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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 ALLIANZ GLOBAL RISKS US
12 INSURANCE COMPANY, *et al.*,
13 **Plaintiffs,**
14 v.
15 UNITED STATES OF AMERICA,
16 **Defendant.**

Case No. 21-cv-1202-BAS-BGS

**ORDER GRANTING THE
GOVERNMENT’S MOTION TO
DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION (ECF
No. 12)**

17
18 Before the Court is Defendant United States of America (“Government”)’s motion
19 to dismiss this subrogation action for lack of subject matter jurisdiction pursuant to Federal
20 Rule of Civil Procedure (“Rule”) 12(b)(1) (“Motion”).¹ (Mot., ECF No. 12.) Plaintiffs
21 oppose² (Opp’n, ECF No. 13) and the Government replies (Reply, ECF No. 14). The Court
22 finds the Motion suitable for determination on the papers submitted and without oral
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25
26 ¹ Alternatively, the Government moves for dismissal for failure to state a claim pursuant to Rule 12(b)(6).

27 ² Plaintiffs consist of Allianz Global Risks US Insurance Company, Endurance American Specialty
28 Insurance Company, Tokio Marine America Insurance Company, and XL Insurance America, Inc. Plaintiffs allege they are the subrogees of General Dynamics Corporation and National Steel and Shipbuilding Company. (Compl. ¶¶ 1–5, ECF No. 7.)

1 argument. *See* Fed. R. Civ. P. 78(b); Civ. L.R. 7.1(d)(1). For the reasons set forth below,
 2 the Government’s Motion is **GRANTED**.

3 **I. BACKGROUND**

4 **A. Pertinent Facts**

5 **1. Building Basin No. 1**

6 On January 1, 1991, National Steel and Shipbuilding Company (“NASSCO”) leased
 7 from the San Diego Unified Port District (“Port”) Building Basin No. 1 (“Basin”), which
 8 is “located at the eastern side of San Diego Bay” in San Diego, California. (Compl. ¶ 5.)
 9 On the Basin’s premises there is a “graving dock” NASSCO uses “for shipbuilding [and]
 10 other work related to vessels[.]” (*Id.* ¶ 7.) A “graving dock” essentially is a type of “dry
 11 dock”: “[a]n enclosed basin into which a ship is taken for underwater cleaning and
 12 repairing . . . [that] is fitted with watertight entrance gates which when closed permit the
 13 dock to be pumped dry.” *Dry Dock*, INTERNATIONAL MARITIME DICTIONARY 246
 14 (2d Ed. 1961); *Graving Dock*, *id.* at 336 (“A drydock in which ships are repaired as opposed
 15 to a building dock, in which ships are built.”).³ When the Basin’s graving dock was
 16 pumped dry and its sea gate closed, the ocean waters from the San Diego Bay “would
 17 impart a substantial load to the sea gate, a portion of which was transferred from the gate’s
 18 structural load member to” a “horizontal steel, structural support beam” (“Beam”). (*Id.* ¶¶
 19 21–22.)

20 **2. NASSCO’s Shipbuilding Contract with the Navy**

21 On approximately March 9, 2016, the United States Navy (“Navy”) entered a 176-
 22 page contract with NASSCO to design, build, and perform other work related to Navy
 23 vessels at the Basin (“Contract”). (*Id.* ¶ 15; Contract No. N0002416C2227A00022, Ex. 1
 24

25
 26 ³ Courts have looked to maritime-specific, dictionary sources to educate themselves as to the
 27 meaning of crucial maritime terms where, as here, those terms are not defined by the parties. *See, e.g.,*
 28 *Atl. Specialty Ins. Co. v. Thomassen*, No. 1:15-cv-00009-SLG, 2016 WL 4649804, at *6 n.55 (D. Alaska
 Sept. 6, 2016) (turning to the International Maritime Dictionary to decipher the meaning of the terms
 “ways,” “gridiron,” and “drydock” in insurance dispute involving a sunken vessel because parties had not
 provided definitions for such terms).

1 to Notice of Lodgment, ECF No. 12-2.) The Contract explicitly requires certification of
2 “[d]rydocking and shipping ways employed [by NASSCO] in [its] performance of th[e]
3 [C]ontract . . . in accordance with MIL-STD-1625D (SH), dated 27 August 2009, Safety
4 Certification Program [(SCP)] for Drydocking Facilities and Shipbuilding Ways for U.S.
5 Ships” (“Military Standard 1625D”). (Compl. ¶ 16; Contract 34; *see also* Military Standard
6 1625D, Ex. 2 to Notice, ECF No. 12-3.)⁴

7 As set forth in Military Standard 1625D, the SCP’s purpose is:

8 To ensure the safety of U.S. Navy ships during docking and undocking
9 operations, while in dock, while under construction, and during launching and
10 transfer operations. The designed capacity of the drydocking facility is to be
11 determined, as well as its current material condition with regard to its
12 foundations, structure, and supporting auxiliary systems, including those for
13 ship protection. Also included is an assessment of operating procedures,
14 manning, and personnel.

14 (Military Standard 1625D § 1.1.1.) By its terms, Military Standard 1625D and the SCP
15 delineated therein apply to the Basin’s graving dock. (*Id.* § 1.2.)

16 To “ensure the dock is in satisfactory condition to safely operate[,]” the SCP requires
17 the facility’s “operator,” here, NASSCO, to “implement a maintenance program subject to
18 Navy external audits at three-year intervals.” (Military Standard 1625D §§ 4.9.1, 4.9.2.)
19 Among other things, the maintenance program mandates the operator to undertake “control
20 inspections” for the purpose of “record[ing] the condition of the facility,” “identify[ing]
21 deficiencies,” and “evaluat[ing] the effectiveness of preventative maintenance and
22 deficiency correction procedures.” (*Id.* § 4.9.3.2.) Components of a facility deemed
23 “[s]tructures” within the meaning of Military Standard 1625D must be evaluated “at 2-year
24 intervals,” subject to deviation “to accommodate drydock operations and other significant
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26
27 ⁴ The Contract is marked by multiple paginations—bates stamp numbers at the bottom righthand
28 corner of each page of the document and the pagination set forth in the Contract itself. Accordingly, the
Court’s citations to the Contract refer to the pagination assigned by the Public Access to Court Electronic
Records (“PACER”) system.

1 conflicts that prevent accomplishment on schedule.” (*Id.* § 4.9.3.2(a).) Section 5.2 of
2 Military Standard 1625D sets forth the detailed control-inspection requirements and
3 certification standards for “Graving Docks.” (Military Standard § 5.2.)

4 While NASSCO—as the Basin’s “operator”—is responsible for conducting control
5 inspections (*see* Military Standard 1625D §§ 4.9.1, 4.9.3.2(b)), the Navy is required to
6 “provide oversight” in connection therewith (*id.* § 4.9.3.2.1). In particular, Navy personnel
7 “shall”:⁵

- 8 • “[A]ccompany commercial activities during control inspections.”
9 (*Id.* § 4.9.3.2.1(a));
- 10 • “[R]eview the activity’s control inspection results for accuracy and
11 completeness and concur with the results based on their observations
12 during the inspections. If the inspection results are determined to be
13 inaccurate or incomplete, the activity shall be required to determine the
14 reason for the discrepancies and to implement corrective action by
15 modifying their inspection procedures or inspector qualifications as
16 applicable to correct the inspection results.” (*Id.* § 4.9.3.2.1(b));
- 17 • “[V]erify qualifications of activity’s control inspection personnel[.]”
18 (*Id.* § 4.9.3.2.1(c));
- 19 • “[R]eview inspection instructions for divers and be present during the
20 briefing of the divers to ensure that divers understand their inspection
21 responsibilities.” (*Id.* § 4.9.3.2.1(d)); and
- 22 • “[M]aintain records of control inspection reviews and inspector
23 qualifications for the triennial Navy maintenance audit.”
24 (*Id.* § 4.9.3.2.1(e).)

23 Notably, Military Standard 1625D states in its Foreword that “[t]he operating
24 activity,” *i.e.*, NASSCO, “remains solely responsible for maintaining and operating the
25 facility in a safe manner and condition.” (Foreword ¶ 5, Military Standard 1625D.)

27 ⁵ The Naval components responsible for the oversight functions set forth in Section 4.9.3.2.1 of
28 Military Standard 1625D are the Supervisor of Shipbuilding, Conversion, and Repair and the Regional
Maintenance Center. (*See* Military Standard 1625D §§ 3.1.16, 3.1.18, 4.9.3.2.1.)

1 Moreover, the Contract expressly provides “the Government does not assume the risk of
2 and will not pay for the costs of any loss, damage, liability or expense caused by, resulting
3 from, or incurred as a consequence of *delay or disruption* of any type whatsoever.”
4 (Contract 69–70 (emphasis added).)

5 **3. Control Inspections of the Basin**

6 Plaintiffs allege that at some time prior to July 11, 2018, NASSCO and Navy
7 personnel “observed spalling^[6] of concrete above the Beam and acknowledged a need to
8 repair the spalling in reports.” (Compl. ¶ 26.) Nevertheless, NASSCO and Navy personnel
9 allegedly did not once undertake a control inspection of the Beam, despite the Beam
10 assertedly constituting a “structure” within the meaning of Military Standard 1625D and
11 Military Standard 1625D’s requirement that structures must be inspected on a biennial
12 basis. (*Id.* ¶¶ 25, 27–28.)

13 **4. Sea Gate Failure**

14 On approximately July 11, 2018, the Beam failed apparently due to “gradual,
15 substantial corrosion” (“Incident”). (Compl. ¶ 29; *see also id.* ¶¶ 34, 36 (alleging post-
16 Incident investigation revealed “[s]evere corrosion” of the Beam caused the sea gate
17 failure).) When the Beam failed, the sea gate collapsed, causing ocean water from San
18 Diego Bay to flood the Basin. (*Id.* ¶ 32; *see also* Mem. 3.) The Incident allegedly caused
19 damage to property in which NASSCO and General Dynamics Corporation (“GDC”) had
20 insurable interests.⁷

21 **5. Insurance Claims**

22 After the Incident, NASSCO and GDC submitted insurance claims to Plaintiffs for
23 damages caused by the Beam failure. (Compl. ¶ 37.) Plaintiffs paid insurance benefits on
24 “losses arising from the Incident” corresponding to (1) “business interruption and claim
25

26 ⁶ “Spalling” is synonymous with the words “chipping,” “splitting,” and “fragmenting.” *Spalling*,
27 OXFORD ENGLISH DICTIONARY (Online Ed.) (accessed Apr. 27, 2022)

28 ⁷ As explained at *supra* note 2, the Complaint also names GDC as Plaintiffs’ subrogor, but the
Complaint is devoid of facts explaining GDC’s involvement in the Contract or why it held insurable
interests in property at the Basin. (Compl. ¶ 5.)

1 preparation expenses”; (2) “real property damage”; (3) “business personal
2 property/equipment [damage]”; (4) “[lost] inventory”; and (5) “out-of-pocket extra
3 expenses.” (*Id.* ¶ 39.)

4 **B. Procedural History**

5 **1. Complaint**

6 On June 30, 2021, Plaintiffs commenced this subrogation action. (Compl.) The
7 Complaint asserts a single cause of action, which Plaintiffs style as a “negligence” claim.
8 (*Id.* ¶¶ 56–65.) As to each element of negligence,⁸ Plaintiffs allege the following:

9 Duty. Citing California’s “negligent undertaking doctrine,” Plaintiffs allege that the
10 Navy owed NASSCO a duty of “reasonable care and skill” in the performance of
11 “inspection and oversight services” set forth expressly in Military Standard 1625D.
12 (Compl. ¶¶ 57–60 (citing *Allred v. Bekins Wide World Van Servs.*, 45 Cal. App. 3d 984,
13 989 (1975), and *Dekens v. Underwriters Labs. Inc.*, 107 Cal. App. 4th 1177, 1181–82 (Ct.
14 App. 2003)).)

15 Breach. Plaintiffs allege the Navy “negligently performed inspection and/or
16 oversight services” because the Navy “failed to comply” with several provisions of
17 Military Standard 1625D,” including those provisions mandating that the Navy:

- 18 • “inspect or require inspection of the Beam . . . as part of control or
19 structural inspections” pursuant to Sections 4.9.3.2(a) and (c),
20 4.9.3.2.1(a), 4.9.4.1, 5.2.5.4, and 5.2.5.4.2(a);
- 21 • “include or require inclusion of the Beam as an individual item listed
22 on the inspection checklists” pursuant to Sections 4.9.3.2(c) and
23 4.9.3.2.1(b);
- 24 • “require periodic gauging/ultrasonic testing of the Beam” pursuant to
25 Section 5.2.5.4.6; and

26
27 ⁸ “To prevail in an action for negligence” under California law, “the plaintiff must demonstrate
28 that the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that the breach
proximately caused plaintiff’s injuries.” *John B. v. Superior Court*, 38 Cal. 4th 1177, 1188 (2006) (citing
Wiener v. Southcoast Childcare Ctrs., Inc., 32 Cal. 4th 1138, 1145 (2004)).

- “evaluate or require evaluation of the Beam in response to observ[ed] of concrete spalling” pursuant to Section 5.2.5.4.

(*Id.* ¶ 61.) Plaintiffs do not identify any basis for the Navy’s purported breach other than its alleged noncompliance with Military Standard 1625D.

Causation and Damages. Plaintiffs allege that the Navy’s purported breach proximately and legally caused the Incident. They seek approximately \$13,800,998 in monetary damages arising out of the Incident. (Prayer for Relief, Compl. at pp. 18–19.) Plaintiffs allege this amount takes into consideration both (1) the Contract’s clause precluding the Navy’s liability for any “loss, damage, liability, or expense caused by, resulting from, or incurred as a consequence of *delay* or *disruption* of any type whatsoever” and (2) that NASSCO is partially at fault for the Incident. (Compl. ¶¶ 41, 48.)

Plaintiffs allege that this Court has subject matter jurisdiction over this action pursuant to the Federal Torts Claim Act (“FTCA”), 28 U.S.C. § 1346 *et seq.* (Compl. ¶ 12.)

2. Motion to Dismiss

On January 17, 2022, the Government moved to dismiss this action pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. (*See* Mem. 7–13.) It argues that although Plaintiffs cast their cause of action as “negligence,” their claim really is one for breach of contract and, thus, this Court lacks jurisdiction under the FTCA. Rather, the Government avers jurisdiction over this action lies exclusively with the United States Court of Federal Claims (“Court of Federal Claims”) under both the Tucker Act, 28 U.S.C. § 1491(a)(1), *et seq.*, and the Contract Disputes Act (“CDA”), 41 U.S.C. § 7104, *et seq.* (*Id.*)

Plaintiffs oppose the Government’s jurisdictional challenge. (Opp’n 6–13.) They contend their action falls under the purview of the FTCA that grants jurisdiction to federal district courts over claims by plaintiffs alleging the Government caused “injury or loss to property” through the Government’s negligent acts or omissions. (*Id.* 6 (citing 28 U.S.C. § 1346(b)(1).))

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1 II. LEGAL STANDARD

2 A. Rule 12(b)(1)

3 A motion to dismiss pursuant to Rule 12(b)(1) challenges a federal court's subject
4 matter jurisdiction. Where, as here, a Rule 12(b)(1) motion is filed alongside other Rule
5 12 motions, courts should consider the jurisdictional issue first, which "does not require"
6 analysis of the merits. *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011).

7 "Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins.*
8 *Co. of Am.*, 511 U.S. 375, 377 (1994). They "possess only that power authorized by
9 Constitution and statute." *Id.* "It is to be presumed that a cause lies outside this limited
10 jurisdiction, and the burden of establishing the contrary rests upon the party asserting
11 jurisdiction." *Id.*; *see also Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 561 (1992).

12 A Rule 12(b)(1) jurisdictional challenge may be either facial or factual. *See White*
13 *v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). In a facial challenge to subject matter
14 jurisdiction, a defendant asserts that the allegations in the complaint are insufficient to
15 establish jurisdiction as a matter of law. *Whisnant v. United States*, 400 F.3d 1177, 1199
16 (9th Cir. 2005). Where a defendant launches such a challenge, the court will accept the
17 plaintiff's allegations as true and will not look beyond the four corners of the complaint
18 and the documents attached thereto or incorporated by reference therein. *Id.* On the other
19 hand, where a defendant launches a factual challenge to jurisdiction it disputes the truth of
20 the complaint's allegations that, by themselves, would otherwise invoke jurisdiction. *See*
21 *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). Under a factual attack, "the
22 district court is not restricted to the face of the pleadings, but may review any evidence,
23 such as affidavits and testimony, to resolve factual disputes concerning the existence of
24 jurisdiction." *Id.*

25 B. Sovereign Immunity

26 "Where the United States is a defendant, a mere showing of federal jurisdiction does
27 not suffice." *United Aeronautical Corp. v. United States Air Force*, No. 2:20-CV-1095-
28 ODW (JDEx), 2021 WL 794500, at *3 (C.D. Cal. Mar. 2, 2021); *see N. Side Lumber Co.*

1 *v. Block*, 753 F.2d 1482, 1484 (9th Cir. 1985) (“[T]he analysis of jurisdiction cannot stop
 2 with [28] § 1331, because the claims in this case are in essence against the federal
 3 government”). That is because the United States “is immune from suit save as it
 4 consents to be sued, and the terms of its consent to be sued in any court define that court’s
 5 jurisdiction to entertain the suit.” *Tobar v. United States*, 639 F.3d 1191, 1195 (9th Cir.
 6 2011) (quoting *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981)); *see also Gabriel v. Gen.*
 7 *Servs. Admin.*, 547 F. App’x 829, 830 (9th Cir. 2013) (“The United States is immune from
 8 suit unless it has expressly waived its sovereign immunity by consenting to be sued[.]”).
 9 The United States’ consent to suit is a prerequisite for jurisdiction. *See McGuire v. United*
 10 *States*, 550 F.3d 903, 910 (9th Cir. 2008). Without a waiver of sovereign immunity, federal
 11 courts lack subject matter jurisdiction over cases against the government. *See United States*
 12 *v. Mitchell*, 463 U.S. 206, 212 (1983). “The party who sues the United States bears the
 13 burden of pointing to such an equivocal waiver of immunity.” *Holloman v. Watt*, 708 F.2d
 14 1399, 1401 (9th Cir. 1983) (citing *Cole v. United States*, 657 F.2d 107, 109 (7th Cir. 1981)).

15 Relevant to the instant Motion are three limited, congressional waivers of sovereign
 16 immunity: the FTCA; the Tucker Act; and the CDA.

17 1. FTCA

18 The FTCA “waives the sovereign immunity of the United States for actions in tort’
 19 and ‘vests the federal district courts with exclusive jurisdiction over suits arising from the
 20 negligence of Government employees.’”⁹ *Valadez-Lopez v. Chertoff*, 656 F.3d 851, 855
 21 (9th Cir. 2011) (quoting *Jerves v. United States*, 966 F.2d 517, 518 (9th Cir. 1992));
 22 *Thacker v. Tenn. Valley Auth.*, 139 S. Ct. 1435, 1439–40 (2019) (“Congress enacted the
 23 FTCA to waive immunity from tort suits involving agencies across the federal
 24 government.”); *see also* 28 U.S.C. § 1346(b)(1) (waiving suits for “money damages . . . for
 25

26
 27 ⁹ The FTCA has an exhaustion requirement, whereby a claimant must “seek an administrative
 28 resolution of [its] claim” before filing suit in federal district court. *Jerves*, 966 F.2d at 518 (citing
 28 U.S.C. § 2675(a)). The Navy does not contest Plaintiffs complied with that essential jurisdictional
 requirement. (*See also* Compl. ¶¶ 50–55 (alleging adherence to FTCA’s exhaustion procedures).)

1 injury or loss of property . . . caused by the negligent or wrongful act or omission of an
2 employee of the Government while acting within the scope of his office or employment,
3 under circumstances where, the United States, if a private person, would be liable to the
4 claimant in accordance with the law of the place where the act or omission occurred”).

5 **2. Tucker Act and CDA**

6 Through the Tucker Act, Congress also carved out a limited waiver of the United
7 States’ sovereign immunity over “any claim against the United States . . . upon any express
8 or implied contract with the United States” that seeks more than \$10,000 in
9 damages. *N. Side Lumber*, 753 F.2d at 1484 (quoting 28 U.S.C. § 1491(a)(1)). Unlike the
10 FTCA, however, the Tucker Act confers “exclusive” jurisdiction to the Court of Federal
11 Claims over claims falling thereunder. *McGuire*, 550 F.3d at 911; *but see In re Liberty*
12 *Constr.* 9 F.3d 800, 801 (9th Cir. 1993) (“[J]urisdiction under the Tucker Act is not
13 exclusive where other statutes independently confer jurisdiction and waive sovereign
14 immunity.” (quoting *Pacificorp v. Fed. Energy Regulatory Comm’n*, 795 F.2d 816, 826
15 (9th Cir. 1986) (Wallace, J., concurring))).

16 The CDA also contains an even narrower waiver of sovereign immunity for contract
17 claims against the Government. *See Winter v. FloorPro, Inc.*, 570 F.3d 1367, 1370 (Fed.
18 Cir. 2009). Specifically, the CDA waives immunity for claims arising out of “any express
19 or implied contract . . . made by an executive agency for procurement of property or
20 services, other than real property.” 41 U.S.C. § 7102(a). However, like the Tucker Act,
21 the CDA grants exclusive jurisdiction to claims covered under its provisions to the Court
22 of Federal Claims. *See United States v. Suntip Co.*, 82 F.3d 1468, 1474–75 (9th Cir. 1996)
23 (citing *Ingersoll–Rand Co. v. United States*, 780 F.2d 74, 78 (D.C. Cir. 1985)); *but see*
24 *Wright v. United States Postal Serv.*, 29 F.3d 1426, 1431 (9th Cir. 1994) (citing *In re*
25 *Liberty Construction*, 9 F.3d at 801, and holding CDA does not divest district courts of
26 jurisdiction where independent statutory basis for jurisdiction over claim exists).

27

28

1 Hence, while the Tucker Act and CDA’s limited waivers of sovereign immunity are
2 not identical, “both ultimately divest district courts of jurisdiction over claims concerning
3 contracts with the government.” *United Aeronautical*, 2021 WL 794500, at *4.

4 **III. ANALYSIS**

5 By its Motion, the Government argues this Court lacks subject matter jurisdiction
6 over Plaintiffs’ action because the single claim alleged in the Complaint does not fit within
7 the FTCA. No amount of massaging, the Government asserts, can support a construction
8 of Plaintiffs’ cause of action as “negligence.” The Government contends that Plaintiffs
9 effectively allege the Navy breached an “express . . . contract with the United States” and,
10 thus, the Tucker Act and CDA mandate their case be heard by the Court of Federal Claims
11 only.¹⁰ (Mem. 6–13.)

12 To resolve this jurisdictional dispute, the Court must undertake two inquiries. It first
13 must assess whether Military Standard 1625D creates enforceable contractual rights. Then,
14 it must determine whether Plaintiffs’ claim is based “upon breach by the government of a
15 promise made by it in a contract,” or whether Plaintiffs’ action exists independently as a
16 tort. *Woodbury v. United States*, 313 F.2d 291, 295 (9th Cir. 1963).

17 For the reasons stated below, this Court agrees with the Navy that Plaintiffs’ claim
18 fits within the Tucker Act and CDA, not the FTCA. Accordingly, the Court **GRANTS** the
19 Motion and **DISMISSES WITHOUT PREJUDICE** this action.

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22 //

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24 ¹⁰ The Court notes the Government’s Motion is a facial challenge to subject matter jurisdiction.
25 The Government does not contest the truthfulness of Plaintiffs’ allegations; rather, it avers that Plaintiffs
26 improperly style their cause of action as one sounding in negligence. And although the Government
27 proffers, unopposed, extraneous documents for this Court’s consideration—the Contract and Military
28 Standard 1625D—those documents are incorporated by reference to the Complaint. *See Khoja v.*
Orexigen Therapeutics, Inc., 899 F.3d 988, 1002 (9th Cir. 2018) (instructing that Courts may consider as
though part of the pleading extraneous documents upon which the pleading relies or to which it extensively
refers, under the doctrine of incorporation by reference); *see also United States v. Ritchie*, 342 F.3d 903,
907 (9th Cir. 2003).

1 **A. Incorporation by Reference of Military Standard 1625D**

2 The Court observes that, standing alone, Military Standard 1625D is not a
3 contractual instrument. *See Lockheed Martin Corp. v. England*, 424 F.3d 1199, 1206 (Fed.
4 Cir. 2005) (holding that a military standard can have legal effect of contract if it is
5 incorporated by reference into an instrument); *see also Cleek Aviation v. United States*, 19
6 Cl. Ct. 552, 554 (Cl. Ct. 1990). While it appears both parties assume the Contract explicitly
7 incorporates by reference Military Standard 1625D,¹¹ this Court feels it is necessary to
8 probe this presumption given that Military Standard 1625D’s legal effect is essential to the
9 underlying jurisdictional issue presented in the instant Motion.¹²

10 It is well-established that federal law governs interpretation of contracts to which the
11 Government is a party. *United States v. Allegheny Cty.*, 322 U.S. 174, 183 (1944) (“The
12 interpretation of federal government contracts is largely governed by federal common law
13 of contracts.”); *Smith v. Cent. Ariz. Water Conservation Dist.*, 418 F.3d 1028, 1034 (9th
14 Cir. 2005) (“Federal law governs the interpretation of contracts entered into pursuant to
15 federal law and to which the government is a party.” (citing *O’Neill v. United States*, 50
16 F.3d 677, 682 (9th Cir. 1995))).¹³ When employing federal common law to interpret the
17

18 ¹¹ The Government conclusively states in its opening brief that the Contract “incorporate[s]
19 [Military Standard 1652D] by reference,” where it provides “[d]rydocking facilities and shipbuilding ways
20 employed in the performance of this contract shall be certified in accordance with [Military Standard
21 1652D].” (Mem. 3 (citing Contract 33).) But the Government does not provide any accompanying
22 analysis or authority for that legal premise. Nevertheless, Plaintiffs do not oppose the Government’s
23 assertion that Military Standard 1652D creates enforceable rights and obligations. In fact, Plaintiffs
24 appear to *agree* with that notion. (*See, e.g.*, Opp’n 2 (“[Military Standard 1652D] *mandates* participation
25 by the Navy in various aspects of the [graving dock] certification process, *e.g.*, inspections” (emphasis
26 added)).

27 ¹² The Contract itself does not require the Navy to provide “oversight” of NASSCO’s “control
28 inspections” of the Basin’s graving dock, nor does it describe what form that oversight must take. That
information resides exclusively within Military Standard 1625D. But if Military Standard 1625D is not
contractual in nature and, thus, the Navy’s promises set forth therein to oversee NASSCO’s control
inspections are not enforceable ones, then it cannot be said Plaintiffs assert, in substance, a breach of
contract action for the Navy’s alleged failure to comply with that Standard. *See, e.g., Crewzers Fire Crew
Trans., Inc. v. United States*, 741 F.3d 1380, 1382–83 (Fed. Cir. 2014) (holding essential predicate of
breach of contract claim is a valid and enforceable contract).

¹³ Although the Ninth Circuit “ha[s] recognized limited circumstances in which state law may
apply to the interpretation of a federal contract, such as when the United States is not a party, or when the

1 provisions and meaning of a contract, courts may look to “general principles for
2 interpreting contracts.” *GECCMC 2005-C1 Plummer St. Office Ltd. P’ship v. JPMorgan*
3 *Chase Bank, Nat’l Ass’n*, 671 F.3d 1027, 1033 (9th Cir. 2012) (quoting *Klamath Water*
4 *Users Prot. Ass’n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999)).

5 One such “general principle” is that “[w]here a contract incorporates by reference
6 the contents of another writing, the two documents constitute one agreement and should be
7 read together.” *See generally Colden v. Asmus*, 322 F. Supp. 1163, 1165 (S.D. Cal. 1971).
8 Williston on Contracts—perhaps the leading treatise on contract law—provides:

9 Generally, all writings which are part of the same transaction are interpreted
10 together. One application of this principle is the situation in which parties
11 have expressed their intention to have one document’s provision read into a
12 separate document. As long as the contract makes clear reference to the
13 document and describes it in such terms that its identity may be ascertained
14 beyond doubt, the parties to a contract may incorporate contractual terms by
15 reference to a separate, noncontemporaneous document, including a separate
16 agreement to which they are not parties, and including a separate document
17 which is unsigned.

18 Williston on Contracts § 30:25 (4th ed. 2021) (footnotes omitted).

19 With this general principle in mind, the Court finds significant that, in interpreting
20 the provisions of government contracts, the Federal Circuit has explicitly held federal
21 common law recognizes the doctrine of incorporation by reference. *See, e.g., Advanced*
22 *Display Sys. Inc. v. Kent State Univ.*, 212 F.3d 1272, 1282 (Fed. Cir. 2000) (“To incorporate
23 by reference, the host document must identify with detailed particularity what specific
24 material it incorporates and clearly indicate where that material is found[.]”); *Dobyns v.*
25 *United States*, 915 F.3d 733, (Fed. Cir. 2019), *cert. denied*, 140 S. Ct. 1106 (2020)
26 (“[L]anguage used in a contract to incorporate extrinsic material by reference must
27 explicitly, or at least precisely, identify the written material being incorporated and must

28 direct interests and obligations of the government are not in question,” the instant action does not present
one of those limited circumstances. *Smith*, 418 F.3d at 1034 (citing *Flagstaff Med. Ctr., Inc. v. Sullivan*,
962 F.2d 879, 890 (9th Cir. 1992)).

1 clearly communicate that the purpose of the reference is to incorporate the referenced
2 material into the contract.” (quoting *Northrop Grumman Info. Tech., Inc. v. United States*,
3 535 F.3d 1339, 1345 (Fed. Cir. 2008))).

4 This Court agrees with the parties that the Contract incorporates by reference
5 Military Standard 1625D. The Contract expressly identifies precisely that it seeks to
6 incorporate the SCP and indicates that the SCP is found in Military Standard 1625D.
7 (Contract 86–87 (“Drydocking facilities and shipbuilding ways employed in the
8 performance of this contract shall be certified in accordance with [Military Standard
9 1625D], dated 27 August 2009, [SCP] for Drydocking Facilities and Shipbuilding Ways
10 for U.S. Navy Ships.”).) This conclusion rests on all fours with *Lockheed Martin Corp. v.*
11 *England*, 424 F. Supp. 1199, 1206 (2005), in which the Federal Circuit held that
12 agreements between the Navy and contractors can incorporate by reference military
13 standards. *Id.* at 1206 (incorporating by reference a military standard into primary contract
14 and sub-contracts); *see also Cleek Aviation*, 19 Cl. Ct. at 554 (incorporating by reference
15 military standard into primary contract).

16 Accordingly, Military Standard 1625D is “constructively part of the [Contract],”
17 and, together, they are to be interpreted and construed as part of “a single instrument.”
18 Williston on Contracts § 30:25.

19 **B. Whether the FTCA Applies**

20 Having found Military Standard 1625D has the same legal effect as the Contract, the
21 Court next turns to whether Plaintiffs appropriately couch their cause of action as a tort
22 arising under the FTCA, or if Plaintiffs substantively allege breach of contract by the Navy
23 for failing to comply with Military Standard 1625D, a claim over which the Court of
24 Federal Claims has exclusive jurisdiction pursuant to the Tucker Act and CDA.

25 Courts do not allow a plaintiff’s artful pleading to dictate whether a claim is tortious
26 or contractual in nature for the purpose of determining if the FTCA or the Tucker Act and
27 CDA apply. *See Rowe v. United States*, 633 F.2d 799, 802 (9th Cir. 1980), *cert denied*,
28 451 U.S. 970 (1980) (holding plaintiffs cannot rely upon cunning pleading to “evade”

1 Court of Federal Claim’s exclusive jurisdiction under Tucker Act); *LaPlant v. United*
2 *States*, 872 F.2d 881, 882 (9th Cir. 1989), *withdrawn, replaced on reh’g*, 916 F.2d 1337
3 (“At the outset, we note that the language of appellant’s complaint, which casts its claim
4 for relief in terms of tort rather than contract, cannot be determinative in our inquiry.”);
5 *accord Putnam Mills Corp. v. United States*, 432 F.2d 554 (2d Cir. 1970) (per curiam)
6 (“Plaintiff’s attempt to classify his cause of action as a prima facie tort does not suffice to
7 avoid the jurisdictional inhibitions on claims in deceit or contract.”). Rather, “[t]he
8 classification of a particular action as one which is or is not ‘at its essence’ a contract action
9 depends on . . . the source of the rights upon which the plaintiff bases its claim. . . .”
10 *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 967–68 (D.C. Cir. 1982), *cited approvingly by N.*
11 *Star Alaska v. United States*, 14 F.3d 36, 37 (9th Cir. 1994); *see Gabriel*, 547 F. App’x at
12 831 (instructing courts to examine “two factors to determine whether [an] action is founded
13 upon a contract for purposes of the Tucker Act”: the “source of the rights” and “the type
14 of relief sought” (quoting *Megapulse*, 672 F.2d at 967–68)); *but see Tucson Airport Auth.*
15 *v. Gen. Dynamics Corp.*, 136 F.3d 641, 647 (9th Cir. 1998) (holding plaintiff’s claim
16 sounded in contract, not tort, based upon “source of rights” analysis only).

17 The Ninth Circuit has applied this legal framework in several instances and, in doing
18 so, has elucidated where in the sand it draws the line to determine whether an action sounds
19 in tort or contract for jurisdictional purposes. On the one hand, the Ninth Circuit has held
20 in a line of cases beginning with *Woodbury v. United States*, 313 F.2d 291, 295 (9th Cir.
21 1963) that where a “‘tort’ complained of is based entirely upon breach by the government
22 of a promise made by it in a contract, so that the claim is in substance a breach of contract
23 claim, and only incidentally and conceptually also a tort claim, we do not think that the
24 common law or local state law right to ‘. . . sue in tort’ brings the case within the Federal
25 Tort Claims Act.” *Id.* at 295. *Woodbury* involved a real estate developer who obtained
26 financing from the Federal Housing Administration (“FHA”) in the form of an “interim
27 construction loan” to build housing for Navy personnel at a base in Alaska. The project
28 was marred by financial difficulty, and when the FHA foreclosed, the plaintiff sued the

1 FHA for breach of fiduciary duty premised upon the FHA’s failure to arrange for or provide
2 long-term financing. The Ninth Circuit concluded that although plaintiff had styled his
3 claim as a tort it was, in essence, a breach of contract claim because liability depended
4 purely upon (1) the FHA’s promise in the interim loan contract and (2) whether the FHA
5 had breached that promise. *Id.* at 296–97 (“Fiduciary duty or not, there can be no liability
6 in this case unless Woodbury can prove (1) an express or implied promise by the
7 government, through the [FHA], to adopt and carry out a permanent long-range plan to
8 finance the project and (2) a wrongful breach of that promise.”).

9 Since *Woodbury*, the Ninth Circuit has held that where the elements of a claim
10 against the Government styled as a “tort” essentially are co-extensive with what the
11 plaintiff must allege to prove breach of contract, the FTCA does not govern, despite the
12 plaintiff’s classification of the claim. *See, e.g., LaPlant*, 872 F.2d at 881, 884 (holding
13 claim cast as “breach of duty of good faith” under Montana law predicated upon plaintiff’s
14 loan agreement with the Farmers Home Administration (“FmHA”) was substantively a
15 breach of contract premised upon an obligation “deriv[ed] from a governmental promise
16 as opposed to obligations externally imposed by state law”); *N. Star Alaska*, 14 F.3d at 37
17 (holding claim for reformation cast by plaintiff as a statutory cause of action fell within
18 Tucker Act for plaintiff’s “right to reformation is based upon the [underlying] contractual
19 agreement itself”); *Love v. United States*, 915 F.2d 1242 (9th Cir. 1989) (holding claim for
20 negligent undertaking of a contract did not fit within FTCA because it effectively alleged
21 “economic harm arising out of an alleged abuse of a contractual relationship”); *cf.*
22 *Performance Contracting, Inc. v United States*, 2:11-cv-2920-MCE-CKD, 2012 WL
23 3234210, at *1 (E.D. Cal. Aug. 6, 2012) (holding claim cast as one for negligent oversight
24 and inspection of construction project was truly for breach of contract “because each claim
25 depends on the interpretation of the Government’s contractual obligations under” the
26 construction contract); *United Aeronautical*, 2021 WL 794500, at *1.

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1 At the same time, the Ninth Circuit in *Woodbury* recognized that some wrongs that
2 sound in both tort and contract properly fit within the FTCA. *Woodbury*, 313 F.2d at 296.
3 Specifically, the Ninth Circuit opined:

4 We do not mean that no action will ever lie against the United States under
5 the [FTCA] if a suit could be maintained for a breach of contract based upon
6 the same facts [as a collateral claim sounding in tort]. We only hold that
7 where, as in this case, the action is essentially for breach of a contractual
8 undertaking, and the liability, if any, depends wholly upon the government's
9 alleged promise, the action must be under the Tucker Act [and/or the CDA],
and cannot be under the [FTCA].

10 *Id.* at 296 (citing *Aleutco Corp. v. United States*, 244 F.2d 674 (1957)). In *Walsh v. United*
11 *States*, 672 F.2d 746 (9th Cir. 1982), *Fort Vancouver Plywood Co. v. United States*, 747
12 F.2d 547 (9th Cir. 1984), and *Love v. United States*, 915 F.2d 1242 (9th Cir. 1989), the
13 Ninth Circuit elucidated under what circumstances a claim that can be conceptualized as
14 sounding in both contract and tort is properly before a district court pursuant to the FTCA.

15 In *Walsh*, plaintiffs sold and conveyed a highway easement, which crossed lands
16 used by plaintiffs for the pasturage of cattle. 672 F.2d at 747. Over the course of time,
17 plaintiffs' cattle guards on the easement property became damaged and filled with dirt,
18 snow, and debris" due to its proximity to the highway. *Id.* Plaintiffs sued the Government
19 for negligence, alleging that the Government's deficient maintenance and repair of the
20 easement, which, in turn, damaged plaintiffs' livestock operation. *Id.* The Government
21 moved to dismiss the complaint for lack of subject matter jurisdiction, arguing that
22 plaintiffs truly alleged a breach of contract predicated upon the terms of the easement. *Id.*
23 The Ninth Circuit disagreed, finding that "the terms of the conveyance d[id] not
24 unambiguously place a duty of repair upon [the Government]," but that duty arose from
25 the *common law* privilege and duty of the owner of the easement to repair and maintain it."
26 *Id.* at 748–50. Thus, the Ninth Circuit found plaintiffs' conversion claim was "essentially
27 one sounding in tort" and distinguishable from the "tort" claim in *Woodbury*, which
28 substantively alleged breach of contract. *Id.*

1 In *Fort Vancouver Plywood*, the Ninth Circuit clarified that where tort “[l]iability is
2 not established exclusively by contract,” a claim may be permitted under the FTCA “even
3 if liability did arise because of contract obligations.” 747 F.2d at 552 (citing *Woodbury*,
4 313 F.2d at 291, and *Walsh*, 672 F.2d at 746). There, plaintiff entered a timber sales
5 contract with the United States Forest Service (“USFF”). After plaintiff had cut and
6 prepared the timber pursuant to the contract, but before the timber was removed, an
7 adjacent site at which the USFF was conducting a “slash and burn” operation caught fire.
8 *Id.* at 549. That fire crossed over to plaintiff’s site, destroying the timber. *Id.* Plaintiffs
9 sued the USFF in district court, alleging that it had negligently performed the slash and
10 burn operation. The Government moved to dismiss the action for lack of subject matter
11 jurisdiction, arguing that the claim arose under the sales contract and, thus, *Woodbury*, not
12 *Walsh*, controlled. *Id.* at 550–51. The Ninth Circuit disagreed, opining that the sales
13 contract was only remotely relevant to the elements plaintiffs would be required to prove
14 in order to establish the USSF had been negligent in its slash and burn operation. *Id.* at
15 551–52. In so holding, the Ninth Circuit found significant that the timber contract “d[id]
16 not allocate liability under the circumstances presented”; rather, the contract “establishe[d]
17 ownership interests [in the timber], but otherwise [was] not implicated” by plaintiff’s
18 negligence claim. *Id.*

19 Finally, the Ninth Circuit reiterated in *Love* that district courts may retain jurisdiction
20 pursuant to the FTCA over a claim “could have been brought as a breach of contract claim,
21 but [that] equally support[ed] a tort claim.” 915 F.2d at 1246. In *Love*, plaintiffs—
22 Montana farmers—entered into agricultural loans with the FmHA secured by a chattel
23 mortgage on plaintiff’s livestock and machinery. *Id.* at 1244. When plaintiffs defaulted
24 on the loan, the FmHA instituted bankruptcy proceedings pursuant to which plaintiffs’
25 livestock and machinery were sold. *Id.* Plaintiffs instituted an action in district court
26 asserting, *inter alia*, the FmHA had converted their livestock and machinery when it
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1 wrongfully instituted the bankruptcy sale.¹⁴ *Id.* The Government moved for dismissal of
2 under Rule 12(b)(1) on the ground plaintiffs’ conversion claim was, in substance, a claim
3 for breach of the loan agreement. As in *Walsh* and *Fort Vancouver Plywood*, the Ninth
4 Circuit disagreed. *Id.* at 1247. The Ninth Circuit reasoned that plaintiffs’ conversion claim
5 fell within the FTCA because plaintiffs’ success on the merits of that cause of action did
6 not “depend[] wholly upon the government’s alleged [breach of] promise” but on plaintiffs’
7 “claim of ownership and possession of property.”¹⁵ *Id.* Accordingly, the Ninth Circuit
8 held that plaintiff’s conversion claim in *Love* did not resemble the breach of fiduciary duty
9 in *Woodbury*. *Id.*

10 Here, the Government contends that the instant action is governed by the *Woodbury*
11 line of cases, whereas Plaintiffs assert conversely that the Ninth Circuit’s precedent under
12 *Walsh*, *Fort Vancouver Plywood*, and *Love* controls. In the Court’s view, the jurisdictional
13 question at the heart of the Motion is not a close call. This is not an action in which a
14 breach of contract merely lies in the background of Plaintiffs’ negligent undertaking claim
15 or, as Plaintiffs describe it, one in which a contract incidentally supports but one element
16 of an otherwise independent state law tort. Rather, this action is paradigmatic of the sorts
17 described by the Ninth Circuit in *Woodbury*, where the Government’s liability “depends
18 wholly upon the government’s alleged promise,” and, thus, is under the Tucker Act or
19 CDA, not the FTCA. 313 F.2d at 296; *cf. Performance Contracting*, 2012 WL 3234210 at
20 *1. Plaintiffs’ allegation that the Navy owed to NASSCO a duty to perform with
21 reasonable care “inspection and oversight services” is lifted straight from Section 4.9.3.2.1
22 of Military Standard 1625D. (*Compare* Compl. ¶ 60 with Military Standard 4.9.3.2.1.)
23 Moreover, Plaintiffs’ “breach” allegations rely exclusively upon the assertion that the Navy
24 failed to oversee control inspections in the manner prescribed in Sections 4.9.3.2.1 and 5.2
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26 ¹⁴ Plaintiffs also alleged that FmHA had negligently undertaken services pursuant to the loan
27 agreement. *Love*, 915 F.2d at 1246.

28 ¹⁵ As explained at *supra* page 16, however, the Ninth Circuit found that FTCA jurisdiction *did not*
extend to plaintiffs’ negligent undertaking claim, which effectively alleged “economic harm arising out
of an alleged abuse of a contractual relationship.” *Id.* at 1248.

1 of Military Standard 1625D—no other basis for finding breach is alleged in the Complaint.
2 (Compl. ¶ 61 (alleging the Navy “breached” its duty of care owed to NASSCO by “fail[ing]
3 to comply” with Military Standard 1625D and citing several sub-provisions of Sections
4 4.9.3.2.1 and 5.2 with which the Navy purportedly failed to abide, by way of example).)
5 In sum, Plaintiffs’ negligent undertaking theory in the instant action does nothing to render
6 the Navy liable for any independent state tort that does not depend on the Navy’s purported
7 breach of the Contract.

8 Put differently, there can be no question Plaintiffs’ “negligence” claim is
9 contractually based because it requires the Court to decide what NASSCO’s rights were
10 pursuant to the Contract and Military Standard 1625D in order to determine whether
11 Plaintiffs establish duty, breach, and even damages. *See Tucson Airport Auth.*, 136 F.3d at
12 647 (finding claim styled as tort to be contractually-based where plaintiff was “asking the
13 district court to decide what its contract rights [were]”); *Performance Contracting*, 2012
14 WL 3234210, at *4 (“Each of Plaintiff’s causes of action is essentially one for breach of
15 contract because each claim depends on the interpretation of the Government’s contractual
16 obligations under the General Contract.”). Indeed, the Court cannot even assess what
17 amount, if any, Plaintiffs are entitled, assuming *arguendo* they establish liability, without
18 wading into the morass of interpreting the Contract and Military Standard 1625D’s liability
19 clauses. (Contract 69–70 (immunizing Navy from liability “for any loss, damage, liability
20 or expense caused by, resulting, or incurred as a consequence of delay or disruption of any
21 type whatsoever”); Foreword ¶ 5, Military Standard 1625D (stating NASSCO shall be
22 solely responsible for maintaining and operating” the graving dock).)¹⁶ But district courts
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24 ¹⁶ Plaintiffs attempt to sidestep this issue entirely by alleging they seek only “losses from the
25 Incident which are recoverable from the United States (those which are not ‘a consequence of delay or
26 disruption’),” and by asserting that Military Standard 1625D does not contain language necessary under
27 California law to limit liability. (Opp’n 12.) However, there clearly is a dispute between the parties as
28 to both the scope of “delay and disruption” within the meaning of the Contract and the effect of the liability
limitations in Military Standard 1625D. (*See supra* Sec. II.A (explaining federal law—not California
law—governs the contracts to which the Government is a party).) Thus, the Court does not foresee any
circumstance under which interpretation of the liability-limiting provisions of the Contract and Military
Standard 1625D will evade its analysis, should the Court reach the question of damages.

1 are forbidden from undertaking federal-contract interpretation to resolve claims that, in
2 substance, allege the Government breached an express contract for services and the
3 claimant seeks over \$10,000 in damages. *United States Marine, Inc. v. United States*, 722
4 F.3d 1360 (Fed. Cir. 2013) (“[W]hen there is no other jurisdictional grant covering a
5 contract claim already covered by the Tucker Act, that Act’s conferral of jurisdiction on
6 the [Court of Federal Claims] is exclusive because no other grant exists.” (citing *Bowen v.*
7 *Massachusetts*, 487 U.S. 879, 910 n.48 (1988))); *see also LaPlant*, 772 F.2d at 884 (holding
8 Tucker Act’s policy goal is to “ensur[e] uniformity in the interpretation and application of
9 the obligations attaching to governmental contracts,” which the Tucker Act (and the CDA)
10 achieve by remitting such claims to the Court of Federal Claims).

11 Plaintiffs acknowledge that its negligence claim is derived from the Contract but
12 assert that there also exists independent tort liability under California’s doctrine of
13 negligent undertaking of services. (Opp’n 8; Compl. ¶ 59 (alleging that California also
14 recognizes the negligent undertaking doctrine contained in Section 324A of the
15 Restatement Second of Torts).)¹⁷ But the Ninth Circuit has made clear a [state’s] law’s
16 characterization of an action . . . as an action sounding in tort [cannot] control our inquiry.”
17 *See LaPlant*, 74 F.2d at 882–83 (“); *Performance Contracting*, 2012 WL 3234210, at *5
18 (similar). Indeed, the Ninth Circuit instructs federal district courts to “ignore . . . state law
19 characterizations of [a] claim” when classifying a claim as tortious or contractual, and
20 “focus instead on substance,” *i.e.*, the source from which the rights upon which a plaintiff
21 predicates its claim emanate. *LaPlant*, 74 F.2d at 882–83; *see N. Star Alaska*, 14 F.3d at
22 37. Thus, it matters not that California law recognizes an independent tort claim for
23 negligent undertaking of services where, as here, that tort is “wholly dependent” upon
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26 ¹⁷ Plaintiffs also argue in their opposition that the Navy owed Plaintiffs a duty of care arising out
27 of its exercise of control over the Basin. (Opp’n 8.) But the Complaint does not allege any such duty, nor
28 does the Complaint allege the Navy exercised any degree of control over the Basin or graving dock—it
alleges only that the Navy was obligated to provide oversight of control inspections. The Court will not
consider a theory of negligence Plaintiffs proffer in their Opposition without any predicate in the
Complaint.

1 Plaintiffs’ contractual rights and the Navy’s contractual obligations explicitly set forth in
2 the Contract and Military Standard 1625D. *See Woodbury*, 313 F.2d at 296.

3 This Court’s conclusion that the instant action falls outside the contours of the FTCA
4 is consistent with the Ninth Circuit’s decisions in *Walsh*, *Fort Vancouver Plywood*, and
5 *Love*. Those decisions do not alter the central holding in *Woodbury* that where a claim
6 styled as a tort is “based entirely upon breach by the government of a promise made by it
7 in a contract” the FTCA does not apply. *Love*, 915 F.2d at 1248. An examination of the
8 source of the rights upon which Plaintiffs’ claim rests lays bare that that is precisely the
9 case here.

10 Accordingly, the Court finds that Plaintiffs have failed to establish their claim falls
11 within the FTCA and, therefore, that the Court has subject matter jurisdiction over this
12 action.

13 * * * *

14 Having concluded this Court lacks subject matter jurisdiction under the FTCA, the
15 Court need not address the remaining arguments in the Motion. *See Maya*, 658 F.3d at
16 1068 (9th Cir. 2011). Accordingly, the Court holds that Plaintiffs’ claim must be brought,
17 if at all, before the Court of Federal Claims pursuant to the waivers of immunity in the
18 Tucker Act and CDA. *See* 28 U.S.C. § 1491(a)(1) (granting Federal Court of Claims
19 jurisdiction over breach of contract actions against Government exceeding \$10,000 in
20 damages); 41 U.S.C. § 7102 (granting Federal Court of Claims jurisdiction over action for
21 breach of contract actions against Government in which underlying contract was made by
22 “an executive agency for . . . the procurement of services [or] the . . . maintenance of real
23 property”). The Navy’s Motion is thus **GRANTED** with leave to amend.


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1 **IV. CONCLUSION**

2 For the reasons stated above, the Motion is **GRANTED WITHOUT PREJUDICE**
3 to leave to amend. Plaintiffs may file an amended complaint by **no later than May 20,**
4 **2022.**

5 **IT IS SO ORDERED.**

6 **DATED: April 28, 2022**


Hon. Cynthia Bashant
United States District Judge

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