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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CALIFORNIA MARINE
CLEANING, INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA,
through the DEPARTMENT OF
THE NAVY,

Defendant.

Case No.: 22-cv-741-LAB-BLM

ORDER

- 1) DENYING MOTION TO DISMISS, [Dkt. 9]; and**
- 2) GRANTING IN PART AND DENYING IN PART REQUEST FOR JUDICIAL NOTICE, [Dkt. 12-1]**

Plaintiff California Marine Cleaning, Inc. (“Cal Marine”) sued the United States, through the Department of the Navy (the “Navy”), in connection with the July 2020 fire aboard the USS Bonhomme Richard (“BHR”), which at the time of the fire was pier-side at Naval Base San Diego. Cal Marine alleges that the Navy failed to take reasonable care in fire safety, prevention, and suppression aboard the ship, and is liable for damages stemming from its negligent actions. The suit invokes the Public Vessels Act (“PVA”), 46 U.S.C. §§ 31101, *et seq.*, and the Suits in Admiralty Act (“SIAA”), 46 U.S.C. §§ 30901, *et seq.*

The United States moves to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) (the “Motion”), arguing that

1 because the dispute relates to the execution of a government contract, Cal Marine
2 was required to exhaust its administrative remedies under the Contract Disputes
3 Act (“CDA”), 41 U.S.C. § 7102, prior to filing this suit, which the United States
4 alleges it hasn’t done. (Dkt. 9). Cal Marine opposes the Motion, arguing that
5 because this case is based in tort, not contract, the CDA’s exhaustion
6 requirements don’t apply, and this Court has federal question jurisdiction over Cal
7 Marine’s federal admiralty claims. (Dkt. 12). Cal Marine also filed a request for
8 judicial notice in support of its opposition. (Dkt. 12-1).

9 **I. BACKGROUND**

10 On September 4, 2018, the Naval Sea Systems Command awarded
11 National Steel and Shipbuilding Co. (“NASSCO”) a contract to perform repair work
12 onboard the BHR. (See Dkt. 9-2). NASSCO, in turn, subcontracted part of the
13 repair work—namely flushing, cleaning, and making gas-free tanks throughout the
14 ship—to Cal Marine. (See Dkt. 9-8). This work was ongoing when, in July 2020, a
15 fire broke out on the BHR, destroying some of Cal Marine’s equipment and
16 preventing it from completing the project. (Dkt. 1, Compl. ¶¶ 3, 42–44).

17 On October 18, 2021, the Navy’s Major Fires Review released a report
18 assessing the July 2020 fire and ultimately attributing the fire in part to several
19 failures by the Navy to follow its own policies, including failing to exclude
20 unauthorized individuals from entering the vessel, properly responding to the fire,
21 adhering to fire safety standards, and properly handling and stowing hazardous
22 and combustible materials. (*Id.* ¶ 19). The report also broadly discusses
23 ineffective day-to-day training, insufficient oversight and accountability, and
24 inconsistent attention and resourcing on pier-side fire safety and damage control
25 readiness. (*Id.* ¶ 20). Following the fire, the Navy commenced disciplinary
26 proceedings against multiple sailors, officers, and admirals. (*Id.* ¶ 21). Cal
27 Marine’s Complaint asserts three causes of action against the United States for
28 negligence, ultrahazardous activity, and respondeat superior liability. (*Id.*

1 ¶¶ 22–40). Cal Marine asserts these under the PVA and, in the alternative, under
2 the SIAA. (*Id.* ¶ 1).

3 **II. LEGAL STANDARD**

4 “Federal courts are courts of limited jurisdiction.” *Kokkonen v. Guardian Life*
5 *Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). “Subject matter jurisdiction must exist
6 as of the time the action is commenced.” *Morongo Band of Mission Indians v. Cal.*
7 *State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988). Rule 12(b)(1) of
8 the Federal Rules of Civil Procedure allows a defendant to move for dismissal on
9 the grounds that the court lacks subject matter jurisdiction over a case. Fed. R.
10 Civ. P. 12(b)(1). The burden is on the plaintiff to establish that the court has
11 subject matter jurisdiction over an action. *Assoc. of Am. Med. Colls. v. United*
12 *States*, 217 F.3d 770, 778–79 (9th Cir. 2000). In resolving an attack on its
13 jurisdiction, a court may go outside the pleadings and consider evidence beyond
14 the complaint relating to jurisdiction without converting the motion to dismiss into
15 a motion for summary judgment. *Safe Air For Everyone v. Meyer*, 373 F.3d 1035,
16 1039 (9th Cir. 2004). If the district court ultimately determines it has no jurisdiction
17 over the subject matter, “the action should [be] dismissed, regardless of the
18 parties’ preference for an adjudication in federal court.” *Morongo Band of Mission*
19 *Indians*, 858 F.2d at 1380.

20 **III. ANALYSIS**

21 **A. Statutory Framework**

22 Under the SIAA, the United States’ sovereign immunity is waived “in cases
23 where ‘a civil action in admiralty could be maintained’ against a private person in
24 the same situation.” *Ali v. Rogers*, 780 F.3d 1229, 1233 (9th Cir. 2015) (quoting
25 46 U.S.C. § 30903(a)). The SIAA permits a party to bring a civil action in personam
26 in admiralty against the United States where (1) the “vessel is owned by the United
27 States or operated on its behalf,” and (2) there is a “remedy cognizable in
28 admiralty for the injury.” *Id.* The SIAA “does not itself provide a cause of action. It

1 merely operates to waive the sovereign immunity of the United States in admiralty
2 suits.” *Dearborn v. Mar Ship Operations, Inc.*, 113 F.3d 995, 996 n.1 (9th Cir.
3 1997).

4 Like the SIAA, the PVA also provides for the statutory waiver of federal
5 sovereign immunity in the admiralty context. The PVA applies to “civil action[s] in
6 personam in admiralty . . . for damages caused by a public vessel of the United
7 States.” 46 U.S.C. § 31102(a)(1). The Ninth Circuit has interpreted the phrase
8 “damages caused by a public vessel” broadly “to encompass *all* tort and contract
9 claims ‘arising out of the possession or operation of the ship.’” *Tobar v. United*
10 *States*, 639 F.3d 1191, 1198 (9th Cir. 2011) (emphasis in original) (quoting
11 *Thomason v. United States*, 184 F.2d 105, 107 (9th Cir. 1950)); see *Canadian*
12 *Aviator, Ltd. v. United States*, 324 U.S. 215, 224 (1945) (holding “[t]he consent to
13 suit embodied in the [PVA] thus extends to cases where the negligence of the
14 personnel of a public vessel in the operation of the vessel causes damage to other
15 ships, their cargoes, and personnel”). “The [SIAA] and the subsequently adopted
16 [PVA] are complementary jurisdictional statutes providing for admiralty suits
17 against the United States.” *Aliotti v. United States*, 221 F.2d 598, 602 (9th Cir.
18 1955). “[B]y virtue of their interrelated status, the SIAA and the PVA together
19 provide original and exclusive admiralty jurisdiction in the United States district
20 courts.” *Guidry v. Durkin*, 834 F.2d 1465, 1472 (9th Cir. 1987) (internal citation
21 and footnote omitted).

22 **B. Admiralty Jurisdiction**

23 The United States argues that dismissal is appropriate here because,
24 despite styling this as a tort case, Cal Marine’s claims actually sound in contract,
25 and as such, Cal Marine was required to first exhaust its administrative remedies
26 pursuant to the CDA, 41 U.S.C. §§ 7101 *et seq.*, before bringing suit in federal
27 court. The United States represents that NASSCO submitted a Request for
28 Equitable Adjustment (“REA”) on Cal Marine’s behalf to the Navy, and this claim

1 is still pending before the Navy's Contracting Officer. Cal Marine disputes this,
2 stating that it doesn't have a REA claim with the Navy¹ and, contrary to the United
3 States' characterizations, its claims are entirely based in admiralty tort, thus falling
4 within the purview of this Court's jurisdiction. The Court agrees with Cal Marine.

5 A plaintiff's "[t]ort claims may sound in admiralty jurisdiction if they satisfy a
6 test with three components showing that the claim has the requisite maritime
7 flavor." *Ali*, 780 F.3d at 1235 (citing *Christensen v. Georgia-Pacific Corp.*, 279
8 F.3d 807, 814 (9th Cir. 2002)). The relevant tort or harm must've "(1) taken place
9 on navigable water (or a vessel on navigable water having caused an injury on
10 land), (2) a potentially disruptive impact on maritime commerce, and (3) a
11 substantial relationship to traditional maritime activity." *Id.* (citing *Jerome B.*
12 *Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995)
13 (internal quotations omitted)). Cal Marine's tort claims sound in admiralty
14 jurisdiction because the fire occurred aboard the BHR while it was docked at the
15 Naval Base San Diego undergoing repairs and maintenance, a fact that isn't
16 disputed by either party. See *Sisson v. Ruby*, 497 U.S. 358, 367 (1990) (finding a
17 fire that erupted on a yacht during the storage and maintenance of such a vessel
18 on navigable waters is related to maritime activity). As in *Sisson*, Cal Marine has
19 satisfied all three requirements for admiralty jurisdiction: (1) the fire occurred
20 aboard the BHR while it was docked at Naval Base San Diego, (2) the fire had a
21 potentially disruptive impact on maritime commerce by spreading to nearby
22 vessels or making the marina inaccessible while the fire was being contained and
23 extinguished over four days, and (3) maintenance or repairs of a vessel at a
24 marina on navigable waters is related to maritime activity.

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28 ¹ NASSCO filed an REA claim, but Cal Marine has requested any claim involving relief for its damages be withdrawn. (See Dkt. 12-3 ¶ 3, Ex. 3).

1 1. **Applicability of CDA**

2 A plaintiff “may not avoid the jurisdictional bar of the CDA merely by alleging
3 his contract dispute in the language of tort.” *See Mendenhall v. Kusicko*, 857 F.2d
4 1378, 1379 (9th Cir. 1988). The United States argues that Cal Marine’s tort claims
5 arose from and relate to a contract between the Navy and NASSCO, which
6 NASSCO then individually subcontracted to Cal Marine. According to the
7 Government, this limits the waiver of immunity in the PVA and SIAA. (Dkt. 9 at 15).
8 The Government contends, “the SAA and PVA provide general waivers of
9 sovereign immunity in maritime cases such as this, but because the losses in this
10 case relate to performance under a government contract, the more specific waiver
11 of sovereign immunity in the CDA applies.” (*Id.* at 16). The Court disagrees with
12 this position, and finds the case law cited in support of this proposition
13 unpersuasive.

14 Specifically, the United States quotes *Southwest Marine, Inc. v. United*
15 *States* for the proposition that the CDA “has been carefully drafted to give
16 jurisdiction to federal district courts after the administrative remedies mandated
17 by the CDA have been exhausted. . . . Then, and only then, can the contractor file
18 suit in federal district court if the CDA claim arises out of a maritime contract.” 926
19 F. Supp. 142, 144 (N.D. Cal. 1995). *Southwest Marine* is distinguishable because
20 it involved only claims for breach of government procurement contracts that were
21 subject to the CDA. *Id.* at 143. The Ninth Circuit has rejected the conclusion “the
22 CDA provides the exclusive basis for litigation of claims relating to government
23 contracts.” *Wright v. U.S. Postal Serv.*, 29 F.3d 1426, 1428 (9th Cir. 1994). So
24 long as there is another statute that provides an independent grant of jurisdiction
25 to the district courts, the CDA doesn’t preempt a subcontractor from bringing its
26 action under that other statute, even where the contracts at issue are within the
27 scope of the CDA. *Id.* at 1430. Here, Cal Marine brings maritime tort claims that
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1 provide an independent basis for jurisdiction.²

2 Although NASSCO can't sue the United States directly for contract claims
3 until it exhausts its remedies provided by the CDA, this doesn't preclude Cal
4 Marine from bringing its maritime tort claims. The United States relies on *Eastern,*
5 *Inc. v. Shelley's of Delaware, Inc.*, 721 F. Supp. 649 (D.N.J. 1989), for the
6 proposition that subcontractors can't access district courts when the CDA
7 preempts contractors from bringing its contract disputes to district courts. (Dkt. 9
8 at 12). In *Eastern*, the plaintiff alleged breach of contract, among other claims, and
9 argued that as an unpaid subcontractor it held an interest in the contract balance
10 owed by the U.S. Postal Service to Shelley's and/or its sureties. 721 F. Supp. at
11 650. Unlike the plaintiff in *Eastern*, Cal Marine hasn't alleged any breach of
12 contract claims against the Navy that would require it to adhere to the CDA first to
13 exhaust its administrative remedies or wait for NASSCO to sponsor its claims.

14 The United States also points to *Shaver Transportation Co. v. United States*,
15 which states that "the CDA not only applies to PVA and SAA cases, but
16 supersedes those statutes when their terms conflict." 948 F. Supp. 2d 1193, 1199
17 (D. Or. 2013). However, unlike in this case, the plaintiff in *Shaver*, a subcontractor,
18 brought a breach of contract claim against the United States in district court
19 without first proceeding through the administrative remedies of the CDA. *See id.*
20 The court in *Shaver* reasoned: (1) exhaustion of administrative remedies was a
21 prerequisite to its jurisdiction over contract claims brought under the CDA; (2) as
22 a subcontractor lacking privity with the United States, plaintiff was unable to
23 pursue the CDA's administrative remedies; and (3) therefore the court lacked

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25 ² The United States also argues the "Exhaustion Doctrine" serves three main
26 purposes that promote judicial economy. (Dkt. 9 at 9–10). One benefit is that the
27 Navy may settle all claims through the REA process, thereby avoiding the time
28 and expense of costly litigation. However, if the Navy was going to settle the
claims, there is no reason why it can't settle with Cal Marine through the litigation
process.

1 jurisdiction. See *id.* at 1201–02. Importantly, the *Shaver* court also mentions “the
2 CDA is not necessarily ‘the exclusive basis for litigation of claims relating to
3 government contracts’ before the U.S. District Courts. . . . [E]quitable claims
4 related to government contracts can be entertained in the district courts (rather
5 than in the U.S. Court of Federal Claims) as long as there is an independent basis
6 for jurisdiction separate from the CDA.” *Id.* at 1201 (internal citation omitted).

7 Cal Marine hasn’t claimed any contractual right or obligation. In fact, it
8 doesn’t have a contract with the Navy. Absent a contract between the United
9 States and Cal Marine, officials who administer CDA claims don’t have jurisdiction
10 over any claims brought by Cal Marine directly. *NavCom Def. Elecs., Inc. v. Ball*
11 *Corp.*, 92 F.3d 877, 879 (9th Cir.1996) (holding “contracting officers have
12 jurisdiction only over claims by contractors against the government, not over
13 claims brought directly by subcontractors”). Instead, the Complaint refers to
14 common law negligence principles as a source of rights. Negligence, strict liability
15 based on ultrahazardous activity, and respondeat superior all lie outside of
16 contract law, rendering the CDA inapplicable to Cal Marine’s tort claims.

17 **2. Claims Arising During Performance of a Contract**

18 The duty to exercise reasonable care to prevent risks of harm to others is
19 based upon tort law. See *Rayonier Inc. v. United States*, 352 U.S. 315, 319–20
20 (1957); see also Restatement (Third) of Torts: Phys. and Emot. Harm § 7 (2010).
21 The United States argues that while there isn’t privity of contract between the Navy
22 and Cal Marine, the dispute arises from and relates to the BHR contract because
23 the contract “imposes a duty on both the government and the contractor to protect
24 the vessel from fire.” (Dkt. 9 at 17). However, the fact that a contract requires
25 specified safety precautions doesn’t negate liability for a tort claim where the
26 contractor fails to follow those specifications. See *Rooney v. United States*, 634
27 F.2d 1238, 1244 (9th Cir. 1980).

28 The United States also argues that Cal Marine equipment was present on

1 the ship only due to contractual relations. While true, this doesn't affect the tortious
2 nature of the claim. That the alleged tort occurred in the context of contractual
3 relationships doesn't per se render the claim contractual in nature. *Aleutco Corp.*
4 *v. United States*, 244 F.2d 674, 679 (3d Cir. 1957) (holding court had jurisdiction
5 where elements of both contract and tort were involved in the claim) (internal
6 citations omitted). Access to federal courts shouldn't be denied to a plaintiff "who
7 pleads and proves a classic in tort" because this would go against Congress' intent
8 to waive the United States' sovereign immunity in certain cases. *Id.*

9 Finally, the United States points to the Defense Financial Acquisition
10 Regulation ("DFAR") provisions incorporated into Cal Marine's contract with the
11 prime contractor, NASSCO, which states that the parties agreed to settle all
12 disputes through the CDA process. DFAR 252.243-7002 lays out the proper
13 procedure for requests for equitable adjustment of contract pricing changes.
14 (Dkt. 9-22 at 14). DFAR 5252.233-9103 further delineates the required
15 information for any CDA administrative remedy filed in relation to "any other act
16 or omission to act on the part of the Government." (*Id.* at 8). The most natural
17 reading of these regulations is that they extend requirements about what
18 information should be included in CDA administrative claims to all such claims
19 and prohibit contractors from withholding any relevant information on the basis
20 that the request didn't relate to a "change order" or an engineering change. The
21 United States denies otherwise applicable tort relief against the Government to all
22 subcontractors, but these DFAR regulations shouldn't be read to radically alter
23 tort liability or sovereign immunity across the vast web of government contracts.

24 None of the cases cited by the government indicate that an otherwise
25 well-plead tort claim brought by a subcontractor against the United States must
26 first exhaust the CDA's administrative remedies for contractual disputes. Nor is
27 there any clear indication by Congress that the CDA should limit the United States'
28 traditional maritime tort liability. In fact, there is *no* reference to tort in the CDA.

1 The only reference to maritime affairs in the CDA is a provision, 41 U.S.C. §
2 7102(d), stating district courts have jurisdiction over appeals from the
3 administrative remedy for maritime contracts. If anything, the statute indicates
4 deference to district court jurisdiction over claims in admiralty. Because this Court
5 has jurisdiction over Cal Marine's admiralty tort claims, the United States' Motion
6 is **DENIED**.

7 **IV. REQUEST FOR JUDICIAL NOTICE**

8 Courts may "judicially notice a fact that is not subject to reasonable dispute
9 because it: (1) is generally known within the trial court's territorial jurisdiction; or
10 (2) can be accurately and readily determine from sources whose accuracy cannot
11 reasonably be questioned." Fed. R. Evid. 201(b). Proper subjects of judicial notice
12 may include legislative documents and publicly accessible websites. *Anderson v.*
13 *Holder*, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012); *Daniels-Hall v. Nat'l Educ. Ass'n*,
14 629 F.3d 992, 998–99 (9th Cir. 2010). Cal Marine's request is **GRANTED IN**
15 **PART** as to the following facts: (1) the USS BHR is a vessel owned by the United
16 States; (2) a fire occurred on the BHR in July 2020; (3) damages were caused by
17 the fire; and (4) the BHR was in navigable waters at the time of the fire in July
18 2020. (Dkt. 12-1 ¶¶ 1–4). Although the United States objects to Cal Marine's
19 request for judicial notice, it doesn't contest that a fire occurred on the BHR in July
20 2020 at Naval Base San Diego, (Dkt. 4 ¶ 3), and damages were caused by the
21 fire, (Dkt. 9 at 5). Cal Marine's request is **DENIED IN PART AS MOOT** as to the
22 remaining facts as those facts are irrelevant to the determination of subject matter
23 jurisdiction.³

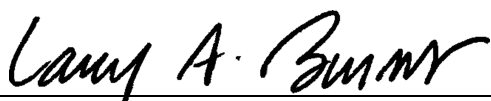
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26 ³ Although Cal Marine requests the Court take judicial notice of the United States'
27 admittance of subject matter jurisdiction, a party can't forfeit or waive subject
28 matter jurisdiction because it involves a court's power to hear a case. *Arbaugh v.*
Y&H Corp., 546 U.S. 500, 514 (2006); *United States v. Cotton*, 535 U.S. 625, 630
(2002).

1 **V. CONCLUSION**

2 The United States' motion to dismiss for lack of subject matter jurisdiction is
3 **DENIED.** (Dkt. 9). The Court **GRANTS IN PART** and **DENIES IN PART** Cal
4 Marine's request for judicial notice. (Dkt. 12-1).

5 **IT IS SO ORDERED.**

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7 Dated: July 26, 2023

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Honorable Larry Alan Burns
United States District Judge

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