

In the United States Supreme Court
Petition for Writ of Certiorari
Probir Kumar Bondyopadhyay vs. United States of America

APPENDIX-A

Judicial response of the three member Judicial Panel of the
U.S. Court of Appeals for the Federal Circuit (CAFC)

**[The CAFC did NOT address the Jeffersonian Claim of the U.S.
Constitutional Creature under Article 1 Section 8 Clause 8 to be
addressed EXCLUSIVELY under Title 28 USC Section 1498(a)
– the Constitution Law.]**

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

PROBIR KUMAR BONDYOPADHYAY,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2020-2091

Appeal from the United States Court of Federal Claims
in No. 1:19-cv-01831-MBH, Senior Judge Marian Blank
Horn.

Decided: March 11, 2021

PROBIR KUMAR BONDYOPADHYAY, Houston, TX, pro se.

JOSHUA MILLER, Commercial Litigation Branch, Civil
Division, United States Department of Justice, Washing-
ton, DC, for defendant-appellee. Also represented by
SCOTT DAVID BOLDEN, JEFFREY B. CLARK, GARY LEE
HAUSKEN.

Before PROST, *Chief Judge*, LOURIE and REYNA, *Circuit Judges*.

PER CURIAM.

Dr. Probir Kumar Bondyopadhyay appeals from a decision of the United States Court of Federal Claims (the “Claims Court”) dismissing his complaint against the United States. He alleged a “violation” of U.S. Patent 6,292,134 (the “’134 patent”), a patent infringement-based taking by the government, and fraud. *See Bondyopadhyay v. United States*, 149 Fed. Cl. 176, 179–83 (2020) (“*Decision*”). Because the court correctly concluded that the claims were barred by *res judicata* or for lack of jurisdiction, we *affirm*.

BACKGROUND

Dr. Bondyopadhyay filed a complaint in the Claims Court on November 27, 2019, alleging that the United States “violat[ed] [his] Exclusive Right for Limited Times,” the ’134 patent. *Decision* at 179. The ’134 patent relates to a “geodesic sphere phased array antenna system” for “multi-satellite tracking and communications.” ’134 patent, Abstract, col. 3 ll. 3–6. Dr. Bondyopadhyay accused the government of a “violation of *Exclusive Right for Limited Times* of an Inventor, Owner, U.S. Citizen [which is] a U.S. Constitutional Order that can NOT be dismissed by any Article 3 U.S. Courts or Article 1 U.S. Courts, created under Section 8, Clause 9.” *Decision* at 179 (emphasis in original). Dr. Bondyopadhyay stated that the government “*has taken the livelihood of this Independent Inventor* for a prolonged period of eleven years and 23 days and continues to remain indifferent towards this *Constitutional Order* for a long time.” *Id.* at 182 (emphasis in original). Dr. Bondyopadhyay further argued that the government committed “acquisition of Innovation fraud under Title 15 USC section 638(a) and 638(b)” and “honors [a] false inventor.” *Id.* at 179, 182–83 (original formatting omitted). In the complaint, Dr. Bondyopadhyay did not expressly focus

on a specific device as infringing the '134 patent claims. *Id.* at 187. He instead referred to government technology that, in 2014, he accused of infringing the '134 patent. *Id.*

This is the second time that Dr. Bondyopadhyay has appealed to this court regarding the '134 patent. *See Bondyopadhyay v. United States*, 748 Fed. App'x 301 (Fed. Cir. 2018) ("*Bondyopadhyay I Appeal*"), *aff'g Bondyopadhyay v. United States*, 136 Fed. Cl. 114 (2018) ("*Bondyopadhyay I*"). On February 23, 2014, Dr. Bondyopadhyay filed a complaint in the Claims Court accusing the United States Air Force of infringing the '134 patent by "using and manufacturing a portion of a phased antenna array system." *Bondyopadhyay I* at 116. The accused device at issue in that case was "the Ball Advanced Technology Demonstration antenna." *Id.* at 118–19.¹ On March 20, 2015, the court granted the government's partial motion to dismiss his claims for pre-January 11, 2008 damages as time barred by the six-year statute of limitations set forth in 28 U.S.C. § 2501 and any claims that arose after the '134 patent expired on September 18, 2009. *See Bondyopadhyay v. United States*, No. 14-147C, 2015 WL 1311726, at *7 (Fed. Cl. Mar. 20, 2015). The court also dismissed Dr. Bondyopadhyay's Fifth Amendment takings claim. *See id.* at *6.

After the claim construction phase, the Claims Court granted the government's August 23, 2017 motion for summary judgment. *See Bondyopadhyay I* at 120–21, 124. The court found that the accused device did not infringe the '134 patent literally or under the doctrine of equivalents. *See id.* On appeal, this court determined that the Claims Court "correctly granted summary judgment of

¹ We previously discussed the '134 patent and the technology at issue in the *Bondyopadhyay I Appeal* opinion. *See id.* at 302–05.

noninfringement in favor of the government.” *Bondyopadhyay I Appeal* at 308.

In the present case, the Claims Court interpreted Dr. Bondyopadhyay’s complaint as setting forth three claims: (1) infringement of the ’134 patent, (2) a patent infringement-based Fifth Amendment taking, and (3) fraudulent or false conduct. *See Decision* at 179. Regarding the infringement claim, the court determined that Dr. Bondyopadhyay already litigated that issue to a final judgment in the *Bondyopadhyay I* case, so his infringement claims were barred by the doctrine of *res judicata*. *See id.* at 190. The court found that Dr. Bondyopadhyay did “not refute [the government’s] statements in its motion to dismiss . . . that [t]he device made pursuant to this Acquisition Timeline is the Ball Advanced Technology Demonstration antenna,” or that “the exhibits appended to [Dr. Bondyopadhyay’s] complaint and in *Bondyopadhyay I* make clear that [Dr. Bondyopadhyay] accuses the *exact same* device of infringing the *exact same* patent.” *Id.* at 189–90 (emphasis in original).

Next, for the same reasons discussed in the *Bondyopadhyay I* opinion, the Claims Court determined that it lacked subject matter jurisdiction to hear Dr. Bondyopadhyay’s patent infringement-based Fifth Amendment takings claim. *See id.* at 191 (“[T]o the extent plaintiff alleges a taking claim based on the alleged infringement of the ’134 patent, this court lacks jurisdiction to hear such a claim as a Fifth Amendment taking claim.”). Furthermore, the court determined that Dr. Bondyopadhyay’s fraud allegations were tort claims which are expressly excluded from its jurisdiction by the Tucker Act. *See id.* at 192; 28 U.S.C. § 1491(a). The court thus determined that it lacked subject matter jurisdiction to adjudicate those fraud-based claims. *See Decision* at 192 (“[P]laintiff’s allegations of fraudulent or false conduct on the part of the defendant . . . must be dismissed for lack of jurisdiction in this court.”).

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The Claims Court additionally considered whether Dr. Bondyopadhyay's claims were barred by the applicable statute of limitations. *See id.* at 192–94. As set forth in 28 U.S.C. § 2501, the statute of limitations for every claim of which the court has jurisdiction is six years after such claim first accrues. The court determined that, even if the statute of limitations could be tolled by 28 U.S.C. § 286 for an additional 44 days, “under any plausible formulation of the claims in [Bondyopadhyay’s] complaint, the current case, which was filed on November 27, 2019, was not filed within the applicable statute of limitations pursuant to 28 U.S.C. § 2501 and 35 U.S.C. § 286.” *Id.* at 194. The court thus dismissed Dr. Bondyopadhyay’s complaint, stating that he “did not offer any evidence or argument as to why [his] current case for patent infringement against the United States is not materially identical to the patent infringement claims at issue in [his] previous case in this court, or why his current case is within the applicable statute of limitations.” *Id.*

Dr. Bondyopadhyay timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).²

DISCUSSION

We review dismissals by the Claims Court for *res judicata* or for lack of jurisdiction *de novo*. *Frazer v. United States*, 288 F.3d 1347, 1351 (Fed. Cir. 2002). A plaintiff “bears the burden” of demonstrating jurisdiction. *Thomson v. Gaskill*, 315 U.S. 442, 446 (1942). Although *pro se* plaintiffs are entitled to a liberal construction of their complaint,

² Dr. Bondyopadhyay’s opening brief references *Bondyopadhyay v. Sec’y of Defense*, No. 4:13-cv-01914 (S.D. Tex.). *See, e.g.*, Appellant’s Br. 2–4, 6, 11, 14–16. To the extent Dr. Bondyopadhyay challenges that district court’s findings in this appeal, we lack jurisdiction over any such challenges.

see *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972), the leniency afforded *pro se* litigants with respect to mere formalities does not relieve them of jurisdictional requirements, *Kelley v. Sec’y, U.S. Dep’t of Labor*, 812 F.2d 1378, 1380 (Fed. Cir. 1987).

Beginning with the patent infringement claims, Dr. Bondyopadhyay argues that the doctrine of *res judicata* does not apply. See Appellant’s Br. 15. He states that the Claims Court “failed to correctly apply” 28 U.S.C. § 1498(a). *Id.* at 7. Dr. Bondyopadhyay asserts that the court misunderstood that the issue is unauthorized *use* of the ’134 patent for 12 years and 229 days—distinguishing between the idea of an alleged *use* of the ’134 patent by the government versus a need to identify *an accused device* that falls within the scope of any of the ’134 patent claims. See Appellant’s Reply Br. 10. Dr. Bondyopadhyay claims that a July 30, 2002 letter from the Air Force Legal Services Agency is proof of patent infringement by admission. See *Bondyopadhyay I*, ECF 17, Ex. 2 (No. 14-147C). Dr. Bondyopadhyay characterizes the letter as admitting to infringement of the ’134 patent by the government’s “experimental use.” Appellant’s Reply Br. 2, 8, 12.

The government responds that Dr. Bondyopadhyay already brought identical infringement claims against the same party and litigated those claims to a final judgment, so the doctrine of *res judicata* resolves this issue. See Appellee’s Br. 8, 11–12. The government asserts that Dr. Bondyopadhyay’s argument that the antenna system could not be fully built during the life of the ’134 patent is a new argument and, regardless, one that supports the Claims Court’s dismissal of his infringement claims. See *id.* at 9.

Under the doctrine of *res judicata*, a final judgment on the merits precludes the same parties from relitigating claims that were raised or could have been raised before. See *Faust v. U.S.*, 101 F.3d 675, 677 (Fed. Cir. 1996).

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"Claim preclusion requires (1) an identity of parties or their privies, (2) a final judgment on the merits of the first suit, and (3) the later claim to be based on the same set of transactional facts as the first claim such that the later claim should have been litigated in the prior case." *Bowers Inv. Co. v. United States*, 695 F.3d 1380, 1384, (Fed. Cir. 2012) (citing *Ammex, Inc. v. United States*, 334 F.3d 1052, 1055 (Fed. Cir. 2003)).

The Claims Court correctly determined that Dr. Bondyopadhyay's claims accusing the United States of infringing the '134 patent were barred by the doctrine of *res judicata*. In *Bondyopadhyay I*, Dr. Bondyopadhyay accused the government of infringing the '134 patent through development of the Ball Advanced Technology Demonstration antenna. See *Bondyopadhyay I* at 116. As discussed *supra*, the court found that the government's antenna did not infringe the '134 patent literally or under the doctrine of equivalents and granted the government's motion for summary judgment. See *id.* at 124. We affirmed. See *Bondyopadhyay I Appeal* at 308. Regarding the patent infringement claims, there was thus a final judgment on the merits. Dr. Bondyopadhyay again here seeks under 28 U.S.C. § 1498 to assert the same '134 patent against the same party. But regardless how Dr. Bondyopadhyay characterizes his claims, as unauthorized use of the patent or depriving him of a constitutional right to make a living, his claims boil down to patent infringement, claims that were previously adjudicated against him, and he has failed to allege sufficient additional facts to indicate otherwise.³ We

³ The July 30, 2002 letter, for example is not sufficient. See *Bondyopadhyay I*, ECF 17, Ex. 2 (No. 14-147C); see also Appellant's Reply Br. 2, 12. The government asserted in the letter that "there is no infringement of the '134 patent." *Bondyopadhyay I*, ECF 17, Ex. 2 (No. 14-147C). The government then provided an alternative

therefore affirm the finding of *res judicata* for the infringement claims.

We next consider the dismissal of Dr. Bondyopadhyay's takings claim. Dr. Bondyopadhyay argues that the doctrine of *res judicata* does not apply. See Appellant's Br. 15. He refers to a "Constitutional Order of *exclusive right for limited times*" and requests that this court "restore" his "Constitutional right to make a living." See *id.* at 7, 11, 13, 16. The government responds that Dr. Bondyopadhyay already brought an identical takings claim and litigated it to a final judgment, so the doctrine of *res judicata* resolves this issue. See Appellee's Br. 8, 11–12. Our precedent dictates that "the Claims Court does not have jurisdiction to hear takings claims based on alleged patent infringement by the government." *Golden v. United States*, 955 F.3d 981, 986–88 (Fed. Cir. 2020). "Those claims . . . are to be pursued exclusively under 28 U.S.C. § 1498," *id.* at 988, as patent infringement claims. As patent infringement, those claims have previously been adjudicated and, as indicated above, are now barred under *res judicata*.

Finally, to the extent that Dr. Bondyopadhyay challenges the Claims Court's conclusion regarding his claims based on alleged governmental fraud, we conclude that the court lacked subject matter jurisdiction. "The plain language of the Tucker Act excludes from the Court of Federal Claims[s] jurisdiction claims sounding in tort." *Rick's Mushroom Serv., Inc. v. United States*, 521 F.3d 1338, 1343 (Fed. Cir. 2008); see U.S.C. § 1491(a)(1). "[F]raud as a

argument for non-infringement, stating that "*even if* the '134 patent were found to be valid and infringed, we are of the opinion that the performance under the five contracts falls within the experimental use exception to patent infringement." *Id.* (emphasis added). Dr. Bondyopadhyay failed to explain how the government's repeated denial of infringement in this letter constitutes an admission.

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cause of action lies in tort.” *Brown v. United States*, 105 F.3d 621, 623 (Fed. Cir. 1997). Thus, the court properly dismissed Dr. Bondyopadhyay’s fraud claims for lack of jurisdiction.

Because we conclude that the Claims Court did not err in dismissing Dr. Bondyopadhyay’s claims that are at issue on appeal for reasons of *res judicata* or for lack of jurisdiction, we do not need to reach the issue of whether his claims were filed outside of the applicable statute of limitations.

Finally, on January 28, 2021, Dr. Bondyopadhyay filed a “motion for special leave” to introduce additional information dated March 31, 2020. We normally do not consider supplemental material submitted after briefing unless it was previously unavailable. *See, e.g., Landreth v. United States*, 797 Fed. App’x 521, 524 (Fed. Cir. 2020). We therefore deny this motion. On February 12, 2021, Dr. Bondyopadhyay filed a memorandum in lieu of oral argument. Dr. Bondyopadhyay first restates arguments already presented in his briefs, which we carefully considered. Dr. Bondyopadhyay’s also moves for settlement of his financial claim, which is moot in view of our affirmance of the Claims Court’s dismissal of his legal claims.

CONCLUSION

We have considered Dr. Bondyopadhyay’s remaining arguments and conclude that they are without merit. For the reasons discussed above, we *affirm* the judgment of the Claims Court.

AFFIRMED

In the United States Supreme Court
Petition for Writ of Certiorari
Probir Kumar Bondyopadhyay vs. United States of America

APPENDIX-B

Judicial response of the U.S. Court of Appeals for the Federal Circuit (CAFC)
under CAFC Rule 40 and Rule 35

**[The 90 days window for filing this Petition for Writ of Certiorari
began on May 24, 2021]**

NOTE: This order is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

PROBIR KUMAR BONDYOPADHYAY,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2020-2091

Appeal from the United States Court of Federal Claims
in No. 1:19-cv-01831-MBH, Senior Judge Marian Blank
Horn.

**ON PETITION FOR PANEL REHEARING AND
REHEARING EN BANC**

Before MOORE, *Chief Judge**, NEWMAN, LOURIE, DYK,
PROST**, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN,
HUGHES, and STOLL, *Circuit Judges*.

PER CURIAM.

* Chief Judge Kimberly A. Moore assumed the position of Chief Judge on May 22, 2021.

** Circuit Judge Sharon Prost vacated the position of Chief Judge on May 21, 2021.

O R D E R

Probir Kumar Bondyopadhyay filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on June 1, 2021.

FOR THE COURT

May 24, 2021

Date

/s/ Peter R. Marksteiner

Peter R. Marksteiner

Clerk of Court

In the United States Supreme Court
Petition for Writ of Certiorari
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APPENDIX-C

The Opinion of the U.S. Court of Federal Claims (USCFC), that did **NOT** address the Jeffersonian Claim of the U.S. Constitutional Creature (under Article 1 Section 8 Clause 8) thus, disobeying the order of its Creator. (June 23, 2020)

[The Jeffersonian Claim must have to be addressed EXCLUSIVELY under Title 28 USC Section 1498(a) – the Constitution Law.]

In the United States Court of Federal Claims

No. 19-1831C

Filed: June 23, 2020

* * * * *

PROBIR K. BONDYOPADHYAY,

Plaintiff,

v.

UNITED STATES,

Defendant.

**Pro Se; Patent Infringement; Res
Judicata; Fifth Amendment Taking;
Fraud; Statute of Limitations.**

* * * * *

Probir K. Bondyopadhyay, pro se, Houston, TX.

Joshua I. Miller, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., for defendant. With him were **Gary L. Hausken**, Director, Commercial Litigation Branch, and **Joseph H. Hunt**, Assistant Attorney General, Civil Division.

OPINION

HORN, J.

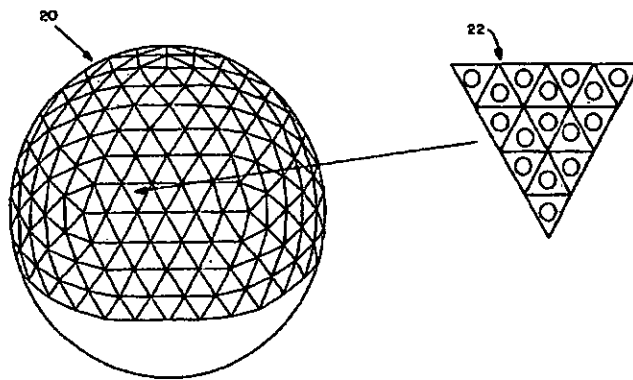
FINDINGS OF FACT

Plaintiff's complaint, filed on November 27, 2019, states that "[t]he Plaintiff, a U.S. Citizen is the sole inventor and owner of the live U.S. Patent 6,292,134 entitled *Geodesic Sphere Phased Array Antenna System*." (capitalization and emphasis in original) (internal references omitted). Attached to plaintiff's complaint is only the first page of the '134 patent, which is dated September 18, 2001. The '134 patent lists plaintiff as the inventor. The abstract of the '134 patent attached to the complaint states:

A geodesic sphere phased array antenna system, capable of scanning the entire omni-directional communication space and comprising substantially equilateral triangular planar subarrays of antenna elements arranged in a geodesic sphere configuration. Icosahedron, one of the five regular solids and truncated icosahedron, one of the fifteen semi-regular solids are the preferred basis of the geodesic sphere phased array construction. The entire communication space is considered as subdivided into a large number of smaller cells and corresponding to each such cellular

communication space, a contiguous set of the subarrays is energized and electronically phased to scan the cellular space. Another contiguous set of subarrays is energized and electronically phased to scan another cellular space in a similar manner resulting in limited angle scanning requirements which permit the basic antenna elements to be connected in a cluster as a unit building block to which transmit/receive signal distribution and processing means are connected resulting in lower costs in deployment, operation and maintenance.

Below the abstract, the following image is provided:



The first page of the '134 patent also states that the '134 patent contains "**30 Claims, 14 Drawing Sheets.**" (capitalization and emphasis in original).

Plaintiff's complaint, although at times difficult to follow, seems to allege that the defendant infringed on his ownership of the '134 patent. Plaintiff's complaint states that "[t]he violation of the Constitutional Order has occurred at the Small Business Innovation Research (SBIR) Program of the U.S. Air Force administered by the Air Force Research Laboratory (AFRL) under the central control of the Office of the Secretary of Defense (OSD)." (capitalization and emphasis in original) (internal references omitted). Plaintiff further alleges in his opposition to defendant's motion to dismiss that there have been "two distinctly separate violations: (i) acquisition of Innovation fraud under Title 15 USC section 638(a) and 638 (b). [sic] and (ii) violation of **Exclusive Right for Limited Times** of an Inventor, Owner, U.S. Citizen, (This Plaintiff)." (capitalization and emphasis in original). With regard to plaintiff's alleged second violation, plaintiff states that the "**Exclusive Rights for Limited Times** is a U.S. Constitutional Order that can NOT be dismissed by any Article 3 U.S. Courts or Article 1 U.S. Courts, created under Section 8, Clause 9." (capitalization and emphasis in original).

Plaintiff's complaint further states:

The U.S. Air Force has acquired the innovation (that soon became the U.S. Patent), in 1999 in clear **violation of Title 15 USC Section 638a and 638b**

to modernize the Air Force Satellite Control Network (AFSCN). The proof, at the origin of this U.S. Air Force effort, is staring at the Honorable Federal Court in Exhibit-3.

(capitalization and emphasis in original). Exhibit 3 of plaintiff's complaint is labeled: "**TIME LINE OF DEVELOPMENT WORKS ON THE MODERNIZATION OF AIR FORCE SATELLITE CONTROL NETWORK (AFSCN) BY THE AIR FORCE RESEARCH LABORATORY (AFRL)**" (capitalization and emphasis in original), and contains an uncited image depicting the United States Air Force's projected acquisition timeline for the construction of a Full Scale Geodesic Dome Phased Array Antenna, starting in 1999 and completed by 2021.

Plaintiff's multiple filings with the court in the above-captioned case do not specify a particular device of the AFRL which he alleges infringed on the '134 patent. The above-captioned case, Case No. 19-1831C, however, is one of many actions commenced by plaintiff relating to the alleged infringement on the '134 patent, including an administrative claim filed by plaintiff with the Judge Advocate General of the United States Air Force on June 17, 2002, which was denied 44 days later, on July 30, 2002. Between 2003 and 2013, plaintiff filed at least six lawsuits relating to the '134 patent in the United States District Court for the Southern District of Texas against contractors of the AFRL, as well as against the United States.¹

¹ In defendant's motion to dismiss, the defendant notified the court of six lawsuits filed by plaintiff between 2002 and 2013 which relate to the '134 patent. Defendant states:

Plaintiff filed two lawsuits against the Government's contractors, alleging infringement of the '134 patent by those contractors:

- Bondyopadhyay v. Custom Mfg. & Eng'g. Inc., Civ. No. 4:03-cv-1542 (S.D. Tex. Filed May 7, 2003) (dismissed July 30, 2003 for lack of personal jurisdiction);
- Bondyopadhyay v. Alpha Omega Elec. LLC, Civ. No. 4:03-cv-1578 (S.D. Tex. Filed May 9, 2003) (dismissed July 30, 2003 for lack of personal jurisdiction).

Plaintiff then filed four lawsuits against the Government in district court over the next decade:

- Bondyopadhyay v. U.S. Secretary of Defense et al., Civ. No. 4:03-cv-3107 (S.D. Tex. Filed Aug. 6, 2003) (dismissed Dec. 5, 2003 for lack of subject matter jurisdiction and failure to exhaust administrative remedies);
- Bondyopadhyay v. U.S. Dept. of Defense et al., Civ. No. 4:04-cv-1990 (S.D. Tex. Filed May 18, 2004) (dismissed Aug. 6, 2004 for lack of subject matter jurisdiction);
- Bondyopadhyay v. Commander, U.S. Air Force Research

In 2014, plaintiff filed a previous lawsuit against the United States in the United States Court of Federal Claims, which was assigned to Judge Williams. During the course of the proceedings before Judge Williams, she issued three Opinions: a 2015 Opinion granting the United States' partial motion to dismiss, see Bondyopadhyay v. United States, No. 14-147, 2015 WL 1311726 (Fed. Cl. 2015) (Bondyopadhyay I); a Claim Construction Opinion in 2017, see Bondyopadhyay v. United States, 129 Fed. Cl. 793, 807 (Fed. Cl. 2017) (Bondyopadhyay II); and finally, a grant of defendant's motion for summary judgment in 2018, see Bondyopadhyay v. United States, 136 Fed. Cl. 114 (Bondyopadhyay III), aff'd, 748 F. App'x 301 (Fed. Cir. 2018). Also in 2018, Judge Williams' summary judgment decision in favor of defendant in Bondyopadhyay III was affirmed by the United States Court of Appeals for the Federal Circuit. See Bondyopadhyay v. United States, 748 F. App'x 301 (Fed. Cir. 2018) (Bondyopadhyay IV). In Judge Williams' decision granting defendant's partial motion to dismiss in Bondyopadhyay I, Judge Williams determined that some of plaintiff's claims were time-barred, and others "arose after expiration of the patent-in-suit." See Bondyopadhyay I, 2015 WL 1311726, at *1. Judge Williams' decision in Bondyopadhyay I also dismissed plaintiff's "claims for a Fifth Amendment taking, punitive damages, and costs arising out of other litigation." Id. In Judge Williams' Claim Construction Opinion in Bondyopadhyay II, Judge Williams determined, after a claims construction hearing, that the '134 patent's use of the term "sphere" meant "greater than a hemisphere so as to provide the phased array antenna hemispherical or wider coverage." See Bondyopadhyay II, 129 Fed. Cl. at 807.

In granting summary judgment in favor of the United States in Bondyopadhyay III, Judge Williams found that there was no infringement of the '134 patent by the United States Air Force's device, referred to as the Ball Advanced Technology Demonstration antenna (Ball ATD). See Bondyopadhyay III, 136 Fed. Cl. at 124. Judge Williams described the Ball ATD as follows:

There is only one accused device at issue—the Ball Advanced Technology Demonstration antenna. Since at least 2000, the Air Force Research Laboratory was interested in the feasibility of a large antenna system called the Geodesic Dome Phased Array Antenna. As part of this research, the Air

Laboratory (AFRL) et al., Civ. No. 4:12-cv-1658 (S.D. Tex. filed June 1, 2012); and

- Bondyopadhyay v. U.S. Secretary of Defense et al., Civ. No. 4:12-cv-1914 (S.D. Tex. Filed July 1, 2013) (dismissed Oct. 23, 2013 for lack of subject matter jurisdiction).

The court also notes that a Westlaw docket search for plaintiff, at [https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20%22Probir%20K.%20Bondyopadhyay%22&contentType=DOCKET&querySubmissionGuid=i0ad74013000001729929984d66570adb&categoryPageUrl=Home%2FDockets&searchId=i0ad74013000001729929984d66570adb&transitionType=ListViewType&contextData=\(sc.Search\)](https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20%22Probir%20K.%20Bondyopadhyay%22&contentType=DOCKET&querySubmissionGuid=i0ad74013000001729929984d66570adb&categoryPageUrl=Home%2FDockets&searchId=i0ad74013000001729929984d66570adb&transitionType=ListViewType&contextData=(sc.Search)) (last visited June 23, 2020), reveals 15 cases filed by plaintiff in state and federal courts.

Force sponsored a number of small businesses to research and develop technology required for building a full-scale Geodesic Dome Phased Array Antenna. Subsequently, in November 2006, the Air Force awarded a contract to Ball Aerospace & Technologies Corporation to develop a Geodesic Dome Phased Array Antenna advanced technology demonstration. Accordingly, Ball was "to develop, build, and demonstrate the technological maturity, manufacturing readiness, and mission effectiveness of a scalable sector" of a Geodesic Dome Phased Array Antenna. The Ball Advanced Technology Demonstration antenna was the result of this research and development.

The Ball Advanced Technology Demonstration antenna was designed in 2006–07, manufactured in 2007–08, and installed at Schriever Air Force Base in Colorado in 2008–09, for testing and demonstration. The actual demonstration of the Ball Advanced Technology Demonstration antenna took place between February 2009 and May 2009.

The Ball Advanced Technology Demonstration antenna, which stood roughly one to two stories high, was not completely constructed to constitute a full sphere, and was only made up of six flat panels: a single central pentagonal-shaped panel, surrounded by five outer hexagonal-shaped panels. . . .

After the demonstration in 2009, the Ball Advanced Technology Demonstration antenna was disassembled, with one part sent back to Ball Aerospace for further testing, and after 2012, the Air Force Research Laboratory did not engage in any activities to develop, manufacture, or test a Geodesic Dome Phased Array Antenna.

Bondyopadhyay III, 136 Fed. Cl. at 118–20 (internal references omitted). Finding that the Ball ATD did not infringe upon the '134 patent under a literal interpretation, or under the doctrine of equivalents, Judge Williams stated:

In sum, because the Ball Advanced Technology Demonstration antenna was incapable of providing hemispheric or greater coverage, it did not literally infringe the '134 patent. Under either test for infringement under the doctrine of equivalents, the accused device cannot be found as infringing. Accordingly, Defendant's motion for summary judgment is **GRANTED**, and Plaintiff's 'Motion of the Infringement Phase' is **DENIED**.

Id. at 124 (capitalization and emphasis in original) (internal citation omitted).

As discussed above, plaintiff in the above-captioned case does not reference a specific device which allegedly infringed on the '134 patent, although plaintiff's filings in the above-captioned case mention the previous proceedings in this court. Plaintiff's complaint states:

The *constitutional* financial claim has already been recorded with the U.S. Court of Appeals for the Federal Circuit [**Exhibit-6**]. It is \$100 per hour for 1500 hours per year for 11 years and 23 days, plus administrative and office cost of \$1000 per month for 60 months. The total amount of **Constitutional Financial Claim** is \$1,719,000.

(alteration, capitalization and emphasis in original). Attached as Exhibit 6 of plaintiff's complaint in the above-captioned case is a portion of plaintiff's briefing before the United States Court of Appeals for the Federal Circuit in Bondyopadhyay IV.² Additionally, in plaintiff's opposition to defendant's motion to dismiss, plaintiff references the company which constructed the Ball ATD, stating that "[t]he U.S. Air force [sic] Research Laboratory (AFRL) and the contractor Ball Aerospace Corporation have done sub-standard work. This has already been pointed out during earlier Court proceedings (case 1:14-cv-00147-MCW)."³

² An excerpt from the appeal file in the United States Court of Appeals for the Federal Circuit from Bondyopadhyay IV, which is attached at Exhibit 6 of plaintiff's complaint in the above-captioned case, states:

9.0 THE PLAINTIFF INDEPENDENT INVENTOR'S FINANCIAL CLAIM

9.1 PART-A based on *exclusive rights for limited times* (period September 18, 2001 through October 11, 2012). The Plaintiff Appellant independent Inventor *was deprived of* full time highly specialized Phased Array Antenna Engineering work on his own invention.

9.2 This PART-A amount is \$100 per hour for 1500 hours per year for eleven (11) years and 23 days.

9.3 PART-B Plaintiff Appellant's Court cost (US Court of Federal Claims, period February 2014 through April 2018). This includes clerical, postal, copying and office costs at their minimum.

9.4 This PART-B amount is \$1000 per month for 50 months.

10. This Claim originated from a procurement fraud in the Small Business Innovation Research (SBIR) program of the U.S. Air Force managed by U.S. Air Force Research Laboratory (AFRL). Therefore, this Constitutional Claim should be levied against the budget of the U.S. AFRL.

(capitalization and emphasis in original).

³ The court cannot find any such statement by Judge Williams or by the United States Court of Appeals for the Federal Circuit which recognizes that the AFRL or Ball Aerospace Corporation have "done sub-standard work."

Plaintiff's complaint in the above-captioned case, once again, appears to allege a Fifth Amendment taking claim, stating that the "*Defendant has taken the livelihood of this Independent Inventor* for a prolonged period of eleven years and 23 days and continues to remain indifferent towards this *Constitutional Order* for a long time." (capitalization and emphasis in original). Plaintiff's filings with the court in the above-captioned case, however, do not indicate the exact nature of an alleged event that occurred eleven years and 23 days prior to plaintiff's filing of the above-captioned case.

Furthermore, plaintiff appears to allege fraudulent conduct by defendant. Exhibit 5 to plaintiff's complaint is labeled: "U.S. AIR FORCE AND THE DEPARTMENT OF DEFENSE '**HONORS**' **FALSE** '**INVENTOR**' OF THE GEODESIC SPHERE PHASED ARRAY ANETENNA SYSTEM" (capitalization and emphasis in original). Exhibit 5 consists of the following article published on October 11, 2012 in "Air Force Print News Today"⁴

AF nominates AFMC, AFSPC civilians for DOD award

By Gloria Kwizera
Air Force Personnel Center Public Affairs

10/11/2012 - **JOINT BASE SAN ANTONIO-RANDOLPH, Texas** --Two Air Force civilians have been nominated for the Department of Defense Distinguished Civilian Service Award.

Dr. Boris Tomasic, Air Force Research Laboratory, Air Force Materiel Command, and Angelica M. Collazo, 92nd Information Operations Squadron, Air Force Space Command, will represent the Air Force during the 57th annual DOD competition, Air Force Personnel Center officials said.

The award is the highest honor given by the Secretary of Defense to career civilian employees, said Staff Sgt. Leland T. Moseley, AFPC Special Trophies and Awards section. It is presented annually to a small number of DOD civilians whose careers reflect exceptional devotion to duty and significant contributions of broad scope to DOD operational efficiency, economy, or other improvements.

Tomasic invented and led the development of a revolutionary new antenna - the Geodesic Dome Phased Array Antenna - for the Air Force satellite control network. It provides tracking, telemetry and control of nearly all DOD and National Aeronautics and Space Administration satellites, transitioning the technology from initial concept to a field ready demonstration levels. He also provided critical support to Air Combat Command on the Joint Threat

⁴ AF Nominates AFMC, AFSPC civilians for DOD award, available at, <https://www.af.mil/News/Article-Display/Article/110314/af-nominates-afmc-afspc-civilians-for-dod-award> (last visited June 19, 2020).

Emitter, Increment Two Program, developing a system that mimics surface-to-air missile system radars currently employed worldwide.

Tomasic's contributions to antenna technology paved the way for Air Force, Navy and Marine fighter pilots to fly against several emulator systems in realistic combat training scenarios. Tomasic also contributed to practical radar and communication system improvements that benefit all DOD forces, including a field deployable phased array for ballistic missile defense, assessment of the Army's Comanche and Black Hawk helicopter antennas, Space Based Radar system development for the Defense Advanced Research Projects Agency and development of extremely high frequency solid state antenna technology that resulted in improved aircraft connectivity with the military strategic, tactical and relay satellite network..

Collazo has been at the forefront of cutting-edge cyber defense initiatives critical to the projection of global military power and national defense. She led the execution of more than \$62 million to deploy the first of its kind global information protection capability, initiating more than 200 major software changes to a cyber incident handling database. That system is now the baseline for U.S. Strategic Command's Joint Computer Emergency Response Team Database, used by Joint Chiefs of Staff decision-makers to correlate critical cyber incidents across all services.

Collazo drove establishment of facilities that emulated DOD networks enabling operators to conduct product and network security assessments. As a result, her facility was selected as the first-ever site for critical testing of enterprise-wide solutions to prevent, detect and counter unauthorized users and actions on DOD networks. She directed 63 system and 25 base cyber vulnerability assessments, sharing findings with numerous DOD commanders, system program offices and other joint agencies, enabling them to remediate thousands of critical system vulnerabilities.

Tomasic and Collazo are authorized to wear the Air Force Recognition Lapel Pin, Moseley said.

(capitalization and emphasis in original). In plaintiff's opposition to defendant's motion to dismiss, plaintiff also states that defendant committed "acquisition of Innovation fraud under Title 15 USC section 638(a) and 638 (b)." (capitalization in original).

Defendant moves to dismiss plaintiff's complaint in its entirety, on multiple grounds, arguing that this court lacks subject-matter jurisdiction over plaintiff's claims, and that plaintiff has failed to state a claim upon which relief can be granted, pursuant to Rules 12(b)(1) and 12(b)(6) (2019) of the Rules of the United States Court of Federal Claims (RCFC). Defendant states that "it appears there are three potential causes of action in the complaint: (1) unauthorized patent use by the Government; (2) a 'taking' by the Government of the '134 patent; and (3) a fraud claim (or inventorship dispute) against the

Government.” (internal references and footnote omitted). Finally, defendant argues that all of plaintiff’s claims are barred by the statute of limitations. Regarding the alleged unauthorized patent use, defendant argues that “[a]lthough the complaint does not identify any particular accused device, the exhibits appended to Plaintiff’s complaint here and in Bondyopadhyay I make clear that Plaintiff accuses the **exact same** device of infringing the **exact same** patent” in both suits. (capitalization and emphasis in original). Defendant argues that “both the patent and taking claims have previously been adjudicated against Plaintiff, such that these causes of action fail on the grounds of res judicata.” Defendant argues that “neither the patent nor the taking claims can be plausibly pled because the ‘134 patent has been construed in a manner that prohibits a finding of infringement or taking by the Government’s activities.” Defendant also argues that the court “lacks any semblance of subject-matter jurisdiction over Plaintiff’s taking and fraud claims.”

DISCUSSION

The court recognizes that plaintiff is proceeding pro se. When determining whether a complaint filed by a pro se plaintiff is sufficient to invoke review by a court, a pro se plaintiff is entitled to a more liberal construction of the pro se plaintiff’s pleadings. See Haines v. Kerner, 404 U.S. 519, 520-21 (requiring that allegations contained in a pro se complaint be held to “less stringent standards than formal pleadings drafted by lawyers”), reh’g denied, 405 U.S. 948 (1972); see also Erickson v. Pardus, 551 U.S. 89, 94 (2007); Hughes v. Rowe, 449 U.S. 5, 9-10 (1980); Estelle v. Gamble, 429 U.S. 97, 106 (1976), reh’g denied, 429 U.S. 1066 (1977); Matthews v. United States, 750 F.3d 1320, 1322 (Fed. Cir. 2014); Diamond v. United States, 115 Fed. Cl. 516, 524 (2014), aff’d, 603 F. App’x 947 (Fed. Cir.), cert. denied, 575 U.S. 985 (2015). However, “there is no ‘duty [on the part] of the trial court . . . to create a claim which [plaintiff] has not spelled out in his [or her] pleading’” Lengen v. United States, 100 Fed. Cl. 317, 328 (2011) (alterations in original) (quoting Scogin v. United States, 33 Fed. Cl. 285, 293 (1995) (quoting Clark v. Nat’l Travelers Life Ins. Co., 518 F.2d 1167, 1169 (6th Cir. 1975))); see also Bussie v. United States, 96 Fed. Cl. 89, 94, aff’d, 443 F. App’x 542 (Fed. Cir. 2011); Minehan v. United States, 75 Fed. Cl. 249, 253 (2007). “While a pro se plaintiff is held to a less stringent standard than that of a plaintiff represented by an attorney, the pro se plaintiff, nevertheless, bears the burden of establishing the Court’s jurisdiction by a preponderance of the evidence.” Riles v. United States, 93 Fed. Cl. 163, 165 (2010) (citing Hughes v. Rowe, 449 U.S. at 9; and Taylor v. United States, 303 F.3d 1357, 1359 (Fed. Cir.), reh’g and reh’g en banc denied (Fed. Cir. 2002)); see also Pauly v. United States, 142 Fed. Cl. 157 (2019); Golden v. United States, 129 Fed. Cl. 630, 637 (2016); Shelkofsky v. United States, 119 Fed. Cl. 133, 139 (2014) (“[W]hile the court may excuse ambiguities in a pro se plaintiff’s complaint, the court ‘does not excuse [a complaint’s] failures.’” (quoting Henke v. United States, 60 F.3d 795, 799 (Fed. Cir. 1995))); Harris v. United States, 113 Fed. Cl. 290, 292 (2013) (“Although plaintiff’s pleadings are held to a less stringent standard, such leniency ‘with respect to mere formalities does not relieve the burden to meet jurisdictional requirements.’” (quoting Minehan v. United States, 75 Fed. Cl. at 253)).

"Determination of jurisdiction starts with 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.) (citing Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1 (1983)), reh'g denied (Fed. Cir. 1997); see also Klamath Tribe Claims Comm. v. United States, 97 Fed. Cl. 203, 208 (2011); Gonzalez-McCaulley Inv. Grp., Inc. v. United States, 93 Fed. Cl. 710, 713 (2010). A plaintiff need only state in the complaint "a short and plain statement of the grounds for the court's jurisdiction," and "a short and plain statement of the claim showing that the pleader is entitled to relief." RCFC 8(a)(1), (2); Fed. R. Civ. P. 8(a)(1), (2) (2019); see also Ashcroft v. Iqbal, 556 U.S. at 677-78 (citing Bell Atl. Corp. v. Twombly, 550 U.S. at 555-57, 570). To properly state a claim for relief, "[c]onclusory allegations of law and unwarranted inferences of fact do not suffice to support a claim." Bradley v. Chiron Corp., 136 F.3d 1317, 1322 (Fed. Cir. 1998); see also Am. Bankers Ass'n v. United States, 932 F.3d 1375, 1380 (Fed. Cir. 2019) ("To avoid dismissal under RCFC 12(b)(6), a plaintiff 'must allege facts 'plausibly suggesting (not merely consistent with)' a showing of entitlement to relief.'" (quoting Acceptance Ins. Cos., Inc. v. United States, 583 F.3d 849, 853 (Fed. Cir. 2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. at 557))). McZeal v. Sprint Nextel Corp., 501 F.3d 1354, 1363 n.9 (Fed. Cir. 2007) (Dyk, J., concurring in part, dissenting in part) (quoting C. WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1286 (3d ed. 2004)); Briscoe v. LaHue, 663 F.2d 713, 723 (7th Cir. 1981) ("[C]onclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss."), aff'd, 460 U.S. 325 (1983). "A plaintiff's factual allegations must 'raise a right to relief above the speculative level' and cross 'the line from conceivable to plausible.'" Three S Consulting v. United States, 104 Fed. Cl. 510, 523 (2012) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. at 555), aff'd, 562 F. App'x 964 (Fed. Cir.), reh'g denied (Fed. Cir. 2014). As stated in Ashcroft v. Iqbal, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' 550 U.S. at 555. Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Ashcroft v. Iqbal, 556 U.S. at 678 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. at 555).

The United States has waived sovereign immunity over patent infringement claims against the federal government and its contractors, and has provided the United States Court of Federal Claims with jurisdiction to hear such claims, under 28 U.S.C. § 1498(a). Section 1498(a) states, in relevant part:

Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the United States Court of Federal Claims for the recovery of his reasonable and entire compensation for such use and manufacture. . . .

For the purposes of this section, the use or manufacture of an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or any person, firm, or corporation for the Government and

with the authorization or consent of the Government, shall be construed as use or manufacture for the United States.

28 U.S.C. § 1498(a) (2018); see also Golden v. United States, 955 F.3d 981, 986 (Fed. Cir. 2020) ("28 U.S.C. § 1498(a) permits suits against the United States for its unauthorized use of a patented invention."); Zoltek Corp. v. United States, 672 F.3d 1309, 1312 (Fed. Cir. 2012).

Defendant in the above-captioned case asserts that plaintiff's patent claims have previously been decided in this court, in favor of the United States, by Judge Williams' decisions, on the partial motion to dismiss, Bondyopadhyay I, the claims construction, Bondyopadhyay II, and the motion for summary judgment, Bondyopadhyay III. The United States Court of Appeals for the Federal Circuit affirmed the lower court's claim construction and finding that the Air Force's Ball ATD did not infringe on the '134 patent. See generally Bondyopadhyay IV, 748 F. App'x at 308. Defendant argues that the doctrine of res judicata, and more specifically, the doctrine of claim preclusion, bars plaintiff from bringing his claim of patent infringement again in the above-captioned case.

The doctrine of res judicata "includes the two related concepts of claim preclusion and issue preclusion." Nasalok Coating Corp. v. Nylok Corp., 522 F.3d 1320, 1323 (Fed. Cir.), reh'g and reh'g en banc denied (Fed. Cir. 2008); see also Faust v. United States, 101 F.3d 675, 677 (Fed. Cir.), reh'g denied (Fed. Cir.), cert. denied, 520 U.S. 1200 (1997) ("[W]e note that the term res judicata has been used narrowly to denote 'claim preclusion' and more generally to denote either 'claim preclusion' or 'issue preclusion.'" (quoting Foster v. Halco Mfg. Co., 947 F.2d 469, 478 (Fed. Cir. 1991))). The United States Supreme Court has stated:

Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.

Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326 n.5 (1979).

In a recent case, the United States Court of Appeals for the Federal Circuit described the difference between claim and issue preclusion as follows:

"The doctrine of res judicata involves the related concepts of claim preclusion and issue preclusion." Phillips/May Corp. v. United States, 524 F.3d 1264, 1267 (Fed. Cir. 2008). "Issue preclusion operates only as to issues actually litigated, whereas claim preclusion may operate between the parties simply by virtue of the final judgment." Young Engr'rs, Inc. v. U.S. Int'l Trade Comm'n, 721 F.2d 1305, 1314 (Fed. Cir. 1983).

First Mortg. Corp. v. United States, Case No. 19-1798, 2020 WL 3108286, at *4 (Fed. Cir. June 12, 2020) (ellipses in original).

Regarding claim preclusion, the Federal Circuit in First Mortgage further stated:

Claim preclusion “foreclose[es] any litigation of matters that . . . should have been advanced in an earlier suit.” Phillips/May Corp., 524 F.3d at 1267 (internal quotation marks and citation omitted). “A final judgment on the merits of an action precludes the parties or their privies from relitigating issued that were or could have been raised in that action.” Federated Dep’t Stores, Inc. v. Moltie, 452 U.S. 394, 398, 101 S. Ct. 2424, 69 L. Ed.2d 103 (1981) (citing Commissioner v. Sunnen, 333 U.S. 591, 597, 68 S. Ct. 715, 92 L. Ed. 898 (1948) and Cromwell v. Cty. Of Sac, 94 U.S. 351, 352–53, 24 L. Ed. 195 (1877)).

First Mortg. Corp. v. United States, 2020 WL 3108286, at *4 (alteration and ellipses in original); see also Hallco Mfg. Co., Inc. v. Foster, 256 F.3d 1290, 1294 (Fed. Cir. 2001) (“The general concept of claim preclusion is that when a final judgment is rendered on the merits, another action may not be maintained between the parties on the same ‘claim.’” (citing Restatement (Second) of Judgments §§ 18–19)).

“Generally, claim preclusion applies where: ‘(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.’” First Mortg. Corp. v. United States, 2020 WL 3108286, at *4 (quoting Ammex, Inc. v. United States, 334 F.3d 1052, 1055 (Fed. Cir. 2003) (citing Parklane Hosiery Co. v. Shore, 439 U.S. at 326 n.5)). A Judge of the United States Court of Federal Claims has stated:

[C]laim preclusion applies when there is (i) “a judgment on the merits in a prior suit;” (ii) “a second suit involving the same parties or their privies;” and (iii) the second suit is “based on the same cause of action.” Parklane Hosiery, 439 U.S. at 326 n.5, 99 S. Ct. 645; see also Gillig[v. Nike, Inc.], 602 F.3d at 1361 [(Fed. Cir. 2010)]; Jet, Inc. v. Sewage Aeration Sys., 223 F.3d 1360, 1362 (Fed. Cir. 2000); Strategic Hous. Finance Corp. of Travis Cty. v. United States, 87 Fed. Cl. 183, 192 (2009).

Aviation Software, Inc. v. United States, 101 Fed. Cl. 656, 662–63 (2011). Furthermore, for claim preclusion to apply, “a litigant must have a ‘full and fair opportunity’ to litigate its case.” Id. at 663 (quoting Poyner v. Murray, 508 U.S. 931, 933 (1993)); see also Kremer v. Chemical Const. Corp., 456 U.S. 461, 481 n.22 (1982); Pactiv Corp. v. Dow Chemical Co., 449 F.3d 1227, 1233 (Fed. Cir. 2006).

The related doctrine of issue preclusion, also known as collateral estoppel, precludes a party from re-litigating an issue that was “litigated and resolved in a valid court determination essential to the prior judgment.” New Hampshire v. Maine, 532 U.S. 742, 748–49, reh’g denied, 533 U.S. 968 (2001). “Under the judicially-developed doctrine

of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation.” United States v. Mendoza, 464 U.S. 154, 158 (1984); see also Allen v. McCurry, 449 U.S. 90, 94 (1980) (“Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.”). “When an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” Ashe v. Swenson, 397 U.S. 436, 443 (1970). The United States Supreme Court has explained that issue preclusion guards against “the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.” Montana v. United States, 440 U.S. 147, 153–54 (1979) (footnote omitted). The Supreme Court also stated:

Issue preclusion bars successive litigation of “an issue of fact or law” that “is actually litigated and determined by a valid and final judgment, and . . . is essential to the judgment.” Restatement (Second) of Judgments § 27 (1980) (hereinafter Restatement). If a judgment does not depend on a given determination, relitigation of that determination is not precluded. Id., § 27, Comment h.

Bobby v. Bies, 556 U.S. 825, 834 (2009); see also United States v. Mendoza, 464 U.S. at 158 (“Collateral estoppel, like the related doctrine of res judicata, serves to ‘relieve parties of the cost and vexation of multiple law-suits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.’” (quoting Allen v. McCurry, 449 U.S. at 94)).

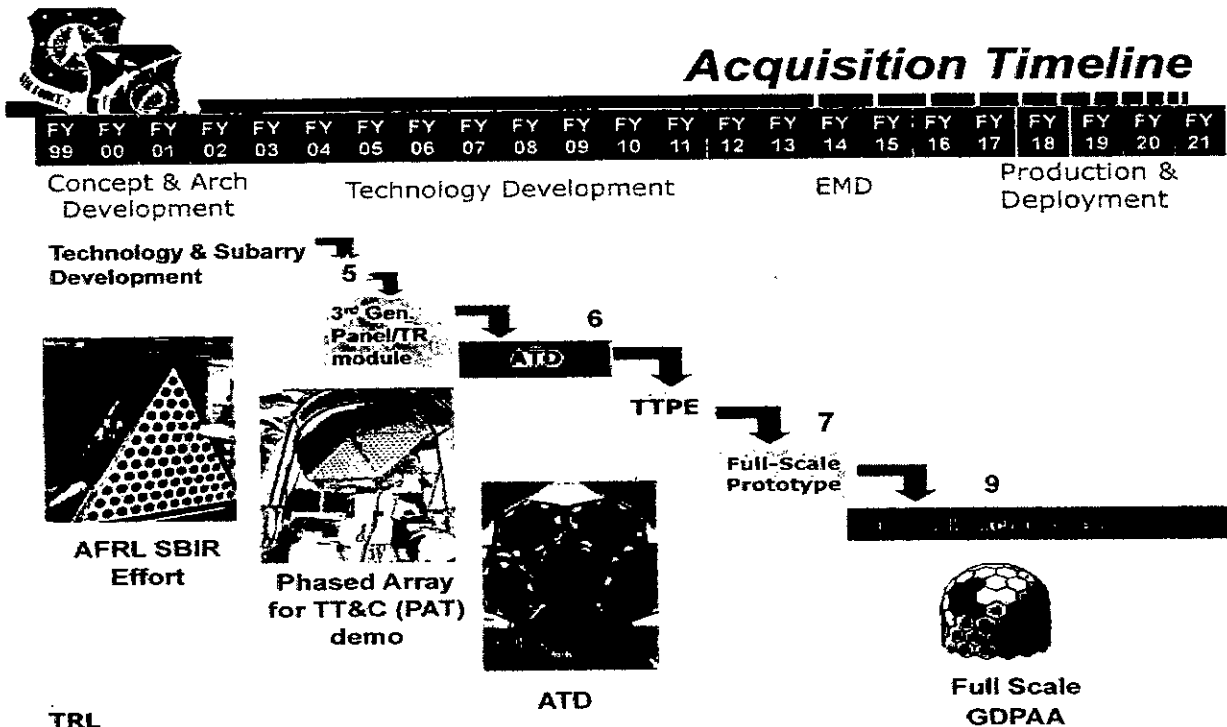
The United States Court of Appeals for the Federal Circuit has set out four guidelines for determining whether issue preclusion is appropriate:

Issue preclusion bars a cause of action when four conditions are met: “(1) the issue is identical to one decided in the first action; (2) the issue was actually litigated in the first action; (3) resolution of the issue was essential to a final judgment in the first action; and (4) the plaintiff had a full and fair opportunity to litigate the issue in the first action.”

Laguna Hermosa Corp. v. United States, 671 F.3d 1284, 1288 (Fed. Cir. 2012) (quoting In re Freeman, 30 F.3d 1459, 1465 (Fed. Cir. 1994); see also Biafora v. United States, 773 F.3d 1326, 1333 (Fed. Cir. 2014); Ga. Power Co. v. United States, 143 Fed. Cl. 743, 748 (2019).

Although plaintiff in the above-captioned case does not expressly mention any device by name, including the AFRL’s Ball ATD, as having allegedly infringed upon the ‘134 patent, plaintiff’s complaint appears to revolve around the manufacturing of the Ball ATD, the device which was at the center of the dispute before Judge Williams in Bondyopadhyay I through Bondyopadhyay III, and the United States Court of Appeals for

the Federal Circuit in Bondyopadhyay IV. As discussed above, attached to plaintiff's complaint in the current case before the court is the following acquisition timeline:



The above acquisition timeline was also filed by plaintiff in Judge Williams' case, and appears to comport with Judge Williams' description of the Ball ATD. In Bondyopadhyay III, Judge Williams described the Ball ATD as follows:

There is only one accused device at issue—the Ball Advanced Technology Demonstration antenna. Since at least 2000, the Air Force Research Laboratory was interested in the feasibility of a large antenna system called the Geodesic Dome Phased Array Antenna. As part of this research, the Air Force sponsored a number of small businesses to research and develop technology required for building a full-scale Geodesic Dome Phased Array Antenna. Subsequently, in November 2006, the Air Force awarded a contract to Ball Aerospace & Technologies Corporation to develop a Geodesic Dome Phased Array Antenna advanced technology demonstration. Accordingly, Ball was “to develop, build, and demonstrate the technological maturity, manufacturing readiness, and mission effectiveness of a scalable sector” of a Geodesic Dome Phased Array Antenna. The Ball Advanced Technology Demonstration antenna was the result of this research and development.

The Ball Advanced Technology Demonstration antenna was designed in 2006–07, manufactured in 2007–08, and installed at Schriever Air Force Base in Colorado in 2008–09, for testing and demonstration. The actual

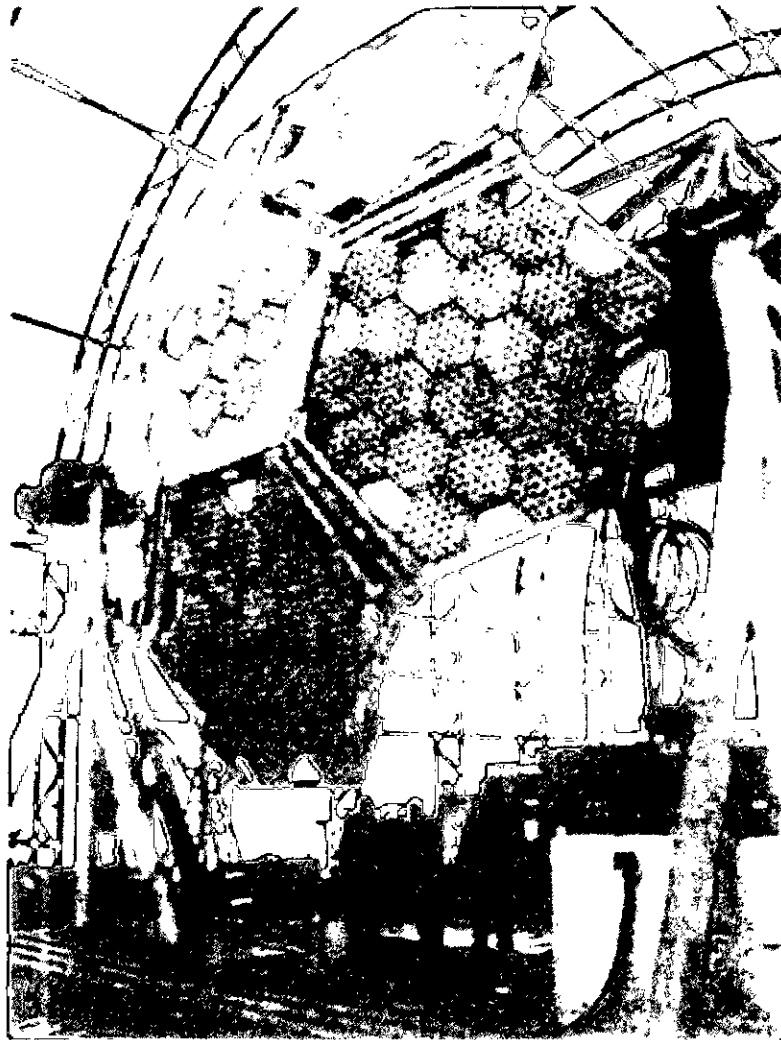
demonstration of the Ball Advanced Technology Demonstration antenna took place between February 2009 and May 2009.

The Ball Advanced Technology Demonstration antenna, which stood roughly one to two stories high, was not completely constructed to constitute a full sphere, and was only made up of six flat panels: a single central pentagonal-shaped panel, surrounded by five outer hexagonal-shaped panels. The figure below depicts the Ball Advanced Technology Demonstration antenna constructed by the Air Force:



As explained by Dr. Haupt, Defendant's expert, this figure shows the six panels that constitute the Ball Advanced Technology Demonstration antenna array. In Dr. Haupt's opinion, and, as is obvious from the figure, these six panels are a very small fraction of the array panels of a full Geodesic Dome Phased Array Antenna. The Ball Advanced Technology Demonstration antenna is not a "sphere" as defined by the Court in its claim construction opinion because it is not greater than a hemisphere, as it only had six panels.

The picture of the Ball Advanced Technology Demonstration antenna appended to the Complaint shows these six panels as follows:



After the demonstration in 2009, the Ball Advanced Technology Demonstration antenna was disassembled, with one part sent back to Ball Aerospace for further testing, and after 2012, the Air Force Research Laboratory did not engage in any activities to develop, manufacture, or test a Geodesic Dome Phased Array Antenna.

Bondyopadhyay III, 136 Fed. Cl. at 118–120 (footnotes and internal references omitted).

As noted above, plaintiff's filings in the current case do not mention the Ball ATD by name, nor does plaintiff attach to his current filings any of the images, reproduced above, from Judge Williams' case, except for the acquisition timeline. Plaintiff's filings in the current case, however, do not reference any other device for the court to consider. Moreover, plaintiff does not refute defendant's statements in its motion to dismiss currently before the court, that "[t]he device made pursuant to this Acquisition Timeline is the Ball Advanced Technology Demonstration antenna," or that "the exhibits appended to Plaintiff's complaint and in Bondyopadhyay I make clear that Plaintiff accuses the **exact**

same device of infringing the **exact same** patent,” (capitalization and emphasis in original). Plaintiff’s complaint also makes numerous references to his previous case in this court, although plaintiff appears to incorrectly conclude that the previous decisions by Judge Williams and the United States Court of Appeals for the Federal Circuit cut in plaintiff’s favor because Judge Williams and the Federal Circuit recognized that plaintiff owns the ‘134 patent. That plaintiff appears to be the owner of the ‘134 patent, however, does not satisfy the inquiry of whether any device used by the United States infringed on plaintiff’s ‘134 patent.

As discussed above, in Bondyopadhyay III, Judge Williams found that the Ball ATD did not infringe upon the ‘134 patent, see Bondyopadhyay III, 136 Fed. Cl. at 124, and in Bondyopadhyay IV, the United States Court of Appeals for the Federal Circuit upheld her decision. See Bondyopadhyay IV, 748 F. App’x at 308. Moreover, this was the central dispute in the plaintiff’s previous case in this court, during part of which Judge Williams conducted a claim construction hearing and issued a claims construction opinion in 2017. See Bondyopadhyay II, 129 Fed. Cl. 793. Plaintiff has had “full and fair opportunity to litigate the issue,” and did litigate the issue now presented in the current case, in the previous action before Judge Williams. See Poyner v. Murray, 508 U.S. at 933. Therefore, plaintiff’s claim that the Ball ATD infringed on the ‘134 patent is barred by the doctrine of res judicata.

Defendant next argues that, to the extent plaintiff states a Fifth Amendment taking claim, this court lacks subject-matter jurisdiction to hear the claim, also under the doctrine of res judicata. Defendant alternatively argues that the court lacks jurisdiction over any patent infringement-based taking claims, even if res judicata does not apply. Plaintiff failed to address, in the many filings plaintiff submitted in the current case, defendant’s arguments, raised in its motion to dismiss, the issue of whether plaintiff’s Fifth Amendment taking claim is properly before the court.

The United States Supreme Court has stated that “[t]he principles of res judicata apply to questions of jurisdiction as well as to other issues.” Am. Sur. Co. v. Baldwin, 287 U.S. 156, 166 (1932). Judges of the United States Court of Appeals for the Federal Circuit and the United States Court of Federal Claims also have explained that the principles of res judicata may apply to questions of jurisdiction. See Amgen Inc. v. United States Int’l Trade Comm’n, 902 F.2d 1532, 1536 n.5 (Fed. Cir. 1990) (“Dismissals for lack of jurisdiction may be given res judicata effect as to the jurisdictional issue.”);⁵ Wagstaff v. United States, 105 Fed. Cl. 99, 110 (2012) (“As for Plaintiff’s claims of violations of the Fair Debt Collection Practices Act, both a federal district court and a federal appellate court have ruled that the United States has not waived its sovereign immunity with respect to such claims. Accordingly, this jurisdictional issue has already been resolved, and the

⁵ The court notes that in an unpublished opinion, the United States Court of Appeals for the Federal Circuit stated that “[i]t is well settled that the principles of res judicata apply to questions of jurisdiction as well as to other issues.” Citizens Elecs. Co., Ltd. v. OSRAM GmBH, 225 F. App’x 890, 893 (Fed. Cir. 2007) (citing Am. Sur. Co. v. Baldwin, 287 U.S. at 166).

court is barred from adjudicating these claims under principles of res judicata." (citing Wagstaff v. Dep't of Educ., Case No. 5:05-cv-01245, at 19-22 (W.D.Tex. Feb. 15, 2007; Wagstaff v. Dep't. of Educ., 509 F.3d 661, 663-64 (5th Cir. 2007), cert. denied, 554 U.S. 904, reh'g denied, 554 U.S. 942 (2008)); but see Goad v. United States, 46 Fed. Cl. 395, 398, appeal dismissed, 243 F.3d 553 (Fed. Cir.), cert. denied, 531 U.S. 1015 (2000) ("[I]f 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 res judicata does not apply."). Judges of the United States Court of Federal Claims also have indicated that, under the related doctrine of issue preclusion, or collateral estoppel, this court may be precluded from exercising subject-matter jurisdiction in an ongoing action when the same action, based on the same facts, has been previously dismissed on jurisdictional grounds and the jurisdictional flaw that necessitated dismissal on the first suit has not been cured. See Lowe v. United States, 79 Fed. Cl. at 229 ("It is beyond cavil that the issue of collateral estoppel goes to subject matter jurisdiction, and may be pleaded as a 12(b)(1) motion." (citing Schwasinger v. United States, 49 F. App'x 888 (Fed. Cir. 2002) (affirming lower court's dismissal of a plaintiff's third complaint on the basis of collateral estoppel because plaintiff's two prior complaints were identical to the third complaint and had been dismissed for lack of subject matter jurisdiction))).

As discussed above, Judge Williams' first decision in plaintiff's patent infringement case previously filed in this court was the 2015 grant of defendant's partial motion to dismiss in Bondyopadhyay I, which dismissed plaintiff's Fifth Amendment taking claim on the ground that the court lacked subject-matter jurisdiction. See Bondyopadhyay I, 2015 WL 1311726, at *6 ("To the extent Plaintiff's claim of patent infringement is brought as a Fifth Amendment taking, the claim is dismissed."). Judge Williams explained:

Defendant correctly asserts that a claim for patent infringement against the Government is considered under § 1498 rather than the Fifth Amendment. Demodulation[, Inc. v. United States], 118 Fed. Cl. [69,] at 73 [(2014)] ("Count IV is dismissed to the extent that Plaintiff attempts to fashion its patent infringement claim as a Fifth Amendment takings claim. A patent infringement claim is a tort claim and therefore is excluded by the Tucker Act's prohibition on 'cases sounding in tort.' The only way to bring a patent infringement claim in this Court is to assert the claim under 28 U.S.C. § 1498(a)"); Keehn v. United States, 110 Fed. Cl. 306, 355 (2013) ("[P]laintiff's Fifth Amendment takings theory is without merit. It is 28 U.S.C. § 1498(a), not the Fifth Amendment to the United States Constitution, that provides the waiver of sovereign immunity that enables a plaintiff to file suit against the government for patent infringement."). To the extent Plaintiff's claim of patent infringement is brought as a Fifth Amendment taking, the claim is dismissed.

Bondyopadhyay I, 2015 WL 1311726, at *6 (final alteration in original). As addressed by Judge Williams, the case law is clear that a patent infringement claim such as plaintiff's is not to be treated as a Fifth Amendment taking claim. See Golden v. United States, 955 F.3d at 986 ("We first consider the dismissal of Golden's patent infringement-based

takings claims. The Claims Court held that it did not have jurisdiction over these claims pursuant to 28 U.S.C. § 1491, because patent infringement claims against the government are to be pursued exclusively under 28 U.S.C. § 1498. We agree.” (internal reference omitted)). Therefore, to the extent plaintiff alleges a taking claim based on the alleged infringement of the ‘134 patent, this court lacks jurisdiction to hear such a claim as a Fifth Amendment taking claim.

Defendant also addresses a remaining claim by plaintiff, that a “possible reading of Plaintiff’s complaint is that Plaintiff believes that the Government has committed fraud by identifying someone *other* than Plaintiff as inventor of what Plaintiff believes he invented.” (emphasis in original). In Exhibit 5 of plaintiff’s complaint, plaintiff attaches an article published by the Air Force Personnel Center Public Affairs, on October 11, 2012, quoted above, regarding the nomination of two Air Force civilians for the “Department of Defense Distinguished Civilian Service Award.” The article states that one of the civilians employed by the AFRL, Dr. Boris Tomasic, “invented and led the development of a revolutionary new antenna - the Geodesic Dome Phased Array Antenna - for the Air Force satellite control network.” To the extent that plaintiff alleges that the United States committed a fraud, or made fraudulent statements in this exhibit, this court lacks subject-matter to adjudicate the claim, as they are tort claims. The Tucker Act expressly excludes tort claims, including those committed by federal officials, from the jurisdiction of the United States Court of Federal Claims. See 28 U.S.C. § 1491(a) (“The United States Court of Federal Claims shall have 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.”); see also Keene Corp. v. United States, 508 U.S. 200, 214 (1993); Rick’s Mushroom Serv., Inc. v. United States, 521 F.3d 1338, 1343 (Fed. Cir. 2008); Alves v. United States, 133 F.3d 1454, 1459 (Fed. Cir. 1998); Brown v. United States, 105 F.3d 621, 623 (Fed. Cir.) (“Because Brown and Darnell’s complaints for ‘fraudulent assessment[s]’ are grounded upon fraud, which is a tort, the court lacks jurisdiction over those claims.”), reh’g denied (Fed. Cir. 1997); Golden Pac. Bancorp v. United States, 15 F.3d 1066, 1070 n.8 (Fed. Cir.), reh’g denied, en banc suggestion declined (Fed. Cir.), cert. denied, 513 U.S. 961 (1994); Rohland v. United States, 136 Fed. Cl. 55, 65–66 (2018) (“Claims of fraud, conspiracy, harassment, breach of fiduciary duty, negligence, trespass, and false imprisonment sound in tort.”); Hampel v. United States, 97 Fed. Cl. 235, 238 (2011); Jumah v. United States, 90 Fed. Cl. 603, 607 (2009) (“[I]t is well-established that the Court of Federal Claims does not have jurisdiction over tort claims. Here, Mr. Jumah seeks damages for ‘[n]eglect, [m]isrepresentation, [f]alse [i]mprisonment, [c]onspiracy, [i]ntentional [i]nfliction of emotional [d]istress, [i]nvasion of [p]rivacy, [n]egligence and [t]respass and [p]unitive [d]amages.’ These are all claims sounding in tort.” (internal citation omitted; all brackets in original)), aff’d, 385 F. App’x 987 (Fed. Cir. 2010); Woodson v. United States, 89 Fed. Cl. 640, 650 (2009); Fullard v. United States, 77 Fed. Cl. 226, 230 (2007) (“This court lacks jurisdiction over plaintiff’s conspiracy claim because the Tucker Act specifically states that the Court of Federal Claims does not have jurisdiction over claims ‘sounding in tort.’”); Edelmann v. United States, 76 Fed. Cl. 376, 379–80 (2007) (“This Court ‘does not have jurisdiction over claims that defendant

engaged in negligent, fraudulent, or other wrongful conduct when discharging its official duties' . . . [and] Plaintiffs' claims of fraud, misrepresentation, slander, perjury, harassment, intimidation, coercion, theft, and defamation, and their claims that the Government deprived Ms. Edelmann of her right to a fair trial, are tort claims." (quoting Cottrell v. United States, 42 Fed. Cl. 144, 149 (1998)); McCullough v. United States, 76 Fed. Cl. 1, 3 (2006), appeal dismissed, 236 F. App'x 615 (Fed. Cir.), reh'g denied (Fed. Cir.), cert. denied, 552 U.S. 1050 (2007); Agee v. United States, 72 Fed. Cl. 284, 290 (2006); Zhengxing v. United States, 71 Fed. Cl. 732, 739, aff'd, 204 F. App'x 885 (Fed. Cir.), reh'g denied (Fed. Cir. 2006). Therefore, plaintiff's allegations of fraudulent or false conduct on the part of the defendant are claims which sound in tort, and, accordingly, must be dismissed for lack of jurisdiction in this court.

Finally, defendant alternatively argues that all of plaintiff's claims are barred by the statute of limitations. Suits brought against the United States in the United States Court of Federal Claims are generally subject to a six-year statute of limitations. According to the statute at 28 U.S.C. § 2501 (2018):

Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues. . . . A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

Id. "The six-year statute of limitations set forth in section 2501 is a jurisdictional requirement for a suit in the Court of Federal Claims." John R. Sand & Gravel Co. v. United States, 457 F.3d 1345, 1354 (Fed. Cir.), reh'g en banc denied (Fed. Cir. 2006), aff'd, 552 U.S. 130 (2008).

For suits involving patent infringement against the United States, however, the time limitation to file suit against the United States for patent infringement can be tolled up to six years from the time an administrative claim is filed to when the administrative claim is denied, pursuant to 35 U.S.C. § 286 (2018). The statute at 35 U.S.C. § 286 states:

Except as otherwise provided by law, no recovery shall be had for any infringement committed more than six years prior to the filing of the complaint or counterclaim for infringement in the action.

In the case of claims against the United States Government for use of a patented invention, the period before bringing suit, up to six years, between the date of receipt of a written claim for compensation by the department or agency of the Government having authority to settle such claim, and the date of mailing by the Government of a notice to the claimant that his claim has been denied shall not be counted as part of the period referred to in the preceding paragraph.

Id. Although the statute at 35 U.S.C. § 286 does not reference this court's six-year statute of limitations in 28 U.S.C. § 2501, judges of this court have found that "[t]he six-year

limitations period established by 28 U.S.C. § 2501 is modified by 35 U.S.C. § 286.” Unitrac, LLC v. United States, 113 Fed. Cl. 156, 164 (2013), aff’d, 589 F. App’x 990 (Fed. Cir. 2015) (citing Dow Chemical Co. v. United States, 32 Fed. Cl. 11, 20, aff’d in part, rev’d in part on other grounds, 226 F.3d 1334 (Fed. Cir. 2004)); see also Filler v. United States, Case No. 19-173; 2020 WL 2312244, at *6 (Fed. Cl. May 8, 2020) (“In limited circumstances, the statute of limitations for claims of infringement against the United States government may be tolled where the patentee files an administrative claim.” (citing 35 U.S.C. § 286)); Ideal Innovations, Inc. v. United States, 139 Fed. Cl. 737, 743 (2018) (“Section 286 allows for the tolling of the § 2501 limitations period for patent infringement claims while a validly filed administrative claim is being brought.”).

A patent infringement claim against the United States accrues when the accused device is “first available for use, and it is when the use occurs that a license is considered to have been taken.” Unitrac, LLC v. United States, 113 Fed. Cl. at 160 (quoting Decca Ltd. v. United States, 544 F.2d 1070, 1082, 210 Ct. Cl. 546, 567 (1980)); see also Filler v. United States, 2020 WL 2312244, at *5; Floyd v. United States, 125 Fed. Cl. 183, 189 (2016). Furthermore, “[a]lleged ongoing infringement does not extend or restart the limitations period. Rather, once the device is available for use, the license is taken, the patent owner’s cause of action accrues, and the patent owner has six years to bring its case.” Ross-Himes Designs, Inc. v. United States, 139 Fed. Cl. 444, 459 (2018) (citing Starobin v. United States, 662 F.2d 747, 749, 229 Ct. Cl. 67, 70 (1982)); see also Filler v. United States, 2020 WL 2312244, at *5.⁶ In Starobin, the United States Court of Claims, the predecessor court to this court, stated:

[e]ach device, i.e., each individual member of the universe of infringing devices . . . can be taken only once in its lifetime, and if that taking occurs prior to the six-year period which immediately precedes the filing of the lawsuit in the Court of Claims, then recovery as to that particular device is barred forever by 28 U.S.C. § 2501.

Starobin v. United States, 662 F.2d at 749–50 (footnote omitted).

As discussed above, plaintiff’s patent infringement claim in the above-captioned case fails under the doctrine of res judicata. But regardless, the statutes at 28 U.S.C. § 2501 and 35 U.S.C. § 286 provide that plaintiff’s patent infringement claim was filed outside of the applicable statute of limitations in which to file. Plaintiff in the above-captioned case filed an administrative claim with the Judge Advocate General of the

⁶ The court notes that, in an unpublished decision in 2017, the United States Court of Appeals for the Federal Circuit stated that “the jurisdictional clock for a § 1498 action begins to run when the government first uses the claimed invention without authorization and that specific use is not considered continuous in nature for jurisdictional purposes.” Sacchetti v. United States, 711 F. App’x 979 (Fed. Cir. 2017) (citing Starobin v. United States, 662 F.2d at 750; and also citing Regent Jack Mfg. Co. v. United States, 337 F.2d 649, 651, 167 Ct. Cl. 815, 817 (1964); Hyde v. United States, 336 F. App’x 996, 998 (Fed. Cir. 2009); Bissell v. United States, 41 F. App’x 414, 416 (Fed. Cir. 2002)).

United States Air Force on June 17, 2002, which was denied 44 days later, on July 30, 2002. In order for plaintiff's infringement claim to be timely in this court under 28 U.S.C. § 2501 and 38 U.S.C. § 286, plaintiff's claim must have been filed within six years and 44 days from when plaintiff's claim accrued, which, as discussed above, occurs "when the accused [instrumentality] is first available for use." Floyd v. United States, 125 Fed. Cl. at 189 (alteration in original) (quoting Unitrac, LLC v. United States, 113 Fed. Cl. at 160)). Neither party in the above-captioned case states when, if ever, the Ball ATD was first available for use. Judge Williams stated in Bondyopadhyay III, however, that "the actual demonstration of the Ball Advanced Technology Demonstration antenna took place between February 2009 and May 2009." Bondyopadhyay III, 136 Fed. Cl. at 119. Even taking the later, May 2009 date of demonstration of the Ball ATD as the time the Ball ATD was first available for use, plaintiff would have had to file the current case within six years and 44 days of May 2009, i.e., July 2015.

Judge Williams also stated in Bondyopadhyay III that "after 2012, the Air Force Research Laboratory did not engage in any activities to develop, manufacture, or test a Geodesic Dome Phased Array Antenna." Bondyopadhyay III, 136 Fed. Cl. at 120. Even if this court took the first day "after 2012," i.e., January 1, 2013, as the date in which plaintiff's claims accrued, which is later than any violation plaintiff alleges to have occurred in this case, plaintiff would have had to file this case on or before February 14, 2019 in order to be timely. Therefore, under any plausible formulation of the claims in plaintiff's complaint, the current case, which was filed on November 27, 2019, was not filed within the applicable statute of limitations pursuant to 28 U.S.C. § 2501 and 35 U.S.C. § 286.

CONCLUSION

Plaintiff's allegations in the above-captioned case are often confused and miss the mark, even allowing plaintiff every benefit of interpretation, given plaintiff's pro se status. Plaintiff failed to effectively or directly respond to a number of the dispositive legal issues raised in defendant's motion to dismiss, although plaintiff filed frequent, unresponsive documents. Plaintiff instead opted, over and over again, to reiterate his assertion that he is the owner of the '134 patent, without addressing whether infringement actually occurred. Moreover, plaintiff did not offer any evidence or argument as to why plaintiff's current case for patent infringement against the United States is not materially identical to the patent infringement claims at issue in plaintiff's previous case in this court, or why his current case is within the applicable statute of limitations. For all these reasons, as discussed above, defendant's motion to dismiss is **GRANTED**, and plaintiff's complaint is **DISMISSED**, with prejudice. The Clerk shall enter **JUDGMENT** consistent with this Opinion.

IT IS SO ORDERED.

s/Marian Blank Horn
MARIAN BLANK HORN
 Judge

In the United States Supreme Court
Petition for Writ of Certiorari
Probir Kumar Bondyopadhyay vs. United States of America

APPENDIX-D

The U.S. District Court Order of October 23, 2013 that established the facts for Jeffersonian Claim of the Petitioner as a U.S. Constitutional Creature under Article 1 Section 8 Clause 8 to be addressed EXCLUSIVELY under Title 28 USC Section 1498(a) – the Constitution Law.]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PROBIR BONDYOPADHYAY

Plaintiff,

v.

THE UNITED STATES
SECRETARY OF DEFENSE, *et al.*,

Defendants,

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Civil Action No. H-13-1914

ORDER

Pending before the Court is Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, or Alternatively for Failure to State a Claim (Document No. 7). Having considered the motion, submissions, and applicable law, the Court finds that the motion to dismiss should be granted.

I. BACKGROUND

On July 01, 2013, the plaintiff, Probir Kumar Bondyopadhyay ("Plaintiff") filed a civil complaint in this Court alleging that the defendants, Secretary of Defense Charles Timothy Hagel ("Hagel") and Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, Teresa Stanek Rea ("Rea") (collectively, "Defendants"), violated Article I, Section 8, Clause 8 of the United States Constitution by making a false claim of ownership against Plaintiff's invention. Plaintiff filed for Patent 6,292,134 on February 25, 2000, as the

inventor of the Geodesic Sphere Phased Array Antenna System ("GSPAAS"). Rea granted this patent to Plaintiff on September 18, 2001. On October 11, 2012, Hagel's office sent a letter identifying Dr. Boris Tomasic as the inventor of a "revolutionary"¹ new invention, the GSPAAS.

In his complaint, Plaintiff alleges Hagel knew he was the inventor of GSPAAS. Plaintiff believes an employee of Hagel, Fredric Sinder, verified ownership of Plaintiff's patent through an ex-parte patent reexamination request on June 4, 2002. Plaintiff lists a series of questions in the complaint he requires the defendants answer regarding the invention of GSPAAS' and the reexamination request.

Defendants filed a motion to dismiss for lack of subject matter jurisdiction, or alternatively, for failure to state a claim on August 9, 2013. Defendants do not dispute Plaintiff's ownership of GSPAAS, but request the Court dismiss his complaint. Primarily, Defendants argue the Court lacks jurisdiction over the claim because Defendants are protected by sovereign immunity. Even without sovereign immunity, Defendants claim that Plaintiff lacks standing to bring the claim because he was not injured by the inventor misidentification and Rea did not commit any offense because her office only certified Plaintiff's patent. Defendants also challenge his standing on redressability grounds, arguing that the answers to Plaintiff's questions, addressed to

¹ *Complaint*, Document 1, dated June 1, 2013, Exhibit 1.

Defendants, are available through public information and Plaintiff already owns the rights to GSPAAS. Finally, Defendants argue Plaintiff's claim should fail under Federal Rule of Civil Procedure 12(b)(6) because Plaintiff's "false claim" complaint lacks a valid legal issue.

Plaintiff has filed numerous responses to the motion to dismiss.² In the first and third response, Plaintiff requests for the Defendants to respond to the series of questions included in the complaint. In the second response, Plaintiff states that the United States Air Force engaged in "Public Use" of GSPAAS.³ Plaintiff argues the "importance" of his invention is "eloquently stated" in public "only when the invention is fraudulently and wrongfully claimed" by another.⁴ Plaintiff includes several exhibits to show the making and discussion of GSPAAS by the Air Force. Plaintiff continues to dispute the misidentification of ownership by Defendants, requesting this Court recognize him as the legal inventor of GSPAAS.

II. STANDARD OF REVIEW

A motion to dismiss for lack of subject matter jurisdiction allows a party to challenge the subject matter jurisdiction of the district court to hear a case. FED. R.

² In addition, Plaintiff has filed variously-styled motions at Documents 11, 17, 24, 26, 28, 32, 34, 36, and 39, some of which seem to respond in opposition to the motion to dismiss.

³ *Plaintiff's Response*, Document No. 10, at 2.

⁴ *Plaintiff's Response*, Document No. 10, at 2.

Civ. P. 12(b)(1). It is the burden of the plaintiff to prove the court has subject matter jurisdiction over the claim. *In re Fema Trailer Formaldehyde Prods. Liab. Litig.*, 668 F.3d 281, 286 (5th Cir. 2012). A claim must be dismissed if it lacks subject matter jurisdiction, which may be found in “the complaint alone,” “supplemented by undisputed facts evidenced in the record,” or “supplemented by undisputed facts plus the court’s resolution of disputed facts.” *Id.*

III. LAW AND ANALYSIS

A. Sovereign Immunity

Defendants argue that they are protected by sovereign immunity from Plaintiff’s claim. Construing Plaintiff’s claim liberally, his complaint appears to indicate a patent infringing activity through false claims of ownership of his invention.

The United States and its agencies are generally immune from suit without consent. *Freeman v. United States*, 556 F.3d 326, 335–34 (5th Cir. 2009). This immunity is extended to suits against government officials acting in their official capacity. *Danos v. Jones*, 652 F.3d 577, 581–82 (5th Cir. 2011). The United States has agreed to waive sovereign immunity in suits against its employees for the “use or manufactur[ing]” of another person’s patent without a license or authorization.

28 U.S.C. § 1498(a). This type of claim can only be brought in the United States Court of Federal Claims. *Id.*

In the present case, Plaintiff has not shown that sovereign immunity has been waived. First, Plaintiff identifies the defendants in their official capacity as employees of the United States. Second, Plaintiff's allegation of "false claim[s]" involving the misidentification of the inventor of GSPAAS does not constitute the "use or manufacturing" of his patent, as defined by statute. Third, as required by the statute, Plaintiff does not allege that the public use of GSPAAS by Defendants was unauthorized. Fourth, even if the use were without authorization and the waiver applied, this Court would be the incorrect venue to hear the claim, because only the Court of Federal Claims has jurisdiction over these types of suits. Therefore, the Court finds that Defendants are protected by sovereign immunity, and therefore, this court does not possess subject matter jurisdiction over this matter.

B. Standing

Defendants argue that Plaintiff was uninjured by the misidentification of the inventor of GSPAAS, and even if he were injured, the Court could not redress the injury. A patentee is entitled to protection by a civil trial to remedy violations of his patent. 35 U.S.C. § 281. The patentee must first show standing to bring the claim into a federal district court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Standing requires an injury to a plaintiff, caused by a defendant, that is repairable by a favorable decision. *Horne v. Flores*, 557 U.S. 433, 445 (2009) (“To establish standing, a plaintiff must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant’s challenged action; and redressable by a favorable ruling”).

1. Injury in Fact

Plaintiff claims to be injured by the correspondence misidentifying the inventor of GSPAAS. A plaintiff must show an “injury in fact,” one that is “concrete, particularized, and actual or imminent.” *Id.* When a claim involves a patent, an injury in fact exists if another party engages or threatens to engage in infringing activities—i.e., the unauthorized production, use, marketing, or selling of a valid patent. 35 U.S.C. §§ 271, 281; *see also Funeral Consumers Alliance, Inc. v. Serv. Corp. Int’l.*, 695 F.3d 330, 342 (5th Cir. 2012) (holding that an injunctive relief request requires current injury or “future threat”).

Plaintiff lacks an injury in fact based on the allegation in his complaint, because he has not shown his patent ownership rights have been violated to cause him a concrete or future injury. First, the correspondence sent by Hagel to employees of Defendants does not involve acts of infringement because this action does not involve the use, marketing, selling, or unauthorized production of GSPAAS. Instead, the letter

merely states the wrong identity of the inventor of GSPAAS. Second, Defendants' agree Plaintiff is the original inventor, do not dispute Plaintiff's rights to the patent, and do not threaten future infringement of the patent. The ex-parte reexamination request in 2002 did not indicate any adverse interest by Defendants, but merely verified that a patent existed. Third, Plaintiff's reference to the Air Force's "Public Use" does not accuse the Air Force of unauthorized use. Fourth, Plaintiff does not allege that Rea created or threatened any harm, but merely authorized the original patent. In conclusion, the Court finds Plaintiff does not have standing to bring the claim, because he failed to show an injury in fact.

2. *Redressability*

Defendants argue that even if Plaintiff demonstrated an injury, it cannot be redressed by the Court. A claim is redressable if it is "likely" that a favorable decision would relieve a plaintiff's injury. *Lujan*, 504 U.S. at 561. Requests for injunctive relief can redress violations only if the plaintiff is "likely to suffer future injury by the defendant and . . . the sought-after relief will prevent that future injury." *Arguello v. Conoco, Inc.*, 330 F.3d 355, 361 (5th Cir. 2003). Relief requires more than "generalized interest[s] in deterr[ing]" speculative harmful actions. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 108–09 (1998). Administrative requests to

present compliance reports and records to calm generalized interests do not satisfy the requirement that a request for relief prevents a future injury. *Steel Co.*, 523 U.S. at 105.

Plaintiff's request for injunctive relief lacks redressability because (1) it is no more than a generalized interest in deterrence and (2) Plaintiff already possess the relief he seeks in asking the Court to recognize him as the legal inventor of GSPAAS. First, Plaintiff's request for a response to a series of questions regarding patent administrative process submissions is similar to a request for records or compliance reports. Like the plaintiff's requests in *Steel*, this type of administrative request is not a sufficient request to prevent a future threat of harm, because these are merely general requests that do not deter a threat of infringement or other injury. Second, Plaintiff's rights would not change with a ruling recognizing his ownership of GSPAAS, because he has a valid United States Patent Second. Because Plaintiff already owns the patent to GSPAAS and his request for a response to the series of questions in the complaint is not a concrete interest for relief, the Court cannot redress Plaintiff's alleged injury.

IV. CONCLUSION

Based on the foregoing, the Court hereby

ORDERS that Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, or Alternatively for Failure to State a Claim (Document No. 7) is **GRANTED**. Plaintiff's case is hereby **DISMISSED** without prejudice. The Court further

ORDERS that all other pending motions are hereby **DENIED**.

SIGNED at Houston, Texas, on this 23 day of October, 2013.

A handwritten signature in black ink, appearing to read "David Hittner", is written over a horizontal line.

DAVID HITTNER
United States District Judge



US006292134B1

(12) **United States Patent**
Bondyopadhyay

(10) **Patent No.:** **US 6,292,134 B1**
(45) **Date of Patent:** **Sep. 18, 2001**

(54) **GEODESIC SPHERE PHASED ARRAY
ANTENNA SYSTEM**

(76) **Inventor:** **Probir K. Bondyopadhyay**, 14.418
Oak Chase Dr., Houston, TX (US)
77062

(*) **Notice:** Subject to any disclaimer, the term of this
patent is extended or adjusted under 35
U.S.C. 154(b) by 0 days.

(21) **Appl. No.:** **09/513,014**

(22) **Filed:** **Feb. 25, 2000**

Related U.S. Application Data

(60) Provisional application No. 60/121,874, filed on Feb. 26,
1999.

(51) **Int. Cl.⁷** **H01Q 3/02; H01Q 3/12**

(52) **U.S. Cl.** **342/374**

(58) **Field of Search** **342/368-384**

(56) **References Cited**

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5,457,465 * 10/1995 Collier et al. 342/374

* cited by examiner

Primary Examiner—Thomas H. Tarcza

Assistant Examiner—Fred H. Mull

(74) *Attorney, Agent, or Firm*—Marvin J. Marnock

(57) **ABSTRACT**

A geodesic sphere phased array antenna system, capable of scanning the entire omni-directional communication space and comprising substantially equilateral triangular planar subarrays of antenna elements arranged in a geodesic sphere configuration. Icosahedron, one of the five regular solids and truncated icosahedron, one of the fifteen semi-regular solids are the preferred basis of the geodesic sphere phased array construction. The entire communication space is considered as subdivided into a large number of smaller cells and corresponding to each such cellular communication space, a contiguous set of the subarrays is energized and electronically phased to scan the cellular space. Another contiguous set of subarrays is energized and electronically phased to scan another cellular space in a similar manner resulting in limited angle scanning requirements which permit the basic antenna elements to be connected in a cluster as a unit building block to which transmit/receive signal distribution and processing means are connected resulting in lower costs in deployment, operation and maintenance.

30 Claims, 14 Drawing Sheets

