No.

IN THE

Supreme Court of the United States

DANIEL BRINK, ET AL., Petitioners

v.

CONTINENTAL INSURANCE COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 ("Longshore Act") provides an exclusive remedy for all injuries that are *within the act*, specifically a process for determining compensation for disability and medical expenses arising out of injuries suffered in the course of employment that is covered by the act. But Section 5(a) of the Longshore Act does not create a claim, or provide coverage for injuries, financial, physical and emotional, that are not the result of an "injury" that is within the Act – "accidental injury . . . arising out of and in the course of employment," § 2(2), 33 U.S.C. § 902 (2). The statute does not create, and therefore cannot limit, claims that are caused by subsequent intentional conduct of employers or insurance carriers that causes harm to persons who are no longer, or even never were, employees within the coverage of the Act, and for whom the Act never provided any remedy at all. Nothing in the act can be construed to destroy, or take away common law rights of affected persons without a sufficient *quid pro quo*.

The Racketeer Influence Corrupt Organization (RICO) Act, 18 U.S.C. §1961 et seq., applies to any enterprise created by a company covered by the Longshore Act, through which that company acting together with another, such as a third party administrator, acts to commit a pattern of illegal or fraudulent acts (as defined by RICO) that proximately causes an independent harm to individuals and their property. Nothing in the Longshore Act, or in RICO, exempts companies covered by the act from the remedial reach of RICO.

The questions presented are simple and straightforward:

1. Whether the Longshore Act's exclusive remedy provision excludes not only accidental injuries directly related to the "work" of covered workers—but also injuries that are secondary and new—that were not caused by the "work" itself, but are independent, caused by the new, supervening, intentional, and malicious conduct of Insurance Companies—inducing new and independent injuries wholly unrelated to the original covered "work" itself.
2. Whether the Longshore Act's exclusive remedy provision can be construed to reach beyond regulation of compensation for injuries suffered while doing the "work" covered by the act to define what is and is not actionable outside the Act, or whether there is some further comprehensive scheme that preempts tort actions, excluding actions against Insurance Companies and/or Contracting Companies for new injuries inflicted in the United States, unrelated to the covered work itself, not in the course of the covered employment, not on account of the original injury suffered while working, affecting entirely new injuries and harms caused by independent and supervening intentional acts?

3. Whether RICO can apply to an "enterprise" created by contracting Companies, their insurance carriers, and third party administrators who utilize the enterprise to commit fraudulent acts that proximately caused independent harm to covered workers and their families, and thousands similarly situated persons.

PARTIES TO THE PROCEEDING

Petitioners Daniel Brink; Ronald Bell; Merlin Clark; Marcie Clark; C.J. Mercadante; Johann Steenberg; Steven Thompsen; Jack Jones; Fred Busse; Mark Griffin; Wallace Byars; Antonio Ambrose; Cody McAnally; Patrick J. Brewer; Coenrad Theunissen; Malik Hadi; Robert Biddle; Margaretha Bezuidenhout; Harbee Kreesha; Mohsen Alsaleh;; Mbusi Cele; Marlene Gericke; Nicky Pool; Mark McLean; Allen Porch, III; Catharina Louw; Surita Swart; Christo Engelbrecht; Desire Tablai, as guardian and natural parent of Diante Tablai, a minor, and Migual Tablai, a minor; and Christine Holguin-Luge were Plaintiffs and Appellants below.

Respondents Continental Insurance Company; ACE American Insurance Company; Zurich Insurance; Tacticor International; DynCorp International, LLC; Northrop Grumman Corporation; Halliburton Corporation; Ronco Consulting; Wackenhut Services International; Global Linguist Solutions, LLC; Siegler, Inc.; US Investigations Services, LLC; Combat Support Associates; AECOM Government Services, Inc.; Erinys Ltd.; Khudairi Group; Exelis Systems Corporation; USIS International, Inc.; L-3 Services, Inc.; Kellogg Brown & Root Services, Inc.; Academi, LLC; American International Group, Inc. were Defendants and Appellees below.

Parsons Group ITT Corp.; Titan Corporation; XE Holdings, LLC; AIG Insurance Company; CNA Global Insurance; and Kellogg Brown & Root, LLC appeared before the District Court, but are not parties in this Petition.

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PETITION FOR WRIT OF CERTIORARI

The above-named Petitioners respectfully petition for a writ of certiorari to review the judgement of the United States Court of Appeals for the District of Columbia Circuit in this matter.

OPINIONS BELOW

The opinion of the court of appeals affirming in part and reversing in part, reported at 787 F.3d 1120, is reprinted in the Appendix (App.) at 1a-18a. The order denying rehearing en banc, reported at 2015 U.S. App. LEXIS 13842 (D.C. Cir. Aug. 6, 2015), is reprinted at App. 57a. The underlying opinion of the district court, reported at 787 F.3d 1120 (D.C. Cir. 2015), is reprinted at App. 22a-55a.

JURISDICTION

The Circuit Court of Appeals for the District of Columbia entered its judgment on June 2, 2015 and denied a petition of rehearing and rehearing en on August 6, 2015 App. 56a-57a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

Title 33, United States Code, Section 905(a) is reproduced in the Appendix at 58a.

STATEMENT OF THE CASE

The decision below calls into question fifty years of well-known precedent by construing the exclusive remedy provision of the Longshore Act in a way that allows employers and insurance carriers to deliberately injure workers who have suffered an initial injury on the job.

The question of what conduct by insurance companies relating to their handling of Longshore Act and Defense Base Act claims must be shielded from liability by the exclusive remedy provision of the Longshore Act has been inconsistently addressed by the several circuits. Decisions across the circuits do not provide meaningful guidance to litigants or to trial courts, leading to uncertainty, and more litigation.

The Plaintiffs brought a class action suit against the Defendants – DBA contractor-employers and their insurers – in federal district court for the District of Columbia alleging damages caused by conduct that is independent of the work covered by the act, and is outside the compensation system established by the act. The alleged wrongful conduct includes, *inter alia*, that Defendants threatened individuals once they made a claim of on the job injury, threatened their families when benefits were demanded, and in many cases, after accepting claims as covered and legally valid, failed or refused to provide medical benefits owed to Plaintiffs under the DBA while fraudulently asserting in reports to the Department of Labor that they had paid such benefits; cut off medical benefits owed under the DBA and fraudulently claiming their system caused it or they lost the checks; stopped payment on checks

for compensation or otherwise caused grave harm to persons in wheelchairs or caused bank investigations against individuals for checks that had been fraudulently mishandled by Defendants; delayed provision of medical benefits or compensation owed under the DBA, made false statements and misrepresentations regarding payment of DBA benefits while reducing, denying or ignoring Plaintiffs' medical needs; failed to comply with DOL orders to pay DBA benefits; discouraged workers from making DBA claims on pain of termination, or falsely imprisoned employees; directed incurring debts by spouses and family members only to withdraw payment once the bills came in, and threatened workers at their homes with institutionalization of their spouses and parents or financial ruin, through their agents and employees.[1]

Of the 30 plus individuals identified in the Complaint, the Court recognized only three as having claims not barred by the DBA exclusivity provisions, Bell, Holguin-Luge, and Pool, but neglected to apply the same reasoning to others with similar claims: Marcie Clark (a former employee's spouse, never an employee, whose claims include outrage and fraud and RICO damages to her personal and family life, who never had any right to claim benefits under the

[1] The U.S. District Court for the District of Columbia had jurisdiction based on 28 U.S.C. § 1331 in that several federal questions were raised including violations of the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. §§ 1961-68 and the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101 et seq.) and based on the Class Action Fairness Act (28 U.S.C. § 1332 (d)).

Act);[2] Fred Busse for damages caused by insurance company's manipulation of his bank account; Daniel Brink and his business agreements with CNA and DynCorp related to his trip to the U.S. and his refitting of his home in reliance on fraudulent promises of DynCorp; Chris Mercadante who was harassed and threatened and ultimately falsely imprisoned by Blackwater for claiming he was injured and needed treatment, to name a few.

This case presents a question of exceptional importance to the operation of the sole federal private-sector workers'-compensation program, the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50, and its extensions, including the Defense Base Act, 42 U.S.C. §§ 1651-54 ("DBA"): whether either the Act's "exclusive-remedy" provision, 33 U.S.C. § 905 (a), or its provisions for augmentation of periodic compensation payable in the event of untimely payment under certain circumstances, 33 U.S.C. § 914 (e), (f), or its dormant provision of criminal penalties for willfully making false statements in opposition to claims for benefits, 33 U.S.C. § 931 (c), forecloses state or federal common-law or statutory tort remedies for bad-faith insurance claims practices with respect to benefits under the Act.

The circuit court's June 2, 2015 opinion (App. 1a-18a) answered that question in the affirmative, in large part based on the authority of *Hall v. C&P Telephone Co.*, 809 F.2d 924 (D.C. Cir. 1987) (per curiam) (*Hall II*). App. 9a. Petitioners seek review by

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[2] Three others had ADA claims which were improperly dismissed due to faulty pleading without any allowance to replead.

this Court as the foreclosure of such remedies is based on a misreading of the terms and the intent of the exclusive-remedy clause and a misunderstanding of the very limited applicability of the augmentation-for-delay provisions, which had no bearing on any of Plaintiffs' cases.

The Second Amended Complaint ("SAC") lists alleged tortious acts that give rise to causes of action based on deliberate, knowing and intentional efforts to cause foreseeable harm to Plaintiffs and their families, their credit, their finances and personal property, including loss of necessary medical treatment, and increased or new physical and psychological injuries. According to the Department of Labor ("DOL"), over 100,000 persons reported injuries and deaths since the beginning of the Iraq and Afghanistan campaigns.[3] Longshore cases result in payouts of nearly $500,000,000 per annum.[4]

The pattern of conduct alleged includes, *inter alia*: promising to provide benefits with detrimental reliance and then withholding the promised benefits (including Brink, Mercadante, Biddle, Bezuidenhout, Steenberg, Theunissen, Jones, Byars, Clark, among others) (SAC ¶ 136); refusing to provide benefits after being instructed to do so by the DOL and after accepting the benefits as due including medical

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[3] See U.S. Dep't of Labor, *Defense Base Act Case Summary Reports*, (last visited Oct. 30, 2015); U.S. Dep't of Labor, *Defense Base Act Case Summary by Employer*, http://www.dol.gov/owcp/dlhwc/dbaallemployer.htm (last visited Oct. 30, 2015); SAC ¶¶ 552-63.

[4] See Office of Workers' Compensation Programs, U.S. Dep't of Labor, *OWCP Annual Report to Congress—Fiscal Year 2012*, Feb. 26, 2014.

procedures (Mercadante, Clark, Busse, Bell, and many others) (SAC ¶ 82); issuing checks to pay for medical treatment but then stopping payment (Brink, Busse) (SAC ¶ 353); telling injured victims they will be treated but then hiring doctors that have agreed to falsify and misrepresent the facts to avoid payment (Brink, Busse, Mercadante, Clark, and many others) (SAC ¶¶ 188 – 192); making false statements to doctors and to the DOL concerning payment of medical expenses, reimbursements (Brink, Mercadante, Clark, Steenberg, among others), and incorrectly paying disability benefits (Steenberg, Clark, Busse, and many others).

The actions of Defendants were deliberate and designed to inflict injury, or done knowingly and foreseeing serious injury to Plaintiffs. Daniel Brink who was involved in an IED explosion in Iraq while on the job, had his legs and parts of his hands torn off, suffered a brain injury, had multiple surgeries, PTSD, and complications for years. Defendants DynCorp and CNA Insurance accepted his claim, but over a period of years injured him by taking actions that caused secondary injuries, e.g., because they failed to pay for his wheelchair it was repossessed, and another wheelchair was not delivered because Defendants stopped payment on a check. CNA caused a secondary injury to Mr. Brink by authorizing $150,000 in payments for medical expenses but then delaying payment for 3 years, causing him to lose his house and furniture, while being forced into homelessness. While CNA engaged in a pattern of misrepresentation to Mr. Brink and DOL that it had paid the medical bills, Doctors and nurses who had not been paid refused to provide him with needed care, causing new and additional mental

and physical injuries. But Mr. Brink's claim has been dismissed based upon the exclusive remedy bar.

Mr. Mercadante, who was severely injured while working for Blackwater, was told that medical treatment had been approved, but when he attended appointments payment was denied. The delays and refusal to pay healthcare providers interfered with subsequent treatment, causing him to suffer new injuries. His life-threatening injuries became worse, exacerbating his psychological issues. These claims are corroborated by Dr. Afield, one of Mr. Mercadante's doctors, who wrote:

> "I must say in 49 years of practice that I have had in medicine, this is really rather outrageous and I can see why the man is so upset…I feel I am obligated to inform somebody that what they are doing is killing him. This is just not the way you treat your people and it is certainly not the way you treat people coming back from Iraq."[5]

Mr. Mercadante's claims have been dismissed under the exclusive remedy doctrine.

Merlin Clark, whose claims have also been dismissed, suffered massive injuries from an ordnance explosion. After his DBA claim was initially accepted, and he was repeatedly told that benefits been paid, then his claim was rejected, and payments were refused, which interfered with medical treatment.[6] As a result, Mr. Clark lost

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[5] SAC ¶¶ 130-66.
[6] *Id.* ¶¶ 100-10.

appropriate medical treatment, financial stability, psychological stability and treatment, medications, and medical devices needed for recovery. His wife was forced to give up her career to care for Mr. Clark.[7]

Plaintiff Holguin-Luge, whose claim was originally dismissed, was sexually assaulted by a KTTC employee who threatened to kill her if she told anyone, which the circuit court reversed and remanded.[8] But, the similar claim of Plaintiff Biddle, who was willfully injured by Blackwater, has been dismissed.[9] The claim of Plaintiff Thompson who was refused PTSD treatment after KBR and AIG directed his doctor to rewrite his report to say he was exaggerating his symptoms has also been dismissed.[10] Plaintiff Busse, whose claim has been dismissed, was awarded benefits, yet payment was delayed three years while Defendants SEII and AIG fraudulently sought opinions from multiple additional doctors when the initial opinion did not meet their expectations, causing Mr. Busse to suffer new injuries. His claim has been dismissed in this action, though AIG actually engaged in sending a forged check.[11] Plaintiff Pool's claim has survived though she was blackballed by most medical providers in South Africa after CNA refused to pay her medical bills. The decision below allows her

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[7] *Id.* ¶¶111-1l6; Declaration of Marcie Hascall Clark attached to Memorandum in Opposition to WSI/RONCO's Motion to Dismiss

[8] SAC ¶ 322, 325, 328.

[9] *See id.* ¶ 283.

[10] *See id.* ¶ 187.

[11] See *id.* ¶ 260-65.

claim to proceed but not the strikingly similar claim of Mr. Brink.[12] And Plaintiff Mercadante who was intentionally threatened and falsely imprisoned has been dismissed.

The injuries suffered by each of the described Plaintiffs was secondary to the underlying covered claim, and was the direct result of Defendants' supervening wrongful and deliberate conduct.[13] Yet some claims have survived dismissal, while others have been dismissed, with often semantic distinctions providing the only explanation.

REASONS FOR GRANTING THE PETITION

This case presents a straightforward question of statutory construction of the exclusive remedy provision of the Longshore Act, which affects several hundred thousand contractors who have been badly injured, or killed, and who have been abused by ongoing intentional acts of the contacting companies and insurance companies who are paid billions of dollars to assist the United States in its missions in Iraq and Afghanistan and Kuwait and elsewhere on U.S. Bases. This also affects tens of thousands of Longshore cases brought in the courts.[14]

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[12] *See id.* ¶ 412.

[13] SAC ¶¶ 39 – 71, and with specificity as to each named representative Plaintiff ¶¶ 72 – 560.

[14] This court is no stranger to resolving splits among circuits recently as to differences about scope of Longshore Act provisions or meaning of particular provisions. *See, e.g., Roberts v. Sea-Land Services, Inc.,* __U.S.__, 132 S. Ct. 1350, 182 L. Ed. 2d 341 (2012);; *Pacific Operators Offshore, LLP v. Valladolid*, __U.S. __, 132 S.Ct. 680, 181 L. Ed. 2d 675 (2012).

Numerous courts have recognized that the exclusive remedy of the workers compensation scheme of the Longshore Act and Defense Base Act together – do not foreclose claims for intentional torts such as outrage, fraud, or other independent torts that are not "on account of an injury" suffered while performing the actual work for which they sought and received workers compensation benefits. No court, other than this one below, has held that the Longshore Act preempts intentional torts by these companies even if they are caused by deliberate acts against individuals who are not even the worker who suffered a compensable injury. Other courts have found that there is an intentional tort exception, and yet still other courts have said there likely would be. Thus this case presents a morality tale of the harm wrought by the absence of predictable and measurable standards. Though Petitioners hope they are not overly cynical, we do not believe we will be the first to suggest that business practices can be expected to fall to the lowest accepted legal standard. If Longshore employers and their insurers believe the law will protect them from the consequences of conduct designed to drive down the costs of claims, regardless of the secondary harm it may cause, they can be expected to conform their business practices to legal expectations, however diminished. If the exclusive remedy doctrine is determined by courts to apply to conduct outside of the workplace, and even into claims behavior, and to protect corporations from the secondary impact of their practice upon workers, they should be expected to take full advantage.

The decision below while explicitly recognizing that claims of assault and battery are not foreclosed,

nevertheless utilized a decision, now several decades old, decided under the District of Columbia Workers Compensation Act, to foreclose claims based on other intentional acts. That case, and the District of Columbia Workers Compensation Act, easily distinguishable, characterized claims of external "bad faith" as being within the exclusive remedy, and denied the Plaintiffs any remedy for other deliberate acts, though the basis for making the distinction cannot be understood on any other than a semantic basis.

Consider Daniel Brink: the carrier deliberately authorized his nurse manager to incur $150,000 in medical expenses, including a mechanized wheelchair, but after all expenses were incurred, refused any payments, including stopping payment on a check issued for the wheelchair. The carrier then admitted responsibility for payment but falsely informed the DOL that payment had been made. This caused the loss not only of the wheelchair, but the worker's home and furniture. How could such acts be less egregious than simple assault or battery and not actionable in tort? One suspects Mr. Brink would have happily taken a simple beating rather than suffer through years of economic and consequential emotional and physical agony ending in homelessness. Yet under the current rubric, depending on which circuit you are in, the beating is actionable while the years of suffering intentional economic privation caused by malicious conduct is not.

I. THE "EXCLUSIVE REMEDY" PROVISION OF THE LONGSHORE ACT PERMITS ACTIONS AGAINST EMPLOYERS AND INSURANCE CARRIERS FOR DELIBERATE, INTENTIONAL TORTS BASED ON ACTIONS WELL AFTER THE INJURY OF THE INJURED WORKER.

The Longshore Act "creates a comprehensive federal scheme to compensate" workers who are injured in the course of covered employment. While the Act requires that compensation for such an injury be paid promptly "without an award" unless the employer files a notice "controvert[ing]" liability (§ 14(a), (d)-(e), 33 U.S.C. § 914 (a), (d)-(e)), it provides administrative procedures both for prompt issuance of awards in undisputed claims (subject to "modification" if and when a dispute develops thereafter) and for formal-hearing proceedings to resolve disputed claims (Act § 19(b)-(e), 33 U.S.C. § 919 (b)-(e)).

It has absolutely no remedy for the claims in this case, and does not pretend to exclude deliberate harm and intentional torts such as are claimed in this case. This case was wrongly decided as being a mere "bad faith" refusal to pay benefits case that falls squarely within the ambit of *Hall v. C&P Telephone Co.*, 793 F.2d 1354, 1356 (D.C. Cir. 1986) (*Hall I*), and that case on rehearing, *Hall v. C&P Tel. Co.,* 809 F.2d 924 (1987) (per curiam) (*Hall II*). It is not that kind of case. Instead, it involves cases solely of those whose claims have been accepted, who are supposed to be paying or providing benefits, but

the employers and carriers have tried to illegally and intentionally go around the law to threaten, stop payment, employ fraud and artifice to pretend to be complying with the law but instead trying to harm plaintiffs and their families, through intimidation, lying to doctors, lying to the Department of Labor, creating wedges with doctors, pretending to lose checks or electronic payment information, lying about when things were sent to doctors, and threatening spouses. They have, under the law of the well-pleaded complaint, intentionally inflicted mental and emotional distress on plaintiffs, their families, and have wreaked financial havoc.

There is no remedy for any of these abuses under the Longshore or DBA Acts. The Longshore Act has no provisions at all providing a remedy for the acts described in the SAC, with the sole exception of a provision added in 1984 to criminalize "knowingly and willfully making a false statement or representation for the purpose of reducing, denying, or terminating benefits," § 31(c), 33 U.S.C. § 931 (c) – a provision that has lain fallow for 30 years despite ample occasions for its invocation. Premium rates for LHWCA insurance are regulated solely by the states in which the insured employment is conducted; those for DBA insurance are entirely *un*regulated.

The authorities on the scope of § 5 (a) have generally recognized that its foreclosure of tort liability is inapplicable to cases of *intentional* injury by the employer, even as to events that *are* "in the course of [the worker's] employment." *A fortiori*, there is no basis for denying recovery for intentional torts that are *not* in the course of the worker's employment.

Hall II may not apply to most if not all of the conduct as other circuit's law should be applied under choice of law principles, as many of the actions took place in other circuits that caused the wrong harm, such as New York 2d Circuit (AIG and CNA), Illinois 7th Circuit (CNA headquarter offices for DBA decisions where Brink and Pool traveled), Texas, 5th Cir (DynCorp, KBR, Bell lives there and events occurred there), Missouri (Busse), 11th Cir. Florida (Clarks and Mercadante) and so on. Many were wronged in South Africa such as Steenberg and Bezuidenhout. Which law should apply beyond *Hall II* is not for the 12(b)(6) setting to determine. *Hall II* involved a case in the District of Columbia. No District of Columbia plaintiffs exist in this case.[15]

The Court's order also conflicts with other courts around the country in rejecting intentional torts that do not occur on the job. For example, *Ross v. Dyncorp*, 362 F.Supp.2d 344, 364-65 (D.D.C. 2005), ruled that plaintiffs could sue for intentional infliction of mental and emotional distress due to the inhumane handling of a dead body. Yet Plaintiffs have alleged just that in the mistreatment of persons in wheelchairs (Brink), burn victims left to die (Tablai), and other extreme and uncivilized behavior that society cannot tolerate (Bezuidenhout, mishandling of body parts and accusing deceased of taking drugs and dying of alcohol intake), claims of family members who have no ability to claim under

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[15] *See, e.g., Harper v. LG Elec. USA*, 595 F. Supp. 2d 486, 490-91 (D.N.J. 2009) (observing that choice-of-law determinations require a full factual record and refusing to rule on choice-of-law at the 12(b)(6) stage); *Sioux Biochemical, Inc. v. Cargill, Inc.*, 410 F. Supp. 2d 785, 800 (N.D. Iowa 2005).

the Act (Marcie Clark), claims of worsening PTSD and inflicting it on family members as in Clark, Mercadante, and others. Family members of living workers have no remedies in the Act when companies or insurance companies (or both in conspiracy) seek to deliberately inflict damage or distress on family members by threatening them (Mercadante, Clark, Theunissen, Steenberg), claims of fraud in banking and stop payments (Busse and Brink). Similarly, in *Kuhlman v. Crawford and Co.*, 2002 U.S. Dist. LEXIS 28223, No. 01-6036-CIV (S.D. Fla. Jan. 23, 2002), the court permitted a claim to proceed for intentional infliction of emotional distress, alleging the carrier knowingly prepared a false labor market survey report, intent on denying or reducing his disability benefits. Because these *actions took place after the injury*, the court found that they gave rise to a separate cause of action from the exclusivity provision of the LHWCA. This, even though the labor market survey itself was commissioned in response to the claim. *See Houston v. Bechtel Assoc. Prof. Corp*., 522 F. Supp. 1094, 1096 (D.D.C. 1981).

In *Fisher v. Halliburton*, 667 F.3d 602 (5th Cir. 2012), the court concluded that the exclusive remedy bar only applied in the lack of certain factors:

> We are not confronting a situation in which…employer personally assaulted an employee. Nor are we confronting a situation in which an employer has conspired with a third party to inflict an assault on the employee.

Id. at 620. The 5th Circuit specifically chose not to address the issue of intentional tort by employers

and carriers against claimants, because it was not properly before them. However, the court did take the opportunity to point out that a number of states have found such injuries actionable in civil court:

> Importantly, the cases take a very narrow view of the types of intentional injury that lie outside of the LHWCA— the cases consistently require that the employer have had a specific intent or desire that the injury occur.

Id. at 618.

The 5th Circuit not only relied upon multiple state court decisions on this point, but also Professor Arthur Larson's treatise, *Larson's Workers' Compensation Law* § 103.01 (2011), at 103-3, that intentional acts by employers are not covered under the Longshore Act. *Fisher*, 667 F.3d at 618 n.59 (citing 6 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 103.01, at 103-3 (2011) The court further looked to the *Bechtel* decision, where specific intent is required on the part of the employer for an employee to bring a tort action outside of the LHWCA, *Houston v. Bechtel, 522 F. Supp*. at 1096.

The 5th Circuit noted the decision in *Talik v. Fed. Marine Terminals,* 117 Ohio St.3d 496 (2008), which held:

> Although [LHWCA] covers an intentional tort by third parties against an employee, the definition does not include an intentional tort by an employer.

> Thus, courts have held that because Congress did not explicitly include an employer intentional tort in the exclusive-remedy provision of Section 905(a), an employee may pursue an intentional tort action against the employer. We therefore cannot say that Congress has expressly preempted the intentional tort standard that Ohio uses.

Id. at 503 [citations omitted].

See also Bowen v. Aetna Life, 512 So.2d 248 (Fla. App. 1987) (permitting intentional infliction of emotional distress, as a result of the carrier's intentional and malicious refusal to pay benefits, which the court held did not fall under the exclusivity provision of the Act); *Linn v. United Plant Guard Workers of America, Local 114,* 383 U.S. 53, 86 S. Ct. 657, 15 L.Ed.2d 582 (1966) ("[t]o the extent…that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated…."); *Hoffman v. Lyons,* No. 08-5248, 2009 U.S. Dist. LEXIS 84458 (D. N.J. Sept. 15, 2009) (recognizing intentional tort exception to exclusive remedy of Longshore if plaintiff alleges employer's specific intent to injure); *Taylor v. Transocean Terminal Operators, Inc.*, 785 So.2d 860, 863-64 (La. Ct. App. 2001), *cert. denied sub nom. Transocean Terminal Operators, Inc. v. Taylor,* 534 U.S. 1020 (2001) (examining case law, finding no cases saying there is no intentional tort exception to exclusive remedy, and recognizing intentional tort exception under Longshore because "the workers compensation 'bargain' typically does

not include an employer's intentional tort."); *Holmes v. Pacarini USA, Inc.*, 88 So. 3d 671, 673 (La.App. 4 Cir. 2012) (approving *Taylor*, finding that intentional tort is exception to Longshore exclusive remedy and remanding as discovery needed to show whether the torts were truly intentional); *Talik*, 117 Ohio St. at 503 (court recognizes exception to exclusive remedy preemption under Longshore for state intentional tort with intent plus harm that is "substantially certain" to occur, which is a fact issue).

The Circuit split and muddying of the intentional tort exception comes prior to *Fisher* in *Atkinson v. Gates, McDonald & Co.*, 838 F.2d 808 (5th Cir. 1988). There the Fifth Circuit held that the exclusivity provision of Section 5(a) precludes a claimant from bringing a suit against an agent of his employer, the administrator of a fund established by the self-insured employer for payment of claims under the Act, for alleged bad faith in terminating compensation payments, even though the Act does not contain any language explicitly precluding such a lawsuit. The court indicated in a footnote that its holding may be inconsistent with the First Circuit decision in *Martin v. Travelers Ins. Co.,* 497 F.2d 329 (1st Cir. 1974), but elected to follow *Sample v. Johnson*, 771 F.2d 1335 (9th Cir. 1985), *cert. denied,* 475 U.S. 1019 (1986), and *Hall*, 809 F.2d 924. *Atkinson*, 838 F.2d at 814, n. 6.

But even *Sample* recognized a true intentional tort exception to the exclusive remedy of the Longshore Act.[16] It found the exclusive remedy provision

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[16] The District Court erred by finding a stricter exclusive remedy in the Defense Base Act, but the Circuit Court declined to follow this clear error of statutory interpretation. The DBA's

(Footnote continued . . .)

"not applicable to claims concerning such [intentional] injuries. However, the term 'intentional' is construed very strictly…." *Sample*, 771 F.2d at 1346 (quoting Professor Larson on workers compensation non applicability to intentional injuries). Just prior to the ruling in this case, but well after it was fully briefed, another federal district court found that there is an intentional tort exception, but that it requires deliberate intent to harm, not just knowledge that the harm occur and allowing it to occur. *Birkenbach v. Nat'l Gypsum Co.*, 2014 U.S. Dist. LEXIS 88483, 13-15 (E.D. Mich. June 30, 2014) . The court went through a series of cases that make the proper distinctions of recognizing the intentional tort exception in Longshore cases but not anything falling short of true intentional and deliberate intent to injure, and found:

> The conduct Birkenbach complains of does not fall within the intentional tort exception of the LHWCA because willful and wanton conduct, short of a deliberate intent to injure, is within the exclusive reach of the Act.

Id.[17]

Since the ruling in the case at bar, commentators who represent companies and insurance carriers in Longshore and DBA cases have been touting the *Brink* case as substantially

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extra exclusive remedy provision found at 42 U.S.C. only applies to also excluding state workers compensation proceedings, which Longshore does not. 42 U.S.C. § 1651 (c).

[17] Numerous other cases also recognize exceptions to exclusive remedy bar in Longshore cases. See fn. 23 and accompanying text.

clarifying the scope of the exclusive remedy bar, and extending it beyond what was known to exist previously. See, e.g., Alan Brackett, *D.C. Circuit Rules No Intentional Tort Exception Under Defense Base Act*, Navigable Waters: A Maritime, Longshore, and Defense Base Act Blog (June 15, 2015), http://navwaters.com/2015/06/04/d-c-circuit-rules-no-intentional-tort-exception-under-defense-base-act/.

The lower court decision has sown further confusion, inspiring courts to find that the doctrines of exclusive remedy and exhaustion of administrative remedies prevent an employee from suing for their wrongful termination and loss of wages under a contract theory as well. *See Sickle v. Torres Advanced Enterprise Solutions*, LLC, 17 F.Supp.3d 10, 48 BRBS 37(CRT) (D.C.D.C. 2013) (appeal held in abeyance pending outcome of the instant case).[18]

The evidence on the 209-page SAC establishes intentional torts viewing the evidence in a light most favorable to Plaintiffs. But no discovery was permitted on the intentional tort issues. Thus this case has far-reaching meaning not only for the hundred thousand contractors injured in Iraq and Afghanistan and still being injured there, but also for the millions who are subject to the Longshore Act internationally. This decision should be heard by this Court to resolve the confusion such a decision has engendered and to permit cases to move forward that fit within the true intentional tort exception.

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[18] The Circuit Court's allowance of the claims of Nicki Pool in the instant case under a contract theory to proceed would seem to indicate that the Circuit Court will reverse when it hears the *Sickle* appeal.

II. WHETHER THE "EXCLUSIVE REMEDY" PROVISION OF THE LONGSHORE ACT PERMITS AN ACTION FOR DAMAGES THAT ARE NOT "ON ACCOUNT OF THE" WORKERS COMPENSATION INJURY IS AN EXCEPTIONALLY IMPORTANT FEDERAL QUESTION THAT WARRANTS THIS COURT'S REVIEW

The decision of the Circuit Court errs for another reason: it extends the exclusive remedy provision beyond the injury on the job and seeks to sweep into its bar any subsequent injury committed by the employer or carrier off the job. To the extent the Court sees *Hall* as controlling even those situations like this one where there is an intentional harm that the carrier or the contracting company desires to commit to harm a person or persons – then that is directly at odds with other precedent of the District of Columbia and with the vast majority of other courts that state the Longshore and Defense Base Act is only an exclusive remedy for negligence or other non-intentional torts for injuries suffered *on the job*. The Court then adopts a preemption doctrine that goes beyond exclusive remedy analysis. The Longshore and DBA act only to foreclose a tort suit, whether negligence based or a genuine intentional tort for those things that could be remedied exclusively by the Act: viz., benefits for on the job injuries, and penalties for failing to comply

with the Act regarding payment for benefits. Nothing more.[19]

Indeed, the decision (*Garret v. Washington*) on which the Circuit Court deferred and later agreed with in *Hall II, 809 F. 2d*, accurately stated that under § 5(a), "an employee is barred from bringing a common law tort action against his employer for injuries which have been or could be compensated under the Act." *Garrett v. Washington Air Compressor Co.*, 466 A.2d 462, 463 (D.C. 1983). Without remarking explicitly that the action of the insurer which was allegedly tortious – bad-faith opposition to his claim for a previous back injury – was not such an "injury," the court reasoned that the plaintiff's argument "ignores the fact that the Act provides a specific remedy for the wrong of which he complains," describing the operation of LHWCA § 14(b), (d), (e), 33 U.S.C. § 914, and concluding that "appellant's remedy for the alleged tardiness of [the employer and its insurer] in making payments under the Act was to seek an administrative fine pursuant to 33 U.S.C. § 914 (e)." *Garrett*, 466 A.2d at 464. On

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[19] This misnomer of preemption is most vexing considering (1) that the court allowed several causes of action to proceed on remand including an intentional tort of assault against Bell by KBR once Bell filed his PTSD claim, the ADA claims, the claim of Nicki Pool for her services as a nurse and consequential damages for CNA not paying under their agreement, and the sexual assault on the KBR employee; and (2) numerous types of claims are permitted against contractors under federal law such as ADA, Title VII, and ADEA, as well as contract actions for breach of agreements to pay wages. True field preemption may be found in the battlefield preemption discussed in *Fisher v. Halliburton* or in *Saleh v. Titan Corp*., 580 F.3d 1, 9 (D.C. Cir. 2009) .

rehearing in *Hall*, the Court, agreeing with *Garrett,* reasoned that the LHWCA

> . . . provides a comprehensive scheme for compensating employees who are injured or killed in the course of employment. In return for the guarantee of a practical and expeditious statutory remedy, employees relinquish their common-law tort remedies against employers for work-related injuries.

Hall, 809 F.2d at 926. Describing the claimant's action against the employer as based on his being "[u]nsatisfied with the statutory *quid pro quo*," the Court repeated the *Garrett* court's reasoning:

> Not only does the Act provide general immunity to employers from employee tort suits, [citing § 5(a)], but it also provides a specific remedy for an employer's late payment of claims. *Id.* § 914(e), (f).

Id.[20] The other courts that have reached similar conclusions under the LHWCA and its extensions have relied upon the same reasoning, but have often stated the matter as one of *preemption* of otherwise available state-law remedies by the "comprehensiveness" of the statutory "scheme."

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[20] The Court appears to have overlooked the fact that the plaintiff's dissatisfaction there was not with "the statutory *quid pro quo*," but with the fact that he had been *denied* the benefit of the workers'-compensation bargain: the supposed "guarantee of a practical *and expeditious* statutory remedy" had proved worthless.

But the Act provides no remedy or authority for the Department of Labor to regulate insurers' claims practices. Section 14(e), the sole provision relied upon in *Garrett*, augments the compensation payable by ten percent if it is not paid promptly without the need for a claim or a "compensation order" making the award, *only if the employer or insurer fails to file a one-page form* "controverting" the claimant's rights.[21] If the denial of liability has not been brought to the administrator's attention, even if as a result of a *good-faith* belief that the Act does not apply, the amount due is augmented under § 14(e); conversely, if the form has been filed, even if it states no colorable ground for the denial or asserts such a ground without any basis and in bad faith, the augmentation provision does *not* apply, *Hitt v. Newport News S. & D.D. Co.*, 38 Ben. Rev. Bd. Serv. (MB) 47 (2004), and the Act provides no remedy at all for the harm resulting from what is often several years of delay before an award can be obtained. In short, the augmentation provisions have nothing to do with good or bad faith. Further, contrary to the Court's apparent casual assumption in *Hall*, it applies only to untimely "installment[s] of compensation," a phrase that does not encompass the *medical* benefits the employer in that case had allegedly withheld in bad faith.

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[21] Indeed, notwithstanding the explicit statutory reference to the prescribed form, the Benefits Review Board and some courts have held that the augmentation is avoided so long as the relevant Labor Department agency "knew of the facts a proper notice would have revealed." *E.g.*, *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288, 1295 (9th Cir. 1979).

Hall II moved well beyond what the DBA was designed to do -- to create a simplified, uniform compensation system for civilian contractors and their employers engaged in work outside of the United States at military bases and in Zones of Special Danger.

In order to be a comprehensive statutory scheme, the statute in question must provide administrative remedies, but none are provided in either the law for the deliberate damages inflicted upon these Plaintiffs by the Defendants. The injured Plaintiffs received benefits through the Department of Labor; through intentional acts of fraud, bad faith, misrepresentation, intentional infliction of emotional distress, etc., the Defendants went outside the scope of the DBA and gave rise to the claims contained in the SAC. It is unreasonable to find, for example, that intentionally stopping payments on a wheelchair for a Plaintiff who lost a leg, leading to the repossession of that wheelchair and fraud on the DOL about what happened, was anything other than an act of malicious intent on the well-pleaded complaint.

Marcie Clark, herself and similarly situated spouses, are not claimants or possible takers under the Act (as are widows) and could have no claims before the Department of Labor. Johann Steenberg and others in the Complaint were threated on their property by agents for the carrier. Daniel Brink had agreements with DynCorp and CNA that were breached--including agreements to reimburse him for the expense of flying from South Africa to the United States and for retrofitting his home to accommodate his disabilities. These agreements have nothing to do with the exclusive remedy provision but have been dismissed.

The Circuit Court says that *Martin v. Travelers Ins. Co.*, 497 F.2d 329, 330-31 (1st Cir. 1974), has been strictly limited to its facts, and was rejected by *Hall II,*[22] but in the case of Brink, those exact facts caused Brink to lose his home and car, and have no medical providers for a time including no psychiatrist or psychologist even though he has severe PTSD and brain injury from the explosion; harmed Busse when the insurance company deliberately committed fraud regarding a check it sent to Plaintiff and then caused him to be accused of bank fraud. This harm and numerous similar harms in the SAC are not within the Act. This argues for accepting this case to bring clarity and uniformity to define when a claim fits within a harm that is specifically "on account of the injury" and when it is extreme and outrageous misconduct and attendant harm that is outside that exclusivity language. The very thing that *Hall II* and *Atkinson* sought to prevent is not present in the instant case – viz., trying to convert untimely payment of benefits that has potential remedies in the Act into an intentional

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[22] *Hall II* was grounded in the fact that there was a remedy for late compensation payments. *Hall II* did not, as the lower courts said, specifically reject *Martin*. The opinion implies that a contrary result could be found if one fell within Martin when it said at the very end of the opinion:

> In our view, the Garrett court was clearly correct in concluding that the sort of tort claims advanced here fall within the Act's exclusivity provisions. *See also Texas Employers Insurance Association v. Jackson*, 618 F. Supp. 1316, 1319-22 (E.D. Tex. 1985). But see *Martin v. Travelers Insurance Co.*, 497 F.2d 329 (1st Cir. 1974).

tort by calling it fraudulent or mere bad faith non-payment. Here the defendants engaged in extraordinary actions to directly harm Plaintiffs by threatening them, stopping payment on checks that upset their financial welfare, using fraud and deceit to appear to be compliant with the law, and to cause Plaintiffs to lose health providers of any kind due to intentional financial fraud *where they assert they do owe the money to the health care providers*. These are all harms that would be actionable even if there were no workers compensation claims. The depredations on Americans from two theaters of war mandate a more nuanced rule of law than the Circuit Court's procrustean rule allowed.

All of the law points to the existence of a cause of action for all of the above – and lip service was paid by the District Court here to that rule, as it was in *Hall I and II*. "[W]hen an employer intentionally committed the act," the injury is not "accidental" and does not fall under the exclusive-remedy provision of the workers' compensation act. 6 *Larson* § 103.01, at 103-3. *See also Jones v. Halliburton Co.*, 625 F. Supp. 2d 339, 356 (S.D. Tex. 2008), *aff'd,* 583 F.3d 228 (5th Cir. 2009) (sexual assault and outrage claims actionable despite having a DBA claim). The Court (and many courts) are afraid of "bad faith" creating a floodgate of litigation. This is not bad faith, in the sense the courts use it, to mean denying and delaying payments for bad faith reasons. The cases before the Court here are those that the Defendants have admitted they owe the money, have claimed they paid the money, but they have lied repeatedly and caused massive harm deliberately in carrying out their "gaslighting" campaign to drive the plaintiffs and their families to financial and

emotional ruin. These companies should not and cannot get away with this deplorable state of affairs engendered by over a decade of two wars.

Numerous courts recognize that the Longshore Act and DBA do not foreclose all state tort actions for discrimination, intentional infliction and other deliberate harms apart from the workers compensation injury itself. See, e.g., *Hernandez v. General Adjustment Bureau*, 199 Cal App3d 999, 245 Cal Rptr 288 (1988) (plaintiff's cause of action not barred where defendant knew of plaintiff's susceptibility to profound mental distress and repeated suicide attempts and still intentionally delayed payment of workers' compensation disability benefits); *Correa v. Pennsylvania Manufacturers Association Insurance Co.*, 618 F. Supp 915 (D. Del. 1985) (recognizing right of employee to maintain suit to redress intentional bad faith conduct in delay or termination of workers' compensation benefit payments); *Continental Casualty Insurance Co v. McDonald*, 567 So2d 1208 (Ala. 1990) (accord); *Boudoin v. Bradley*, 549 So2d 1265 (La. App. 1989) (accord); *Moss v. Dixie Mach. Welding & Metal Works, Inc.,* 617 So.2d 959, 961 (La.Ct.App. 4th Cir.) (state wrongful discharge may coexist with a Longshore discrimination remedy; no Longshore preemption); *LaCour v. Lankford Co., Inc.*, 287 S.W.3d 105, 110-11 (Tex. App. 2009) (exclusive remedy provisions did not bar wrongful discharge); *Reddy v. Cascade General, Inc*, 227 Or. App. 559, 571-72 (2009) (Longshore Act fell "far short of [the] threshold of 'adequacy'…and, particularly and most importantly, [did] not provide for compensation for

any injury or loss other than equitable recoupment of back pay.").[23]

When a plaintiff demonstrates that an injury or death – *even if* in the course of employment – is the result of a "specific intent" to cause harm, immunity under LHWCA §5(a) is inapplicable, *see Houston v. Bechtel*, 522 F. Supp. at 1096. *See also Rustin v. District of Columbia*, 491 A.2d 496, 501 (D.C. 1985) (the exclusivity provision "does not reach

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[23] *Ladner v. Secretary of H.E.W.*, 304 F.Supp. 474 (S.D. Miss. 1969) (plaintiffs may pursue benefits under social security SSI and SSD for the same injury and disability in addition to a DBA/LHWCA claim); *Palermo v. Letourneau Tech., Inc.*, 542 F.Supp.2d 499 (S.D. Miss. 2008) (the LHWCA does not occupy the field of wrongful discharge and employment so as to preempt a state law claim for wrongful discharge for pursuit of workers compensation benefits); *Machado v. National Steel & Shipbuilding Co.*, 9 BRBS 803 (1978) (an administrative judge lacks power to make findings on breach of contract even if plaintiffs could proceed under Section 948(a) of the DBA); *Hais v. Smith, 547 A.2d 986, 987 (D.C. 1988)* (implied covenant of good faith and fair dealing means that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract."); *Paul v. Howard Univ.*, 754 A.2d 297 (D.C. 2000) ("all contracts contain an implied duty of good faith and fair dealing as enumerated in *Hais v. Smith*…"); *Lawrence v. U.S.*, 631 F. Supp. 631 (E.D. Pa. 1982) (Federal Employees Compensation Act [5 U.S.C.A. § 8116(c)] did not provide the exclusive remedy for mental suffering, humiliation, embarrassment or loss of employment alleged by the employee, where such claim did not involve compensatory damages and was not premised upon injuries otherwise covered by FECA remedies); *Jones v. Halliburton Co.*, 791 F.Supp.2d 567, 588 (S.D. Tex. 2011) (since "[employee]'s injuries did not arise out of or in the course of her employment agreement, the exclusivity provisions of the LHWCA and the DBA [did] not apply to any of her common law claims, including the intentional tort claims.").

actions where the employer specifically intended to injure the employee"). The Act does not address claims, as exist with plaintiffs in this case, of spouses or children for emotional harm due to injuries of the spouse or father. See *Lee v. Bath Iron Works*, 2005 LHC 01 625 (October 28, 2009) (LHWCA only recognizes injuries with causal connection to employment, but does not recognize or provide for any claims for spouse or child for emotional harm by the illness or death of an employee).[24]

Professor Larson writes of this as a general principle:

> Several legal theories have been advanced to support [the employer intentional tort] exception to exclusivity. The best is that the employer will not be heard to allege that the injury was 'accidental,' and therefore was under the exclusive provision of the workers' compensation act, when the employer intentionally committed the act.

6 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 103.01, at 103-3 (2011). By their very nature, neither the DBA nor the LHWCA were intended to cover every possible subject of litigation that might arise involving an injured worker. The Act does not speak to intentional or even *negligent* acts that cause injury

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[24] This case also was before U.S. District Court of Maine on August 6, 2009, which can be found at http://www.gpo.gov/fdsys/pkg/USCOURTS-med-1_06-cv-00057/pdf/USCOURTS-med-1_06-cv-00057-0.pdf

off the job, or to any actionable conduct by anyone other than the employer occurring subsequent to the injury.

The Circuit Court got it wrong, and there are far-reaching effects beyond this class action for the thousands who are suffering deliberate harms at the hands of the companies being sued here.

Additionally, the SAC specifically pleads on behalf of a class of third country nationals, the wholesale failure to provide DBA insurance to thousands of individuals by setting up a rival method for dealing with claims. This is a specific exception of application of the exclusive remedy doctrine in section 905(a) ("except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death."). See ¶¶ 535-560 of SAC. The Circuit Court and District Court failed to allow these claims to proceed as a class.

III. WHETHER PROPERTY INTERESTS OF FORMER MILITARY CONTRACTORS IN THEIR HOMES, CREDIT HISTORY OR PERSONAL PROPERTY LOST BY PREDICATE ACTS OF FRAUD BY INSURANCE COMPANIES FALL UNDER RICO

Because the only exclusivity of the Longshore/DBA Acts lies in bringing claims on account of the injury, RICO would only be preempted

from any claim that has a remedy before the Department of Labor. The SAC lists with great specificity the times and places where misrepresentations were made to the degree possible in a class action law suit with a multiplicity of Defendants.

The LHWCA and DBA are comprehensive only with respect to work-related *accidental injuries* (and occupational diseases), not for intentional torts by and upon employees and non-employees. RICO is meant to be read broadly and to be liberally construed to effectuate the purposes of the Act, *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U.S. 479, 497 (1985). RICO is not preempted even though a more specific and comprehensive statutory scheme exists that utilizes the same fraud. *See United States v. Computer Sciences Corporation*, 689 F.2d 1181, 1186-88 (4th Cir. 1982)(False Claims Act does not preempt RICO); *United States v. Boffa*, 688 F.2d 919, 931-33 (3d Cir. 1982) (despite overlap of mail fraud predicate of RICO and labor statutes, not preempted). The plaintiffs' property rights in their credit rating, bank accounts, and homes and cars that were destroyed by Defendants' deliberate acts are within the ambit of RICO. *See McNally v. United States*, 483 U.S. 350 (1987) (RICO directed at schemes to defraud Plaintiff of tangible and intangible property rights).

Plaintiffs will be able to more properly plead the elements of and facts to support a common purpose among the participants, an organization, and continuity. The 209 page complaint contains all of those facts showing the attempt by contractors working in tandem with the carriers to intimidate individuals who bring claims and make it so

unpleasant as to discourage others from bringing claims or additional claims at all.

Under Fed. R. Civ. P. 15 (a)(2), Plaintiffs should have been given leave to cure any defects in their SAC through amendment. Plaintiffs were never put on notice from the Court in what respects the RICO claims or lack of particularity needed to be cured. *See Carribean Broadcasting System, Ltd. v. Cable & Wireless, PLC,* 148 F.3d 1080, 1084-85 (D.C. Cir. 1998)(reversing district court's refusal to permit amendment on motion to dismiss for failing to recite particulars as to depriving use of a facility in a monopolization claim because not within spirit of Rule 15).

RICO addresses the creation of criminal enterprises intent on fraud, which is clearly not a part of the coverage intended by either the DBA or LHWCA. The Plaintiffs herein clearly have standing under 18 U.S.C. §1964(c), because they can show how their property or business was harmed as a result of the Defendants' actions. In the case at bar, although the Plaintiffs filed timely claims for DBA benefits to which they were entitled, and the Defendants agreed that they were entitled to receive, nevertheless the Defendants have willfully and intentionally conspired to deprive the Plaintiffs of those benefits, which are properly the property of the Plaintiffs and not the Defendants.

Defendants rely primarily on *Danielsen v. Burnside-Ott Aviation Training Center, Inc.*, 941 F.2d 1220 (D.C. Cir. 1991), involving whether the Service Contract Act, 41 U.S.C. § 351-358 was a comprehensive statutory scheme. They further rely upon *Bridges v. BCBC Ass'n*, 935 F. Supp. 37 (D.D.C. 1996), on whether the Federal Employee Health

Benefits Act, 5 U.S.C. § 8901-8914, is a comprehensive statutory scheme. Neither has anything to do with either the DBA or the LHWCA.

Defendants argued and the court accepted the notion that Plaintiffs lacked a property interest in their workers' compensation claims such that RICO did not apply here. But the property interests were not in the workers compensation payments but in their credit, their homes, their furniture and cars, which many of the plaintiffs like Brink, Byars, and others lost in whole or part due to the inhumane scheme of these companies and the insurance carriers to deliberately harm the plaintiffs.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 13-7165.

Daniel BRINK, et al., Appellants v. CONTINENTAL INSURANCE COMPANY, et al., Appellees.

United States Court of Appeals, District of Columbia Circuit.

Decided June 2, 2015.

Joshua T. Gillelan II argued the cause and filed the briefs for appellants.

Richard J. Doren argued the cause for appellees. With him on the brief were Geoffrey M. Sigler, Thomas M. Johnson, Holly P. Smith, Molly S. Carella, Christopher E. Appel, Roderick L. Thomas, Mark B. Sweet, Lawrence S. Ebner, Raymond B. Biagini, Tami L. Azorsky, Alejandro L. Sarria, David I. Ackerman, Kenneth Pfaehler, Avi D. Schick, Sandra D. Hauser, Leslie Paul Machado, Robert B. Wallace, David M. Ross, Matthew W. Carlson, F. Greg Bowman, David Randall J. Riskin, Charles C. Platt, Dina B. Mishra, John B. Rudolph, Brannon C. Dillard, Tara M. Lee, Joseph C. Davis, and Sara Z. Moghadam. Timothy W. Bergin and Daniel P. Rathbun entered appearances.

Opinion for the Court filed by Senior Circuit Judge SENTELLE.

SENTELLE, *Senior Circuit Judge*:

Appellant Daniel Brink, joined by thirty-one other individuals, brought a class action lawsuit stemming

from the workers' compensation benefits owed to class members under the Defense Base Act, 42 U.S.C. § 1651 *et seq.,* for injuries suffered while working for United States government contractors in Iraq and Afghanistan. In connection with their Base Act claims, appellants alleged that several government contractors, insurance companies, and third parties (collectively "contractors") committed torts and violated the Longshore and Harbor Workers' Compensation Act, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and the Americans with Disabilities Act ("ADA"). The district court dismissed all of appellants' claims. We affirm the dismissal of appellants' class-wide tort claims as well their RICO and Longshore Act claims. This dismissal, however, does not preclude any individual appellants from bringing independent claims outside of the Base Act's statutory scheme. With respect to the ADA claims brought by three individual appellants, we remand to the district court to reconsider and explain its denial of leave to amend the complaint.

I.

Members of the plaintiff class suffered severe injuries. They lost limbs in massive explosions, suffered traumatic brain injuries from "concussive blasts, mortars, rockets, and bombs," and developed post-traumatic stress disorder after witnessing "gruesome scenes of carnage." Second Am. Compl. ¶¶ 12, 48, *Brink, et al. v. Xe Holding, LLC, et al.,* 910 F.Supp.2d 242 (D.D.C.2012) (No. 11-cv-01733) ("SAC"). Because they were injured while working "under contracts or subcontracts" with the United States government in

Iraq and Afghanistan, appellants alleged that class members are covered by the Base Act. *Id.* ¶ 562.

Enacted in 1941, the Defense Base Act, 42 U.S.C. § 1651 *et seq.,* provides relief to employees of government contractors whose death or injuries occurred while accompanying military forces overseas. The Base Act builds upon and incorporates provisions of the Longshore Act, which was enacted to provide workers' compensation coverage to maritime employees. *See* 42 U.S.C. § 1651(a); 33 U.S.C. § 902(3). As with the Base Act, Congress passed the Longshore Act "to strike a balance between the concerns of [the employees] on the one hand, and their employers on the other." *Morrison-Knudsen Constr. Co. v. Dir., Office of Workers' Comp. Programs,* 461 U.S. 624, 636, 103 S.Ct. 2045, 76 L.Ed.2d 194 (1983). "Employers relinquished their defenses to tort actions in exchange for limited and predictable liability," and employees accepted "limited recovery because they receive prompt relief without the expense, uncertainty, and delay that tort actions entail." *Id.* Both the Longshore Act and the Base Act contain exclusivity provisions stating that employer liability under the statutes "shall be exclusive and in place of all other liability." 33 U.S.C. § 905(a) (Longshore Act); 42 U.S.C. § 1651(c) (Base Act).

Appellants brought this action on behalf of themselves and an estimated 10,000 similarly situated workers, SAC ¶¶ 560-62, seeking $2 billion in damages as well as declaratory and injunctive relief to require the contractors "to comply with their legal obligations here and around the world, as to all past, present and future individuals who work in support of America's

wars," *id.* ¶ 1. Appellants alleged the contractors "failed or refused to provide medical benefits owed to [them] under the [Base Act];" "cut off medical benefits;" delayed providing benefits; "made false statements and misrepresentations" regarding payment of Base Act benefits "while actually reducing, denying or ignoring [appellants'] medical needs;" failed to comply with orders to pay benefits; "threatened or discouraged workers from making [Base Act] claims;" and terminated appellants' employment "after they were disabled by their [Base Act]-covered injuries." *Brink,* 910 F.Supp.2d at 247. Appellants asserted class-wide claims for discrimination and retaliatory discharge under the Longshore Act (Count I); violations of RICO (Count II); bad faith and tortious breach of the covenant of good faith (Count III); unconscionable, fraudulent, and deceptive trade practices (Count IV); civil conspiracy (Count V); violations of the ADA (Count VI); outrage (Count VII); and wrongful death (Count VIII). *See* SAC ¶¶ 564-631. In addition, appellants sought preliminary and permanent injunctive relief (Count IX). *Id.* ¶¶ 632-39.

The extensive factual allegations in the complaint include some assertions that could be predicates for independent legal claims, falling outside this class action. For example, Ronald Bell alleged that employees from Kellogg Brown & Root "intimidated and threatened" him and that he reported the assault to a local sheriff's department. *Id.* ¶ 79. Christine Holguin-Luge alleged she was sexually assaulted in Iraq. *Id.* ¶¶ 321-35. Nicky Pool, the owner of a nursing care company, alleged that CNA Global Insurance "approved numerous medical treatments" but then

refused to pay for them, causing her company to lose $200,000. *Id.* ¶¶ 351, 477-88. We note, however, that the complaint before us includes no separate counts or claims for relief for any of these individuals.

The contractors moved to dismiss appellants' second amended complaint in its entirety, and the district court granted the contractors' motions pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Relying on "this Circuit's binding precedent" in *Hall v. C & P Telephone Company,* 809 F.2d 924 (D.C.Cir.1987) (per curiam), the district court concluded that appellants' "state law causes of action all arise out of their underlying claims to [Base Act] benefits and thus are barred by the exclusive scheme set forth in the [Base Act] and [Longshore Act]." *Brink,* 910 F.Supp.2d at 249-50, 252 (dismissing Counts III, IV, V, VII, and VIII). The district court similarly held that the comprehensive statutory scheme barred appellants' RICO claims as well as their discrimination and retaliatory discharge claims arising under the Longshore Act, 33 U.S.C. § 948a. *Id.* at 254-56 (dismissing Counts I and II).

Three individuals—erlin Clark, Harbee Kreesha, and Mohsen Alsaleh—alleged violations of the ADA. *Id.* at 256 (citing SAC ¶¶ 111, 113, 203, 215, 608-18). The district court "interpret[ed] these allegations as including two possible claims under the ADA: (1) failure to accommodate, and (2) disability discrimination for firing Plaintiffs." *Id.* at 256-57. Under either theory, the district court concluded that Clark, Kreesha, and Alsaleh failed to state a claim under the ADA. *Id.* at 258. The district court held that their allegations were "insufficient . . . to meet their

burden of demonstrating that their injuries substantially limited a major life activity and thus qualified them as disabled under the ADA." *Id.* Therefore, the district court dismissed their ADA claims (Count VI).

Appellants moved for reconsideration pursuant to Federal Rule of Civil Procedure 59(e), and sought leave to file an amended complaint under Federal Rule of Civil Procedure 15(a) to correct the defects in their ADA claims. The district court denied both motions with prejudice. Appellants timely appealed.

II.

On appeal, appellants raise three issues: (1) whether the statutory scheme bars appellants' tort claims; (2) whether the district court erred in dismissing appellants' federal claims; and (3) whether the district court abused its discretion when it denied the motion for leave to allow some of the appellants to amend their ADA claims. For the reasons discussed below, we conclude that the statutory scheme bars appellants' class-wide tort claims; the district court did not err in dismissing appellants' RICO and Longshore Act claims; and the district court abused its discretion by denying without explanation the motion for leave to allow some of the appellants to amend their ADA claims.

A. Tort Claims

Appellants contend that neither the Base Act nor the Longshore Act bars their tort claims. In their view, the Base Act "does not extend tort immunity to

intentional torts of the employer, the insurance carrier, or third parties." Appellants' Br. 20. Appellants also suggest their injuries, caused by the contractors' intentional post-employment acts, are not covered by the Longshore Act because they are not "accidental." *See* 33 U.S.C. § 902(2) (defining the term "injury" as "accidental injury or death arising out of and in the course of employment"); *Martin v. Travelers Ins. Co.,* 497 F.2d 329, 330-31 (1st Cir.1974).

We reject appellants' arguments. As previously noted, the statutory scheme represents a "legislated compromise between the interests of employees and the concerns of employers." *Wash. Metro. Area Transit Auth. v. Johnson,* 467 U.S. 925, 931, 104 S.Ct. 2827, 81 L.Ed.2d 768 (1984). In other words, "there is a quid pro quo." *Id.* "In return for the guarantee of compensation, the employees surrender common-law remedies against their employers for work-related injuries," while the employers gain "immunity from employee tort suits." *Id.* The statutory text codifies this legislative compromise by making statutory remedies exclusive. The Longshore Act provides:

> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . . .

33 U.S.C. § 905(a) (emphasis added). The Base Act expressly incorporates this exclusivity provision, *see*

42 U.S.C. § 1651(a), and includes an additional exclusivity provision. Under a subsection titled, "Liability as exclusive," the statute states:

> The liability of an employer, contractor (or any subcontractor or subordinate subcontractor with respect to the contract of such contractor) under this chapter shall be exclusive and in place of all other liability of such employer, contractor, subcontractor, or subordinate contractor to his employees (and their dependents) coming within the purview of this chapter, under the workmen's compensation law of any State, Territory, or other jurisdiction, irrespective of the place where the contract of hire of any such employee may have been made or entered into.

42 U.S.C. § 1651(c) (emphasis added).

In the *Hall* decision we construed the District of Columbia Workers' Compensation Act, which, like the Base Act, incorporates the exclusive remedy provision of the Longshore Act. The plaintiff in *Hall,* "[u]nsatisfied with the statutory *quid pro quo,*" contended that "employees should be permitted to bring tort claims when the employer refuses to make timely compensation payments with *an intent to injure.*" 809 F.2d at 926 (emphasis added). We rejected Hall's argument and refused to undo the "legislated compromise" codified in the statutory scheme. *Id.* (quoting *Johnson,* 467 U.S. at 931, 104 S.Ct. 2827). All the tort claims—including intentional tort claims—"fall within the [statutory] exclusivity provisions." *Id.*

As the district court rightly discerned, the reasoning of *Hall* governs this case. First, the complaint alleges that all class members "were covered by the Defense Base Act." SAC ¶ 562. Second, based on appellants' own allegations, their classwide tort claims (including the alleged intentional torts) directly relate to their claims for Base Act benefits. *See id.* ¶¶ 59, 61; *Brink,* 910 F.Supp.2d at 252 (summarizing appellants' claims). Consequently, appellants' class-wide tort claims are barred by the exclusive statutory scheme set forth in the Base Act and Longshore Act. *Hall,* 809 F.2d at 926; *see also* Oral Arg. Recording 15:00-16:33 (acknowledging that *Hall* bars appellants' class-wide tort claims).

Appellants suggest that *Martin v. Travelers Insurance Co.,* a First Circuit case decided in 1974, identifies an exception to *Hall. See* Appellants' Br. at 43-44 (discussing *Martin,* 497 F.2d at 330-31). The First Circuit in *Martin* permitted a narrow exception to the Longshore Act's exclusivity because "the crux of the complaint [was an] insurer's callous stopping of payment without warning when it should have realized that acute harm might follow." *Martin,* 497 F.2d at 331. Appellants read *Martin* as creating an exception to exclusivity for intentional tort claims, and ask us to reverse the district court's dismissal because their class-wide tort claims were "clearly pleaded outside of the exclusive remedy setting." Appellants' Br. at 43. We disagree with appellants' broad reading of *Martin.* In fact, we implicitly rejected *Martin* in *Hall.* There we stated explicitly that the D.C. Court of Appeals had been "clearly correct" in *Garrett v. Washington Air Compressor Co.,* 466 A.2d 462 (D.C.1983), in concluding that the tort claims

before it "[fell] within the Act's exclusivity provisions." *Hall,* 809 F.2d at 926. In the citations following that conclusion, we suggested our rejection of *Martin* by introducing it with the negative "but see" signal. *Id.* We were not then, nor are we now, bound to follow the decisions of other circuits. We are, however, bound to follow those of our own. Therefore, as the appellants recognize, they must petition for rehearing en banc in order to make the case for narrowing or overruling *Hall.* And, whatever the scope of the First Circuit's *Martin* decision, *Hall* clearly encompasses intentional tort claims of the kind alleged in this class action.[1]

Appellants argue that the statutory scheme does not provide remedies for the tortious injuries caused by the contractors' intentional actions. That is incorrect. The Base Act penalizes employers for failing to pay (or timely pay) benefits. *See* 33 U.S.C. § 914(e), (f). If an employer fails to comply with a Department of Labor compensation order, federal courts have jurisdiction to enforce the compensation order, *id.* § 921(d), and assess criminal penalties, *id.* § 938. Additionally, the employer is criminally liable for knowingly making false statements to reduce, deny, or terminate benefits. *Id.* § 931(c). Even though some of these remedies sound in criminal law and not in tort, the statute provides remedy against contractors and insurers who do not comply with statutory obligations.

Appellants complain that the Base Act's "minuscule" penalties are provided by "a bureaucratic system of government administration. . . that is complex and slow," SAC ¶ 58, but that does not empower us to disturb the "legislatively enacted compensation scheme," *Duke Power Co. v. Carolina Env't Study*

Grp., Inc., 438 U.S. 59, 88, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978). "While it may be that the penalty provisions are inadequate to fully compensate a worker who has been harmed by an employer's refusal to pay when due, the problem requires a political solution." *Sample,* 771 F.2d at 1347.

As the district court correctly opined, the precedent of *Hall* requires that we apply the exclusivity provision of the Longshore Act as incorporated in the Base Act according to the statutory terms. We affirm the district court's dismissal of appellants' class-wide tort claims (Counts III, IV, V, VII, and VIII).

We note, as the appellees acknowledge, that *Hall* does not preclude individual appellants from pursuing claims that arise independently of an entitlement to benefits under the Longshore Act, such as a common-law assault claim based on a threat against a Longshore Act claimant, *see* Oral Arg. Recording 34:15-35:15, or a claim by a Longshore Act care-provider sounding in contract and based on a separate agreement to make payments to her to provide care to the Longshore Act claimant, *see id.* 40:01-57. We reiterate that such claims are not encompassed in this class-action complaint. *See* SAC ¶¶ 564-639; Oral Arg. Recording 38:43-39:04, 49:29-50:25, 52:39-54. Therefore, our decision does not preclude separate proceedings for Ronald Bell to allege assault, SAC ¶ 79, Christine Holguin-Luge to allege sexual assault, *id.* ¶¶ 321-35, and Nicky Pool to allege a breach of contract, *id.* ¶¶351, 477-88.

B. Federal Claims

1. RICO Claims

Because the statutory scheme of the Base Act and Longshore Act contains exclusive remedies, it "leaves no room" for appellants' RICO claims. *Danielsen v. Burnside-Ott Aviation Training Ctr., Inc.,* 941 F.2d 1220, 1226 (D.C.Cir.1991). Appellants alleged the contractors violated RICO by conspiring "to misrepresent" information related to Base Act claims "to injured parties and the [Department of Labor]," and "by denying claims using fraud." SAC ¶ 573. The Base Act, however, already provides a remedy for the alleged misconduct. Titled "Penalty for misrepresentation," § 931 of the Longshore Act (which the Base Act incorporates) provides an exclusive remedy for false statements made by "an employer, his duly authorized agent, or an employee of an insurance carrier who knowingly and willfully makes a false statement or representation for the purpose of reducing, denying, or terminating benefits to an injured employee, or his dependents." 33 U.S.C. § 931(c). The violator "shall be punished by a fine not to exceed $10,000, by imprisonment not to exceed five years, or by both." *Id.* These exclusive remedies leave no room for appellants' RICO claims.

Appellants further alleged the contractors violated RICO by conspiring to "delay payments to providers or to claimants" and to "stop payments on checks." SAC ¶ 573. However, § 914 of the Longshore Act, as incorporated by the Base Act, already provides a penalty for employers who do not make on-time payments. *See* § 914(e)-(f) (increasing the amount due by 10 and 20 percent). Thus, there is no room for a

RICO claim based on delayed or stopped compensation payments.

Even if the statutory scheme left room for appellants' RICO claims, the district court stated another ground for dismissing these claims: Appellants "fail[ed] to state a cause of action under RICO." *Brink,* 910 F.Supp.2d at 255 n. 12. We agree. To state a RICO claim, appellants needed to allege four elements: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *W. Assocs. Ltd. P'ship v. Mkt. Square Assocs.,* 235 F.3d 629, 633 (D.C.Cir.2001) (citations and internal quotation marks omitted). Appellants' claims fail on the second element because they alleged an indeterminate "RICO enterprise of individuals" broadly consisting of "insurance companies, attorneys, adjusters, third party medical providers, third party case administrators, third party investigators and contractors." SAC ¶ 576 (emphasis omitted). Appellants did not allege any facts establishing required elements of a RICO enterprise: "(1) a common purpose among the participants, (2) organization, and (3) continuity." *United States v. Richardson,* 167 F.3d 621, 625 (D.C.Cir.1999). Thus, they failed to allege a RICO enterprise.

Appellants also failed to plead predicate acts with particularity to satisfy Federal Rule of Civil Procedure 9(b). *See Danielsen,* 941 F.2d at 1229. Neither appellants' mail nor wire fraud claims contain any reference to "specific fraudulent statements, who made the statements, what was said, when or where these statements were made, and how or why the alleged statements were fraudulent." *Brink,* 910 F.Supp.2d at 255 n. 12. Appellants' "[t]hreadbare

recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" for Rule 12(b)(6), let alone Rule 9(b). *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). Accordingly, we affirm the dismissal of appellants' RICO claims.

2. Longshore Act Claims

The Longshore Act prohibits an employer from discriminating against or discharging an employee who has filed (or attempted to file) a claim for compensation benefits. *See* 33 U.S.C. § 948a; 20 C.F.R. § 702.271(a)(1). Appellants alleged that the contractors violated the Longshore Act because they "discriminated against," SAC ¶ 565, and terminated employees who filed claims, *id.* ¶ 567. Appellants sought "reinstatement or damages," *id.* ¶ 570, the same remedy available under the statute, *see* § 948a, as well as attorney's fees. However, the district court dismissed appellants' claims for failing to exhaust their administrative remedies. *Brink,* 910 F.Supp.2d at 256.

We affirm the dismissal of appellants' Longshore Act claims. The Base Act incorporates the Longshore Act's administrative procedures for the filing, adjudication, and payment of workers' compensation claims. Appellants explained: "Th[e] [Base Act] system is administered according to statute by the United States Department of Labor (DOL), in the administrative Office of Workers' Compensation Programs (OWCP), subject to hearing and decision in contested cases by the Office of Administrative Law Judges (OALJ) of the DOL, and administrative appeal

to the Benefits Review Board." SAC ¶ 2 (citing 33 U.S.C. §§ 919, 921(b)(3)). Only after "a matter works its way through the OWCP, OALJ, and [the] Board," can a claimant "appeal into the federal courts." *Id.* Appellants have not even attempted to comply with the statutory requirements. There is no evidence appellants followed the administrative process set forth in the statute and related regulations. *See* 33 U.S.C. § 948a; 20 C.F.R. §§ 702.271-274. In particular, there is no evidence that any appellants filed a complaint with the district director of the applicable compensation district, or that a district director conducted an investigation of the complaint. 20 C.F.R. § 702.271(b). Nor is there any evidence that the district director determined that discrimination occurred or recommended reinstatement, restitution, or compensation for lost wages. *Id.* § 702.272(a). Under these circumstances, dismissal is warranted because appellants have not exhausted their administrative remedies.

3. ADA Claims

As noted above, the district court ordered dismissal of the ADA claims and denied appellants' motions for reconsideration under Rule 59(e) and for leave to file an amended complaint under Rule 15(a). "When the district court denies a motion for leave to amend under Rule 15(a), we review its decision for abuse of discretion, bearing in mind that the rule is to be construed liberally." *Belizan v. Hershon,* 434 F.3d 579, 582 (D.C.Cir.2006) (citation omitted).

Courts "should freely give leave" for a party to amend a pleading "when justice so requires." Fed.R.Civ.P.

15(a)(2). In light of the "liberal intent of Rule 15(a)(2)," appellants argue that the district court abused its discretion when it did not provide them leave to amend their ADA claims. Appellants' Br. 57-58. We agree.

Appellants could amend their complaint after it was dismissed with prejudice "only by filing, as they properly did, a 59(e) motion to alter or amend a judgment combined with a Rule 15(a) motion requesting leave of court to amend their complaint." *Firestone v. Firestone,* 76 F.3d 1205, 1208 (D.C.Cir.1996). We have said that denial of the Rule 59(e) motion in that situation is an abuse of discretion if the dismissal of the complaint with prejudice was erroneous; that is, the Rule 59(e) motion should be granted unless "the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Id.* at 1209 (internal quotation marks omitted); *see also Belizan,* 434 F.3d at 583 (same).

That high bar was not met here. "Turning . . . to the Rule 15(a) issue, we find error in the district court's complete failure to provide reasons for refusing to grant leave to amend." *Firestone,* 76 F.3d at 1209; *see also Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) ("[O]utright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules."). Moreover, although the contractors argue that the proposed amendment would have been futile, it is at least "plausible," *see Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), that the severe

injuries described by Clark, Kreesha, and Alsaleh could interfere with major life activities within the meaning of the ADA, 42 U.S.C. § 12102(2)(A); *see also Adams v. Rice,* 531 F.3d 936, 944 (D.C.Cir. 2008). Kreesha and Alsaleh also expressly allege that they sought the accommodation of doing translation work in the United States, and it again seems facially plausible that translating from home would be a "reasonable accommodation" under the ADA. 42 U.S.C. § 12111(9).

We therefore remand for the district court to reconsider and explain its decision to deny leave to amend. *See Belizan,* 434 F.3d at 584. The contractors do not resist this result. *See* Oral Arg. Recording 46:30-43 ("To the extent this court requires [the district court] to offer further explanation as to the three plaintiffs bringing ADA claims against three defendants, we defer to the court on that.").

*** * ***

For the reasons stated, we affirm the district court's judgment dismissing appellants' class-wide tort claims as well as appellants' RICO and Longshore Act claims.[2] We vacate the district court's denial of appellants' motion for reconsideration and leave to file an amended complaint, and remand to the district court to explain its decision not to grant leave to some of the appellants to correct the defects in their ADA claims.

So ordered.

FootNotes

1. We are not alone in declining to follow *Martin.* Other courts have done so, including even the First Circuit, which gave it birth but subsequently limited its application closely to its facts. *See Barnard v. Zapata Haynie Corp.,* 975 F.2d 919, 920-21 (1st Cir.1992); *see also Sample v. Johnson,* 771 F.2d 1335, 1347 (9th Cir.1985) (criticizing *Martin* as an "opinion free of citation to authority" and stating that the "bulk of authority" contradicts it); *Atkinson v. Gates, McDonald & Co.,* 838 F.2d 808, 813 n. 6 (5th Cir.1988) (deciding to "follow *Sample* and *Hall"* instead of *Martin*).

2. On February 10, 2015, Appellees U.S. Investigations Services, LLC and USIS International, Inc. (collectively "US Investigations") notified this Court that U.S. Investigations had filed a petition under chapter 11 of the Bankruptcy Code and that all judicial proceedings against the debtor are stayed under 11 U.S.C. § 362. Suggestion of Bankruptcy, *Brink, et al. v. Continental Insurance Co., et al.,* No. 13-7165 (D.C. Cir. Feb. 10, 2015). We ordered all parties except U.S. Investigations to file responses. After reviewing the suggestion of bankruptcy and responses thereto, we held this case in abeyance as to U.S. Investigations pending further order of the court.

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:11-cv-01733-EGS

9/26/2013

MINUTE ORDER. Upon consideration of Plaintiffs' 145 Motion to Alter Judgment for Reconsideration and 146 Motion for Leave to File Amendment to Second Amended Complaint, the Court hereby DENIES both motions with prejudice. Rule 59(e) permits a party to file a motion to alter or amend judgment. Fed. R. Civ. P. 59(e). The disposition of a motion originating under Rule 59(e) is entrusted to the district court's discretion, and "'need not be granted unless the district court finds there is an intervening change in controlling law, the availability of new evidence, or the need to correct a clear error or to prevent manifest injustice.'" Ciralsy v. Cent. Intelligence Agency, 355 F.3d 661, 675 (D.C. Cir. 2004) (quoting Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996)). Although courts have "considerable discretion in ruling on a Rule 59(e) motion," Piper v. U.S. Dep't of Justice, 312 F. Supp. 2d 17, 20 (D.D.C. 2004), such motions are "disfavored and relief from judgment is granted only when the moving party establishes extraordinary circumstances," Niedermeier v. Office of Baucus, 153 F. Supp. 2d 23, 28 (D.D.C. 2001). A motion to reconsider under Rule 59(e) "is [neither]... an opportunity to reargue facts and theories upon which a court has already ruled, nor a vehicle for presenting theories or arguments that could have been advanced earlier." SEC v. Bilzerian, 729 F. Supp. 2d 9, 14 (D.D.C. 2010). Plaintiffs here claim that the Court's ruling is "contrary to law and will create

manifest injustice." Pls.' Mot. for Reconsideration at 1. To that end, Plaintiffs present seven bases for reconsideration, arguing that: (1) the Court incorrectly applied the D.C. Circuit's decision in Hall v. C&P Telephone Co, 809 F.2d 924 (D.C. Cir. 1987) (per curiam) and similar decisions in other Circuits, and erred in failing to accept Plaintiffs' argument that their claims fall outside of the exclusivity provision of the Defense Base Act ("DBA"), 42 U.S.C. § 1651 et seq., on the basis of the First Circuit's decision in Martin v. Travelers Insurance Co., 497 F.2d 329 (1st Cir. 1974), Pls.' Mot. for Reconsideration at 9-14; (2) the exclusivity provision of the DBA is narrower than the exclusivity provision of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., an argument raised for the first time in their motion for reconsideration, id. at 14-15; (3) the Court did not properly consider their argument regarding deliberate acts that are not preempted by the statutory scheme, id. at 15-17; (4) the Court did not consider case law from other jurisdictions regarding their retaliatory discharge claim under the DBA, id. at 17-20; (5) the Court improperly dismissed Plaintiffs' Americans with Disabilities Act, 42 U.S.C. § 12112, claims because they did adequately plead the elements of prima facie case, id. at 21-24; (6) the Court erroneously found that they did not allege claims for breach of contract and detrimental reliance, id. at 24-29; and (7) the Court incorrectly applied Danielson v. Burnside-Ott Aviation Training Center, Inc., 941 F.2d 1220 (D.C. Cir. 1991), in determining that the DBA bars RICO claims, Pls.' Mot. for Reconsideration at 29-33. Plaintiffs also seek leave to file an amendment to their Second Amended Complaint to correct the pleading deficiencies in their ADA and contract-based

claims. The Court finds that in their Motion for Reconsideration Plaintiffs essentially reargue the same points they made in the voluminous briefing on the motions to dismiss filed in this matter, and that their motion is a transparent attempt to have their arguments reheard. To the extent that Plaintiffs' present any new arguments in their motion for reconsideration, they are to no avail, because Rule 59(e) motions are not "vehicles for bringing before the court theories or arguments that were not advanced earlier." Harvey v. District of Columbia, 949 F. Supp. 878, 879 (D.D.C. 1996). Moreover, even if the Court were to accept Plaintiffs' new arguments, they would fail for the reasons articulated in the Court's memorandum opinion. See Brink v. XE Holding, 910 F. Supp. 2d 242 (D.D.C. 2012). Although the Court did not specify in its December 21, 2012 Order whether the dismissal of Plaintiffs' Second Amended Complaint was with or without prejudice, in this Circuit, a dismissal pursuant to Fed. R. Civ. P. 12(b)(6) "is a resolution on the merits and is ordinarily prejudicial." Okusami v. Psychiatric Inst. of Washington, Inc., 959 F.2d 1062 (D.C. Cir. 1992); see Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 505 (2001). Accordingly, Plaintiffs' motions are hereby DENIED. Signed by Judge Emmet G. Sullivan on September 26, 2013. (lcegs1) (Entered: 09/26/2013)

Civil Action No. 11-1733 (EGS).

Daniel BRINK, et al., Plaintiffs, v. XE HOLDING, LLC, et al., Defendants.

United States District Court, District of Columbia.

December 21, 2012.

Scott J. Bloch, Law Offices of Scott J. Bloch, PA, Washington, DC, for Plaintiffs.

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MEMORANDUM OPINION

EMMET G. SULLIVAN, District Judge.

Plaintiffs, thirty-one civilian government contractor employees (and/or their surviving relatives), bring this purported class action against twenty-three defendants, which include United States government contractors (the "Contractor Defendants") and their insurance carriers (the "Insurer Defendants") (collectively, "Defendants").[1] Plaintiffs allege violations of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 948a, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1861 *et seq.,* the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.,* and several common law tort claims, based upon Defendants' handling of Plaintiffs' claims for medical benefits under the Defense Base Act. Pending before the Court are fourteen motions to dismiss pursuant to Rules 12(b)(1), 12(b)(2), 12(b)(3), and 12(b)(6) of the Federal Rules of Civil Procedure.[2]

Upon consideration of the motions, the responses and replies thereto, the relevant law, and the entire record in this case, the Court will GRANT the motions and DISMISS Plaintiffs' claims.

I. BACKGROUND

A. Statutory Background

The Defense Base Act ("DBA"), 42 U.S.C. § 1651 *et seq.,* establishes a uniform, federal compensation scheme for civilian contractors and their employees for injuries sustained while providing functions under contracts with the United States outside its borders. The DBA applies "the provisions of the Longshore and Harbor Workers' Compensation Act [33 U.S.C. § 901

et seq. (the "LHWCA" or the "Longshore Act")] ... in respect to the injury or death of any employee engaged in any employment ... under a contract entered into with the United States ... where such contract is to be performed outside the continental United States...." 42 U.S.C. § 1651(a)(4). As Plaintiffs note at the outset of their Complaint, "[the] DBA system is administered according to statute by the United States Department of Labor (DOL), in the administrative Office of Workers' Compensation Programs (OWCP), subject to hearing and decision in contested cases by the Office of Administrative Law Judges (OALJ) of the DOL, and administrative appeal to the Benefits Review Board. If a matter works its way through the OWCP, OALJ, and Board, only then can a party appeal into the federal courts." Second Am. Compl. ("SAC") ¶ 2 (citing 33 U.S.C. §§ 919, 921(b)(3)).

The DBA includes a provision that makes an employer's liability under the statutory scheme exclusive:

> The liability of an employer, contractor (or any subcontractor or subordinate subcontractor with respect to the contract of such contractor) under this chapter shall be exclusive and in place of all other liability of such employer, contractor, subcontractor, or subordinate contractor to his employees (and their dependents) coming within the purview of this chapter, under the workmen's compensation law of any State, Territory, or other jurisdiction, irrespective of the place where the contract of hire of any such employee may have been made or entered into.

42 U.S.C. § 1651(c); *see also* 33 U.S.C. § 905(a) ("The liability of an employer prescribed in section 4 [of the LHWCA, 33 U.S.C. § 904] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law ... on account of [an employee's] injury or death."). Like the LHWCA and other workers' compensation statutes, the DBA represents a compromise between employees and their employers: "[e]mployers relinquish[] their defenses to tort actions in exchange for limited and predictable liability," and "[e]mployees accept the limited recovery because they receive prompt relief without the expense, uncertainty, and delay that tort actions entail." *Morrison-Knudsen Constr. Co. v. Dir., Office of Workers' Comp. Programs,* 461 U.S. 624, 636, 103 S.Ct. 2045, 76 L.Ed.2d 194 (1983).

The DBA incorporates the LHWCA's detailed administrative procedures for the filing, adjudication, and payment of workers' compensation claims. An injured employee or decedent is required to give written notice of injury or death within thirty days after either the date of the injury or death, or the date the employee or beneficiary becomes aware or should have been aware of the injury or death. *See* 33 U.S.C. § 912; 20 C.F.R. § 702.212. A claimant then has one year within which to file a claim for compensation on account of that injury or death. *See* 33 U.S.C. § 913(a). Within ten days of learning that an employee has been injured, an employer must send a report to the Department of Labor "District Director." *See* 33 U.S.C. § 930(a); 20 C.F.R. § 702.201. Unless the employer is

self-insured, the employer's DBA insurance carrier is responsible for processing and payment of an injured employee's claim. *See* 33 U.S.C. § 935; 20 C.F.R. § 703.115. The District Director must be notified when payments commence and if payment is suspended for any reason. *See* 20 C.F.R. § 702.234. If the right to compensation is controverted by the employer, 33 U.S.C. § 914(d); 20 C.F.R. § 702.251, no benefits are due until a compensation award is made by the District Director. Upon receiving a notice of controversion or an employee's challenge to reduction, suspension, or termination of benefits, the District Director commences adjudication proceedings. *See* 20 C.F.R. §§ 702.252, 702.261-262. There is a mandatory three-tier process for adjudicating claims: (1) informal mediation before the District Director; (2) formal hearings and fact-finding proceedings before an Administrative Law Judge; and (3) appellate review by the Department of Labor Benefits Review Board, which is subject to further appellate review by a court of competent jurisdiction. *See* 33 U.S.C. § 921; 20 C.F.R. §§ 702.311-319 ("Action by District Directors"); 702.331-351 ("Formal Hearings"); 702.371-373 ("Interlocutory Matters"); 702.391-394 ("Appeals"); *see also* 42 U.S.C. § 1653(b). An employee who successfully prosecutes a controverted claim is entitled to attorneys' fees. *See* 33 U.S.C. § 928; 20 C.F.R. § 702.134.

The LHWCA's administrative scheme also provides for a number of penalties, which include, *inter alia:*

- penalties for failure to timely report employee injuries, see 33 U.S.C. § 930(e); 20 C.F.R. § 702.204;

- penalties paid directly to the employee for failure to timely pay pre-award or post-award compensation, see 33 U.S.C. §§ 914(e)-(f); 20 C.F.R. §§ 702.233, 702.350;
- penalties for making false statements or misrepresentations in reporting employee injuries, see 33 U.S.C. § 930(e); 20 C.F.R. § 702.204;
- criminal penalties and imprisonment for false statements or misrepresentations made to reduce, deny, or terminate benefits, 33 U.S.C. § 931(c); 20 C.F.R. § 702.217(b);
- criminal penalties, imprisonment, and other remedies for failure to pay compensation, see 33 U.S.C. § 938;
- judicial enforcement of a final compensation order, see 33 U.S.C. § 921(d); and
- penalties and the payment of lost wages for retaliation, wrongful discharge or discrimination with regard to employees who claim or attempt to claim benefits, see 33 U.S.C. § 948a; 20 C.F.R. § 702.271.

B. Factual and Procedural Background

This action arises out of Defense Base Act claims filed by civilian government contractor employees who suffered injuries while working in Afghanistan and Iraq. Plaintiffs, the contractor employees and/or their surviving relatives,[3] purport to bring this action on behalf of more than 10,000 similarly situated individuals who were denied benefits under the DBA.

According to the SAC, Defendants, in conspiracy with others, have sought to defeat the rights of American

citizens and foreign nationals to receive their lawful compensation under the DBA. SAC ¶ 2. Throughout the two hundred page Complaint, Plaintiffs allege that Defendants:

- failed or refused to provide medical benefits owed to Plaintiffs under the DBA, see, e.g., SAC ¶¶ 41, 57, 59, 62, 83, 103, 123, 133, 158, 178, 186, 210, 225, 260, 282, 315, 343, 366, 375, 382, 401, 422-24, 450, 495, 533, 546-47;
- cut off medical benefits owed under the DBA, see, e.g., SAC ¶¶ 59, 61, 62, 75, 81, 106, 175, 200, 205, 214, 227, 240, 273, 276, 351, 377, 394;
- delayed the provision of medical benefits or compensation owed under the DBA, see, e.g., SAC ¶¶ 59, 61, 87, 145, 262, 361, 376, 408, 423, 434, 540, 545;
- made false statements and misrepresentations to the DOL and Plaintiffs regarding the payment of their DBA benefits while actually reducing, denying or ignoring Plaintiffs' medical needs, see, e.g., SAC ¶¶ 6, 59, 103, 109-10, 122, 135, 146, 150, 154, 163, 179, 202, 214, 273-74, 277, 283, 351, 357, 378, 461-62;
- failed to comply with DOL orders to pay DBA benefits, see, e.g., SAC ¶¶ 59, 82, 242, 261, 316, 357, 384;
- threatened or discouraged workers from making DBA claims, see, e.g., SAC ¶¶ 54, 55, 78-79, 132, 137, 250, 269; and
- terminated Plaintiffs after they were disabled by their DBA-covered injuries, see, e.g., SAC ¶¶ 13, 62, 84, 111, 203, 215, 252-54, 260, 420.

Plaintiffs further state that the "[c]ontractors and their insurance carriers ... have utilized fear, threats, implied threats, and elaborate ruses to deprive whole classes of... persons injured from effectively obtaining any benefits, have employed devices and artifices to prevent any medical treatment for PTSD, [and have] accus[ed] persons of faking or of malingering...." SAC ¶ 12. According to Plaintiffs, all of these actions exacerbated the harm that Plaintiffs had already suffered based on their DBA-covered injuries and caused additional financial and emotional harm. *See, e.g.,* SAC ¶¶ 52, 88, 126, 166, 182, 206, 217, 228, 245, 256, 268, 278, 283, 292, 320, 344, 394, 403, 412, 439, 463, 476, 523, 534. Plaintiffs emphasize that the damages they seek in this action are not related to what they claimed in their DBA actions. *See id.*

Plaintiffs filed their initial Complaint in this matter on September 26, 2011. They filed an Amended Complaint on November 22, 2011. On April 23, 2012, the Court granted Plaintiffs' unopposed request to file a Second Amended Complaint (hereinafter "SAC") pursuant to Federal Rule of Civil Procedure 15(a)(2). The SAC alleges claims for: retaliatory discharge and discrimination under the LHWCA, 33 U.S.C. § 948a (Count I); violations of RICO, 18 U.S.C. § 1961 *et seq*. (Count II); bad faith, tortious breach of the covenant of good faith (Count III); unconscionable, fraudulent and deceptive trade practices (Count IV); civil conspiracy (Count V); violations of the ADA, 42 U.S.C. § 12101 *et seq*. (Count VI); outrage (Count VII); and wrongful death (Count VIII).[4] The Complaint seeks $2 billion in damages, as well as injunctive relief in order to prevent harm to Plaintiffs and those similarly situated, "and to require Defendants to comply with

their legal obligations here and around the world, as to all past, present and future individuals who work in support of America's wars." SAC ¶ 1.

On July 13 and 16, 2012, Defendants filed fourteen motions to dismiss, including two joint motions filed by the Contractor Defendants and the Insurer Defendants. *See* n. 2 *supra.* The motions are ripe for determination by the Court.

II. LEGAL STANDARDS

Federal district courts are courts of limited jurisdiction, *Kokkonen v. Guardian Life Ins. Co.,* 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994), and a Rule 12(b)(1) motion for dismissal presents a threshold challenge to a court's jurisdiction, *Haase v. Sessions,* 835 F.2d 902, 906 (D.C.Cir.1987). On a motion to dismiss for lack of subject matter jurisdiction, the plaintiff bears the burden of establishing that the court has jurisdiction. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). In evaluating such a motion, the Court must "accept as true all of the factual allegations contained in the complaint," *Wilson v. Dist. of Columbia,* 269 F.R.D. 8, 11 (D.D.C.2010) (citation omitted), and should review the complaint liberally while accepting all inferences favorable to the plaintiff, *Barr v. Clinton,* 370 F.3d 1196, 1199 (D.C.Cir.2004). Because subject matter jurisdiction focuses on the court's power to hear the claim, however, the court must give the plaintiff's factual allegations closer scrutiny when resolving a Rule 12(b)(1) motion than would be required for a Rule 12(b)(6) motion. *Macharia v. United States,* 334 F.3d

61, 64, 69 (D.C.Cir. 2003). Thus, to determine whether it has jurisdiction over a claim, the court may consider materials outside the pleadings where necessary to resolve disputed jurisdictional facts. *Herbert v. Nat'l Acad, of Scis.,* 974 F.2d 192, 197 (D.C.Cir.1992).

Faced with motions to dismiss under Rule 12(b)(1) and Rule 12(b)(6), a court should first consider the Rule 12(b)(1) motion because "[o]nce a court `determines that it lacks subject matter jurisdiction, it can proceed no further.'" *Sledge v. United States,* 723 F.Supp.2d 87, 91 (D.D.C.2010)(quoting *Simpkins v. Dist. of Columbia,* 108 F.3d 366, 371 (D.C.Cir. 1997)).

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint. *Browning v. Clinton,* 292 F.3d 235, 242 (D.C.Cir.2002). A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (internal quotation marks and citations omitted). "[W]hen ruling on defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Atherton v. D.C. Office of the Mayor,* 567 F.3d 672, 681 (D.C.Cir.2009) (quoting *Erickson v. Pardus,* 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007)). The court must also grant the plaintiff "the benefit of all inferences that can be derived from the facts alleged." *Kowal v. MCI Commc'ns Corp.,* 16 F.3d 1271, 1276 (D.C.Cir.1994). A court need not, however, "accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint." *Id.*

In addition, "[t]hreadbare recitals of elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). Only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.*

III. ANALYSIS

All of the Defendants argue that the Second Amended Complaint should be dismissed in its entirety because the Defense Base Act provides the exclusive process and forum to resolve Plaintiffs' claims. *See, e.g.,* Contractor Defs.' Joint Mem. at 10-22; Insurer Defs.' Joint Mem. at 7-21; Khudairi Group's Mem. at 13-17. Defendants further argue that Plaintiffs fail to state a claim under RICO, the ADA, or any of their common law causes of action. *See, e.g.,* Contractor Defs.' Joint Mem. at 23-37; Insurer Defs.' Joint Mem. at 21-36. Finally, several Defendants argue (1) that this Court lacks personal jurisdiction over them and that venue is improper, *see* Global Linguist Solutions' Mem. at 4-11; AECOM and CSA's Mem. at 4-7; USIS International's Mem. at 3-4, 9; CNA Financial's Mem. at 8-9; (2) that they are not proper parties to this action because there are no claims alleged directly against them, *see* Northrop Grumman's Mem. at 10-11; CNA Financial's Mem. at 5-8; Khudairi Group's Mem. at 17-22; and (3) that they were improperly named in the Complaint because they settled all claims with the relevant plaintiff (and counsel of record in this action) months before the initial Complaint was filed, *see* Exelis Systems' Mem. at 10-11. As discussed in more detail below, the Court concludes that the Defense Base Act preempts all of

Plaintiffs' state law claims, as well as Plaintiffs' RICO and retaliatory discharge claims. The Court further concludes that Plaintiffs fail to state a claim under the ADA. The Court therefore does not reach the Defendants' alternative arguments.

A. Exclusivity of the DBA and the LHWCA

1. State Law Claims (Counts III, IV, V, VII, and VIII)

The D.C. Circuit has held that the LHWCA, which is incorporated into the DBA, "provides a *comprehensive* scheme for compensating employees who are injured or killed in the course of employment." *Hall v. C & P Tel. Co.,* 809 F.2d 924, 926 (D.C.Cir.1987) [*Hall II*] (emphasis in original). In *Hall,* the plaintiff alleged that his employer had wrongfully delayed and denied his benefits under the D.C. Workers' Compensation Act, which at the time incorporated the LHWCA's statutory framework. The plaintiff filed suit for intentional infliction of emotional distress and bad-faith refusal to make timely workers' compensation benefits payments. *See Hall v. C&P Tel. Co.,* 793 F.2d 1354, 1355 (D.C.Cir.1986) [*Hall I*]. On rehearing, the D.C. Circuit stated that the plaintiff, "[u]nsatisfied with the [LHWCA's] statutory *quid pro quo* ... contend[ed] that employees should be permitted to bring tort claims when the employer refuses to make timely compensation payments with an *intent to injure*." *Hall II,* 809 F.2d at 926 (emphasis added). The court found, however, that recognizing such a cause of action would "undo[] the legislated compromise between the interests of employees and the concerns of employers." *Id.* (internal quotation marks and

citation omitted). Therefore, the court held that tort claims based upon delayed or denied benefits "fall within the Act's exclusivity provisions," and it affirmed the district court's dismissal of the suit for lack of subject matter jurisdiction. *See id.*

Courts in several other circuits have likewise found this exclusive remedy scheme to bar state tort claims like those alleged here. *See Barnard v. Zapata Haynie Corp.,* 975 F.2d 919, 920 (1st Cir. 1992) (holding that the LHWCA preempts state tort claims for intentional failure to make timely compensation payments, as well as willful and malicious refusal to pay); *Atkinson v. Gates, McDonald & Co.,* 838 F.2d 808, 809-12 (5th Cir.1988) (same); *Sample v. Johnson,* 771 F.2d 1335, 1344-47 (9th Cir.1985) (same); *Nauert v. Ace Prop. & Cas. Ins. Co.,* No. 04-cv-2547, 2005 WL 2085544, at *3-5 (D.Colo. Aug. 27, 2005) (dismissing claims for bad faith failure to pay compensation based on exclusivity of DBA and LHWCA); *see also Brown v. Gen. Servs. Admin.,* 425 U.S. 820, 834-35, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976) ("We have consistently held that a narrowly tailored employee compensation scheme preempts the more general tort recovery statutes.").[5]

In addition, the LHWCA precludes state tort claims alleging "false statement[s] or representation[s] for the purpose of reducing, denying, or terminating" a claimant's benefits. *Tipton v. Northrop Grumman Corp.,* No. 08-1267, 2008 WL 5378129, at *4 (E.D.La. Dec. 22, 2008). As several courts have recognized, Section 931(c) of the LHWCA, as incorporated by the DBA, establishes an employer's exclusive liability for such alleged conduct in the form of criminal penalties and liability. *See Barnard,* 975 F.2d at 921 n. 4;

Atkinson, 838 F.2d at 811. Further, courts have found that the exclusive remedies and adjudication processes in the LWHCA preempt claims of retaliation or discrimination in connection with a claim for benefits. *See LeSassier v. Chevron USA, Inc.,* 776 F.2d 506, 509-10 (5th Cir.1985)(holding that exclusive administrative remedy 33 U.S.C. § 948a preempted state law retaliatory discharge claim); *Ravencraft v. Sundowner Offshore Servs.,* No. 97-3572, 1998 WL 246699, *2 (E.D.La. May 14, 1998) (same).

Plaintiffs do not address or acknowledge this Circuit's binding precedent set forth in *Hall.* Instead, they make several arguments in an attempt to avoid the exclusivity of the DBA. None of these arguments are persuasive.

First, Plaintiffs rely on a purported exception recognized in *Martin v. Travelers Insurance Co.,* 497 F.2d 329 (1st Cir.1974). *See* Pls.' Opp'n to Contractor Defs.' Joint Mem. at 9-11; Pls.' Opp'n to Insurer Defs.' Joint Mem. at 24-26. There, after the defendant insurer had issued a benefits check to the plaintiff, and the plaintiff had deposited and substantially drawn on the check, the defendant stopped payment without warning. The First Circuit held that this constituted an independent wrong, and that the plaintiff was not precluded under the LHWCA from pursuing independent state law remedies. 497 F.2d at 330-31. However, in a later opinion, the First Circuit distinguished *Martin,* stating that the crux of the complaint in *Martin* was "the insurer's callous stopping of payment without warning when it should have realized that acute harm might follow. A stop payment on a sizable compensation check which may

have been deposited and drawn upon carries the obvious possibility of embarrassment and distress." *Barnard,* 975 F.2d at 920 (citing *Martin,* 497 F.2d at 331); *see also Atkinson,* 838 F.2d at 814 n. 6 ("[I]t is perhaps possible to construe *Martin* as involving a situation where the conduct complained of... would be actionable even if the compensation benefits for which the drafts were given were not actually owing to begin with. In other words, it might be possible to construe *Martin* as presenting a situation where the plaintiff's recovery would not depend on a determination that he was owed compensation under the LHWCA ... if this is not a correct reading of *Martin,* then we expressly decline to follow that decision.").[6] Departing from *Martin,* the court in *Barnard* found that the refusal to pay benefits and the failure to make timely payments, irrespective of defendants' intent, were the types of claims that fell under the exclusive remedies of the LWHCA. *See* 975 F.2d at 920.[7] In doing so, the First Circuit relied upon other circuits, including the D.C. Circuit, which had rejected similar attempts to bring state law tort claims based upon the failure to pay LHWCA benefits. *See id.* at 921 (citing *Hall,* 809 F.2d at 924; *Atkinson,* 838 F.2d at 812; *Sample,* 771 F.2d at 1347); *see also Fisher v. Halliburton,* 667 F.3d 602, 619 (5th Cir.2012) ("[A]llowing an injured employee to recover from his employer under this theory of intentional-tort liability would inject into the DBA's workers' compensation scheme an element of uncertainty at odds with the statute's basic purpose: providing prompt relief for employees, and limited and predictable liability for employers.").[8] *Martin* thus conflicts with the precedent of this Circuit, as well as several others.

Even were the Court persuaded that *Martin* provided an exception to *Hall* — which does not appear to be the case — because Plaintiffs' claims all depend on a determination that they were owed compensation under the DBA, they do not fall under any such exception. Each of Plaintiffs' state law causes of action directly relates to Plaintiffs' claims for DBA benefits:

> • With respect to Count III (Bad Faith and Tortious Breach of Covenant of Good Faith), Plaintiffs allege that Defendants engaged in bad faith denial of claims, and bad faith refusal to pay reasonable and necessary medical bills by, e.g., unreasonably denying claims ..., failing to properly and adequately investigate claims, delaying payments for medical bills and disability, SAC ¶¶ 587-92;
> • With respect to Count IV (Unconscionable, Fraudulent and Deceptive Trade Practices), Plaintiffs allege that Defendants engaged in deceptive, unconscionable acts and practices by representing they provided all benefits covered under law, when in fact they did not intend to provide such, and ... act[ed] with deception toward Plaintiffs concerning the characteristics of their ... medical and disability benefits, SAC ¶¶ 593-601;
> • With respect to Count V (Civil Conspiracy), Plaintiffs allege that Defendants engaged in a conspiracy to deprive injured and disabled workers of DBA benefits in violation of the DBA, SAC ¶¶ 602-07; • With respect to Count VII (Outrage, or Intentional Infliction of Emotional Distress), Plaintiffs allege that Defendants intended to inflict emotional

> distress on Plaintiffs or knew or should have known that emotional distress was likely to result from their denial of DBA benefits, SAC ¶¶ 619-25; and • With respect to Count VIII (Wrongful Death), Plaintiffs allege that those Plaintiffs who are deceased died as a result of the neglect and intentional misconduct of Defendants, SAC ¶¶ 626-31.9

As Plaintiffs reaffirm in their own Opposition briefs, the crux of their Complaint is that "Defendants' failure to make the proper compensation payments resulted in the infliction of harm on Plaintiffs, which Defendants could have reasonably anticipated.... Defendants' delay, termination, and/or minimization of compensation have aggravated Plaintiffs' injuries." Pls.' Opp'n to Contractor Defs.' Joint Mem. at 16; *see* also Pls.' Opp'n to Insurer Defs.' Joint Mem. at 16. Plaintiffs claim that Defendants, in conspiracy with each other, refused to pay for Plaintiffs' medical benefits, terminated their medical benefits, repeatedly lied and made misrepresentations to DOL regarding payments for medical treatment, wrongfully terminated certain Plaintiffs, and provided inadequate care. *See* Pls.' Opp'n to Contractor Defs.' Joint Mem. at 20-22. Although Plaintiffs allege that these actions exacerbated their underlying employment-related injuries and/or that the claims process itself caused them undue stress and financial hardship, it is clear that Plaintiffs' state law causes of action all arise out of their underlying claims to DBA benefits and thus are barred by the exclusive scheme set forth in the DBA and LHWCA.

Plaintiffs also argue that the exclusive remedy bar only exists as to damages "on account of the injury or death" claimed under the DBA, not for damages intentionally, fraudulently, and in bad faith inflicted by Defendants after they have accepted the claim and are paying benefits. *See* Pls.' Opp'n to Contractor Defs.' Joint Mem. at 7-8; Pls.' Opp'n to Insurer Defs.' Joint Mem. at 7. According to Plaintiffs, because their injuries occurred outside the scope of their employment, the exclusive remedy is inapplicable to their claims. *See* Pls.' Opp'n to Contractor Defs.' Joint Mem. at 26-27; Pls.' Opp'n to Insurer Defs.' Joint Mem. at 10-11, 23-24, 30-31. But the D.C. Circuit rejected these identical arguments in *Hall,* as did the Fifth Circuit in *Atkinson. See Hall,* 809 F.2d at 926; *Atkinson,* 838 F.2d at 811; *see also Nauert,* 2005 WL 2085544, at *3-5. As the court stated in *Atkinson:*

> [Plaintiff] asserts that the exclusivity provision of section 5(a) applies only to liability on account of such injury, and that ... the damages which she claims for the subsequent failure to pay compensation benefits cannot possibly arise out of her employment.... Th[is] contention overlooks the fact that [plaintiff's] claim necessarily presupposes an obligation to pay LHWCA benefits, and hence necessarily arises out of her on-the-job injury.

838 F.2d at 811 (internal citation omitted).[10]

Alternatively, Plaintiffs argue that Defendants' "failure to secure payment of compensation," through false statements and representations estops them from asserting preemption. Pls.' Opp'n to Contractor

Defs.' Joint Mem. at 11; *see also* Pls.' Opp'n to Insurer Defs.' Joint Mem. at 26-27.[11] The LHWCA provides an exception to the exclusivity-of-remedy provision when "an employer fails to secure payment of compensation as required by" the Act. 33 U.S.C. § 905(a). However, implementing regulations to the DBA make clear that an employer "secures payment of compensation" by obtaining a DBA "workers' compensation insurance" policy "before commencing performance," and maintaining that insurance "until performance is completed." 48 C.F.R. § 52.228-3. Plaintiffs do not allege that any of the Defendants failed to obtain and maintain such an insurance policy, and this argument thus fails.

Finally, Plaintiffs argue quite perplexingly that the exclusive remedy provision of the DBA does not apply to them because they are independent contractors, not employees, and thus are not covered by the DBA. They also assert that they are suing certain Defendants who were not their actual employers or insurers. *See* Pls.' Opp'n to Contractor Defs.' Joint Mem. at 24-25; Pls.' Opp'n to Insurer Defs.' Joint Mem. at 28-29. These arguments undermine the premise of the claims set forth in the Complaint, all of which allege that Plaintiffs were harmed by Defendants' refusal or failure to timely provide the DBA benefits to which Plaintiffs were entitled.

The allegations in the Complaint are extremely serious and deeply disturbing. However, Congress has expressly set forth its intention that employers' liability under the DBA "shall be exclusive and in place of all other liability." 42 U.S.C. § 1651(c); *see also Hall,* 809 F.2d at 925-26. Based on the binding

authority from this Circuit, as well as persuasive authority from several other circuits, the Court finds that all of Plaintiffs' state law claims are barred by the exclusive scheme set forth in the DBA and the LHWCA. Accordingly, Counts III, IV, V, VII, and VIII are hereby DISMISSED.

2. Federal Claims (Counts I and II)

Defendants further argue that Plaintiffs' federal claims are barred. As the D.C. Circuit and several others have recognized, federal enabling statutes that provide exclusive administrative remedies bar RICO actions for alleged violations of those schemes. *See Danielsen v. Burnside-Ott Aviation Training Ctr., Inc.,* 941 F.2d 1220 (D.C.Cir.1991) (affirming dismissal of RICO claims as barred by exclusive statutory remedies under the Federal Services Contract Act); *Bridges v. Blue Cross & Blue Shield Ass'n,* 935 F.Supp. 37, 43 (D.D.C.1996) (finding that the Federal Employees Health Benefits Act's administrative remedy bars RICO claims); *see also, e.g., Ayres v. Gen. Motors Corp.,* 234 F.3d 514, 522-25 (11th Cir.2000) *Bodimetric Health Servs., Inc. v. Aetna Life & Cas.,* 903 F.2d 480, 486-87 (7th Cir.1990); *Norman v. Niagara Mohawk Power Corp.,* 873 F.2d 634, 637-38 (2d Cir.1989); *cf. Brown v. Cassens Transport Co.,* 675 F.3d 946, 954-55 (6th Cir.2012) (noting that federal courts "have held RICO inapplicable to claims that should have been raised before federal agencies that had exclusive-remedy clauses in their enabling statutes," but finding that state statute did not preempt RICO claim).

In *Danielsen,* the D.C. Circuit held that the plaintiffs' claims against their government contractor employer were precluded by the comprehensive statutory scheme under the Service Contract Act, 41 U.S.C. § 351 *et seq.* There, the plaintiff-employees alleged that the defendants had entered into contracts with the government using improper wage classifications (in violation of the Service Contract Act), and had repeatedly used the mails to further the contracts, thus constituting to mail fraud under RICO. *See* 941 F.2d at 1225-26. However, the court held that because the Act provided "an extensive series of regulations governing the wage determination process, including procedures for enforcement and review," the administrative remedies available under the Service Contract Act were "exclusive" and did not give rise to a separate cause of action under RICO. *See id.* at 1226-29. This Court later applied the holding in *Danielsen* to the Federal Employee Health Benefits Act ("FEHBA"), 5 U.S.C. § 8901 *et seq.,* which authorizes the U.S. Office of Personnel Management "to procure and administer health benefits plans for federal workers by contracting with private health insurance carriers." *Bridges,* 935 F.Supp. at 39. The court stated, "[a]lthough the governing statute in this case is different [from that in *Danielsen*], the underlying principles are the same, and the claims cannot stand." *Id.* at 40 (citing *Danielsen,* 941 F.2d 1220). Because the FEHBA created a "comprehensive administrative enforcement mechanism for review of disputed claims," the court found that the RICO claims were precluded and must be dismissed. *See id.* at 41-43 ("The FEHBA leaves no room for a remedy under RICO; the broad enforcement and oversight powers of the OPM established in the statute indicate that the

exclusive remedy for an action cognizable under the FEHBA lies under the FEHBA, not under another federal statute.").

Plaintiffs do not respond to this argument or this authority whatsoever. For this reason alone, the Court could treat this argument as conceded and dismiss all of the federal claims. *See Hopkins v. Women's Div., Gen. Bd. of Global Ministries,* 284 F.Supp.2d 15, 25 (D.D.C.2003), *aff'd,* 98 Fed.Appx. 8 (D.C.Cir.2004) ("It is well understood in this Circuit that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded." (citation omitted)). However, the Court has analyzed the arguments with respect to each of Plaintiffs' federal claims individually.

The allegations that form the basis of Plaintiffs' RICO claim (Count II) are directly addressed by the comprehensive administrative procedures and remedies available under the DBA. For example, Plaintiffs claim that Defendants conspired to "[make] misrepresent[ations] to injured parties and the DOL and commit crimes under the DBA by denying claims using fraud...." SAC ¶ 573. However, Section 931(c) of the LHWCA, which is incorporated in the DBA, provides specific criminal penalties against any "employer, his duly authorized agent, or an employee of an insurance carrier who knowingly and willfully makes a false statement or representation for the purpose of reducing, denying, or terminating benefits to an injured employee...." 33 U.S.C. § 931(c). Likewise, Plaintiffs' allegation that Defendants

committed "various forms of wire and mail fraud" to "delay payments to providers or to claimants" is addressed in Sections 914(e) and (f) of the LHWCA, as incorporated by the DBA, which provide financial penalties for delays in compensation. *See* 33 U.S.C. §§ 914(e), (f); 20 C.F.R. §§ 702.233, 702.350. Based upon the reasoning of *Danielsen* and *Bridges,* the Court concludes that to permit Plaintiffs to convert non-compliance with the DBA — a statute with its own comprehensive administrative remedies — into mail and wire fraud and thereby maintain a civil RICO action would contradict the purpose and intent of the DBA.[12] Accordingly, Plaintiffs' RICO claim (Count II) is DISMISSED.

Furthermore, Count I, which alleges a violation of the LHWCA's anti-retaliation and discrimination provision, 33 U.S.C. § 948a, is also barred.[13] Plaintiffs allege that they "were discriminated against in the terms, conditions, and benefits of employment, retirement, insurance, and status due to their accessing or attempting to access the DBA system...." SAC ¶ 565. Yet Plaintiffs seek precisely the same remedies provided by the DBA for such alleged conduct. *Id.* at ¶ 570 (seeking reinstatement or damages and attorneys' fees); *cf.* § 948a ("Any employee so discriminated against shall be restored to his employment and shall be compensated by his employer for any loss of wages arising out of such discrimination."). Plaintiffs may not pursue their claims for retaliation and discrimination in the federal courts without first exhausting their administrative remedies through the exclusive process provided in the LHWCA. *See* § 948a; 20 C.F.R. §§ 702.271-274; *see also LeSassier,* 776 F.2d at 508-10; *Slightom v. Nat'l*

Maint. & Repair, Inc., 747 F.Supp.2d 1032, 1037-38 (S.D.Ill.2010). Plaintiffs nowhere allege that they have exhausted their administrative remedies. Moreover, Plaintiffs' reliance on cases involving state law wrongful discharge claims is irrelevant and not persuasive.[14] Accordingly, Count I is also DISMISSED.

B. ADA Claims (Count VI)

Three individual Plaintiffs, Merlin Clark, Harbee Kreesha, and Mohsen Alsaleh, bring claims for violation of the ADA against their employers, Ronco Consulting (as to Clark) and Global Linguist Solutions (as to Kreesha and Alsaleh). *See* SAC ¶¶ 111, 113, 203, 215, 608-618. Specifically, Plaintiffs allege that they were fired after they became disabled, and that their disabilities "were motivating factors in the decisions of Defendant contractors not to offer jobs with accommodations, or to fire persons who were ... being treated for DBA injuries, or to rehire but fail to accommodate restrictions or disabilities reasonably." SAC ¶¶ 611-13. The Court interprets these allegations as including two possible claims under the ADA: (1) failure to accommodate, and (2) disability discrimination for firing Plaintiffs.

The ADA prohibits an employer from discriminating against an "individual with a disability" who can perform the essential functions of his job with "reasonable accommodations." 42 U.S.C. § 12112(a)-(b). As relevant here, to "`discriminate' is defined to include `not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability ...,

unless [the employer] demonstrates that the accommodation would impose an undue hardship on the operation of the business...." *Woodruff v. Peters,* 482 F.3d 521, 527 (D.C.Cir.2007) (quoting 42 U.S.C. § 12112(b)(5)(A)). A "qualified individual" is "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The ADA defines "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of" an individual. 42 U.S.C. § 12102(2)(A).

To establish a *prima facie* case of unlawful discrimination based on a failure to accommodate under the ADA, a plaintiff must show that: "(1) he is a qualified individual with a disability within the meaning of the ADA; (2) that the employer had notice of his disability; (3) there was some reasonable accommodation denied to him; and (4) such accommodation would have enabled him to perform the essential functions of this job." *Saunders v. Galliher & Huguely Assocs., Inc.,* 741 F.Supp.2d 245, 248 (D.D.C.2010) (citing *Duncan v. Wash. Metro. Area Transit Auth.,* 240 F.3d 1110, 1114 (D.C.Cir.2001)). The employee bears the burden of proving that he is qualified. *Miller v. Hersman,* 759 F.Supp.2d 1, 10 (D.D.C.2010). In addition, "[a]n underlying assumption of any reasonable accommodation claim is that the plaintiff-employee has requested an accommodation which the defendant-employer has denied." *Flemmings v. Howard Univ.,* 198 F.3d 857, 861 (D.C.Cir.1999); *Saunders,* 741 F.Supp.2d at 249 ("It is the employee's burden to identify reasonable

accommodations which would allow him to perform the essential functions of the job....").

A disability discrimination claim under the ADA is subject to the familiar burden-shifting framework of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). First, the plaintiff must establish a *prima facie* case of discrimination under the ADA by showing that he: (1) had a disability; (2) was qualified for the position with or without a reasonable accommodation; and (3) suffered an adverse employment action because of the disability. *Swanks v. Wash. Metro. Area Transit Auth.,* 179 F.3d 929, 933-34 (D.C.Cir.1999). If the plaintiff does so, the burden shifts back to the employer to articulate a "legitimate non-discriminatory reason for its action," leaving the plaintiff an opportunity to prove that the employer's proffered justification was not the true reason, but a pretext for discrimination. *Id.* (citing *Aka v. Wash. Hosp. Ctr.,* 156 F.3d 1284, 1289 (D.C.Cir. 1998) (*en banc*)).

Plaintiffs have failed to state the essential elements of a claim for either failure to accommodate or disability discrimination under the ADA. First, Plaintiffs make only conclusory allegations regarding each individual Plaintiff's status as a "qualified individual" under the ADA. Plaintiff Kreesha alleges that he has Post-Traumatic Stress Disorder, and that this "substantially limits his major life activities." Pls.' Opp'n to Contractor Defs.' Joint Mem. at 42; *see also* SAC ¶¶ 193-95. Plaintiff Clark alleges that he suffered numerous physical injuries and a traumatic brain injury as a result of an explosion, and that these injuries "qualify [him] as having a disability under the

ADA." Pls.' Opp'n to Contractor Defs.' Joint Mem. at 42; *see also* SAC ¶¶ 90-100. Finally, Plaintiff Alsaleh claims that he contracted Leishmaniasis after being bitten by a sand fly. *See* SAC ¶¶ 209-210. Alsaleh also claims that he has conditions including "cardiac issues, chest pain and pressure, lung issues, shortness of breath and collapse, sleep disorder...." *Id.* ¶¶ 212-13. These allegations are insufficient for Plaintiffs to meet their burden of demonstrating that their injuries substantially limited a major life activity and thus qualified them as disabled under the ADA. Moreover, Plaintiffs completely fail to allege that they requested any accommodation for their disabilities that their employers then denied. They have therefore failed to state a claim for either failure to accommodate or disability discrimination under the ADA. *See Hovsepyan v. Blaya,* 770 F.Supp.2d 259, 266 (D.D.C.2011); *Reynolds v. U.S. Capitol Police Bd.,* 357 F.Supp.2d 2, 18 (D.D.C.2004).

Accordingly, Plaintiffs' ADA claims (Count VI) are DISMISSED.[15]

IV. CONCLUSION

For the foregoing reasons, the Court concludes that the exclusive remedies in the DBA preclude Plaintiffs' state law claims, their RICO claim, and their claim under Section 948a of the LHWCA and must therefore be dismissed pursuant to Rule 12(b)(1). The Court further concludes that Plaintiffs' ADA claims fail to state a claim for relief under Rule 12(b)(6). Accordingly, Defendants' Motions to Dismiss are hereby GRANTED and the Second Amended

Complaint is DISMISSED. A separate Order accompanies this Memorandum Opinion.

FootNotes

1. Pursuant to a Stipulation filed on August 27, 2012, Plaintiffs dismissed all claims against Defendant Parsons Group. *See* Docket No. 108.

2. In resolving the pending motions, the Court has relied on the following documents: Plaintiffs' Second Amended Complaint [Docket No. 50]; Contractor Defendants' Joint Motion to Dismiss [Docket No. 80]; Plaintiffs' Opposition to Contractor Defendants' Joint Motion to Dismiss [Docket No. 114]; Contractor Defendants' Joint Reply [Docket No. 127]; Insurer Defendants' Joint Motion to Dismiss [Docket No. 82]; Plaintiffs' Opposition to Insurer Defendants' Joint Motion to Dismiss [Docket No. 115]; Insurer Defendants' Reply [Docket No. 138]; Plaintiffs' Opposition to Defendant KBR and Halliburton's Motion to Dismiss [Docket No. 121]; Defendants KBR and Halliburton's Reply [Docket No. 130]; Defendant Academi's Motion to Dismiss [Docket No. 83]; Plaintiffs' Opposition to Defendant Academi's Motion to Dismiss [Docket No. 109]; Defendant Academi's Reply [Docket No. 133]; Defendants Wackenhut International and Ronco Consulting's Motion to Dismiss [Docket No. 85]; Plaintiffs' Opposition to Defendants Wackenhut International and Ronco Consulting's Motion to Dismiss [Docket No. 111]; Defendants Wackenhut International and Ronco Consulting's Reply [Docket No. 134]; Defendant Northrop Grumman's Motion to Dismiss [Docket No. 87]; Plaintiffs' Opposition to Defendant Northrop Grumman's Motion to Dismiss [Docket No. 120];

Defendant Northrop Grumman's Reply [Docket No. 140]; Defendant Global Linguist Solutions' Motion to Dismiss [Docket No. 88]; Plaintiffs' Opposition to Defendant Global Linguist Solutions' Motion to Dismiss [Docket No. 117]; Defendant Global Linguist Solutions' Reply [Docket No. 136]; Defendants AECOM Government Services and Combat Support Associates' Motion to Dismiss [Docket No. 89]; Plaintiffs' Opposition to Defendants AECOM Government Services and Combat Support Associates' Motion to Dismiss [Docket No. 113]; Defendants AECOM Government Services and Combat Support Associates' Reply [Docket No. 135]; Defendant Exelis Systems' Motion to Dismiss [Docket No. 91]; Plaintiffs' Opposition to Defendant Exelis Systems' Motion to Dismiss [Docket No. 116]; Defendant Exelis Systems' Reply [Docket No. 139]; Defendant L-3 Services' Motion to Dismiss [Docket No. 93]; Plaintiffs' Opposition to Defendant L-3 Services' Motion to Dismiss [Docket No. 119]; Defendant L-3 Services' Reply [Docket No. 131]; Defendant U.S. Investigations Services' Motion to Dismiss [Docket No. 94]; Defendant USIS International's Motion to Dismiss [Docket No. 95]; Plaintiffs' Combined Opposition to Defendants U.S. Investigations Services and USIS International's Motions to Dismiss [Docket No. 122]; Defendant U.S. Investigations Services' Reply [Docket No. 128]; Defendant USIS International's Reply [Docket No. 129]; Defendant DynCorp International's Motion to Dismiss [Docket No. 99]; Plaintiffs' Opposition to Defendant DynCorp International's Motion to Dismiss [Docket No. 112]; Defendant DynCorp International's Reply [Docket No. 132]; Defendant CNA Financial's Motion to Dismiss [Docket No. 90]; Plaintiffs' Opposition to Defendant

CNA Financial's Motion to Dismiss [Docket No. 110]; Defendant CNA Financial's Reply [Docket No. 137]; Defendant Khudairi Group's Motion to Dismiss [Docket No. 100]; Plaintiffs' Opposition to Defendant Khudairi Group's Motion to Dismiss [Docket No. 118]; Defendant Khudairi Group's Reply [Docket No. 141].

3. One plaintiff, Nicky Pool, is the nurse for another Plaintiff, Daniel Brink. See SAC ¶¶ 477-88. Ms. Pool alleges that CNA has refused to pay medical invoices that she sent for care of Mr. Brink.

4. Plaintiffs additionally include a request for preliminary and permanent injunctive relief, which is titled Count IX but is properly construed as a claim for relief, rather than a separate cause of action.

5. Courts recognize that the LHWCA "grants the employer's insurance carrier ... the same immunity which it grants the employer...." *Atkinson,* 838 F.2d at 811; *see also Barnard,* 975 F.2d at 921 (finding nonpayment claims against insurer preempted by LHWCA); *Johnson v. Am. Mut. Liab. Ins. Co.,* 559 F.2d 382, 383 (5th Cir.1977)(finding that the LHWCA's exclusivity provision barred a negligence claim against an insurer).

6. Given the Fifth Circuit's statement in *Atkinson* that it "expressly decline[d] to follow" *Martin* — to the extent that it was inconsistent with the Fifth Circuit's holding that the LWHCA preempts claims for intentional torts — Plaintiffs' reference to a "*Martin/Atkinson*" exception is puzzling, to say the least.

7. The First Circuit noted one additional distinction: "*Martin* was decided by this court in 1974. In 1984, Congress passed extensive amendments to the LHWCA following a debate over Union concerns regarding abuse by insurers arbitrarily withholding

payment of benefits under the Act. Congress ultimately enhanced the criminal penalty for such arbitrary withholdings from a misdemeanor to a felony, increasing the maximum fine to $10,000 and the maximum imprisonment to five years." *Barnard,* 975 F.2d at 921 n. 4 (citing 33 U.S.C. § 931(c) (1988); Longshoremen's and Harbor Worker's Compensation Act Amendments of 1981: Hearings on S. 1182 Before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, 97th Cong., 1st Sess. 433, 516-23, 545 (1981)).

8. *Ross v. DynCorp,* 362 F.Supp.2d 344 (D.D.C.2005), is not to the contrary. There, another Judge in this District concluded that the DBA barred plaintiffs' negligence-based claims regarding the death of their son; however, the intentional infliction of emotional distress claim, which the court determined failed as a matter of law, was based upon the employer's communication with the family about the decedent's remains, and thus did not arise out of an entitlement to benefits under the DBA. *See* 362 F.Supp.2d at 358-59. It does not appear that any party there argued that the DBA barred the intentional infliction of emotional distress claim.

9. Plaintiffs also allege that their claims for detrimental reliance and breach of contract are valid. *See, e.g.,* Pls.' Opp'n to Contractor Defs.' Joint Mem. at 14-15, 22; Pls.' Opp'n to Insurer Defs.' Joint Mem. at 14-15, 21. Plaintiffs did not include these claims in their Complaint and cannot add them in their Opposition briefs.

10. Plaintiffs' reliance on numerous state court cases interpreting either state worker's compensation acts or state law regarding adequate remedies are neither relevant nor persuasive.

11. The DBA requires that a contractor must "provide for ... the payment of compensation and other benefits under the provisions of" the Act and must "maintain in full force and effect during the terms of such contract... the said security for the payment of such compensation and benefits." 42 U.S.C. § 1651(a)(4); *see also* 33 U.S.C. § 932(a).

12. Even if Plaintiffs' RICO claim were not barred by the exclusive remedies in the DBA, the Court would find that Plaintiffs fail to state a cause of action under RICO. In order to make out a claim under RICO, a plaintiff must allege the following elements: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 496, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). To show such a pattern, RICO requires at least two predicate criminal racketeering acts over a ten-year period. *See* 18 U.S.C. § 1961(5). "[T]hese predicate offenses are acts punishable under certain state and federal criminal laws, including mail and wire fraud." *Western Assocs. Ltd. P'ship ex rel. Ave. Assocs. Ltd. v. Market Square Assocs.,* 235 F.3d 629, 633 (D.C.Cir.2001) (citing 18 U.S.C. § 1961(1)(B)). First, Plaintiffs fail to allege the existence of a RICO enterprise. An "enterprise is an entity, ... a group of persons associated together for a common purpose of engaging in a course of conduct." *United States v. Turkette,* 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981). Plaintiffs allege that Defendants associated with an undefined "RICO enterprise of individuals" that included "insurance companies, attorneys, adjusters, third party medical providers, third party case administrators, third party investigators and contractors." SAC ¶ 576. Plaintiffs completely fail to provide sufficient factual allegations

to suggest, however, that the Defendants combined as a unit with any semblance of (1) a common purpose, (2) organization, and/or (3) continuity. *See Doe I v. State of Israel,* 400 F.Supp.2d 86, 119-20 (D.D.C.2005); *see also In re Ins. Brokerage Antitrust Litig.,* 618 F.3d 300, 374 (3d Cir. 2010); *McCullough v. Zimmer, Inc.,* 382 Fed. Appx. 225, 231 (3d Cir.2010)("Simply listing a string of individuals or entities that engaged in illegal conduct, without more, is insufficient to allege the existence of a RICO enterprise."). Second, Plaintiffs fail to allege any predicate acts with particularity. The predicate acts of an alleged RICO fraud must be pled with particularity as required under the heightened pleading standard of Rule 9(b) of the Federal Rules of Civil Procedure. *See Prunte v. Universal Music Grp.,* 484 F.Supp.2d 32, 42 (D.D.C.2007). Plaintiffs fail to allege with any specificity the "who, what, when, where, and how" related to their mail and wire fraud claims — they fail to allege specific fraudulent statements, who made the statements, what was said, when or where these statements were made, and how or why the alleged statements were fraudulent. *See* Insurer Defs.' Joint Mem. at 27-29. Finally, Plaintiffs fail to allege a RICO conspiracy under Section 1962(d). Even had Plaintiffs properly alleged two predicate acts of mail, wire, or bank fraud, Plaintiffs nonetheless fail to plead facts demonstrating that any of the Defendants reached an agreement to commit the two predicate acts. Plaintiffs' RICO allegations are precisely the type of threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, that the Supreme Court has found insufficient to state a claim for relief under Rule 12(b)(6), let alone under Rule 9(b). *See Iqbal,* 129 S.Ct. at 1949.

13. Section 948a provides, in pertinent part: "It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer...." 33 U.S.C. § 948a.

14. In addition, the plain text of Section 948a states that "the employer alone and not his [insurance] carrier shall be liable for such penalties and payments." Plaintiffs explicitly concede that this is so, and then attempt to argue that they may nonetheless bring claims against the Insurer Defendants under state statutes. *See* Pls.' Opp'n to Insurer Defs.' Joint Mem. at 32-33. However, the Complaint does not allege claims of retaliation under state statutes, and Plaintiffs cannot escape the explicit language of Section 948a, which precludes them from asserting retaliation and discrimination claims against the Insurer Defendants even had they exhausted their administrative remedies.

15. Global Linguist Solutions ("GLS") argues alternatively in its motion to dismiss that "should any claims survive," the Court should dismiss the allegations against GLS pursuant to either Rule 12(b)(2) or 12(b)(3) of the Federal Rules of Civil Procedure because this Court lacks personal jurisdiction over GLS and venue is improper in the District of Columbia. Global Linguist Solutions' Mem. at 1-2. Because the Court concludes that none of Plaintiffs' claims, including the two ADA claims against GLS, survive, the Court does not reach GLS's alternative arguments.

No. 13-7165.

Daniel BRINK, et al., Appellants v. CONTINENTAL INSURANCE COMPANY, et al., Appellees.

United States Court of Appeals, District of Columbia Circuit.

Filed On: August 6, 2015

BEFORE: Garland, Chief Judge; Brown, Circuit Judge; and Sentelle, Senior Circuit Judge

ORDER

Upon consideration of appellants' petition for panel rehearing filed on July 2, 2015, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Ken R. Meadows
Deputy Clerk

No. 13-7165.

Daniel BRINK, et al., Appellants v. CONTINENTAL INSURANCE COMPANY, et al., Appellees.

United States Court of Appeals, District of Columbia Circuit.

Filed On: August 6, 2015

BEFORE: Garland, Chief Judge; Henderson*, Rogers, Tatel, Brown, Griffith,Kavanaugh, Srinivasan, Millett*, Pillard, and Wilkins, Circuit Judges; Sentelle, Senior Circuit Judge

O R D E R

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Ken R. Meadows
Deputy Clerk

Title 33 U.S.C. § 905(a) provides:

> (a) The liability of an employer prescribed in section 4 [33 USC § 904] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to
>
> (b) secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 4 [33 USC § 904]