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6 UNITED STATES DISTRICT COURT  
7 SOUTHERN DISTRICT OF CALIFORNIA  
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9 KAREN OCAMPO, as personal  
10 representative of SALOMON  
11 RODRIGUEZ,  
12 Plaintiff,  
13 v.  
14 UNITED STATES OF AMERICA, et. al.  
15 Defendant.

Case No.: 15cv00180 JAH-WVG

**ORDER GRANTING DEFENDANT  
NASSCO'S MOTION TO DISMISS  
[Doc. No. 156]**

16 AND RELATED CROSS CLAIM.  
17  
18

19 Pending before the Court is Defendant National Steel and Shipbuilding Company's  
20 ("NASSCO") motion to dismiss Defendant United State's second cross-claim for breach  
21 of express maritime contract. The United States opposes the motion and Plaintiff takes no  
22 position. After a thorough review of the parties' submissions and for the reasons discussed  
23 below, the Court GRANTS Defendant NASSCO's motion to dismiss.

24 **BACKGROUND**

25 On January 27, 2015, Damaris Manzanero Vazquez, appearing as the personal  
26 representative of Salomon Rodriguez, filed a complaint against United States of America  
27 and NASSCO. On November 23, 2015, Anakaren Lopez, appearing as the personal  
28 representative of Salomon Rodriguez, filed a First Amended Complaint and, filed a Second

1 Amended Complaint on March 14, 2017. On November 6, 2017, Plaintiff filed a Third  
2 Amended Complaint (“TAC”) which replaced Anakaren Lopez with Karen Ocampo as the  
3 personal representative for Salomon Rodriguez. Plaintiff seeks damages for negligence  
4 and alleges Defendants’ negligence caused Salomon Rodriguez to fall off the unguarded  
5 side of an elevator platform approximately 98 feet down an elevator trunk while working  
6 aboard the USS Boxer in navigable waters at Pier 13, Naval Station, San Diego, California.  
7 TAC ¶¶ 11 - 21. Plaintiff asserts, as the decedent’s personal representative, she is entitled  
8 to recover on behalf of Mr. Rodriguez’s minor son. *Id.* ¶ 27.

9 The United States filed an answer and cross claim against NASSCO asserting claims  
10 for negligence and contribution, and breach of express maritime contract. NASSCO filed  
11 an answer to the FAC and an answer to the crossclaim.

12 NASSCO filed a motion for summary judgment or, in the alternative, partial  
13 summary judgment which this Court denied by order filed September 24, 2018. NASSCO  
14 filed the pending motion to dismiss on March 22, 2019. Plaintiff filed its statement of no  
15 position on the motion on March 27, 2019. The United States filed an opposition on April  
16 29, 2019 and NASSCO filed a reply on May 6, 2019. NASSCO and the United States  
17 appeared before this Court for a hearing on the motion to dismiss on May 21, 2019. After  
18 hearing oral argument, the Court took the matter under submission.

### 19 **LEGAL STANDARD**

20 NASSCO seeks to dismiss the United States’ cross-claim for breach of express  
21 maritime contract under Rule 12(b)(1) of the Federal Rules of Civil Procedure. A  
22 defendant may seek to dismiss a complaint for lack of jurisdiction over the subject matter  
23 pursuant to Rule 12(b)(1). The federal court is one of limited jurisdiction. See Gould v.  
24 Mutual Life Ins. Co. v. New York, 790 F.2d 769, 774 (9th Cir. 1986). As such, it cannot  
25 reach the merits of any dispute until it confirms its own subject matter jurisdiction. See  
26 Steel Co. v. Citizens for a Better Environ., 523 U.S. 83, 95 (1998). When considering a  
27 Rule 12(b)(1) motion to dismiss, the district court is free to hear evidence regarding  
28 jurisdiction and to rule on that issue prior to trial, resolving factual disputes where

1 necessary. See Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983). In such  
2 circumstances, “[n]o presumptive truthfulness attaches to plaintiff’s allegations, and the  
3 existence of disputed facts will not preclude the trial court from evaluating for itself the  
4 merits of jurisdictional claims.” Id. (quoting Thornhill Publishing Co. v. General  
5 Telephone & Electronic Corp., 594 F.2d 730, 733 (9th Cir. 1979)). The party seeking to  
6 invoke jurisdiction has the burden of establishing that jurisdiction exists. See Kokkonen  
7 v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994).

## 8 DISCUSSION

9 NASSCO argues the Contract Disputes Act of 1978 (“CDA”) prohibits this Court  
10 from hearing the United States’ breach of contract claim. Specifically, NASSCO argues  
11 the CDA prohibits any party to a government contract from bringing contract-related  
12 claims before exhausting administrative remedies and the United States failed to exhaust  
13 the administrative remedies prior to filing its cross-claim. NASSCO further argues the  
14 United States cannot comply with the jurisdictional requirements of exhausting  
15 administrative remedies because its purported claim is not ripe, in that the United States  
16 cannot submit a claim without a sum certain and cannot identify a sum certain until the  
17 conclusion of the negligence action.

18 In opposition, the United States initially contends the motion is untimely. The  
19 United States also argues once Plaintiff filed suit and placed the contract into litigation, the  
20 Department of Justice (“DOJ”) gained complete control of the litigation pursuant to 28  
21 U.S.C. section 516 and, thereby, divested the contracting officer (“CO”) of authority to act  
22 under on the contract under the CDA. The United States contends section 516 divests the  
23 CO from hearing and deciding contract claims that are related to claims before the Court  
24 and maintains Plaintiff asserts the accident occurred as a direct and proximate result of  
25 NASSCO’s multiple failures to perform its contractual obligations. Additionally, the  
26 United States maintains NASSCO put the contract at issue by attaching it to its  
27 unsuccessful motion for summary judgment and listing it as a trial exhibit, the Court looked  
28 to the contract as part of its order denying the motion for summary judgment, and the trial

1 in this matter will focus on NASSCO's breaches of contract, the same claims the CO would  
2 review. The United States maintains this issue is one of first impression and it is the facts  
3 of this case that lead to this result.

4 The United States further contends if NASSCO argues that the exclusive forum for  
5 deciding issues related to government contracts lies with the United States Court of Appeals  
6 for the Federal Circuit, it is mistaken, because 41 U.S.C. section 7107 carves out an  
7 exception for contract claims falling under the Suits in Admiralty Act and/or the Public  
8 Vessels Act and section 7102 provides that appeals arising under maritime law are  
9 governed by the Admiralty Act or the Public Vessels Act.

10 In reply, NASSCO argues the motion is not untimely because the question of subject  
11 matter jurisdiction can be brought at any time. NASSCO maintains the United States does  
12 not challenge that its breach of contract claim is governed by the CDA nor that it failed to  
13 comply with the CDA by bringing its cross-claim.

14 NASSCO also argues the three cases relied on by the United States to create this  
15 argument are inapposite and the United States' reliance on them is misleading, and the  
16 argument that the CDA can be eviscerated by a third party simply naming the United States  
17 and raising a government contract in a tort action is nonsensical. Additionally, NASSCO  
18 argues the United States' attempts to assert that this Court has jurisdiction over the case  
19 under 41 U.S.C. section 7102 is a red herring because a district court can obtain jurisdiction  
20 over an appeal from a contracting officer's final decision if the contractor appealing  
21 chooses so. Here, there is no final decision.

22 As an initial matter, a motion challenging jurisdiction may be made "any time during  
23 the proceedings." Attorneys Trust v. Videotape Computer Products, Inc., 93 F.3d 593, 595  
24 (9th Cir. 1996). As such, Defendant's motion is not untimely.

25 The CDA requires claims by the government against a contractor relating to a  
26 contract for the (1) procurement of property, (2) procurement of services, (3) procurement  
27 of construction, alteration, repair or maintenance of real property and (4) the disposal of  
28 personal property, be submitted to the contracting officer. 41 U.S.C. §§ 7102, 7103. The

1 United States does not dispute the CDA applies to its claim for breach of contract. Instead,  
2 the United States argues the Court has jurisdiction to hear the case because the CO was  
3 divested of authority to act on the claim once Plaintiff filed this action. Pursuant to 28  
4 U.S.C. section 516, “the conduct of litigation in which the United States, an agency, or  
5 officer thereof is a party. . .is reserved to the officers of the Department of Justice, under  
6 the direction of the Attorney General.” The power must be narrowly construed. Hughes  
7 Aircraft Co. v. U.S., 534 F.2d 889, 901 (Ct.Cl. 1976). The DOJ’s exclusive control is  
8 limited to conduct of pending litigation and does not encompass related matters not  
9 currently pending. Id. Plaintiff’s claims pending before this Court involve allegations that  
10 the accident was a result of NASSCO’s failure to perform certain contractual obligations.  
11 The contract and alleged breach of the contract are at issue in this action. Assuming the  
12 United States’ related breach of contract claim was sufficiently related to Plaintiff’s claims  
13 to be considered pending at the time Plaintiff’s complaint was filed, the CO is divested of  
14 authority to address the United States breach of contract claim.

15         However, the United States does not explain or provide support for its contention  
16 that the Court gains jurisdiction to hear the breach of contract claim because the CO is  
17 divested of authority to address the claim. The cases relied upon by the United States  
18 demonstrate the CO is divested of authority to act on a claim arising from pending litigation  
19 but they do not support the United States’ contention that the Court has jurisdiction over  
20 the claim. For example, in Peterson Builders, Inc. v. U.S., 27 Fed.Cl. 443 (1993), a  
21 contractor sought to amend its complaint against the United States to add a claim for duress.  
22 A previous claim for duress was dismissed for failure to present the claim to the contracting  
23 officer. Thereafter, the plaintiff submitted a claim for duress to the contracting officer who  
24 informed the plaintiff the CO lacked authority to issue a decision. In the motion seeking  
25 to amend the complaint, the plaintiff sought to amend his claim under the 60 day deemed  
26 denial provisions of the CDA, which permitted a contractor to bring a suit on a contract if  
27 the CO fails to issue a decision or notify the contractor of when a decision will be  
28 forthcoming within 60 days of receipt of the claim. The court denied the plaintiff’s motion

1 for leave to file its amended complaint upon finding the CO was not obligated to address  
2 the claim because the CO lacked authority to act when the litigation was being pursued by  
3 the Attorney General. Id. at 445. The finding that the CO was divested of authority to  
4 address the claim did not lead to jurisdiction in the court. Similarly, the court in Boeing  
5 Co. v. U.S., 26 Cl.Ct. 529 (1992), recognized the DOJ's exclusive authority over related  
6 claims but does not support the United States' contention that the Court has jurisdiction to  
7 hear a related claim.

8 Here, the United States failed to submit the breach of contract claim to the CO prior  
9 to filing its cross-claim. As such, the Court is without jurisdiction to hear the claim.

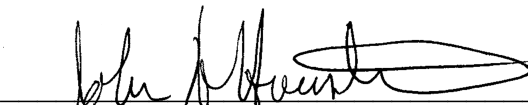
10 **CONCLUSION AND ORDER**

11 Based on the foregoing, IT IS HEREBY ORDERED:

12 1. Defendant NASSCO's motion to dismiss is **GRANTED**. The United States'  
13 cross-claim for breach of contract is **DISMISSED without prejudice**.

14 2. The hearing set for July 15, 2019 is **VACATED**.

15 DATED: July 12, 2019

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18 JOHN A. HOUSTON  
19 United States District Judge  
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