In the United States Court of Federal Claims

No. 08-406 T

(Filed July 2, 2009)

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JAY PETERSON, *Pro Se*,	*	
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Plaintiff,	*	Tax; Refund Claim; Breach of
	*	Contract Claim; 26 U.S.C.
v.	*	§ 7422(a) (2006); 28 U.S.C.
	*	§ 1346(a)(2) (2006); RCFC
THE UNITED STATES,	*	12(b)(6); *Res Judicata.*
	*	
Defendant.	*	
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Jay Peterson, Provo, UT, *pro se.*

Carl D. Wasserman, United States Department of Justice Tax Division, with whom were *John A. DiCicco*, Acting Assistant Attorney General, *Steven I. Frahm*, Chief, Court of Federal Claims Section, *G. Robson Stewart*, Assistant Chief, Court of Federal Claims Section, Washington, D.C., for defendant.

OPINION

Bush, *Judge.*

Before the court is defendant's motion to dismiss plaintiff's amended complaint pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC). The motion has been fully briefed. Oral argument was neither requested by the parties nor required by the court. For the reasons set forth

herein, defendant's motion is granted.

BACKGROUND[1]

Plaintiff Jay Peterson is seeking a tax refund in the amount of $343,936 for the tax year 2001.[2] Compl. at 8. The tax payment of $343,936 was made on behalf of plaintiff by a court-appointed receiver as reflected in *Federal Trade Commission v. U.S. Hotline, Inc*., No. 2:93-CV-00444-DB (D. Utah filed May 10, 1993). *See* Def.'s Mot. Ex. 2 at 3 (Memorandum Opinion & Order, *Peterson v. United States*, No. Civ. 2:04-CV-962BSJ, 2006 WL 1184735 (D. Utah May 2, 2006). This Federal Trade Commission (FTC) litigation commenced on May 10, 1993, when the FTC filed a complaint against plaintiff and his subchapter S corporations in the United States District Court for the District of Utah for alleged violations of the Federal Trade Commission Act. Def.'s Mot. Ex. 2 at 3. On June 15, 1993, the district court issued an "Order for Preliminary Injunction With Asset Freeze, Appointment of a Receiver, and Other Relief." *Id*.

As a result of the June 15th Order, the district court appointed a receiver for the pending FTC litigation. Def.'s Mot. Ex. 2 at 3. The receiver gained control of more than $5 million in assets belonging to Mr. Peterson and his companies, which were subject to administration by the receiver as a result of the pending FTC litigation. *Id*. On December 7, 1993, Mr. Peterson attempted to regain control of the receivership assets by filing a petition for relief under Chapter 11 of the

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[1]/ The court makes no findings of fact in this opinion. The facts recited here are taken from the amended complaint, defendant's motion to dismiss, and plaintiff's brief. The court relies largely on defendant's motion to dismiss because plaintiff's amended complaint is not organized in a manner which would aid the court's understanding of the chronology of the factual events. For the purposes of resolving defendant's motion, the facts set forth are undisputed unless otherwise indicated.

[2]/ The actual tax refund amount claimed on Mr. Peterson's Forms 1040 and 1041 is $343,935.74. (See attachments to the Original Complaint filed in this court on June 2, 2008). In various parts of the record, the court notes that there is a minor discrepancy in the amount of the tax refund claimed by plaintiff. The court chooses to rely on plaintiff's Forms 1040 and 1041 which reflect the tax refund as $343,935.74. Thus, the court, in this opinion, will refer to the tax refund amount as $343,936.

Bankruptcy Code. *Id*. On March 4, 1994, Mr. Peterson's subchapter S corporations also filed Chapter 11 bankruptcy petitions. *Id*. By order entered May 5, 1994, the district court stayed all bankruptcy proceedings, and retained exclusive jurisdiction of the receivership assets. *Id*. at 3-4.

Subsequently, on April 28, 1995, Jay Peterson, his subchapter S corporations, the FTC, the IRS, the Utah State Tax Commission, and the court-appointed receiver entered into a settlement agreement with respect to the administration of the receivership assets. Def.'s Mot. Ex. 2 at 4. The settlement agreement stated, among other things, that residual distributions from the receivership estate "shall be taxable to Jay Peterson individually." Compl. Ex. A ¶ 9.3 (Settlement Agreement). Paragraph 9.3, in pertinent part, provided:

> In the event that the value of the residual assets of the Receivership Estate (including the Kaleidoscope Home) is greater than the value of the Kaleidoscope Home (which has an agreed value of $250,000), the assets of the Receivership Estate in excess of the value of the Kaleidoscope Home shall be distributed to Jay Peterson (the "Residual Distribution"), subject to the withholding of taxes by the Receiver provided for herein, and all such Residual Distributions shall be taxable to Jay Peterson individually. In the event that the value of the residual assets (including the Kaleidoscope Home) is less than the value of the Kaleidoscope Home, the residual assets of the Receivership Estate shall be distributed to Jay Peterson tax free.

Id. Paragraph 9.4 of the settlement agreement stated that the receiver "shall" withhold funds from any residual distribution made to plaintiff, and "shall" utilize those funds to pay taxes directly to the IRS and the Utah State Tax Commission. Compl. Ex. A ¶ 9.4. Paragraph 9.4 further stated that Mr. Peterson was required to report the amount of any residual distribution on his tax returns, and that he retained the rights provided by law to contest his income tax liability. *Id*.

In 2001, pursuant to the settlement agreement, the receiver made a residual distribution to plaintiff in the amount of $768,960, but withheld $343,936 and paid that amount to the IRS in accordance with the settlement agreement. Def.'s Mot. Ex. 2 at 6.

On April 15, 2002, plaintiff filed a personal income tax return on Form 1040 and a tax return for his bankruptcy estate on Form 1041 for the tax year 2001. *Id*. Accompanying the two tax return forms were two other documents, one document entitled "Disclosure Statement," and another document entitled, "Refund Claim."[3] Def.'s Mot. at 8. Mr. Peterson failed to report the residual distribution of $768,960 as income on his tax returns as required by the settlement agreement. *Id*. at 4. In fact, both tax return forms claimed -0- income and reported a refund due in the amount of $343,936. *Id*. After Mr. Peterson was informed by the IRS that his tax return forms could not be located, plaintiff re-filed both returns (Forms 1040 and 1041) on October 17, 2003. Def.'s Mot. at 4.

When the IRS failed to pay Mr. Peterson any of the refund amount claimed by plaintiff in his 2001 tax return forms, Mr. Peterson filed suit on October 15, 2004 against the IRS in the United States District Court for the District of Utah, (Utah district court), claiming a refund of $343,936. Def.'s Mot. Ex. 1 (Utah Compl.). In that lawsuit, Mr. Peterson claimed that "[t]he court should hold that plaintiff is entitled to a refund of the full amount of the estimated tax payment in the amount of $343,936 paid to the Internal Revenue Service in 2001, together with applicable interest thereon." Utah Compl. ¶ 13. On May 2, 2006, the Utah district court rejected plaintiff's tax refund claim and granted defendant's motion for summary judgment.[4] Def.'s Mot. Ex. 2 at 22. The Utah district court stated that Mr. Peterson was "bound by the terms of his Settlement Agreement, including its treatment of the Receiver's residual distribution for tax purposes." *Id*. at 21. The Utah district court further stated that "[t]he United States is correct that Peterson is precluded from claiming a refund of estimated taxes withheld from that

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[3]/ As previously discussed, the Forms 1040 and 1041 were attached to Mr. Peterson's Original Complaint filed in this court on June 2, 2008. Attached to those forms are the two referenced documents: (1) the "Disclosure Statement," and (2) the "Refund Claim."

[4]/ The Utah district opinion is reported at *Peterson v. United States*, No. Civ. 2:04-CV-962BSJ, 2006 WL 1184735 (D. Utah May 2, 2006).

residual distribution on grounds that are inconsistent with the terms of the Settlement Agreement . . . ." *Id*. Plaintiff appealed the Utah district court's decision, and on August 14, 2007, the United States Court of Appeals for the Tenth Circuit upheld the lower court decision.[5] Def.'s Mot. Ex. 4 at 6-7.

During the litigation before the Utah district court, plaintiff pursued administrative remedies with the IRS, seeking a refund of the $343,936. The IRS responded on June 2, 2006, disallowing the claim for refund on the basis that the claim was "frivolous" and had "no legal basis." [6] Compl. ¶ 3.

Despite the unfavorable outcome from the IRS, the Utah district court and the Tenth Circuit, Mr. Peterson pursued the same tax refund claim of $343,936 before the United States Tax Court. Def.'s Mot. Ex. 5. On August 22, 2007, plaintiff filed an amended petition with the Tax Court requesting that his underlying tax liability for 2001 be refunded in whole or part, and that interest be paid on the refund from October 1, 2001. The Tax Court held that it had no jurisdiction to hear plaintiff's case, and thus denied plaintiff's motion for summary judgment. Def.'s Mot. Ex. 6 at 5.

Now Mr. Peterson is before this court seeking the same claim for refund in the amount of $343,936. Compl. at 8. Plaintiff filed suit in this court on June 2, 2008. Following this court's November 26, 2008 Order, the parties were given the opportunity to start with a "clean slate" so as to argue "their points of view in concise, well-organized and well-researched pleadings and briefs." Order of November 26, 2008. Thus, the court permitted plaintiff until December 22, 2008 to file an amended complaint. *Id*.

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[5]/ The Tenth Circuit opinion is reported at *Peterson v. United States*, 239 Fed. Appx. 428 (10th Cir. 2007).

[6]/ Plaintiff states that he appealed "a related penalty claim" before the Appeals Division of the IRS in Denver. Compl. ¶ 4. From that statement, Mr. Peterson then goes on to assert that in September 2006, the Appeals Division of the IRS reversed the IRS' rationale for the denial of plaintiff's refund claim. Neither party has provided the court with a copy of this putative decision, nor have the parties provided briefing on this matter. Accordingly, the court will not give further consideration to this unsubstantiated assertion by plaintiff.

As a result of this court's Order dated November 26, 2008, the current filings before the court include Plaintiff's First Amended Complaint (Compl.), filed January 7, 2009, Defendant's Motion to Dismiss the Amended Complaint (Def.'s Mot.), filed January 19, 2009, Plaintiff's Response to Motion to Dismiss the Amended Complaint (Pl.'s Opp.), filed February 3, 2009, Reply of the United States to Plaintiff's Response to the United States's Motion to Dismiss the Amended Complaint (Def.'s Reply), filed March 10, 2009, Pl.'s Reply to Reply (Pl.'s Sur-Reply), filed March 31, 2009, and Reply of the United States to Plaintiff's Sur-Reply to the United States's Motion to Dismiss the Amended Complaint (Def.'s Sur-Reply), filed April 1, 2009.

In his amended complaint, plaintiff asserts two counts: (1) claim for tax refund in the amount of $343,936 plus interest, and (2) breach of contract. In Count I, plaintiff asserts the same claim for refund litigated in the Utah district court in the amount of $343,936. Compl. ¶¶ 1-8. In Court II, plaintiff asserts that defendant has breached the terms of the settlement agreement by refusing to refund plaintiff $343,936. *Id*. ¶¶ 9-25. For relief, plaintiff seeks judgment against the IRS in "Count 1 for the amount of [$343,936] along with compounded interest from October 1, 2001 and in Count II requests judgment in the amount of $60,843,935 and interest." *Id*. at 8.

DISCUSSION

I. *Pro Se* Litigants

Pro se plaintiffs are entitled to a liberal construction of their pleadings. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972) (requiring that allegations contained in a *pro se* complaint be held to "less stringent standards than formal pleadings drafted by lawyers"). In that regard, the court has examined the complaint and briefs thoroughly and has attempted to discern all of plaintiff's legal arguments. However, while "[t]he fact that [a plaintiff] acted *pro se* in the drafting of his complaint may explain its ambiguities, . . . it does not excuse its failures, if such there be." *Henke v. United States*, 60 F.3d 795, 799 (Fed. Cir. 1995). In other words, the leniency afforded to a *pro se* litigant with respect to mere formalities

does not relieve the burden to meet jurisdictional requirements. *Kelley v. Sec'y, U.S. Dep't of Labor*, 812 F.2d 1378, 1380 (Fed. Cir. 1987); *Biddulph v. United States*, 74 Fed. Cl. 765, 767 (2006).

II. Jurisdiction

Pursuant to the Tucker Act, the United States Court of Federal Claims has 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) (2006). The Tucker Act, however, "does not create any substantive right enforceable against the United States for money damages. The Court of Claims has recognized that the Act merely confers jurisdiction upon it whenever the substantive right exists." *United States v. Testan*, 424 U.S. 392, 398 (1976) (citation omitted). A plaintiff coming before the United States Court of Federal Claims, therefore, must also identify a separate provision of law conferring a substantive right for money damages against the United States. *Todd v. United States*, 386 F.3d 1091, 1094 (Fed. Cir. 2004).

In the present case, plaintiff seeks a tax refund for the 2001 tax year. The Court of Federal Claims has jurisdiction over tax refund claims pursuant to 26 U.S.C. § 7422 (2006), 28 U.S.C. § 1346(a)(1) (2000) and 28 U.S.C. § 1491(a)(1) (2006). *Foreman v. United States*, 60 F.3d 1559, 1562 (Fed. Cir. 1995). Accordingly, the court has jurisdiction over Count I of the complaint. The Tucker Act provides jurisdiction over breach of contract claims in this court, 28 U.S.C. § 1491(a)(1), and thus the court has jurisdiction over Count II of the complaint.

III. Motion Filed under RCFC 12(b)(6)

Defendant asks that plaintiff's amended complaint be dismissed for failure to state a claim upon which relief can be granted, a request which is governed by RCFC 12(b)(6). *White & Case LLP v. United States*, 67 Fed. Cl. 164, 168 (2005). It is well-settled that a complaint should be dismissed under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." *Lindsay v.*

United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002). When considering a motion to dismiss under this rule, "the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800, 814-15 (1982). The court must therefore inquire whether the complaint meets the "plausibility standard" recently described by the United States Supreme Court, *i.e.*, whether it adequately states a claim and provides a "showing [of] any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1968-69 (2007).[7]

IV. Plaintiff's Refund Claim is Barred by the Principles of *Res Judicata*

As previously discussed, plaintiff filed this action seeking a tax refund of $343,936 plus interest for the 2001 tax year. The government asserts that Mr. Peterson's claim for refund should be barred by *res judicata* because "the essence

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[7]/ In his sur-reply filed March 31, 2009, plaintiff raises the issue of whether defendant's 12(b)(6) motion should be converted to a motion for summary judgment because defendant presented matters outside the pleadings in the briefing of its motion to dismiss. *See* Pl.'s Sur-Reply at 2. The court has reviewed defendant's motion to dismiss, including its attachments, and has determined that it is not necessary to convert defendant's 12(b)(6) motion to a summary judgment motion. It is well-settled that a court, when dealing with a 12(b)(6) motion, "'is not limited to the four corners of the complaint'" and it may also consider "'matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items, appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned without converting the motion into one for summary judgment.'" *Kawa v. United States*, 77 Fed. Cl. 294, 306 (2007) (quoting 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (3d ed. 2004); *see also Lynch v. Bd. of State Exam'rs of Electricians*, 218 F. Supp. 2d 3, 7 n.7 (D. Mass. 2002) (holding that the court on a 12(b)(6) motion may consider plaintiff's inclusion of the results of state court proceedings in the complaint); *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995) ("In deciding whether to dismiss a claim under Fed. R. Civ. P. 12(b)(6), a court may look beyond the plaintiff's complaint to matters of public record.").

Here, defendant included the complaint and court decisions from the Utah district court and the United States Tax Court. Defendant has also attached the IRS' letter dated June 2, 2006 disallowing plaintiff's claim for refund. The court regards these documents as either matters of public record or documents integral to plaintiff's claim for refund. Thus, the court concludes that a 12(b)(6) motion is the appropriate vehicle to argue for the dismissal of plaintiff's claim for refund.

of [plaintiff's] complaint before this Court is identical to the essence of the complaint he filed in Utah in 2004." Def.'s Mot. at 3. The government's overarching argument is as follows:

> Peterson ultimately filed suit against the United States in the United States District Court for the District of Utah claiming a refund of [$343,936]. As discussed in detail below, the federal district court in Utah rejected Peterson's arguments and dismissed the complaint with prejudice. Peterson's current suit before this Court seeking a refund of his 2001 taxes in the amount of [$343,936] plus interest is an attempt to relitigate those issues. This litigation involves the same parties that participated in the earlier case that reached a judgment on the merits based on the same set of transactional facts.

Id. at 4. Because plaintiff's claim for refund is based on the same facts as the Utah district court case, the government asserts that this court should dismiss Mr. Peterson's claim on *res judicata* grounds for failure to state a claim upon which relief may be granted. Mr. Peterson, on the other hand, makes several arguments against this court's application of *res judicata*. Pl.'s Opp. at 1-2. Plaintiff maintains that defendant has not satisfied the elements of *res judicata* to warrant dismissal of his refund claim. The court has reviewed all of Mr. Peterson's arguments and concludes that defendant has successfully demonstrated that plaintiff's claim for refund is barred by *res judicata*.

Under 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). Application of the *res judicata* doctrine ensures "'that there 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 as between the parties.'" *Id*. at 401 (quoting *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931)). In sum, the doctrine of *res judicata* "precludes litigants from contesting matters that they have already had a full and fair opportunity to litigate, protects defending parties from the expense of

duplicitous litigation, conserves judicial resources, and minimizes the possibility of inconsistent decisions by multiple forums asked to resolve the same matter." *Tindle v. United States*, 56 Fed. Cl. 337, 345 (2003) (citing *Montana v. United States*, 440 U.S. 147, 153-54 (1979)).

In order for a party to prevail on a defense of *res judicata*, the party must prove that: "(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." *Ammex, Inc. v. United States*, 334 F.3d 1052, 1055 (Fed. Cir. 2003) (citations omitted). In the present case, defendant has proved all three elements of *res judicata*.

A. The Parties are Identical or in Privity

It is undisputed that the first element of *res judicata* has been met. The parties, Mr. Peterson and the United States, are the same as the parties in the first action before the Utah district court. Thus, defendant has satisfied the first element of *res judicata.*

B. The First Suit Proceeded to a Final Judgment on the Merits

Plaintiff asserts that the first litigation of his refund claim in the Utah district court did not proceed to a final judgment on the merits. Specifically, plaintiff argues that the Utah district court's decision was not a final judgment on the merits because that court failed to issue a ruling on the deductions claimed by Mr. Peterson in the tax return documents submitted to the IRS on April 15, 2002, and again on October 17, 2003. Pl.'s Opp. at 2-5. Plaintiff's argument is as follows:

> The actual decision necessary for its holding made by both the District and Tenth Circuit courts was that this pro se taxpayer must repeat his lengthy administrative Refund Claim word for word in the body of the Complaint so that it appears <u>twice</u> in the pleadings before it is adequate notice to the United States. The District

> Court decided that the complaint was inadequate and the Tenth Circuit affirmed with the statement on page 5, DOJ exhibit 4, that, "Peterson's attachment to his complaint of the refund claim he submitted with his 2001 tax return was insufficient to put the United States on notice that he was arguing *in this action* that he was entitled to deductions for 2001."

Id. at 4-5.

In response, defendant argues that the second element of *res judicata* is satisfied because plaintiff's first suit in the Utah district court proceeded to a final judgment on the merits. Defendant asserts that on October 14, 2004, plaintiff filed a complaint with the Utah district court seeking a refund of the full amount of the estimated tax payment in the amount of $343,936 paid to the IRS in 2001, together with applicable interest. *See* Utah Compl. ¶ 13. Defendant contends that Mr. Peterson lost that lawsuit on the merits, and the lower court's decision was affirmed on August 10, 2007 by the United States Court of Appeals for the Tenth Circuit. Def.'s Mot. at 7. Thus, defendant concludes that "[plaintiff's] first suit was therefore adjudicated on the merits, heard on appeal, is binding and is final." *Id*.

Defendant further contends that the Utah district court's refusal to rule on certain deductions in plaintiff's 2001 refund claim does not mean that Mr. Peterson's claim was not heard on the merits. Def.'s Reply at 2. Defendant contends that Mr. Peterson had the opportunity to litigate the deductions in the first proceeding, but failed to do so. *Id*. at 2-5. Therefore, defendant asserts Mr. Peterson cannot now raise the same deduction issues related to his 2001 tax refund claim before this court:

> Peterson explicitly brought a "tax refund" suit for the 2001 tax year in Utah. Rather than argue the validity of his alleged deductions at the appropriate time, he decided *not* to argue that he was entitled to those deductions, choosing instead to pursue other aspects of his refund

> claim. Judge Jenkins devoted three pages of his opinion to Peterson's decision to forgo discussing itemized deductions. As Judge Jenkins explained, Peterson did not raise any issue regarding specific deductions in his complaint or summary judgment motion, and did not raise any issue regarding specific deductions until court inquiry at the summary judgment hearing. . . . Peterson had the opportunity to assert all bases of his tax refund suit for tax year 2001 in his refund suit for that year. Now that Peterson lost his 2001 refund suit, he brings it again - attaching the very same refund claim he previously brought before the Court in Utah.

Id. at 2-3 (citations omitted). Defendant thus maintains that *res judicata* also precludes Mr. Peterson from raising the deduction issues in this subsequent litigation. *See* Def.'s Reply at 2.

Defendant's argument must prevail for two reasons. First, defendant is correct that the earlier litigation before the Utah district court resulted in a final judgment on the merits with respect to plaintiff's refund claim. Relying on the settlement agreement that Mr. Peterson had signed in 1995, Compl. Ex. A, the Utah district court held that plaintiff was bound by the terms of the settlement agreement, and the IRS was under no obligation to refund plaintiff $343,936 for tax year 2001. Def.'s Mot. Ex. 2 at 20-21. On May 2, 2006, as previously discussed, the Utah district court denied plaintiff's motion for summary judgment, dismissing the case with prejudice. Def.'s Mot. Ex. 3 (ordering "that judgment be entered in favor of the defendant and the plaintiff's cause of action is dismissed with prejudice"*).* Dismissal with prejudice is a final decision on the merits for *res judicata* purposes. *See Scott Aviation v. United States*, 953 F.2d 1377, 1378 (Fed. Cir. 1992) ("A dismissal with prejudice effectively renders an adjudication on the merits."); *Simons v. United States*, 74 Fed. Cl. 709, 714 (2006) ("'It is clear that a stipulation of dismissal with prejudice, or, for that matter, a dismissal with prejudice at any stage of a judicial proceeding, normally constitutes a final judgment on the merits which bars a later suit on the same cause of action.'" (quoting *Astron Indus. Assoc., Inc. v. Chrysler Motors Corp*., 405 F.2d 958, 960 (5th Cir. 1968))); *see also Fernandez-Montes v. Allied Pilots Ass'n,* 987 F.2d 278,

284 (5th Cir. 1993) (stating that a dismissal designated "with prejudice" is usually regarded as an adjudication on the merits for purposes of *res judicata*). Accordingly, the Utah district court's Memorandum Opinion and Order, filed May 2, 2006, was a final judgment on the merits for *res judicata* purposes, and this court is bound by that decision.[8]

Second, defendant is correct that Mr. Peterson should have raised any deduction claim in the earlier litigation. Mr. Peterson's failure to raise his deduction claim in the earlier litigation barred the claim from being raised before this court under the doctrine of *res judicata*. It is well settled that the doctrine of *res judicata* precludes a party from bringing a claim that was, or should have been raised in a prior litigation. *Carson v. Dep't of Energy*, 398 F.3d 1369, 1375 n.8 (Fed. Cir. 2005) (stating that *res judicata*, or claim preclusion, "refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit"); *Case, Inc. v. United States*, 88 F.3d 1004, 1011 (Fed. Cir. 1996) (stating that *res judicata* "prevents a party from relitigating the same claims that were or could have been raised before"); *Rood v. United States*, 63 Fed. Cl. 213, 216 (2004) ("This Court and the Federal Circuit have also recognized that *res judicata* 'extends beyond those causes of action expressly included by the plaintiff in his claim to cover causes of action which were not but *should* have been raised in the prior litigation.'" (quoting *Brown v. United States*, 3 Cl. Ct. 31, 41 (1983))) (other citations omitted).

In the instant case, the Utah district court dismissed plaintiff's deduction claim on the basis that it had not been properly brought before the district court. The record shows, as Judge Jenkins explained, that plaintiff did not properly plead the elements of his deduction claim in the first proceeding. Instead, plaintiff attempted to raise the deduction issues, reflected in documents attached to his Utah district court complaint, without having first alleged them on the face of the complaint, or having requested relief related to those deductions:

> Neither Peterson's Complaint nor his own motion for

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[8]/ It is also well-settled that the Court of Federal Claims lacks authority to review decisions by federal district or federal appellate courts. *See Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994) ("[T]he Court of Federal Claims does not have jurisdiction to review the decisions of district courts . . . . ").

> summary judgment raised the question of deductions or requested a refund of all or part of the $343,936 at issue based upon the adjustment of his tax liability for 2001 to account for valid and lawful deductions or credits.

Def.'s Mot. Ex. 2 at 19. Thus, the Utah district court concluded by stating that:

> Under the terms of the Settlement Agreement, Peterson "retains the rights provided by law to contest his income tax liability," by claiming valid deductions, tax credits, and the like, but he has not pleaded such a contest in his proceeding, and the questions of which deductions he may rightfully claim, what his net tax liability for 2001 may be, and whether he is entitled to a refund of part or all of the [$343,936] *on that basis*, are not before this court in this proceeding.

Id. at 20-21 (citation omitted).[9]

The Tenth Circuit affirmed the Utah district court's decision on all grounds, stating that the district court did not err in refusing to consider plaintiff's claim for deductions:

> [N]owhere in Peterson's complaint is there any claim that his taxes for 2001 were improperly calculated and/or that he was entitled to deductions for that year. Peterson's attachment to his complaint of the refund claim he submitted with his 2001 tax return was insufficient to put the United States on notice that he was arguing *in this action* that he was entitled to deductions for 2001. The district court did not err in refusing to consider this matter where Peterson argued it for the first time at the hearing on the cross motions for summary judgment.

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[9]/ The Utah district court notes in its Memorandum Opinion and Order filed May 2, 2006 that plaintiff did concede during the February 23rd hearing "that some of those deductions were in fact doubtful or even invalid." Def.'s Mot. Ex. 2 at 19.

Def.'s Mot. Ex. 4 at 4-5. In light of the Utah district court's decision and the Tenth Circuit's affirmance thereof, this court finds that Mr. Peterson's claim for refund has been adjudicated on the merits. Furthermore, plaintiff's argument that the Utah district court's refusal to hear his arguments on entitlement to deductions obviated that court's final judgment on the merits of the case for purposes of *res judicata* is wholly without merit. The Utah district court's decision on plaintiff's refund claim satisfies the second element required for *res judicata*, *i.e.*, that a first suit proceeded to a final judgment on the merits. Mr. Peterson's unheard claim for deductions was a misstep on the part of plaintiff, inasmuch as that was a claim which should have been brought before the Utah district court at the time plaintiff's refund claim was heard. Plaintiff's failure to properly present his deduction claim before the Utah district court, as previously discussed, in no way obstructs defendant's satisfaction of the second element necessary to demonstrate *res judicata*, and this court rules that the government has succeeded in that regard.

C. The Second Claim is Based on the Same Set of Transactional Facts as the First Action

Finally, the government argues that the third element of *res judicata* is satisfied because the present case "is essentially a carbon-copy of [plaintiff's] prior claim." Def.'s Mot. at 7. Defendant argues that the basis for Mr. Peterson's current claim is that the IRS has still not paid plaintiff's refund claim for $343,936 with interest for the 2001 tax year. Compl. ¶ 5. To support his claim for refund, plaintiff relies on tax return Forms 1040 and 1041, and two documents entitled "Disclosure Statement" and "Refund Claim." The document entitled "Refund Claim" is referenced in plaintiff's Forms 1040 and 1041. These documents are attached to plaintiff's original complaint filed in this court on June 2, 2008.

Defendant asserts that Mr. Peterson relied on identical documents in the Utah district court litigation. Def.'s Mot. at 9. In that lawsuit, plaintiff filed his Utah complaint on October 15, 2004, and attached the same documents to the Utah complaint: Forms 1040 and 1041, the Disclosure Statement and the Refund Claim. *Id*. Defendant further asserts that Mr. Peterson is seeking the same relief in the present action as he did in the Utah district court lawsuit:

> An examination of the prior litigation in the District of Utah demonstrates that Peterson is seeking to relitigate

> the very issues he raised or could have raised previously. . . . Specifically, Plaintiff's 2004 suit challenged the requirement of a settlement agreement Peterson had reached with the Federal Trade Commission requiring him to report on his tax returns a residual distribution upon the termination of a receivership as income, with the bankruptcy receiver withholding taxes and paying the funds directly to the IRS. This became the basis for his refund suit in Utah, and Peterson sought $343,936, "representing the total amount of federal income taxes overpaid by Plaintiff for calendar year 2001, together with applicable interest." This is the same claim Peterson presents in this suit.

Id. (citations omitted). Thus, the government contends that *res judicata* should bar plaintiff's claim because it is based on the same set of transactional facts as the prior litigation.

Mr. Peterson, however, does not accept the assertion that his present claim for refund is similar to that adjudicated in the Utah district court. Mr. Peterson alleges that *res judicata* cannot apply because the current action has "several important factual assertions that occurred *after* the judgment was entered in the first lawsuit by Judge Jenkins on May 1, 2006." Pl.'s Opp. at 6. These new factual assertions that allegedly form the basis of plaintiff's current claim are as follows:

> They include the IRS denial of Refund Claim and AGREEMENT to litigate the Refund Claim in the Court of Federal Claims in its letter of June 2, 2006. The Appeals Division decision reversing the IRS rationale for refund claim denial in September of 2006, and the grossly illegal 2001 tax assessment on or about October 10, 2006.

Id. at 6. Mr. Peterson concludes that these "later occurring transactional facts radically change the nature of taxpayer's claim," barring the application of *res judicata*. *Id*. In rebuttal, the government argues that plaintiff's argument that the refund claim is based on "later occurring transactional facts" is an attempt to mislead the court. Def.'s Reply at 5. Defendant asserts that Mr. Peterson's claim

for refund is based on the same transactional facts as the 2004 Utah district court complaint. *Id*.

To determine whether two causes of action have the same transactional facts, the United States Court of Appeals for the Federal Circuit looks to the Restatement (Second) of Judgments § 24 for guidance. *See Ammex, Inc. v. United States*, 334 F.3d 1052, 1056 (Fed. Cir. 2003) (noting that the Federal Circuit is guided by Restatement (Second) of Judgments § 24 to analyze the transactional facts in a case); *see also Philips/May Corp. v. United States*, 524 F.3d 1264, 1271 (Fed. Cir. 2008) (same); *Williams v. United States*, 86 Fed. Cl. 594, 601 (2009) (same). Section 24(2) of the Restatement (Second) of Judgments provides:

> What factual grouping constitutes a "transaction," and what groupings a "series," are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Restatement (Second) of Judgments § 24(2) (1982). Relying on the Restatement, the term "transaction" is defined as the "'core of operative facts,'" the "'same operative facts,'" or the "'same nucleus of operative facts,'" and "'based on the same, or nearly the same factual allegations.'" *Ammex*, 334 F.3d at 1056 (quoting *Herrmann v. Cencom Cable Assocs., Inc*., 999 F.2d 223, 226 (7th Cir. 1998)) (other citations omitted).

The court finds defendant's argument persuasive. A review of the Utah district court complaint and the complaint in the present action reveals that the Court of Federal Claims is faced with the same claim adjudicated in the Utah district court. Plaintiff, in essence, has made the same factual allegations and sought the same remedies as in his prior suit before the Utah district court. In his suit before the Utah district court, Mr. Peterson sought a refund claim in the amount of $343,936 based on his allegation that he filed Forms 1040 and 1041, as well as documents entitled "Disclosure Statement," and "Refund Claim" with the IRS on April 15, 2002, to the attention of Shelley Dockstader. Utah Compl. ¶ 6. For relief, plaintiff requested, " judgment against Defendant in the amount of $343,936, representing the total amount of federal income taxes overpaid by Plaintiff for calendar year 2001, together with applicable interest thereon until

paid." *Id*. at 6.

In the present action, plaintiff seeks a refund in the amount of $343,936 based on the fact that "[o]n April 15, 2002, taxpayer filed timely his 1040 income tax return, Disclosure Statement, and Refund Claim for $343,936 with IRS employee Shelley Dockstader." Compl. ¶ 2. Like the first action, plaintiff also requests a "judgment against the United States in Count I in the amount of [$343,936] along with compounded interest from October 1, 2001." Compl. at 8. In both lawsuits, Mr. Peterson's refund claim is based on the same transactional facts. Mr. Peterson has alleged that he filed tax return Forms 1040 and 1041, with accompanying documents, on April 15, 2002, seeking a refund in the amount of $343,936, and he has requested relief in that amount with interest.

Therefore, Mr. Peterson's assertions that "later transactional facts" change the nature of his claim in this action are unavailing. It is true that the IRS disallowed plaintiff's 2001 refund claim on June 2, 2006, and the Utah district court judgment was entered on May 2, 2006. However, these facts do not alter the court's finding that the current suit is based on the same transactional facts as the prior suit in the Utah district court.

Additionally, plaintiff's contention that the IRS' disallowance letter of June 2, 2006 was an "agreement" between the IRS and Mr. Peterson such that plaintiff could bring a lawsuit against the IRS, is simply untenable. The disallowance letter merely informed plaintiff that his 2001 tax refund claim was denied, and that if he did not agree with the IRS decision, "[he] may file suit to recover tax, penalties, or other amounts, with the United States District Court having jurisdiction or with the United States Claims Court." Def.'s Reply Ex. 1. It was not an agreement that the IRS would further entertain plaintiff's refund claim, or waive its right to contest the claim.

Plaintiff also contends that "the Appeals Division decision reversing the IRS rationale for refund claim denial in September of 2006, and the grossly illegal 2001 tax assessment on or about October 10, 2006" change the nature of plaintiff's refund claim in this action. Pl.'s Opp. at 6. The court is not persuaded that these two factual assertions change the nature of plaintiff's claim, especially since the parties have provided neither legal discussion nor documentary evidence concerning the allegations. As discussed above, plaintiff's allegations in this action and in the prior lawsuit are based on the same core of operative facts, and

these "new, later occurring transactional facts" do not change the nature of plaintiff's refund claim in both suits, or the evidence required to support both claims.

Given that the complaint is based on the same transactional facts as the case before the Utah district court, defendant has proved the third element of *res judicata*. Accordingly, plaintiff's complaint is subject to dismissal under the doctrine of *res judicata*.

V. Plaintiff's Breach of Contract Claim is Barred by the Doctrine of *Res Judicata*

In his complaint before this court, plaintiff asserts a breach of contract claim against the government. Mr. Peterson's breach of contract claim, in essence, alleges that the government breached the settlement agreement of 1995 when it refused to refund plaintiff $343,936:

> Because of the IRS relentless barrage of crimes, lies, cheats, gaming, deceptions, delays, nonfeasance, malfeasance, and other bad faith breaches contractual promise to promptly and fairly pay taxpayer's refund claim, taxpayer has never received the thoroughly meritorious refund of his [$343,936] in withholding taxes and interest, now alleged to be also damages in the same amount for breach of the Settlement Agreement.

Compl. ¶ 23. Plaintiff requests the court to award damages in the amount of $60,000,000 for his breach of contract claim because the IRS denied plaintiff "the desperately needed Return of Capital . . . to restore his very successful publishing companies, his reasonable expectation of the fruits of his contract." *Id*. ¶ 25. Plaintiff asserts that his "publishing companies were built to a professionally appraised value of $60,000,000," and that he expected to rebuild his companies "to at least the same value with adequate operating capital, and also restore 400 jobs." *Id*.

Plaintiff contends that his breach of contract claim is not barred by *res judicata* because the Utah district court did not have jurisdiction to hear the

contract claim. Because *res judicata* does not apply to his breach of contract claim, plaintiff asserts that the claim is still viable before the Court of Federal Claims.

Defendant, on the other hand, argues that *res judicata* bars Mr. Peterson's breach of contract claim because the claim is based on plaintiff's assertion that he is entitled to a tax refund of $343,936. Defendant argues that the claim for refund, as previously discussed, was adjudicated in the Utah district court, and dismissed for lack of merit. According to defendant, Mr. Peterson's breach of contract claim is "just a renewed attack on the validity of the Settlement Agreement," and the Utah district court ruled in May 2006 that plaintiff was bound to the terms of that settlement agreement. Def.'s Reply at 6.

Plaintiff is correct in his assertion that the Utah district court did not have jurisdiction to hear the breach of contract claim because the Little Tucker Act, 28 U.S.C. § 1346(a)(2) (2006), prevents district courts from hearing contract claims against the United States that exceed $10,000. *See* 28 U.S.C. § 1346(a)(2). Here, plaintiff seeks breach damages in the amount of $60,000,000.

Nonetheless, plaintiff's breach of contract claim is still barred by the doctrine of *res judicata*. The court agrees with defendant, and the record shows that Mr. Peterson's breach of contract claim is essentially a repackaging of the claim for refund in the amount of $343,936. The foundation of the contract claim is supported by nothing more than the facts underlying the refund claim which was argued unsuccessfully before the Utah district court. A cursory review of plaintiff's complaint supports defendant's observation:

> Throughout the lengthy negotiations for the Settlement, the Service and its DOJ representative repeatedly assured and promised the doubting parties and the skeptical judges approving the Settlement over and over and over that if it received [$343,936] in withholding, then it would process and pay an anticipated Refund Claim and/or Lawsuit for the withholding of Imaginary Tax III very promptly and with good faith and fair dealing.

> Before receiving the withholding for Imaginary Tax III in the arbitrary amount of [$343,936], the Service again affirmed that taxpayer had a Reservation of Rights clause in the contract that it would enforce very promptly in good faith and fair dealing, promising in its written pleadings . . .
>
> *After* the Service received the [$343,936] in withholding, however, it ripped off the curtains on its hoax and performed *exactly* the wrongdoing and breach that it had promised over and over and over not to perform . . .

Compl. ¶¶ 13-15. Thus, the breach of contract claim is based on the government's alleged failure to refund plaintiff the $343,936 which was the subject of the Utah district court litigation. The facts essential to support the breach of contract claim are the same facts as those required for the refund claim. Plaintiff is not alleging a new breach of contract claim before this court, but rather he is asserting the same refund claim that was litigated in the Utah district court. *See Tindle*, 56 Fed. Cl. at 347 ("Altering the theory of recovery does not create a new claim under the transactional approach.") (citing *Anderson v. United States*, 46 Fed. Cl. 725, 729-30 (2000), *aff'd*, 4 Fed. Appx. 871 (Fed. Cir. 2001)) (other citations omitted). Accordingly, plaintiff's breach of contract claim is barred by the doctrine of *res judicata* because it arises from the same set of transactional facts that were litigated before the Utah district court.

In addition to its argument that plaintiff's breach of contract claim is barred by the doctrine of *res judicata*, the government also asserts that plaintiff's breach of contract claim is essentially a tort claim over which this court lacks jurisdiction. A cursory look at plaintiff's complaint supports the government's assessment. Mr. Peterson repeatedly accuses the IRS of perpetrating "a hoax" which he states breached the government's obligation to conduct itself in good faith and fair dealing. Compl. ¶¶ 15-18, 20-22. Mr. Peterson claims that he is due $343,936 as a result of "the IRS relentless barrage of crimes, lies, cheats, gaming, deceptions, delays, nonfeasance, malfeasance, and other bad faith breaches of its contractual promise . . . . " *Id.* ¶ 23. Furthermore, Mr. Peterson asserts that he is due $500,000 in attorney fees, value of trustee services, expenses of investigating, and other costs and expenses of countering the many bad faith breaches inside and outside seven

litigation venues. *Id*. ¶ 24. The common thread running throughout Mr. Peterson's breach of contract claim is the assertion that the IRS engaged in a litany of acts of bad faith.

It is well established that claims against the government based upon allegations of bad faith sound in tort, and thus this court has no jurisdiction to entertain such claims. *See Minehan v. United States*, 75 Fed. Cl. 249, 259 (2007) (stating that the "the law is clear that allegations regarding bad faith or fraudulent actions by government officials or agencies do sound in tort"); *Franklin Savings Corp. v. United States*, 56 Fed. Cl. 720, 731 (2003) (stating that "to the extent that Franklin alleges the appointment of the conservator was made in bad faith, those claims were ones sounding in tort over which this court has no jurisdiction"); *Richards v. United States*, 20 Cl. Ct. 753, 758 (1990) (stating that "plaintiff's Complaint suggests that the District Court and other government employees acted fraudulently and in bad faith in their dealings with him[;] . . . such claims sound in tort and as such also are clearly outside the jurisdiction of the United States Claims Court").[10] Because plaintiff's breach of contract claim is essentially a tort claim, this court lacks jurisdiction to hear it.

CONCLUSION

Defendant has established the three elements of *res judicata*. The Utah district court's decision was a final judgment on the merits, plaintiff asserts the same factual allegations in both cases, and the parties in both suits are identical.

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[10]/ Plaintiff lists $60,000,000 as a third amount of breach damages which he states is the appraised value of his publishing companies. Compl. ¶ 23. Mr. Peterson argues that as a result of defendant's breach, plaintiff has not had the financial means to rebuild his publishing companies. Aside from the fact that plaintiff's breach of contract claim is barred by *res judicata*, as well as the fact that the claim sounds in tort, the court notes these alleged damages are too speculative and remote to be recoverable. *See Boston Edison Co. v. United States*, 64 Fed. Cl. 167, 183 (2005) ("In contract law, and especially in this court, damages must be directly caused by defendant's breach and not be too remote."); *see also Wells Fargo Bank N.A. v. United States*, 88 F.3d 1012, 1021 (Fed. Cir. 1996) ("'[R]emote and consequential damages are not recoverable in a common-law suit for breach of contract . . . especially . . . in suits against the United States for the recovery of common law damages.'" (quoting *Northern Helex Co. v. United States*, 524 F.2d 707, 720 (Ct. Cl. 1975))).

Thus, inasmuch as the requirements of *res judicata* are fully satisfied, Mr. Peterson's claim for refund is barred on that basis. Additionally, plaintiff's breach of contract claim is barred both on the grounds of *res judicata* and because it sounds in tort.

Accordingly, it is hereby **ORDERED** that

(1) Defendant's Motion to Dismiss, filed January 16, 2009, is **GRANTED**;

(2) The Clerk's Office is directed to **ENTER** final judgment in favor of defendant **DISMISSING** plaintiff's complaint, filed January 7, 2009, with prejudice; and

(3) Each party shall bear its own costs.

_____
LYNN J. BUSH
Judge