

2023-1909

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

HAWAIIAN DREDGING CONSTRUCTION COMPANY, INC.,

Plaintiff-Appellant,

– v. –

UNITED STATES,

Defendant-Appellee.

*On Appeal from the United States Court of Federal Claims in
No. 1:22-cv-00339-CNL, Honorable Carolyn N. Lerner, Judge*

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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I. ARGUMENT

The Government's Brief in this Appeal demonstrates the trial court's errors in deciding the Government's Motion to Dismiss. Specifically, the Government points out improper factual findings and determinations that the trial court relied upon to decide the motion to dismiss. In doing so, the Government asks this Court to ignore HDCC's well plead allegations to save the trial court's decision from reversal. Finally, the Government's Brief attempts to "fill in the blanks" to cover the trial court's errors and failures.

1. The Government Acknowledges that HDCC is Entitled to Assert Constructive Changes Claims.

First, the Government acknowledges that HDCC can sustain each of its claims by alleging that the Government's actions or inaction constituted a constructive change. Specifically, the Government acknowledges that HDCC can survive the Government's Motion to Dismiss by alleging facts in its Complaint that plausibly suggest the existence of "'unforeseen delays' and 'additional requirements such that the trial court could find HDCC's constructive change and associated breach claims to be 'facially plausible...'" (Gov't Br., p. 28.) As demonstrated in its Brief and further below, HDCC's First Amended Complaint (the "Complaint") contained well plead facts that plausibly support "unforeseen

delays” and “additional requirements” resulting from the Government’s actions and inactions. (*See* HDCC Br., pp. 20-34.)¹

2. The Government Highlights the Trial Court’s Failure to Accept HDCC’s Well Plead Factual Allegations as True and Improper Factual Findings.

Next, the Government acknowledges the well-settled law that the trial court must take “all factual allegations in the complaint as true and construe the facts in the light most favorable to the non-moving party” *Jones v. United States*, 846 F.3d 1343, 1351 (Fed. Cir. 2017) and “draws all reasonable inferences in the claimant’s favor.” *Lindsay v. United States*, 295 F.3d 1252 (Fed. Cir. 2002). However, the Government contends that the trial court did not need to accept HDCC’s well plead allegations as true or construe the allegations in the light most favorable to HDCC. (Gov’t Br., p. 29.) To support its contention, the Government suggests that HDCC’s allegations were “legal conclusions, deductions or opinions” or “[t]hreadbare recitals of elements of a cause of action, supported by mere conclusory statements.” (*Id.* at pp. 29-30.) The Government’s contention is wrong.

¹ The Government’s suggestion that it is improper for HDCC to rely on exhibits to the Complaint is wrong. As previously demonstrated, when determining a Rule 12(b)(6) motion to dismiss, the trial court must consider not only the allegations contained in the complaint, but also exhibits attached to the complaint. *See Terry v. United States*, 103 Fed. Cl. 645, 652 (Ct. Cl. 2012) (“documents appended to a motion to dismiss ‘are considered part of the pleadings if they are referred to in the plaintiff’s complaint and are central to his claim.”); *see also* RCFC 10.

The allegations HDCC relies upon support each of its claims are not legal conclusions and go well beyond threadbare recitals of the elements of its claims. *In re Bill of Lading Transmission & Processing Sys. Pat. Litig.*, 681 F.3d 1323, 1346 (Fed. Cir. 2012) (The Federal Circuit held that a complaint was not merely legal conclusions where the “complaint contain[s] detailed factual allegations and reasonable inferences drawn therefrom.”) Therefore, the trial court erred when it refused to take HDCC’s allegations as true and construe the facts in the light most favorable to HDCC.

a. *The Government’s Failure to Timely Secure and Provide the Final ROW.*

HDCC alleged that the Government was required to obtain the final right of way (“ROW”) for the Project but failed to do so in a timely manner which resulted in delays and additional costs. (Appx728, Appx31-32, Appx42-44, Appx189-193, Appx229-230) Specifically, HDCC alleged the Government was required to obtain property rights from adjacent property owners so that it could establish the final boundaries for the Project and provide HDCC with the final ROW. (Appx31-32, Appx42-44, Appx189-193, Appx229-230).² This is not a legal conclusion or

² The Government points to several provisions of the Contract regarding HDCC’s responsibilities but does not and cannot dispute that the Government was responsible under the Contract to obtain property rights from adjacent property owners so it could establish final boundaries for the Project and obtain the final ROW. (Gov’t Br., p. 28; Appx31-32, Appx42-44, Appx189-193, Appx229-230)

threadbare recital but rather is a detailed allegation explaining the Government's obligations under the Contract.

HDCC also alleged that the Government did not timely secure these rights and obtain the final ROW until November 7, 2016 – over four months after the notice to proceed (“NTP”) was issued. (Appx190) Again, this is not a legal conclusion or threadbare recital – rather, it is a detailed factual allegation regarding the amount of time the Government took to obtain the final ROW after the Government directed HDCC to proceed with performance of the Contract which HDCC could not do fully since the Government had not provided the final ROW.

HDCC next alleged that the Government's delay in fulfilling its obligations was unforeseeable. (Appx44-46, Appx229-230) The Government contends that the trial court was not required to accept HDCC's allegation regarding foreseeability as true because the Contract did not specify the date by which the Government was to provide the final ROW and therefore HDCC's allegation that the Government's delay was unforeseeable was “baseless.” (Gov't Br., p. 32.) The Government's contention is wrong.

The fact that the Contract did not specify a time for performance does not mean that HDCC cannot assert that the Government caused delay. Indeed, when a contract does not specify the period in which the government must act, “the law imposes an obligation to act within a reasonable period of time.” *Specialty*

Assembling & Packing Co. v. United States, 355 F.2d 554, 565 (Ct. Cl. 1966); *Franklin Pavkov Constr. Co. v. Roche*, 279 F.3d 989, 997 (Fed. Cir. 2002) (“The time, place and manner of delivery, if not specified in the contract or by subsequent agreement of the parties, should be a reasonable time, place and manner that enables the contractor to perform under the contract.”).

Therefore, the question raised by HDCC’s allegation is whether the Government fulfilled its obligation to provide the final ROW in a reasonable and foreseeable amount of time. It is well-settled that questions of foreseeability and reasonableness of time for performance are inherently factual questions. *See Micron Technology, Inc. v. Rambus Inc.*, 645 F.3d 1311, 1321 (Fed. Cir. 2011) (“foreseeability of an event is a traditional issue of fact.”); *Int’l Prod. Specialists, Inc. v. Schwing Am., Inc.*, 580 F.3d 587, 595 (7th Cir. 2009) (“What constitutes a reasonable time for performance given the facts of the case is again a question of fact...”). It is also well-settled that in evaluating Rule 12(b)(6) motions, a trial court is not at liberty to decide factual questions or make factual findings. *See Coop. Entm’t, Inc. v. Kollektive Tech., Inc.*, 50 F.4th 127, 133 (Fed. Cir. 2022). Therefore, the trial court erred in rejecting HDCC’s allegations regarding the foreseeability and reasonableness.

In short, HDCC does not “take the trial court to task for actually examining the Contract” but rather HDCC is pointing out the trial court’s error in rejecting

HDCC's well plead factual allegations and making its own factual findings regarding what was reasonable and foreseeable which are inherently factual questions.

b. The Government Made Changes to the Design Parameters After Award of the Contract.

The Government next claims that HDCC's allegation that the Government made changes to the design parameters for the Project is "not entitled to a presumption of truthfulness" because it "is inconsistent with both the RFP and Contract." (Gov't Br., p. 33.) Specifically, the Government suggests that "HDCC misread the Contract as establishing an earlier ROW acquisition deadline or misconstrued the RFP documents as representing final ROWs." (*Id.*, p. 34.) In doing so, the Government again asks this Court to condone the trial court's rejection of HDCC's well plead allegations and improper factual determinations regarding reasonableness, foreseeability, and materiality.

As demonstrated above, the question of whether the Government provided the final ROW in a reasonable and foreseeable amount of time is a question fact and thus it was not appropriate for the trial court to decide this factual question on a 12(b)(6) motion.

Moreover, whether the differences between the design parameters in the RFP (upon which HDCC based its bid) and the final ROW were material is also a

question of fact which is improper for the trial court to decide on a 12(b)(6) motion. *See Micron*, 645 F.3d at 1321; *Int’l Tech. Corp. v. Winter*, 523 F.3d 1341,1349 (Fed. Cir. 2008) (“[C]ontractor must prove that the conditions differed materially from those represented” ... “which is again a fact question.”); *see also Kollektiv Tech.*, 50 F.4th at 133.

In short, HDCC alleged that the design parameters included in the RFP upon which HDCC based its bid and developed its design were materially different than the design parameters that the Government ultimately delivered in the final ROW – four months after directing HDCC to proceed. (Appx31-32, Appx44-46, Appx189-193, Appx229-230) HDCC also alleged that these material changes to the design parameters when HDCC design was already 80% complete resulted in redesign of significant portions of the roadway and improvements which resulted in delays and additional engineering and construction costs. (Appx45-46) These are not legal conclusions or threadbare allegations that run contrary to the terms of the Contract or RFP. Rather, these are well plead factual allegations that if proven true constitute a constructive change which entitles HDCC to additional time and costs.

c. Bell/Heery Supports HDCC’s Claim for ROW Impacts on the Permit Process.

The Government claims that FAR 52.236-7, the Permits & Responsibilities clause bars HDCC from seeking additional time and costs resulting from the

Government's delays in providing the final ROW. (Gov't Br., pp.34-37.) The Government's position ignores *Bell/Heery v. United States*, 739 F.3d 1324 (Fed Cir. 2014) and the allegations in HDCC's Complaint. *Bell/Heery* made clear that a contractor assumed the risks associated with obtaining the necessary permits ***unless*** the contractor alleges there is a "countervailing contractual duty on the Government that contradicts or renders ambiguous the express allocation of risk." 739 F.3d at 1334.

HDCC alleged that the Government had a countervailing contractual duty. Specifically, HDCC alleged that the Government had the obligation to provide a final ROW within a reasonable amount of time but failed to do so which in turn delayed HDCC's ability to apply for the 404 permits and resulted in delays additional costs. (Appx31-32, Appx46-47, Appx193-196)

Notwithstanding, the Government contends that the trial court does not need to accept HDCC's allegations as true and in the light most favorable to HDCC. (Gov't Br., p. 37.) However, as demonstrated above, HDCC's allegations are not legal conclusions or threadbare allegations but rather are well plead factual allegations that, if proven true, support HDCC's claims.

d. *HDCC Alleged that the Government Caused Delays by Failing to Timely Execute the Agreements with the Utilities as Required by the Contract.*

Again, the Government improperly contends that HDCC's allegation are "legal conclusions...couched as factual allegations." (Gov't Br., pp. 37-38.) The Government's contention ignores the facts alleged by HDCC and misstates the basis for HDCC's claim.

HDCC alleged that the Government was responsible to *execute* agreements with the utility owners to relocate or adjust utilities within the Project that could impact construction. (Appx48-49, Appx196-206) HDCC also alleged that the Government did not fulfill the responsibility to execute the agreements in a timely manner. Specifically, HDCC alleges that it provided the required utility agreements to the Government on August 3, 2017, but the Government did not return the executed agreements until February 28, 2018 – 209 days later. (Appx199-200) This is a far cry from a legal conclusion couched as a factual allegation. Indeed, HDCC provides specific details of the alleged failure on the Government's part which supports its claims for delay and breach of the Contract.

Further, the Government states HDCC can point to no provision requiring the Government to compel utilities to meet HDCC's schedule. (Gov't Br., p. 38.) This is not the basis of claim – rather, HDCC's claim is that HDCC prepared the

agreements for the Government execution per the terms of the Contract, but the Government did not timely execute such agreements which caused delays.

Finally, contrary to the Government's claim, since the Contract expressly required the Government to execute the agreements with the utility owner, the Government's failure to do so in a timely manner supports HDCC's claim for breach of contract and breach of the duty of good faith and fair dealing. *See Metcalf Constr. Co. v. United States*, 742 F.3d 984, 990 (Fed. Cir. 2014) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement. Failure to fulfill that duty constitutes a breach of contract...")

e. The Trial Court's Dismissal of the Wall Work Claims was Predicated on Improper Factual Findings.

The Government's brief demonstrates that the trial court overstepped by improperly making factual findings regarding the merits of HDCC's claims relating to the Castleton and MECO wall work. In the Complaint, HDCC alleged that the Government's delay in issuing contract modifications for additional work relating to the Castleton and MECO wall work caused HDCC to remain on standby for 482 days. (Appx31-32, Appx49-50, Appx206-215) As noted by the Government, in dismissing this claim, the trial court "interpreted" Complaint to

find that HDCC made a “unilateral decision to delay its contract work.” (Gov’t Br., pp. 39-40.)

As an initial matter, it was improper for the trial court to “interpret” or make factual findings at the 12(b)(6) stage. *See Kollektive Tech.*, 50 F.4th at 133. Moreover, the trial court’s “interpretation” was wrong. Specifically, the trial court’s interpretation was based on the trial court’s acceptance of the Contracting Officer’s statement in the Final Decision that the MECO wall “was part of HDCC’s original scope of work and was entirely unrelated to the Castleton Terrace Wall issue...” (Appx12-13) HDCC disputes that the MECO work was part of HDCC’s original scope of work. (Appx206)

In sum, at this stage, it was improper for the trial court to weigh evidence and make factual findings. Rather, the question is whether HDCC plead facts which if proven would support a claim which HDCC has done. (Appx31-32, Appx49-50, Appx206-215)

3. The Trial Court Erred by Dismissing Claims Not Addressed in its Decision.

Finally, the trial court erred by dismissing two of HDCC’s claims that were not included in the Government’s Motion to Dismiss and not addressed by the trial court in its decision granting the Motion to Dismiss. Specifically, HDCC’s Complaint included claims for constructive acceleration and challenging the

Contracting Officer's decision to rescind previously approved and paid contract modification. (Appx30, Appx31, Appx34, Appx51)

In an effort to correct the trial court's failure, the Government attempts to "fill in the blanks" with its own theory. Specifically, the Government opines, without any support or reference to the trial court's decision, that HDCC's constructive acceleration claim is dependent upon the sufficiency of HDCC's delay claim and since the trial court dismissed those claims, the acceleration claim was also dismissed. (Gov't Br., p. 41.) However, the trial court did not make such a finding, nor did it offer any basis for the dismissal of HDCC's constructive acceleration claim.

Similarly, the trial court did not provide any analysis of HDCC's claim relating to the Contracting Officer's decision to rescind previously approved and paid contract modification. The Government acknowledges the trial court's failure but again attempts to cure the failure by offering another theory of what the trial court meant to do. Specifically, the Government offers a tortured theory that "repayment claim is dependent upon HDCC succeeding in its claim for utility relocation costs." (Gov't Br., p. 42.). The Government's claim is pure speculation and not supported by the trial court's decision.

In sum, the trial court erred in dismissing these claims without addressing them in its decision and the Government cannot cure the trial court's failures by offering its own theories of what the trial court meant to do.

4. The Trial Court Abused its Discretion in Denying HDCC's Motion for Reconsideration.

The trial court's denial of HDCC's Motion for Reconsideration of the trial court's Order dismissing HDCC's Complaint without prejudice was an abuse of discretion, was contrary to the policy underlying the statute of limitations, and results in a manifest injustice. Further, the Government's reliance on the doctrine of "waiver" is baseless as the Government clearly recognized that HDCC sought leave to amend in the alternative.

a. HDCC Did not Waive its Argument related to the Statute of Limitations in its Motion for Reconsideration.

The Government contends that HDCC waived the argument "that dismissal without prejudice would be tantamount to a dismissal with prejudice because the statute of limitations had run" on the basis that HDCC did not raise the issue in its briefs related to the Government's Motion to Dismiss. (Gov't Br., p. 47.) The Government's contention is without merit and is illogical.

Waiver is an intentional relinquishment or abandonment of a known right or privilege. *See Clark v. United States*, 149 Fed. Cl. 409, 414 (Ct. Cl. 2020). At the time HDCC submitted its briefs related to the Government's Motion to Dismiss,

HDCC did not know that the Complaint would be dismissed without leave to amend. Therefore, HDCC could not have intentionally relinquished a known right.

Courts look to whether a party's express statement or conduct is inconsistent with an intent to assert a right to determine if waiver has been established. *See DynCorp Int'l*, 125 Fed. Cl. 446, 452 (Ct. Cl. 2016) (“To be effective, a waiver ‘must be a voluntary, knowing and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences.’”). Here, HDCC's conduct does not support a waiver. HDCC has pursued its claims diligently and never took the position that it intended to relinquish its rights. To the contrary, HDCC made affirmative statements in its briefs that the Complaint was sufficient and should be accepted by the Court.

b. The Dismissal of HDCC's Timely Filed Claim is a Manifest Injustice and does Not Comport to the Policy Underlying the Statute of Limitations.

The Government contends that persuasive authority supports affirmance of the trial court's denial of the Motion for Reconsideration. The Government's contention is wrong. First, the Government attempts to distinguish *Burden v. Yates*, 644 F.2d 503 (5th Cir. 1981) on the basis that it is a 5th Circuit case. However, the Government proposes a D.C. Circuit case for a “different, persuasive take.” Such a distinction is without consequence since both cases are from other Circuits because there are no Federal Circuit decisions directly on point.

Next, the Government seeks to distinguish *Burden* on the basis that it dealt with a dismissal without prejudice as a sanction for failure to obey court directives versus a Rule 12(b)(6) motion. This distinction is also without consequence to the significance of the ruling. The Court in *Burden* recognized that this dismissal, while made without prejudice, was “tantamount to a dismissal with prejudice” because the statute of limitations had run, which was a “drastic remedy.” *Burden*, 644 F.2d at 505. While the Court had the power to stand by the dismissal, the Court recognized that the plaintiff’s actions did not warrant such a drastic sanction because they sounded in negligence not contumaciousness. *Id.* Here, the impact of the Court’s dismissal *without* prejudice, which operates as a dismissal *with* prejudice, to an otherwise viable claim, is draconian.

The Government relies instead on *Morrissey v. Mayorkas*, 17 F. 4th 1150 (D.C. Cir. 2021), which upheld the District Court’s dismissal of two plaintiffs’ lawsuits against the Government because, after receiving explicit instructions and warnings from the Court that their matters would be dismissed if not timely served, the Court dismissed the actions when plaintiffs failed to timely serve the defendants. *Morrissey* is distinguishable because it relates to service and the necessity to provide timely notice of claims to the defendants—in HDCC’s case, the Government has not argued and cannot argue that it did not have notice of

HDCC's claims, and the arguments related thereto or that the Court warned HDCC of dismissal.

Finally, to preclude HDCC from pursuing its originally timely filed claims would act contrary to the goal of the statute of limitations. The purpose of “[s]uch statutes ‘promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.’” *Burnett v. New York Cent. R. Co.*, 380 U.S. 424, 428 (1965). Here, the Government has not, and cannot possibly argue that there are any surprises, that memories have faded, or that witnesses have disappeared. There are no surprises and HDCC has clearly not “slumbered” in bringing its claim.

Ultimately, it was an abuse of discretion by the Court of Federal Claims to deny HDCC's Motion for Reconsideration. (Appx1695-1705; Appx1717-1724)

5. The Trial Court Abused its Discretion in Denying HDCC's Motion in the Alternative for Leave to Amend.

The Government ignores HDCC's numerous requests for leave to amend made prior to judgment, and further ignores HDCC's timely post-judgment request to amend, all of which particularly and sufficiently preserved HDCC's request to amend the Complaint. Moreover, the Government in its briefings responded to and acknowledged the possibility of leave being granted to amend. The Government

further ignores the sufficiency of the proposed amended complaint, thereby defeating the Government's assertion of futility.

a. *HDCC's Request for Leave to Amend was Raised Particularly Before and After the Judgment.*

The Government inappropriately relies on *United Cmtys., LLC v. United States*, 157 Fed. Cl. 19 (Ct. Cl. 2021), explaining that because the plaintiff sought leave to amend "in a single perfunctory sentence in its response to a motion to dismiss" the plaintiff was not entitled to leave to amend. *United Cmtys.* is distinguishable for several reasons.

First, in *United Cmtys.* the plaintiff only asked *once* in its opposition to the motion to dismiss as follows: "In the alternative, [p]laintiff respectfully requests any dismissal granted be without prejudice and that [p]laintiff be permitted fourteen (14) days after any such order to amend its [c]omplaint." *United Cmtys.*, 157 Fed. Cl. at 21 (internal citation omitted). Here, HDCC more particularly requested leave in three separate prejudgment filings relating to the Government's Motion to Dismiss:

1. HDCC's Opposition to Motion to Dismiss (Appx1632-1653):

C. Alternatively, HDCC Should be Granted Leave to Amend its Complaint.

Under Rule 15(a)(2), "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." RCFC 15(a)(2). "The decision whether 'to grant leave [to amend] rests within the sound discretion of the [court],' and the federal rules 'strongly favor granting leave to amend.'" *The Centech Grp., Inc. v. United States*, 78 Fed. Cl. 658, 659 (2007).

Here, in the event that the Court finds that HDCC's Complaint does not state sufficient facts to support any portion of its claims against the Government, the Court should grant HDCC leave to amend the Complaint.

(Appx1651-1652)

2. HDCC's Surreply (Appx1664-1672):

II. CONCLUSION

Based on the foregoing and the reasons set forth in HDCC's Opposition (Doc. 18.), HDCC respectfully requests that this Court deny the Government's Motion to Dismiss. Alternatively, HDCC respectfully requests that the Court grant leave for HDCC to amend its Complaint.

(Appx1671)

3. HDCC's Brief on issues Identified in Court's November 22, 2022 Order (Appx1675-1683):

6. In light of questions 4 and 5, address whether Plaintiff should be granted leave to amend its Amended Complaint.

HDCC believes that it has sufficiently stated its claims against the Government in the Amended Complaint and exhibits attached thereto. However, to the extent that the Court disagrees or would like further clarification included within the body of the complaint, HDCC should be granted leave to file an amended complaint. RCFC 15(a)(2) (“[t]he court should freely give leave when justice so requires.”) “The decision whether ‘to grant leave [to amend] rests within the sound discretion of the [court],’ and the federal rules ‘strongly favor granting leave to amend.’” The Centech Grp., Inc. v. United States, 78 Fed. Cl. 658, 659 (2007).

(Appx1682) In short, HDCC made clear that if the trial court did not believe that HDCC sufficiently stated its claims, HDCC was seeking leave to amend.

(Appx1682)

Finally, the Government responded to HDCC's request for leave but never argued that HDCC's request was insufficient or not properly before the trial court. For example, in the Government's Reply in Support of its Motion to Dismiss, the Government argued that leave to amend should be denied “[b]ecause HDCC cannot allege facts sufficient to state a claim for relief as a matter of law that are not materially inconsistent with the factual positions HDCC has already taken, the Court should deny leave to amend.” (Appx1662) The Government **did not** say, however, that HDCC did not properly seek leave. Indeed, the Government went on to state, and essentially concede, that if the trial court deemed appropriate, HDCC

should be permitted to amend:

Additionally, should the Court find that any of HDCC's subclaims can potentially state a claim, the Court should direct HDCC to file an amended complaint omitting the remaining subclaims and alleging a corrected sum certain demand amount that reflects only the grounds for relief that the Court has not dismissed.

(Appx1662). Therefore, it is disingenuous for the Government to claim that HDCC failed to state the particularized reasons for leave to amend.

Similarly, the trial court's Order makes it clear that the trial court was aware that HDCC had requested leave to amend but instead of addressing the request on the merits, the trial court arbitrarily ruled that the request was not properly before the court. This is a clear abuse of discretion, especially in light of the strong policy favoring liberal leave to amend. *See* RCFC 15(a)(2) ("The court should freely give leave when justice so requires."); *see also* *Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago & NW. Indiana*, 786 F.3d 510, 521 (7th Cir. 2015) ("When the district court has taken the unusual step of entering judgment at the same time it dismisses the complaint, the court need not find other extraordinary circumstances and must still apply the liberal standard for amending pleadings under Rule 15(a)(2).").

Finally, regardless of whether the request was before the trial court prior to the Order dismissing the case, HDCC is still entitled to request leave to amend post

judgment. *See Chargepoint, Inc. v. SemaConnect, Inc.*, 920 F.3d 759, 776 (Fed. Cir. 2019) (holding that a motion to amend filed after a judgment of dismissal has been entered can be considered after judgment is vacated under Rule 59(e) or Rule 60(b)). Therefore, regardless of whether HDCC properly requested leave to amend in response to the Government’s Motion to Dismiss (which it did), HDCC is still entitled to seek post-judgment leave to amend in conjunction with its Motion for Reconsideration. *Id.*

b. The Trial Court Erred in Denying HDCC’s Motion for Leave to Amend on the Basis of Futility.

Finally, the trial court erred as a matter of law in denying HDCC’s Motion in the Alternative for Leave to Amend on the basis of futility. For the reasons already stated in HDCC’s Brief, HDCC sufficiently plead a cause of action for Count I – Breach of Contract (FAR 52.243-4-Changes) and Count II – Breach of Contract (Implied Covenant of Good Faith and Fair Dealing), and provided the necessary factual support for those causes of action, and, therefore, denial of the Motion in the Alternative for Leave to Amend on the basis of futility was an error of law. (HDCC’s Br., pp. 47-54.)

Importantly, “[a] ‘complaint need not ‘make a case’ against a defendant or ‘forecast evidence sufficient to prove an element’ of the claim. It need only ‘allege facts sufficient to state elements’ of the claim.” *Robertson v. Sea Pines Real Est.*

Cos., 679 F.3d 278, 291 (4th Cir. 2012) (internal citations omitted) (“*Iqbal* and *Twombly* do not require a plaintiff to prove his case in the complaint.”). Ultimately, “A court decides whether this standard is met by separating the legal conclusions from the factual allegations, assuming the truth of only the factual allegations, and then determining whether those allegations allow the court to reasonably infer” that the plaintiff is entitled to relief. *Lee v. Dep’t of Pub. Safety and Corr. Serv.*, Civil Action No. RWT-13-1341, 2014 WL 1120238, at * 3 (D. Md. March 19, 2014) (internal citations omitted). The Government is wrong to state that HDCC did not plausibly state a cause of action in its Proposed Second Amended Complaint under the standard enumerated above.

Ultimately, the Proposed Second Amended Complaint includes more than sufficient factual allegations, when taken in the light most favorable to HDCC, to sufficiently state a claim against the Government. (Appx1606-1621; HDCC Br., pp. 47-54) The allegations in the Proposed Amended Complaint and the referenced attachments including the Certified Claim and Sage Report, surpass any question of futility. Therefore, the trial court’s Order denying HDCC’s Motion in the Alternative for Leave to Amend on the basis of futility was an error in the law and must be reversed.

II. CONCLUSION.

The trial court's Opinion and Order dated February 14, 2023 granting the Government's Motion to Dismiss and Judgment should be vacated, and this matter remanded to the trial court to proceed on the merits.

Alternatively, the trial court's April 24, 2023 Opinion denying HDCC's Motion for Reconsideration and Motion for Leave to Amend should be vacated and this case should be remanded and HDCC should be granted leave to file its proposed Amended Complaint.

Dated: March 1, 2024

Respectfully submitted,

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**Federal Rule of Appellate Procedure Rule 32(g) Certificate of Compliance
with Type-Volume Limit**

I hereby certify that on this 1st day of March 2024, that the Reply Brief of Appellant-Plaintiff Hawaiian Dredging Construction Company, Inc. complies with the type-volume limit of Fed. Cir. Rule 28.1 (b)(1), because, excluding the parts of the document exempted by Fed. R. App. 32(f), the Reply Brief of Appellant-Plaintiff Hawaiian Dredging Construction Company, Inc. contains 4607 words. I further certify that this document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font, Times New Roman.

/s/ Michael C. Zisa

Michael C. Zisa

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of March, 2024, a copy of the foregoing was served on the following through the Court's CM/ECF electronic filing service:

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