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ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of - )  
 )  
Sauer Incorporated ) ASBCA No. 62295  
 )  
Under Contract No. N69450-09-D-1277 )

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OPINION BY ADMINISTRATIVE JUDGE WOODROW ON  
THE GOVERNMENT’S MOTION FOR RECONSIDERATION

The Department of the Navy (Navy or government) moves for reconsideration of the Board’s August 13, 2025, decision denying its motion for summary judgment. The Navy raises two issues for reconsideration: (1) that the Board erred in concluding that there was a genuine issue of material fact concerning the scope of the release between Sauer, Inc. (Sauer) and its subcontractor, Tri-State Painting, LLC (TSI); and (2) that the Board erred in concluding that the settlement agreement between Sauer and TSI creates a new liability and obligates Sauer to pursue recovery of its pass-through claims against the government in light of the United States Court of Appeals for the Federal Circuit’s affirmance of the United States Court of Federal Claims decision in *George Hyman Constr. Co. v. United States*, 30 Fed. Cl. 170 (1993), *aff’d mem.* 39 F.3d 1197 (Fed. Cir. 1994)<sup>1</sup>. (Gov’t mot. at 1-2) The motion has been fully briefed, with Sauer filing an opposition on September 25, 2025, and the Navy filing a reply on September 29, 2025. Issuance of this decision was delayed due to a lapse in government appropriations. For the reasons stated below, the Navy’s motion for reconsideration is denied.

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<sup>1</sup> We note that the Federal Circuit’s decision affirming *George Hyman* was non-precedential, pursuant to Federal Circuit Local Rule 47.6.

### *I. Standard for Reconsideration*

In deciding a motion for reconsideration, we examine whether the motion is based upon newly discovered evidence, mistakes in our findings of fact, or errors of law. *Precision Standard, Inc.*, ASBCA No. 58135, 16-1 BCA ¶ 36,504 at 177,860. A motion for reconsideration does not provide the moving party the opportunity to reargue its position or to advance arguments that properly should have been presented in an earlier proceeding. *See Dixon v. Shinseki*, 741 F.3d 1367, 1378 (Fed. Cir. 2014). The moving party must show a compelling reason why the Board should modify its decision. *ADT Constr. Grp., Inc.*, ASBCA No. 55358, 14-1 BCA ¶ 35,508 at 174,041.

### *II. Decision*

#### *A. The Board Correctly Found a Genuine Issue of Material Fact Regarding Whether Change Order No. 10 Operated as a Valid Release*

The Navy speculates that the Board “relied on an erroneous belief that that the government was a party to the S.D. Georgia litigation” when the Board held that the Navy had failed to show the absence of a disputed material fact in this appeal (gov’t mot. at 4 (quoting Decision at 10 (“[I]n the S.D. Georgia litigation, the *government* was unable to prove the absence of a genuine issue of material fact as to whether Change Order No. 10 was ever agreed to by the parties.”))). The Navy is incorrect. The quoted sentence from page 10 of our Decision did reference the government by mistake, but the surrounding language makes clear that we were talking about the surety – the defendant in the Southern District of Georgia litigation.<sup>2</sup>

Notably, the Navy does not, and cannot, challenge the Southern District of Georgia’s holding that there was “a clear and lively dispute about a material fact” regarding whether Sauer and TSI had mutually assented to Change Order No. 10. *See* Decision at 4.

Next, the Navy argues that Sauer failed to submit a factual affidavit purporting to establish a disputed issue of material fact concerning the release in Change Order No. 10 (gov’t mot. at 4-5). This argument is without merit. First, it is unnecessary for Sauer to present evidence in this appeal to establish a dispute of material fact, because the burden is on the Navy to demonstrate that an “iron-clad” release existed that would trigger the *Severin* doctrine. *Metric Constructors, Inc. v. United States*, 314 F.3d 578, 582 (Fed. Cir. 2002). The Navy presented extrinsic evidence in this appeal regarding the intention of the parties when entering into Change Order No. 10 (gov’t mot. for partial summary judgment at 5, ex. I (affidavit of James Rossini)). That evidence does not overcome the Southern District of Georgia’s finding of a live controversy

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<sup>2</sup> We will issue an *errata* correcting our opinion.

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regarding mutual assent, nor does it outweigh the parties' subsequent settlement conduct. Indeed, disputes over credibility and intent cannot be resolved at summary judgment. *Lockheed Martin Aeronautics Co.*, ASBCA Nos. 62249, 62727, 23-1 BCA ¶ 38,311 at 186,021 (Board does not weigh evidence or make credibility determinations in deciding summary judgment motions). The Navy insists that Sauer has failed to "put-up" and contest the affidavit of its own controller, Mr. James Rossini (gov't reply br. at 4). This argument misapprehends the summary judgment standard. Sauer is not required to submit a contradictory affidavit to create a genuine dispute of material fact. The existence of a federal court ruling finding a "clear and lively dispute" on this exact issue, coupled with the parties' subsequent conduct in settling that live dispute for millions of dollars, is itself overwhelming evidence that a genuine dispute of material fact exists regarding the validity and effect of Change Order No. 10. The Navy cannot isolate a single piece of extrinsic evidence (the Rossini affidavit) and demand it be treated as dispositive while ignoring the larger factual context that demonstrates the very existence of a dispute.

Second, it is wholly appropriate for the Board to take judicial notice of the Southern District of Georgia's ruling to conclude that there is a material factual dispute about whether Sauer and TSI mutually assented to Change Order No. 10. *See* FED. R. EVID. 201; ASBCA Rule 10(c); *see JAAAT Tech. Servs., LLC*, ASBCA No. 61792 *et al.*, 21-1 BCA ¶ 37,878 at 183,973, n.11 (taking judicial notice pursuant to Federal Rule of Evidence 201 of public securities filings). Doing so does not mean that the Board adopts the Southern District of Georgia's ruling as its own; instead, the Board takes notice of the crucial fact that a federal court, when presented with evidence regarding Change Order No. 10, officially ruled that there was "a clear and lively dispute about a material fact." *United States for Use and Benefit of TSI Tri-State Painting, LLC v. Federal Insurance Co.*, No. 2:16-cv-00113, 2022 WL 1477441, at \*6. We recognize the Navy's reliance on *Ballard v. Heineman*, 548 F.3d 1132, 1136 (8th Cir. 2008), for the proposition that another court's conclusions are not themselves evidence (gov't reply br. at 4). Our decision is consistent with *Ballard*. We did not adopt the Southern District of Georgia's reasoning or findings as proof of liability; rather, we took judicial notice of the fact that a federal court, when presented with evidence on Change Order No. 10, found a live dispute as to mutual assent. This fact alone is sufficient to establish the existence of a material factual dispute regarding whether the change order is a valid release.

*B. George Hyman Is Distinguishable*

The Navy next contends that the Board's holding that the settlement agreement between Sauer and TSI creates a "new liability" obligating Sauer to pursue recovery of its pass-through claims against the government is in direct conflict with the Federal Circuit's affirmance of the Court of Federal Claims' decision in *George Hyman Constr.*, 30 Fed. Cl. 170 (gov't mot. at 6). According to the Navy, the Board erred in

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relying on *J.L. Simmons Co. v. United States*, 304 F.2d 886 (Ct. Cl. 1962), for the proposition that a prime contractor may bring suit on behalf of its subcontractor “when the prime contractor has reimbursed its subcontractor for the latter’s damages or remains liable for such reimbursement in the future” (gov’t mot. at 6-7).

We disagree. The facts of this appeal align more closely with *J.L. Simmons*, which is binding precedent, than with *George Hyman*, which is not. In *George Hyman*, the subcontractor executed an unconditional release of all claims against the prime contractor. 30 Fed. Cl. at 171-72. Although the parties later attempted to sign an agreement “reviving” the subcontractor’s claim, the Court of Federal Claims held that the claim had already been extinguished, and the subsequent agreement was a *de facto* reformation beyond the court’s jurisdiction (*id.* at 174-75). The court therefore applied the *Severin* doctrine to bar the pass-through claim because no liability remained between the prime and its subcontractor (*id.* at 177-78).

In contrast, in *J.L. Simmons*, the Court of Claims held that contingent liability – where the prime was obligated to reimburse its subcontractors “as and when” it recovered from the government – was sufficient to avoid the *Severin* bar. The court emphasized that conditional liability remained real liability, even if the ultimate payment depended on government recovery. *J.L. Simmons*, 304 F.2d at 888-89.

Sauer’s circumstances are materially indistinguishable from *J.L. Simmons*. The dispute over the validity of Change Order No. 10 was never resolved; rather, the Southern District of Georgia found a “clear and lively dispute about a material fact” as to whether the change order represented mutual assent. Sauer thereafter entered into a settlement agreement with TSI (the 2022 settlement), making substantial monetary payments (\$7.85 million) and assuming an obligation to pay additional amounts contingent upon recovery from the government. Decision at 5-6. These obligations establish both actual and contingent liability, squarely within the framework recognized in *J.L. Simmons* as sufficient to support a pass-through claim.

Unlike the revival agreement in *George Hyman*, whose sole purpose was to create standing to sue under the CDA, the 2022 settlement agreement is prospective and does not attempt to retroactively change the terms of Change Order No. 10. See *W.G. Yates & Sons Constr. Co. v. Caldera*, 192 F.3d 987, 991-92 (Fed. Cir. 1999) (holding that conditional liability, even when dependent on recovery from the government, is sufficient to avoid the *Severin* bar). The purpose of the 2022 settlement was to resolve the ongoing Miller Act litigation and avoid a trial against the surety. Unlike in *George Hyman*, where the “revival” was a paper exercise, Sauer made real monetary payments to TSI. Sauer’s liability to TSI is not fictional; it is current, enforceable, and only partially satisfied.

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To avoid any ambiguity, when we describe the 2022 settlement agreement as creating “new liability,” we mean only that Sauer assumed present and contingent obligations to TSI through an enforceable settlement supported by consideration. That liability arose out of an unresolved dispute and Sauer’s actual monetary payments. This is not the “revival” of extinguished claims barred in *George Hyman*, but rather the continuation and resolution of a live controversy. The Navy, in its reply brief, seizes on Sauer’s use of the term “new liability” as a concession that its actions are “antithetical” to the *Severin* doctrine and “expressly barred” by *George Hyman*. (Gov’t reply br. at 5) This is a misinterpretation. The prohibition in *George Hyman* is against creating liability from nothing, that is, reviving a claim after it has been definitively and unconditionally extinguished. Here, because a live controversy existed as to whether the claim was ever extinguished by Change Order No. 10, the settlement agreement did not ‘revive’ a dead claim. Instead, it converted a disputed, unliquidated liability into a settled, partially-liquidated liability (\$7.85 million paid) with a remaining contingent component. This is precisely the kind of enforceable obligation that satisfies the *Severin* doctrine, as established in *J.L. Simmons*.

The policy concern underlying *George Hyman* – preventing parties from fabricating liability through a paper agreement to create standing – is not implicated here. Rather, the 2022 agreement establishes the same type of contingent liability as in *J.L. Simmons*.

### *C. Timing of the 2022 Settlement Agreement Does Not Render it a Revival*

The Navy next argues that, because the 2022 settlement decision between Sauer and TSI post-dates the Navy’s January 2022 motion for partial summary judgment, the settlement should be treated as an impermissible attempt to “revive” liability that had already been extinguished by the earlier release in Change Order No. 10 (gov’t mot. at 7-8).

The timing of the 2022 settlement agreement is not dispositive and does not render the settlement ineffective under *Severin* and *George Hyman*. That is because the liability was never extinguished – if no valid release occurred, then there was nothing to “revive.” In *George Hyman*, there was no live controversy between the contractor and subcontractor when they signed the agreement attempting to revive the subcontractor’s pass-through claims. Here, in contrast, Sauer made a substantial payment of \$7.85 million to resolve the live controversy in the Southern District of Georgia regarding the legal effect of the Change Order No. 10 release. The 2022 settlement agreement expressly acknowledges contingent liability tied to a preexisting claim, not a manufactured one. Decision at 5-6.

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*D. Use of Extrinsic Evidence in Evaluating Change Order No. 10*

The Navy next contends that the language of Change Order No. 10 is clear on its face and that the Board should not rely on extrinsic evidence to contradict its plain meaning (gov't mot. at 9). The Navy relies on *MW Builders, Inc. v. United States*, 136 Fed. Cl. 584, 588 (2018) to support the exclusion of extrinsic evidence (gov't mot. at 9). *MW Builders* is distinguishable because it involved an issue of contract interpretation where the agreement was facially unambiguous. Here, in contrast, the issue is mutual assent, not the mere construction of terms. Moreover, the Navy itself seeks to rely on extrinsic evidence in its motion for partial summary judgment when it cites to the affidavit of James Rossini, Sauer's Controller, to contend that Change Order No. 10 was intended to be a complete release of TSI's claims against Sauer (*id.* at 4). The Navy's own reliance on extrinsic evidence underscores why the Board may properly consider such materials in determining whether a genuine dispute of material fact exists regarding the validity of Change Order No. 10.

*E. The Navy's Speculation About the Parties' Motives is Unpersuasive*

In an attempt to make this appeal fit the *George Hyman* fact pattern, the Navy speculates regarding the various reasons why Sauer and TSI may have wished to revive TSI's pass-through claims, including that the parties mistakenly believed that revival of liability is legally permissible or were unaware of the holding in *George Hyman* or its affirmance by the Federal Circuit (*id.* at 8). The Navy's unfounded speculation about the parties' lack of knowledge fails to undercut the fact that Sauer paid a significant sum to settle the litigation and further committed to paying TSI additional money recovered from the government.

Indeed, the most plausible reason given is that the parties wished to avoid the expense of protracted litigation in the Southern District of Georgia (*id.* at 8). The desire to avoid litigation is fully consistent with the fact that the parties were settling a live controversy and lends credence to the Board's conclusion that the 2022 settlement agreement was much more than a nominal agreement to "revive" TSI's pass-through liability solely for the purpose of pursuing claims against the government.

*F. Jurisdictional Arguments Do Not Defeat Sauer's Claim*

The Navy further argues that the Board's decision "raises jurisdictional issues," given that the operable facts of Sauer's "new liability" have never been presented as a certified claim to the contracting officer (*id.* at 9). This argument is meritless because Sauer's pass-through claim arises out of the same operative facts and seeks the same relief as its existing certified claim.

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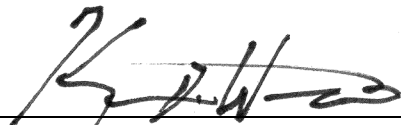
Moreover, the Board described the 2022 settlement agreement as “creating a new liability” only in the limited sense of establishing that Sauer is *currently* liable to TSI, not in the impermissible sense of “reviving” a claim that had already been released (as was barred in *George Hyman*). The Board did not suggest that the agreement unlawfully “revived” a released obligation; rather, we viewed the 2022 agreement as evidence that Sauer agreed to pay TSI (and in fact did pay) in connection with the same operative facts now being litigated. That supports the conclusion that Sauer was not released; or, at a minimum, reassumed its liability to TSI. This is in sharp contrast to the factual posture of *George Hyman*, in which there was no ongoing litigation or live controversy at the time that the parties attempted to revive the subcontractor’s pass-through liability. *George Hyman* at 177.

The Navy’s concern that the settlement reflects a “new claim” requiring certification is misplaced. Sauer’s settlement obligations arise from the same operative facts and seek the same relief as the certified claim already before the contracting officer. Precedent confirm that claim amendments and evidentiary developments do not divest jurisdiction where they stem from the same factual matrix. *See Scott Timber Co. v. United States*, 333 F.3d 1358, 1365-66 (Fed. Cir. 2003) (holding that jurisdiction is proper where an amended or clarified claim arises from the same operative facts, seeks essentially the same relief, and merely increases the amount of damages or refines the legal theory).

CONCLUSION

For these reasons, the Navy has not demonstrated newly discovered evidence, factual error, or legal error warranting reconsideration. Genuine issues of material fact remain regarding the validity of Change Order No. 10, and the 2022 settlement agreement between Sauer and TSI represents a resolution of a live dispute, not an impermissible revival of an extinguished claim. The settlement establishes both actual and contingent liability consistent with *J.L. Simmons* and does not fall within the bar of *George Hyman*. Accordingly, we deny the Navy’s motion for reconsideration.

Dated: November 18, 2025

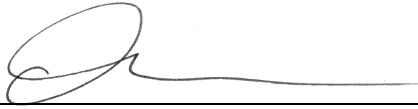
  
KENNETH D. WOODROW  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signatures continued)

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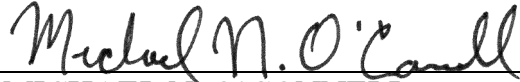
I concur



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OWEN C. WILSON  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

I concur



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MICHAEL N. O'CONNELL  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 62295, Appeal of Sauer Incorporated, rendered in conformance with the Board's Charter.

Dated: November 18, 2025

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PAULLA K. GATES-LEWIS  
Recorder, Armed Services  
Board of Contract Appeals