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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

KIRSTIE DUNBAR-KARI,  
  
Plaintiff,  
  
vs.

CASE NO. CV-F-09-0389 LJO SMS  
  
**ORDER ON DEFENDANT’S MOTION TO  
DISMISS (Doc. 42)**

UNITED STATES OF AMERICA, and  
STUART JOHNSTON, d.b.a., JOHNSTON  
CONSTRUCTION,  
  
Defendants.

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STUART JOHNSTON, d.b.a. JOHNSTON  
CONSTRUCTION,  
  
Cross-complainant,

vs.  
  
UNITED STATES of AMERICA,  
  
Cross-defendants.

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**INTRODUCTION**

This action arises out of a fire that burned the El Portal Market (“Market”) in Yosemite National Park (“Yosemite”) on April 21, 2008. Plaintiff Kirstie Dunbar-Kari (“Ms. Dunbar-Kari”), who signed a six-year contract to operate the Market one month prior to the fire, alleges that the fire was caused by the negligence of defendants United States of America (“government”) and Stuart Johnston, d.b.a.

1 Johnston Construction (“Johnston”), while Johnston was overseeing Market renovations.

2 By notice filed on September 23, 2010, Defendant United States moves to dismiss the second  
3 and third claims in first amended complaint (“FAC”) pursuant to Fed.R.Civ.P. 12(b)(1) for lack of  
4 subject matter jurisdiction. Plaintiff Kirstie Dunbar-Kari filed an opposition to the motion on October  
5 11, 2010. The government filed a reply brief on October 18, 2010. Pursuant to Local Rule 230(g), this  
6 motion was submitted on the pleadings without oral argument, and the hearing set for October 25, 2010  
7 was VACATED. Having considered the moving, opposition and reply papers, as well as the Court’s  
8 file, the Court issues the following order.

9 **BACKGROUND**

10 On March 31, 2008, the government, through the National Park Service, awarded Ms. Dunbar-  
11 Kari a six-year concession contract (#CC-YOSE 003-08) to operate the Market. On April 21, 2008,  
12 while the government and Johnston, its contractor, were renovating the Market building’s structure, a  
13 fire ignited. Ms. Dunbar-Kari alleges that the fire ignited due to electrical malfunctions and defects  
14 caused by the negligent acts, omissions, and other conduct by the defendants. The fire destroyed the  
15 Market and Ms. Dunbar-Kari’s property contained inside the Market. As a result, Ms. Dunbar-Kari  
16 alleges that she suffered damages in the form of lost personal property, lost future net profits from the  
17 Market, lost salary, and the cost of loan payments.

18 In the FAC, Ms. Dunbar-Kari alleges that before April 21, 2008, Marty Nielson, the Division  
19 Chief of the Business and Revenue Management Division of the Yosemite National Park represented  
20 to Plaintiff over the telephone that the NPS did not require her to carry insurance for the Market until  
21 she took physical occupancy of the Market after the renovations were completed. Ms. Dunbar-Kari  
22 alleges that this representation was confirmed by an e-mail dated April 8, 2008 from Mr. Nielson to  
23 Plaintiff, which stated “[p]er our conversation this morning, the National Park Service does not require  
24 that you carry property insurance on the market building until you occupy the structure.” Ms. Dunbar-  
25 Kari alleges that based on the representations by the NPS to her that she was not required to carry  
26 insurance for the Market until she took occupancy of the structure after the renovations were completed.  
27 Ms. Dunbar-Kari alleges that the government has waived, and is estopped from relying upon, any  
28 provision of the concession contract (including, but not limited to the provisions of the concession

1 contract) requiring Ms. Dunbar-Kari to carry insurance for the Market at the time of the fire.

2 Ms. Dunbar-Kari filed her FAC on January 14, 2010 to assert seven causes of action against  
3 defendants. By prior motion by the government and order thereon, this Court dismissed the following  
4 claims against the government: breach of contract (fourth cause of action); reformation (fifth cause of  
5 action); negligent misrepresentation (sixth cause of action); and declaratory relief (seventh cause of  
6 action). This Court granted that motion on the basis of lack of subject matter jurisdiction because the  
7 Tucker Act conferred exclusive jurisdiction to the Court of Federal Claims. (Doc. 33, March 23, 2010  
8 Order.)

9 In this motion, the government moves to dismiss the second cause of action for waiver and the  
10 third cause of action for estoppel on the basis that the Court lacks subject matter jurisdiction. The  
11 second cause of action states in pertinent part, that the government:

12 “by representing to her that she was not required to carry property  
13 insurance on the building structure of El Portal Market until she took  
14 occupancy . . . Defendant UNITED STATES OF AMERICA, ha[s]  
15 waived any right to enforce any agreement between Plaintiff KARI and  
16 the National Park Service requiring Plaintiff KARI to carry property  
17 insurance on the building structure of El Portal Market at the time of the  
18 April 21, 2008 fire as well as having waived any use of such requirement  
19 in defense or mitigation of the within action. (Doc. 28, FAC, ¶ 23.)

17 The third cause of action for estoppel alleges in pertinent part that: the government “is estopped from  
18 enforcing any agreement between the National Park Service and Plaintiff KARI requiring Plaintiff KARI  
19 to carry property insurance on the building structure of El Portal Market at the time of [the] April 21,  
20 2008 fire as well as being estopped from any use of such requirement in defense or mitigation.” (Doc.  
21 28, FAC ¶24.)

22 Several provisions of the Concession contract<sup>1</sup> deal with insurance and liability for conduct. For  
23 instance, Concession contract §11(b) states that, “The concessioner shall obtain and maintain during the  
24 entire term of this Contract at its sole cost and expense, the types and amounts of insurance coverage  
25 necessary to fulfill the obligation of this Contract as determined by the Director.” (Doc. 42, Exh. A,  
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27 <sup>1</sup> The concession contract is attached as an Exhibit to this motion. (Doc. 42, Exh. A to Berg Decl.) For purposes  
28 of this motion, Plaintiff does not dispute that Exhibit A is the concession contract CC-YOSE 003-08. (See Doc. 43,  
Opposition p. 3.)

1 p15.) The Concession contract also provides that the “Concessioner shall provide fire and extended  
2 insurance coverage on Concession Facility for all or part of their replacement cost . . .” The Concession  
3 contract §11(a) provides for the concessioner to indemnify and hold harmless the government under  
4 certain circumstances. The contract contains an integration clause which provides that the contract is  
5 “the sole and entire agreement,” and “[n]o oral representations” may amend the contract. (Doc. 42, Exh.  
6 A p.21.)

## 7 STANDARD OF REVIEW

### 8 **Fed. R. Civ. P. 12(b)(1) review standards**

9 The government contends that this Court lacks jurisdiction over Ms. Dunbar-Kari’s claims  
10 pursuant to Fed. R. Civ. P. 12(b)(1). In considering a motion to dismiss for lack of subject matter  
11 jurisdiction, the plaintiff, as the party seeking to invoke the court’s jurisdiction, always bears the burden  
12 of establishing subject matter jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S.  
13 375, 376-78, 114 S.Ct. 1673 (1994). The court presumes a lack of subject matter jurisdiction until the  
14 plaintiff proves otherwise. *Kokkonen*, 511 U.S. at 376.

15 The court must also consider whether the motion to dismiss is “facial, confining the inquiry to  
16 allegations in the complaint, or factual, permitting the court to look beyond the complaint.” *Savage v.*  
17 *Glendale Union High School*, 343 F.3d 1036, 1039-40 n.2 (9th Cir. 2003), *cert. denied*, 541 U.S. 1009  
18 (2004); *see also, White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). In the facial attack, a party  
19 challenges subject matter jurisdiction by asserting that the allegations in the complaint are insufficient  
20 on their face to invoke federal jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th  
21 Cir. 2004), *cert. denied*, 544 U.S. 1018 (2005). In this case, the court must consider the allegations of  
22 the complaint as true. *See Thornhill Publishing Company, Inc. v. General Telephone & Electronics*  
23 *Corp.*, 594 F.2d 730 (9th Cir. 1979). In a factual challenge, the truth of the allegations, which would  
24 otherwise invoke subject matter jurisdiction, is challenged. In this circumstance, this Court “is not  
25 restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony,  
26 to resolve factual disputes concerning the existence of jurisdiction.” *McCarthy v. U.S.*, 850 F.2d 558,  
27 560 (9th Cir. 1988).

28 The government’s current motion is a is a facial attack, as the government “asserts that the

1 allegations contained in the complaint are insufficient on their face to invoke federal jurisdiction.” *Safe*  
2 *Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004), *cert. denied*, 489 U.S. 1052 (1989). In  
3 a facial attack, the Court “assume[s] plaintiff’s factual allegations to be true and draw[s] all reasonable  
4 inferences in his favor.” *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009) (quoting *Wolfe v.*  
5 *Strankman*, 392 F.3d 358, 362 (9th Cir. 2004)). The Court does not, however, accept the “truth of legal  
6 conclusions merely because they are case in the form of factual allegations.” *Warren v. Fox Family*  
7 *Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003) (internal quotations omitted) (quoting *W. Mining*  
8 *Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981))

### 9 **Sovereign Immunity**

10 Sovereign immunity is a jurisdictional bar to proceeding against the government. “[T]he United  
11 States may not be sued without its consent and [] the existence of such consent is a prerequisite to  
12 jurisdiction.” *United States v. Mitchell*, 463 U.S. 206, 211 (1983). Evidence of the government’s  
13 consent must be unequivocal and may not be implied. *Blue v. Widnall*, 162 F.3d 541, 544 (9th Cir.  
14 1998). The government’s consent to suit defines the jurisdiction of the court to hear an action against  
15 the federal government. *Baker v. United States*, 817 F.2d 560, 562 (9th Cir. 1987), *cert. denied*, 487 U.S.  
16 1204 (1988). The party asserting jurisdiction has the burden to establish all jurisdictional facts. *Indust.*  
17 *Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990).

18 The government has wived its sovereign immunity in certain circumstances. The Tucker Act  
19 waives the United States’s sovereign immunity in suits in the Court of Federal Claim for damages based  
20 upon contract. *See* 28 U.S.C. §1346(a)(2); *EEOC v. Peabody Western Coal Co.*, 610 F.3d 1070, 1084  
21 (9<sup>th</sup> Cir. 2010). For tort claims, the Federal Tort Claims Act (“FTCA”) is a “limited waiver of sovereign  
22 immunity, making the Federal Government liable to the same extent as a private party for certain torts  
23 of federal employees acting within the scope of their employment.” *United States v. Orleans*, 425 U.S.  
24 807, 813 (1976). The issue, here, is whether the third and fourth causes of action fall within the FTCA  
25 such that this Court has jurisdiction.

### 26 **DISCUSSION**

27 Ms. Dunbar-Kari argues that this Court has subject matter jurisdiction pursuant to the FTCA.  
28 Plaintiff argues that the damages she seeks in the wavier and estoppel claims arise out of the negligent

1 conduct of the government’s employee and do not arise out of the Concession contract. Plaintiff argues  
2 that the government’s liability arises out of tort and not for breach of the Concession contract.

3 The government contends that Ms. Dunbar-Kari’s waiver and estoppel claims must be dismissed  
4 because the grant of jurisdiction under the FTCA does not extend to claims for intentional or negligent  
5 misrepresentation. The government contend the claims should be dismissed because the government  
6 cannot be sued for money damages based on erroneous oral and written advice. *Office of Personnel Mgt.*  
7 *v. Richmond*, 496 U.S. 414, 416 (1990).

### 8 **Determining the Character of the Claims<sup>2</sup>**

9 An action against the United States which is “at its essence” a contract claim lies within the  
10 Tucker Act and that a district court has no subject matter jurisdiction. If a plaintiff’s claim is "concerned  
11 solely with rights created within the contractual relationship and has nothing to do with duties arising  
12 independently of the contract the claim is founded upon a contract with the United States' and is  
13 therefore within the Tucker Act and subject to its restrictions on relief." *North Star Alaska v. U.S.*, 14  
14 F.3d 36, 37 (9<sup>th</sup> Cir. 1994), citing *North Side Lumber v. Block*, 753 F.2d 1482, 1486 (9th Cir.), *cert.*  
15 *denied*, 474 U.S. 931, 106 S.Ct. 265, 88 L.Ed.2d 271 (1985). *See also Megapulse v. Lewis*, 672 F.2d  
16 959, 968 (D.C.Cir.1982) (Whether an action is founded upon a contract for purposes of the Tucker Act  
17 “depends both on the source of the rights upon which the plaintiff bases its claims, and upon the type  
18 of relief sought (or appropriate).”). “The FTCA is the exclusive remedy for *tortious conduct* by the  
19 United States.” *Federal Deposit Ins. Corp. v. Craft*, 157 F.3d 697, 716 (9th Cir. 1998) (emphasis added);  
20 *see also* 28 U.S.C. §2679. Ms. Dunbar-Kari may not rely on the FTCA to establish subject matter  
21 jurisdiction over her claims rooted in contract. *See Woodbury v. United States*, 313 F.2d 291 (9th Cir.  
22 1963) (“where ‘tort’ complained of is based entirely upon” a breach of contract, jurisdiction does not  
23 lie in FTCA)

24 The Court must examine the “the source of the rights upon which the plaintiff bases its claims,  
25 and upon the type of relief sought.” *North Star Alaska*, 14 F.3d at 37. The determination of whether  
26 a particular claim is essentially one in tort or one in contract, must be made on a case by case basis by

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27 <sup>2</sup> Plaintiff cites *Karlen v. United States*, 727 F.Supp. 544, 546 (D.S.D. 1989) for the proposition that determining  
28 the character of a claim is a three step analysis. This case is outside of this circuit and not binding on this Court.

1 assessing the extent to which the contract is implicated in the claim asserted. *Darko v. U.S., Dept. of*  
2 *Agriculture, Farmers Home Admin.*, 646 F.Supp. 223, 227 (D.Mont. 1986). In *Fort Vancouver Plywood*  
3 *Company v. United States*, 747 F.2d 547 (9th Cir.1984), the court was faced with determining the  
4 character of a claim before it as either tort or contract. Plaintiff had entered into a timber sales contract  
5 with the United States Forest Service. A fire, allegedly caused by the negligence of the Forest Service,  
6 destroyed both cut and standing timber on Fort Vancouver's sale site. Fort Vancouver filed a negligence  
7 action for monetary damages under the Federal Tort Claims Act. The district court, however, dismissed  
8 the action for want of subject matter jurisdiction, concluding that Fort Vancouver's claim had its basis  
9 in contract rather than tort. *Fort Vancouver*, 747 F.2d 549. In reversing that decision, the Ninth Circuit  
10 reviewed a number of cases that addressed the application of the FTCA to a claim for damages which  
11 potentially could have been prosecuted as a breach of contract claim. The Court held that there was  
12 subject matter jurisdiction on the negligence claims: "In this case the contract establishes ownership  
13 interests, but otherwise is not implicated. The contract does not allocate liability under the circumstances  
14 presented by this case." *Id.* at 552. In *Walsh v. United States*, 672 F.2d 746 (9th Cir.1982), the  
15 government granted a cattle easement to plaintiff, then rendered the easement useless by damaging the  
16 cattleguards. In both cases, *Vancouver* and *Walsh*, the Ninth Circuit held that the plaintiffs' claims were  
17 within the district courts' jurisdiction under the FTCA, because they were traditional negligence claims  
18 not grounded in the plaintiffs' contractual relationship with the government. *See Fort Vancouver*, 747  
19 F.2d at 552; *Walsh*, 672 F.2d at 751. The plaintiffs' contractual relationship with the government was  
20 incidental to their cause of action. For purposes of their tort suits, it made no difference if they had not  
21 been in contractual privity with the government.

22 Here, however, Ms. Dunbar-Kari's contract with the government is not incidental to the claims  
23 for waiver and estoppel. Both claims rely upon express contract provisions and assert the contract's  
24 provisions have "no force" because of the representations of the government officials. Both claims  
25 squarely place the contract terms at center stage, because the claims seek to negate the contract terms.  
26 Plaintiff seeks to have this Court determine that certain provisions of the contract are "waived" and  
27 certain provisions are "estopped" from being enforced. Each claim is based on the existence of promises  
28 created by the contract and the parties conduct in relation to those promises. For instance, the contract





1 and its agencies so numerous and scattered,” there is always a risk that misinformed agency employees  
2 and representatives may err in interpreting statutes and regulations, and even “the utmost vigilance  
3 would not save the public from the most serious losses.” *Wagner v. FEMA*, 847 F.2d 515, 519 (9th  
4 Cir.1988) (quoting *United States v. Kirkpatrick*, 22 U.S. (9 Wheat.) 720, 735 (1824)).

5 The Court does not reach this argument because the claims for waiver and estoppel are barred  
6 pursuant to the Tucker Act since they are rooted in contract.

7 **CONCLUSION**

8 For the foregoing reasons, this Court GRANTS the motion to dismiss the second and third causes  
9 of action for lack of subject matter jurisdiction.

10 IT IS SO ORDERED.

11 **Dated: November 1, 2010**

**/s/ Lawrence J. O'Neill**  
**UNITED STATES DISTRICT JUDGE**

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