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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MYRNA ADAME, et al.,
Plaintiffs,
v.
NATIONAL STEEL AND
SHIPBUILDING COMPANY, INC.,
et al.,
Defendants.

Lead Case No.: 24-cv-00297-AJB-VET
Consolidated with:
Case No. 24-cv-00306-AJB-VET
Case No. 24-cv-00346-AJB-VET
Case No. 24-cv-00350-AJB-VET

**ORDER REGARDING
DEFENDANTS’ MOTIONS TO
DISMISS
(Doc. Nos. 31; 32)**

Before the Court is a motion to dismiss filed by Defendants National Steel and Shipbuilding Company (“NASSCO”), General Dynamics Corporation, Inc. (“GDC”) (Doc. No. 31), which United Support Services, Inc. (“USSI”) joined (Doc. No. 32). Plaintiffs filed an opposition to NASSCO and GDC’s motion (Doc. No. 34) and to USSI’s motion (Doc. No. 35), to which all parties respectively replied (*see* Doc. Nos. 36 (NASSCO/GDC reply); 37 (USSI reply).) For the reasons set forth herein, the Court **DENIES without prejudice** Defendants’ Rule 12(b)(1) motion, **GRANTS** NASSCO and GDC’s Rule 12(b)(6) motion, **GRANTS in part** and **DENIES in part** USSI’s Rule 12(b)(6) motion.

1 **I. BACKGROUND**

2 Plaintiffs’ complaint arises from injuries caused by toxic smoke that emanated from
3 a July 2020 fire (the “Incident”) on the United States Navy’s amphibious assault ship, the
4 USS Bonhomme Richard (“BHR”). (First Amended Complaint (“FAC”), Doc. No. 27, ¶¶
5 1–4; *see also id.* ¶¶ 35–41 (detailing the extent of Plaintiffs’ alleged injuries).)¹ The federal
6 government contracted with Defendants in 2018 to service the BHR. (*Id.* ¶ 20.) NASSCO,
7 a subsidiary of GDC, was charged with maintenance and repairs, which it was conducting
8 while the BHR was pier side at the Naval Base San Diego (the “Naval Base”) at the time
9 of the Incident. (*Id.* ¶¶ 20–23.) According to the FAC, NASSCO, acting as an independent
10 contractor, “maintained control and custody” of “portions” of the BHR while performing
11 repairs but “deviat[ed from] the requirements of both reasonable acceptable standards in
12 the industry and the terms of its contract in storing and maintaining its supplies on board,”
13 which “caused the fire and directly contributed to its uncontrolled spread across the ship.”
14 (*Id.* ¶¶ 22–23, 25.) Plaintiffs also allege USSI “was an independent contractor hired by the
15 United States to provide fire safety services,” but USSI “did not have the proper
16 certifications to provide these services,” “failed to adequalty [sic] warn the military
17 personnel on the USS Bonhomme Richard about potential fire hazards,” and failed to
18 “notify any other Defendants that they were out of compliance with reasonable fire safety
19 protocols.” (*Id.* ¶ 26.)

20 “The US Navy concluded in its own investigation that the five-day fire and
21 destruction of the ship was preventable if ship building and maintenance personnel and
22 contractors avoided clutter, followed fire safety measures, enabled unrestricted access to
23 firefighting and damage control equipment, and enforced fire safety training.” (*Id.* ¶ 27.)
24 Plaintiffs allege Defendants’ negligent acts and omissions caused the fire and directly
25

26 ¹ This case results from the consolidation of four actions filed against Defendants: (1) the instant
27 lead case *Adame et al. v. Nat’l Steel and Shipbuilding Co. et al.*, 23-cv-00297-AJB-VET; (2) *Garland et*
28 *al. v. Nat’l Steel and Shipbuilding Co. et al.*, 24-cv-00306-AJB-VET; (3) *Adame et al. v. Nat’l Steel and*
Shipbuilding Co. et al., 24-cv-00346-AJB-VET; and (4) *Garland et al. v. Barrera et al.*, 24-cv-00350-
AJB-VET. All references to filings are to those in the lead case.

1 contributed to its uncontrolled spread across the ship. (*Id.* ¶ 23.) After the Court denied
2 Plaintiffs’ motion to remand (Doc. No. 19), Defendants filed motions to dismiss (*see* Doc.
3 Nos. 20; 23). In response, Plaintiffs filed the FAC, Defendants’ challenges to which the
4 Court addresses herein.

5 **II. MOTIONS TO DISMISS PURSUANT TO RULE 12(b)(1)**

6 **A. Legal Standard**

7 “Federal courts are courts of limited jurisdiction[,] . . . possess[ing] only that power
8 authorized by Constitution and statute, which is not to be expanded by judicial decree.”
9 *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Rule 12(b)(1) of the
10 Federal Rules of Civil Procedure permits a party to file a motion to dismiss for “lack of
11 subject matter jurisdiction.” Fed. R. Civ. P. 12(b)(1). “Once challenged, the party asserting
12 subject matter jurisdiction has the burden of proving its existence.” *Robinson v. United*
13 *States*, 586 F.3d 683, 685 (9th Cir. 2009).

14 “A Rule 12(b)(1) jurisdictional attack may be facial or factual.” *Safe Air for*
15 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). “A ‘facial’ attack accepts the
16 truth of the plaintiff’s allegations but asserts that they ‘are insufficient on their face to
17 invoke federal jurisdiction.’” *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014)
18 (quoting *Safe Air for Everyone*, 373 F.3d at 1039). “A ‘factual’ attack, by contrast, contests
19 the truth of the plaintiff’s factual allegations, usually by introducing evidence outside the
20 pleadings.” *Id.* (citation omitted).

21 “In resolving a factual attack on jurisdiction, the district court may review evidence
22 beyond the complaint without converting the motion to dismiss into a motion for summary
23 judgment.” *Safe Air for Everyone*, 373 F.3d at 1039. “Once the moving party has converted
24 the motion to dismiss into a factual motion by presenting affidavits or other evidence
25 properly brought before the court, the party opposing the motion must furnish affidavits or
26 other evidence necessary to satisfy its burden of establishing subject matter jurisdiction.”
27 *Savage v. Glendale Union High Sch., Dist. No. 205, Maricopa Cnty.*, 343 F.3d 1036, 1040
28 (9th Cir. 2003).

1 “If the ‘existence of jurisdiction turns on disputed factual issues,’ and those
2 ‘jurisdictional disputes are not intertwined with the merits of the claim,’ then ‘it falls to the
3 district court to resolve those factual disputes itself.’” *Bowen v. Energizer Holdings, Inc.*,
4 118 F.4th 1134, 1143 (9th Cir. 2024) (quoting *Friends of the Earth v. Sanderson Farms,*
5 *Inc.*, 992 F.3d 939, 944 (9th Cir. 2021)). However, “a court must leave the resolution of
6 material factual disputes to the trier of fact when the issue of subject-matter jurisdiction is
7 intertwined with an element of the merits of the plaintiff’s claim.” *Leite*, 749 F.3d at 1122
8 n.3. “[J]urisdictional issues and substantive issues’ are deemed ‘intertwined when the
9 question of jurisdiction is dependent on the resolution of factual issues going to the
10 merits.’” *Bowen*, 118 F.4th at 1143 (quoting *Safe Air for Everyone*, 373 F.3d at 1039).

11 **B. Discussion**

12 Defendants move to dismiss the entire action on the grounds that the Court lacks
13 subject matter jurisdiction. Specifically, Defendants assert that the Court would have
14 federal admiralty jurisdiction but, because Defendants were acting as agents of the United
15 States, the Suits in Admiralty Act (“SIAA”) applies, making suit against the United States
16 the exclusive remedy. (*See generally* Doc. Nos. 31-1; 32.) Plaintiffs oppose the motions on
17 the basis that Defendants were independent contractors—not agents—and resolution of this
18 issue is improper at this stage of the proceedings. (*See generally* Doc. Nos. 34; 35.)

19 **1. Applicable Rule 12(b)(1) Framework**

20 First, the parties disagree over whether Defendants’ motions are facial or factual
21 attacks. Plaintiffs argue that “Defendants’ motion to dismiss should be considered a facial
22 attack on Plaintiffs’ FAC” because (1) Defendants attach documents which “create a
23 factual dispute requiring denial of the motion” and (2) Defendants filed their motion
24 “before any discovery has been conducted in this matter.” (Doc. No. 34 at 10.) “Given
25 these facts,” Plaintiffs assert without support of case law that “the Court may treat
26 Defendants’ motion as a facial challenge and deny the motion because . . . Plaintiffs’
27 allegations in the FAC are assumed to be true.” (*Id.*)

28 ///

1 In reply, NASSCO and GDC assert their jurisdictional challenge is factual, not
2 facial, because they “‘present[] affidavits or other evidence’ in support of [their] motion,
3 including NASSCO’s contract with the Navy, the Navy’s Command Report, and a
4 declaration from a NASSCO employee speaking to the Navy’s pervasive control over all
5 aspects of NASSCO’s work on the BHR.” (Doc. No. 36 at 3 (quoting *Savage*, 343 F.3d at
6 1039).)

7 The crux of Defendants’ challenge is that they were acting as agents of the United
8 States—not independent contractors—at the time of the Incident and, as such, they are
9 immune from suit under the exclusivity clause of SIAA. (*See generally* Doc. Nos. 31; 32;
10 36; 37.) Throughout their papers, the parties mostly proffer different facts from which they
11 make conflicting legal conclusions regarding agency, and Plaintiffs also contest the truth
12 of portions of Defendants’ declarations. (*See, e.g.*, Doc. Nos. 34 at 6; 35 at 6–7.) Because
13 Defendants rely on additional facts as further context—including facts from the affidavits
14 and other evidence outside the pleadings—the challenge is factual rather than facial. *See*
15 *Leite*, 749 F.3d at 1121. As such, “[n]o presumptive truthfulness attaches to [P]laintiff[s]’
16 allegations, and the existence of disputed material facts will not preclude the trial court
17 from evaluating for itself the merits of jurisdictional claims.”² *San Diego Cnty. Credit*
18 *Union v. Citizens Equity First Credit Union*, 65 F.4th 1012, 1028 (9th Cir. 2023) (quoting
19 *Thornhill Pub. Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979)).

20 Second, the parties’ arguments raise the issue of who bears the burden. Defendants
21 assert “it is *Plaintiffs’* burden to prove that jurisdiction exists[.]” (*See* Doc. Nos. 31-1 at 13
22 (citing *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010)
23 (addressing standing where a class action was originally filed in federal court); 36 at 3
24

25 ² Plaintiffs also assert that “the court must construe all factual disputes in favor of the non-moving
26 party.” (Doc. No. 34 at 8.) However, all the cases upon which Plaintiffs rely address *appellate standard*
27 *of review* of a district court’s determination of whether the *Feres* doctrine applies to the specific facts of
28 a Federal Tort Claims Act suit. *See McConnell v. United States*, 478 F.3d 1092 (9th Cir. 2007); *Costo v.*
United States, 248 F.3d 863 (9th Cir. 2001); *Dreier v. United States*, 106 F.3d 844 (9th Cir. 1996), *as*
amended (Feb. 4, 1997).

1 (quoting Wright & Miller, § 1350, 5B Fed. Prac. & Proc. Civ. § 1350 (4th ed.) and *Savage*
2 *v. Glendale Union High Sch., Dist. No. 205, Maricopa Cnty.*, 343 F.3d 1036 (9th Cir.
3 2003)).) Defendants rely exclusively on cases addressing jurisdictional motions to dismiss
4 complaints filed originally in federal court, none of which address the applicability of the
5 SIAA, let alone its exclusivity provision. The complex procedural posture of the instant
6 action is inapposite.

7 Because “[i]t is presumed that a cause lies outside this [Court’s] limited
8 jurisdiction, . . . the burden of establishing the contrary rests upon the party asserting
9 jurisdiction.” *Kokkonen*, 511 U.S. at 377 (citations omitted). When an action has been
10 removed to federal court by Defendants, as this action has, “[t]he remover bears the burden
11 of proving by a preponderance of the evidence that each of the requirements for subject-
12 matter jurisdiction has been met.” *DeFiore v. SOC LLC*, 85 F.4th 546, 553 (9th Cir. 2023).
13 However, here, Defendants are also the movants challenging jurisdiction, which on
14 superficial glance would place Plaintiffs in the position of advocating for jurisdiction.
15 However, Defendants fail to identify any case law supporting such a stance under similar
16 circumstances.

17 Based on the Court’s review, it appears that the issue of who carries the burden of
18 proving application of the SIAA’s exclusivity provision is an unaddressed issue. As such,
19 the Court turns to how the Ninth Circuit has addressed an exception to a waiver of
20 sovereign immunity in the SIAA’s sister statute the Federal Tort Claims Act (“FTCA”).
21 “The FTCA waives sovereign immunity from suits arising out of certain negligent acts of
22 federal employees.” *Chang v. United States*, 139 F.4th 1087, 1092 (9th Cir. 2025) (citation
23 and internal quotation marks omitted). “The government’s immunity is restored, however,
24 under what is known as the ‘discretionary function exception,’ with respect to claims
25 arising out of certain discretionary duties of federal agencies and employees.” *Young v.*
26 *United States*, 769 F.3d 1047, 1053 (9th Cir. 2014). “That exception disallows tort liability
27 against the United States in the case of claims ‘based upon the exercise or performance or
28 the failure to exercise or perform a discretionary function or duty on the part of a federal

1 agency or an employee of the Government, whether or not the discretion involved be
2 abused.” *Chang*, 139 F.4th at 1092–93 (quoting 28 U.S.C. § 2680(a)). “Because an
3 exception to the FTCA’s general waiver of immunity, although jurisdictional on its face,
4 is analogous to an affirmative defense, [the Ninth Circuit joined] the Sixth and Seventh
5 Circuits [in] correctly plac[ing] the burden on the United States as the party which benefits
6 from the defense.” *Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992). For over
7 three decades, the Ninth Circuit has held that the discretionary function exception applies
8 equally to the SIAA as to the FTCA. *See Earles v. United States*, 935 F.2d 1028, 1032 (9th
9 Cir. 1991); *see also Fiedler v. United States*, 165 F.4th 1310, 1316 (9th Cir. 2026) (“The
10 government bears the burden of proving that the discretionary function exception [to the
11 SIAA’s waiver of immunity] applies.”).

12 Because the exclusivity provision limits the SIAA’s waiver of immunity by
13 requiring applicable suits be brought only against the United States, rather than agents, the
14 Court finds it to be, though jurisdictional, similarly analogous to an affirmative defense.
15 As such, the Court holds that the party invoking protection of the SIAA’s exclusivity clause
16 bears the burden of proving it applies.³

17 2. Suits in Admiralty Act

18 The Court turns next to whether SIAA and, more specifically, its exclusivity
19 provision apply to the instant action.

20 i. Legal Framework

21 “[T]he SIAA applies when (1) a vessel is owned by the United States or operated on
22 its behalf, and (2) there is a remedy cognizable in admiralty for the injury.” *Ali v. Rogers*,
23 780 F.3d 1229, 1233 (9th Cir. 2015); *see also Dearborn v. Mar Ship Operations, Inc.*, 113
24

25 ³ Interestingly, although the Court finds Defendants’ reliance on original jurisdiction cases
26 misplaced, the Ninth Circuit’s analysis in one such cited case actually provides another analogue
27 supporting the Court’s conclusion. In *Savage*, the Ninth Circuit analyzed whether a school district was an
28 agent of the state of Arizona entitled to sovereign immunity. *See generally Savage*, 343 F.3d 1036. There,
the school district defendant—not the plaintiff—bore the burden of proving it was an agent of the state
entitled to sovereign immunity. (*Id.*)

1 F.3d 995, 996 n.1 (9th Cir. 1997) (“[T]he Suits in Admiralty Act does not itself provide a
2 cause of action. It merely operates to waive the sovereign immunity of the United States in
3 admiralty suits.”) (citation and internal quotation marks omitted).

4 “The Constitution’s grant of federal jurisdiction for admiralty, ‘codified at 28 U.S.C.
5 § 1333(1), allows the filing of claims related to maritime contracts and maritime torts.’”
6 *Ali*, 780 F.3d at 1234–35 (quoting *In re Mission Bay Jet Sports, LLC*, 570 F.3d 1124, 1126
7 (9th Cir. 2009)). “Tort claims may sound in admiralty jurisdiction if they satisfy a test with
8 three components showing that the claim has the requisite maritime flavor.” *Id.* at 1235.
9 “The relevant tort or harm must have (1) taken place on navigable water (or a vessel on
10 navigable water having caused an injury on land), (2) ‘a potentially disruptive impact on
11 maritime commerce,’ and (3) a ‘substantial relationship to traditional maritime activity.’”
12 *Id.* (quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527,
13 534 (1995)).

14 The SIAA contains an exclusivity provision under which, “[i]f a remedy is provided
15 by this chapter, it shall be exclusive of any other action arising out of the same subject
16 matter against the officer, employee, or agent of the United States or the federally-owned
17 corporation whose act or omission gave rise to the claim.” 46 U.S.C. § 30904; *see also*
18 *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (“The United States, as sovereign, is
19 immune from suit save as it consents to be sued, and the terms of its consent to be sued in
20 any court define that court’s jurisdiction to entertain the suit.”).

21 **ii. Application of SIAA Generally**

22 Plaintiffs do not contest either that the BHR is a vessel owned by the United States
23 or that there is a remedy cognizable in admiralty for their injuries. (*See generally* Doc. Nos.
24 34; 35.) *See also Ramirez v. Ghilotti Bros. Inc.*, 941 F. Supp. 2d 1197, 1210 n.7 (N.D. Cal.
25 2013) (collecting cases demonstrating that failure to respond to an issue concedes it).
26 Regardless, based on its own analysis, the Court finds that Plaintiffs’ negligence, trespass,
27 and nuisance claims have the requisite maritime flavor, passing both the location prong
28 and the nexus prongs to sound in admiralty. *See California Marine Cleaning, Inc. v. United*

1 *States through Dep't of the Navy*, 684 F. Supp. 3d 1014, 1020–21 (S.D. Cal. 2023) (finding
2 the same with regard to a subcontractor's negligence claims). All three claims arise from a
3 fire that occurred aboard the BHR while it was docked at the Naval Base and had a
4 potentially disruptive impact on maritime commerce by spreading to nearby vessels or
5 making the neighboring marinas inaccessible while the fire was being contained and
6 extinguished for days. The “activity giving rise to the incident” was the allegedly negligent
7 actions of Defendants while conducting repairs and providing fire safety services to the
8 docked vessel, which are activities that show “a substantial relationship to traditional
9 maritime activity.” *See In re Mission Bay Jet Sports, LLC*, 570 F.3d at 1126. As such,
10 Plaintiffs' claims fall within the scope of the SIAA.

11 **iii. Application of the Exclusivity Provision Specifically**

12 Thus, if Defendants—whose acts or omissions allegedly gave rise to Plaintiffs'
13 claims—were acting as agents of the United States at the time of the Incident, then the
14 SIAA's exclusivity provision would bar Plaintiffs' suit. It is this narrow issue of agency
15 upon which the parties disagree, both on the substantive determination and on whether it
16 is appropriate to make such a determination at this stage of litigation.

17 **a. Rules of Agency**

18 In determining whether agency exists for purposes of the SIAA, courts in the Ninth
19 Circuit “use the common law definition of agency as a starting point for [their] analysis
20 and will then consider the relevant case law as well as the specific provisions of the
21 agreement between [the parties].” *Dearborn*, 113 F.3d at 997. “Agency is the fiduciary
22 relationship that arises when one person (a ‘principal’) manifests assent to another person
23 (an ‘agent’) that the agent shall act on the principal's behalf and subject to the principal's
24 control, and the agent manifests assent or otherwise consents so to act.” Restatement
25 (Third) Of Agency § 1.01 (2006). “[A]n ‘agent’ [i]s one who is employed as a fiduciary,
26 acting for a principal with the principal's consent and subject to the principal's overall
27 control and direction in accomplishing some matter undertaken on the principal's behalf.”
28 *Dearborn*, 113 F.3d at 997 (citation and internal quotation marks omitted).

1 “Two characteristics appear most often to be dispositive” in cases finding agency
2 under the SIAA: “(1) the United States must exercise significant control over the
3 charterer’s activities—either day to day control or overall control and direction of the
4 mission, and (2) the charterer must be engaged in conducting the business of the United
5 States.” *Id.* at 997–98.⁴ “In this respect, ‘agent’ may apply more broadly in this context
6 than it does elsewhere, and may include in some cases entities properly defined as
7 ‘independent contractors.’” *Dearborn*, 113 F.3d at 998 n.3; *see also DeFiore*, 85 F.4th at
8 555 (“The common term ‘independent contractor’ is equivocal in meaning and confusing
9 in usage because some termed independent contractors are agents while others are
10 nonagent service providers.”) (cleaned up).

11 **b. Factual Dispute Over Agency**

12 As briefly discussed *supra* § II.B.1, there is a factual dispute over the issue of agency.

13 NASSCO argues that the relationship between it and the United States was
14 substantively one of agency because “the Navy comprehensively controlled NASSCO’s
15 work.” (Doc. No. 31-1 at 22–23.) Specifically, NASSCO asserts (1) the Navy dictated what
16 NASSCO was required to do and how to do it without permitting NASSCO to unilaterally
17 act, (2) the Navy “reinforced its control through ‘continuous’ quality assurance
18 monitoring,” and (3) NASSCO’s maintenance work filled a government need incident to
19 the BHR’s operation. (Doc. No. 31-1 at 18–22.) NASSCO supports its motion with the
20 declaration of Jamie Van Cleaf, Director of Project and Materials Engineering for
21 NASSCO, who was Program Manager “responsible for full execution of the repair work,
22 quality, cost, schedule, and safety” of the BHR repairs. (Doc. No. 31-2 (“Van Cleaf
23 Decl.”).) Van Cleaf avers to his understanding of the Navy’s control over NASSCO based
24 on, *inter alia*, the contract, the Standard Items, the Navy Regulations, and the NAVSEA
25

26 ⁴ “[A] charter party is a contract for the use (lease) of a vessel in whole or in part. . . . It is a
27 specialized form of contract for the hire of a ship, specified by name. . . . The party that obtains the use
28 and service of the ship is called the charterer or shipper; the party supplying the ship is the carrier or
shipowner.” Charter Party Forms and Functions, 2 Admiralty & Mar. Law § 11:1 (7th ed. 2026).

1 8010 Manual, all or portions of which are attached as exhibits to the declaration. (*Id.*; *see*
2 *also* Doc. No. 31-3 (NASSCO Contract).)

3 USSI joins NASSCO’s motion, asserting the arguments apply equally. (Doc. No.
4 32.) Specifically, USSI asserted that it “was under contract with the US Navy to provide
5 technical support services,” the “scope of [which] clearly involved performance of services
6 supportive of federal government missions.” (Doc. No. 32 at 2.) Additionally, USSI states
7 that the contract required the Navy, through the Southwest Regional Maintenance Center
8 (“SWRMC”), to direct, oversee, supervise and control all work and assignments, while
9 USSI was required to comply with SWRMC directives without discretion or authority to
10 deviate from those directives, unilaterally act, or independently command other personnel.
11 (*Id.* at 2–3.) In support of its motion, USSI proffers the declaration of its president, Micheal
12 Fernandez (Doc. No. 32-1 (“Fernandez Decl.”)) and its contract (Doc. No. 32-2).

13 In the FAC, Plaintiffs allege that “[b]oth companies[, NASSCO and USSI,] were
14 hired as independent contractors, and not as agents of the United States government.” (FAC
15 ¶ 20; *see also id.* ¶¶ 19, 22, 25–26.) Relying on NASSCO’s contract with the United States
16 and the Command Report,⁵ Plaintiffs point to six factors in the Restatement (Second) of
17 Agency that support a finding that NASSCO was an independent contractor. (Doc. No. 34
18 at 19–22; FAC ¶¶ 19–22, 25–26.) Specifically, Plaintiffs argue (1) the contractual language
19 demonstrates an intent to create a non-agent independent contractor relationship, (2)
20 NASSCO agreed to furnish the materials and management to complete the work, except
21 for those specifically identified by the United States, (3) NASSCO received profits, (4) the
22 contracted period, including extensions, was limited, (5) NASSCO possessed specialized
23 skills to conduct the repairs, and (6) the United States did not have actual control over
24 NASSCO’s everyday activities because NASSCO routinely acted on their own, without
25

26 ⁵ Both NASSCO and GDC’s motion and Plaintiffs’ opposition attach the U.S. NAVY, COMMAND
27 INVESTIGATION INTO THE FIRE ABOARD USS BONHOMME RICHARD (LHD-6) 12 JULY 2020, 5830 MEMO
28 N00/156 (Apr. 5, 2021). (*See* Doc. Nos. 31-8 (“Command Report”); 34-1 at 146–579.) For clarity and
efficiency, the Court eschews parallel citation to both filings. Instead, citation hereafter is to the Command
Report filed at Doc. No. 31-8 with pincites to CM/ECF’s electronic pagination.

1 submitting for approval, and demonstrated actual ownership over Lower V. (Doc. No. 34
2 at 19–22.) Moreover, Plaintiffs argue that “Defendants’ negligent and reckless actions as
3 independent contractors fall outside the scope of the Contract with the Navy and, as a result,
4 causes Defendants’ actions to fall outside of the same subject matter as any perceived
5 remedy against the United States.” (*Id.* at 11.)

6 Similarly, Plaintiffs rely on USSI’s contract with the United States and the
7 Command report to argue USSI was an independent contractor not subject to the SIAA’s
8 exclusivity provision. (Doc. No. 35.) Specifically, Plaintiffs assert “USSI does not present
9 sufficient facts for the Court to conclude it was, in fact, an agent of the United States”
10 because its motion is supported by a self-serving declaration that is both conclusory and
11 contradicted by the applicable contract. (*Id.* at 6–8.) Plaintiffs also incorporate their
12 arguments from their opposition to NASSCO and GDC’s motion into their opposition to
13 USSI’s motion as USSI joined the former’s motion to dismiss. (*Id.* at 3.)

14 Having reviewed the briefs and all evidence attached thereto, the Court agrees with
15 Plaintiffs that there is a genuine and extensive factual dispute. The NASSCO Contract
16 expressly defines NASSCO “as an independent Contractor and not as an agent of the
17 Government[.]” (Doc. No. 31-3 at 81.) Detailed requirements of both contracts and the
18 incorporated standards indicate control. However, evidence of how those provisions and
19 requirements were implemented on the vessel is necessary to assess whether actual control
20 was exerted, particularly considering that Plaintiffs assert Defendants acted outside the
21 scope of their contract.⁶ The Command Report also includes conflicting reports on the
22 issue. For example, some evidence indicates that the Navy did not exercise significant
23

24 ⁶ Defendants’ argument in reply seems to imply that *Dearborn* sets forth an exclusive test for
25 identifying when a charter is an agent. (*See* Doc. No. 36 at 5 (stating “Plaintiffs barely discuss the
26 evidentiary record” in disregard of Plaintiffs’ six factor analysis), 6 (“Plaintiffs offer no evidence to rebut
27 any of these facts, nor do they explain how these facts are insufficient to meet the governing ‘overall
28 control and direction of the mission’ test.”).) However, *Dearborn* states that (1) the common law definition
of agency is their “starting point” and (2) the factors proffered by Defendants as exclusive are the “[t]wo
characteristics [that] appear most often to be dispositive[.]” *Dearborn*, 113 F.3d at 997–98. Nothing in
Dearborn suggests that the inquiry is restricted to only those two factors.

1 control over Defendants’ day-to-day activities or that Defendants sometimes acted outside
2 the scope of their contracts:

3 According to the NASSCO PM⁷ for [the BHR], when ship spaces were
4 undergoing maintenance performed by NASSCO, the ship still used spaces in
5 some circumstances. Space “ownership” would be transferred to the ship
6 when all contractor work in a space had been completed. A housekeeping
7 walkthrough would be conducted within the space, and full custody would
8 then be turned over to the ship.

8 (Command Report at 94.)

9 The [BHR] CO,⁸ XO,⁹ CMC,¹⁰ and Department Heads did not effectively
10 ensure the readiness and material condition of the spaces under their
11 cognizance. Contributing to this, both the Lead Maintenance Activity (LMA)
12 and several of the ship’s Department Heads misunderstood [BHR]’s absolute
13 responsibility and ownership over the material condition of the ship’s spaces,
14 regardless of the maintenance work being conducted. The LMA and [BHR]
15 erroneously thought space ownership was transferred to the LMA for work
16 and back to Ship’s Force after completion within a space after formal turnover
17 occurred. [BHR] leadership’s lack of ownership and responsibility for the ship
18 and its physical spaces throughout the phases of the availability directly led to
19 the poor material condition in Lower V and Upper V on the morning of 12
20 July 2020, which hastened the spread of the fire and impeded efforts to attack
21 it.

18 (*Id.* at 286.)

19 The Deck Department Head and LCPO¹¹ failed to exercise control over the
20 storage of materials in both Upper V and Lower V. Both individuals stated
21 that NASSCO owned the spaces while acknowledging the ship stored large
22 quantities of material in the space. They were not proactive in monitoring or
23 preventing accumulation of combustible material.

23 (*Id.* at 287.)

24 ///

26 ⁷ Project Manager. (Command Report at 425.)

27 ⁸ Commanding Officer. (*Id.* at 419.)

28 ⁹ Executive Officer. (*Id.* at 427.)

¹⁰ Command Master Chief. (*Id.* at 342.)

¹¹ Lead Chief Petty Officer. (*Id.* at 342.)

1 USS Inc. manages the FSO¹² program for SWRMC. USS Inc. is contracted to
2 assist “the GFSO¹³ with Fire Safety Program development, implementation,
3 inspection, and training in order to ensure safe industrial repair operations for
4 U.S. Navy ships during maintenance availabilities under SWRMC’s
cognizance.”

5 (*Id.* at 167.)

6 SWRMC utilization of contractors from [USSI] to fill FSO responsibilities
7 was executed without adequately addressing the limitations of contractors
8 vice government employees. The inability to direct the prime contractor (a
9 reserved government function) or formally vote as Chairman of the FSC¹⁴ are
10 key examples of such limitations. As a member of the [Project Team], their
11 status as a contractor was further subjected to the direction of the PM or other
12 government employees, making it unlikely they could effectively act as
13 arbiters of risk decisions. This further contributed to fire risk accumulation on
14 BHR.

15 (*Id.* at 296.)

16 SWRMC failed to adequately oversee the USS[I] CFSOs.¹⁵ There was an
17 example of a forged FSO letter of designation for the duties with regard to
18 specific ships, and unqualified individuals conducted FSO qualification
19 boards.

20 (*Id.*)

21 On the other hand, the Command Report also includes broad statements of the
22 Navy’s “absolute responsibility for the safety, well-being and efficiency of the ship,” (*id.*
23 at 283), the CO’s “absolute responsibility for the safety of his or her command as well as
24 ‘overall control of the shipboard emergency response,” (*id.* at 195), and the Navy’s
25 “absolute responsibility and ownership over the material condition of the ship’s spaces,
26 regardless of the maintenance work being conducted,” (*id.* at 286). (*See also* Van Cleaf
27 Decl. ¶ 16; Doc. No. 36 at 8.) Such statements are corroborated by Defendants’
28 declarations. Van Cleaf attests to the instructions and specifications the Navy provided

12 Fire Safety Officer. (*Id.* at 410.)
13 Government Fire Safety Officer. (*Id.* at 422.)
14 Fire Safety Council. (*Id.* at 421.)
15 Contract Fire Safety Officers. (*Id.* at 63.)

1 about how NASSCO was to complete work, the Navy’s verification and approval process
2 for completed work, and the “exclusive control” the Navy exercised “as dictated by Navy
3 policies and regulations over NASSCO’s day-to-day ability to access the Vessel and, once
4 on board, specific areas of the Vessel to perform its work under the Contract.” (Van Cleaf
5 Decl. ¶¶ 10–12, 15.) Fernandez avers that the Navy through SWRMC “directed, oversaw,
6 supervised, and controlled” “every significant aspect” of USSI’s performance under the
7 contract, including “USSI’s fire safety support activities on the [BHR] at all times prior to
8 the Incident,” while USSI had no discretion or authority. (Fernandez Decl. ¶ 6.)

9 Because the application of the exclusivity provision turns on the disputed factual
10 issue of agency, the Court must next determine whether this issue is intertwined with the
11 merits of Plaintiffs’ claims. Plaintiffs assert that resolution of the factual dispute is
12 improper at this stage of the proceedings because “question of jurisdiction is ‘so
13 intertwined’ with resolution of the factual issues going to the merits of the case.” (Doc. No.
14 34 at 8–10.) NASSCO and GDC counter that there is no intertwinement because (1) the
15 SIAA provides the basis for jurisdiction but not Plaintiffs’ claim for relief and (2) the issue
16 of agency—the jurisdictional issue—is not an element of negligence—the merits issue.
17 (Doc. No. 36 at 4–5.)

18 “[W]here the jurisdictional issue and substantive issues are so intertwined that the
19 question of jurisdiction is dependent on the resolution of factual issues going to the merits,
20 the jurisdictional determination should await a determination of the relevant facts on either
21 a motion going to the merits or at trial.” *Augustine v. United States*, 704 F.2d 1074, 1077
22 (9th Cir. 1983). The Ninth Circuit has concluded “jurisdictional issues are intertwined with
23 an element of the merits of the plaintiff’s claim” where (1) “a party’s right to recovery rests
24 upon the interpretation of a federal statute that provides both the basis for the court’s
25 subject matter jurisdiction and the plaintiff’s claim for relief,” (2) “the claim at issue arises
26 under the Constitution,” (3) “in the context of a motion to remand to state court a case
27 involving federal-officer removal jurisdiction,” the disputed fact is “material to federal-
28 officer jurisdiction” and “intertwined with an element of the plaintiff’s claim,” and (4) “a

1 plaintiff's allegations concerning standing are intertwined with allegations concerning an
2 element of her claim." *Bowen*, 118 F.4th at 1143 (citations omitted).

3 As an initial matter, both of Defendants' arguments are correct. First, "[t]he SIAA
4 provides no cause of action; it just waives sovereign immunity where an admiralty remedy
5 is available." *Ali*, 780 F.3d at 1233. Second, agency is not an element of negligence. *Cf.*
6 *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1070 (9th Cir. 2001) ("[T]o recover for
7 negligence, a plaintiff must establish: (1) duty; (2) breach; (3) causation; and (4)
8 damages.").

9 However, resolution of the factual issues necessary to determine agency—
10 specifically the actual on-the-boat circumstances of Defendants' day-to-day experience
11 and performance—are the same factual issues that will likely be proffered to demonstrate
12 breach or a lack of breach of Defendants' alleged duty. Because these factual issues within
13 the Command Report, contracts, and declarations will be proffered as evidence for the
14 merits of Plaintiffs' claims, it would be inappropriate for the Court on the limited record
15 before it to resolve those factual issues for the purpose of resolving whether the SIAA's
16 exclusivity provision applies. *See, e.g., Daniels v. United States*, No.
17 316CV02077BTMDHB, 2017 WL 3478765, at *7 (S.D. Cal. Aug. 11, 2017) ("[T]he Court
18 believes the agency issue is more appropriately resolved on a motion for summary
19 judgment after limited discovery.").

20 NASSCO argues that "the long line of cases . . . cited in its motion . . . find SIAA
21 agency on facts like those here." (Doc. No. 36 at 6.) However, the Court finds NASSCO's
22 cases unpersuasive. Two of the cases NASSCO relies upon address the issue of agency on
23 summary judgment, which is procedurally inapposite to this action's current posture.¹⁶ *See*
24 *Dearborn v. Mar Ship Operations, Inc.*, 113 F.3d 995 (9th Cir. 1997); *Favorite v. Marine*
25 *Pers. & Provisioning, Inc.*, 955 F.2d 382 (5th Cir. 1992). Cases addressing the issue on a
26

27 ¹⁶ Moreover, to a degree, these cases align with the Court's impression that the agency issue here is
28 too underdeveloped and would be more appropriate after completion of discovery and on, for example,
summary judgment.

1 motion to dismiss involved complaints in which the plaintiffs pled an agency relationship.
2 *See Daniels*, 2017 WL 3478765, at *7 (“Whether this allegation [that the defendants were
3 ‘agents and/or subagents’] is the result of error or not, Plaintiff and this Court are bound
4 by it, and as Defendants SA-TECH and CPC are (at least for this Court’s immediate
5 consideration) agents of the United States under the SIAA, their joint motion must be
6 granted.”). *Also compare Compton v. Oasis Sys., LLC*, 549 F. Supp. 3d 1173 (S.D. Cal.
7 2021), Def.’s Mot. Dismiss, Doc. No. 3-1 at 16–17 (“Plaintiff has not sued the United
8 States in this action. To the extent Plaintiff may claim that the United States is one of the
9 Doe defendants, the allegations in the Complaint that Defendants at all times acted in the
10 scope of ‘their agency’ is dispositive.”) *with generally* Pl.’s Opp’n, Doc. No. 6 (not
11 contesting agency).

12 Finally, the scope of the contracts at issue was much narrower than those of the
13 charterers in many of the cases cited by Defendants. *See, e.g., Dearborn*, 113 F.3d at 996
14 (“Dearborn, a seaman employed by Bay Ship as a wiper aboard the United States Naval
15 Ship KANE, was injured when he slipped and fell down a stairway that led from the deck
16 of the vessel into the engine room. At the time of the injury, the KANE was owned by the
17 United States through the United States Navy, Military Sealift Command, but chartered to
18 Bay Ship under the terms of an agreement entitled ‘Performance Work Statement–Military
19 Sealift Command–Special Mission Oceanographic and Hydrographic Survey Ships.”);
20 *Smith v. United States*, 346 F.2d 449 (4th Cir. 1965) (“The Potomac, a Navy tanker owned
21 by the United States, was a public vessel. Employed exclusively in hauling petroleum
22 products to various military bases for national defense, she was under the direction and
23 control of the Military Sea Transportation Service (MSTS). Subject to the other provisions
24 of the contract with the Government, which was dated June 22, 1961, Marine undertook to
25 ‘manage and conduct the business regarding the operation of such tankers’, including the
26 Potomac, ‘as may be furnished to it by the Government from time to time.”); *Petition of*
27 *U.S.*, 367 F.2d 505, 507–08 (3d Cir. 1966) (“Briefly, Mission San Francisco was an
28 undocumented tanker owned by the United States. At the time of the collision, this tanker

1 was being operated by Mathiasen under a contract with Military Sea Transportation
2 Service, an agency of the United States Navy. The agreement provided that Mathiasen
3 would ‘manage and conduct the business of the Government with respect to’ the tanker
4 and, to that end, would ‘equip, fuel, supply, maintain, man, victual, and navigate’ the ship.
5 Mathiasen supplied a master and a civilian crew. There is no suggestion that under this
6 contract the tanker could be or ever was used except in ‘the business of the Government’,
7 more particularly as a naval supply ship.”); *Favorite*, 955 F.2d at 384 (“The USNS
8 SEALIFT CARIBBEAN is owned by Marine Vessel Leasing Corporation (Leasing) and
9 bareboat chartered to the United States, via the Military Sealift Command (MSC). The
10 MSC entered into a contract with Marine Personnel and Provisioning, Inc. (Personnel) and
11 Marine Transport Management Company (Management) to provide the maintenance,
12 operations and crew for the USNS SEALIFT CARIBBEAN.”). The level of control the
13 *Dearborn* factors set forth as often dispositive demonstrate significant oversight when the
14 scope of the charter party covers the entirety of a vessel; however, that level of control is
15 much more routine when the scope of the applicable contract is for more narrow services.
16 As such, the Court is not persuaded at this early stage of litigation by Defendants’ reliance
17 on these cases for blanket comparison of the level of control necessary where the entities
18 at issue were not charterers.

19 Having found the factual determinations required to resolve application of the SIAA
20 exclusively provision and the merits of Plaintiffs claim are intertwined, the Court **DENIES**
21 **without prejudice** Defendants’ motion to dismiss pursuant to Rule 12(b)(1). *See*
22 *Augustine*, 704 F.2d at 1077 (“[T]he jurisdictional determination should await a
23 determination of the relevant facts on either a motion going to the merits or at trial.”).
24 Defendants may reraise the issue of jurisdiction after discovery. *See, e.g., Shaw v. United*
25 *States*, No. 18-CV-06243-PJH, 2019 WL 268648, at *3 (N.D. Cal. Jan. 18, 2019) (“An
26 early summary judgment motion—or another challenge to this court’s subject matter
27 jurisdiction—may be appropriate following discovery on the issue of agency.”); *Daniels*,
28 2017 WL 3478765, at *7.

1 **IV. MOTIONS TO DISMISS PURSUANT TO RULES 8 AND 12(b)(6)**

2 Defendants seek to dismiss the claims against GDC for failure to state a claim
3 because the factual allegations expressly naming GDC are independently insufficient and
4 the allegations referring to Defendants collectively violate Rule 8. (Doc. Nos. 31-1; 32.)
5 USSI’s motion expands the scope of the Rule 8 challenge to seek dismissal of the entire
6 action “due to Plaintiffs’ impermissible group pleading.” (Doc. No. 32 at 4–5.)

7 **A. Legal Standard**

8 Under Rule 8(a)(2) a complaint must contain “a short and plain statement of the
9 claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). “A Rule
10 12(b)(6) motion tests the legal sufficiency of a claim.” *Navarro v. Block*, 250 F.3d 729,
11 732 (9th Cir. 2001). “The court may dismiss a complaint as a matter of law for (1) lack of
12 a cognizable legal theory or (2) insufficient facts under a cognizable legal claim.”
13 *SmileCare Dental Grp. v. Delta Dental Plan of California, Inc.*, 88 F.3d 780, 783 (9th Cir.
14 1996) (citation and internal quotation marks omitted). To defeat a motion to dismiss, a
15 complaint must contain “enough facts to state a claim to relief that is plausible on its face.”
16 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

17 “In deciding such a motion, all material allegations of the complaint are accepted as
18 true, as well as all reasonable inferences to be drawn from them.” *Navarro*, 250 F.3d at
19 732; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (“When there are well-pleaded
20 factual allegations, a court should assume their veracity and then determine whether they
21 plausibly give rise to an entitlement to relief.”). Notwithstanding this deference, the
22 reviewing court need not accept legal conclusions as true. *Iqbal*, 556 U.S. at 678. However,
23 “When there are well-pleaded factual allegations, a court should assume their veracity and
24 then determine whether they plausibly give rise to an entitlement to relief.” *Iqbal*, 556 U.S.
25 at 679. “In sum, for a complaint to survive a motion to dismiss, the non-conclusory factual
26 content, and reasonable inferences from that content, must be plausibly suggestive of a
27 claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir.
28 2009) (quotations and citation omitted).

1 **B. Discussion**

2 With regard to NASSCO¹⁷ and USSI, the FAC proffers sufficient individualized
3 allegations delineating both parties’ responsibilities and failures related thereto. (*See, e.g.*,
4 FAC ¶¶ 25 (“[NASSCO] was found to have had deviations within the requirements of both
5 reasonable acceptable standards in the industry and the terms of its contract in storing and
6 maintaining its supplies on board the [BHR]. During its time performing its duties as in
7 dependent contractor, [NASSCO] remained in custody and control of portions of the
8 [BHR] rather than the ship being in the custody and control of the United States
9 government.”), 26 (“[USSI] was an independent contractor hired by the United States to
10 provide fire safety services. Upon information and belief, [USSI] did not have the proper
11 certifications to provide these services to the United States while performing its contracted
12 work on the [BHR]. In addition, [USSI] failed to adequately [sic] warn the military
13 personnel on the [BHR] about potential fire hazards—including the fire hazards that led
14 rise to the fires on July 12, 2020—nor did [USSI] notify any other Defendants that they
15 were out of compliance with reasonable fire safety protocols.”).)

16 Because Plaintiffs allege in essence that NASSCO was responsible for safely storing
17 and maintaining its supplies in the areas it was working on and USSI was responsible for
18 fire safety of the entire ship, collective allegations regarding, for example, failure to
19 properly “avoid[] clutter, follow[] fire safety measures, enable[] unrestricted access to
20 firefighting and damage control equipment,” and “maintain[] close watch on the area” are
21 reasonably attributable to both NASSCO and USSI. (*See* FAC ¶¶ 27, 29; *see, e.g., id.* ¶¶
22 28 (“Defendants had carelessly placed large and heavy electric and other cables in a manner
23 that prevented sailors from closing doors and other hatches to prevent the further spread of
24

25
26 ¹⁷ NASSCO’s Rule 8 challenge is surgically crafted to target the collective allegations only to the
27 extent Plaintiffs intended to include GDC. (*See* Doc. No. 31-1 at 26–27.) However, USSI’s joinder either
28 misreads NASSCO’s narrow argument or intentionally expands it to challenge the collective pleading of
all Defendants as a violation of Rule 8. (*See* Doc. No. 32 at 4–5.) Although USSI cannot challenge
allegations on NASSCO’s behalf, the Court addresses whether Rule 8 is violated as to any Defendant for
completeness.

1 the fire. Misplaced scaffolding, equipment, and debris also came in the way of firefighters,
2 thereby compounding the already difficult task of fighting flames.”), 43 (“Defendants each
3 have special knowledge and expertise far beyond that of a layperson with regard to the ship
4 safety and ship fire mitigation, engineering, construction, use, operation, inspection, repair,
5 and maintenance of US Navy warships.”), 44 (“Defendants had a duty to Plaintiffs to take
6 reasonable steps to prevent ship fires, fight ship fires, control ship fires and mitigate fire
7 hazards aboard the vessel.”), 45 (“Defendants breached the above duties by failing to take
8 reasonable steps to mitigate fire hazards, prevent fires, and fight ship fires.”).)

9 Accordingly, the Court finds that the FAC does not violate Rule 8 as to NASSCO
10 and USSI by including collective allegations. *See United States v. United Healthcare Ins.*
11 *Co.*, 848 F.3d 1161, 1184 (9th Cir. 2016) (“There is no flaw in a pleading, however, where
12 collective allegations are used to describe the actions of multiple defendants who are
13 alleged to have engaged in precisely the same conduct.”).

14 Turning to GDC, the FAC makes only two allegations against GDC by name:

15 Defendant GENERAL DYNAMICS CORPORATION, INC., was, at all
16 times relevant to this pleading, a Delaware corporation authorized to do, and
17 doing business, in California. At all times relevant to this pleading,
18 GENERAL DYNAMICS CORPORATION, INC., provided services
19 supporting the USS Bonhomme Richard and did so through its agents,
employees, and subsidiaries, including by working in concert by and through
NATIONAL STEEL AND SHIPBUILDING COMPANY.

20 (FAC ¶ 15.)

21 “Upon information and belief, at all times relevant to this complaint,
22 NATIONAL STEEL AND SHIPBUILDING COMPANY is and was a
23 subsidiary of GENERAL DYNAMICS CORPORATION, INC. and worked
with and reported to GENERAL DYNAMICS CORPORATION, INC.”

24 (FAC ¶ 21.)

25 Plaintiffs assert that, accepting these allegations as true, they “have pleaded GDC
26 dictates general policies and controls how NASSCO will operate on a day-to-day basis.”
27 (Doc. No. 34 at 26.) To the extent Plaintiffs seek to hold GDC directly liable for its own
28 actions, these allegations are insufficient. Unlike the allegations against NASSCO and

1 USSI which include detailed acts and omissions prior to the collective pleading, the
2 allegations against GDC fail to provide a sufficient basis for how they were directly
3 involved such that the collective pleading makes sense. To the extent Plaintiffs seek to hold
4 GDC liable on a theory of alter ego, the FAC is devoid of allegations supporting such a
5 theory. (*See generally* FAC; *see also* Doc. No. 31-1 at 24–26 (raising and disposing of an
6 alter ego theory).) In fact, from Plaintiffs’ opposition, it appears Plaintiffs had no intention
7 of pleading alter ego against GDC as they devote multiple paragraphs to explaining why
8 “*Defendants’* argument that GDC is only an alter ego must fail.”¹⁸ (Doc. No. 34 at 25–26.)
9 With regard to GDC only, the FAC violates Rule 8 and fails to state a claim pursuant to
10 Rule 12(b)(6).

11 Plaintiffs request leave to amend the FAC (Doc. No. 34 at 27), while NASSCO
12 asserts that such amendment would be futile because (1) Plaintiffs do not identify what
13 allegations they would add and (2) Plaintiffs “have already amended once without
14 substantively changing it” (Doc. No. 36 at 11). Pursuant to Rule 15, “[t]he court should
15 freely give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2); *see also Eminence*
16 *Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (“Absent prejudice, or a
17 strong showing of any of the remaining *Foman* factors, there exists a presumption under
18 Rule 15(a) in favor of granting leave to amend.”). Here, Defendants do not assert Plaintiffs’
19 request is infected by bad faith or dilatory motive or would inflict undue prejudice. *Cf.*
20 *Foman v. Davis*, 371 U.S. 178, 182 (1962). Although Plaintiffs amended their initial
21 complaint in response to Defendants’ initial motion to dismiss, the amendment successfully
22 addressed some issues raised by Defendants and shifted the landscape of Defendants’
23 subsequent motions to dismiss. This is not yet a circumstance where Plaintiffs have taken
24 multiple “bites at the apple by alleging and re-alleging the same theories in an attempt to
25 cure pre-existing deficiencies.” *See Eminence Cap.*, 316 F.3d at 1053 (citation and internal
26 quotation marks omitted). The Court finds providing leave to amend proper at this juncture.

27
28 ¹⁸ Despite this, Plaintiffs conclude they should be entitled to conduct discovery into application of California’s alter ego factors based on the allegations within the FAC (Doc. No. 34 at 28 n.8).

1 *See Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir.
2 2004) (“Dismissal without leave to amend is improper unless it is clear . . . that the
3 complaint could not be saved by any amendment.”).

4 **C. Conclusion**

5 Accordingly, the Court **GRANTS** NASSCO and GDC’s motion to dismiss claims
6 against GDC for failure to state a claim. However, the Court **GRANTS in part** and
7 **DENIES in part** USSI’s motion to dismiss. All claims against GDC are **DISMISSED**
8 **with leave to amend** pursuant to Rules 8 and 12(b)(6). The Court **GRANTS** Plaintiffs
9 leave to amend the FAC for the **limited purpose** of addressing the deficiencies regarding
10 GDC identified herein. Amendment beyond the scope provided will not be considered.

11 **IV. CONCLUSION**

12 Based on the foregoing, the Court hereby **ORDERS**:

13 1. Defendants’ motions to dismiss pursuant to Rule 12(b)(1) are **DENIED**
14 **without prejudice**.

15 2. NASSCO and GDC’s motion to dismiss claims against GDC pursuant to
16 Rules 8 and 12(b)(6) is **GRANTED**. All claims against GDC are **DISMISSED**.

17 3. USSI’s motion to dismiss all claims pursuant to Rules 8 and 12(b)(6) is
18 **GRANTED in part** and **DENIED in part** as detailed *supra*.

19 4. Plaintiffs are **GRANTED limited leave to amend** the claims against GDC
20 only as detailed *supra*.

21 5. If Plaintiffs choose to file an amended complaint, it must comply with the
22 limited leave granted herein and be filed **no later than April 13, 2026**. Plaintiffs must
23 concurrently file a red-lined version of the amended complaint in compliance with Civil
24 Local Rule 15.1.c.

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1 6. Defendants must file a responsive pleading to the operative complaint no later
2 than **April 27, 2026**. If Defendants wish to respond to any amended complaint pursuant to
3 Rule 12, such a motion must be limited to addressing only that which Plaintiffs
4 substantively amended.

5 **IT IS SO ORDERED.**

6 Dated: March 30, 2026

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8 Hon. Anthony J. Battaglia
9 United States District Judge
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