# In the United States Court of Federal Claims

No. 05-1355C
Filed February 28, 2007
**NOT TO BE PUBLISHED**

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| HIRSCH FRIEDMAN, | * |
| Plaintiff, | * |
| v. | * |
| THE UNITED STATES, | * |
| Defendant. | * |

**Hirsch Friedman,** Atlanta, Georgia, *pro se*.

**Richard P. Schroeder**, United States Department of Justice, Civil Division, counsel for Defendant.

## MEMORANDUM OPINION AND ORDER

**BRADEN, *Judge***

This case arises out of a May 7, 2002 Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims ("Settlement Agreement"), between the Department of Veteran's Affairs ("VA") and Plaintiff, who is proceeding herein *pro se.*

## I. RELEVANT FACTUAL BACKGROUND.[1]

On August 17, 2000, Plaintiff filed an administrative claim against the VA for medical malpractice. *See* PX A ¶ 1. On May 7, 2002, the parties agreed to settle any "known or unknown" claim, based on acts or omissions giving rise to the administrative claim. *See* PX A ¶ 1 ("Settlement Agreement"). In return, the Government agreed to pay Plaintiff $200,000, "without set off or claim of any nature thereon by, the United States of America, its agents, servants, and employees." *Id.* ¶ 2. The Settlement Agreement also provided that: "The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement." *Id.* ¶ 7. In addition, the Settlement Agreement specified that payment would be made to Plaintiff by a check, drawn against the Treasury of the United States, and delivered to Plaintiff at a particular address. *Id.* ¶ 8.

On July 25, 2002, the VA notified Plaintiff of receipt from the Department of the Treasury of notice of a federal tax levy filed against Plaintiff for unpaid liabilities in the amount of $230,983.12. *See Friedman* v. *United States,* No.1:02-CV-2461-BBM, 2002 WL 31495842, at *1-2. (N.D. Ga. Sept. 24, 2002) ("*Friedman I*").[2] The VA advised Plaintiff that the $200,000 settlement check would be forwarded to the Internal Revenue Service ("IRS"), pursuant to the Department of Treasury's demand. *Id.*[3]

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[1] The facts recited herein were derived from: Plaintiff's December 23, 2005 Original Complaint ("Compl.") and exhibit thereto ("PX A"); Defendant ("Government")'s April 20, 2006 Motion to Dismiss ("Gov't Mot. Dis."); Plaintiff's July 5, 2006 Amended Complaint ("Am. Compl."); Plaintiff's July 5, 2006 Objection to Defendant's Statement of Facts ("Pl. Fact Resp."); Plaintiff's July 5, 2006 Response ("Pl. Resp."); the Government's August 17, 2006 Motion to Dismiss Plaintiff's "Takings Claim" and Reply to Plaintiff's Response to the Government's Motion to Dismiss ("Gov't Reply"); Plaintiff's December 1, 2006 Response to the Government's Motion to Dismiss Plaintiff's "Takings Claim" ("Pl. TC Resp."); the Government's February 2, 2007 Reply to Plaintiff's Response to Defendant's Motion to Dismiss "Takings Claim" and Response to Plaintiff's Cross-Motion ("Gov't TC Reply").

[2] Pursuant to the Internal Revenue Code, where a taxpayer has neglected or refused to pay taxes due, the IRS may collect the amount due by levy, subject to certain procedural requirements. *See* 26 U.S.C. § 6331(a).

[3] Section 6332(a) provides:

> any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights (or discharge such obligation) to the Secretary[.]

26 U.S.C. § 6332(a).

On September 5, 2002, Plaintiff filed a Complaint in the United States District Court for the Northern District of Georgia ("United States District Court") against the VA and the IRS, challenging the imposition of the levy and transfer of the settlement check to the IRS as a breach of the Settlement Agreement.[4] *See Friedman I,* 2002 WL 31495842; *see also Friedman* v. *United States*, No. 1:02-CV-2461-BBM, 2003 WL 22429685 (N.D. Ga. Aug. 6, 2003) ("*Friedman II*"), a*ff'd*, 391 F.3d 1313 (11th Cir. 2004) ("*Friedman III*").

On September 19, 2002, the United States District Court convened a hearing to determine whether the IRS's levy was reasonable. *See Friedman I,* 2002 WL 31495842*; see also Friedman II,* 2003 WL 22429685 at *2. On September 24, 2002, the United States District Court issued an Order holding that "the IRS's imposition of the Levy was 'reasonable under the circumstances.'" *Friedman I,* 2002 WL 31495852 at *8; *see also Friedman II,* 2003 WL 22429685 at *2. The United States District Court also held that, pursuant to 26 U.S.C. § 7429(f), this determination was final. *See Friedman II,* 2003 WL 22429685 at *2.

Thereafter, Plaintiff amended the September 5, 2002 Complaint to include additional defendants and a claim that, because of "[d]efendants' willful and wanton negligence in the treatment of Plaintiff, Plaintiff sustained serious and permanent injuries, and has endured and will endure severe pain, suffering and limitations for the rest of his life." *See Friedman II,* 2003 WL 22429685 at *2.

On August 6, 2003, the United States District Court granted the Government's Motion to Dismiss the Amended Complaint for lack of jurisdiction, holding that the Tucker Act "requires that claims against the United States for amounts in excess of $10,000 founded on contracts with the United States" be brought in the United States Court of Federal Claims. *Id.* at *3. Plaintiff appealed. On December 2, 2004 the United States Court of Appeals for the Eleventh Circuit affirmed the dismissal, "[finding] no error in the district courts's determination that jurisdiction over this action lies in the Court of Claims." *Friedman III,* 391 F.3d at 1315.

## II. PROCEDURAL HISTORY.

On December 23, 2005, Plaintiff filed a Complaint in the United States Court of Federal Claims. Count I alleges breach of the Settlement Agreement and claims that "a sum of money [is] due to the Plaintiff pursuant to a written contract, created as a settlement agreement, between the parties pursuant to 28 U.S.C. §2672 arising out of a claim brought under the United States Federal Tort Claims Act[.]" Compl. ¶ 1. Count II requests that the court "require the Government to return said sum taken illegally." *Id*. ¶ 49. The Complaint seeks damages "in the principle sum of $200,000," as well as specific performance of the Settlement Agreement. *Id.* ¶ 51. In addition, the Complaint demands interest, costs, necessary expenses and attorney's fees incurred in the current

[4] Pursuant to 26 U.S.C. § 7429(b)(1), (2)(A) a taxpayer may bring action in federal district court for judicial review of a levy where the court "shall determine" whether the levy was "reasonable under the circumstances." 26 U.S.C. § 7429(b)(3)(B).

proceeding and "proceedings prior to this court." *Id.* ¶¶ 50-51.

On April 20, 2006, the Government filed a Motion to Dismiss.

On July 5, 2006, Plaintiff filed an Amended Complaint, clarifying that Count II is a claim for the Government "to return said sum illegally taken." Am. Compl. ¶ 49. On the same day, Plaintiff also filed a Response to the Government's Motion to Dismiss and an Objection to the Government's Statement of Facts. On August 17, 2006, the Government filed a Motion to Dismiss Plaintiff's Newly Filed Takings Claim and Reply to Plaintiff's Response to the Government's Previously Filed Motion to Dismiss. On December 1, 2006, Plaintiff filed a Response. On February 2, 2007, the Government filed a Reply and a Response to "Plaintiff's Cross-Motion for Relief, pursuant to RCFC 60(b)."

## III. DISCUSSION.

### A. Jurisdiction.

The jurisdiction of the United States Court of Federal Claims is established by the Tucker Act. *See* 28 U.S.C. §1491. The Act grants the court "jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. §1491(a)(1).

The Tucker Act, however, is merely "a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages . . . the Act merely confers jurisdiction upon it whenever the substantive right exists." *U.S.* v. *Testan*, 424 U.S. 392, 398 (1976). Therefore, in order to pursue a substantive right within the jurisdiction of the Tucker Act, a plaintiff must identify and plead an independent contractual relationship, constitutional provision, federal statute, and/or executive agency regulation that provides a substantive right to money damages. *See Todd* v. *United States*, 386 F.3d 1091, 1094 (Fed. Cir. 2004) ("[J]urisdiction under the Tucker Act requires the litigant to identify a substantive right for money damages against the United States separate from the Tucker Act[.]"); *see also Fisher* v. *United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc) ("The Tucker Act does not create a substantive cause of action; in order to come within the jurisdictional reach and the waiver of the Tucker Act, a plaintiff must identify a separate source of substantive law that creates the right to money damages. In the parlance of Tucker Act cases, that source must be 'money-mandating.'" (internal citations omitted)). [5]

[5] Regarding the money-mandating requirement of the Tucker Act, the United States Supreme Court has held that: "This 'fair interpretation' rule demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity . . . . It is enough, then, that a statute creating a Tucker Act right be *reasonably amenable* to the reading that it mandates a right of recovery in damages. While the premise to a Tucker Act claim will not be 'lightly inferred' . . . a *fair inference*

### B. *Pro Se* Plaintiff Pleading Requirements.

In the United States Court of Federal Claims, the pleadings of a *pro se* plaintiff are held to a less rigid standard than those of the litigants represented by counsel. *See Hughes* v. *Rowe*, 449 U.S. 5, 9 (1980) (*pro se* complaints, "however inartfully pleaded," are held to "less stringent standards than formal pleadings drafted by lawyers" (citing *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972))). It has been the tradition of this court to examine the record "to see if [a *pro se*] plaintiff has a cause of action somewhere displayed." *Ruderer* v. *United States*, 188 Ct. Cl. 456, 468 (1969). Nevertheless, "'[t]his latitude . . . does not relieve a *pro se* plaintiff from meeting jurisdictional requirements.'" *Skillo* v. *United States*, 68 Fed. Cl 734, 739 (2005) (quoting *Bernard* v. *United States*, 59 Fed.Cl. 497, 499, *aff'd*, 98 Fed. Appx. 860 (Fed. Cir. 2004)).

### C. Standard For Decision On A RCFC 12(b)(1) Motion To Dismiss.

A challenge to the "court's general power to adjudicate in specific areas of substantive law . . . is properly raised by a [Rule] 12(b)(1) motion." *Palmer* v. *United States*, 168 F.3d 1310, 1313 (Fed. Cir. 1999); *see also* RCFC 12(b)(1) ("Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter [.]").

When considering whether to dismiss an action for lack of subject matter jurisdiction, the court is "obligated to assume all factual allegations to be true and to draw all reasonable inferences in plaintiff's favor." *Henke* v. *United States*, 60 F.3d 795, 797 (Fed. Cir. 1995). Nonetheless, Plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence. *See Reynolds* v. *Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988) ("[O]nce the [trial] court's subject matter jurisdiction [is] put in question, it [is] incumbent upon [plaintiff] to come forward with evidence establishing the court's jurisdiction.").

### D. Standard For Decision On A RCFC 12(b)(6) Motion To Dismiss.

Dismissal for failure to state a claim upon which relief can be granted under Rule 12(b)(6) "is proper only when a plaintiff can 'prove no set of facts in support of his claim which would entitle him to relief.'" *Adams* v. *United States*, 391 F.3d 1212, 1218 (Fed. Cir. 2004) (quoting *Leider* v. *United States*, 301 F.3d 1290, 1295 (Fed. Cir. 2002)); *see also* RCFC 12(b)(6) ("Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a

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will do." *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 472-73 (2003) (emphasis added). The United States Court of Appeals for the Federal Circuit has recognized, but not resolved, whether the United States Supreme Court, in restating the money-mandating test, may have made it less stringent. *See Fisher*, 402 F.3d at 1173-74 (citing *White Mountain*, 537 U.S. at 472-73).

claim upon which relief can be granted[.]").

When reviewing a motion to dismiss for failure to state a claim upon which relief can be granted, the court "must accept as true all the factual allegations in the complaint, and . . . indulge all reasonable inferences in favor of the non-movant." *Sommers Oil Co.* v. *United States*, 241 F.3d 1375, 1378 (Fed. Cir. 2001) (citations omitted).

### E. The Court's Resolution Of The Government's April 20, 2006 Motion To Dismiss.

#### 1. The United States Court Of Federal Claims Does Not Have Jurisdiction To Adjudicate Plaintiff's Tax Refund Claim.

The initial Complaint states that: "Count II is brought in the alternative to require the IRS to refund said sum illegally taken." Compl. ¶ 49. The Amended Complaint further explains that: "Count II is brought in the alternative to require the Government to return said sum illegally taken." Am. Compl. ¶ 49. The Government argues that Plaintiff's amendment "merely *re-label[s]* his tax refund claim as a takings claim." *See* Gov't Reply at 7 (emphasis added). Accordingly, the Government argues that Plaintiff "has not alleged or shown that the jurisdictional prerequisites for a [f]ederal tax refund suit have been met." *Id.* at 8; *see also* Gov't Mot. Dis. at 13.

The court has determined that Count II of the Amended Complaint fails to plead the requisite jurisdictional facts for a tax refund claim, *i.e.*, the taxpayer must have paid fully any tax due and timely filed a refund claim with the IRS. *Compare* Am. Compl. ¶¶ 49, 51 *with* 26 U.S.C. §§ 6532(a), 7422(a), (1998); 28 U.S.C. § 1346(a)(1); *see also Shore* v. *United States*, 9 F.3d 1524, 1526 (Fed. Cir. 1993) (holding tax refund claims are dismissed where "principal tax deficiency has not been paid in full"). In this case, however, neither the Complaint nor the Amended Complaint states that Plaintiff paid the amount of tax due and also filed a claim with the IRS. *Id*. Accordingly, the court will grant Plaintiff leave to file a Second Amended Complaint, to satisfy Plaintiff's jurisdictional burden, if he is able to do so.

#### 2. The United States Court of Federal Claims Does Not Have Jurisdiction to Adjudicate Plaintiff's Takings Claim.

In the alternative, the Government contends that if Count II is solely considered as a takings claim,[6] it should nevertheless be dismissed. *See* Gov't Reply at 8.

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[6] Whether Plaintiff intended to plead a taking claim is unclear. Plaintiff's Response to the Government's Motion to Dismiss Plaintiff's Newly Filed Takings Claim states:

> Since the check has never been delivered to the Plaintiff, nor endorsed by him he has never received, nor accepted the settlement. Until received and accepted the check obviously, remained the property of the Government. Therefore, there does not

As stated above, the Amended Complaint alleges that the settlement funds were "*illegally* taken" by the Government. *See* Am. Compl. ¶ 49 (emphasis added). The United States Court of Federal Claims has jurisdiction over claims asserted under the Just Compensation Clause of the Fifth Amendment to the United States Constitution. *See Murray* v. *United States*, 817 F.2d 1580, 1583-84 (Fed. Cir. 1987) ("[a]lthough the Claims Court has jurisdiction over a [t]aking claim, the more difficult question is whether the [plaintiff has] stated such a claim in this case"). To invoke the court's jurisdiction, however, the plaintiff must admit that the Government's taking was authorized, because an actionable "taking" can only result from authorized federal actions.[7] *See Blanchette* v. *Connecticut General Ins. Co.*, 419 U.S. 102, 127 (1974) (holding that the federal action at issue must be authorized); *Rith Energy, Inc*. v. *United States*, 247 F.3d 1355, 1365 (Fed. Cir. 2001) ("an uncompensated taking and an unlawful government action constitute 'two separate wrongs [that] give rise to two separate causes of action,' and that a property owner is free either to sue in district court for asserted improprieties committed in the course of the challenged action or to sue for an uncompensated taking in the [United States] Court of Federal Claims"(citations omitted)); *Tabb Lakes, Ltd.* v. *United States*, 10 F.3d 796, 802 (Fed. Cir. 1993) ("[C]laimant must concede the validity of the government action which is the basis of the taking claim to bring suit under the Tucker Act."). Unauthorized acts by federal officials are torts, not takings. *See Smithson* v. *United States*, 847 F.2d 791, 794 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989) (claims based on unauthorized acts (wrongdoing) by the [G]overnment officials sound in tort); *see also* 28 U.S.C. 1491(a) ("the United States Court of Federal Claims shall have jurisdiction upon any claim . . . in cases *not sounding in tort*."(emphasis added)).

Even if Plaintiff were to acknowledge the *legality* of the IRS's actions, as a matter of law, Count II does not allege facts to support a takings claim, because the lawful exercise of the federal tax collection powers is not a taking. *See U.S. Shoe Corp.* v. *United States*, 296 F.3d 1378, 1383 (Fed. Cir. 2002) (ruling that imposition of the federal income tax does not constitute a taking under the Fifth Amendment); *see also Branch ex rel. Me. Nat'l Bank* v. *United States*, 69 F.3d 1571, 1576-77 (Fed. Cir.1995) ("enforcement action [of the constitutional tax assessment], including seizure of the property, could not be challenged as a taking"). Accordingly, Plaintiff's taking claim must be dismissed. *See* RCFC 12(b)(6).

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> appear to actually have been a taking of property, but there has been an interference with the completion of an otherwise valid settlement.

Pl. TC Resp. at 44.

[7] On September 24, 2002, the United States District Court for the Northern District of Georgia issued an order of its determination "that the IRS's imposition of the Levy was 'reasonable under the circumstances,'" and therefore "lawful." *Friedman I,* 2002 WL 31495852, at *8.

### 3. The United States Court Of Federal Claims Does Not Have Jurisdiction To Adjudicate Plaintiff's Claim For Specific Performance.

The Amended Complaint also seeks specific performance of the May 7, 2000 Settlement Agreement. *See* Am Compl. ¶ 50. Specific performance, however, is an equitable remedy not "an incident of or collateral to" a monetary judgment. *See* 28 U.S.C. § 1491(a)(2); *see also Rig Masters, Inc.* v. *United States*, 42 Fed. Cl. 369, 373 (1998) ("It is well established that [the United States Court of Federal Claims] does not have jurisdiction over claims for specific performance." (citing *United States* v. *King*, 395 U.S 1, 3-4 (1969))). Specifically, the court does not have jurisdiction to provide equitable relief when it is the "primary focus of the plaintiff's suit." *Rice* v. *United States*, 31 Fed. Cl. 156, 164 (Fed. Cl. 1994), *aff'd* 48 F.3d 1236 (Fed. Cir. 1995); *see also Brown* v. *United States*, 105 F.3d 621, 624 (Fed. Cir. 1997) ("T]he Tucker Act does not provide independent jurisdiction over such claims for equitable relief."). Accordingly, the court has no jurisdiction to grant specific performance in this case.

### 4. The United States Court Of Federal Claims Does Not Have Jurisdiction To Review The District Court's Levy Determination.

On September 24, 2002, the United States District Court issued an order "that the IRS's imposition of the Levy was 'reasonable under the circumstances.'" *Friedman I,* 2002 WL 31495852, at *8; *see also Friedman II,* 2003 WL 22429685, at *2. Therefore, pursuant to 26 U.S.C. § 7429(f), the judgment of the United States District Court is now final and not reviewable by another court. *See Friedman II,* 2003 WL 22429685*, at *2*; *see also* 26 U.S.C. § 7429(f) ("Any determination made by a court under this section shall be final and conclusive and *shall not be reviewed by any other court*." (emphasis added)). Nevertheless, Plaintiff argues that, as a matter of law, the $200,000 settlement funds, based on "service connected" injuries and disabilities, are not subject to IRS levy and the Internal Revenue Code "does not allow for and specifically excludes the seizure of undelivered mail." Pl. TC Resp. at 1, 2, 3, 4, 12, 40-43 (citing 26 U.S.C. § 6334(5), (10)). The United States Court of Federal Claims, however, does not have jurisdiction to review the District Court's levy determination. *See* 26 U.S.C. § 7429 (f).

Furthermore, pursuant to the doctrine of *res judicata*, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981). The purpose of *res judicata* is to ensure "that there should be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled between the parties." *Id*. at 401 (quoting *Baldwin* v. *Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931)). *Res judicata* applies when "(1) the parties are identical or in privity; (2) the first suit proceeded to a final judgment on the merits; and (3) the second claim is based on the same set of transactional facts as the first." *Parklane Hosiery Co., Inc.* v. *Shore*, 439 U.S. 322, 326 n.5 (1979). Accordingly, under the doctrine of *res judicata*, this court is precluded from reviewing the District Court's levy determination.

### 5. The United States Court of Federal Claims Does Not Have Jurisdiction To Award Costs Incurred In Proceedings In Other Courts.

The Amended Complaint also seeks attorneys fees, costs, and interest thereon incurred in connection with the proceedings in the United States District Court. *See* Am. Compl. ¶ 51. This court does not, however, have jurisdiction to award costs for an action which was dismissed in another court. *See* 28 U.S.C. § 1491.

### 6. Count I Of The Amended Complaint Fails to State A Claim Upon Which Relief Can Be Granted.

The Amended Complaint alleges that the Government breached the Settlement Agreement, because it did not pay Plaintiff, but instead delivered the check to the IRS. *See* Am. Compl. ¶¶ 34, 39, 42, 45-47. Plaintiff claims that the "United States of America expressly agreed that payment of the settlement sum of . . . [$200,000] would be paid to Plaintiff, ' . . . *without set off or claim of any nature thereon by, the United States of America, its agents, servants, and employees*.'" *Id.* ¶ 23; *see also* PX A ¶ 2. Plaintiff also argues that, because 28 U.S.C. § 2672 provides that the authority of the head of a Government department settling a tort claim "shall be final and conclusive on all offices of the Government," the Government is asking the court to afford a special exception for the IRS. *See* Pl. TC Resp. at 4. Plaintiff therefore contends that the VA had a contractual duty not only to pay him the $200,000, but also to prevent the IRS from levying on that payment. *Id*.

The Government counters that Count I fails to state a claim upon which relief can be granted, because, as a matter of law, the VA was not authorized to compromise the IRS's tax claims against Plaintiff, and therefore, "any alleged agreement by the VA to do so is not binding upon the United States." Gov't Mot. Dis. at 11.

The Government is correct. To establish the existence of an enforceable contractual duty, Plaintiff must show that the Government representative entering into the agreement had the authority to bind the Government. *See City of El Centro* v. *United States*, 922 F.2d 816, 820 (Fed. Cir. 1990) ("When the United States is a party . . . the Government representative 'whose conduct is relied upon must have actual authority to bind the government in contract'" (citations omitted)); *see also Trauma Service Group* v. *United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997) ("A contract with the Untied States also requires that the Government representative who entered or ratified the agreement had actual authority to bind the United States."); *Mil-Spec Contractors, Inc.* v. *United States*, 835 F.2d 865, 867 (Fed. Cir. 1997) ("It is well established that a purported agreement with the United States is not binding unless the other party can show that the official with whom the agreement was made had authority to bind the government" (citations omitted)).[8]

[8] It is the responsibility of the contracting party to determine whether the Government representative had the authority to agree to the contractual terms. *See Fed. Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947) ("Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately

As a matter of law, the VA does not have the authority to settle, compromise, waive, or otherwise block IRS claims. Any agreement that purports to do so is invalid. The exclusive method for settling cases arising under the Internal Revenue Code is set forth in Sections 7121 and 7122:

> (a) Authorization. - The Secretary [of the Treasury] may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General or his delegate may compromise any such case after reference to the Department of Justice for prosecution or defense.

26 U.S.C. § 7122(a); *see also Bowling* v. *United States*, 510 F.2d 112, 113 (5th Cir. 1975) ("the provisions for compromising tax cases are found in §§ 7121 and 7122 of the Internal Revenue Code [and] . . . are exclusive and strictly construed); *cf. Botany Worsted Mills* v. *United States*, 278 U.S. 282, 288-89 (1929) (holding that statutes authorizing conclusive agreements and settlements to be made in particular ways and with the approval of designated officers, raise an inference that adjustments or settlements made in other ways are not binding (citations omitted)). The Secretary of the Treasury has in turn delegated authority to administer settlement provisions of the Internal Revenue Code to the IRS Commissioner ("Commissioner") and the Commissioner has delegated that authority to IRS officers and employees. *See* Treas. Reg. 26 C.F.R. §§ 601.202 (1984) and 301.7121-1 (1967). Therefore, the authority to compromise the IRS's claims against Plaintiff was vested exclusively in the Secretary of the Treasury or his/her delegate.

Moreover, the VA is expressly limited by statute to settling *tort* claims. *See* 26 U.S.C. § 7122(a); 28 U.S.C. § 2672; 28 C.F.R. Pt. 14, App. §1(a) (the Secretary of VA only has the authority to adjust, determine, compromise and settle a claim involving the VA, relating to the administrative settlement of *federal tort claims*, if the amount of the proposed adjustment, compromise, or award *does not exceed $200,000* (emphasis added)).

Accordingly, any agreement between Plaintiff and the VA that purports to compromise, settle, waive, or otherwise nullify Plaintiff's federal tax obligations is not lawful or binding against the Government. As such, the Amended Complaint fails to state a claim for breach of contract upon which relief can be granted. *See* RCFC 12(b)(6).

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ascertained that he who purports to act for the Government stays within the bounds of his authority."); *see also Trauma Service Group*, 104 F.3d at 1325 ("Anyone entering into an agreement with the Government takes the risk of accurately ascertaining the authority of the agents who purport to act for the Government, and this risk remains with the contractor even when the Government agents themselves may have been unaware of the limitations on their authority.").

### 7. Plaintiff May Further Amend The Complaint, If Possible, To State A Claim For Breach Of Contract By Misrepresentation.

The Amended Complaint does not allege a claim for breach of contract by misrepresentation. Plaintiff, however, argues in response to the Government's Motion to Dismiss that the Government fraudulently induced him to enter the Settlement Agreement, "because the evidence of negligence was overwhelming and at trial the likelihood of a seven-figure verdict was possible." Pl. TC Resp. at 32. Plaintiff, further argues that the Government "is estopped from claiming that the VA did not have the authority to enter into the [S]ettlement [A]greement," because the IRS entered into "a *sub rosa* agreement with the VA having intended to trick Plaintiff" into accepting the Settlement Agreement, but then diverted the $200,000 check to the IRS. *See* Pl. TC Resp. at 17; *see also* Pl. TC Resp. at 15 ("Plaintiff believes the IRS acted in *pari delicto* with agents of the VA to intentionally mislead the Plaintiff into signing the settlement agreement"); *id.* at 16 (claiming IRS and VA entered into a *sub rosa* agreement "designed to misrepresent their intent to Plaintiff").[9]

In *C.T.A. Inc.* v. *United States,* the predecessor to the United States Court of Appeals for the Federal Circuit held that where claims are "entirely dependent on, and in fact evolve[ ] from the contract[,] . . .[they are] in substance . . . claim[s] for breach of contract by misrepresentation and when the substance of the claim is in contract, subject matter jurisdiction exists under the Tucker Act even if tortious elements also exist." *C.T.A. Inc.* v. *United States*, 44 Fed. Cl. 684, 698 (citations omitted); *see also Gregory Lumber Co.* v. *United States*, 9 Cl. Ct. 503 at 518, 520, 525-26 (1986) (holding tortious breach of contract styled as misrepresentation in the inducement is breach of contract reviewable under Tucker Act).

Accordingly, the court will grant Plaintiff leave to file a Second Amended Complaint, properly to assert such a claim, if he is able. *See D.V. Gonzalez Elect. & General Contractors, Inc*. v. *United States*, 55 Fed. Cl. 447 (2003) (conclusory allegations without any supporting facts cannot withstand a motion to dismiss).

## F. The Court's Resolution Of Plaintiff's Motion For Relief, Pursuant To RCFC 60(b) Motion Is Premature.

Plaintiff also has filed a Motion Pursuant to RCFC 60(b) "to avoid the [Government's] claim asserting that the VA did not have authority to enter into the settlement." Pl. TC Resp. at 16. RCFC 60(b) provides that on "motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding" for mistake, newly discovered evidence, fraud or any other reason justifying relief. *See* RCFC 60(b). The motion must be made within a reasonable time or for mistake, newly discovered evidence, or fraud, not more than one year after the judgment. *Id.*

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[9] Plaintiff also claims that the Government "comes into this court with unclean hands; removing from it the ability to ask for the equitable relief to which it claims it is entitled." Pl. TC Resp. at 37. This doctrine, however, is inapplicable since the Government has not asserted any equitable claim in this court.

Plaintiff's motion is premature and dismissed, without prejudice to be refiled at an appropriate time, if the circumstances so warrant.

## IV. CONCLUSION.

For the aforementioned reasons, the Government's Motion to Dismiss the Amended Complaint is granted-in-part and denied-in-part. Plaintiff is hereby granted 30 days leave to file a Second Amended Complaint to assert, if he is able, a claim for breach of contract by misrepresentation and the requisite facts to establish the court's jurisdiction over the tax refund claim, pursuant 26 U.S.C. §§ 6532(a), 7422(a) and 28 U.S.C. § 1346(a)(1). *See* RCFC 15(a).

**IT IS SO ORDERED.**

**SUSAN G. BRADEN**
**Judge**