# APPENDIX

NOTE: This order is nonprecedential.

# United States Court of Appeals for the Federal Circuit

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**URS ENERGY & CONSTRUCTION, INC., FOR THE USE AND BENEFIT OF THE SECURED CREDITORS OF GROUND IMPROVEMENT TECHNIQUES, INC., PNC BANK, N.A., FIREMAN'S FUND INSURANCE COMPANY, R.N. ROBINSON & SONS, INC.,**
*Plaintiffs*

**v.**

**UNITED STATES,**
*Defendant-Appellee*

**v.**

**ROBERT KINGHORN, LAW OFFICES OF FREDERICK HUFF,**
*Movants-Appellants*

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2019-2101

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Appeal from the United States Court of Federal Claims in No. 1:12-cv-00057-RHH, Senior Judge Robert H. Hodges, Jr.

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

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

PER CURIAM.

**ORDER**

Appellants Robert Kinghorn and Law Offices of Frederick Huff 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 August 12, 2020.

FOR THE COURT

August 5, 2020
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

* Circuit Judge Hughes did not participate.

NOTE: This disposition is nonprecedential.

# United States Court of Appeals for the Federal Circuit

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**URS ENERGY & CONSTRUCTION, INC., FOR THE USE AND BENEFIT OF THE SECURED CREDITORS OF GROUND IMPROVEMENT TECHNIQUES, INC., PNC BANK, N.A., FIREMAN'S FUND INSURANCE COMPANY, R.N. ROBINSON & SONS, INC.,**
*Plaintiffs*

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*Movants-Appellants*

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2019-2101

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Appeal from the United States Court of Federal Claims in No. 1:12-cv-00057-RHH, Senior Judge Robert H. Hodges, Jr.

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Decided: May 18, 2020

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ANNA BONDURANT ELEY, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by JOSEPH H. HUNT, STEVEN JOHN GILLINGHAM, ROBERT EDWARD KIRSCHMAN, JR.

STEVEN R. SCHOOLEY, Schooley Law Firm, Orlando, FL, argued for movants-appellants.

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Before PROST, *Chief Judge*, DYK and WALLACH, *Circuit Judges*.

PROST, *Chief Judge*.

Robert Kinghorn and the Law Offices of Frederick Huff ("Mr. Kinghorn and Mr. Huff") appeal the denial of their motion to intervene post-judgment at the Court of Federal Claims. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

A motion to intervene must be timely. R. Ct. Fed. Cl. 24(a), (b). We review a trial court's timeliness determination for abuse of discretion. *See NAACP v. New York*, 413 U.S. 345, 365–66 (1973).

Mr. Kinghorn and Mr. Huff moved to intervene nearly one month after summary judgment was granted, and over one year after it was requested. J.A. 4. They sought to modify the judgment by over $4.5 million on a theory that had not been presented to the court by the plaintiffs in this case, a circumstance that these appellants were well aware of months before the grant of summary judgment. *Id.* Applying the relevant factors in its decision, the court denied the motion as untimely. J.A. 5–6.

We hold that the trial court did not abuse its discretion in determining that the post-judgment motion to intervene was untimely. Because timeliness is dispositive, we affirm.

**AFFIRMED**

# United States Court of Appeals for the Federal Circuit

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URS ENERGY & CONSTRUCTION, INC., FOR THE USE AND BENEFIT OF THE SECURED CREDITORS OF GROUND IMPROVEMENT TECHNIQUES, INC., PNC BANK, N.A., FIREMAN'S FUND INSURANCE COMPANY, R.N. ROBINSON & SONS, INC.,
*Plaintiffs*

v.

UNITED STATES,
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ROBERT KINGHORN, THE LAW OFFICES OF FREDERICK HUFF,
*Movants-Appellants*

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2019-2101

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Appeal from the United States Court of Federal Claims in No. 1:12-cv-00057-RHH, Senior Judge Robert H. Hodges, Jr.

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**JUDGMENT**

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THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

**AFFIRMED**

ENTERED BY ORDER OF THE COURT

May 18, 2020

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

# United States Court of Federal Claims

No. 12-57 C
Filed: April 30, 2019

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**URS ENERGY & CONSTRUCTION, INC., for the use and benefit of the secured creditors of GROUND IMPROVEMENT TECHNIQUES, INC.; PNC BANK, N.A.; FIREMAN'S FUND INSURANCE COMPANY; and R.N. ROBINSON & SONS, INC.,**

***Plaintiffs,***

**v.**

**UNITED STATES OF AMERICA,**

***Defendant.***

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*Steven Roger Schooley*, Schooley Law Firm, Orlando, FL, for would-be-intervenors.

*Robert Galen Barbour*, Watt, Tieder, Hoffar & Fitzgerald, LLP, McLean, VA, for plaintiffs.

*Anna Bondurant Eley*, United States Department of Justice, Commercial Litigation Branch, Washington, DC, for defendant.

**ORDER DENYING MOTION TO INTERVENE**

Robert Kinghorn and The Law Offices of Frederick Huff file this motion to intervene and join as parties in this action. They claim that they have an interest in amending our judgment, pursuant to Rule 59(e) of the RFCF, to seek total reimbursement of the full amount of the GIT Judgment and an award for costs. The Government maintains that their motion to intervene should be denied because it is untimely; they are not entitled to intervention as a matter of right; and that they are not entitled to permissive joinder.

Mr. Kinghorn and Mr. Huff do not have a right to intervene or be joined as parties; nor are they entitled to permissive intervention or joinder. Their motion must be denied.

## BACKGROUND

Plaintiff URS Energy & Construction, Inc. entered into a cost-reimbursement contract with the Department of Energy in 1983,[1] which it subcontracted to Ground Improvement Techniques, Inc. (GIT). Later, URS terminated this subcontract. The termination led to years of litigation and GIT eventually obtained a favorable judgment. URS filed this action to obtain reimbursement for the judgment against it in favor of GIT.

The court granted summary judgment in favor of URS on January 11, 2019.[2] Mr. Kinghorn and The Law Offices of Frederick Huff filed this motion to intervene on February 27, 2019. The court previously issued a ruling on the issue of whether Mr. Kinghorn and Mr. Huff could be joined as parties to this action and found that joinder was inappropriate. *See Ground Improvement Techniques, Inc. v. United States*, No. 12–57 C, 2014 WL 1711004, at *6 (Fed. Cl. Apr. 30, 2014) ("*GIT I*") (ruling on joinder).

### *A. Background and Proceedings Regarding the Real Parties in Interest*

During the litigation between URS and GIT, GIT filed for bankruptcy. As part of its reorganization plan during the bankruptcy proceedings, GIT assigned its interest in the litigation to five of its secured creditors: PNC Bank, N.A.; Fireman's Fund Insurance Company; R.N. Robinson & Sons, Inc.; Holland & Knight LLP; and The Law Offices of Frederick Huff. The secured creditors chose to continue litigation against URS in the name of GIT, rather than directing GIT to assign its claims against URS to them.

The reorganization plan provided that if the net proceeds of the URS case were sufficient to satisfy the claims of the secured creditors in full, the remaining proceeds were to be distributed to unsecured creditors on a pro rata basis. GIT and the secured creditors also entered into an Agreement Respecting Litigation, which stipulated that after payment of litigation costs and $125,000 to the unsecured creditors as required by the reorganization plan, the proceeds not in excess of the secured creditors' claims would be distributed first in part to the secured parties and then in part to Mr. Kinghorn, an equity holder in GIT. The agreement also provided that settlement of the litigation and operating decisions regarding the conduct of the litigation required 75% of the voting interests.

GIT eventually obtained a judgment against URS for wrongful termination. The judgment was only partially satisfied, as URS also had filed for bankruptcy. The bankruptcy court, however, ordered URS to submit a certified claim with DOE to satisfy GIT's claims. DOE rejected the certification as inadequate. The bankruptcy court then

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[1] References to "URS" are to be construed to mean both URS Energy & Construction, Inc. and its predecessors in interest, unless otherwise specified. The original contract was between DOE and MK–Ferguson Company, a now-cancelled trade name.

[2] Judgment was entered on January 30, 2019.

ordered GIT to file its claims with DOE under URS' name and to certify its own claims. This claim was denied, so GIT filed a suit in this court against DOE for breach of contract.

The court dismissed GIT's claims brought in its own name because it lacked privity with defendant. *Ground Improvement Techniques, Inc. v. United States*, 108 Fed. Cl. 162, 171–83 (2012). Regarding the remaining claim, brought in URS' name, it found that the secured creditors, not GIT, were the real parties in interest because GIT had transferred its claims to them in bankruptcy. *Id.* at 169–71. The court directed GIT to describe the method by which the real parties in interest would participate in the suit.

GIT filed a motion for reconsideration and sought to continue as the real party in interest, "either through ratification (supported by both Mr. Huff, one of the [s]ecured [creditors], and Mr. Kinghorn, an equity-holder) or through joinder." *Ground Improvement Techniques, Inc. v. United States*, 618 Fed. Appx. 1020, 1025 (Fed. Cir. 2015) ("*GIT II*"). Three of the secured creditors (PNC, Fireman's Fund, and Robinson), which held the required voting interest to conduct litigation, sought to be substituted as the sole plaintiffs.

The court denied GIT's motion for reconsideration and subsequently issued an order substituting the three secured creditors as sole plaintiffs in the suit. *GIT I*, 2014 WL 1711004 at *6. It found that irrespective of the manner of joinder proposed, it was not appropriate for Mr. Kinghorn and Mr. Huff to be joined as parties. *Id.* It explained that Mr. Kinghorn possessed no direct claim against defendant and that the Agreement Respecting Litigation placed control of the litigation in the secured creditors' hands. *Id.* at *7 (stating that joinder could violate the agreement's terms and the conditions of GIT's bankruptcy).

Regarding Mr. Huff, the court found that his position as one of the secured creditors gave his interests adequate protection in the suit. *Id.* The court noted, however, that under the Agreement Respecting Litigation his voting interest was so small that he could not choose counsel or direct litigation; pursuant to this agreement, the secured creditors with 75% or more of the voting interest held control of the litigation. *Id.* (stating that joinder of Mr. Huff could violate the agreement's terms and the conditions of GIT's bankruptcy).

Pursuant to the court's order on April 30, 2014, Robert Galen Barbour was substituted as the attorney of record for URS. The court docket shows that Steven Roger Schooley, counsel for the then nominal plaintiffs and present would-be-intervenors, was terminated as lead attorney for URS that same day. However, it also indicates that Mr. Schooley remained registered to receive all orders and motions submitted in this case.

On appeal, the Federal Circuit affirmed the court's decision that the real parties in interest were the secured creditors and that the three secured creditors should be substituted as the sole plaintiffs. *GIT II*, 618 Fed. Appx. at 1026–28, 1032. The Circuit, moreover, stated that this court rightly held that:

> Just because one of the Secured Parties (Mr. Huff) and an equity holder in GIT (Mr. Kinghorn) might be able to benefit from a judgment won in this court does not mean that Mr. Kinghorn or Mr. Huff may flout the Agreement [Respecting Litigation] and its terms.

*Id.* at 1028 (quoting *GIT I*, 2014 WL 1711004 at *5) (finding that Mr. Kinghorn and Mr. Huff had expressly signed away their control). On January 11, we granted summary judgment in favor of URS and the clerk of court entered judgment on January 30 for $9, 842, 711.83 for the unpaid portion of the GIT Judgment, inclusive of pre-judgment interest, and interest on the certified claim from the date the claim was received. Mr. Kinghorn and Mr. Huff moved to intervene on February 27, 2019; defendant opposes this motion.

*B. Summary of Motion to Intervene*

Mr. Kinghorn and Mr. Huff filed this motion to intervene and be joined as parties, as a matter of right pursuant to Rules 24(a) and 19 of the RCFC; or in the alternative, permissively pursuant to Rules 20 and 24(b) of the RCFC. They maintain that they have an interest in amending the January decision pursuant to Rule 59(e) of the RCFC, to seek reimbursement and collection of the full amount of the GIT Judgment and a cost award.

The would-be-intervenors argue that URS' requested judgment for the full amount of the GIT Judgment in their January 2018 motion for summary judgment, but that the specific relief URS requested was limited to pre-judgment interest and post-certification interest rather than the full amount of the GIT Judgment. They contend that the court based its decision to deny their motion for joinder because their financial interests were already adequately represented by the secured parties and their counsel.

They maintain that they asked the secured parties to pursue reimbursement and collection of the full GIT Judgment, but that their request was declined. Therefore, they contend that the secured parties no longer adequately represent the interest of the other GIT creditors because their interests have been completely satisfied without obtaining reimbursement of the full amount of the GIT Judgment. They maintain that the resulting shortfall is over $4.5 million, which continues to accrue.

## LEGAL STANDARD

Rule 24(a)(2) states that on a timely motion, the court must permit anyone to intervene who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Rule 24(b) states that on a timely motion, the court may permit anyone to intervene who has a claim that shares a common question of law or fact with the main action. Under Rule 24(a) or 24(b), a petitioner's motion to intervene must be timely.

*Am. Renovation & Const. Com. v. United States*, 65 Fed. Cl. 254, 258 (2005). To assess the timeliness of a motion, courts consider: (1) the length of time the moving party knew of its right to intervene; (2) prejudice to the other parties; and (3) any unusual circumstances militating either for or against the court's determination that the application is timely. *Id.*

Rule 19(a)(1) provides that a person must be joined if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Rule 20(a)(1) provides that a person may join in one action as plaintiff if:

> (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
> (B) any question of law or fact common to all plaintiffs will arise in the action.

**DISCUSSION**

Petitioners maintain that their motion to intervene is timely and that they are entitled to intervene as a matter of right; in the alternative, they contend that they should be permissively allowed to intervene as proper parties in this action. Petitioners contend, more specifically, that their motion is timely brought within the twenty-eight day period set forth in Rule 59(e) and would not prejudice any of the other parties.

Defendant points out that by petitioners' own accounts, petitioners were aware of their right to intervene when their request for URS to pursue collection of the full GIT Judgment was declined. Petitioners counter that they became aware of the inadequacy of URS' request when reviewing the January judgment; they allege that they asked that URS seek to alter or amend the judgment, but that URS declined.

The court docket shows that petitioners' counsel, Mr. Schooley, was registered to receive all orders and motions submitted in this case. Mr. Schooley was emailed and presumed to have received the following documents: (1) URS' amended complaint filed in

September 2017; (2) URS' motion for summary judgment filed in January 2018; (2) defendant's cross-motion for summary judgment filed in March 2018; and (4) the court's order granting URS's motion for summary judgment on January 11, 2019.

The briefings submitted to the court should have made clear that, in the petitioners' view, the relief requested and disputed by the named parties did not adequately represent their interest, if that was the case. Instead, they allowed the named parties to devote their resources to litigating the case based on the relief requested. Petitioners' delay in raising the motion is prejudicial to them. Petitioners were aware of a possible right to intervene but neglected to exercise it until after judgment.

Intervention is proper only to protect interests of "such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. The interest thus may not be either indirect or contingent. The interest must also be a legally protectible interest." *Am. Mar. Transp., Inc. v. United States*, 870 F.2d 1559, 1561 (Fed. Cir. 1989) (citations and internal quotations omitted). A legally protectible interest requires something more than a mere economic interest. *Id.* at 1562.

When the issue of joinder was on appeal, the Federal Circuit stated, "[a]t its core, GIT's argument is that, because a significant portion of the Secured Creditors claims have been disbursed, there is no incentive for the Secured Creditors to maximize recovery against the government." *GIT II*, 618 Fed. Appx. at 1028 (quotations omitted). "While this may or may not be true, it is not reason to avoid the plain language of the governing documents in this case."[3] The Court, moreover, affirmed the holding that because petitioners might benefit from a judgment, does not mean that they may flout the Agreement Respecting Litigation. *Id.*

As previously ruled, Mr. Kinghorn possesses no direct claim against defendant, and his absence will not impair the court's ability to render complete relief to the existing parties. *GIT I*, 2014 WL 1711004 at *7 (ruling that joinder was inappropriate and could violate the Agreement Respecting Litigation and conditions of GIT's bankruptcy). The situation is unchanged; Mr. Kinghorn's financial interest remains contingent.[4]

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[3] The Federal Circuit added, "It remains unclear to us which of the multitude of competing bankruptcy claims have been fully satisfied, which have been partially satisfied, and which remain outstanding. Thus, even if we were inclined to elevate GIT's fairness concerns over the language of the governing documents (which we are not), we are unable to fully analyze GIT's argument." 618 Fed. Appx. at 1028 n.3.

[4] The court ruled previously as follows: "Furthermore, Mr. Huff and Mr. Kinghorn do not possess any right or claim independent of the claim asserted by the Secured Parties so as to make permissive joinder under RCFC 20 appropriate. In other words, theirs is not an asserted claim against the United States currently poised to proceed in this court, but a right that might eventually be asserted against the other participants to the Agreement. Thus,

Not only is Mr. Huff's motion untimely, but also joinder could violate the agreement and the conditions of GIT's bankruptcy. *See. id.* (finding that Mr. Huff's voting interest among the secured parties was too small to direct litigation). Under the agreement, Mr. Huff was to turn over all files related to the litigation and not have any further role in it unless the parties to the agreement agreed. Def's. Resp. Mot. Intervene Ex. A, ¶ 8. The parties to the agreement have not agreed that he should have a further role in this litigation.

## CONCLUSION

Petitioners' motion centers on the claim that the named parties' interests diverge and cannot adequately represent them, as they have little incentive to modify the judgment and maximize recovery. Yet, the Federal Circuit addressed a similar claim and ruled that this is no reason to avoid the plain language of the governing documents in this case.

Petitioners do not have a right to intervene or be joined as parties under Rules 24(a) and 19 of the RCFC; nor are they entitled to permissive intervention or joinder under Rules 24(b) and 20 of the RCFC. Mr. Kinghorn and Mr. Huff's motion to intervene is **DENIED**.

**IT IS SO ORDERED.**

s/ Robert H. Hodges, Jr.
Robert H. Hodges, Jr.
Judge

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there is a valid distinction to be drawn between claims arising from the DOE project and the legal principles relevant to those claims, on the one hand, and GIT's creditors' potential claims to a share of any proceeds resulting from this litigation, on the other. The parties are correct to assert that the transaction at issue in this suit, and the questions of law at issue in this suit, are not the same as the transactional context of legal claims that may eventually be adjudicated in a suit brought by Mr. Huff and/or Mr. Kinghorn should a settlement or judgment be obtained by the Secured Parties." *GIT I*, 2014 WL 1711004 at *8.

NOTE: This disposition is nonprecedential.

# United States Court of Appeals for the Federal Circuit

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**GROUND IMPROVEMENT TECHNIQUES, INC., MK FERGUSON COMPANY, FOR THE USE AND BENEFIT OF GROUND IMPROVEMENT TECHNIQUES, INC.,**
*Movants-Appellants*

**v.**

**UNITED STATES,**
*Defendant-Appellee*

**v.**

**PNC BANK, N.A., FIREMAN'S FUND INSURANCE COMPANY, R.N. ROBINSON & SONS, INC., SECURED CREDITORS OF GROUND IMPROVEMENT TECHNIQUES, INC.,**
*Plaintiffs-Appellees*

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2013-5110

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Appeal from the United States Court of Federal Claims in No. 12-CV-0057, Senior Judge Lynn J. Bush.

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Decided: July 28, 2015

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STEVEN R. SCHOOLEY, Schooley Law Firm, Orlando, FL, argued for movants-appellants.

JEFFREY A. REGNER, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by JOYCE R. BRANDA, ROBERT E. KIRSCHMAN, JR., STEVEN J. GILLINGHAM.

ROBERT G. BARBOUR, Watt, Tieder, Hoffar & Fitzgerald, L.L.P., McLean, VA, for plaintiffs-appellees.

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Before PROST, *Chief Judge,* BRYSON and DYK, *Circuit Judges.*

PROST, *Chief Judge.*

Ground Improvement Techniques, Inc. ("GIT") appeals decisions by the U.S. Court of Federal Claims holding that GIT is not the real party in interest, granting the real party in interest's motion for substitution and denying GIT's motion to continue as plaintiff, and dismissing certain of GIT's claims for lack of jurisdiction. For the reasons set forth below, we affirm the decisions of the U.S. Court of Federal Claims.

## BACKGROUND

In 1983, the Department of Energy ("DOE") entered into a prime contract with Morrison Knudson Company, Inc. (the "MK prime contract") for multiple projects across the nation relating to the remediation of uranium mill tailings. The MK prime contract was subsequently passed from Morrison Knudson Company, Inc. to MK-Ferguson Company ("MK"). On March 1, 1995, MK entered into a subcontract with GIT (the "GIT subcontract") for work on particular uranium mill sites located in Slick Rock, Colorado. The GIT subcontract was specifically titled "CONSTRUCTION SUBCONTRACT" and was

identified as being "[u]nder DOE Prime Contract No. DE-AC04-83AL 18796," the MK prime contract. J.A. 89. The DOE provided its consent for MK and GIT to enter into the GIT subcontract. In doing so, the DOE contracting officer stated that its consent "shall neither create any obligation of the Government to, or privity of contract with the subcontractor." J.A. 362.

On September 18, 1995, with the consent of DOE, MK terminated GIT for default. That termination became the subject of multiple years of litigation between MK and GIT in the U.S. District Court for the District of Colorado (the "GIT-MK litigation"). During the course of the GIT-MK litigation, GIT filed for Chapter 11 bankruptcy in the U.S. Bankruptcy Court for the Western District of Pennsylvania, and GIT's interest the GIT-MK litigation became an asset of the bankruptcy estate. As part of the bankruptcy proceeding, GIT entered into a "Reorganization Plan," which stated that "GIT will assign . . . any and all claims, causes of action, right, title, and interest in and to the [GIT-MK litigation]" to five of its secured creditors: PNC Bank ("PNC"), Fireman's Fund Insurance Company ("Fireman's Fund"), Holland & Knight LLP ("Holland & Knight"), The Law Offices of Frederick Huff ("Mr. Huff"), and R.N. Robinson & Sons, Inc. ("Robinson") (collectively, the "Secured Parties"). J.A. 418. The Reorganization Plan further provided that "[i]f the net proceeds of the MK case are sufficient to satisfy the claims of [the Secured Parties] in full, the remaining proceeds shall be distributed to unsecured creditors on a pro rata basis." J.A. 418–19. In a subsequent one-page "Clarifying Order," the Pennsylvania bankruptcy court stated that "the Secured Parties may either direct the Debtor to assign to the Secured Parties or their designee all of the Debtor's rights and interest in the [GIT-MK litigation] or, at their option, continue prosecution of the [GIT-MK litigation] in GIT's name in lieu of an assignment." J.A. 479. The Secured Parties elected to continue litigation against MK in the

name of GIT, rather than directing GIT to assign its claims against MK to the Secured Parties. In addition to the Reorganization Plan, GIT and the Secured Parties also entered into an "Agreement Respecting Litigation," which stated that, after payment of litigation costs and $125,000 to the unsecured creditors as required by the Reorganization Plan, the proceeds not in excess of the secured creditors' claims would be distributed first in part to the Secured Parties and then in part to Mr. Kinghorn, an equity holder in GIT. J.A. 431–34. As provided by the Reorganization Plan, any amounts in excess of the Secured Parties' claims would go to the unsecured creditors. J.A. 418–19. Neither the Agreement Respecting Litigation nor the Reorganization Plan provided for distribution of any proceeds to GIT itself. The agreement also apportioned voting interests regarding the decisions to be made pertaining to the GIT-MK litigation, and specified that choice of counsel required 70% of the voting interests and choice of conduct required 75% of the voting interests. J.A. 432–34.

GIT eventually obtained a judgment against MK in the GIT-MK litigation for wrongful termination. However, the judgment was only partially satisfied, as MK, too, had filed for bankruptcy in the U.S. Bankruptcy Court for the District of Nevada. The unsatisfied portion of GIT's judgment against MK, and post-judgment interest, were claims to be administered in MK's bankruptcy. The Nevada bankruptcy court required MK to submit a certified claim with DOE to attempt to satisfy GIT's claims against MK related to the DOE project. Although MK did so, the certification was contested as inadequate. The Nevada bankruptcy court eventually ordered GIT itself to file GIT's claims with DOE's contracting officer under MK's name, and to certify its own claims. GIT then filed both a certified claim in MK's name and a certified claim in its own name with the DOE contracting officer. When GIT received no response from the contracting officer, GIT

filed a "deemed denied" suit in the U.S. Court of Federal Claims. GIT's suit involved four breach of contract counts against the DOE: Counts I-III in GIT's own name, and Count IV in MK's name, for the benefit of GIT.

On December 5, 2012, the Court of Federal Claims issued a decision addressing two issues raised by the parties. *See Ground Improvement Techniques, Inc. v. United States*, No. 12-57 C, 108 Fed. Cl. 162 (Fed. Cl. Dec. 5, 2012) ("*GIT I*"). First, the court agreed with DOE that GIT lacked privity with the government, and therefore dismissed Counts I–III brought in GIT's own name against the government for lack of subject matter jurisdiction. *Id.* at 171–83. Second, the court agreed with DOE that the Secured Parties, not GIT, were the real parties in interest for all four counts, as GIT's bankruptcy had transferred all its claims in the GIT-MK litigation to the Secured Parties. *Id.* at 169–71. Following its decision, the court denied GIT's motion for reconsideration, but given that Count IV still remained, ordered briefing from both GIT and the Secured Parties addressing if and how—under the court's joinder, ratification, and substitution rules—the suit would go forward on Count IV. *See Ground Improvement Techniques, Inc. v. United States*, No. 12-57 C, (Fed. Cl. May 3, 2013) ("*GIT II*"). In response to the court's order, GIT sought to continue as plaintiff, either through ratification (supported by both Mr. Huff, one of the Secured Parties, and Mr. Kinghorn, an equity-holder) or through joinder. For their part, three of the Secured Parties (PNC, Fireman's Fund, and Robinson) sought to be substituted as the sole plaintiffs in the suit.[1] On April 30, 2014, the court issued a decision

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[1] Together, these three Secured Parties held the requisite voting interests to make decisions regarding the GIT-MK case, as set forth in the Agreement Respecting Litigation. J.A. 432–34.

substituting PNC, Fireman's Fund, and Robinson as the sole plaintiffs in the suit and denying GIT's request to continue as plaintiff. *See Ground Improvement Techniques, Inc. v. United States*, No. 12-57 C, 2014 WL 1711004 (Fed. Cl. Apr. 30, 2014) ("*GIT III*"). The court subsequently directed entry of judgment pursuant to Rule 54(b) of the Rules of the U.S. Court of Federal Claims ("RCFC").

GIT appealed to this court. Specifically, GIT seeks reversal of: (i) the determination that GIT is not the real party in interest; (ii) the substitution of PNC, Fireman's Fund, and Robinson as plaintiffs, and the denial of GIT's request to continue as plaintiff; and (iii) the dismissal of Counts I–III for lack of privity. PNC, Fireman's Fund, and Robinson moved, with the government's consent, for voluntary dismissal of the appeal and the return of jurisdiction to the Court of Federal Claims; GIT opposed. We requested briefing from all three parties, and for the reasons explained below, affirm the decisions of the Court of Federal Claims.

## DISCUSSION

"This court reviews judgments of the Court of Federal Claims to determine whether they are premised on clearly erroneous factual determinations or otherwise incorrect as a matter of law." *Wheeler v. United States*, 11 F.3d 156, 158 (Fed. Cir. 1993). The court below addressed the real party in interest question under RCFC 12(b)(6) and the privity question under both RCFC 12(b)(1) and 12(b)(6). We review the court's determinations under both rules de novo. *Id.* The court addressed the substitution and joinder questions under RCFC 19 and 20. While we have not yet stated whether such determinations are reviewed de novo or for abuse of discretion, *United Keetowah Band of Cherokee Indians of Okla. v. United States*, 480 F.3d 1318, 1324 (Fed. Cir. 2007), we need not decide

the question here because our outcome would be the same under either standard.

I

We begin by addressing the real party in interest question. Under the applicable rule of the Court of Federal Claims, "[a]n action must be prosecuted in the name of the real party in interest." RCFC 17(a)(1). The Court of Federal Claims has defined a real party in interest as "the party that 'possesses the right to be enforced.'" *Grass Valley Terrace v. United States*, 69 Fed. Cl. 543, 546 (2006) (quoting *Mitchell Food Prods., Inc. v. United States*, 43 Fed. App'x. 369, 369 (Fed. Cir. 2002)); *see also Crone v. United States*, 538 F.2d 875, 882 (Ct. Cl. 1976) (describing the real party in interest as the party "to whose present, personal benefit a money judgment may run"). Failure to prosecute an action in the name of the real party in interest results in dismissal of the claim, unless cured. *Aldridge v. United States*, 59 Fed. Cl. 387, 390 (Ct. Cl. 2004); *Norega v. United States*, 113 F. Supp. 463, 464 (Ct. Cl. 1953).

The Court of Federal Claims held that GIT's bankruptcy effected a transfer of GIT's claims related to the DOE project to the Secured Parties, and that the Secured Parties were therefore the real parties in interest for all of GIT's claims in this suit.[2] *GIT I*, 108 Fed. Cl. at 171–83. For the reasons explained below, we agree.

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[2] The Court of Federal Claims held this to be true regardless of "whether the claims are described as claims against MK or against the United States," as all of GIT's claims were founded on either the unsatisfied judgment and post-judgment interest against MK obtained by GIT, or additional, related claims against MK and/or the United States which arise from the DOE project. *GIT I*, 108 Fed. Cl. at 170. The court therefore concluded, and

It is undisputed that when GIT filed for bankruptcy, its assets—including its claims in the GIT-MK litigation—became part of the bankruptcy estate. *See* 11 U.S.C. § 541(a); *Aaron v. United States*, 65 Fed. Cl. 29, 31 (Fed. Cl. 2005) ("It is well established that the bankruptcy estate thus includes all 'causes of action' owned by the debtor at the time of filing for bankruptcy."). The central question in this case, therefore, is whether the events during bankruptcy transferred GIT's claims from its bankruptcy estate to the Secured Creditors. Based on the plain language of the documents involved in the bankruptcy proceedings, the answer is clearly yes.

Most significantly, GIT's Reorganization Plan states that: "GIT will assign . . . any and all claims, causes of action, right, title, and interest in and to the [GIT-MK litigation]" to the Secured Parties and provides for the distribution of proceeds in excess of the Secured Parties' claims to the unsecured creditors. J.A. 418. A debtor submitting such a plan only retains the power over claims or interests if the plan expressly states so. *See* 11 U.S.C. § 1123(b)(3)(B). Here, not only did the Reorganization Plan fail to include any such reservation clause, the plan instead specifically passed GIT's rights in the GIT-MK litigation over to the Secured Parties.

Additional documents involved in the proceedings confirm the transfer of claims in the GIT-MK litigation to the Secured Parties. For example, under the Agreement Respecting Litigation, the proceeds from the GIT-MK litigation were to be distributed to the bankruptcy estate and the creditors, but not to GIT itself. J.A. 432–42. And

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we agree, that all of GIT's claims in this case "arise from and are inseparable from" those that GIT brought against MK in the GIT-MK litigation, and that the real party in interest is the same regardless of how the claims are described. *Id.*

the bankruptcy court's Clarifying Order specified that, pursuant to the transfer clause in the Reorganization Plan, "the Secured Parties may either direct the Debtor to assign to the Secured Parties or their designee all of the Debtor's rights and interest in the [GIT-MK litigation] or, at their option, continue prosecution of the [GIT-MK litigation] in GIT's name in lieu of an assignment." J.A. 479. Together, the Reorganization Plan, Agreement Respecting Litigation, and Clarifying Order all make clear that the Secured Parties had replaced GIT as the ones "to whose present, personal benefit a money judgment" from the GIT-MK litigation runs. *Crone*, 538 F.2d at 882.

GIT's arguments to the contrary are unpersuasive. First, GIT's reading of the Clarifying Order borders on the incredible. The Clarifying Order clearly states that "the *Secured Parties*" could continue prosecution of the GIT-MK litigation in GIT's name in lieu of an assignment. J.A. 479 (emphasis added). To support its claim that GIT continued to control the litigation, GIT simply replaces "the Secured Parties" with "GIT." *See* Corrected Appellants' Br. 21–22 ("It is clear from the language of the Order that GIT could continue 'prosecution of the MK Case in GIT's name *in lieu of an assignment*.'"). This overt misreading of the court's order cannot support GIT's claim.

Second, GIT's focus on the language "will assign" from the Reorganization Plan, J.A. 479, and the fact that "[n]o assignment or transfer was ever consummated," Corrected Appellants' Br. 22, gets it no further. Of course there was no assignment; as permitted by the Clarifying Order, the Secured Parties elected the option of continuing litigation in the name of GIT, rather than having GIT directly assign its claims over to the Secured Parties. GIT's complaint that there was never a formal assignment is beside the point.

Finally, GIT's argument that it remained a "debtor-in-possession" with both the power to pursue the GIT-MK litigation claims as well as the fiduciary obligation to its unsecured creditors to do so also fails. While a debtor-in-possession may have most of the powers of a bankruptcy trustee to pursue claims on behalf of the bankruptcy estate when the bankruptcy proceedings are initiated, 11 U.S.C. § 1107(a), the bankruptcy estate—and accordingly, the debtor-in-possession's authority to pursue claims—ceases to exist upon confirmation of a reorganization plan, *In re United Operating, LLC*, 540 F.3d 351, 355 (5th Cir. 2008). Thus, while GIT may have initially possessed rights to pursue the claims in the GIT-MK litigation, those rights were extinguished upon the Pennsylvania bankruptcy court's confirmation of the Reorganization Plan. This conclusion is not obviated by the GIT's citation to snippets from the Reorganization Plan and other places where the bankruptcy court continued to refer to GIT as a debtor-in-possession. The court's use of such language appears merely to be boilerplate, and in any event, cannot overcome the strong evidence showing that a transfer of rights occurred in this case.

For all of these reasons, we agree with the Court of Federal Claims that GIT's bankruptcy effected a transfer of GIT's claims related to the DOE project to the Secured Parties, and that the Secured Parties, and not GIT, are the real parties in interest in this case.

II

When it has been determined that a plaintiff is not the real party in interest, the court must allow the plaintiff a reasonable amount of time to cure the defect through substitution, joinder, or ratification. *See* RCFC 17(a)(3). Here, the Court of Federal Claims requested briefing from both GIT and the Secured Parties regarding how to move forward in light of the real parties in interest issue. The parties responded with conflicting proposals:

while GIT sought to continue as a plaintiff (supported by ratifications of Mr. Huff and Mr. Kinghorn), three of the Secured Parties (PNC, Fireman's Fund, and Robinson) sought to be substituted as the sole plaintiffs in the suit with the obligation to distribute the proceeds in accordance with the Agreement Respecting Litigation and the Reorganization Plan. The Court of Federal Claims opted for substitution, finding that PNC, Fireman's Fund, and Robinson "possess[ed] the voting power to make operating decisions for plaintiffs in this suit" and that joinder of GIT was inappropriate "for the simple reason that post-bankruptcy GIT has no financial interest in claims arising from the DOE project." *See GIT III*, 2014 WL 1711004, at *6–7.

On appeal, GIT argues that the Court of Federal Claims should have permitted GIT's continued presence as a ratified plaintiff under either the rules governing required joinder, RCFC 19, or permissive joinder, RCFC 20. According to GIT, it must remain a plaintiff in this suit in order "to ensure the procedural integrity of the action and to protect the rights and interest of Huff, Kinghorn, and the unsecured creditors." Corrected Appellants' Br. 42. In response, PNC, Fireman's Fund, and Robinson argue that their substitution is fully supported by the Agreement Respecting Litigation, and that the requirements for neither required nor permissive joinder are met here.

We agree with PNC, Fireman's Fund, and Robinson. Most important to our conclusion is the Agreement Respecting Litigation, which was signed by all five of the Secured Parties (including Mr. Huff) as well as Mr. Kinghorn. GIT has not disputed that, pursuant to the agreement's terms, PNC, Fireman's Fund, and Robinson together hold the requisite 70% and 75% interests to control decisions regarding choice of counsel and litigation conduct, respectively. J.A. 431–42. Mr. Huff and Mr. Kinghorn, pursuant to terms to which they agreed, do not

hold enough interest to direct such decisions. Given that Mr. Huff and Mr. Kinghorn have expressly signed away their control, GIT's argument, premised as it is on protecting the rights of Mr. Huff and Mr. Kinghorn, loses its force. As the Court of Federal Claims rightly held: "Just because one of the Secured Parties (Mr. Huff) and an equity holder in GIT (Mr. Kinghorn) might be able to benefit from a judgment won in this court does not mean that Mr. Kinghorn or Mr. Huff may flout the Agreement [Respecting Litigation] and its terms." *GIT III*, 2014 WL 1711004, at *5.

GIT's argument that it must continue as plaintiff in order to protect the rights of the unsecured creditors also fails, this time because of the provisions of the Reorganization Plan. In order for a bankruptcy court to confirm a debtor's reorganization plan, the debtor must show that the reorganization plan adequately protects the rights and interests of the unsecured creditors. *See* 11 U.S.C. § 1129(b)(2)(B). Here, GIT's Reorganization Plan addresses the interests of the unsecured creditors in multiple places. Most particularly, the plan requires that creditors holding unsecured claims be paid on a *pro rata* basis in the following manner: (1) the first $125,000 of the net proceeds of the GIT-MK litigation; (2) the net proceeds of the GIT-MK litigation, if any, remaining after the claims of the Secured Parties are satisfied in full; (3) up to $120,000 to be paid by GIT's shareholders over a period of five years; and (4) a dividend of $600,000 to be paid by GIT, with payments made on an annual basis over a period of five years. J.A. 423. The Reorganization Plan thus already sets forth the ways in which the claims of the unsecured creditors shall be satisfied.

At its core, GIT's argument is that, "because a significant portion of the Secured Creditors claims have been disbursed, there is no incentive for the Secured Creditors

to maximize recovery against the government." Corrected Appellants' Br. 42. While this may or may not be true,[3] it is not reason to avoid the plain language of the governing documents in this case.

We also agree with the Court of Federal Claims that joinder of GIT is not appropriate under either RCFC 19 or 20. Under RCFC 19, a person must be joined as a party if that person "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest." RCFC 19(a)(1)(B)(i). Under RCFC 20, persons may be joined as a party if "they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and . . . any question of law or fact common to all plaintiffs will arise in the action." RCFC 20(a)(1).

Here, as the Court of Federal Claims observed, GIT no longer has any "financial interest in claims arising from the DOE project. Those claims were transferred to the Secured Parties in the GIT bankruptcy litigation." *GIT III*, 2014 WL 1711004, at *7. GIT, therefore, does not "claim[] an interest relating to the subject of the action" as required by RCFC 19 or have "any right to relief" as required by RCFC 20. Thus, neither mandatory nor permissive joinder is appropriate.

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[3] It remains unclear to us which of the multitude of competing bankruptcy claims have been fully satisfied, which have been partially satisfied, and which remain outstanding. Thus, even if we were inclined to elevate GIT's fairness concerns over the language of the governing documents (which we are not), we are unable to fully analyze GIT's argument.

III

The Court of Federal Claims dismissed Counts I–III (brought in GIT's own name) for lack of privity between GIT and the government, and therefore lack of jurisdiction. *GIT I*, 108 Fed. Cl. at 172–82.[4] In doing so, the court examined and found lacking GIT's many arguments based on theories of direct contract, implied-in-fact contract, and agency. On appeal, GIT again argues that privity between itself and the government exists under multiple theories. Like the Court of Federal Claims, we reject GIT's arguments.

Pursuant to the Tucker Act, the Court of Federal Claims has jurisdiction over claims against the government involving "any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1). Similarly, the Contract Disputes Act provides that "a contractor may bring an action directly on the claim in the United States Court of Federal Claims." 41 U.S.C. § 7104(b)(1). Because a subcontractor ordinarily lacks privity with the government, the Court of Federal Claims generally lacks jurisdiction over claims brought by a subcontractor

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[4] Although the Court of Federal Claims viewed GIT's claims against the government as indistinct from those transferred to the Secured Parties in GIT's bankruptcy, the court nonetheless went on to consider whether, "to the extent that GIT has alleged that it possessed distinct claims against the United States," there was privity of contract between GIT and the government such that subject matter jurisdiction over such claims existed. *GIT I*, 108 Fed. Cl. at 171–72.

Because we hold that GIT is not in privity with the government, we have no occasion to consider whether GIT, which we have held is no longer a debtor-in-possession, has any standing to assert a claim against the government.

against the government, though there are some exceptions. *See J.G.B. Enters., Inc. v. United States*, 497 F.3d 1259, 1261 (Fed. Cir. 2007) ("A subcontractor typically is unable to seek relief against the United States on a dispute over the contract since it is not a party to the contract and thus lacks privity with the United States."); *United States v. Johnson Controls, Inc.*, 713 F.2d 1541 (Fed. Cir. 1983) (concluding that the case did not "fall within any recognized exception to the well-entrenched rule that a subcontractor cannot bring a direct appeal against the government"). Whether a contract exists is a mixed question of law and fact, but where "the parties do not dispute the relevant facts, the privity issue reduces to a question of law, which we review *de novo*." *Cienega Gardens v. United States*, 194 F.3d 1231, 1239 (Fed. Cir. 1998).

Here, it is indisputable that no direct contract between GIT and the government exists. There are two relevant contracts in this case. The first is the MK prime contract, which was entered into between MK and DOE more than a decade before GIT's involvement in the project. The second is the GIT subcontract, which plainly states that it is a "SUBCONTRACT" between MK and GIT and was made "[u]nder DOE Prime Contract No. DE-AC04-83AL 18796," the MK prime contract. J.A. 89. Given the plain language of these contracts, GIT admits, as it must, that it does not have a direct contract with the government. *See* Corrected Appellants' Br. 39 ("[T]he GIT contract is not expressly with the Government . . . . ").

There is also no implied-in-fact contract between GIT and the government. "An implied-in-fact contract is one 'founded upon a meeting of the minds, which, although not embodied in an express contract, is inferred, as a fact from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.'" *City of Cincinnati v. United States*, 153 F.3d 1375, 1377 (Fed. Cir. 1998) (quoting *Baltimore & Ohio R.R. Co. v*

*United States*, 261 U.S. 592, 597 (1923)); *see also City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990) ("An implied-in-fact contract requires findings of: 1) mutuality of intent to contract; 2) consideration; and 3) lack of ambiguity in offer and acceptance."). Here, GIT has failed to show that there was a meeting of the minds between the government and GIT that an implied-in-fact contract existed. To the contrary, the DOE contracting offer expressed the opposite intent by specifically disclaiming "any privity of contract with the subcontractor" when providing its consent for the GIT subcontract. J.A 362. Moreover, there cannot be an implied-in-fact contract between GIT and the government when, as here, there are already two express contracts governing the same subject matter for which GIT now seeks to establish an implied contract. *See Schism v. United States*, 316 F.3d 1259, 1278 (Fed. Cir. 2002) (en banc) ("It is well settled that the existence of an express contract precludes the existence of an implied-in-fact contract dealing with the same subject matter, unless the implied contract is entirely unrelated to the express contract.").

GIT's leading argument for the existence of privity in this case is based on drawing factual analogies to a decision by the Energy Board of Contract Appeals ("EBCA"), *McMillan Bros. Constr.*, EBCA No. 328–10–84, 86–3 B.C.A. P. 17179, 1986 WL 20168 (July 11, 1986). But decisions of the EBCA are not binding on this court. Rather, we examine questions relating to privity under our own jurisprudence. Here, as we held in *Johnson Controls*, GIT has failed to show that this case "fall[s] within any recognized exception to the well-entrenched rule that a subcontractor cannot bring a direct appeal against the government." 713 F.2d at 1550.

Specifically, in *Johnson Controls*, we recognized that privity between a subcontractor and the government may exist if the prime contractor was acting as an agent of the government. *Id.* at 1551–52. However, we rejected in

that case a subcontractor's claim based on agency privity because the following three "crucial factors" were missing:

> The prime contractor was (1) acting as a purchasing agent for the government, (2) the agency relationship between the government and the prime contractor was established by clear contractual consent, and (3) the contract stated that the government would be directly liable to the vendors for the purchase price.

*Id.* at 1551.

These three factors are missing in this case as well. Here, the relevant contracts did not state that MK was acting as the purchasing agent for DOE, did not provide "clear contractual consent" for such relationship, and did not state that DOE would be directly liable to GIT for the contract price. Specifically, with respect to the first two factors, the MK prime contract specified that MK itself—not DOE—was to enter into subcontracts. J.A. 193–95. And it made clear that MK was responsible, not simply for contracting with someone else to work for DOE, but actually performing work under the contract, including "furnish[ing] all labor, material, facilities, services, equipment, superintendence and administration necessary to accomplish engineering, design, construction, and inspection services." J.A. 178–79. With respect to the third factor, the GIT subcontract provided that MK, not DOE, would pay GIT the price for the subcontract. J.A. 130. And, contrary to GIT's argument, the fact that the DOE posted a letter of credit to ensure payment, and directed payment through a dedicated bank account, is not enough to establish an agency relationship between MK and DOE here.

GIT argues that "the totality of the individual contractual provisions present a principal-agent relationship," pointing in support to clauses requiring MK to obtain DOE approval for certain actions. But the need for

MK to obtain DOE approval does not create an agency relationship. As we observed in *Johnson Controls*, "[i]t is true that the government here has retained a great deal of control over the actions of [the contractor] in its dealings with the subcontractors on the project. But it is also apparent that the government meant to use [the contractor] as a buffer between it and the claims of subcontractors." 713 F.2d at 1552. In sum, GIT has failed to establish privity with DOE under an agency theory.

GIT has also failed to establish privity with DOE under four additional factors discussed in *Johnson Controls*, sometimes referred to as the "otherwise in privity" test. *Id.* at 1552–53; *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1139 (6th Cir. 1996). Those four factors, which led to the conclusion that a direct subcontractor appeal was not permitted in *Johnson Controls*, are:

> (1) the government and [subcontractor] never entered into a direct contractual relationship; (2) the 'ABC' clause, contained in both the prime contract and the subcontract, specifically disclaimed a contractual relationship between the government and [subcontractor]; (3) [the contractor] was required to obtain a Miller Act payment bond, which provided a recourse by the subcontractor other than a direct appeal; and (4) there is no provision in any of the contract documents that clearly authorizes a direct appeal by a subcontractor.

713 F.2d at 1552–53.

On balance, these four factors weigh against GIT's direct subcontractor appeal in this case as well. With respect to the first factor, no direct contractual relationship between GIT and the government exists, for the reasons already explained. With respect to the second factor, GIT is correct that there is no contractual provision expressly disclaiming privity between GIT and the

government. But the DOE, in providing its consent for the GIT subcontract, specifically stated that there would be no privity of contract with the subcontractor. J.A. 362. And although this disclaimer was not written into the contract, as it was in *Johnson Controls*, its presence nonetheless weighs against a finding of privity. With respect to the third factor, it is true that GIT did not obtain Miller Act payment bonds as a substitute for a direct remedy against the government, as the subcontractor did in *Johnson Controls*. But *Johnson Controls* does not state that the absence of Miller Act bonds *creates* jurisdiction over direct subcontractor appeals. And in any event, the fourth factor—whether any contractual provision "clearly authorizes a direct appeal by a contractor"—weighs against GIT's direct action against the government in this case. Here, the "Disputes" clause upon which GIT relies says merely that the applicable substantive law is the "body of law applicable to procurement of goods and services by the Government." J.A. 131. As already explained, the rule under the relevant "body of law" is that "[a] subcontractor typically is unable to seek relief against the United States on a dispute over the contract since it is not a party to the contract and thus lacks privity with the United States." *J.G.B. Enters.*, 497 F.3d at 1261. GIT has failed to show why that rule does not apply here.

We therefore agree with the Court of Federal Claims that privity, and thus jurisdiction, is lacking as to GIT's Counts I–III brought in its own name against the government. We do not address Count IV, brought in MK's name for the benefit of GIT, which still remains in this case.

## CONCLUSION

For the foregoing reasons, we affirm the decisions by the Court of Federal Claims that: (i) GIT is not the real party in interest for the claims in this suit; (ii) PNC,

Fireman's Fund, and Robinson should be substituted as sole plaintiffs in this suit; and (iii) there is no privity between GIT and the government, and thus no jurisdiction over GIT's Counts I–III brought in GIT's own name against the government. Given our decision on the merits, we deny as moot the motion by PNC, Fireman's Fund, and Robinson for voluntary dismissal of this appeal. We note that our decision does not address any remaining issues with respect to Count IV, which we leave for further consideration by the Court of Federal Claims.

**AFFIRMED**

# In the United States Court of Federal Claims

No. 12-57 C

(Filed April 30, 2014)

**UNPUBLISHED**

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| GROUND IMPROVEMENT TECHNIQUES, INC., for the use and benefit of the secured creditors of GROUND IMPROVEMENT TECHNIQUES, INC.; and, MK FERGUSON COMPANY, for the use and benefit of GROUND IMPROVEMENT TECHNIQUES, INC., | * | RCFC 17(a); Real Parties in Interest for Claims Transferred to Creditors in Bankruptcy Case; Neither Mandatory Nor Permissive Joinder Under Rules 19 and 20 Applies: Substitution of Real Parties in Interest and Counsel Granted. |
| *Plaintiffs*, | * | |
| v. | * | |
| | * | |
| THE UNITED STATES, | * | |
| | * | |
| *Defendant*.[1] | * | |
| | * | |
| * * * * * * * * * * * * * * * * * * * | * | |

*Robert G. Barbour*, McLean, VA, for plaintiffs (the real parties in interest).

*Steven R. Schooley*, Orlando, FL, counsel for plaintiffs (the nominal plaintiffs). *Frederick Huff*, Littleton, CO, of counsel for plaintiffs (the nominal plaintiffs).

[1] Defendant did not participate in the motions resolved in this opinion. The caption of this case has been corrected to reflect the court's ruling in this opinion and order.

## OPINION AND ORDER

**Bush**. *Senior Judge*.

The court has before it cross-motions which contest the issue of the proper entities to advance claims for plaintiffs, as well as the choice of counsel to represent plaintiffs. The titles of the motions are not of much assistance here, because competing factions claim legitimacy as plaintiffs in this dispute. For the sake of clarity, the court distinguishes between the Real Parties' Motion to Substitute (and the Real Parties' Reply), and the Nominal Plaintiffs' Motion for Ratification/Joinder (and the Nominal Plaintiffs' Reply).[2] On July 12, 2013, the court stayed the cross-motions of these competing factions pending an appeal of prior rulings of this court to the United States Court of Appeals for the Federal Circuit. Subsequently, however, the Federal Circuit stayed the appeal before it to permit a "limited remand" to this court to decide those pending cross-motions regarding the substitution of real parties in interest and counsel. For the reasons stated below, substitution of the real parties in interest is granted, and Mr. Robert G. Barbour is substituted for Mr. Steven R. Schooley to represent plaintiffs in this suit.

## BACKGROUND[3]

### I. Overview of the Current Dispute

[2] The actual titles of these briefs are: (1) Motion to Substitute the Real Parties in Interest Motion to Substitute Counsel, filed May 24, 2013; (2) Plaintiffs' Ground Improvement Techniques, Inc. and MK-Ferguson Company Response to the Motion to Substitute and Cross-Motion to Ratify Plaintiffs, filed June 7, 2013; (3) Secured Parties' Reply to Response to Motion to Substitute and Response to Cross Motion to Ratify, filed June 14, 2013; and, (4) Plaintiffs' Ground Improvement Techniques, Inc. and MK-Ferguson Company Reply to the Secured Parties' Response to Cross-Motion to Ratify Plaintiffs, filed June 21, 2013. The entities and individuals that are aligned with the factions referenced herein as "Real Parties" and "Nominal Plaintiffs" will be discussed *infra*.

[3] This background information is drawn largely from the parties' filings in this case and does not constitute fact finding by the court.

Most of the relevant background for this dispute may be found in *Ground Improvement Techniques, Inc. v. United States*, 108 Fed. Cl. 162 (2012) (*GIT I*) and *Ground Improvement Techniques, Inc. v. United States*, No. 12-57C (Fed. Cl. May 3, 2013) (*GIT II*). Only the facts essential to the dispute currently before the court are presented here. As a threshold observation, the court notes that the Nominal Plaintiffs disagree with the court's prior holdings regarding the real parties in interest to present plaintiffs' claims in this suit. Nominal Plaintiffs' Mot. at 3. Nonetheless, the court's holdings in this regard in *GIT I* and *GIT II* are currently on appeal and are not within the scope of the limited remand from the Federal Circuit. Thus, the primary (and relatively narrow) question currently before the court is whether the real parties in interest identified by the court in *GIT I* and *GIT II* will simply substitute themselves for the Nominal Plaintiffs as the plaintiffs prosecuting this suit, or whether some other configuration of plaintiffs will proceed in this suit. A secondary question is the choice of counsel to represent plaintiffs in this suit.

## II. Contract Disputes Litigation and Bankruptcy Proceedings

In 1995, Ground Improvement Techniques, Inc. (GIT) became the subcontractor for MK-Ferguson Company (MK) on a United States Department of Energy project in Slick Rock, Colorado (the DOE project) for the remediation of uranium mill tailings.[4] During the course of performance, GIT's subcontract was terminated for default and the termination thereafter became the subject of litigation between MK and GIT in the United States District Court for the District of Colorado (the GIT-MK litigation). During the course of that litigation, which, including various appeals, lasted at least twelve years, GIT filed for bankruptcy under Chapter 11 of the Bankruptcy Code, in the United States Bankruptcy Court for the Western District of Pennsylvania (the GIT bankruptcy litigation).

As a result of GIT's bankruptcy, GIT's claims against MK, except for a dividend of $125,000 for GIT's unsecured creditors, were transferred to five of GIT's creditors (the Secured Parties): PNC Bank, Fireman's Fund Insurance Company, Holland & Knight LLP, The Law Offices of Frederick Huff (Mr. Huff), and R.N. Robinson & Son, Inc. The Secured Parties elected to continue litigation against MK in the name of GIT, rather than directing GIT to assign its claims

[4] MK has undergone multiple corporate name changes, and will be referred to as MK even in reference to events which occurred after those name changes.

against MK to the Secured Parties. GIT eventually obtained a large judgment against MK, which was partially satisfied by a surety in 2009.

In 2001, MK, too, filed for bankruptcy under Chapter 11 of the Bankruptcy Code, in the United States Bankruptcy Court for the District of Nevada (the MK bankruptcy litigation). The unsatisfied portion of GIT's judgment against MK, and post-judgment interest, were claims administered in MK's bankruptcy. The bankruptcy court required MK to file a certified claim with DOE to attempt to satisfy GIT's claims against MK related to the DOE project. MK did so, but the certification was contested as inadequate.

The MK bankruptcy court eventually ordered GIT itself to file GIT's claims with DOE's contracting officer under MK's name, and to certify its own claims. GIT also filed a certified claim in its own name with the DOE contracting officer. Having received no response from the contracting officer on its claims, GIT filed a "deemed denied" suit in this court for the claims submitted to the contracting officer in its own name and in MK's name (for the benefit of GIT). Counts I-III of the complaint, claims brought directly by GIT against the United States, were dismissed by this court for lack of privity between GIT (the subcontractor on the DOE project) and the United States. The only remaining claim in this suit (Count IV of the complaint) is the claim in MK's name for the benefit of GIT, a type of claim that is sometimes referred to as a pass-through claim.

## III. This Court's Holding Regarding the Real Parties in Interest Issue

Defendant asserted that GIT was not the real party in interest to bring this suit against the United States for claims related to the DOE Project. The primary thrust of the government's argument was that when GIT went through bankruptcy, any claims it possessed against MK and the United States were transferred to GIT's creditors. Plaintiffs conceded that certain of GIT's creditors might receive some benefit from this suit, but contended that post-bankruptcy GIT would be the major beneficiary of this action.

Defendant's arguments were persuasive, because GIT's bankruptcy effected a transfer of GIT's claims against MK to the Secured Parties. The court cited numerous court documents which showed that the Secured Parties, not GIT, own the claims against MK and the United States. *See GIT I*, 108 Fed. Cl. at 169-70 (citing GIT's Second Amended Plan of Reorganization, a related Agreement

Respecting Litigation, and court orders in the GIT-MK litigation and the MK bankruptcy litigation). Plaintiffs' arguments to the contrary, unsupported by legal authority, were either refuted by the court documents cited by defendant or were irrelevant to the real parties in interest issue. *See id.* at 170-71 (noting that plaintiffs' arguments found no support in court documents, and that GIT's rights to any proceeds from its claims against MK and the United States are now held by the Secured Parties, with any excess to be awarded to GIT's unsecured creditors). The court therefore concluded that GIT's claims against MK are now held by the Secured Parties and that the Secured Parties are the real parties in interest for GIT's claims against MK related to the DOE project, and to any related claims against the United States. *Id.* at 171.

The court held, further, that the Secured Parties are the real parties in interest for the pass-through claim presented in Count IV of the complaint. GIT is merely the nominal plaintiff for the interests of the Secured Parties in the remaining claim in this suit. *Id.* The court therefore ordered GIT to file a notice describing the method by which the real parties in interest would participate in this suit, pursuant to Rule 17(a)(3) of the Rules of the United States Court of Federal Claims (RCFC). Under the rules of this court, to avoid dismissal of a suit the permissible types of participation in litigation for a real party in interest are ratification of the nominal plaintiff, substitution of the real party for the nominal plaintiff, or joinder of the real party. RCFC 17(a).

On February 8, 2013, GIT filed a motion for reconsideration of the court's ruling on the real parties in interest issue, which was accompanied by a notice presenting its position that the Nominal Plaintiffs should continue to represent the interests of the Secured Parties, through ratification. Mr. Barbour also filed documents on February 8, 2013 which were intended to show that the Secured Parties opted for substitution of the real parties in interest as plaintiffs in this suit, and that they rejected ratification of GIT as plaintiff. The court deferred ruling on the substitution issue, and instead issued an opinion on May 3, 2013 denying GIT's motion for reconsideration of the real party in interest holding in *GIT I*. *See GIT II*, slip op. at 8-9.

The parties then briefed the substitution issue. That briefing is now complete and ripe for a ruling. As noted *supra*, the primary dispute concerns control over the litigation of plaintiffs' claims (which were brought in the names of

GIT and MK and which will proceed under the names of those nominal plaintiffs).[5] The secondary issue is the choice of counsel to represent plaintiffs' interests.

## DISCUSSION

### I. Requirement that Actions be Brought by the Real Parties in Interest

Aside from certain exceptions not relevant here, "[a]n action must be prosecuted in the name of the real party in interest." RCFC 17(a)(1). This court has stated that "[w]ithin the context of RCFC 17(a), a real party in interest has been defined as the party that 'possesses the right to be enforced.'" *Grass Valley Terrace v. United States*, 69 Fed. Cl. 543, 546 (2006) (citation omitted). When a plaintiff has been determined to not be the real party in interest for a claim, this court may allow that plaintiff a reasonable amount of time to cure the defect, either through substitution of the real party in interest, joinder or ratification. RCFC 17(a)(3); *see Aldridge v. United States*, 59 Fed. Cl. 387, 390 (2004) (requiring the submission of evidence, within a certain period of time, to determine if a bankruptcy trustee had abandoned a claim to the debtor-plaintiff or wished to assert the claim in this court for the benefit of the bankruptcy estate); *see also First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1289 (Fed. Cir. 1999) (stating that RCFC 17(a) "sets forth the broad and general principle that actions should be brought in the name of the real party in interest and that courts should be lenient in permitting ratification, joinder, or substitution of that party"). Failure to prosecute an action in the name of the real party in interest, unless cured by the methods referenced in RCFC 17(a)(3), will result in the dismissal of the claim.[6] *See, e.g.*, *Norega v. United States*, 113 F. Supp. 463, 464 (Ct. Cl. 1953); *Aldridge*, 59 Fed. Cl. at 390.

### II. The Competing Factions Referenced Herein as "Real Parties" and "Nominal Plaintiffs"

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[5] The caption of this opinion reflects the court's holding in this regard. The Secured Parties are the real parties in interest for this suit, and have been substituted for GIT. GIT and MK remain in the caption merely as nominal plaintiffs for the use and ultimate benefit of the Secured Parties.

[6] The court may rely on relevant court documents submitted by the parties to resolve a real party in interest challenge. *GIT I*, 108 Fed. Cl. at 169 n.5.

Since this court issued its real party in interest holding in *GIT I*, there has been an apparent split among the Secured Parties as to whether GIT should remain in control of the prosecution of this suit. To reiterate, the Secured Parties consist of PNC Bank, Fireman's Fund Insurance Company, Holland & Knight LLP, The Law Offices of Frederick Huff (Mr. Huff), and R.N. Robinson & Son, Inc. One faction, which the court designates as the "Nominal Plaintiffs," only has the support, among the Secured Parties, of Mr. Huff. The other faction, which the court references as the "Real Parties," is composed of PNC Bank, Fireman's Fund Insurance Company, and R.N. Robinson & Sons, Inc.[7]

Although of only tangential relevance to this dispute, the Nominal Plaintiffs faction also has the support of Robert E. Kinghorn, who apparently at the time of GIT's bankruptcy held an equity interest of 25% in GIT. *See* Def.'s Br. of Mar. 5, 2013, Ex. 1 at A-14. Mr. Kinghorn is not identified in the briefing currently before the court, but an exhibit attached to the complaint identifies Mr. Kinghorn, at least as of October 28, 2011, as president of GIT. Compl. Ex. 3 at 3.5; *see also* Def.'s Br. of Apr. 3, 2012, Ex. E at 4 n.4 (describing Mr. Kinghorn as one of the "principals" of GIT). In the Nominal Plaintiffs' motion, Mr. Kinghorn is asserted to have "the greatest monetary interest" in this suit, Nominal Plaintiffs' Mot. at 2, and it is further alleged that "[a]lmost all of the unpaid, reimbursable litigation costs for this litigation have been borne solely by Kinghorn," *id.* at 5. Unfortunately for the Nominal Plaintiffs' latest attempt to retain control of this litigation, Mr. Kinghorn possesses no *voting* interest as to the operating decisions regarding the claims presented in this suit - those voting interests are vested solely in the Secured Parties. *See infra*.

## III. Analysis

### A. The Agreement Respecting Litigation Fully Supports the Real Parties' Motion to Substitute

The Real Parties note, first, the court's prior holdings in *GIT I* and *GIT II* regarding the transfer to the Secured Parties of plaintiffs' claims arising from the DOE project. Real Parties' Mot. ¶¶ 1-2. The Real Parties further note that:

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[7] Holland & Knight LLP has not been identified as being aligned with either faction in the briefs before the court.

> Pursuant to GIT's Second Amended Plan of Reorganization, the Secured Parties executed an Agreement Respecting Litigation that sets forth how the net proceeds from GIT's claims against MK will be distributed and how decisions regarding the selection of counsel and operating decisions in the MK Litigation are to be made.

*Id.* ¶ 3 (footnote omitted). The Real Parties then cite to the relevant paragraphs of the Agreement Respecting Litigation (Agreement), and note that, together, PNC Bank, Fireman's Fund Insurance Company, and R.N. Robinson & Sons, Inc. "have a sufficient collective interest to select counsel for and make operating decisions on behalf of the Secured Parties regarding the conduct of [this] Litigation." *Id.* ¶ 5.

Considering the terms of the Agreement, the court concurs with the position of the Real Parties. First, as to operating decisions, 75% of the voting interests of the Secured Parties control these decisions, and the voting interests are apportioned as follows: Fireman's Fund Insurance Company (48.5%); PNC Bank (24.2%); R.N. Robinson & Sons, Inc. (18%); Holland & Knight LLP and the Law Offices of Frederick Huff (sharing 9.3%). Def.'s Br. of Apr. 3, 2012, Ex. C ¶¶ 2, 9. Thus, for operating decisions, such as the decision to substitute the Secured Parties for GIT or to ratify GIT as plaintiff, the Real Parties have 90.7% of the voting interests and they control operating decisions in this litigation.

As for choice of counsel, only 70% of the voting interests of the participants in the Agreement is required to make this decision. Def.'s Br. of Apr. 3, 2012, Ex. C ¶ 7. Under every settlement level for which participant interests are identified in the Agreement, the Real Parties possess at least 72.6% of the interests in this litigation. *Id.* ¶¶ 1-3. Thus, the Real Parties also possess the power to select counsel to represent the Secured Parties in this litigation.

Although this inescapable conclusion as to the powers afforded by the Agreement has been evident since *GIT I* issued on December 5, 2012, the Nominal Plaintiffs did not willingly cede control of this litigation to the Real Parties. Instead, when the Real Parties attempted, through a defective notice, to assert their rights to control this litigation on February 8, 2013, the Nominal Plaintiffs countered with their own notice relying, in part, on supporting declarations from Mr. Kinghorn and Mr. Huff. The court allowed the parties to brief the dispute by

means of the cross-motions currently before the court.

### B. The Nominal Plaintiffs' Attempts to Avoid the Plain Meaning of the Agreement

The Nominal Plaintiffs first attempt to distort this court's prior holdings. According to the Nominal Plaintiffs, "[g]iven this Court's current view that GIT's creditors are now *all* viewed as "real parties in interest" accordingly, [the Law Offices of Frederic Huff] and Kinghorn have significant interests in this matter thereby permitting their continued prosecution of this case." Nominal Plaintiffs' Mot. at 2 (emphasis added). That is not the holding of *GIT I*. The court reproduces here the key passage from *GIT I*:

> The court documents relied upon by plaintiffs and defendant show that GIT's bankruptcy effected a transfer of GIT's claims against MK to the Secured Parties. First, GIT's Second Amended Plan of Reorganization, and a subsequent clarification of that plan, vest the rights of GIT to claims against MK in the Secured Parties. Second, the Agreement Respecting Litigation shows that the parties entitled to net proceeds from GIT's claims against MK are the Secured Parties, not GIT. Third, GIT's reorganization plan states that any amount of net proceeds in the GIT-MK litigation that exceeds the claims of the Secured Parties against GIT (and the $125,000 paid to GIT's unsecured creditors) shall be distributed to GIT's unsecured creditors. Fourth, during MK's bankruptcy litigation, the proceeds from any suit against MK related to GIT's work on the DOE project were described by the bankruptcy judge as belonging to the creditors of GIT, not GIT. Fifth, in the GIT-MK litigation, the district court observed that GIT's sole role was to facilitate the litigation, not to share in any proceeds that might be obtained, according to the explicit terms of GIT's reorganization plan.

108 Fed. Cl. 169-70 (citations omitted). It is the Secured Parties that are the real parties in interest in this suit, and the Agreement governs their management of this

suit. Just because one of the Secured Parties (Mr. Huff) and an equity holder in GIT (Mr. Kinghorn) might be able to benefit from a judgment won in this court does not mean that Mr. Kinghorn or Mr. Huff may flout the Agreement and its terms. Nothing in the court's rulings in *GIT I* and *GIT II* supports the position advanced in the Nominal Plaintiffs's briefs.

The Nominal Plaintiffs also attempt to distort the terms of the Agreement itself:

> Specifically, due to GIT's prior recoveries and disbursements and due to GIT's adjudicated but yet uncollected entitlements pursuant to the [GIT-MK litigation], Kinghorn and LOFH (Huff) collectively have 27.4% of the allocated voting interests and rights under the Agreement Respecting Litigation.

Nominal Plaintiffs' Reply at 3 (footnote and citation omitted). Even though the most gross misstatement in this passage is corrected in a footnote, where the Nominal Plaintiffs concede that Mr. Huff and Holland & Knight LLP share a 7.4% participant interest in settlements over $8.5 million (thus rendering the collective "27.4%" share figure for Mr. Kinghorn and Mr. Huff patently inaccurate), there is nothing in the Agreement which supports the Nominal Plaintiffs' assertion that previous and anticipated litigation recoveries somehow diminish the voting power of the Real Parties. Nor have the Nominal Plaintiffs cited evidence to convince the court that the Agreement's terms are no longer in force. Simply put, the Nominal Plaintiffs have no argument against the terms of the Agreement other than vague *ipse dixit*: "Nothing renders the Kinghorn and [Huff] interests and rights inferior such that they cannot ratify [the Nominal Plaintiffs] as Plaintiffs in this case." *Id.*

The court must reject the Nominal Plaintiffs' attempt to distort the Agreement and the effect of the transfer of claims prompted by GIT's bankruptcy. The Real Parties possess the voting power to make operating decisions for the plaintiffs in this suit, and, per their instructions, the Secured Parties shall be substituted as plaintiffs in this suit proceeding under the names of nominal plaintiffs GIT and MK. Real Parties' Mot. Ex. 1 ¶ 4. The Secured Parties also possess the voting power to select counsel and have chosen Mr. Barbour to replace Mr. Schooley. *Id.* ¶¶ 2, 5. Thus, the attorney of record for plaintiffs is now Mr. Barbour.

### C. Joinder is Not Appropriate

In a final attempt to preserve a decision-making role in this litigation as well as a continuing role for Mr. Schooley, the Nominal Plaintiffs seek to be joined in this action. In one brief, it appears that GIT seeks to be joined as plaintiff to continue to represent the interests of Mr. Huff and Mr. Kinghorn. Nominal Plaintiffs' Mot. at 6 ("Thus, the ratified Plaintiffs should be permitted to continue prosecuting this case . . . to appropriately assert the rights and interests of [Mr. Huff] and [Mr.] Kinghorn per Rule 19, RCFC and/or Rule 20, RCFC."). In their reply brief, the Nominal Plaintiffs may be suggesting that Mr. Kinghorn and Mr. Huff should themselves be joined as parties, although the arguments in this regard are not particularly coherent. *See* Nominal Plaintiffs' Reply at 4 (seeking mandatory joinder because Mr. Huff and Mr. Kinghorn are "necessary parties"); *id.* at 6 (advocating for permissive joinder and describing Mr. Huff and Mr. Kinghorn as "permission parties to ratify [Nominal] Plaintiffs"). Irrespective of the manner of joinder proposed by the Nominal Plaintiffs, joinder of additional parties in this litigation is inappropriate.[8]

Joinder of GIT, if that is indeed an option proposed by the Nominal Plaintiffs, is inappropriate for the simple reason that post-bankruptcy GIT has no financial interest in claims arising from the DOE project. Those claims were transferred to the Secured Parties in the GIT bankruptcy litigation. *See GIT I*, 108 Fed. Cl. at 169-70. Absent a financial interest in this case, the only rationale that would require GIT to be joined in this action would be if the absence of GIT prevented the court from "accord[ing] complete relief among existing parties." RCFC 19(a)(1)(A). The Nominal Plaintiffs have presented no persuasive argument that removing GIT from a decision-making role in this litigation would impair this court's ability to render complete relief in this action. Mandatory joinder of GIT is therefore not appropriate under this court's rules. Permissive joinder is also not appropriate because GIT has no rights to assert in this suit. *See* RCFC 20(a)(1)(A) (stating that permissive joinder is limited to parties which "assert any right to relief").

As for Mr. Kinghorn, if the Nominal Plaintiffs indeed seek to join him as a

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[8] The court also rejects the Nominal Plaintiffs' curious suggestion that the Real Parties' Motion to Substitute be deemed to be a motion to intervene as co-plaintiffs in this suit. Nominal Plaintiffs' Mot. at 6. Such an interpretation contravenes the clear goals, and title, of the Real Parties' Motion to Substitute.

party to this action, the Real Parties cite appropriate authorities that deny mandatory and/or permissive joinder to entities with merely *contingent* financial interests in the proceeds of suits in this court. *See* Real Parties' Reply at 5-9 (citing *United Keetoowah Band of Cherokee Indians of Okla. v. United States*, 480 F.3d 1318 (Fed. Cir. 2007); *Fisherman's Harvest, Inc. v. United States*, 74 Fed. Cl. 681 (2006); *Franconia Assocs. v. United States*, 61 Fed. Cl. 335 (2004)). Mr. Kinghorn possesses no direct claim against the United States that can be adjudicated in this court, and his absence from this suit will not impair the court's ability to render complete relief to the existing parties in this action. No type of joinder of Mr. Kinghorn is therefore appropriate pursuant to this court's rules. The court notes, too, that the Agreement entered into by Mr. Kinghorn places control of this litigation in the hands of the Secured Parties; thus, in the court's view, joinder of Mr. Kinghorn could quite possibly violate the Agreement's terms and the conditions of GIT's bankruptcy. *See* Def.'s Br. of Apr. 3, 2012, Ex. C ¶¶ 2, 9.

As for Mr. Huff, if the Nominal Plaintiffs indeed seek to join him as a party to this action, the Real Parties argue that his status as one of the Secured Parties gives his interests adequate protection in this suit. Real Parties' Reply at 10-11. The court agrees. The Secured Parties are the real parties in interest in this suit and their interests are now represented by Mr. Barbour. Mr. Huff is thus represented in this suit, although, pursuant to the Agreement he signed, his voting interest among the Secured Parties is so small that he cannot, by himself, choose counsel or direct the litigation. Mandatory joinder is not appropriate, because complete relief may be afforded Mr. Huff and the other Secured Parties, and his interests in a judgment award from this court or a settlement are adequately protected. Additionally, as is the case for Mr. Kinghorn, the Agreement entered into by Mr. Huff places control of this litigation in the hands of those entities or individuals who constitute the Secured Parties and who hold 75% or more of the voting interests at a particular settlement level. Thus, in the court's view, joinder of Mr. Huff as a separate plaintiff could quite possibly violate the Agreement's terms and the conditions of GIT's bankruptcy. *See* Def.'s Br. of Apr. 3, 2012, Ex. C ¶¶ 2, 9.

As previously observed, the Nominal Plaintiffs' arguments regarding joinder are largely vague *ipse dixit* pronouncements that have no basis in law. To the extent that the Nominal Plaintiffs cite generally to *United Keetowah*, the analysis is perfunctory and unpersuasive. *See* Nominal Plaintiffs' Reply at 5 (drawing unspecified support from *United Keetowah* to conclude that Mr. Huff's and Mr. Kinghorn's interests are "direct and immediate," "legally protectable," and

"sufficiently affected" to mandate joinder under RCFC 19). Similarly, when the Nominal Plaintiffs cite generally to *Franconia Associates*, the argument is vague and unpersuasive as well with respect to permissive joinder under RCFC 20:

> As addressed in *Franconia Associates v. United States*, 61 Fed. Cl. 335 (2004), the two (2) criteria for joinder of permissive parties is easily satisfied where, as here, the rights of all parties arise from the same occurrence and transactions. In this matter, all parties to the Agreement Respecting Litigation are considered real parties in interest. Accordingly, Kinghorn and [Huff] have rights to relief equivalent to those of the "Substituting Secured Parties". The contention that neither Kinghorn nor [Huff] have sufficient rights to allow permissive joinder is wrong.
>
> The glaring flaw in the "Substituting Secured Parties[]" argument is that they claim their interests for substitution into this case based on the same grounds as they contend fails to give Kinghorn and [Huff] sufficient interest for permissive joinder. These contentions are entirely inconsistent.
>
> If the "Substituting Secured Parties" have sufficient interest to be considered real parties in interest for purposes of substitution, then Kinghorn and [Huff] must likewise have sufficient interest to be permissive parties. Therefore, the Kinghorn and [Huff] ratifications of Plaintiffs should be sufficient for this case to continue forward.

Nominal Plaintiffs' Reply at 6-7.

As explained *supra*, the rules for joinder relied upon by the Nominal Plaintiffs do not contemplate the joinder of Mr. Huff and Mr. Kinghorn simply because they may eventually assert rights to a portion of any judgment or settlement achieved in this case. These two individuals have no independent rights arising from the DOE project; their financial interests are already adequately represented in this suit by the Secured Parties and the Secured Parties' choice of counsel, Mr. Barbour. The Nominal Plaintiffs have presented no cogent or

persuasive argument that joinder in this case is warranted under this court's rules or applicable precedent.

The court notes that the Nominal Plaintiffs have offered no caselaw which supports joinder of Mr. Huff or Mr. Kinghorn in this case. A proportionate right to a judgment or settlement obtained through this litigation is a contingent interest which does not require joinder of these two individuals as parties, particularly where Mr. Huff and Mr. Kinghorn entered into an Agreement as to how their rights would be protected in this litigation. *See Fisherman's Harvest*, 74 Fed. Cl. at 688 (holding in that case that the advocates of joinder failed to demonstrate that complete relief would not be accorded the existing parties absent joinder, and failed to show that the interests of the entities proposed for joinder would be impaired absent joinder).

Furthermore, Mr. Huff and Mr. Kinghorn do not possess any right or claim independent of the claim asserted by the Secured Parties so as to make permissive joinder under RCFC 20 appropriate. In other words, theirs is not an asserted claim against the United States currently poised to proceed in this court, but a right that might eventually be asserted against the other participants to the Agreement. Thus, there is a valid distinction to be drawn between claims arising from the DOE project and the legal principles relevant to those claims, on the one hand, and GIT's creditors' potential claims to a share of any proceeds resulting from this litigation, on the other. The Real Parties are correct to assert that the transaction at issue in this suit, and the questions of law at issue in this suit, are not the same as the transactional context of legal claims that may eventually be adjudicated in a suit brought by Mr. Huff and/or Mr. Kinghorn should a settlement or judgment be obtained by the Secured Parties. *See* Real Parties Reply at 8-9 (citing RCFC 20(a)(1) and *Franconia Associates*, 61 Fed. Cl. at 336-38). For all of these reasons, joinder of Mr. Huff or Mr. Kinghorn in this action is not appropriate under either RCFC 19 or 20.

## CONCLUSION

The motion for substitution of the real parties in interest as plaintiffs in this litigation and for the substitution of Mr. Barbour for Mr. Schooley as counsel for plaintiffs is granted. Notice of the court's decision shall be communicated to the United States Court of Appeals for the Federal Circuit by the parties as required by the order issued in that appeal. Accordingly, it is hereby **ORDERED** that

(1) The Real Parties' Motion to Substitute the Real Parties in Interest/Motion to Substitute Counsel, filed May 24, 2013, is **GRANTED**;

(2) Plaintiffs' Ground Improvement Techniques, Inc. and MK-Ferguson Company Cross-Motion to Ratify Plaintiffs, filed June 7, 2013, is **DENIED**;

(3) The Clerk's Office is directed to **CORRECT** the docket to reflect the substitution of the real parties in interest as plaintiffs, pursuant to RCFC 17(a)(3), as shown in the caption of this opinion;

(4) The Clerk's Office is directed to **SUBSTITUTE** Mr. Robert G. Barbour, pursuant to RCFC 83.1(c)(4)(A)(i)(II), as the attorney of record for all plaintiffs in this case; and,

(5) Proceedings in this case, pursuant to the court's order of July 12, 2013, remain **STAYED** pending the resolution of the appeal before the Federal Circuit, and all provisions of that order remain in effect.

/s/Lynn J. Bush
LYNN J. BUSH
Senior Judge

# In the United States Court of Federal Claims

No. 12-57 C
(Filed May 3, 2013)

**UNPUBLISHED**

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| GROUND IMPROVEMENT TECHNIQUES, INC., and MK FERGUSON COMPANY, for the use and benefit of GROUND IMPROVEMENT TECHNIQUES, INC., | * | RCFC 59, Motion for Reconsideration; RCFC 17(a); Real Party in Interest for Claims Transferred to Creditors in Bankruptcy Case. |
| *Plaintiffs*, | * | |
| v. | * | |
| THE UNITED STATES, | * | |
| *Defendant.* | * | |
| * * * * * * * * * * * * * * * * * * * | * | |

*Steven R. Schooley*, Orlando, FL, for plaintiffs. *Frederick Huff*, Littleton, CO, of counsel.

*Jeffrey A. Regner*, United States Department of Justice, with whom were *Stuart F. Delery*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Steven J. Gillingham*, Assistant Director, Washington, DC, for defendant.

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## OPINION AND ORDER

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**Bush**, *Judge*.

On February 8, 2013, plaintiffs filed a motion for reconsideration of one

aspect of this court's opinion of December 5, 2012. *See* Order of Feb. 14, 2013. The particular ruling challenged by plaintiffs is the court's holding that Ground Improvement Techniques, Inc. (GIT) is not the real party in interest to pursue the claim in Count IV of the complaint, the only remaining claim in this suit. Plaintiffs' motion is governed by Rule 59 of the Rules of the United States Court of Federal Claims (RCFC). For the reasons stated below, plaintiffs' motion for reconsideration is denied.

## BACKGROUND[1]

Most of the relevant background for this dispute may be found in *Ground Improvement Techniques, Inc. v. United States*, 108 Fed. Cl. 162 (2012), the opinion issued on December 5, 2012 in this case. Only the facts essential to plaintiffs' motion for reconsideration are provided here. As a threshold observation, the court notes that plaintiffs have not pointed to any errors of fact in the court's opinion of December 5, 2012.

### I. Contract Disputes Litigation and Bankruptcy Proceedings

In 1995, GIT became the subcontractor for MK-Ferguson Company (MK) on a United States Department of Energy project in Slick Rock, Colorado (the DOE project) for the remediation of uranium mill tailings.[2] During the course of performance, GIT's subcontract was terminated for default and the termination thereafter became the subject of litigation between MK and GIT in the United States District Court for the District of Colorado (the GIT-MK litigation). During the course of that litigation, which, including various appeals, lasted at least twelve years, GIT filed for bankruptcy under Chapter 11 of the Bankruptcy Code, in the United States Bankruptcy Court for the Western District of Pennsylvania (the GIT bankruptcy litigation).

As a result of GIT's bankruptcy, its claims against MK were transferred to five of GIT's creditors (the Secured Parties): PNC Bank, Fireman's Fund Insurance Company, Holland & Knight LLP, The Law Offices of Frederick Huff,

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[1]/ This background information is drawn largely from the parties' filings, and does not constitute fact finding by the court.

[2]/ MK has undergone multiple corporate name changes, and will be referred to as MK even in reference to events which occurred after those name changes.

and R.N. Robinson & Son, Inc., except for a dividend of $125,000 for GIT's unsecured creditors. The Secured Parties elected to continue litigation against MK in the name of GIT, rather than directing GIT to assign its claims against MK to the Secured Parties. GIT eventually obtained a large judgment against MK, which was partially satisfied by a surety in 2009.

In 2001, MK, too, filed for bankruptcy under Chapter 11 of the Bankruptcy Code, in the United States Bankruptcy Court for the District of Nevada (the MK bankruptcy litigation). The unsatisfied portion of GIT's judgment against MK, and post-judgment interest, were claims administered in MK's bankruptcy. The bankruptcy court required MK to file a certified claim with DOE to attempt to satisfy GIT's claims against MK related to the DOE project. MK did so, but the certification was contested as inadequate.

The bankruptcy court eventually ordered GIT itself to file GIT's claims with DOE's contracting officer under MK's name, and to certify its own claims. GIT also filed a certified claim in its own name with the DOE contracting officer. Having received no response from the contracting officer on its claims, GIT filed a "deemed denied" suit in this court for the claims submitted to the contracting officer in its own name and in MK's name (for the benefit of GIT). Counts I-III of the complaint, claims brought directly by GIT against the United States, were dismissed for lack of privity between GIT (the subcontractor on the DOE project) and the United States. The only remaining claim in this suit (Count IV of the complaint) is the claim in MK's name for the benefit of GIT, a type of claim that is sometimes referred to as a pass-through claim.

## II. This Court's Holding Regarding the Real Parties in Interest Issue

Defendant asserted that GIT was not the real party in interest to bring this suit against the United States for claims related to the DOE Project. The primary thrust of the government's argument was that when GIT went through bankruptcy, any claims it possessed against MK and the United States were transferred to GIT's creditors. Plaintiffs conceded that certain of GIT's creditors might receive some benefit from this suit, but contended that post-bankruptcy GIT will be the major beneficiary of this action.

Defendant's arguments were persuasive, because GIT's bankruptcy effected a transfer of GIT's claims against MK to the Secured Parties. The court cited

numerous court documents which showed that the Secured Parties, not GIT, own the claims against MK and the United States. *See Ground Improvement*, 108 Fed. Cl. at 169-70 (citing GIT's Second Amended Plan of Reorganization, a related Agreement Respecting Litigation, and court orders in the GIT-MK litigation and the MK bankruptcy litigation). Plaintiffs' arguments to the contrary, unsupported by legal authority, were either refuted by the court documents cited by defendant or were irrelevant to the real parties in interest issue. *See id.* at 170-71 (noting that plaintiffs' arguments found no support in court documents, and that GIT's rights to any proceeds from its claims against MK and the United States are now held by the Secured Parties, with any excess to be awarded to GIT's unsecured creditors). The court therefore concluded that GIT's claims against MK are now held by the Secured Parties and that the Secured Parties are the real parties in interest for GIT's claims against MK related to the DOE project, and to any related claims against the United States. *Id.* at 171.

The court held, further, that the Secured Parties are the real parties in interest for the pass-through claim presented in Count IV of the complaint. GIT is merely the nominal plaintiff for their interests in the remaining claim in this suit. *Id.* The court therefore ordered GIT to file a notice describing the method by which the real parties in interest would participate in this suit, pursuant to RCFC 17(a)(3). Along with that notice filed by GIT on February 8, 2013, GIT filed a motion for reconsideration of the court's ruling on the real parties in interest issue. *See* Order of Feb. 14, 2013. Defendant's response was filed on March 5, 2013; plaintiffs' motion is now ripe for decision.

## DISCUSSION

### I. Standards of Review

#### A. RCFC 59

Pursuant to RCFC 59, a plaintiff may be granted reconsideration of the court's disposition of an issue for any of the reasons established by the rules of law or equity. RCFC 59(a)(1)(A)-(B). "The decision whether to grant reconsideration lies largely within the discretion of the [trial] court." *Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990) (citations omitted). "For a movant to prevail, he must point to a manifest error of law or mistake of fact." *Pikeville Coal Co. v. United States*, 37 Fed. Cl. 304, 313 (1997) (citation omitted).

The movant must show: "(1) that an intervening change in the controlling law has occurred; (2) that previously unavailable evidence is now available; or (3) that the motion is necessary to prevent manifest injustice." *First Fed. Lincoln Bank v. United States*, 60 Fed. Cl. 501, 502 (2004) (citations omitted).

It is important to note that a motion for reconsideration functions not as another round of briefing, but as a request for extraordinary relief. *See Caldwell v. United States*, 391 F.3d 1226, 1235 (Fed. Cir. 2004) ("Motions for reconsideration must be supported 'by a showing of extraordinary circumstances which justify relief.'" (quoting *Fru-Con Constr. Corp. v. United States*, 44 Fed. Cl. 298, 300 (1999), *aff'd*, 250 F.3d 762 (Fed. Cir. 2000) (table))). "The purpose served is not to afford a party dissatisfied with the result an opportunity to reargue its case." *A.A.B. Joint Venture v. United States*, 77 Fed. Cl. 702, 704 (2007) (citations omitted). Motions for reconsideration are not granted merely "because an unhappy party failed to urge a theory which it could have raised in original proceedings." *Bernard v. United States*, 12 Cl. Ct. 597, 598 (1987) (citations omitted). Nor are motions for reconsideration properly employed to reassert arguments that the Court has already considered. *Pikeville Coal*, 37 Fed. Cl. at 313 (citation omitted). Absent extraordinary circumstances, a motion for reconsideration will not be granted. *See Caldwell*, 391 F.3d at 1235.

### B. Real Party in Interest

Aside from certain exceptions not relevant here, "[a]n action must be prosecuted in the name of the real party in interest." RCFC 17(a)(1). This court has stated that "[w]ithin the context of RCFC 17(a), a real party in interest has been defined as the party that 'possesses the right to be enforced.'" *Grass Valley Terrace v. United States*, 69 Fed. Cl. 543, 546 (2006) (citation omitted). When a plaintiff has been determined to not be the real party in interest for a claim, this court may allow the plaintiff a reasonable amount of time to cure this defect, either through substitution of the real party in interest, joinder or ratification. RCFC 17(a)(3); *see Aldridge v. United States*, 59 Fed. Cl. 387, 390 (2004) (requiring the submission of evidence, within a certain period of time, to determine if a bankruptcy trustee had abandoned a claim to the debtor-plaintiff or wished to assert the claim in this court for the benefit of the bankruptcy estate); *see also First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1289 (Fed. Cir. 1999) (stating that RCFC 17(a) "sets forth the broad and general principle that actions should be brought in the name of the real party in interest and that courts

should be lenient in permitting ratification, joinder, or substitution of that party"). Failure to prosecute an action in the name of the real party in interest, unless cured by the methods referenced in RCFC 17(a)(3), will result in the dismissal of the claim.[3] *See, e.g.*, *Norega v. United States*, 113 F. Supp. 463, 464 (Ct. Cl. 1953); *Aldridge*, 59 Fed. Cl. at 390.

## II. Analysis

Plaintiffs present two arguments in support of their contention that GIT is a real party in interest in this suit. The first argument is that GIT's status "as a debtor-in-possession" establishes that GIT is also a real party in interest in this suit. Pls.' Mot. at 4. The second argument is that the Secured Parties, in prior proceedings in other courts, have ratified GIT's "standing to proceed as a real party in interest." *Id.* at 8. The court will address these arguments in turn.

### A. The Debtor-in-Possession Argument

The court notes first that plaintiffs did not raise a "debtor-in-possession" argument when defendant first challenged GIT's real party in interest status. There is no reason plaintiffs could not have timely presented this argument for the court's consideration. A motion for reconsideration does not provide plaintiffs an additional bite at this particular apple. *E.g.*, *Bernard*, 12 Cl. Ct. at 598. The court must therefore reject this argument as grounds for overturning the court's ruling on the real party in interest issue.

The court notes further that the cases relied upon by plaintiffs for their "debtor-in-possession" argument were issued in 1954, 1991, and 2008. Pls.' Mot. at 4-5. Thus, it is clear that plaintiffs are not arguing that there has been an intervening change in law between 2012, when they initially briefed the real party in interest issue, and the filing of their motion for reconsideration in February of 2013. Because plaintiffs have not shown that an intervening change in the controlling law has occurred, their motion for reconsideration cannot be granted on that basis.[4] *E.g.*, *First Federal Lincoln Bank*, 60 Fed. Cl. at 502.

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[3]/ The court may rely on relevant court documents submitted by the parties to resolve a real party in interest challenge. *Ground Improvement*, 108 Fed. Cl. at 169 n.5.

[4]/ Nor have plaintiffs argued that newly available evidence or manifest injustice justify continue...

Finally, even if plaintiffs' legal argument regarding GIT's status as "debtor-in-possession" were properly before the court, defendant ably argues that GIT, a reorganized debtor, is no longer a "debtor-in-possession" and no longer has the powers or rights that might, in other circumstances, have authorized GIT to litigate the Secured Parties' claim as a real party in interest. *See* Def.'s Mot. at 5 (citing *In re United Operating, LLC*, 540 F.3d 351, 355 (5th Cir. 2008)). None of the cases cited by plaintiffs controvert defendant's analysis. As to plaintiffs' contention that GIT continues to act as a "debtor-in-possession," as evidenced by commentary by the judge presiding over the MK bankruptcy litigation, *see* Pls.' Mot. at 6-7, nothing in the passages cited by plaintiffs reflects a judicial determination that GIT, not the Secured Parties, is the real party in interest for the claims brought before this court. For all of these reasons, plaintiffs' "debtor-in-possession" argument does not warrant reconsideration of the court's real parties in interest ruling.

### B. The Prior Ratifications Argument

Plaintiffs also argue that "GIT's standing to proceed as the real party in interest . . . has been previously ratified by the 'Secured Parties' recognized by this Court." Pls.' Mot. at 7. Plaintiffs cite no caselaw in support of this argument. Instead, plaintiffs' quote from two documents attached to their motion, dated 2002 and 2009. *See id.* Exs. D-E. Plaintiffs' argument is not persuasive, for a few reasons.

First, this argument was not raised by plaintiffs when they opposed defendant's challenge to GIT's real party in interest status. There is no reason plaintiffs could not have timely presented this argument for the court's consideration. This argument therefore does not constitute grounds for reconsideration under the standard cited *supra*.

Second, the documents in question were signed by plaintiffs' counsel Mr.

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[4]/ ...continue
reconsideration of the court's ruling on the real party in interest issue. As defendant notes, no newly available evidence has been cited by plaintiffs, and no manifest injustice could be alleged in a case where the real parties in interest (the Secured Parties) have expressed their intent to prosecute the one remaining claim in this suit. Def.'s Resp. at 3-4. Thus, plaintiffs have failed to raise any of the justifications for reconsideration that have been established by this court's precedent to legitimize the presentation of their debtor-in-possession argument.

Schooley, and thus cannot be construed to be newly available evidence. The court observes, too, that plaintiffs have not alleged any intervening change in controlling law, or manifest injustice, that would justify the court's reconsideration of its ruling on the real parties in interest issue. The court concludes that plaintiffs have presented no justification that warrants reconsideration in this instance.

Even if plaintiffs' newly contrived legal argument regarding alleged prior ratifications of GIT's real party in interest status were properly before the court, defendant ably argues that there has been no effective ratification by the real parties in interest in this case. *See* Def.'s Resp. at 6. In defendant's view, prior ratifications of GIT for the purposes of representing the interests of the Secured Parties in different cases do not operate as a ratification in this case before this court. In effect, any such prior ratifications were of limited duration and have no applicability to this case. The court must agree. For their prior ratifications argument, plaintiffs rely on evidence that is irrelevant to the real parties of interest issue in this case. For all of these reasons, plaintiffs' "prior ratifications" argument, Pls.' Mot. at 7, does not warrant reconsideration of the court's real parties in interest ruling.

## CONCLUSION

Plaintiffs have failed to show that reconsideration of the court's ruling on the real parties in interest issue is merited. In order to effectively address the remaining claim in this case, this ruling, and the other substantive rulings of the court's opinion of December 5, 2012, shall be entered as final judgments pursuant to RCFC 54(b). In doing so, the court is mindful of the need to avoid piecemeal litigation, but recognizes that in this case it would be profoundly inefficient to leave the door open to potential, much-delayed challenges to this court's rulings. Such challenges, particularly when brought by an entity which is not the real party in interest in this suit, would only hinder the timely resolution of the claim presented in Count IV of the complaint.

The next step in this litigation is the resolution of the apparent dispute regarding the nature of the Secured Parties' participation in this suit and their choice of counsel. *See* Order of February 14, 2013. The briefing schedule set forth below addresses the narrow issue of whether the Secured Parties, according to relevant and reliable evidence, shall now substitute themselves for GIT in the prosecution of the claim set forth in Count IV of the complaint (and substitute

counsel), or whether they shall now ratify GIT to prosecute that claim.[5] This briefing schedule is not an opportunity for the re-introduction of arguments previously rejected by the court.

Accordingly, it is hereby **ORDERED** that

(1) Plaintiffs' Motion for Reconsideration, filed February 8, 2013, is **DENIED**;

(2) Pursuant to RCFC 54(b), insofar as there is no just reason for delay, and in accordance with the court's opinion of December 5, 2012, the Clerk's Office is directed to **ENTER** judgment for defendant as to the dismissal of Counts I-III of the complaint without prejudice, and to also enter judgment for defendant as to the identification of the Secured Parties as the real parties in interest for the claims presented in this suit;

(3) The Secured Parties' Motion to Substitute the Real Parties in Interest in This Suit/Motion to Substitute Counsel shall be **FILED** on or before **May 24, 2013**;

(4) Plaintiffs' Response to the Secured Parties' Motion, and any Cross-Motion to Ratify Ground Improvement Techniques, Inc. as Plaintiff and Mr. Schooley as Counsel, shall be **FILED** on or before **June 7, 2013**;

(5) The Secured Parties' Reply shall be **FILED** on or before **June 14, 2013**; and

(6) Plaintiffs' Reply, if any, shall be **FILED** on or before **June 21, 2013**.

/s/Lynn J. Bush
LYNN J. BUSH
Judge

[5]/ The court notes that it is not 'prior ratifications in prior court proceedings' at issue here, but rather current decisions of the Secured Parties.