Intervenor-Plaintiff-Appellant No. 21-16082, No. 21-16427
and No. 21-16205, Consolidated

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELEODORO GARCIA; JONATHAN X. ABELL, Plaintiffs, and EVEREST NATIONAL INSURANCE COMPANY, a/s/o Nugate Group, LLC, Intervenor-Plaintiff-Appellant, v. UNITED STATES OF AMERICA, Defendant-Appellee.	No. 21-16082 21-16427 D.C. No. 1:19-cv-00658-KJM District of Hawaii, Honolulu **ORAL ARGUMENT REQUESTED**

On Appeal from the United States District Count
for the District of Hawaii of No.: No. 1:19-cv-00658-KJM
The Honorable Kenneth J. Mansfield United States Magistrate Judge

APPELLANT'S OPENING BRIEF

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DISCLOSURE STATEMENT

Everest National Insurance Co. ("Everest") is a wholly-owned subsidiary of Everest Reinsurance Company; Everest Reinsurance Company is a wholly-owned subsidiary of Everest Reinsurance Holdings, Inc.; Everest Reinsurance Holdings, Inc. is a wholly-owned subsidiary of Everest Underwriting Group (Ireland) Limited; and Everest Underwriting Group (Ireland) is a wholly-owned subsidiary of Everest Re Group, Ltd., a publicly traded company, trading under (RE). Nugate, LLC is Everest's worker's compensation insured-employer. Nugate, LLC is owned by Jamila Stanford.

Date: October 18, 2021

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INTERVENOR-PLAINTIFF-APPELLANT EVEREST NATIONAL INSURANCE COMPANY A/S/O NUGATE GROUP, LLC'S OPENING BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

1. Cases

2. Federal Rules of Civil Procedure

3. Military Regulations and Code of Federal Regulations

4. Federal Statutes

5. Federal Rules of Appellate Procedure

6. Secondary Sources

I. STATEMENT OF JURISDICTION

Under 28 U.S.C. 1331, 1346(B) and §2671 the district court had jurisdiction of this case. The April 28, 2021 order dismissed Plaintiffs' complaint and Everest's intervening subrogation complaint and closed the case. ER 257-275. The June 14, 2021 order denied Everest's motion for reconsideration and was the final order in Everest's case. ER 213-217. On July 13, 2021, the district court denied Plaintiff's motion for reconsideration and was the last order on the case. ER 204-211. On June 23, 2021, Everest's Notice of Appeal was filed with the district clerk. ER 212. On August 27, 2021, Everest's Fed.R.App. 4(a)(4)B(ii)(iii) amended notice of appeal was filed under Fed. R. App. 4(a)(4)(B)(i). ER 201-203. Following the final July 13, 2021 order, on August 31, 2021, Everest filed its new Notice of Appeal, Case No. 21 16427. ER 198-200. By order of October 8, 2021, Nos. 21-16082, 21-16205 and 21-16527 were consolidated. The appellate court has jurisdiction under Fed.R.Civ.Pro 54 and 28 USC 1291 1294(1).

II. STATEMENT OF ISSUES

1. Whether the Discretionary Function Exception (DCF) to the Federal Tort Claims Act (hereafter FTCA) shields the government from liability where the government violated: 2005 AR 350.19 (WL) *The Army Sustainable Range Program;* 2012 AR 385.63 (WL) *Range Safety;* 2012 DA Pam. 385.63 (WL) *Range Safety;* and 2014 DA Pam. 385.63 (WL) *Range Safety*.

2. Without specifying a facial or factual challenge in the government's 12(b)(1) or 12(b)(6) motion, that attached 6 exhibits, whether the trial court erred by not considering Plaintiffs' and Everest's opposing Affidavits in deciding the government's Fed.R. Civ. Pro.12(b)(1) motion.

3. Given military regulations, Everest's private contract, and Plaintiff's and Everest's fact affidavits, whether the court erred in concluding the government's decision of how to clear UXO's from Nugate's workspace was shielded from the DCF.

4. In post-judgment proceedings under Fed. R. Civ. Proc. 59 and 60 where a party simultaneously files motions for reconsideration and for leave to amend the complaint, whether the district court commits error by not reviewing the motion to amend the complaint and the reconsideration motion before denying the motion to amend and the motion for reconsideration.

III. STATEMENT OF THE CASE

Everest sues the government because on April 6, 2015, two of Nugate's grass cutter employees were critically injured by unexploded ordinance in the Department of the Army's closed high impact Hawaii military training range. *Transcript,* ER 222: 21-25; ER 87. The Appellant is Everest Insurance Company, a/s/o Nugate Group, LLC. Everest issued a Hawaii worker's compensation and employer's liability policy #5300003405151 to Nugate, LLC. ER 173, ¶3. Everest

provided workers compensation insurance to Eleodoro Garcia and Jonathan Abell for Hawaii job injuries. Eleodoro Garcia and Jonathan Abell are Plaintiffs in appeal no. 21-16205. The Appellee is the United States of America acting through its agent Department of the Army (DOA) ER (the government). ER 166, ¶5. On April 6, 2015, the government operated as a Hawaiian landowner.

On April 6, 2015, Honolulu, Hawaii residents, Plaintiff, Eleodoro Garcia (hereafter "Garcia") and Plaintiff Jonathan X. Abell, (hereafter "Abell") were injured by an anti-tank round in their workspace. ER 96. Their workspace was Area "C" in a DOA military training impact range in Makua Military Reservation (MMR). ER 82. MMR is in the northwest corner of Oahu near the Kaena Point tracking station and 18 miles from the Shofield Barracks via Kolekole pass road. ER 100. Area "C" was the secondary danger area (buffer zone) on the downside of an impact area. 2014 Pamphlet 385-63, page 227, Glossary. The difference between a "range" and an "impact area" is a range is where military ordinances are fired; an impact area is where ordinances land and explode. ER 132. An impact area is the ground within a training center used to contain fired, placed, dropped, thrown or launched munitions. 2005 AR 350-19, 4-15 Impact Areas Terms (e); Section II Terms Impact Area.

On April 6, 2015, Nugate performed ground maintenance services under a contract with the DOA "Contract." ER 58-64. The Expeditionary Contracting

Command of the DOA was the requesting agency, ER 58; *Transcript*, ER 225:14-16. The contract required vegetative maintenance services and rodent control.

The facts explaining how Plaintiffs were injured on April 6, 2015 can be found in the affidavits of Eleodoro Garcia (ER 30-33), Jonathan Abell (ER 34-37), Joe Abell (ER 38-42), Greg Ford (ER 41-51) and Jamila Stanford (ER 52-55). Occurrence facts are also found in the government's redacted Ground Accident report[1] ER 82-145. MMR is a military training base operated by the DOA. Range "C" was a high impact Army training range. ER 53, ¶5; ER 82. On April 6, 2015, Plaintiffs were grass cutter employees of Nugate, LLC allowed onto MMR by a security detail assigned by a Borrowed Military Manpower (BMM). ER 82, 87, 99. On April 6, 2015, the range was closed to the public, but open for special training. ER 144. An April 21, 2015 witness account says the Nugate contractors were the only ones allowed on the range. ER 130. The round that exploded injuring Garcia and Abell is called an unexploded ordinance, or "UXO." *AR 350-19, Sec. II Terms "unexploded ordinance (UXO)".* This UXO was a Rocket, HEAT (High Explosive Anti-Tank) 66mm M72 series, Light Antitank Weapon (LAW). ER 96-97. The UXO was left in Plaintiffs' workspace by the

[1] The DOA prepared an Abbreviated Ground Accident Report (hereafter "AGAR"). The redacted AGAR was exchanged between the parties during district court discovery. On November 02, 2020, the redacted AGAR was marked as sub-exhibit 2-K (Docket# 117-4, pgs. 44-107) in Everest's Compliance Motion (Docket# 117). On January 8, 2021, USA's Supplemental Response to Everest's Production Requests (Docket# 132) produced the same redacted AGAR as sub-exhibit 2-K responsive to Everest's Production Request #5.

government. ER 54 ¶11. Plaintiffs were working in Range C in MMR because this is the area where the government told Plaintiffs to cut the grass. ER 30-33; ER 34-37; ER 38-40.

An April 23, 2015 witness account said there were no training records; the SOP at MMR was outdated; there were no records the area was cleared of UXOs. ER 132-138. Who had access to Range "C" was unknown. ER 134. Soldiers were not allowed onto the range due to UXOs. ER 130. On April 6, 2015 at MMR, there were no clearly identified danger areas distinguished. ER 122, 138; ER 54 ¶ 14. Security was relaxed and personnel was always changing. ER 138. The workers did not have radios or communication devices to report emergencies and there was a lack of communication. ER 138, 140, 142. The only way workers knew where to go was based on what grass had been cut, and from the other uncut grass areas. ER 140. Before April 6, 2015, the DOA Range Safety Office determined where the ICM was located [an item area that contains sub munitions that are considered armed and susceptible to initiation]. ER 126, 132. Before April 6, 2015, the Army Range Officer (RSO) had no records of Nugate's work area being surface or sub surfaced (cleared). ER 122. On April 6, 2015, the MMR was in an inactive range, but was considered a high impact area. ER 128, 132. On April 6, 2015, the RCO was not present and may have been escorting VIPs. ER 128, 136.

Before April 15, 2015, the range may have been understaffed. ER 126. SOP at MMR was outdated. ER 132. The duties of BMM were not known. ER 128. Funding was cut and RCO personnel went from 14 to 0. ER 128. The range office manager said RCO should be used instead of BMM but that RCO would not accept the risk. ER 128. There are unexploded duds all over the range and it is never certain what you might find or where you may step. *Id.* The ground needed to be visible before anyone walked on it. *Id.* The only markings were Gilbert stakes to identify Hawaiian cultural sites. *Id.* The government never gave maps to Nugate warning of UXOs. ER 54, ¶15.

On February 23, 2021, Plaintiff Eleodoro Garcia signed an affidavit. ER 30-33. At MMR, Garcia had contact with DOA Officer Bert Burha 'Bert.' 'Bert' was the army point of contact with the Nugate laborers, including Garcia. At MMR, 'Bert' told Garcia and other laborers they would be working in areas that were safe and cleared of UXO. *Id.* 'Bert' did not provide personnel for safety reason. *Id.* On April 6, 2015, 'Bert' told Garcia where and what to cut. *Id.* Garcia was injured by UXO at MMR in an area Garcia was told by "Bert" was safe and cleared of UXOs. *Id.*

On February 26, 2021, Plaintiff, Jonathan X Abell signed an affidavit. ER 34-27. Abell's affidavit says 'Bert' told Abell that Abell would be working in an area that was safe and cleared of UXOs; 'Bert' also told Abell where and what to

cut. On April 6, 2015, 'Bert' told Abell the areas where Abell was to cut were cleared of UXO hazards. *Id.* On April 6, 2015, Abell was injured by the same UXO that exploded and injured Garcia. 'Bert' told Abell that Abell's work area was safe and cleared of UXOs. *Id.*

On February 26, 2021, witness Joseph Abell signed an affidavit. ER 38-40. Joseph Abell said the Nugate crew worked in an area of MMR that 'Bert' said was safe and cleared of UXOs. *Id.* 'Bert' told Joseph Abell where and what to cut. *Id.* Opposing the motion to dismiss, Plaintiffs introduced the expert opinion of Gregory Ford. ER 41-51. Ford said 2004 AR 350-19, AR 385-63 and 2014 DA Pam. 385.63 governed DOA's safely in Range "C". *Id.* Ford said it was improper to allow a civilian contractor on a live fire range without an escort. *Id.*

On January 26, 2021, Jamila Stanford, owner of Nugate, signed her declaration. ER 52-55. Stanford said Plaintiffs were assigned to cut grass at MMR. On April 6, 2015, the government did not tell Nugate there were UXOs in Area "C", Nugate's workspace. ER 53, ¶9.

At MMR Nugate did not and could not train employees on locating, detecting, or avoiding hidden and unknown UXO's. *Id.* Nugate is not a UXO specialist, but the DOA is. *Id.* It was the DOA's responsibility to train, disclose, educate, and teach Nugate employees where they might encounter UXO's on the DOA's closed high impact military range. *Id.*

At no time did Nugate have control over MMR. Nugate did not have an obligation to search for, detect, investigate, or locate UXO's. At MMR, the UXO detection and removal was the responsibility of the DOA, not Nugate. *Id.* The UXO that injured Garcia and Abell was left on the MMR by the DOA. *Id.* Nugate had no knowledge the UXO that Garcia hit was at that location or might suddenly detonate. *Id.*

From July 1, 2013 through December 31, 2018 at MMR, the DOA did not tell Nugate MMR was previously an active impact range, the type of UXO's Nugate employees might encounter at MMR, where they were (surface or buried), how, where, or when the UXO might resurface, or that using an industrial grade weed wacker might increase the probability of contact with UXO's in Area "C". *Id.* From July 1, 2013 through December 31, 2018 in the areas where Nugate performed ground maintenance, the DOA did not mark areas of buried or suspected areas of UXO's. ER 138; ER 54, ¶14. During Nugate's work at MMR, the DOA provided maps of the worksite. The maps given to Stanford did not mark or warn against suspected UXO's at MMR. ER 54, ¶14.

The contract required Nugate to perform ground maintenance for the DOA on nine Oahu military bases. ER 122. These bases are: Schofield Barracks, East Range, Fort Shafter, Helemano Military Reservation, Pililaau Army Rest Camp, Plilaau Military Range and Dillingham Military. *Id.* Plilaau Military Range

(PMR) is part of Makua Military Reservation (MMR). The Nugate contract did not provide high explosive training. ER 57-92. The Performance Work Statement ("PWS") covered Nugate's and the government's obligations. ER 122. The contract contains the following provisions:

> **Performance Work Statement (PWS)** says:
>
> **2.1 Non-Personal Services**
>
> The government shall neither supervise contractor employees nor control the method by which the contractor performs the required tasks. Under no circumstances shall the government assign tasks to, or prepare work schedules for, individual contractor employees.
> **3.2.2** Safety requirements for explosive hazard conditions: Ground maintenance services at PMR involve exposure to HIGHLY EXPLOSIVE HAZARDOUS CONDITIONS. Ordinance duds exist in the terrain partially or entirely buried in the soil.
> **3.2.2.1** Each employee performing work at the PMR shall attend a one-hour briefing on High Explosive and Fire Prevention Safety. The PMR Range Control Office will conduct the briefing at PMR Range Control office. This initial training is required for all new contractor employees. Training includes safety and accident reporting. The Contractor (Nugate) shall contact the PMR Range Control Office POC to schedule the briefings. No Contractors employee shall perform work at PMR without attending the briefing. All contractor employees must sign in and out at PMR Range Control desk daily. ER 58-64.

IV. PROCEDURAL CASE HISTORY

Following the April 6, 2015 accident and injuries, Abell and Garcia made Hawaii worker's compensation claims through Everest. ER 52. Before the STATE OF HAWAII, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS DISABILITY COMPENSATION DIVISION, Eleodoro D. Garcia and Jonathan X. Abell filed worker's compensation complaints. ER 184-185. Everest paid the worker's compensation claims. Abell was paid $167,326.00 (case closed); Garcia has now been paid $785,000 (medical expenses open and ongoing). ER 28, ¶33. HRS 386-6 (b) allows Hawaiian worker's compensation carrier to join in any action filed by the injured employees.

On March 10, 2020, the first Fed. R. Civ. P. 16 scheduling order was entered which on August 7, 2020 closed the pleading's amendments. On March 25, 2020, Everest filed a Motion to Intervene and Supporting memorandum. ER 182, 183; 184-197. On April 10, 2020 the motion was granted. On April 16, 2020, Everest filed its intervening workers compensation subrogation complaint. ER 173. On May 21, 2020, the government made Fed R. Civ. P. 26(a)(1)(A) initial disclosures. ER 156-164. The government did not disclose 2005 AR 350-19 (WL) as a defense. ER 161. On May 26, 2020, the government answered the subrogation complaint. ER 165-172. On June 16, 2020, Everest sent the government a Fed. R. Civ. P. 34 production request. On August 12, 2020, the government answered the

production request. ER 71-81. In the August 12, 2020 production response answers, (after pleadings amendments closed) the government disclosed 2005 AR 350.19 (WL) as governing regulations. The government did not disclose 2012 DA Pam. 385.63 (WL) or 2014 DA Pam. 385.63(WL) as controlling the government's range maintenance. ER 76 ¶7. On October 2, 2020, the government updated Fed.R. Civ. Pro. 26(a)(1)(A) disclosures, but made no further disclosure of applicable regulations. ER 146-147. On August 26, 2020 and September 12, 2020 Everest asked the government to provide proper initial disclosures. ER 146-147; ER 148-151. On October 30, 2020, at settlement conference, the government said it would be filing a motion to dismiss. On January 8, 2021, the government made first supplemental initial disclosures. ER 66-70. The government again did not reference 2005 AR 350-19 (WL) or 2012 AR 385-63 (WL) as basis for defense. Fed R. Civ. P. 26 (a)(1)(A)(ii).

On January 15, 2021, the government filed a combined Fed. R. Civ. Pro. 12(b)(1) and 12(b)(6) Motion to Dismiss Plaintiffs' and Intervenors' complaints. The government's motion did not request dismissal of Everest's case. To the government's memorandum, the government attached 6 exhibits. ER 56-57, *See* Exhibit 1. Neither the government's Motion to Dismiss nor the Supporting Memorandum specified the government was making a Fed. R. Civ. Pro. 12(b)(1) 'facial' or 'factual' challenge. On February 9, 2021, Everest filed its opposition

response attaching the declaration of Jamila Stanford. ER 52-55. To the government's motion to dismiss, on March 1, 2021, Plaintiffs filed their opposition memo, attaching opposition affidavits of Eleodoro Garcia, (ER 30-33), Jonathan Abell (ER 38-40), witness Joseph Abell (ER 38-40), and expert Gregory Ford (ER 41-51). On March 11, 2021, the government filed its Reply and for the first time argued "*the court should not consider the affidavits submitted by Plaintiffs and Intervenors because the government has made a 'facial' not 'factual' attack and Affidavits should not be considered*".

On March 25, 2021, the government's dismissal motion was argued telephonically before Magistrate Judge Kenneth J. Mansfield. *Transcript*, ER 218-256.

At the hearing the court found 2005 AR 350-19 (b) and (c) applied to the government's Range "C." operations. *Transcript*, ER 238, 239. 244. The court referenced 2014 DA Pam. 385-63 Sec. 2.1 and 2.2 as applying. *Transcript*, ER 232; 10-16. The court said it was mandatory for the government to clear UXO's from temporary and dedicated impact areas. *Transcript,* ER 229: 6-12. The court found the government had to have warning signs. 2014 DA PAM 385 63 2.2(a), *Transcript,* ER 232: 10-16; ER 242: 4-9. The regulations required warning signs in Nugate's workspace. ER 242: 14-18. At the telephonic hearing, Everest stated Everest's response to the government's motion to dismiss was confusing and based

on the government's 6 exhibits. *Transcript,* ER 249: 23-25; ER 250: 1-12. Although not requested by Everest, the Court considered the possibility giving Everest and Plaintiffs the right to amend. ER 242: 25; ER 243" 1-3.

On April 28, 2021, the court granted the government's Motion to Dismiss Everest's and Plaintiffs' complaints. ER 257-275; *Eleodoro Garcia and Jonathan X. Abell and Everest National Insurance Co. a/s/o Nugate Group, LLC v. United States of America*, 2021 WL 2661025. The court did not dismiss the case or state the complaint dismissals were with prejudice. *Id.* The case was dismissed at the pleadings stage before any depositions were taken. The court considered the government's motion as a "facial" attack. ER 260. The court said 2005 AR 350-19 Paragraph 4.12(b) and 2014 DA Pam. 385.63 (2-1) conflict ER 268 and contradict the grant of discretion. ER 269. Although the Army regulations applied, but conflicted, and due to the impossibility to clear MMR of all UXO's, the court found the government's conduct was shielded by the discretionary function exception. ER 269. The April 28, 2021 order cited *Lam v. United States*, 979 F. 3d 665, 676 (9th Cir., 2020) but did not rely on *United States v. White* 211 F.2d 79 (9th Cir. 1954), which is controlling in the 9th Circuit. The court's decision did not address Everest's argument that the government violated 2014 DA Pam. 385-63 2.2 by not having mandatory signage. ER 269. *See Rodriguez v. United States* 2018 WL 1399183 (D.C. N.M. 2019) [holding: 2014 DA PAM 385-63 ¶2.2(d)

establishes a mandatory duty to post warning signs.]

Following the court's April 28, 2021 dismissal, on May 11, 2021, Everest filed Plaintiff-Intervenor's L.R. 60.1 Motion For Reconsideration Of Judgment and Fed R. Civ. Pro. 59(E) Motion To Alter Or Amend Judgment And Fed R. Civ. Pro. 60(B) Motion For Relief From Judgment and Memorandum In Support of Motion. The same day, May 11, 2021, Everest also filed Plaintiff-Intervenor's Motion To Modify the April 23, 2021 Second Amended Rule 16 Scheduling Order and Fed. R. Civ. Pro. 15(A)(2) Motion For Leave To File First Amended Intervening Subrogation Complaint. ER 4-6. A supporting memo was also filed. ER 7-15. On May 11, 2021, Everest proposed First Amended Complaint in Subrogation was served in compliance with LR 10.4. ER 17-28. On May 12, 2021, by *minute order*, the court denied Everest's motion to file its amended subrogation pleading, writing: "*To the extent that Plaintiff-Intervenor seeks to revive the case and file an amended complaint, Plaintiff-Intervenor must properly request relief from the order granting the motion to dismiss*". On June 1, 2021, the court invited the government to respond to Plaintiffs' Motion for Reconsideration. On June 10, 2021, the government responded to Plaintiffs reconsideration motion. On June 14, 2021, the court denied Everest's Post-Judgment Reconsideration Motion. ER 241-245. Despite Everest giving the court a proposed amended complaint, the June 14, 2021 order did not address the merits of Everest's motion to amend (under Fed. R.

Civ. Pro 16 or 15), the proposed merits of the amended pleading, or Everest's request to modify the scheduling order. ER 217; Fed. R. Civ. PRO. 15(a)(2) and Fed. R. Civ. PRO. 16(b)(4). On June 23, 2021, Everest appealed. ER 240. On July 13, 2021 the court denied Plaintiffs' Motion for Reconsideration, in part, because Plaintiffs did not provide a proposed amended complaint. ER 232-239.

V. SUMMARY OF THE ARGUMENTS

On April 15, 2015, the government sent Nugate workers onto a closed high impact military Range "C" to cut grass. Mandatory army regulations governed the government's Range "C" operations. Range "C" operations were covered by 2005 AR 250.4-12(b) and (c) 2014 DA PAM 385-63 Sec. 2.1 and 2.2. The government breached one or more of these regulations and the government is not entitled to immunity. The court erred by not considering Everest's fact proofs controverting the government's Fed. R. 12(b)(1) motion to dismiss. Post-judgment, the court committed reversible error by not allowing Everest at least one attempt to file an amended complaint to establish subject matter jurisdiction.

VI. STANDARD OF REVIEW

Dismissals based on subject matter jurisdiction are reviewed *de novo*. *O'Toole v. United States*, 295 F.3d. 1029, 1032 (9th Cir. 2002). A Court must accept as true the factual allegations of the Complaint. A Court's denial of a Motion to Amend a Complaint is viewed for abuse of discretion. *United States v.*

White, 769 F.3d. 1047 (9th Cir. 2014). A District Court's contract and statutory interpretation is reviewed de novo and Appellate Court reviews a District Court's decision to dismiss Everest's case, based on the case in its entirety.

VII. ARGUMENTS

1. The Court has Subject Matter Jurisdiction and The Discretionary Function Exception Does Not Apply

The Federal Tort Claims Act (FTCA) waives government immunity in actions caused by the government's tortious conduct. The FTCA holds United States liable in circumstances where a private person would be liable to the claimant in accordance with law of the state where the tort occurred. *28 U.S.C. 1346(b)(1). Indian Towing Company v. United States,* 76 S.Ct. 122, 350 U.S. 61 (1955); *Lingren v. United States* 665 F.2d 978 (9th Cir. 1982). *United States v. White,* 211 F.2d. 79 (9th Cir. 1959).

28 U.S.C §1346(b)(1) imposes federal tort liability caused by the government's negligence. 28 U.S.C §2680 then provides a waiver of sovereign immunity, to include activities where the government is performing a "discretionary function." This exception immunizes the United States against "[a]ny claim based upon an act or omission of an employee of the government based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused." 28 U.S.C.

§2680(a). The 28 U.S.C §2680 exception "restores the government's immunity in situations where government employees are carrying out governmental or 'regulatory' duties." *Faber v. U.S.*, 56 F.3d 1122, 1124 (9th Cir. 1995). When the exception applies to a plaintiff's claim, the government has not waived its lawsuit immunity. Courts then decline jurisdiction and dismiss the action. *O'Toole v. United States*, 295 F.3d 1029, 1033 (9th Cir. 2002).

This discretionary function exception "marks the boundary between Congress's willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). It is designed to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort." *Gaubert v. United States*, 499 U.S. 315, 322 (1991). Under the discretionary-function exception to the FTCA, the federal government is protected where a regulation mandates particular conduct and the government's employee obeys the direction. However, if the employee ignores or violates the mandatory regulation, there is no shelter from liability because there is no room for choice and the action is therefore contrary to policy. *Gaubert v. United States*, 499 U.S. 315 (1991).

Following *Berkowitz v. United States*, 486 U.S. 531, 536 (1988), the 9th Circuit in *Whisnant v. United States*, 400 F.3d. 1177 (9th Cir. 2005); *Bear Medicine v. United States*, 241 F3.d. 1208 (9th Cir. 2001); and *Young v. United States*, 769 F.3d. 1047 (9th Cir. 2014), elaborates the scope of the discretionary function exception. Two requirements must be met. First, the act involved must be discretionary in the sense that it "involves an element of judgment or choice." *Gaubert v. United States*, 499 U.S. 315, 322, 111 S.Ct. 1267 113 L.Ed.2d 335 (1991). Where an employee follows a course of action prescribed by federal statute, regulation or policy, the employee's acts are immune from suit. This also means when the employee ignores the statute, rule or regulation and commits 'operational level' safety negligence, the government is liable. *Gaubert*, 499 U.S. at 322, 111 S.Ct. 1267; *Berkovitz v. United States*, 486 U.S. 531, 536, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988). Second, "the exception protects only governmental actions and decisions based on considerations of public policy." *Gaubert*, 499 U.S. at 322, 111 S.Ct. 1267. 'Operational level' negligence does not give the government immunity. *Indian Towing Company v. United States,* 76 S.Ct. 122, 350 U.S. 61 (1955)

The Courts consider whether the challenged action is of the type Congress meant to protect – that is, whether the action involves a decision susceptible to social, economic, or political policy analysis. *Id.* (citing *O'Toole*, 295 F.3d at

1033–1034). The decision need not be grounded in policy considerations; however, it must be, by its nature, susceptible to a policy analysis. *O'Toole v. United States*, 295 F.3d. 1029 (9th Cir. 2002). Then, where the exercise of discretion is involved, "it must be presumed that the agent's acts are grounded in policy when exercising that discretion." *Gaubert*, 499 U.S. at 324.

Under *Gaubert v. United States,* 499 U.S. 315, 325, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991), the court first defines the actions the government and its employees did or did not do. Then the Court asks "whether the government's wrongful conduct violated a specific and mandatory regulation or statute." If the Court finds the government violated a statute or regulation, the answer is 'yes,' and the Court's discretionary function analysis ends. *Bolt v. U.S,* 509 F 3d. 1028 (9th Cir., 2007). Where the government's conduct requires it follow a regulation and the government ignores the regulation, there is no immunity 15 A. F. Proc. Forms §63:4 (2021). When the government violates a regulation or mandatory directive, there is also no immunity Transcript p.34, lines 7-10. *Bibeau v. Pac. Nw. Research Found., Inc.,* 339 F.3d 942, 945 (9th Cir.2003); (citing *Gaubert,* 499 U.S. at 324–25, 111 S.Ct. 1267).

2. The Government's Following Mandatory Range Safety Regulations was not Discretionary In Its Operation of Range "C".

The trial court's April 28, 2021 dismissal requires reversal because the government breached military regulations governing Nugate's operating in Range

"C". Proposed Intervening Complaint, ¶21; (ER 23); 2005 350-19 4-12, *et. seq.* (*Transcript*, ER 228-230); 2014 DA Pam 385-63 2.1 and 2.2, Garcia affidavit (ER 30-33); Abell declaration; (ER 34-40); Ford affidavit (ER 41-51), and Jamila Stanford declaration. ER 30-33. The trial court's April 28, 2021 dismissal also requires reversal because the government breached its private contract with Nugate, LLC. The government was not to supervise Nugate personnel on Range "C". ER 58-64. The government told Plaintiffs where to cut grass and told Plaintiffs Area C was safe and free of UXOs. *Transcript*, ER 46: 10-13, 19-22. The government breached its private contract by not giving Garcia and Abell high explosive training while working in the closed impact Range "C". ER 24, ¶ 24; ER 58-64.

Once Everest established one of the Army Regulations applied the governments conduct, the court's discretionary analysis should have ended *Transcript* , ER 252:7-9. *Berkowitz,* 486 U.S at 536, 108, S. Ct. 1954, *Rodriquez v. United States*, 2018 WL 1388133 (D.C, N.M 2018) [denying discretionary immunity when 2012 AR 385.63 (WL) and 2014 DA Pam. 385.63 (WL) required posting of hazard warning on open military range, but dismissing as plaintiff violated New Mexico wrongful death statute].

As to the background on Army regulations, for the April 6, 2015 accident, 2005 AR 350-19 applied. 2005 AR 350-19 was effective in September of 2005.

2012 DA Pam 385-63 introduced 2012 AR 385-63 on January 30, 2012. AR 385-63 was effective, February 29, 2012. 2014 DA Pam 385-63 updated AR 385-63 on April 6, 2014 and added additional danger zone information, *e.g.* 2.1 (restricted access). 2014 DA Pam 385-63 increased range safety. 2005 AR 350-19 was written in 2005; 2014 DA Pam 385-63 was written in 2014 and updates 2005 AR 350-19. 2012 AR 385-63 (WL), ¶ 1.1-Purpose, states, "*when standards in Department of Army Pamphlet 385-63 conflict with standards of other military services or Federal Agencies, the standard providing the higher degree of protection apply.*" *Id.* (*emphasis added*).

2005 AR 350.19 4-15(b) impact areas required either UXO clearance, UXO avoidance (training) or UXO escorts. The government produced no evidence of UXO clearance or escorts provided to Garcia or Abell before allowing them on Range "C". ER 82-145. The requesting agency (here DOA) assumes all responsibility and liability associated with entry into an impact area because the safety of civilian personnel takes precedence. 2005 AR 350.19 4-15 ¶(e). 2005 AR 350.19 4-12(a) says Range clearance will comply with 2014 DA Pam. 385.63. 2005 AR 350.19 4-12(b) requires clearance of UXO's to allow safe access by Range maintenance. 2014 DA Pam 385-63 2-1 ¶(e) required surface clearance before access is permitted.

2012 AR 385.63 (WL), 2012 DA Pam. 385.63 (WL), and 2014 DA Pam. 385.63 (WL) governs the government's training, warnings and signage while Nugate was in Range "C" (Doc 109; Doc 117.4, p. 386-396, Answer #7). The DOA was to use the 2012 and 2014 DA Pam. 385.63 (WL)'s in conjunction with 2012 AR 385.63 (WL). USA had to follow military regulations, and there was no discretion. *Navarette v. United States*, 500 F.3d 914 (9th Cir. 2007). Both the 2012 and 2014 DA Pam. 385.63 (WL) at ¶2.2 required posting of warning signs, markers, and flags. In Nugate's workspace, the government's signage had to comply with 29 CFR § 1926.200 Accident Prevention Signs and Tags and DA PAM 385-11 (2013). There were no clearly distinguished danger areas ER 122. This means the government did not post warning signs. 2014 DA PAM 385-63 2.2(a). ER 122, 138.

The 2012 AR 385.63 (WL), 2012 DA Pam. 385.63 (WL), and 2014 DA Pam. 385.63 (WL) were implemented for safety for those working in an impact range. The 2012 DA Pam. 385.63 (WL) and 2014 DA Pam. 385.63 (WL, ¶2.1(d)) required personnel safety training. Opposition fact affidavits to the government's motion to dismiss and the proposed amended complaint raise facts that army regulations applied and there was a breach. The government did not provide proper range training and violated 2012 DA Pam. 385.63, 2014 DA Pam. 385.63, and DOA's Ground Maintenance Contract with Nugate. ER 58-64. Under 2012

DA Pam. 385.63 ¶2.1, USA was to place specific warning signs of UXO's in Nugate's work area. On April 5, 2015, no signs or UXO warnings were placed in Range "C." ER 122, 138. Both the 2012 DA Pam. 385.63 (WL) and the 2014 DA Pam. 385.63 (WL) at Chapter 2-1 restrict access to impact areas and require briefing of personnel on the hazards of UXO's. The government never showed it briefed anyone about high explosive in Nugate's work area.

The government agreed Army Regulation 2005 350-19 ("AR 350-19") governs UXO range clearance at MMR *Transcript*, ER 222. 2005 AR 350-19 ¶4-12(a) requires USA to comply with Department of Army Pamphlet 385-64 ("DA Pam 385-64"). 2005 AR 350-19 ¶ 4-12 (b)(1) requires range clearance of UXOs "to allow safe access to range areas for range maintenance, modernization, training, or testing operations."

3. The discretionary function exception does not apply when a military base fails as a Hawaii Landowner.

The government's Range "C" operation did not comply with 2005 AR 350.19 and 2014 DA PAM 385.63 and violated 2.1 and 3.2.2.1 of the private contract. Under no circumstances can the government invite workers onto an impact range, agree to train the workers and supervise the workers and then place the workers onto a range without taking reasonable precautions to protect the workers from UXO 's. The government cut funding to RCO staff because it was cheaper to use BMM who used a security detail to monitor Nugate's grass cutters

on Range "C". Cutting funding that affects range safety is not discretionary. ER 128. The duty to warn Plaintiffs of the hidden and unpredictable dangers of working on an ultra hazardous high impact military range has never been found discretionary. *United States v. White*, 211 F. 2d 79, 82-83 (19th Cr., 1954). *Arizona Maintenance Co. v. U.S*, 864 F.2d 1497 (9th Cir. 1989); *Summers v. U.S.,* 905 F.2d 1212 (9th Cir. 1990). The court in *Demello v. United States,* 2018 U.S. Dist. LEXIS 15867, (W.D. Wash., 2018), citing United States v. White, 211 F 2d 79, 83 (9th Cir., 1954) wrote:

> Plaintiffs have also alleged that the government failed to adequately warn Alexander Demello of the known risks associated with the area or introduce adequate safety measures. *Id.* at 8-9. (The Ninth Circuit has previously noted that the discretionary function exception is not implicated where a military base fails as a landowner in its duty under state law to make safe its property for invitees by warning them of known dangers). *United States v. White*, 211 F.2d 79, 82 (9th Cir. 1954). As noted by the Tenth Circuit, citing the Ninth Circuit's decision in *White*, "the government's decision, as a landowner, not to warn of the known dangers or to provide safeguards cannot rationally be deemed the exercise of a discretionary function." *Smith v. United States*, 546 F.2d 872, 877 (10th Cir. 1976).

Once the government undertook responsibility for safety in Nugate's workspace, the execution of that responsibility is not subject to the discretionary function exception. *Sumner v. United States,* 794 F. Supp. 1358, (M.D. Tenn., 1992) [subject matter jurisdiction confirmed where court found Army violated AR 385.63]; *Rodriguez v. United States*, 2018 WL 1399183 (D.C. N.M. 2018); *Bear Medicine v.*

United States, 241 F.3d 1208, (9th Cir., 2001) [the decision to adopt safety can be policy, but safety implementation is not].

Nugate employees did not know the UXO was at that location, and never voluntarily undertook the risk to locate, disarm, or encounter any UXO's. ER 52-55. The DOA left the UXO on their land, and had the responsibility to remove the hazardous UXO's. *Bear Medicine v. United States,* 241 F.3d 1208, (9th Cir., 2001) [government's execution of safety policy not subject to discretionary function exception]; *Kim v. United States,* 940 F.3d 484, (9th Cir., 2019) [the design of a course of governmental action is shielded by the discretionary function exception, whereas the implementation of that course of action is not].

Safety training by regulation and private contract are not excluded from the FTCA. *Kim v. United States,* 940 F.3d 484, (9th Cir., 2019); *Kennewick Irrigation Dist. v. United States,* 880 F.2d 1018, (9th Cir., 1989) [holding decision not to remove materials during canal construction was not based on policy, but on engineering criteria, not susceptible to 'policy analysis']; *Camozzi v. Roland/Miller & Hope Consulting Group,* 866 F.2d 287, (9th Cir., 1989) [government retaining safety obligations under contracts not excluded from FTCA 28 U.S.C. §2680(a)].

The government and no one else was to maintain safety Range "C" and train Abell and Garcia. *Young v. United States,* 769 F.3d 1047, (9th Cir., 2014) [Holding: FTCA discretionary function exception did not apply where government did not

warn of hazards it knew of and created]. The government knew there were UXO's on Range "C". ER 124. Nugate workers should not have been sent into the tall grass of Range "C". Tall grass hid the visibility of the ground and Nugate workers could not see where they were stepping. ER 128. Because the ground was not visible, EOD's (Explosive Ordinance Disposal Experts) should have cleared Nuagte's worksite before Nugate worked there. ER 128.

4. The government Breached its Private Contract with Nugate and the government has no Discretionary Immunity

The second form of wrongful conduct is the government breached the terms of a private contract, imposing non-discretionary obligations on the government. Under Performance work standards 2.1 the government was not to supervise Nugate employees, nor control the method by which the Contractor performs the tasks. Under no circumstance was the government to assign tasks to the Contractor employees. The government breached 2.1 by telling Abell and Garcia where and what to cut and then certify Range 'C' was safe and free and clear of UXO. ER 30-33; ER 34-37. This was not discretionary nor motivated by policy concerns.

Par. 3.2.2.1 required the government to conduct a one-hour briefing on High Explosive and Fire Prevention Safety. Referencing sign-in sheets, the government says it trained Nugate workers, but produced no training records to verify Plaintiffs training. The government gave no records to Jamila Stanford describing the training or how the training would protect the Nugate workers while cutting grass

in a high impact range. ER 52-55. The government's breach of operational safety in an understaffed closed impact range has nothing to do with discretionary immunity.

5. The Court Erred in Deciding The Government's Motion to Dismiss as a "Facial" Attack and Erred in Not Considering Facts Beyond the Pleadings

The government filed an ambiguous motion saying nothing about whether a "facial or "factual" attack was made against Everest's subrogation Complaint. The court erred by considering the government's motion as a facial attack and did not consider fact matters beyond the pleadings. *Wright & Miller*, S.C. Fed. Proc. § 1364 *Speaking Motions* (3d Ed, 2021). The government's motion identified both standards "facial" and "factual", but didn't make a proper request for relief. Because the government raised a factual attack, Everest had to support subject matter jurisdiction with competent proof. *Leite v. Crane Co*. 749 F3d 1117 (9th Cir, 2014). *See* 27 A Fed. Proc. L Ed § 62:434 (2021) (discussing distinctions between Fed. R. Civ. Pro. 12(b)(1) "facial" and "factual" attacks). Wright & Miller, 5 B Fed. Prac. & Proc. Civ. § 1350 at p.4 (3d Ed. 2021). *See* also 5C Fed. Prac. & Procedure Civ. §1364 *Speaking Motions* (3d Ed, 2021).

Going into the March 25, 2021 hearing, the Court's standard to decide the government's Motion to Dismiss as either a "facial" or "factual" challenge was not defined. Everest was never clear if a "facial" or "fact" challenge was being

made. *Transcript*, ER 250: 8-12. In both the opposition memo and at oral argument, the government relied on collateral proofs to establish a fact challenge to subject matter jurisdiction, *e.g.*, focusing on the Nugate contract, Nugate's negligent supervision, Plaintiffs' contributory negligence, and safety training. *See Transcript* ER 7:13-8:10. The government was proving up a Fed. R. Civ. Proc. 12(b)(1) "factual" attack, not a "facial" attack. ER 56-57.

Dismissing Everest's complete case based upon an ambiguous motion denied Everest adequate notice and opportunity to challenge USA's motion as a "facial" attack. *See by comparison, Wichansky v. Zoel Holding Company, Inc.* 702 Fed.Appx. 559 (9th Cir.2017) (where the Ninth Circuit held that filing an ambiguous "facial" or "factual" motion to dismiss causing the court to decide the motion based on the wrong standard deprived respondent of adequate notice and opportunity to properly prepare and respond.

The District Court used the wrong standard deciding the government's motion and did not consider Plaintiffs' or the government's controverting fact proofs. ER 56-57. Fact documents attached to the Motion to Dismiss and to both opposition memorandums established either the district Court had subject matter jurisdiction, or that with the complaint amendment, Everest could allege additional facts, supportive of jurisdiction. *Wright & Miller*, 5 B Fed. Prac. & Proc. Civ. §1350 at p. 4 (3d ed. 2021). Given the added facts raised in the opposition memo,

affidavits, and at oral arguments, it was a reversible error to reject controverting fact proofs, grant the government's ambiguous to Motion to Dismiss and then later deny Everest's timely post-judgment right to amend.

Everest's fact proofs and other evidence showed the district court had subject matter jurisdiction or that Everest might be able to allege jurisdiction. 5B Fed. Prac. and Proc. Civ. §1350 (3d, 2021), p.5 fn.55. The District Court erred by dismissing Everest's Complaint based as a "facial attack". ER 260. The motion submitted 6 items of extrinsic evidence to attack the factual allegations in Everest's Complaint. ER 56-57. The government's Motion to Dismiss used fact proofs introducing duties of the Garrison Commander, Nugate's safety plan and training, news articles, Nugate's contributory negligence, warnings to Nugate, Nugate's alleged negligent supervision, Nugate's liability insurance, Nugate's day-to day control of employees, and Range Control sign in sheets. *Transcript*, ER 223:19-21, 225: 16-20. The court should not have granted the government's motion under Fed. R. Civ. Proc. 12(b)(1). Once contrary facts were raised in affidavits and at oral arguments. *Rutter Group Prac. Guide Fed. Civ. Pro*. Before trial Ch. 9. D §9:78 and 9:87 eq. (2021). Once the affidavits were filed, jurisdictional facts became intertwined with the merits and the court should not have made a Fed. R. Civ. Pro. 12(b)1 ruling against Everest. *Holt v. United States*, 46 F.3d 1000, 1002-

03 (10th Cir. 1995); *Barnson v. United States*, 531 F.Supp 614, 617 (Dist. Utah, 1982).

The government's Motion to Dismiss the complaints was brought under Fed. R. Civ. Pro. 12(b)(1), 12(b)6 and L.R. 7.1.. The Supporting Memorandum sought only Fed. R. 12(b)(1) relief but offered additional facts under Fed. R. 12(b)(6).

6. Post-Judgment, the Court Should Have Allowed Everest's Complaint Amendment

The U.S. Supreme Court determined that "[i]n the absence of . . . undue delay, bad faith or dilatory motive . . . undue prejudice . . . futility of amendment, etc.--the leave sought should . . . be 'freely given.'" *Foman v. Davis*, 371 U.S. 178,182 (1962). 6 Fed Prac.& Proc. Civ §1487 (3rd Ed., 2021). Generally, a Fed. R. Civ. Pro. 12(b)(1) complaint dismissal is not on the merits and a pleadings amendment should liberally be allowed.

Pursuant to Fed R. Civ. Pro 16(b)(4) and 15(a)(2), L.R. 7.1, 7.4, and the District Court's April 23, 2020 Scheduling Order, following the April 28, 2021 dismissal, on May 11, 2021 Everest filed a Fed R. Civ. Pro 16(b)(4) motion and memorandum to modify the Second Amended Rule 16 Scheduling Order and a Fed. R. Civ. Pro 15(a)(2) motion for leave to file First Amended Complaint in Intervention. ER 5-7, 8-16. Everest's ability to amend its complaint was governed by Fed. R. Civ. Pro. 16(b)(3)(A). 6A Fed. Prac. & Proc. Civ. §1522 "*Modifying*

Scheduling Orders" (2021). The court never ruled on Everest's R.16(b) motion, (*May 12, 2021 minute order)* nor in its reconsideration order. ER 217. The court did not find Everest lacked good cause to bring its motions under R. 16 and R. 15. No ruling was made by the court and Everest could not make its R. 15(a) motion until the court modified the scheduling order. *Johnson v. Mammoth Recreations, Inc.* 975 F. 2d 604 (9th Cir. 1992).

Following the April 28, 2021 dismissal, Everest showed, diligence, and good cause under Fed. R. Civ. Pro 16(b)(4) and should have been allowed to file the Amended Pleading Fed. R. Civ. Pro 15(a)(2). Through no fault of Everest, Everest did not plead violation of military regulations because the government did not identify their relevance until after pleadings closed. Fed .R. Civ. Pro. 26(a)(1)(A)(ii); 26(a)(3)(A)(iii). ER 10, 13.

Fed. R. Civ. Pro 15(a)(2) contemplates a "[L]eave to amend 'shall be freely given when justice requires. It made no difference if pleadings amendments were brought post-judgment as long as defendant is not prejudiced and prior court proceedings are not disrupted. Given the ambiguity of which army regulations applied to the government's range maintenance (ER 268), the trial court should have granted Everest at least one opportunity to re-plead subject matter jurisdiction.

Everest's Proposed First Amended Complaint (given to the court on May 11, 2021) established subject matter jurisdiction. ER 18-29. At ¶21 of the First Proposed Amended Intervening Subrogation Complaint, Everest pleads with specificity which army regulations created Range "C" duties to Everest, including those under 2014 DA 385-63. ER 23-24.

Nothing shown in post-judgment proceedings demonstrated any prejudice to the government by the filing of Plaintiff-Intervenor's First Amended Complaint in Intervention because: (1) the government conducted its own investigation of the cause of UXO explosion; (2) the government knew of the Army regulations applicable to Range "C"; (3) Everest asserted specific fact allegations before discovery closed; (4) no depositions were taken requiring amendment; 5) defendants' discovery answers would not require changes; (6) the facts alleged in the First Amended Complaint in Intervention were known to the government and responding to complaint modifications was routine; and (7) the proposed First Amended Intervening Subrogation Complaint did not add any new causes of action, add new parties, or otherwise change the April 23, 2021 modified Rule 16 scheduling order.

7. The Court Committed Reversible Error by not Reviewing the Merits of the Motion to Amend, the Amended Complaint and the Motion to Vacate Before Denying the Motion to Amend and Denying the Motion to Vacate

On May 11, 2021, twelve days after the court's April 28, 2021 dismissal, Everest filed its Rule 59 and Fed. R. Civ. Proc. 60(b)(1) and (6) motion requesting reconsideration. The Rule 59 and 60 motion requested leave to amend the complaint. ER 5-7. On May 11, 2021, when Everest filed its motion to reopen, it also filed a separate motion to amend, providing the court with the proposed complaint. ER 17-29. On May 12, 2021, the court denied the complaint amendment, stating Everest must request relief from the order granting the motion to dismiss. *Minute Order, May 12, 2021.* On May 12, 2021 the court did not address the motion to amend the scheduling order, the basis for the motion to amend the complaint, the merits of the amended complaint or why the motion to amend the complaint should not be considered with the motion to vacate. Everest's Motion to Amend was denied because the court directed Everest to bring the motion to amend as part of a Rule 59 or R. 60 motion to vacate. *Id.* However, on June 14, 2021, when the court ruled on Everest's Motion to Vacate, the court did not consider Everest's Motions to Amend, or the Proposed Amended Complaint. As a request for relief, Everest's Motion to Amend was included in its Rule 59 and 60 motion.

Absent a finding of futility, a court's Fed. R. Civ. P. 12(b)(1) dismissal of a complaint should not terminate the litigation. The court's April 28, 2021 dismissal forced Everest to try and reopen the judgment and try and amend the complaint under to Fed. R. Civ. P 59 or Rule 60 and 16 and 15.

Once final judgment is entered and the case closed, 'the district court lacks jurisdiction to entertain a motion for leave to amend the complaint unless the judgment is vacated. *Lindauer v. Rogers*, 91 F 3d 1355 (9th Cir. 1996). Other appeal circuits find a conclusion that the district court abused its discretion in denying a motion to amend, is sufficient grounds to reverse the district court's denial of a Rule 59(e) motion. *Matrix Capital v. Bearingpoint, Inc.* 576 F.3d. 172 (4th Cir.). In other words, Rule 15(a) and 59 motions rise and fall together. *Mayfield v. National Assn. for Stock Car Auto Racing*, 674 F 3d 369 (4th Cir., 2011). To evaluate whether Everest's motion to reconsider should have been granted, the court should have determined if the denial of Everest's motion for leave to amend was proper. *Foman v. Davis*, 371 U.S 178 (1962) (error to deny motion to vacate without reviewing merits of complaint amendment).

Other than denying Everest's motion to amend (because it had to be filed as part of a Fed. R. Civ. Proc. 59 motion), nothing in of the court's June 14, 2021 post-judgment order addressed Everest's request to modify the scheduling order, nor provide an explanation for the court's denial of Everest's motion to amend. ER

213-217. The court did not make a ruling the new complaint was inconsistent with plaintiff's prior fact proofs, or that Everest should have made a motion to amend earlier. The court gave no indication the discretionary function exception barred allegations of the proposed amended complaint. *Miller v. United States*, 992F.3d 878 (9th Cir, 2021). [Where proposed amended complaint allegations are based on mandatory regulations, the first element of the Gaubert-Berkowitz test is not met.] Given the circumstance of why the subrogation complaint needed to be amended, the court's analysis never considered the merits of the motion to amend, the reasons why the motion to amend was made post-judgment, the merits of the new complaint, and the facts behind Everest's Fed. R. Civ. Pro. 59 and 60 Motion. To Everest's prejudice, these issues were not addressed by the court in its May 12, 2021 minute order or in its June 14, 2021 order. Everest lost the right to amend its complaint and its case was over. ER 213-217. See: *Foman v. Davis*, 371 U.S 178 (1962); See also: *Williams v. City Group, Inc*. 659 F. 3d 208 (2nd Cir. 2011); [leave to amend might be appropriate in a proper case to take into an account the proposed amendment in deciding vacate a prior judgment]. *Newspin Sports LLC v. Arrow Electronics. Inc.*, 910 F.3d 293 (7th Cir. 2018) [Reversing a district court's denial of leave to amend where plaintiff timely filed a post-judgment motion to amend, and included the proposed amended complaint]. Fed. R. Civ. Proc. 15 (a) liberality must be tempered with considerations of finality. *Foman* affirmed the

principle leave to amend should be freely given. This cannot be reconciled with the suggestion the liberal spirit of Rule 15 vanishes as soon as judgment is entered.

VIII. CONCLUSION

Everest requests this court reverse the April 28, 2021 judgment that found the discretionary immunity exception bars Everest's claims and reinstate Everest's case. Everest alternatively requests the April 28, 2021 judgment be vacated, Everest's motion for reconsideration be granted, and motion for leave to file an amended complaint be granted so that the court can reach the merits of the case.

STATEMENT OF RELATED CASES

These appeals are based on the district court's April 28, 2021 order that dismissed Plaintiffs' and Everest's cases based on the discretionary function exception. On September 8, 2021 Everest filed a motion to consolidate. By order on October 8, 2021, Case Nos. 21-16082, 21-16205, and 21-16427 are consolidated.

DATED: Chicago, Illinois, October 18, 2021

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CIRCUIT RULE 25.5 CERTIFICATE OF SERVICE- CONSOLIDATED APPEALS

I hereby certify that on October 18, 2021, I electronically filed Everest's opening brief and Everest's Excepts of Record, Volume 1 with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. The consolidated appeals are Nos. 21-16082, 21-16205, and 21-16427.

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Date: October 18, 2021

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