FROM,
Dr.Probir Kumar Bondyopadhyay
United States Citizen
14418 Oak Chase Drive
Houston, Texas, 77062-2038
Plaintiff-Appellant

TO
The Honorable Clerk
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
717 Madison Place, N.W.
Washington, D.C. 20439
Tel: 202-275-8000

REFERENCE: Case: 2020-2091

DATE: April 15, 2021

SUBJECT: PLAINTIFF-APPELLANT'S PETITION FOR PANEL REHEARING UNDER CAFC RULE 40 AND RULE 35

(Panel Judgment of March 11, 2021 in Docket Document No. 43)

1. The Plaintiff-Appellant hereby files the *Petition for Panel Rehearing under CAFC Rule 40 and Rule 35,* to bring to laser-sharp attention the points overlooked and misapprehended by the Panel in its March 11, 2021 Judgment. (*Three copies are enclosed*)

2. Kindly place this on the docket immediately.

Thank you.

Pr Bondyopadhyay April 15, 2021
[Dr. Probir K. Bondyopadhyay]
Plaintiff-Appellant

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

717 Madison Place, N.W.
Washington, D.C. 20439

Probir Kumar Bondyopadhyay
U.S. Constitutional Creature
(Article 1 Section 8 Clause 8)
14418 Oak Chase Drive
Houston, Texas, 77062-2038

Plaintiff-Appellant Case: 2020-2091

v.

United States of America
Defendant-Appellee

APRIL 15, 2021 THURSDAY **BY EXPRESS MAIL**

SUBJECT: PLAINTIFF-APPELLANT'S PETITION UNDER CAFC RULE 40 AND RULE 35 (RESPONSE TO THE PANEL JUDGMENT OF 03/11/2021)

1. The Plaintiff-Appellant hereby files the petition simultaneously under Rule 40 *and Rule 35* for **Panel Rehearing** as well as Rehearing by Appeals Court en banc, the Judgment of March 11, 2021 containing multiple errors in conflict with prior CAFC standing orders. This panel judgment shows failure to observe that **the USCFC *never* applied the Law to the Facts *first*** established by the U.S. District Court under Title 28 USC Section 1338(a).

PrBondyPadhyay April 15, 2021

FORM 9. Certificate of Interest

Form 9 (p. 1)
July 2020

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number	**20-2091 (case 0:2020cvus02091)**
Short Case Caption	**BONDYOPADHYAY v. U.S.A.**
Filing Party/Entity	**Dr. PROBIR KUMAR BONDYOPADHYAY, Pro Se.**

Plaintiff-Appellant, **Original Creature of U.S. Constitution under Article 1 Section 8 Clause 8 (Mandate of CAFC 10/29/2018)**

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box.** Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: **April 15, 2021**

Signature: Pr Bondyopadhyay 04/15/21

Name: **Dr. PROBIR KUMAR BONDYOPADHYAY, Pro Se.**

FORM 9. Certificate of Interest

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☒ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☒ None/Not Applicable
Dr. PROBIR KUMAR BONDYOPADHYAY, Pro Se. **Plaintiff-Appellant, Original Creature of U.S. Constitution under Article 1 Section 8 Clause 8 (Mandate of CAFC 10/29/2018)**		

☐ Additional pages attached

Pr Bondyopadhyay, April 15, 2021

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☒ None/Not Applicable ☐ Additional pages attached

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☒ None/Not Applicable ☐ Additional pages attached

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☒ None/Not Applicable ☐ Additional pages attached

/s/ Brandy Spadaccini, April 15, 2021

IN THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT
CASE: 2020-2091 BONDYOPADHYAY v. UNITED STATES

3. TABLE OF CONTENTS

ADDENDUM

P.K. Bondyopadhyay April 15, 2021

IN THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT
CASE: 2020-2091 BONDYOPADHYAY v. UNITED STATES

SUMMARY OF THE PETITION UNDER RULE 40 *AND RULE 35*

This petition, under Rule 40 of the Court of Appeals for the Federal Circuit (CAFC), is filed for rehearing by the Panel to address the following important issues. Simultaneously this petition is filed under Rule 35 of the CAFC because there are multiple issues in the Panel Judgment of March 11, 2021 that are in conflict with the Standing Orders of the CAFC. The pointed issues are as follows:

(i). Point of **Fact overlooked.**

(ii). Point of **Law overlooked.**

(iii). Point of **Fact misapprehended.**

(iv). Point of **Law misapprehended.**

It is deeply embarrassing and disheartening to point out the fact that the Plaintiff-Appellant is a U.S. Constitutional Creature (reaffirmed by the CAFC Mandate of October 29, 2018) was overlooked by the March 11, 2021 Panel Judgment! ***[see 4.4 below]***

The details are presented in the prescribed format below.

Pro Bondyopadhyay April 15, 2021

4. THE TABLE OF AUTHORITIES

The following are the authorities for this petition for rehearing by the Panel under CAFC Rule 40 and the simultaneous petition for hearing by the Honorable CAFC en banc under CAFC Rule 35.

4.1 Article 1 Section 8 Clause 8 of the U.S. Constitution THE CONSTITUTIONAL ORDER

Article I Section 8. Clause 8

To promote the progress of science and useful arts, by securing **for limited times** to authors and inventors the **exclusive right** to their respective writings and discoveries;

4.2 Title 28 USC Section 1338(a) THE POWER OF THE U.S. DISTRICT COURT

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28 U.S. Code § 1338(a)

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks.

4.3 Title 28 USC Section 1498(a) THE EXCLUSIVE CONSTITUTIONAL LAW

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28 U.S. Code § 1498(a)

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.

4.4 U.S. Court of Appeals for the Federal Circuit Mandate (10/29/2018) of September 7, 2018 opinion and judgment.

Case: 18-1674 Document: 32-1 Page: 2 Filed: 09/07/2018 (2 of 16)

BONDYOPADHYAY v. UNITED STATES

Before NEWMAN, O'MALLEY, and CHEN, *Circuit Judges.* PER CURIAM.

I. BACKGROUND A. The '134 Patent

Dr. Bondyopadhyay is the owner and named inventor of the '134 patent, titled "geodesic sphere phased array antenna system."1

IN THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT
CASE: 2020-2091 BONDYOPADHYAY v. UNITED STATES

4.5 U.S. Court of Appeals for the Federal Circuit Standing Order as stated below:

Case 1:19-cv-01831-MBH Document 17 Filed 06/23/20 Page 19 of 22

The Claims Court held that . . . . . .

patent infringement claims against the government are to be pursued **exclusively** under 28 U.S.C. § 1498. **We agree."**

4.6 U.S. Court of Appeals for the Federal Circuit Standing Order as stated below:

Case 1:14-cv-00147-MCW Document 17 Filed 06/24/14 Page 75 of 97

DEPARTMENT OF THE AIR FORCE
AIR FORCE LEGAL SERVICES AGENCY

AFLSA/JACN
1501 Wilson BLVD., Suite 606
Arlington, VA 22209-2403

30 July 2002

Dr. Probir K. Bondyopadhyay
14418 Oak Chase Drive
Houston, Texas 77062

Dear Dr. Bondyopadhyay

In subsequent cases, the courts have refined the application of the experimental use doctrine, but have maintained the doctrine as an affirmative defense to patent infringement for intellectual experimentation where there is no commercial purposes. *See Deuterium Corp. v. U.S.*, 14 USPQ2d 1636 (Fed. Cir. 1990) and *Embrex Inc. v. Service Engineering Corp.*, 55 USPQ2d 1161 (Fed. Cir. 2000).

Sincerely

FRANCIS J. LAMIR, Colonel, USAF
Chief, Commercial Litigation Division

Pr Bondyopadhyay

April 15, 2021

5. THE POINTS OF LAW OR FACT OVERLOOKED OR MISAPPREHENDED BY THE COURT

5.1 THE POINT OF FACT OVERLOOKED BY THE COURT

It is highly embarrassing to point out that the Plaintiff-Appellant is an original creature of the U. S. Constitution (under Article 1 Section 8 Clause 8) and this has been overlooked in the Panel Judgment of March 11, 2021.

This U.S. Court of Appeals for the Federal Circuit (CAFC) with its Mandate (10/29/2018) on its September 7, 2018 opinion and judgment reestablished and reconfirmed this U.S. Constitutional Status of the Plaintiff-Appellant. [see 4.4 above in page 5]

5.2 THE POINT OF LAW OVERLOOKED BY THE COURT

Title 28 USC Section 1338(a) judicially authorized a U.S. District Court to determine, by a U.S District Court Order, the true U.S. Citizen inventor and true owner of a patented U.S. Invention as well as unauthorized use of that patented invention which gives

April 15, 2021

rise to the *Jeffersonian Claim of the Plaintiff Appellant.*

Jeffersonian Claim of the said U.S. Constitutional Creature originates from unauthorized use for expressed U.S. National Defense purpose (or for commercial purpose) of a patented U.S. Invention. [see 4.2 above in page 4]

5.3 THE POINT OF FACT MISAPPREHENDED BY THE COURT

Two pieces of facts admitted into evidence by the U.S. Court of Federal Claims, when carefully read and connected, establish that the U.S. Air Force, (the Defendant as U.S.A.), admitted *unauthorized use* of the patented U.S. Invention (live U.S. Patent 6,292,134) **for expressed U.S. National Defense purposes** during the continuous time period of February 25, 2000 through October 11, 2012.

The two pieces of evidence are (i). the July 30, 2002 letter of Colonel Francis J. Lamir in page 6 above (item 4.6), and (ii). the

Acquisition Time Line picture from the U.S. Air Force. (shown in page 14 of the USCFC Horn Court Judgment of June 23, 2020)

This critically important fact has been misapprehended in the Panel Judgment of March 11, 2021. This is analyzed and discussed in the Arguments section below.

The Most Important Fact misapprehended by the Court

(CAFC Panel Judgment of March 11, 2021)

The Ball Aerospace Corporation of Colorado was brought to this case by the U.S. Air Force, the Defendant (now Defendant-Appellee) to deliberately mislead the Honorable Court. The Plaintiff-Appellant did **NOT** *'accuse'* a manufactured antenna piece (the 12 years 7 month 15 days old *fetus*, the *'device'*).

April 15, 2021

The ACCUSED is the Defendant U.S. Air Force's AFRL for 'unauthorized pregnancy' with the patented U.S. invention for the said time period of 12 years 7 months and 15 days.

5.4 THE POINT OF LAW MISAPPREHENDED BY THE COURT

5.1.2 Title 28 USC Section 1498(a) is misapprehended in the Panel Judgment of March 11, 2021 by the failure to recognize that this is the ***exclusive*** CONSTITUTIONAL LAW applicable in handling this patent claim case against the U.S. Government (U.S. Air Force).

Further, the Panel Judgment of March 11, 2021 **failed to recognize** that the U.S. Court of Federal Claims (USCFC) **NEVER** applied this ***exclusive*** CONSTITUTIONAL LAW to this case. [*handling twice over a long time period*]

Pritha Bondyopadhyay,
April 15, 2021

6. THE ARGUMENT

6.1 An independent U.S. Citizen inventor of a patented U.S. invention and sole owner of that patent is a *revered* U.S. Constitutional creature under Article 1 Section 8 Clause 8, created before it (the U.S. Constitution) created the SCOTUS and POTUS.

The Mandate of this U.S. Court of Appeals for the Federal Circuit (CAFC) issued on October 29, 2018 reaffirmed this U.S. Citizen Plaintiff-Appellant as the sole original inventor and sole owner of the patented U.S. invention: *Geodesic Sphere Phased Array Antenna System* (U.S. Patent 6,292,134), thus *recognizing the Plaintiff–Appellant as a U.S. constitutional creature.*

It is embarrassing to point out that this CAFC mandate of 10/29/2018 was overlooked in the CAFC Panel Judgment of 03/11/2021.

6.2 The Defendant-Appellee is the U.S. Air Force as U.S.A. To be exact, the **Defendant-Appellee is** the U.S. Air Force Research

Bibudhendra Bondyopadhyay April 15, 2021

Laboratory (AFRL) that administers the Air Force Small Business Innovation Research Program (SBIR) operating under the central control of the Office of the U.S. Secretary of Defense (OSD).

The Defendant-Appellee is **NOT** the "accused device" of the Ball Aerospace Corporation of Colorado. The Ball Aerospace was never the Defendant (Defendant-Appellee) in the Plaintiff's (Plaintiff-Appellant) original case. **It is the real Defendant's attorneys (the U.S. Air Force) who brought in Ball Aerospace to intentionally mislead the USCFC and the CAFC (the Claims Court and the Circuit Court) and show disrespect to the *Constitutional Jeffersonian Claim.*** It is this FACT that is MISAPPREHENDED in the Panel Judgment of March 11, 2021.

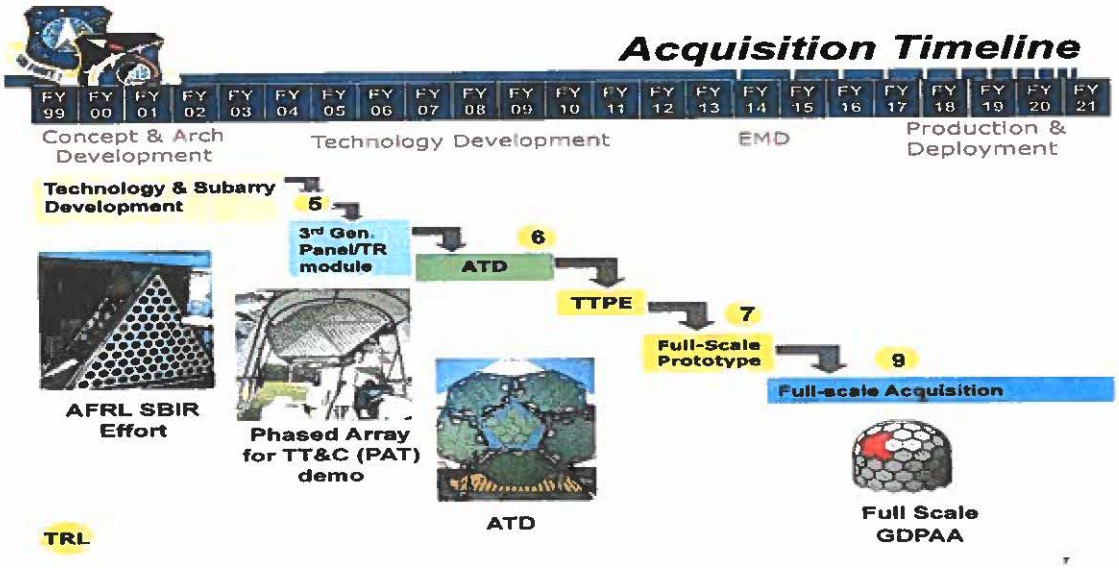
6.3 The picture shown below is the U.S. Air Force document (available in the internet), admitted in to evidence by the June 23, 2020 Opinion of the Horn trial court (USCFC) in page 14 that shows the Acquisition Time Line of the AFSCN modernization

Pr Bondyopadhyay
April 15, 2021

project. This is the critically important factual document overlooked in the Panel Judgment of 03/11/2021 that provided the incontrovertible direct evidence that on July 30, 2002, Colonel Francis J. Lamir **definitely knew** or should have known that there was a DEFINITE national defense purpose (and commercial) at the U.S. Air Force experimental project from the very beginning.

Case 1:19-cv-01831-MBH Document 17 Filed 06/23/20 Page 14 of 22

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



April 15, 2021

As shown below, **there is a definite National Defense purpose from the very beginning.** The **Panel judgment** of March 11, 2021 has **overlooked** this sentence (below) of Colonel Lamir in 4.6 above (violation of Standing Opinion and Order of CAFC).

In subsequent cases, the courts have refined the application of the experimental use doctrine, but have maintained the doctrine as an affirmative defense to patent infringement for intellectual experimentation **where there is no commercial purposes.** See *Deuterium Corp. v. U.S.,* 14 USPQ2d 1636 (Fed. Cir. 1990) and *Embrex Inc. v. Service Engineering Corp.,* 55 USPQ2d 1161 (Fed. Cir. 2000)

6.4 How can there be an argument about *'Res Judicata'* when the U.S. Court of Federal Claims (USCFC) **NEVER** applied the Law to the Facts, first established by the U.S. District Court Order under Title 28 USC Section 1338(a)?

The USCFC Horn Court Opinion is a masterpiece in self-contradiction.

Dr Bondyopadhyay April 15, 2021

It is the Standing Order of the Honorable United States Court of Appeals for the Federal Circuit that Jeffersonian Claims of the said Constitutional Creature (U.S. Citizen Inventor Owner of a patented invention) against the Unites States (U.S. Air Force) MUST be ***EXCLUSIVELY*** dealt with under Title 28 USC Section 1498(a). The USCFC Horn Court Opinion of 06/23/2020 (which is under appeal here) itself said this in page 19 (line 3 from above) as shown in 4.5 above in page 6!

Then, the very Horn Court Opinion shows that congressional laws 28 USC Section 2501 and Title 35 USC Section 286 were applied to observe *Res Judicata*. The previous USCFC Williams Court **never** applied this **exclusive** constitutional law. [to apply the law to the facts, facts have to be admitted into evidence] USCFC Williams Court in its last Opinion of February 9, 2018 **never** admitted that the Plaintiff is the 'owner' of the patent.

The USCFC Horn Court Opinion has **NO** professional integrity.

April 15, 2021

6(a). REMEDY SOUGHT

Adjudication of the Constitutional Jeffersonian Claim is a two-step judicial process through the U.S. Court of Appeals for the Federal Circuit (CAFC). The first step is the establishment of the Jeffersonian Claim which was achieved through the CAFC Mandate of 10/29/2018. This is now the second step.

This second step requires a judicial order from the CAFC reaffirming that the Defendant, the U.S. Air Force, has used the patented U.S. invention, *unauthorized,* **consciously** for the continuous time period of 12 years 7 months and 15 days (from February 25, 2000 through October 11, 2012).

Respectfully submitted,

Pr Bondyopadhyay April 15, 2021

[Dr. Probir Kumar Bondyopadhyay]
U.S. Constitutional Creature Article 1 Section 8 Clause 8
PLAINTIFF-APPELLANT, Pro Se.
Tel: 281-486-7735, 832-758-6514 (mobile)
E-Mail: dr.bondy@gmail.com

[Total word count less than 2300]

IN THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT
CASE: 2020-2091 BONDYOPADHYAY v. UNITED STATES

ADDENDUM

Court's Decision for Panel Rehearing

(A copy of the Panel Judgment of March 11, 2021)

P. Bondyopadhyay, 04/15/2021

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, Washington, 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

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[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.").

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,

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[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).

"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

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[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

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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.

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 U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT
CASE: 2020-2091 BONDYOPADHYAY v. UNITED STATES

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(Federal Rule of Appellate Procedure 32(g)

BY MAIL TO:

(1). Honorable Jeffrey B. Clark
Assistant Attorney General
U.S. Department of Justice
Washington, D.C.
E-Mail: JBC1@usdoj.gov

(2) Mr. Joshua I. Miller, Attorney for the Defendant-Appellee, U.S. Department of Justice, Washington, D.C. U.S.A.
E-Mail: Joshua.miller2@usdoj.gov

P Bondyopadhyay 04/15/2021

IN THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT
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