior to the 2006 amendments to I.R.C. § 7623. *Id.*

B. Plaintiffs' Second Complaint

Plaintiffs filed the current complaint on August 24, 2009, alleging that they are entitled to an additional reward as a result of the information they provided to the IRS regarding the taxpayer's alleged violation of internal revenue laws. *Id.* at 1. They state that this Court has jurisdiction because an "implied-in-fact oral contract underlies their claims, and their contract was breached by the IRS in multiple ways." *Id*. Plaintiffs argue that this contract was formed as a result of the same report of Agent Garrett upon which they previously relied, which purportedly

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> Whistleblower Office shall depend upon the extent to which the individual substantially contributed to such action.

26 U.S.C. § 7623(b)(1) (2006).

[2] Prior to the 2006 amendments, I.R.C. § 7623 provided:

> The Secretary, under regulations prescribed by the Secretary, is authorized to pay such sums as he deems necessary for—
>
> (1) detecting underpayments of tax, and
>
> (2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same, in cases where such expenses are not otherwise provided for by law.
>
> Any amount payable under the preceding sentence shall be paid from the proceeds of amounts (other than interest) collected by reason of the information provided, and any amount so collected shall be available for such payments.

Pub. L. No. 104-168, § 1209, 110 Stat. 1452, 1473 (1996).

confirmed that the IRS had promised to pay each plaintiff 15% of the amount collected from the taxpayer. *Id.* at 3.

In this action, plaintiffs add four allegations not pled in their complaint in *DaCosta I*, and rely upon several new legal theories. First, plaintiffs aver that between 2003 and 2007, IRS agents sent plaintiffs a copy of IRS Publication 733, and referring to this publication, an IRS agent told them that "they would receive 15% EACH of amounts collected by the IRS, if their direct information was responsible for the collection of tax deficiencies." *Id*. at 2.

Second, plaintiffs assert that their alleged agreement with the IRS was institutionally ratified by the Government because "the IRS, by accepting the benefits flowing from the promise of payment, ratified the promise and was bound by it." *Id.* at 3.

Third, plaintiffs contend that because the IRS paid them each a $139,321.01 reward, there was "an oral agreement of some type" between them and the IRS. Plaintiffs' Response to Defendant's Motion to Dismiss at 4 (docket entry 8, Nov. 5, 2009) ("Pls.' Resp."). Plaintiffs allege that this payment establishes some form of contract with the IRS, and thus the Court has jurisdiction over their claims, including a claim that the IRS breached a duty of good faith and fair dealing. *Id.* at 4.

Finally, plaintiffs allege that IRS agents, in order to prevent plaintiffs from collecting the full amount of the reward to which they are entitled, failed to collect additional unpaid taxes from the taxpayer based on the information plaintiffs provided to the IRS. *Id.* at 8. Plaintiffs aver that this failure to collect additional unpaid tax was a "tortuous [sic] breach of contract, and breach of implied duty . . . of good faith and fair dealing," and plaintiffs assert that they are therefore entitled to receive damages in excess of 15% of the amount collected from the taxpayer. *Id.* at 7 (emphasis omitted).

Defendant moves to dismiss plaintiffs' complaint for lack of subject matter jurisdiction, arguing that issue preclusion bars plaintiffs from re-litigating the court's subject matter jurisdiction. Defendant's Motion to Dismiss Plaintiffs' Complaint at 8-10 (docket entry 5, Oct. 23, 2009) ("Def.'s Mot."). Defendant alternatively contends that plaintiffs' new allegations would not alter the Court's earlier conclusion that it lacks subject matter jurisdiction over plaintiffs' claims. Defendant's Response to Plaintiffs' Motion for Summary Judgment and Reply to Plaintiffs' Response to Defendant's Motion to Dismiss Plaintiffs' Complaint at 4-7 (docket entry 9, Dec. 7, 2009) ("Def.'s Resp.").

Plaintiffs counter that whether this Court has jurisdiction over their contract-implied-in-fact claims was not actually litigated in *DaCosta I* because their complaint in the first litigation was based on an alleged contract implied in *law*. Pls.' Resp. at 1. Plaintiffs cross-move for summary judgment, stating that there are no genuine issues of material fact with regard to the implied-in-fact contract between plaintiffs and the IRS. Plaintiffs' Motion for Summary Judgment Pursuant to Rule 56 (docket entry 8, Nov. 5, 2009) ("Pls.' Mot.").

II. Standard of Review

Plaintiffs must set forth a jurisdictional basis for their claims. RCFC 8(a)(1). In determining whether it possesses jurisdiction, the court looks at the complaint, which "must be well-pleaded in that it must state the necessary elements of the plaintiff's claim, independent of any defense that may be interposed." *Holley v. United States*, 124 F.3d 1462, 1465 (Fed. Cir. 1997). When the court decides a motion to dismiss for lack of subject matter jurisdiction, the allegations of the complaint must be construed in the manner most favorable to plaintiffs. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Additionally, the complaints of *pro se* plaintiffs are held to "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Nevertheless, despite the leeway afforded *pro se* plaintiffs, they must still meet jurisdictional requirements. *Bernard v. United States*, No. 04-5039, 98 F. App'x 860, 861 (Fed. Cir. 2004). When the defendant challenges plaintiff's jurisdictional allegations, plaintiffs bear the burden of establishing subject matter jurisdiction by a preponderance of the evidence. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988). The issue facing the court is "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer*, 416 U.S. at 236.

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* RCFC 56(c). A fact is "material" if it has the potential to affect the outcome of the case, and a dispute about a material fact is "genuine" if a reasonable trier of fact could find in favor of the non-moving party based on the evidence presented. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party moving for summary judgment bears the initial burden of demonstrating the absence of genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When deciding a motion for summary judgment, the court must give the non-moving party the benefit of all favorable presumptions and factual inferences. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In order to survive a motion for summary judgment, the non-moving party must provide evidence of facts that give rise to a genuine issue of material fact. RCFC 56(e); *Matsushita*, 475 U.S. at 587. The court will deny the motion if the non-moving party presents evidence of a genuine issue of material fact sufficient to entitle the party to proceed to trial and permit the trier of fact to resolve the parties' differing versions of the truth. *Anderson*, 477 U.S. at 249.

III. Discussion

A. Plaintiffs Are Barred from Re-litigating Issues Actually Argued and Decided in DaCosta I

1. Plaintiffs' Second Complaint is Barred by Issue Preclusion

The doctrine of issue preclusion prevents plaintiffs from relitigating an issue in a second action that has already been fully litigated in a prior action by the same parties. *Banner v. United States*, 238 F.3d 1348, 1354 (Fed. Cir. 2001) (citing *Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1365-66 (Fed. Cir. 2000)). Indeed, "[i]ssue preclusion . . . bar[s] relitigating issues, even if they are presented later as wholly new theories or causes of action." *Uintah Ute Indians of Utah v. United States*, 28 Fed. Cl. 768, 781 (1993).

In order for issue preclusion to apply, the court must find that: (1) the issues are identical to those in a previous proceeding, (2) the issues were actually litigated, (3) the determination of the issues was necessary to the resulting judgment, and (4) the party defending against preclusion had a full and fair opportunity to litigate the issues. *Banner*, 238 F.3d at 1354 (citing *Jet, Inc.*, 223 F.3d at 1365-66). The issue was "actually litigated" if it was properly raised by the pleadings, was submitted for determination, and was determined. *Id.*; *see Kawa v. United States*, 86 Fed. Cl. 575, 583-84 (2009). Additionally, the party had a "full and fair opportunity to litigate the issues" if there were no significant procedural limitations in the prior proceeding, the party had an incentive to fully litigate the issue, and effective litigation was not limited by the nature or relationship of the parties. *Banner*, 238 F.3d at 1354.

The issue presented to the Court in plaintiffs' second complaint is identical to the issue presented and decided in the previous litigation brought by plaintiffs. In *DaCosta I*, the Court was required to and did decide whether it possessed subject matter jurisdiction over plaintiffs' claims with respect to information submitted to the IRS prior to the 2006 amendments to I.R.C. § 7623, which allegedly created a contract implied in fact with the United States. *DaCosta I*, 82 Fed. Cl. at 556-7. Plaintiffs state that their "first complaint #1 was based entirely on an IMPLIED IN LAW CONTRACT . . . NOT AN IMPLIED IN FACT CONTRACT WITH THE GOVERNMENT (IRS)." Pls.' Resp. at 1 (emphasis in original). In reality, however, plaintiffs argued in *DaCosta I* that this court possessed subject matter jurisdiction based merely on an "implied contractual relationship." *DaCosta I*, 82 Fed. Cl. at 556. But under the Tucker Act, this Court does not have jurisdiction over contracts implied in law. 28 U.S.C. § 1491(a)(1); *see United States v. Mitchell*, 463 U.S. 206, 217 (1983); *Barrett Refining Corp. v. United States*, 242 F.3d 1055, 1059 (Fed. Cir. 2001). Thus, in *DaCosta I*, this Court construed plaintiffs' argument to be based on an alleged implied-in-fact contract with the United States. *DaCosta I*, 82 Fed. Cl. at 556-57. Indeed, the Court held in *DaCosta I* that plaintiffs "failed to meet their burden of alleging facts sufficient to establish jurisdiction . . . based on a *contract implied in fact*, even construing their allegations liberally." *Id.* at 557 (emphasis added). Therefore, the issue of this

Court's subject matter jurisdiction over plaintiffs' claims resulting from an alleged breach of a contract implied in fact was actually argued and decided in *DaCosta I*.

Moreover, plaintiffs had a full and fair opportunity to litigate the issue in *DaCosta I*. There were no significant procedural limitations and plaintiffs had every incentive to fully litigate the issue in that case. Finally, effective litigation was not limited by the nature or relationship of the parties. Thus, because the Court has already determined the issue, plaintiffs cannot re-litigate this Court's jurisdiction over plaintiffs' implied-in-fact contract claim even if presented as new legal theories or causes of action.[3] *See Uintah Ute Indians of Utah*, 28 Fed. Cl. at 781.

2. The "Curable Defect Exception" Does Not Alter the Preclusive Effect of *DaCosta I*

Plaintiffs contend that the newly alleged facts in their second suit cure any jurisdictional defect present in their first suit. Generally, a court's prior dismissal of an action for lack of subject matter jurisdiction forecloses the re-litigation of the same jurisdictional issue in a subsequent action unless the "curable defect" exception applies. *Citizen Elecs. Co. v. OSRAM GmbH*, No. 2006-1211, 225 F. App'x 890, 893 (Fed. Cir. 2007), *aff'g* No. 05-1560, 2005 WL 3484202 (D.D.C. Dec. 20, 2005) (citing *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1191 (D.C. Cir. 1983)); *Smalls v. United States*, No. 07-715, 2008 WL 2396757, at *13 (Fed. Cl. June 6, 2008). The curable defect doctrine permits a second action when a "'precondition requisite' to the court's proceeding with the original suit was not alleged or proven, and is supplied in the second suit," *Citizen Elecs. Co.*, 225 F. App'x at 893 (citing *Dozier*, 702 F.2d at 1192), and the party relies on facts or "occurrences subsequent to the original dismissal." *Dozier,* 702 F.2d at 1192 (emphasis omitted); *see also Park Lake Res. LLC v. United States Dep't of Agriculture*, 378 F.3d 1132, 1137 (10th Cir. 2004); *Magnus Elecs., Inc. v. La Republica Argentina*, 830 F.2d 1396, 1401 (7th Cir. 1987); *Citizen Elecs. Co.*, 2005 WL 3484202, at *3.

That is, the newly alleged facts must have arisen *after* the court's dismissal of the first complaint. *See Citizen Elecs. Co.*, 225 F. App'x at 893 ("[P]laintiff cannot relitigate a jurisdictional dismissal by relying upon those facts that existed at the time of the first dismissal."). As numerous courts have observed, "[u]nder a system such as that established by

[3] Plaintiffs' most recent claims are also barred by the related doctrine of claim preclusion. Claim preclusion forecloses "litigation of matters that never have been litigated" but "should have been advanced in an earlier suit." *Phillips/May Corp. v. United States*, 524 F.3d 1264, 1267 (Fed. Cir. 2008) (internal quotation omitted). The doctrine applies to preclude a later action if the earlier action proceeded to a final judgment and the new action is "based on the same set of transactional facts as the first." *Id.* at 1268 (quoting *Ammex, Inc. v. United States*, 334 F.3d 1052, 1055 (Fed. Cir. 2003). In this case, *DaCosta I* is considered a determination on the merits as to the jurisdictional issue. *Goad v. United States*, 46 Fed. Cl. 395, 398 (2000). Because "the second-filed claim presents the same jurisdictional issue as raised in the first suit," claim preclusion "bars the second claim." *Id.* at 398.

the Federal Rules of Civil Procedure, which permits liberal amendment of pleadings, it does not make sense to allow a plaintiff to begin the same suit over and over again in the same court, each time alleging additional facts that the plaintiff was aware of from the beginning of the suit, until it finally satisfies the jurisdictional requirements." *Magnus Elecs. Inc.*, 830 F.2d at 1401; *see also Dozier*, 702 F.2d at 1192-93 & n.6; *Citizen Elecs. Co.*, 2005 WL 3484202, at *3.

The Rules of the Court of Federal Claims, which parallel the Federal Rules of Civil Procedure, permit plaintiffs to amend their pleadings to add factual allegations not included in the original compliant, and mandates that leave to amend such pleadings be "liberally granted." RCFC 15(a)(2);[4] *Citizens Elecs. Co.*, 2005 WL 3484202, at *3. Furthermore, in the event that plaintiffs discover new facts too late to permit them to seek amendment of their complaint before the Court dismisses the case, plaintiffs may, within a year of entry of judgment, move for relief from the judgment based on newly discovered evidence. RCFC 60(b)(2);[5] *see Shelden v. United States*, 26 Cl. Ct. 375, 378 (1992), *rev'd on other grounds*, 7 F.3d 1022 (Fed. Cir. 1993). Because of the availability of these procedural mechanisms, courts only permit a party to "cure" a jurisdictional defect when the defect can be remedied by reference to events that occurred after the dismissal of the action. *Dozier,* 702 F.2d at 1192.

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[4] RCFC 15(a)(2) provides:

> (2) **Other Amendments.** In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

[5] RCFC 60(b)(2) provides:

> (b) **Grounds for Relief from a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
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> . . .
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under RCFC 59(b)
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> . . .

The newly discovered evidence must have been of the sort that the plaintiff could not have discovered, with the exercise of reasonable diligence, before dismissal of the complaint. *Placeway Constr. Corp. v. United States*, 19 Cl. Ct. 484, 489 (1990).

In this case, plaintiffs' new factual allegations do not "cure" the jurisdictional defects of *DaCosta I* because the newly alleged facts all arose well before this Court dismissed *DaCosta I* on July 11, 2008. *DaCosta I*, 82 Fed. Cl. at 558. The first such allegation is that, *between 2003 and 2007*, conversations with IRS agents as well as copies of IRS Publication 733 sent to them established a contract implied in fact with the IRS. Compl. at 2-5. Because these events occurred well before dismissal, plaintiffs could have sought to amend their complaint in *DaCosta I* to add the factual allegations upon which plaintiffs now rely. Therefore, these new factual allegations do not satisfy the curable defect exception.

Plaintiffs' second new allegation refers back to the Court's discussion in *DaCosta I* about Agent Garrett's lack of authority to bind the Government. *DaCosta I,* 82 Fed. Cl. at 557. The Court noted that plaintiffs did not "contend that any unauthorized statement by Mr. Garrett was ratified by the IRS." *Id.* In their current complaint, plaintiffs allege that their purported agreement with the IRS was institutionally ratified by the Government. Compl. at 3. Citing *Silverman v. United States*, 679 F.2d 865 (Ct. Cl. 1982), plaintiffs argue that "the IRS, by accepting the benefits flowing from the promise of payment, ratified the promise and was bound by it." Compl. at 3. However, once again, the IRS's alleged acceptance of benefits occurred before this Court's dismissal of *DaCosta I* on July 11, 2008 and plaintiffs could have sought to amend their complaint to add this allegation. *See* Compl. at 5 (IRS allegedly accepted the benefit of plaintiffs' information before March 2007). Therefore, this new allegation also fails to satisfy the curable defect exception.

Similarly, plaintiffs' new allegations regarding the receipt of $139,321.01 and the IRS's alleged failure to properly collect taxes from the taxpayer all relate to events that occurred in March of 2007, before the Court's dismissal of *DaCosta I. Id.* Thus, because plaintiffs have failed to allege any new facts occurring after the dismissal in *DaCosta I,* they remain barred from re-litigating this Court's finding that it did not possess subject matter jurisdiction over plaintiffs' claims based on an alleged contract implied in fact.

B. Plaintiffs Do Not Allege A Claim within this Court's Jurisdiction

Even if plaintiffs' second complaint were not barred by issue preclusion, the Court would conclude that plaintiffs' most recent complaint fails to allege facts sufficient to support a conclusion that this Court has subject matter jurisdiction based upon an implied-in-fact contract.

A valid contract requires offer,[6] acceptance,[7] and consideration.[8] 17A Am. Jur. 2d *Contracts* § 19 (2009). A contract implied in fact results when an express offer and acceptance are missing but the parties' conduct indicates mutual assent.[9] *City of Cincinnati v. United States*, 153 F.3d 1375, 1377 (Fed. Cir. 1998). To prove a contract implied in fact with the Government, the plaintiff must allege: (1) mutuality of intent to contract, (2) consideration, (3) a lack of ambiguity in offer and acceptance, and (4) the government representative whose conduct is relied upon must have actual authority to bind the government in contract. *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990). Plaintiffs' new allegations fail to set forth the elements of a contract implied in fact or any other basis for the court's jurisdiction.

1. IRS Publication 733

Plaintiffs claim that the Government's sending IRS Publication 733 to them constitutes an unambiguous offer and acceptance. But the United States is not contractually bound by the mere invocation of a cited statute and regulation. *Merrick v. United States*, 846 F.2d 725, 726 (Fed. Cir. 1988). Indeed, the Federal Circuit has specifically held that IRS Publication 733 does not in itself create a contract. *Cambridge v. United States*, 558 F.3d 1331, 1336 (Fed. Cir. 2009) (citing *Krug v. United States*, 168 F.3d 1307, 1309 (Fed. Cir. 1999)). In IRS Publication 733, "the Government invites offers for a reward; the informant makes an offer by his conduct; and the Government accepts the offer by agreeing to pay a specific sum." *Id.* (emphasis omitted). An enforceable contract is formed only after the informant and the Government negotiate and come into agreement on a specific amount as the reward. *Compare Merrick*, 846 F.2d at 726 (plaintiff stated a claim for relief by alleging that an IRS official with authority to bind the agency agreed to a specific amount of reward with reference to Publication 733) *with Krug*, 168 F.3d at 1309 (plaintiff failed to state a claim by relying solely on the language of Publication 733) *and Cambridge*, 558 F.3d at 1335 (plaintiff failed to state a claim by relying on the IRS's sending Publication 733 without allegations that a person with authority offered a specific reward or

[6] An offer is "a display of willingness to enter into a contract on specified terms, made in a way that would lead a reasonable person to understand that an acceptance, having been sought, will result in a binding contract." *Black's Law Dictionary* 1189 (9th ed. 2009).

[7] Acceptance is "an offeree's assent, either by express act or by implication from conduct, to the terms of an offer in a manner authorized or requested by the offeror, so that a binding contract is formed." *Id.* at 13.

[8] Consideration is "something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee." *Id.* at 347.

[9] Mutual assent is the "[a]greement by both parties to a contract, usually in the form of offer and acceptance." *Black's Law Dictionary* 132 (9th ed. 2009). Mutual assent is determined in modern contract law "by an objective standard—that is, by the apparent intention of the parties as manifested by their actions." *Id.*

accepted plaintiffs' suggestion of a specific reward).

In their second complaint, plaintiffs state that IRS agents sent plaintiffs a copy of IRS Publication 733, and, referencing the publication, IRS agents told plaintiffs that "they would receive 15% EACH of amounts collected by the IRS, *if their direct information was responsible for the collection of tax deficiencies.*" Compl. at 2 (emphasis added). However, by sending plaintiffs a copy of IRS Publication 733, the IRS agents merely invited offers for a reward. Since Publication 733 does not constitute an offer, plaintiffs did not accept an offer from the United States when they provided information to the IRS. Although plaintiffs allege that the IRS indicated how the reward would be determined if plaintiffs' already-provided information proved useful, plaintiffs fail to allege that an IRS official with authority to bind the agency either made an offer for a specific reward or agreed to plaintiffs' offer. *See DaCosta I*, 82 Fed. Cl. at 557 (Agent Garrett did not have authority to bind the IRS and his statements to plaintiffs did not induce them to provide information because the information was provided voluntarily *before* Agent Garrett said anything to plaintiffs). Thus, plaintiffs fail to allege an agreement with the IRS that fixed a specific amount as an additional reward. *Cambridge*, 558 F.3d at 1335

2. IRS Ratification of Agent Garrett's Alleged Offer

Plaintiffs' allegation that the IRS ratified Agent Garrett's promise also fails to provide the court with jurisdiction. Plaintiffs cite *Silverman*, 679 F.2d at 870, a case involving the Federal Trade Commission's ("FTC's") attempt to purchase stenographic reporting services. *Id*. at 867. In *Silverman*, the FTC accepted and used the plaintiff's transcripts but did not pay plaintiff. *Id.* at 870. The Court of Claims held that by accepting the benefits, the FTC had ratified the promise made by an FTC employee and thus was liable pursuant to a contract implied in fact. *Id.* at 870-71.

The Federal Circuit has since explained the basis for its decision in *Silverman*. In *City of El Centro*, a hospital in California sued the Government for the money it expended in treating fourteen illegal aliens who were injured while attempting to flee from Border Patrol agents. *City of El Centro*, 922 F.2d at 818. The trial court, relying on *Silverman*, found that the Government had accepted the benefit of the hospital's services and thereby "institutionally ratified" an implied-in-fact contract. *Id.* The Federal Circuit reversed and explained that *Silverman* did not involve "ratification." *See Aero-Abre, Inc. v. United States*, 39 Fed. Cl. 654, 658 (1997) ("[T]he Federal Circuit, in [*City of El Centro*] construed *Silverman* not as a case in which a government agency ratified an unauthorized agreement, but as one in which the contracting employee had implied actual authority to bind the government."). While the court in *Silverman* had discussed a theory of institutional ratification, the Federal Circuit noted that in *Silverman,* an FTC official who had "authority to approve vouchers for payment for goods and services" approved the transaction. *City of El Centro*, 922 F.2d at 821 (quoting *Silverman*, 679 F.2d at 868) (emphasis omitted). Since the hospital had not shown a promise by the Government made "by an official empowered to bind the Government to pay for the care rendered" it "had not shown that any individual with contracting authority exercised that authority to bind the United States in this

matter." *Id.*

In this case, plaintiffs likewise fail the test for institutional "ratification" as interpreted in *City of El Centro.* Plaintiffs fail to allege that a person with actual or implied authority to bind the Government approved the alleged contract. Pls.' Resp. at 3 ("Plaintiffs' complaint does not allege that these agents possessed the authority to bind the Government (IRS) contractually."). Therefore, like the hospital in *City of El Centro*, plaintiffs cannot establish the existence of an implied-in-fact contract. *City of El Centro*, 922 F.2d at 821; *see also Aero-Abre Inc.*, 39 Fed. Cl. at 658.

3. Plaintiffs' Receipt of $139,321.01

Finally, plaintiffs allege that their individual receipt of $139,321.01 from the IRS itself demonstrates that there was "an oral agreement of some type" between them and the IRS. Pls.' Resp. at 4. Plaintiffs allege that this payment establishes some form of contract with the IRS, and thus, the Court has jurisdiction over their claims, including their claim that the IRS breached the duty of good faith and fair dealing that is implied in every contract. *Id.* However, this additional allegation does not support the creation of a contract implied in fact. Plaintiffs each received a reward of $139,321.01 after the IRS notified plaintiffs in writing on March 13, 2007 that each of them would receive that amount. This sequence of events indicates only that the IRS was required to pay that amount. *DaCosta I*, 82 Fed. Cl. at 557. Plaintiffs concede that they were each paid that amount, and thus, the IRS fulfilled its commitment.

4. Tortious Breach of Contract, Duty of Good Faith and Fair Dealing, and Remaining Claims

As set forth above, plaintiffs do not allege conduct that shows an unambiguous offer and acceptance, and plaintiffs therefore fail to satisfy that and other elements of a contract implied in fact. As a result, this Court does not have subject matter jurisdiction over plaintiffs' most recent claims based on an alleged contract implied in fact.

Moreover, because the Court has found that plaintiffs have not adequately alleged that the Government had any contractual obligations, plaintiffs' allegations of tortious breach of contract and breach of the duty of good faith and fair dealing necessarily fail. *Piper v. United States*, 90 Fed. Cl. 498, 506 (2009) ("In the instant case, the court has concluded that plaintiff was not contractually employed by the [Government]. Thus, there can be no tortious breach of contract."); *Night Vision Corp. v. United States*, 68 Fed. Cl. 368, 390 (2005) ("To the extent plaintiff argues that the government violated the covenant of good faith and fair dealing, plaintiff fails to show the existence of a contract, let alone the precise contractual terms to which the covenant attached."). Because plaintiffs fail to adequately allege a contract, their remaining allegations sound in tort and are therefore outside the jurisdiction of this court. *Piper*, 90 Fed. Cl. at 506; *see also Pacific Mach., Inc. v. United States*, No. 03-1906, 2005 WL 6112621, at *7 (Fed. Cl. May 2, 2005) ("To satisfy jurisdictional requirements, though, the 'tortious breach of

contract' must be *directly* connected to the government's contractual obligations.").

CONCLUSION

For the reasons set forth above, defendant's motion to dismiss plaintiffs' complaint for lack of subject matter jurisdiction pursuant to RCFC 12(b)(1) is **GRANTED**, and the Clerk is directed to enter judgment dismissing plaintiffs' complaint without prejudice. Plaintiffs' cross-motion for summary judgment pursuant to RCFC 56 is **DENIED** as moot.

Plaintiffs may appeal the Court's judgment to the Court of Appeals for the Federal Circuit within sixty (60) days of the date of entry of judgment. Failure to file a timely notice of appeal will waive the right to an appeal, and the Court's order will be final.

IT IS SO ORDERED.

GEORGE W. MILLER
Judge