In The United States Court of Federal Claims

No. 10-115 T
(Filed August 13, 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NOT FOR PUBLICATION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, Wake Forest, North Carolina, each appearing *pro se*.

Joseph B. Syverson, Attorney of Record, G. Robson Stewart, Assistant Chief, Steven I. Frahm, Chief, Court of Federal Claims Section, Tax Division, 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' third complaint before this court arising from the same underlying facts. Defendant has moved to dismiss the complaint on the ground that the doctrine of issue preclusion bars plaintiffs from relitigating the court's subject matter jurisdiction, an issue that was resolved against them in earlier litigation between the same parties. Alternatively, defendant argues that plaintiffs—without reference to issue preclusion—have not sufficiently alleged the elements of a contract implied in fact, which is the only basis for plaintiffs' assertion that the court possesses subject matter jurisdiction over their claims in this action. Defendant has therefore moved to dismiss plaintiff's complaint for lack of subject matter jurisdiction on that ground as well. 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[1]

A. Alleged Meetings with IRS Agents

In the spring of 2003, plaintiffs became aware of a situation that they believed involved tax fraud. Compl. at 2 (docket entry 1, Feb. 19, 2010, as amended, docket entry 4, Mar. 22, 2010).[2] After discussing the matter with a friend (a retired IRS agent), they decided to go to the IRS Criminal Division with the information they had. *Id.* The information pertained to various alleged tax violators including the individual referred to in *DaCosta I* and *II*. Plaintiffs then called the Memphis IRS Service Center, the Philadelphia Campus International Case Office and the IRS Miami Service Center and reported the alleged tax violations. *Id.* From these calls, plaintiffs learned about the IRS rewards program, whereby the IRS would pay them a monetary reward for providing information to the IRS regarding tax violations if the information resulted in recovery of deficient taxes. *Id.*

Plaintiffs allege that they were told by IRS agents that they would get a reward of 10% to 15% of the amount collected by the IRS if their information was used to collect tax deficiencies. Compl. at 2. According to plaintiffs, these agents indicated that the IRS would pay 15% for "direct and responsible information." *Id.* Two different IRS agents then said they would send plaintiffs a publication that would indicate how the amount and payment of the reward would be determined if their information was directly responsible for significant tax collections. *Id.* The agents referred to paragraph 1 of IRS Publication 733, with which plaintiffs were not previously familiar. *Id.* Plaintiffs later received IRS Publication 733, and they allege that, according to that publication, they should each receive 15% of the tax deficiencies and penalties recovered by the IRS as the result of information they provided. *Id.* Under this theory, the combined total reward due both plaintiffs would be 30% of the total amount collected by the Government. *Id.*

Plaintiffs then turned over their information to Agent Evan Garrett of the IRS's Miami District Criminal Division. *Id.* Plaintiffs asked Agent Garrett to sign a receipt for the documents and taxable income asset reports provided by plaintiffs. *Id.* Plaintiffs allege that the receipt signed by Agent Garrett stipulated that this information was being tendered in accordance with the specific requirement for a 15% reward that the agents had verbally explained. *Id.* The signed

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[1] The Court assumes familiarity with the opinions in plaintiffs' two previous cases. *See DaCosta v. United States*, No. 09-558, 2010 WL 537572 (Fed. Cl. Feb. 16, 2010) ("*DaCosta II*"); *DaCosta v. United States*, 82 Fed. Cl. 549 (2008) ("*DaCosta I*"). Plaintiff N.B. Salty Miller, suing as Howard Miller, has, individually, filed a fourth complaint in this court alleging that defendant breached the same purported implied-in-fact contract that plaintiffs relied upon in their earlier cases. *See Miller v. United States*, No. 10-274 (filed May 6, 2010).

[2] On March 5, 2010 (docket entry 4), plaintiffs filed additional documents to be attached to their complaint, which the Court construed as a motion for leave to amend the complaint. The Court granted this motion on March 22, 2010 (docket entry 12). All references to "Compl." are to the original complaint as filed on March 5, 2010.

receipt, however, only indicates that Agent Garrett received the documents and says nothing about how plaintiffs' reward would be calculated. *See* Ex. 3 to Compl. at 4.

B. DaCosta I

In *DaCosta I*, filed on November 19, 2007, plaintiffs sought damages both pursuant to the IRS whistleblower statute and predicated on the breach of a purported implied-in-fact contract with defendant. *DaCosta I*, 82 Fed. Cl. at 556. Plaintiffs alleged that this contract arose from information concerning tax fraud committed by a taxpayer ("Taxpayer A"), which they turned over to the IRS. *Id.* at 552. Although plaintiffs received a reward for providing this information, they contended that the implied contract entitled them to a larger reward.[3] *Id.*

The Court granted defendant's motion to dismiss plaintiffs' complaint on July 11, 2008 holding, *inter alia*, that it lacked subject matter jurisdiction over plaintiffs' claims under the whistleblower statute, I.R.C. § 7623(b), because that statute vests the Tax Court with exclusive jurisdiction over claims involving information turned over to the IRS after the effective date of the 2006 amendments to § 7623(b). *DaCosta I*, 82 Fed. Cl. at 555; *see* I.R.C. § 7623(b)(4).

But plaintiffs also relied on a purported implied-in-fact contract between themselves and Agent Garrett, which they claim arose from a report that allegedly stated that plaintiffs were entitled to receive 15% of monies obtained from Taxpayer A. *Id.* at 556. The Court concluded 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. Plaintiffs did not allege "that they negotiated with the IRS and that the parties agreed on and set a specific amount for reward." *Id.* Further, Special Agent Garrett "did not have authority to bind the Government to a specific award percentage." *Id.* No appeal was taken from the judgment in *DaCosta I*.

C. DaCosta II

Plaintiffs filed their second complaint on August 24, 2009. *DaCosta II*, 2010 WL 537572, at *2. Plaintiffs once again alleged that they were entitled to a larger reward for the information they had provided with respect to Taxpayer A because of an "implied-in-fact oral contract," which "was breached by the IRS in multiple ways." *Id.* Plaintiffs again contended that this contract arose as a result of the alleged report prepared by Special Agent Evan Garrett. *Id.* at *3. Plaintiffs alleged that "IRS agents sent [them] 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 (quoting Compl., *DaCosta II*, No. 09-558 (docket entry 1, Aug. 24, 2009)). Plaintiffs stated that other IRS agents made similar statements to them regarding reward calculations, but failed to identify any agent with whom they spoke who had authority to

[3] On March 13, 2007, Messrs. DaCosta and Miller received letters from the IRS stating that each had been selected to receive a reward of $139,321.01 based on their 2003 Applications for Reward regarding Taxpayer A, and that checks for that sum would be forthcoming. On March 21, 2007, plaintiffs each received payment of $139,321.01. *DaCosta I*, 82 Fed. Cl. at 551.

contractually bind the IRS. *Id.* at *8. Plaintiffs sought damages for breach of the implied duty of good faith and fair dealing for the alleged failure of the IRS to collect all of the unpaid taxes due from Taxpayer A as the information plaintiffs provided purportedly revealed. *Id.* at *2.

On February 16, 2010, this Court dismissed plaintiffs' second complaint, holding that plaintiffs were precluded from relitigating the issue of the court's jurisdiction based on a purported implied-in-fact contract with defendant. *Id.* at *5. "[T]he 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*," and plaintiffs "had a full and fair opportunity to litigate [this] issue in *DaCosta I*."[4] *Id.* at *4, 5. This decision was appealed by plaintiffs and is currently under review in the Court of Appeals for the Federal Circuit. *DaCosta v. United States*, No. 2010-5097 (Fed. Cir. Mar. 29, 2010).

D. Plaintiffs' Current Complaint (DaCosta III)

In their complaint plaintiffs allege, just as they did in *DaCosta I* and *II*,[5] that "an implied-in-fact oral contract underlies their claims." Compl. at 1. Plaintiffs contend that the present complaint is different from their prior complaints because it relates to a different taxpayer, Taxpayer B. Plaintiffs' Response to Defendant's Motion to Dismiss ("Pls.' Resp.") at 2 (docket entry 18, Apr. 21, 2010). The new taxpayer, Taxpayer B, is "described as . . . the principal of Bastion Holdings, Ltd." *Jorril Fin. Inc. v. Bardi Ltd.*, Suit No. C.L. 1999/J 103, slip. op. at 7 (Jam. Sup. Ct. of Judicature, Jan. 16, 2003), *attached as* Ex. 4 to Compl. Taxpayer B is a different individual from the allegedly delinquent taxpayer in *DaCosta I* and *II*, Taxpayer A, who was the director and sole shareholder of Bardi Ltd. *Id.* at 2.

According to the documents attached to plaintiffs' most recent complaint, Taxpayer A entered into a business agreement concerning the sale of Bardi stock to Bastion Holdings, which was disputed by Jorril Financial, Inc. *Id.* at 4. This transaction, while included in the plaintiffs' information concerning alleged tax fraud by Taxpayer B, makes up only a small portion of the information turned over to the IRS concerning Taxpayer B. Email from N.B. Salty Miller to IRS Agent John Cann (Apr. 27, 2005 10:24:57 CST), *attached as* Ex. 6 to Compl. In addition, plaintiffs alleged that Taxpayer B's alleged liability resulted from different incidents of purported fraudulent sale of stocks and other illegal activities than those referred to in *DaCosta I* and *II*.

Plaintiffs have not received any portion of the reward allegedly due to them for the information they turned over to the IRS concerning Taxpayer B. Compl. at 4. Plaintiffs allege that the IRS has "chosen to drop this case down a black hole with no explanation." Compl. at 4-5. Although plaintiffs contend that the IRS had an obligation to collect deficient taxes from

[4] The Court alternatively found that plaintiffs had failed to adequately allege the elements of an implied-in-fact contract with the IRS. *Id.* at *6-9.

[5] Plaintiffs have abandoned their claims regarding information turned over to the IRS after 2006.

Taxpayer B, they have been told that no significant tax deficiencies have, as of yet, been collected from Taxpayer B. Compl. at 5.

Plaintiffs allege that the implied-in-fact contract at issue in this case, although it related to different taxpayers, arose from the same conversations with IRS agents relied upon in both *DaCosta I* and *DaCosta II*. As in the earlier cases, plaintiffs also allege that this contractual relationship was created when the Government accepted their information after IRS agents had "promised" plaintiffs that their reward would be calculated according to IRS Publication 733. Compl. at 4. Further, plaintiffs again claim that the IRS breached its implied duty of good faith and fair dealing by failing to collect all of the taxes owed by Taxpayer B, a percentage of which would, allegedly, be due and owing to plaintiffs as their reward. *Id.* at 1.

Defendant has moved to dismiss plaintiffs' complaint, maintaining that the issue of the court's subject matter jurisdiction over the alleged implied-in-fact contract with the United States was fully litigated in *DaCosta I* and *DaCosta II*. Defendant's Motion to Dismiss Plaintiffs' Complaint ("Def.'s Mot.") at 1 (docket entry 14, Apr. 8, 2010). Thus, defendant contends that issue preclusion bars relitigation of that issue. *Id.* at 1. Plaintiffs' principal counter-argument is that because the tax offender and the information provided by plaintiffs in this case are different from the individual and information involved in the prior cases, issue preclusion does not bar plaintiffs from relitigating this Court's jurisdiction to hear this case. Pls.' Resp. at 1-2.

Defendant alternatively argues that even accepting plaintiffs' allegations as true, they do not establish the creation of an implied-in-fact contract. Def.'s Mot. at 14. Defendant contends that the agency, through IRS Publication 733, the applicable version of § 7623 and the regulations thereunder, merely "invite[d] offers for a reward." *Id.* (quotation and citation omitted). A contract arises only when the "informant *makes* an offer by his conduct; and the Government *accepts* the offer by agreeing to pay a specific sum." *Krug v. United States*, 168 F.3d 1307, 1309 (Fed. Cir. 1999). In fact, according to the IRS, no significant deficient taxes have been collected from Taxpayer B to date. Compl. at 4-5.

Plaintiffs contend that the promise allegedly made by various IRS agents to calculate their reward according to IRS Publication 733 constitutes the "fixed" amount required by the case law. *Id.* at 4. Plaintiffs have cross-moved for summary judgment, maintaining that "there are no genuine issues of material fact at issue with respect to the implied-in-fact oral contract between [defendant] and plaintiffs." Plaintiffs' Motion for Summary Judgment ("Pls.' Mot.") at 1 (docket entry 19, Apr. 21, 2010).[6]

[6] This case has an unusual procedural background. Initially, the case was assigned to Judge Francis M. Allegra (docket entry 2, Feb. 19, 2010). On March 10, 2010, defendant submitted a "Notice of Directly Related Case," indicating that this case, No. 10-115, had been filed and was related to the two previous cases, *DaCosta I* and *II*, that had been decided by the undersigned. Defendant also moved before Judge Allegra to transfer the case to the undersigned (docket entry 7, filed Mar. 17, 2010). Plaintiffs opposed, but Judge Allegra granted the motion, transferring the case to the undersigned on March 19, 2010, in furtherance of "the conservation

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. Apr. 9, 2004). When the defendant challenges plaintiffs' 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 736, 748 (Fed. Cir. 1988). The issue facing the court is "not whether plaintiff[s] will ultimately prevail but whether the claimant is entitled to offer evidence to support their claims." *Scheuer*, 416 U.S. at 236.

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of judicial resources and the efficient administration of justice" (docket entry 9).

On April 9, 2010, plaintiffs moved for recusal, citing their disagreement with the Court's previous decisions in *DaCosta I* and *II* (docket entry 15). The Court denied this motion on April 14, 2010, observing that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion . . . . Almost invariably, they are proper grounds for appeal, not for recusal." Order at 1 (docket entry 16) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994) (internal citations omitted)). Additionally, plaintiffs had not demonstrated that the Court's prior opinions had shown "a high degree of favoritism or antagonism as to make fair judgment impossible." *Id.* at 2 (quoting *Liteky*, 510 U.S. at 555).

On August 6, 2010, plaintiffs filed what the Court construed to be a second motion for recusal and request for "investigation regarding the judge selection process in Case No. 10-115T and Case No. 10-274T" (docket entry 26). Plaintiffs argued that the clerk's office had disregarded a "Notice of Directly Related Case" that they had attached to the complaint in this case and in Case No. 10-274, which had indicated that the case should have been assigned to Judge Susan Braden. *Id.* at 1. On August 6, 2010, the Court denied plaintiffs' second motion for recusal finding that plaintiffs had again failed to demonstrate any "favoritism or antagonism" in the Court's prior opinions and that recusal was not warranted. Order at 2 (docket entry 27). The Court also referred plaintiffs' allegations regarding improper conduct on the part of the clerk's office to Chief Judge Emily C. Hewitt for investigation. *Id.* at 1. On August 10, 2010, Chief Judge Hewitt filed an order finding no improper conduct on the part of the clerk's office (docket entry 28).

III. Discussion

A. Plaintiffs are Barred from Relitigating the Issue of this Court's Subject Matter Jurisdiction

Issue preclusion prevents plaintiffs from relitigating an issue in a second action that has already been fully litigated in a prior action between 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)). Relitigation of an issue is barred "even if [the issue is] presented later as [a] wholly new theor[y] or cause[] 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 issue is identical to that in a previous proceeding, (2) the issue was actually litigated, (3) the determination of the issue was necessary to the resulting judgment, and (4) the party defending against preclusion had a full and fair opportunity to litigate the issue. *Banner*, 238 F.3d at 1354 (citing *Jet, Inc.*, 223 F.3d at 1365-66). All of these elements are satisfied in the case at hand.

1. The Jurisdictional Issue in *DaCosta III* Is Identical to the Jurisdictional Issue in *DaCosta I* and Plaintiffs Fail to Cure the Defects

a. The Issues Are Identical

In *DaCosta I*, this Court concluded that it does not possess subject matter jurisdiction over plaintiffs' claims resulting from an alleged breach of an implied-in-fact contract with defendant to pay plaintiffs a reward for information they provided to the IRS. *DaCosta I*, 82 Fed. Cl. at 558. Plaintiffs contend that since information relating to a different taxpayer, Taxpayer B, is involved in this case, issue preclusion does not apply. Pls.' Resp. at 2. But plaintiffs allege in all three cases that the same sequence of events led to an implied-in-fact contract with defendant. Specifically, the issue underlying all of plaintiffs' complaints is whether their dealings with the IRS—the IRS's sending of Publication 733 and various oral communications with IRS agents—established a contractual obligation on the part of the IRS to pay plaintiffs 15% of any amounts collected relating to certain identified taxpayers. *See* Compl. at 3 ("[The IRS] authorized and made a partial reward payment to Plaintiffs in [the Taxpayer A] case that was submitted to the IRS during the same time frame, under similar circumstances. . . . Plaintiffs have submitted no less than 10 multimillion dollar cases . . . ."); *DaCosta II*, 2010 WL 537572, at *2 ("Plaintiffs argue that this contract was formed as a result of the same report of Agent Garrett upon which they previously relied, which purportedly confirmed that the IRS had promised to pay each plaintiff 15% of the amount collected from the taxpayer."); *DaCosta I*, 82 Fed. Cl. at 556 (observing that plaintiffs alleged that the report from Agent Garrett "indicat[ed] [that] the appropriate amount of reward due plaintiffs . . . was 15% each of the total amount collected").

While plaintiffs allege in this case that they provided information about a different taxpayer, Taxpayer B, the contractual relationship that purportedly entitles them to compensation is identical to the contract alleged in both of their previous cases, which involved information relating to Taxpayer A. Thus, while the form of the complaints vary slightly, plaintiffs' jurisdictional claim in this case is based upon the same facts that plaintiffs alleged in *DaCosta I* and *DaCosta II*, and, therefore, raises the identical jurisdictional issue. *See Lowe v. United States*, 79 Fed. Cl. 218, 230 (2007) ("[T]he underlying *facts relevant to the jurisdictional issue remain unchanged* and, thus, the issue of jurisdiction may not be re-litigated.") (emphasis added).

b. Plaintiffs' New Allegations do not Satisfy the Curable Defect Exception to Issue Preclusion

Plaintiffs' attempt to "cure" the jurisdictional deficiency of their previous complaints by adding allegations regarding purported conversations and transactions with various IRS agents is unavailing. Pursuant to the "curable defect exception," plaintiffs may avoid the preclusive effect of a previously litigated issue in certain circumstances by making additional allegations concerning additional relevant facts. *Citizens Elecs. Co. v. OSRAM GmbH*, No. 2006-1211, 225 F. App'x 890, 893 (Fed. Cir. Mar. 29, 2007). But the curable defect exception applies only if "there are developments tending to 'cure' the jurisdictional deficiency in the first suit" that occurred "subsequent to the initial dismissal." *GAF Corp. v. United States*, 818 F.2d 901, 912-13 (D.C. Cir. 1987); *see also Goad v. United States*, 46 Fed. Cl. 395, 398 (2000). "Hence, if the second-filed claim presents the same jurisdictional issue as raised in the first suit, the doctrine of [issue preclusion] bars the second claim." *Goad*, 46 Fed. Cl. at 398. "On the other hand, if the second-filed claim contains new information which cures the jurisdictional defect fatal to the first-filed suit, then the second-filed suit presents a different jurisdictional issue and [issue preclusion] does not apply." *Id.*

Plaintiffs' allegations regarding conversations with IRS agents, their receipt of IRS Publication 733, and information turned over to the IRS concerning Taxpayer B all pertain to events that occurred *before* the filing of their initial complaint in *DaCosta I*. Compl. at 1-3. Thus, these new allegations cannot cure the initial jurisdictional defect.

In sum, plaintiffs provided information relating to several different taxpayers during their conversations with IRS agents concerning the rewards program. Compl. at 2. Although plaintiffs allege that they deserve a separate reward for information relating to each allegedly delinquent taxpayer, their claims with respect to each taxpayer derive from the same purported implied-in-fact contract arising out of plaintiffs' dealings with IRS agents. *Id.* Thus, the jurisdictional issue presented in this litigation is identical to the issue that was litigated in *DaCosta I*, 82 Fed. Cl. at 558, and the jurisdictional defects are not cured by the allegations in the complaint in this action. *See Lowe*, 79 Fed. Cl. at 230 ("[P]laintiff's attempted 'cure' does not cure.").

2. Plaintiffs Had a Full and Fair Opportunity to Litigate the Jurisdictional Issue, Which was Actually Actually Litigated and Necessary to the Judgment

The issue whether the court had subject matter jurisdiction was actually litigated and decided in a manner adverse to plaintiffs in *DaCosta I*. In that case the Court expressly considered and rejected plaintiffs' contention that the events alleged in that case created an implied-in-fact contract with the United States. *DaCosta I*, 82 Fed. Cl. at 557. Plaintiffs had a full and fair opportunity in *DaCosta I* to litigate whether this Court has subject matter jurisdiction based on a purported implied-in-fact contract with the United States that plaintiffs contend arose from the same events. *DaCosta II*, 2010 WL 537572 at *5. This Court further held, in *DaCosta II*, that the issue preclusion doctrine prevented plaintiffs from relitigating the jurisdictional issue.[7] *Id.* at 4. Plaintiffs are the same individuals who originally filed these claims in *DaCosta I* and again in *DaCosta II*. Compl. at 1. Thus, plaintiffs had a more than full and fair opportunity to litigate the jurisdictional issue.

"Issue preclusion 'has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.'" *Rosales v. United States*, 89 Fed. Cl. 565, 581 (2009) (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979)). The Court understands that plaintiffs view this rule as unduly harsh. After all, plaintiffs urge, they seek relief in this action relating to the information they provided about a separate individual. But all of the allegedly new factual and legal claims existed before plaintiffs filed their first complaint in this court. That is, plaintiffs could have sought relief relating to both Taxpayers A and B in their initial compliant because their purported right to relief derives from the same alleged contractual relationship. But plaintiffs did not do so. This decision on plaintiffs' part should not force defendant to relitigate and the court to decide the same issue again and again, *ad infinitum*. Plaintiffs are precluded from returning for more "bite[s] of the apple." *Maher v. United States*, 92 Fed. Cl. 413, 420 (2010) (quotation and citation omitted). Accordingly, plaintiffs' complaint must be dismissed.

[7] Even though plaintiffs have appealed the judgment in *DaCosta II*, this Court's final judgment in that case also provides a sufficient basis for the application of issue preclusion. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 13 cmt. f. (1982); *see also Huron Holding Co. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189 (1941) (holding that a pending appeal does not "detract from . . . [the] decisiveness and finality" of a judgment).

B. Even if Litigation of Plaintiffs' Jurisdictional Contention in This Action Were Not Barred by Issue Preclusion, Plaintiffs Fail to Sufficiently Allege the Elements of an Implied-In-Fact Contract with Defendant

Plaintiffs claim that they are contractually entitled to a reward because of their reliance on the statements of IRS agents. Compl. at 3. Plaintiffs contend that an implied-in-fact contract was created when the IRS accepted their information regarding alleged tax violations after sending plaintiffs IRS Publication 733. *Id.* The contract allegedly arose out of conversations with IRS agents that plaintiffs have described. *Id.*

To establish an implied-in-fact contract with the Government, plaintiff must demonstrate (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 fall short on all of these fronts.

1. An Authorized Agent of the IRS Never Contracted with Plaintiff or Ratified a Prior Unauthorized Contract

Plaintiffs contend that the promise allegedly made by IRS agents was institutionally ratified by the IRS when it accepted and used the information for its benefit. Plaintiffs' Reply to Defendant's Response to Plaintiffs' Motion for Summary Judgment at 7 (docket entry 25, May 11, 2010). Institutional ratification occurs when the Government seeks and receives benefits from an unauthorized contract. *Janowsky v. United States*, 133 F.3d 888, 891-92 (Fed. Cir. 1998). But this doctrine requires government officials who have contracting authority to demonstrate "clear acceptance of an unauthorized agreement." *Strickland v. United States*, 382 F. Supp. 2d 1334, 1348 (M.D. Fl. 2005); *see also Digicon Corp. v. United States*, 56 Fed. Cl. 425, 426 (2003). Neither Agent Garrett nor the other IRS agents to whom plaintiffs refer had such authority. *DaCosta I*, 82 Fed. Cl. at 557.

Also, plaintiffs state that the IRS has notified them that no significant amount of deficient taxes have been collected from Taxpayer B to date. Compl. at 4. Thus, plaintiffs cannot plausibly claim that the IRS has "used" the information provided by plaintiffs concerning Taxpayer B to its benefit.[8] Because plaintiffs fail to identify an IRS official with whom they spoke who had authority to contractually bind the IRS and the IRS has not "benefitted" from the

[8] Plaintiffs' reliance on the email from Agent Robert Gardner is misplaced. That email states "the Philadelphia Off Shore Management . . . ha[d] already begun to do their own research and case building [regarding Taxpayer B]." Email from Robert B. Gardner, IRS Agent, to N.B. Salty Miller (Aug. 3, 2007, 9:47:13 CST), *attached as* Ex. 8 to Compl. Plaintiffs contend that this email proves that an audit was initiated in this case, but there is no mention of an "audit" in the email. *Id.* At most, it indicates that agents in an office of the IRS had begun looking into the matter. There is no indication that the IRS conducted an audit or that the IRS collected any deficient taxes from Taxpayer B.

information allegedly provided about Taxpayer B, plaintiffs do not adequately allege the elements of an implied-in-fact contract.

2. IRS Publication 733 Does Not Constitute an Offer

Plaintiffs next claim that the agency's sending IRS Publication 733 to them constitutes an unambiguous offer, and their providing of information constitutes acceptance. Compl. at 4. But "the United States cannot be contractually bound merely by invoking [a] cited statute and regulation." *Merrick v. United States*, 846 F.2d 725, 726 (Fed. Cir. 1988). Further, the Federal Circuit has specifically held that sending IRS Publication 733 does not in itself constitute an offer. *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.* (quoting *Krug*, 168 F.3d at 1309). In other words, an enforceable contract is formed only after the informant and the Government negotiate and agree on a fixed amount for a reward. *See Merrick*, 845 F.2d at 726 (holding that plaintiff stated a claim for relief by alleging that an IRS official with authority to bind the agency had agreed to a specific amount as the informant's reward).

Plaintiffs state that IRS agents sent them a copy of IRS Publication 733, and, referencing the publication, told plaintiffs that "they would receive 15% EACH of tax deficiencies collected in this and other cases." Compl. at 3. Plaintiffs contend that this conversation constituted an agreement on the specific amount of the reward due to plaintiffs. *Id.* By sending plaintiffs a copy of IRS Publication 733, however, the IRS agents merely invited offers for a reward. *Krug*, 168 F.3d at 1309. Since IRS Publication 733 is not an offer, plaintiffs could not have accepted an offer 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 have failed to allege that they negotiated a fixed amount of reward with the Government in response to their "offer" to provide information. *DaCosta I*, 82 Fed. Cl. at 557; *see also City of El Centro*, 922 F.2d at 821 (quoting *Silverman v. United States*, 679 F.2d 865, 868 (Ct. Cl. 1982)) (to prove an implied-in-fact contract with the United States, plaintiff must show that an "individual with contracting authority exercised that authority to [contractually] bind the United States").

Plaintiffs' case is like *Cambridge*, 558 F.3d at 1334. In that case, plaintiff relied on IRS Publication 733 as the sole basis for the existence of a contractual relationship but did not allege that an official with contracting authority had offered a specific reward or accepted plaintiffs' suggestion of a specific reward. Accordingly, the Federal Circuit held that plaintiff failed to sufficiently allege an implied-in-fact contract with the IRS. *Id.* Plaintiffs here likewise fail to identify any communications with an *authorized* IRS official or an agreement on a fixed amount for a reward. Without more, plaintiffs' reliance on IRS Publication 733 is insufficient to establish a contractual relationship with defendant. *Id.* at 1336 (citing *Krug*, 168 F.3d at 1309).

Therefore, even considering plaintiffs' newly alleged facts *de novo*, the Court concludes that plaintiffs have failed to sufficiently allege the elements of an implied-in-fact contract with defendant, and the Court therefore lacks subject matter jurisdiction over plaintiffs' complaint on that basis.

C. *Without a Contract, Plaintiffs' Remaining Claims Sound in Tort and Are Therefore Not Within This Court's Jurisdiction*

As a general matter, the court possesses jurisdiction over claims of tortious breach of contract, because such a claim sounds both in contract and in tort. *See, e.g., Agredano v. United States*, 82 Fed. Cl. 416, 430 (2008), *rev'd on other grounds*, 595 F.3d 1278 (Fed. Cir. 2010). This Court does not, however, possess jurisdiction over such a claim when no contract exists between plaintiff and the United States. *Phang v. United States*, No. 2009-51, 2010 WL 2788291, at *2 (Fed. Cir. July 13, 2010) (holding that the Court of Federal Claims possesses jurisdiction to hear tort claims only if they stem from a contract claim); *Garrett v. United States*, 78 Fed. Cl. 668, 670-71 (2007) (dismissing for lack of subject matter jurisdiction plaintiff's complaint, which alleged, *inter alia*, tortious breach of contract, because plaintiff had failed to allege necessary elements of an implied-in-fact contract). Plaintiffs' claims that the IRS's inaction constitutes a tortious breach of contract and a breach of the implied duty of good faith and fair dealing must be dismissed. In the absence of a contract between plaintiffs and defendant no breach of contract, tortious or otherwise, could have occurred, and no implied covenant of good faith and fair dealing could have come into existence. *Pinnix v. The Fielding Inst.*, No. 01-2961, 2002 WL 31546523, at *2 (3d Cir. Nov. 18, 2002) ("[S]ince no contract existed there can be no breach of an implied covenant of that contract.").

CONCLUSION

For the reasons set forth above, defendant's motion to dismiss plaintiffs' complaint for lack of subject matter jurisdiction is **GRANTED**, and the Clerk is directed to enter judgment dismissing plaintiffs' complaint without prejudice. Plaintiffs' cross-motion for summary judgment 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