# APPENDIX

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[ENTERED: August 9, 2018]

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
AUG 9 2018
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

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| THERESA JONES, individually and as Executrix of the Estate of Landon Jones, deceased and CHRISTINA GIBSON, individually and as Executrix of the Estate of Jonathan Gibson, deceased,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>UNITED STATES OF AMERICA and UNITED STATES DEPARTMENT OF THE NAVY,<br><br>Defendants-Appellees. | No. 17-55234<br><br>D.C. No. 3:15-cv-02087-WQH-AGS<br><br>MEMORANDUM* |

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Southern District of California
William Q. Hayes, District Judge, Presiding

Submitted August 7, 2018**
Pasadena, California

Before: McKEOWN, CALLAHAN, and NGUYEN, Circuit Judges.

Theresa Jones and Christina Gibson appeal the district court's dismissal of their negligence claim against the United States for actions and decisions by the United States Navy that allegedly led to the tragic deaths of their husbands. We have jurisdiction pursuant to 28 U.S.C. § 1291, review de novo, *Costo v. United States*, 248 F.3d 863, 865–66 (9th Cir. 2001), and affirm.[1]

The sole question on appeal is whether the rule announced in *Feres v. United States*, 340 U.S. 135, 146 (1950), that the federal government cannot be held liable for "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service," applies to this case.[2] It does. The incident occurred on a Navy ship while the pilots were on duty and under orders relating to military operations in

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[1] As the parties are familiar with the facts and procedural history, we restate them only as necessary to explain our decision.

[2] *Feres v. United States* addressed liability under the Federal Tort Claims Act, *see* 340 U.S. 135, 146 (1950), but the doctrine has been extended to cases arising under the Public Vessels Act, *see Charland v. United States*, 615 F.2d 508 (9th Cir. 1980).

the Red Sea. Thus, their tragic deaths were "incident to service" and the Navy cannot be held liable for any negligence involved in its decision to continue using Arleigh Burke Class Destroyers. *See id.* at 137, 146 (holding the United States was not liable for allegedly quartering the decedent "in barracks known or which should have been known to be unsafe"); *see also Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 668, 674 (1977) (noting that an action against the United States for malfunction of an aircraft emergency ejection system that it designed would be barred by *Feres*); *Costo*, 248 F.3d at 867 (outlining considerations relevant to *Feres* analysis).[3]

The plaintiffs argue that we should focus only on, and decline to apply, the military discipline rationale for the *Feres* doctrine because there is no military discipline concern here. But "we are not free to make this judgment call." *Ritchie v. United States*, 733 F.3d 871, 877 (9th Cir. 2013). In *Johnson v. United States*, the Supreme Court "reaffirm[ed]" the *Feres* doctrine, including each of its underlying policy rationales. 481 U.S. 681, 688–92 (1987).[4] And in

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[3] *Cf. Schoenfeld v. Quamme*, 492 F.3d 1016, 1023, 1025 (9th Cir. 2007) (noting that the plaintiff "was on liberty" and "not engaged in military activity when he was injured" and that "the military did not require" him to engage in the activity that injured him); *Johnson v. United States*, 704 F.2d 1431, 1439–40 (9th Cir. 1983) (noting that the plaintiff was not under "military orders or performing any sort of military mission" but instead was "off-duty" and "in exactly the same position as a civilian" when he was injured).

[4] *See also Atkinson v. United States*, 825 F.2d 202, 205–06 (9th Cir. 1987) ("Simply put, *Johnson* appears to breathe new life into the first two *Feres* rationales, which until that time had been largely discredited and abandoned.").

*Atkinson v. United States*, we found that *Johnson* "compelled" us to apply the *Feres* doctrine. 825 F.2d 202, 206 (9th Cir. 1987). We did so despite "believ[ing] that the military discipline rationale [did] not support [its] application" because other rationales did. *Id.*

Even so, the military discipline rationale on which we have so often focused compels us to apply *Feres* here. A trial in this case would necessarily "involve second-guessing military orders, and would . . . require members of the Armed Services to testify in court as to each other's decisions and actions" about the Navy's continued use of Arleigh Burke Class Destroyers. *See Stencel*, 431 U.S. at 671–73.

Our duty here is unequivocal. Despite criticisms that we and other courts have lodged against the *Feres* doctrine, "we are bound by the decisions of prior three judge panels . . . , [and] the decisions of prior three judge panels could not be more clear: we have 'consistently' barred claims under *Feres* 'to avoid examining acts of military personnel which were allegedly negligent with respect to other members of the armed services.'" *Ritchie*, 733 F.3d at 877 (quoting *Monaco v. United States*, 661 F.2d 129, 134 (9th Cir. 1981)). "[U]ntil Congress, the Supreme Court, or an en banc panel of this Court reorients the doctrine, we are bound to follow" it. *Costo*, 248 F.3d at 869.

**AFFIRMED.**

[ENTERED: May 27, 2016]

**UNITED STATES DISTRICT COURT**

**SOUTHERN DISTRICT OF CALIFORNIA**

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|---|---|
| THERESA JONES, individually and as Executrix of the Estate of LANDON JONES, decease; ANTHONY JONES, a minor by and through his parent, THERESA JONES; HUNTER JONES, a minor by and through his parent, THERESA JONES; CHRISTINA GIBSON; individually and as Executrix of the Estate of JONATHAN GIBSON, decease; MAKAYLIN GIBSON, a minor by and through her parent, CHRISTINA GIBSON; ALEXANDER GIBSON, a minor by and through his parent, CHRISTINA GIBSON,<br><br>Plaintiff,<br>v.<br>UNITED STATES DEPARTMENT OF THE NAVY; UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; PRUDENTIAL INSURANCE COMPNAY OF AMERICA, a New Jersey Corporation; GIBBS & COX, INC., a New | CASE NO. 15cv2087-WQH-RBB<br><br>ORDER |

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| York Corporation; BATH IRON WORKS CORPORATION, a Maine Corporation; HUNTINGTON INGALLS INDUSTRIES, INC., a Delaware Corporation; and JANA VAVASSEUR, an individual, | |
| Defendant. | |

HAYES, Judge:

The matters before the Court are: (1) the motions to dismiss filed by Defendants Prudential Insurance Company of America ("Prudential") (ECF No. 17), Huntington Ingalls Inc. ("Huntington") (ECF No. 18), Gibbs & Cox ("Gibbs") (ECF No. 21), Bath Iron Works Corporation ("Bath") (ECF No. 22), the United States ("U.S.") and the United States Department of the Navy ("Navy") (ECF No. 27); and (2) Huntington's Ex Parte Motion for Leave to File Notice of Supplemental Authority in Support of its Motion to Dismiss (ECF No. 46).

**I. Background**

On September 18, 2015, Plaintiffs commenced this action seeking damages for the deaths of Anthony Jones and Jonathan Gibson. (ECF No. 1). On November 12, 2015, Plaintiffs filed a first amended complaint ("FAC"). (ECF No. 9).

On January 12, 2016, motions to dismiss were filed by Prudential (ECF No. 17), Huntington (ECF No. 18), Gibbs (ECF No. 21), and Bath (ECF No. 22). On January 14, 2016, Bath filed a joinder to

Huntington's motion to dismiss. (ECF No. 25). On January 15, 2016, Gibbs filed a joinder to the motions to dismiss filed by Huntington and Bath. (ECF No. 29). On January 15, 2012, the U.S. and the Navy filed a Motion to Dismiss. (ECF No. 27).

On February 2, 2016, Plaintiffs filed a response in opposition to the Motions to Dismiss filed by the U.S. and the Navy (ECF No. 34), Prudential (ECF No. 35), and Huntington, Gibbs, and Bath (ECF No. 36).

On February 8, 2016, Prudential filed a reply. (ECF No. 38). On February 8, 2016, the U.S. and the Navy also filed a reply. (ECF No. 39). On February 9, 2016, replies were filed by Bath (ECF No. 40), Gibbs (ECF No. 41), and Huntington (ECF No. 42).

On April 7, 2016, Huntington filed an Ex Parte Motion for Leave to File Notice of Supplemental Authority in Support of its Motion to Dismiss. (ECF No. 46). On April 7, 2016, Bath filed a Notice of Joinder in Huntington's Ex Parte Motion. (ECF No. 47). On April 8, 2016, Gibbs filed a Notice of Joinder in Huntington's Ex Parte Motion. (ECF No. 48). On April 15, 2016, Plaintiffs filed a response in opposition. (ECF No. 51).

On May 25, 2016, the Court heard oral arguments on the motions.

**II. Allegations in the Complaint**

Plaintiffs allege four causes of action: (1) negligence as to Defendant the U.S.; (2) strict product liability (design defect) as to Defendants Gibbs and Bath; (3) strict product liability (failure to warn) as to Defendant Huntington; (4) violation of 38 U.S.C.

§ 1967 *et seq*., negligent failure to notify as to Defendants the Navy and Prudential. (ECF No. 9).

On September 22, 2013, Lieutenant Commander Landon Jones ("Jones") and Chief Warrant Officer 3 Jonathan Gibson ("Gibson") "died and were forever lost at sea . . . when their MH-60S helicopter, callsign 'INDIAN 617,' was forced off the side of the [USS William P.] LAWRENCE under the command of Vavasseur ('Vavasseur') after being hit by a wave of water during negligent ship maneuvering." *Id*. at ¶ 22.

Gibbs "designed the original Arleigh Burke Class Destroyer" and Bath "was the lead design agent for the follow-on modification not the Arleigh Burke Class Destroyer. . . ." *Id*. at ¶ 23. "Both variations of the Arleigh Burke Class Destroyers suffered from a defect known as low-freeboard that unreasonably and unnecessarily endangered aircraft and aircrew operating on its flight decks." *Id*. Huntington "manufactured the LAWRENCE" for the Navy and "[a]s its manufacturer, Huntington knew or reasonably should have known that LAWRENCE had the low-freeboard design defect but nevertheless did not adequately provide warnings of this dangerous defect to users of the LAWRENCE, including but not limited to Jones and Gibson." *Id*.

"The freeboard is the distance between the waterline and the flightdeck." *Id*. at ¶ 24. "The smaller or lower the freeboard, the closer the flight deck is to the water." *Id*. "[A]ircrew and flightdeck crews on low freeboard ships are more vulnerable to waves washing over the flightdeck and injuring or killing them, or damaging equipment and aircraft." *Id*.

On September 22, 2013, the sea conditions experienced by the LAWRENCE "were reasonably foreseeable during normal operating conditions." *Id*. On that day, "the LAWRENCE was conducting operations in the Red Sea and was scheduled to recover INDIAN 617 in order to receive flu vaccines from another ship." *Id*. at ¶ 25. "The plan was for INDIAN 617 to make a quick drop off of the flu vaccines, pick up three LAWRENCE sailors and some equipment, and then depart, so that the LAWRENCE could quickly rendezvous with USS NIMITZ." *Id*. "[T]he LAWRENCE was not ready for flight quarters to receive INDIAN 617 and was falling behind." *Id*. "At 12:25 p.m. local time, INDIAN 617 finally received flight conditions and requested to land, but the LAWRENCE waved INDIAN 617 off when the winds changed." *Id*. at ¶ 26.

"According to the Naval Air Training and Operating Procedures Standardization ('NATOPS'), NAVY's standard operating procedures for flight operations, the ship must maneuver itself to ensure that it is within safe parameters such that the ship's pitch, roll and winds across the deck allow a helicopter to safely land aboard the ship." *Id*. at ¶ 27.

"Once the ship is within a safe envelope to recover a helicopter, the commanding officer orders 'green deck,' which locks the ship in the safe course and speed until the helicopter has landed." *Id*. at ¶ 28. "Once the helicopter has landed, flightdeck crew rushes out to the helicopter and secures it to the ship with chocks and chains." *Id*. "Chocks are heavy rubber wedges placed on both the front and back of the helicopter wheels." *Id*. "Chains are attached from the helicopter to the ship's flight deck." *Id*.

"According to Navy procedure, once the helicopter is chocked and chained, the commanding officer can set 'red deck,' which allows the ship to maneuver freely so long as due caution is taken." *Id.* at ¶ 29. "During 'red deck,' the helicopter's rotors may still be spinning while the helicopter shuts down and flight deck crew may still remain on the weatherdeck of the ship (the weatherdeck is the deck on a ship that has no overhead protection from the weather)." *Id.*

"After INDIAN 617's first aborted attempt to land, the LAWRENCE commanding officer, Vavasseur, conferred with [the] bridge team to maneuver the LAWRENCE in order to land INDIAN 617." *Id.* at ¶ 30. "Vavasseur ordered a speed of 30 knots in the same direction as the wind which reduced the relative wind felt on the ship." *Id.* at ¶ 31. Vavasseur "was in a hurry to meet up with the NIMITZ. . . . " *Id.*

"The sea conditions consisted of waves six feet high with winds gusting from 20 to 30 knots." *Id.* at ¶ 32. "[W]itnesses noted that the wake of the LAWRENCE was nearly at the level of the flight deck even without excessive ship motion." *Id.* "[A]s a ship moves at higher speed it sinks deeper into the water, further decreasing the height from the waterline to the flight deck." *Id.* "NAVY engineers estimate that the freeboard of the LAWRENCE was only seven feet high when the fatal wave struck INDIAN 617." *Id.*

"After INDIAN 617 had landed but before it could take off again, Vavasseur ordered maximum speed and turned the ship to a southerly course that put the seas on the ship's aft port quarter (waves coming from the aft (back) part of the ship and from

the port (left) side)." *Id*. at ¶ 33. "This course and high speed combination caused the ship to roll dramatically from side to side with the pilots Jones and Gibson still strapped inside INDIAN 617 waiting to take off." *Id*. "The LAWRENCE began to experience an unstable motion -- a motion where the bow and stern of the ship move left and right and the ship rides and up and down the waves -- and she started to roll heavily in the swells, eventually experiencing a 12-degree roll." *Id*. "A 12-degree roll can cause personnel to lose footing and is a danger when the ship's safety nets are down." *Id*. at ¶ 34. "The nets are normally up and surround the flight deck to prevent personnel on deck from falling overboard." *Id*. "During flight operations, the nets come down to allow the helicopter to land on the flight deck." *Id*. "NAVY standard operating procedure is to clear the decks of personnel when the ship is experiencing 12-degree rolls." *Id*.

"Vavasseur then ordered the LAWRENCE to turn another five degrees to the right, using two degrees of rudder." *Id*. at ¶ 35. "This last command caused the ship to roll 13 degrees to the port and then 17 degrees to starboard." *Id*. "When the LAWRENCE began to roll, INDIAN 617's crew chief was helping an airman load two 250-pound aircraft jacks into the helicopter." *Id*. at ¶ 36. "The crew chief fell to the flight deck and the jacks fells on his leg, crushing it." *Id*. "As the ship dangerously rolled port and starboard, INDIAN 617 began to buckle on the flight deck." *Id*. at ¶ 37. "The chains strained to hold INDIAN 617 to the rolling ship." *Id*. "Its main rotor blades and tail rotor were still spinning." *Id*.

"The fatal wave struck INDIAN 617's tail rotor assembly, disintegrating it, causing the helicopter to

tip over." *Id.* at ¶ 38. "When INDIAN 617 tipped over, its main rotor blades struck the LAWRENCE's flightdeck causing the helicopter to violently vibrate and tear itself from its chains." *Id.* "Without a tail rotor to stabilize the spinning overhead main rotor, the now-unchained helicopter began to spin chaotically on the flight deck." *Id.* "The ship rolled one more time and INDIAN 617, with Landon Jones and Jonathan Gibson trapped inside, slid off the side of the ship into the Red Sea . . . ." *Id.* at ¶ 39. The bodies of the pilots were not recovered. *Id.* at ¶ 40. "Between 1983 and the LAWRENCE incident, at least 13 Hazard Reports – a NAVY safety reporting process - were written about waves damaging helicopters and flight deck nets aboard low-freeboard destroyers and frigates." *Id.* at ¶ 41. "[M]any Navy personnel reported that rolling and waves caused damage to these flight decks." *Id.* "[B]etween January 2003 and March 2013 . . . the NAVY documented at least nine mishaps involving waves washing over destroyer flight decks." *Id.*

"[T]he NAVY never published quantified parameters for reasonable and safe ship handling to prevent future occurrences of this well-documented hazard." *Id.* at ¶ 42. "The NAVY published no guidance beyond merely using 'caution' when maneuvering with a spinning helicopter on deck." *Id.* "NAVY Surface Warfare Officer training on flight operations is focused solely on creating a safe flight envelope for launch and recovery, but had no other restrictions on what to do after the recovery of aircraft." *Id.* at ¶ 43.

"Pilots who are strapped into their helicopter while the main rotor blades are spinning are

particularly vulnerable on the Flight IIA destroyers, which have a history of waves coming over the flight deck." *Id* at ¶ 44.

When Mrs. Jones "sought to collect the $400,000 in life insurance . . . [the] NAVY told her that her husband had cancelled" the Servicemembers' Group Life Insurance ("SGLI") coverage "not once but on five different occasions." *Id*. at ¶ 46. "Based on the NAVY's assertion that Mrs. Jones was not entitled to life insurance proceeds, PRUDENTIAL's Office of Servicemembers Group Life Insurance denied her claim and continues to deny it to this day." *Id*. "[U]nder the SGLIA, the Secretary of the Navy is required to notify the beneficiary spouse in writing when the servicemember declines SGLI coverage . . . ." *Id*. at ¶ 47. "Officials with both the NAVY and PRUDENTIAL told Mrs. Jones that despite the fact that the NAVY failed to notify her that her husband had declined life insurance coverage, her husband's cancellation of the SGLI nevertheless remained in effect and that she would not receive the $400,000." *Id*. at ¶ 48.

"With respect to PRUDENTIAL, the Veteran's Administration ('VA') contracted with PRUDENTIAL to serve as the VA's primary insurer under the SGLIA and to operate under VA supervision for the benefit of servicemembers." *Id*. at ¶ 49. "The SGLIA authorizes the VA to purchase coverage from one or more qualified commercial insurers instead of offering coverage by the VA itself." *Id*. "Under the SGLIA, the VA is the policyholder." *Id*. "Defendant NAVY acts on behalf of policyholder VA to maintain appropriate records related to SGLI coverage for each member of the service and NAVY is responsible to use its records

to certify coverage for the servicemember at the time of death." *Id*. "PRUDENTIAL received – and continues to receive - subsidies from the United States Federal Government to provide SGLI coverage." *Id*. at ¶ 50. "[D]espite receiving large federal subsidies to insure servicemembers for service-related tragedies just like the one that befell Landon Jones, PRUDENTIAL has refused to provide the $400,000 in life insurance proceeds to his widow

## III. Discussion

### A. Standard of Review

Federal Rule of Civil Procedure 12(b)(6) permits dismissal for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Federal Rule of Civil Procedure 8(a) provides that "[a] pleading that states a claim for relief must contain ... a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "A district court's dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is proper if there is a 'lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.'" *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011) (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)).

"[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)). "To survive a motion to dismiss, a complaint must contain sufficient

factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citation omitted). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679. "In sum, for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quotations and citation omitted).

**B. Motion to Dismiss filed by Prudential (ECF No. 17)**

Prudential moves to dismiss Plaintiff's[1] fourth cause of action for violation of Servicemembers' Group Life Insurance Act ("SGLIA"), 38 USC §§ 1965 *et seq.*, with prejudice for failure to state a claim up which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). (ECF No. 17). Prudential contends that Plaintiff's claim must be dismissed because Jones declined life insurance coverage under

[1] Plaintiff Theresa Jones is the only plaintiff bringing a claim for relief against Prudential.

SGLI and Prudential had no obligation to notify Mrs. Jones of her husband's declination of the coverage.

Plaintiff Theresa Jones contends that Prudential "had a duty" to notify her when her husband declined life insurance coverage under the SGLI. (ECF No. 35). Plaintiff contends that she is entitled to bring this action against Prudential because she had a right to be notified that her husband had declined life insurance and did not receive notification. Plaintiff contends that denying her the right to be notified would "negate" the statutory requirements of the SGLIA. *Id.* at 5-6. Plaintiff requests leave of the Court to amend her FAC if the Court grants the motion to dismiss.

The SGLIA, 38 USC §§ 1965 *et seq*., requires that,

> If a member who is married and who is eligible for insurance under this section makes an election under subsection (a)(2)(A) not to be insured under this subchapter, the Secretary concerned shall notify the member's spouse, in writing, of that election.

38 U.S.C. 1967(f)(1). The Secretary must make a "good faith effort" to notify the spouse of such an election. 38 U.S.C. 1967(f)(4). The SGLIA also directs the "Secretary concerned" to notify the servicemember's spouse in the event the servicemember designates a person other than the spouse or child as a beneficiary. 38 U.S.C. § 1967(f)(3). The SGLIA states that "[f]ailure to provide a notification required under this subsection in a timely manner does not affect the validity of any election . . . of beneficiary designation." 38 U.S.C. § 1967(f)(4).

In this case, Plaintiff concedes in her FAC that "under the SGLIA, the Secretary of the Navy is required to notify the beneficiary spouse in writing when the servicemember declines SGLI coverage . . . ." (ECF No. 9 at ¶ 47). Plaintiff does not cite any statute, regulation, or case law that would require Prudential to notify a person of his or her spouse's declination of SGLI coverage. Plaintiff also fails to cite any authority that would make Prudential liable when a spouse fails to receive notice of a servicemember's declination. Under the SGLIA, "the Secretary" is required to notify the beneficiary spouse. Prudential is not "the Secretary." The Court concludes that Plaintiff has failed to state a claim upon which relief can be granted against Prudential.

In general, leave to amend is freely granted. *See Foman v. Davis*, 371 U.S. 178 (1962). However, allowing Plaintiff to amend its claim against Prudential would be futile. *See Gompper v. VISX*, 298 F.3d 893, 898 (9th Cir. 2002) (complaints should only be dismissed without leave to amend where it is clear that the complaint cannot be saved by any amendment). Plaintiff's fourth cause of action as to Prudential is dismissed without leave to amend.

**C. Motions to Dismiss filed by Huntington (ECF No. 18), Gibbs (ECF No. 21), and Bath(ECF No. 22)**

In separate motions to dismiss, Defendants Huntington, Gibbs, and Bath move to dismiss Plaintiffs' second and third causes of action for product liability because those claims are preempted by the Death on the High Seas Act ("DOHSA"), 46 U.S.C. § 30301, *et seq*. (ECF Nos. 18-1 at 7, 21-1 at 11,

22-1 at 8).[2] Plaintiffs "concede that the Death on the High Seas Act . . . is likely the proper statute under which to litigate this case." (ECF No. 36 at 8). Plaintiffs request "leave to amend their FAC to allege DOHSA causes of action." *Id.*

DOHSA provides a federal statutory remedy for wrongful death occurring at sea:

> When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative.

46 U.S.C. § 30302. In this case, Plaintiffs do not plead a cause of action under DOHSA in their FAC. Plaintiffs conceded that DOHSA is "the proper statute under which to litigate this case." (ECF No. 36 at 8). The Court grants the motions to dismiss filed by Defendants. *See also*, *Helman v. Alcoa Global Fasteners, Inc.*, 637 F.3d 986, 988 (9th Cir. 2011) (holding that the plaintiffs' claims were preempted by DOHSA).

Defendants request that their motions to dismiss be granted without leave to amend because any amendment would be futile. (ECF Nos. 18-1 at 7,

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[2] Defendants contend that Plaintiffs' FAC should be dismissed for several other reasons. The Court finds it unnecessary to address these arguments at this time.

21-1 at 6, 22-1 at 5, 21-1). Plaintiffs request that the Court grant leave to amend the FAC. Any request for leave to amend shall be filed as a Motion for Leave to File an Amended Complaint.

**D. Motion to Dismiss filed by the U.S. and the Navy (ECF No. 27)**

Defendants the U.S. and the Navy move to dismiss Plaintiffs' first cause of action for negligence for lack of subject matter jurisdiction because *Feres v. United States*, 340 U.S. 135, 143,(1950), ("*Feres* doctrine") prohibits suits against the military and military personnel for injuries arising out of or in the course of activity "incident to service." (ECF No. 27-1 at 23). The U.S. and the Navy also contend that amendment of the FAC in order to remedy DOHSA issues would not cure the *Feres* bar and therefore the Court should dismiss Plaintiffs' first cause of action without leave to amend.

Plaintiffs contend that their case should be allowed to proceed despite the *Feres* doctrine. (ECF No. 34 at 7). Plaintiffs concede that none of the exceptions to the *Feres* doctrine "are analogous to or stand for the same proposition Plaintiffs proffer here, but rather highlight the ever-increasing criticism of the *Feres* doctrine and courts' willingness to make exceptions to [the *Feres* doctrine] where justice would so demand." *Id.* at 11. Plaintiffs suggest that the Court make an exception in this case because

> [h]olding the Navy responsible for its conduct in this case does not implicate command decisions, a judicially-created shield that so often prevents a remedy to servicemembers harmed by military

> negligence. And indeed providing an exception to Feres here (or overruling it entirely) will likely improve military discipline because it will act as an incentive to the Navy to operate more responsibly and safely which will save lives, money, equipment and materiel. Two sailors are gone and without fixing that which killed them, more could certainly follow. And this would be the greatest injustice of all…more preventable deaths.

*Id*. at 18.

The *Feres* doctrine prohibits suits against the military and military personnel for injuries arising out of or in the course of activity "incident to service." 340 U.S. at 146; *see e.g., United States v. Johnson*, 481 U.S. 681 (1987) (holding that the *Feres* doctrine barred an action on behalf of a helicopter pilot who died during a rescue mission on high seas because it was an activity incident to his military service even if the alleged negligence was by a civilian employee); *Charland v. U.S.*, 615 F.2d 508 (9th Cir. 1980) (dismissing a wrongful death action involving the death of a Navy seaman who died while on leave on the Colorado River during voluntary participation in Navy training exercises).

In this case, Plaintiffs allege in their FAC that the decedents were on active duty and were performing duties incident to their military service at the time of their deaths. (ECF No. 9 at ¶ 25). Plaintiffs acknowledge that this case "would not seem to fit any of the current *Feres* exceptions . . . ." (ECF No. 9 at 4).

The Court concludes that the government's liability is precluded by the *Feres* doctrine and that any attempted amendment would be futile. The Motion to Dismiss filed by the United States and the Navy is granted with prejudice.

**IV. Conclusion**

IT IS HEREBY ORDERED that the motion to dismiss filed by Prudential (ECF No. 17) is granted with prejudice.

IT IS FURTHER ORDERED that the motion to dismiss filed by the U.S. and the Navy (ECF No. 27) is granted with prejudice.

IT IS FURTHER ORDERED that the motions to dismiss filed by Huntington (ECF No. 18), Gibbs (ECF No. 21) and Bath (ECF No. 22) are granted without prejudice.

IT IS FURTHER ORDERED that the ex parte motion filed by Huntington (ECF No. 46) is denied as moot.

IT IS FURTHER ORDERED that any Motion for Leave to File an Amended Complaint shall be filed by June 14, 2016. Any responses shall be filed by June 28, 2016. Any replies shall be filed by July 5, 2016.

DATED: May 27, 2016

/s/ William Q. Hayes
**WILLIAM Q. HAYES**
United States District Judge

[ENTERED: October 16, 2018]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 16 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

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| THERESA JONES, individually and as Executrix of the Estate of Landon Jones, deceased and CHRISTINA GIBSON, individually and as Executrix of the Estate of Jonathan Gibson, deceased, | No. 17-55234 |
| | D.C. No. 3:15-cv-02087-WQH-AGS Southern District of California, San Diego |
| | ORDER |
| Plaintiffs-Appellants, | |
| v. | |
| UNITED STATES OF AMERICA and UNITED STATES DEPARTMENT OF THE NAVY, | |
| Defendants-Appellees. | |

Before: McKEOWN, CALLAHAN, and NGUYEN, Circuit Judges.

The panel has voted to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

On behalf of the Court, the petition for rehearing en banc is DENIED.

28 U.S.C.A. § 1346

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 7104(b)(1) and 7107(a)(1) of title 41. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space

> Administration shall be considered an express or implied contract with the United States.

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

> (2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of title 18).

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(g) Subject to the provisions of chapter 179, the district courts of the United States shall have exclusive jurisdiction over any civil action commenced under section 453(2) of title 3, by a covered employee under chapter 5 of such title.

28 U.S.C.A. § 2674

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.