In the United States Court of Federal Claims

No. 11-781T[1/]
(Filed August 6, 2012)

SCOTT R MARTIN,		)
	Plaintiff,	)
v.		)
		)
THE UNITED STATES,		)
	Defendant.	)

OPINION AND ORDER

Before the court are plaintiff's Complaint To Enforce The Liquidated Damages On The Default Of Implied Contract (Compl.);[2/] Plaintiff's Motion For Summary Judgment on the Liquidated Damages of Implied Contract, Table of Authorities and Indexed Proof of Claim attached (Pl.'s Mot., ECF No. 1) filed by Scott R. Martin, pro se, on November 18, 2011; Defendant's Motion to Dismiss and Brief in Support of Defendant's Motion to Dismiss (Def.'s Mot., ECF No. 10) filed February 7, 2012; Plaintiff's Preliminary Question, Opposition to Defendant's Motion to Dismiss and Request for Judicial Notice (Pl.'s Opp'n, ECF No. 13) filed March 9, 2012; and Defendant's Reply in Support of its Motion to Dismiss (Def.'s Reply, ECF No. 14) filed on March 16, 2012.

Underlying facts asserted in the Complaint, but not conclusions of law, are assumed to be true for the purpose of resolving the motions before the court. It is asserted that the Internal Revenue Service (IRS) served a Notice of Levy for

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[1/] The "T" classification, denoting tax cases, was assigned by the Clerk's Office upon the filing of the Complaint and submission of the Civil Cover Sheet completed by plaintiff, which in this instance, designated Nature of Suit Code 226 – which is "Tax-Other." In this regard, it is noted that plaintiff responded negatively to whether the case was directly related to any pending or previous case. If so, a Notice of Directly Related Case was required to be filed. RCFC 40.2. As discussed hereinafter, on November 18, 2011, when this case was filed, plaintiff had three directly-related consolidated cases pending before Chief Judge Hewitt. All four cases presented an implied contract theory concerning the collection of assessed back taxes, penalties and the like.

[2/] Subsequent references are to Plaintiff's Redacted Complaint (ECF No. 5) filed December 12, 2011. References in this Opinion to filings in this case shall be to the ECF page number.

$4,525.48 on plaintiff's account at Nevada State Bank. In a September 28, 2011 document, plaintiff "accepted" the levy on the condition that defendant provide authority for both the levy and the underlying tax assessment, and respond to other demands. The transmittal also gave notice that plaintiff did not consent to "unauthorized actions" against his interests. By not responding to the demands in the letter, "in combination with ongoing unauthorized actions against the interests of this Plaintiff," the Complaint concludes that an implied contract was formed wherein the United States agreed to pay to him liquidated damages in the amount of $4,250,000. (Pl.'s Compl. 3, 6, ECF No. 5.)

Plaintiff's Motion for Summary Judgment filed with his Complaint contends that the September 28, 2011 transmittal warned the IRS "that an implied Contract, with a Liquidated Damages clause, could be established by the conduct of the parties." (*Id*. at 11 (emphasis in original).) Silence and lack of response, plaintiff alleges would be, as warned in the letter, consent to the alleged implied contract, abandonment of any presumption of correctness of the tax assessment and levy, and agreement to the imposition of liquidated damages. Failure of the IRS to provide authority requested or cease collection of the levy, would constitute a breach of this implied contract and liability for $4,250,000 in liquidated damages, actual damages being difficult to ascertain. There being no genuine issue of material fact, plaintiff concludes he is entitled to summary judgment on his claim for liquidated damages. (*Id*. at 6.)

Plaintiff had three other cases in this court also pertaining to IRS collection efforts. Case No. 11-496T concerned a Notice of Federal Tax Lien (NOFTL) for $32,228.29 for tax years 2004, 2005 and 2006 filed at the Washoe County Recorder's Office, Reno, Nevada on August 16, 2010. (Compl. 11-496T at 5, ECF No. 1.) It is marked with the same "Conditional Acceptance Upon Proof of Claim Per Attached" affixed to the levy in this case. The same NOFTL is attached to plaintiff's Complaint in Case No. 11-756T. (Compl. 11-756T at 5, ECF No. 1-1.) The Complaint in Case No. 11-260T is sealed and was not examined, however, non-confidential substance including the NOFTL is discussed in detail in the court's initial opinion, detailed hereinafter. The instant case, plaintiff's fourth, concerns a Notice of Levy on Nevada State Bank for the Tax Period ended December 31, 2006. (Compl. 27, ECF No. 5.)

The three prior cases sought recovery of liquidated damages of $4,250,000 pursuant to a February 18, 2011 document. The court granted Defendant's Motion

to Dismiss the three prior consolidated cases for failure to state a valid cause of action. In the instant case, while the dates and addressees of the transmittals differ, the defendant and theories of recovery advanced are the same.

Adopting the reasoning of the prior decision by this court, the implied contract theory, also asserted in plaintiff's present Complaint, does not state a valid cause of action for an implied contract. Because the implied contract theory advanced in the prior three cases is the same as presented here, and because the matters now alleged could have been raised in plaintiff's prior three cases and were not, the finality of the prior dismissal serves to foreclose plaintiff's reassertion of this theory in this case. Accordingly, in the subsequent Conclusion, Plaintiff's Motion for Summary Judgment is denied and Defendant's Motion to Dismiss is granted.

I. Background

In the present case, defendant did not respond to plaintiff's motion for summary judgment but filed a Motion to Dismiss (ECF No. 10) on February 7, 2012. Invoking RCFC 12(b)(1) and 12(b)(6), defendant contends that plaintiff's Complaint fails to state a claim upon which relief can be granted and, alternatively, to the extent plaintiff contests the underlying levy or tax assessment, his arguments lack merit.

Plaintiff's tax liability is background for his implied contract theory and the following facts are taken from documents filed in this case. Plaintiff did not file an individual income tax return for the tax year 2006. The IRS sent him a delinquency notice on December 10, 2007. On October 14, 2008, the IRS prepared a substitute tax form and following an audit, on November 9, 2009, assessed plaintiff $2,934.00 in tax, $454.77 in failure to pay penalties, $138.83 in estimated tax penalty, $733.50 as a late filing penalty, and $609.38 in interest. A notice of balance due required by statute was sent to plaintiff that same day. At least as of the time of the matters described in the instant Complaint plaintiff had a unpaid assessed liability for tax year 2006 of $4,870.48. (Def.'s Mot. 26-28, ECF No. 10-1.)

The IRS issued plaintiff a statutory notice of intent to levy on December 14, 2009, and on March 31, 2010, and April 5, 2010, collection due process notices were sent, informing plaintiff of his procedural rights. Return receipts for those notices were signed on April 9, 2010. On May 24, 2010, plaintiff was placed into the federal payment levy program and on August 13, 2010, a Notice of Federal Tax Lien was

filed. On August 30, 2011, the IRS issued a Notice of Levy on plaintiff's account at the Nevada State Bank for $4,525.48.[3/]

Broadly construed, plaintiff's implied contract theory is based on his September 28, 2011 transmittal to Sarina E. Schubert, IRS Revenue Officer who signed the Notice of Levy; Nevada State Bank; the General Counsel of the Treasury; and the Chief Counsel of the IRS. (Compl. 17-25, ECF No. 5.) The letter is described by plaintiff in his Complaint as "a Conditional Acceptance, Request for Clarification, 14 Day Request For Statement Of Account, Notice and Demand, Waiver of Tort/Implied Contract and Liquidated Damages." (*Id.* at 2.) This document, construed liberally, included a demand that the IRS prove that plaintiff is "a 'person' as defined at 26 U.S.C. Part 301.6671-1(b)"[4/] (*id*. at 19), that he is "obligated to pay a tax 'paid by stamp,'"(*id.* (emphasis omitted)), and that the IRS demonstrate authority for the Levy other than § 6201(a) or § 6331(a), *(id.* at 19-20).

Plaintiff's letter also declared that failure to satisfactorily respond within fourteen days or "[a]ny attempt to proceed with any sanctions, penalties, or collection efforts," (Compl. 23, ECF No. 5) would: (1) constitute an admission that plaintiff's positions were correct; and (2) create an implied contract by silence of agreement to the terms in the letter including liability for liquidated damages of $4 million if the levy was not removed, plus an additional $250,000 for "taking of my private property" (*id*. at 24) by the levy as compensation for "intentional breach of [his] rights in commerce, and the breach of Duties and Obligations of the U.S. Treasury/Internal Revenue Service" (*id*. at 23 (emphasis omitted)).

[3/] The Notice of Levy on plaintiff's account at Nevada State Bank is Plaintiff's Proof of Claim attached to his Complaint. (Compl. 27-28, ECF No. 5.) Predicate details culminating in the collection efforts are attached as Exhibit 2 to Defendant's Motion to Dismiss. (ECF No. 10-1 at 25-28.)

[4/] As defendant's Motion specifically assumes, and plaintiff in his Opposition did not counter, this citation should have been to 26 C.F.R. Section 301.6671-1(b) which provides in relevant part:

> **Person defined**. For purposes of subchapter B of chapter 68, the term "person" includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

Defendant asks that plaintiff's Complaint be dismissed for failure to state a valid cause of action, citing RCFC 12(b)(6), asserting that the allegations presented do not, no matter how broadly construed, state a valid claim for an implied contract against the United States. Also, defendant contends that to the extent plaintiff is contesting his underlying tax liability, the court lacks subject matter jurisdiction and dismissal under RCFC 12(b)(1) is warranted. Defendant also points out that plaintiff's three previous cases were dismissed on January 13, 2012, for failure to state a claim upon which relief could be granted. *Martin v. United States*, 102 Fed. Cl. 779 (*Martin I*), *recons. denied*, 103 Fed. Cl. 445 (2012) (*Martin II*).

II. Legal Standards

A. Rule 12(b)(1) dismissal for lack of subject matter jurisdiction

Subject-matter jurisdiction is required before the court can address the merits of a case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). Plaintiff has the burden of establishing jurisdiction. *Keener v. United States*, 551 F.3d 1358, 1361 (Fed. Cir. 2009). "In deciding whether there is subject-matter jurisdiction, the allegations stated in the complaint are taken as true and jurisdiction is decided on the face of the pleadings." *Folden v. United States*, 379 F.3d 1344, 1354 (Fed. Cir. 2004) (internal quotation marks and citation omitted). While complaints filed by pro se plaintiffs may be held to "'less stringent standards than formal pleadings drafted by lawyers,'" *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (*quoting Haines v. Kerner*, 404 U.S. 519, 520 (1972)); *Vaizburd v. United States*, 384 F.3d 1278, 1285 n.8 (Fed. Cir. 2004), pro se plaintiffs must nevertheless meet jurisdictional requirements, *Bernard v. United States*, 59 Fed. Cl. 497, 499, *aff'd*, 98 Fed. App'x. 860 (Fed. Cir. 2004) (unpublished); *see also Henke v. United States*, 60 F.3d 795, 799 (Fed. Cir. 1995). Thus a pro se plaintiff, like any other, must establish the court's jurisdiction to hear his claims. *See Taylor v. United States*, 303 F.3d 1357, 1359 (Fed. Cir. 2002). If the court determines that it does not have subject matter jurisdiction, dismissal is required. RCFC 12(h)(3).

As a general matter, apart from a few well-recognized exceptions such as those for third-party beneficiaries and subrogated insurers on performance and payment bonds, the "government consents to be sued only by those with whom it has privity of contract." *Flexfab, L.L.C. v. United States*, 424 F.3d 1254, 1263 (Fed. Cir. 2005) (*quoting Erickson Air Crane Co. of Wash., Inc. v. United States*, 731 F.2d 810, 813

(Fed. Cir. 1984)). In all events, for the purposes of establishing jurisdiction for a suit on a contract, a plaintiff's complaint must contain "a non-frivolous allegation of a contract with the government." *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1353 (Fed. Cir. 2011) (emphasis omitted) (citing *Lewis v. United States*, 70 F.3d 597, 602, 604 (Fed. Cir. 1995); *Gould, Inc. v. United States*, 67 F.3d 925, 929-30 (Fed. Cir. 1995)).

B. Rule 12(b)(6) dismissal for failure to state a claim

Rule 12(b)(6) governs motions to dismiss for "failure to state a claim upon which relief can be granted." RCFC 12(b)(6). When determining whether to grant a Rule 12(b)(6) motion, the court "must accept as true all the factual allegations in the complaint" and make "'all reasonable inferences in favor of the non-movant.'" *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed. Cir. 2001). Pleadings filed pro se are construed liberally. *Pentagen Techs. Int'l, Ltd. v. United States*, 175 F.3d 1003, 1005 (Fed. Cir. 1999). Nevertheless, neither "[t]hreadbare recitals of the elements of a cause of action" nor legal conclusions are entitled to the presumption of truth. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Rule 12(b)(6) "is to allow the court to eliminate actions that are fatally flawed in their legal premises and destined to fail, and thus to spare litigants the burdens of unnecessary pretrial and trial activity." *Advanced Cardiovascular Sys., Inc. v. SciMed Life Sys., Inc.*, 988 F.2d 1157, 1160 (Fed. Cir. 1993). Failure to state a valid claim upon which relief can be granted warrants a judgment on the merits rather than a dismissal for lack of jurisdiction. *See Gould, Inc. v. United States*, 67 F.3d 925, 929 (Fed. Cir. 1995) ("A dismissal for failure to state a claim … is a decision on the merits which focuses on whether the complaint contains allegations, that, if proven, are sufficient to entitle a party to relief."); *see also Engage Learning, Inc.*, 660 F.3d at 1353-54; *Martin I*, 102 Fed. Cl. at 784.

III. Discussion

A. No implied contract

Plaintiff contends he demanded the IRS provide authority for its actions against his bank account, cease "unauthorized actions [against him] and return converted funds without damages;" or "[p]ay the liquidated damages of waiver of tort/implied

contract." (Pl.'s Opp'n 7, ECF No. 13.) Plaintiff also contends that through the non-response of its agents,[5/] the United States has abandoned any presumption of correctness and has failed "to show where the activities of this Plaintiff meets the criteria to be subject to Assessment, the [NOFTL], and the associated Levy." (*Id.* at 3.) Plaintiff continues, reasoning that the "silence of the United States is a fraud within the context of *U.S. v. Tweel*," and the "refusal or neglect of Treasury/IRS to show its authority to act against this Plaintiff when initially queried is at least 'intentionally misleading.'" (*Id*.) If there were fraud or misrepresentation, it would be a tort, plaintiff hypothesizes. If a tort,[6/] plaintiff could (as apparently he has in the circumstances presented) elect to treat the tort as an implied contract and seek damages thereon. And because damages are, plaintiff contends, "'uncertain'" or "'difficult to quantify,'" then the liquidated damages he presented in his September 28, 2011 letter (again by its silence the IRS consented to both the imposition and the amount plaintiff concludes) are appropriate. (*Id*. at 4.)

Then, diverting from the implied contract theory of his Complaint, plaintiff requests in his Opposition to Defendant's Motion to Dismiss that the court take judicial notice of: (1) the definition of the "United States;" (2) the creditor/debtor relationship between plaintiff and Nevada State Bank; (3) the authority of the Secretary of Treasury to assess taxes "which have not been duly paid by stamp;"[7/] and (4) the authority of the Secretary to levy wages of officers, employees or elected

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[5/] In this regard plaintiff also contends that the IRS failed to respond to his demand that cause be shown why the acts of the individuals given the notice were not binding on the United States, and notes that defendant does not contend that the United States is so bound in said matters. Plaintiff's comment concerning any responsibility of the United States to have responded to plaintiff's correspondence under the Freedom of Information Act has no relevance here.

[6/] As defendant points out, this court lacks jurisdiction over tort claims against the United States. 28 U.S.C. § 1491 ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States … for liquidated or unliquidated damages in cases not sounding in tort.").

[7/] Plaintiff cited 26 U.S.C. § 6201(a):

> (a) Authority of Secretary—The Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law

officials of the United States or the District of Columbia. These questions have no relevance to plaintiff's attempt to collect liquidated damages for breach of the implied contract he asserts exists. (Pl.'s Opp'n 6, ECF No. 13 (emphasis in original).)

Defendant's Reply in Support of Its Motion to Dismiss (ECF No. 14) states that plaintiff provided no meaningful response, pointing out that his conclusion that the IRS never established how plaintiff was subject to the underlying tax assessment, the NOFTL and the associated levy, is not relevant to his implied contract theory and his pursuit of liquidated damages. The validity of the tax or the assessment has no bearing other than background to plaintiff's implied contract claim. Nevertheless, defendant cites precedent as to the presumptive validity of tax assessments and collections, and plaintiff's burden of proof to challenge and rebut that presumption, noting that aside from general complaints that the presumption has been "self rebutted by conduct," plaintiff did not allege any flaw in the assessment or collection efforts. (*Id*. at 2.)

Defendant also points out that plaintiff's reliance on *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977) is inapt and is not precedent for the creation of the implied contract plaintiff advocates. *Tweel* was a criminal case in which a Revenue Agent's false assurance that no "special agent" was involved in the investigation, implying that a civil audit not a criminal investigation was afoot, resulted in a Fourth Amendment violation, justifying the suppression of evidence gained from the consensual search. Misrepresentation in a criminal investigation that resulted in consent to a search has no applicability to plaintiff's theory that silence following his unilateral demands created an implied contract in which the IRS agreed to pay liquidated damages. (*Id*. at 3.)

As the court previously held, an implied-in-fact contract is "an agreement … founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Martin I*, 102 Fed. Cl. at 785 (quoting *Balt. & Ohio R.R. Co. v. United States*, 261 U.S. 592, 597 (1923)). Like an express contract, a party alleging an implied-in-fact contract "must show a mutual intent to contract including an offer, an acceptance, and consideration." *Trauma Serv. Grp. v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997). In *Martin I* the court concluded that plaintiff failed to allege "three of the required elements of an implied-in-fact contract with the government and therefore fail[ed]" to state a valid

cause of action. 102 Fed. Cl. at 785. Those three elements found lacking are also absent in this case – acceptance, consideration, and acceptance by a government official with authority. Plaintiff's Complaint here alleges that silence and/or continuation with the levy should be construed as "acceptance" of plaintiff's unilateral imposition of a liquidated damages provision. Neither silence, lack of response, ceasing the levy on his bank account, nor failure to respond to plaintiff's questions either factually or legally support plaintiff's claim of implied contract. As the court explained in dismissing plaintiff's prior three consolidated complaints, "silence of the IRS simply does not qualify as an acceptance by the government of the terms." *See Martin I*, 102 Fed. Cl. at 785 (citing *Radioptics, Inc. v. United States*, 223 Ct. Cl. 594, 609 (1980)). That no monies or consideration was exchanged for the promises alleged is also undisputed. No bargained-for exchange is alleged. *See id.* at 786. Thirdly, there is no assertion that anyone with actual authority to bind the government had accepted plaintiff's offer. *Id.* Plaintiff's allegations of an implied contract formed by silence and inaction of the IRS is "patently insubstantial." *See Twp. of Saddle Brook v. United States*, 104 Fed. Cl. 101, 110 (2012) (dismissing "complaint [that] provides nothing more than bald assertions that the [agency] made an agreement with plaintiff").

Plaintiff's conclusory statement that defendant "has established by its conduct an Implied Contract with this Plaintiff, and is liable for the Liquidated Damages therein" (*see* Compl. 3, ECF No. 5) is unsupported by either fact or law. The facts and circumstances plaintiff presents simply do not create an implied contract.

B. Plaintiff's implied contract theory was rejected in *Martin I*

Because plaintiff's claim of implied contract is the same as that rejected in *Martin I*, and could have been raised in the prior three cases before the court, the doctrine of issue preclusion prevents plaintiff's attempt to reassert that rejected theory.[8/] The implied contract by unilateral demands and silence here are identical to

[8/] In its Notice of Directly Related Case and Motion for Transfer in the instant case filed January 12, 2012, defendant sought to consolidate this case with plaintiff's three prior cases, asserting that "[t]he parties to and the issues raised in this matter are the same as those in the three aforementioned cases." (Def.'s Notice and Mot. 2, ECF No. 7.) By Order dated January 23, 2011 (ECF No. 9), the undersigned denied the consolidation request, because the court's January 13, 2012 Opinion in *Martin I* dismissing plaintiff's prior three consolidated actions precluded any transfer for further consolidation.

those decided in *Martin I* and further consideration is precluded. *Shell Petroleum, Inc. v. United States*, 319 F.3d 1334, 1338 (Fed. Cir. 2003). To the extent that the circumstances are not identical, any difference could have been easily raised in the prior action.[9/] "[A] final judgment on the merits of an action precludes the parties from relitigating issues that were or could have been raised in that action." *Int'l Air Response v. United States*, 302 F.3d 1363, 1368 (Fed. Cir. 2002) (citing *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). *See also Larson v. United States*, 89 Fed. Cl. 363, 389, 397 (2009).

> When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar … , the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
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> What factual grouping constitutes a "transaction," and what groupings constitute 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 (1982). The United States Court of Appeals for the Federal Circuit has followed the transactional approach in applying the doctrine of res judicata. *See, e.g., Acumed LLC v. Stryker Corp.*, 525 F.3d 1319, 1323 (Fed. Cir. 2008) ("In applying the doctrine of claim preclusion, this court is guided by the Restatement (Second) of Judgments.") (citing *Foster v. Hallco Mfg. Co*., 947 F.2d 469, 477 n.7, 478–79 (Fed. Cir. 1991)). "Accordingly, the court looks at the underlying cluster of factual circumstances to answer the question whether the issues raised, and relief sought before this court, could have been raised in the prior litigation." *Tindle v. United States*, 56 Fed. Cl. 337, 346-47 (2003). "Altering the theory of recovery does not create a new claim under the transactional approach." *Id.*

[9/] Plaintiff's September 28, 2011 letter to IRS included a demand for a response within 14 days. Plaintiff filed the instant lawsuit on November 18, 2011. He could have raised the September 28, 2011 letter demand in the prior litigation. The court's Opinion dismissing plaintiff's three prior consolidated cases was issued on January 13, 2012.

In *Martin I* and *II* the Complaints were also to enforce liquidated damages based on an implied contract – the same claim as asserted here. The differences are: (1) in *Martin I* and *II* plaintiff's transmittal was dated February 18, 2011 and was precipitated by a NOFTL filed in the Washoe County Recorder's Office covering several tax years, including 2006; (2) in the instant action plaintiff's transmittal was dated September 28, 2011 and was precipitated by a Notice of Levy on Nevada State Bank for the 2006 tax year. The theory advanced as to why the plaintiff is entitled to liquidated damages are the same as are the parties. The identical implied contract theory was rejected in *Martin I* and *II* and the finality of that decision mandates the dismissal of the instant reiteration of that claim.

The claim that was finally decided in *Martin I* and *II* was whether an implied contract to pay liquidated damages can be imposed on the IRS by plaintiff's unilateral demand. That the demand was written again several months later in connection with a related collection attempt, matters not. Any factual differences are immaterial to the legal issue already resolved between these parties. Whether an implied contract with the United States was formed such as to create a valid cause of action under the Tucker Act is the same and plaintiff's attempts to relitigate that issue are barred by doctrines of repose. *Blonder-Tongue Lab., Inc v. Univer. of Ill. Found*., 402 U.S. 313, 323-24 (1971); *S. Pac. R. Co. v. United States*, 168 U.S. 1, 48-49 (1897); *Cromwell v. Cnty. of Sacramento,* 94 U.S. 351, 352 (1876) (holding that a final judgment on the merits bars further claims by parties based on the same cause of action); *Laguna Hermosa Corp. v. United States*, 671 F.3d 1284, 1288 (Fed. Cir. 2012); *Shell Petroleum, Inc. v. United States*, 319 F.3d 1334, 1338-40 (Fed. Cir. 2003). To hold otherwise would allow plaintiff to raise the same implied contract by inaction theory and liability for liquidated damages against defendant *seriatim*.

CONCLUSION

Accordingly, it is **ORDERED:**

(1) Plaintiff's Motion for Summary Judgment (ECF No. 1, 5) is **DENIED**;

(2) Defendant's Motion to Dismiss (ECF No. 10) is **GRANTED**; and

(3) The Clerk of Court shall **DISMISS** plaintiff's Complaint for failure to state a claim upon which relief can be granted.

James F. Merow
Senior Judge