IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DANIEL BRINK *et al.*, Plaintiffs, -v- **XE HOLDING, LLC *et al.*,** Defendants.	Case: 1:11-cv-01733 (EGS)

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR OPPOSITION TO DEFENDANTS' INSURANCE COMPANIES COMBINED MOTION TO DISMISS

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Defendants' Motion to Dismiss should be denied because this Court has jurisdiction to hear Plaintiffs' claims, allowing reasonable inferences from them, on which this Court can grant them relief against Defendants. Painting with a broad brush, Defendants bandy the exclusive remedy as a talisman, as if it gives them a license to deliberately harm Plaintiffs. The Acts do not in any way preempt tort claims that are not made "on account of the injury" that occurred while performing under a defense base contract in Iraq, and do not preempt common law breach of contract claims, RICO, fraud or other claims for acts committed after employment ended, and for which no workers compensation benefits are sought.

Neither Mr. Bell, nor Mr. or Mrs. Clark, nor Mr. Brink, Mercadante, Steenberg, nor any of the other Plaintiffs in this action are bringing suit against their employers for injuries they suffered while on the job. The injuries they suffered for which Plaintiffs seek compensation occurred after they suffered job related injuries. Plaintiffs seek damages and punishment from

Defendants for the harm they caused by chronic, systemic, and calculated fraud that is not capable of justification by claims of good faith or isolated mistake.

BRIEF STATEMENT OF FACTS

The Second Amended Complaint ("SAC") shows through thorough listing of specific acts actionable torts and causes of action against the Contractors and Insurance Companies based on the deliberate, knowing and intentional efforts to foreseeable harm Plaintiffs and their families, their credit, their finances, personal property, and loss of medical doctors, increased or new physical and psychological harms through elaborate bad faith ruses, in violations of their contracts or promises to Plaintiffs and those similarly situated. According to the Department of Labor, over 87,505 persons have had injuries and deaths reported since the beginning of the Iraq and Afghanistan campaigns since 2001.[1] It is likely the injuries to foreign contractors is much higher, but Defendants have systematically denied they are covered by insurance or refused to report these deaths and injuries and tried to cover them up or point at subcontractors, with as many as 10,000 contractors specifically required to be covered by the Contractors and Insurance Carriers (CNA having exclusive contract with Department of State and Army Corps of Engineers to provide DBA coverage) have utterly deprived them and their families of coverage or benefits.[2]

Defendants' acts of fraud include promising to provide benefits and then refusing (SAC ¶ 136), being instructed to provide benefits by the Department of Labor and then refusing to do so (SAC ¶ 82), paying benefits for treatment and then stopping payment on the check (SAC ¶ 353), and telling victim who have been injured that they will be treated and then hiring doctors who they know will misrepresent the facts in court in order to avoid having to pay (SAC ¶¶ 188 – 192), the Employers and Insurance Carriers lying repeatedly to doctors and to the Department of

[1] See http://www.dol.gov/owcp/dlhwc/lsdbareports.htm, http://www.dol.gov/owcp/dlhwc/dbaallemployer.htm.
[2] SAC ¶¶ 552-63.

Labor concerning payment of medical expenses, reimbursements, correctly paying disability benefits, and many other matters shows by specific dates and circumstances in the 200 plus page SAC. The Contractors and Insurance Carriers worked together to accomplish the "overall objective" of depriving Plaintiffs of benefits, and in doing so are liable for their conspiracy to do so. Both Contractors and Insurance Carriers participated in the Enterprise that was set up to discourage claims, force claimants into bankruptcy, loss of credit, and to force them to accept whatever was offered to get them out of the vice grip of these companies.[3]

The actions of Defendants were deliberate and designed to inflict injury, or done knowing and foreseeing serious injury to Plaintiffs. For example, Daniel Brink was involved in an IED explosion in Iraq on the job, had his legs torn off, parts of his hands, suffered a brain injury, had multiple surgeries, PTSD, and complications for years. He was at their mercy. Defendants DynCorp and CNA Insurance accepted the claim as valid, but over the next few years, harmed him deliberately and lied about it to the Department of Labor, such as having his wheelchair repossessed for non-payment to the South African supplier and another wheelchair not delivered from a stop-payment of a check, which CNA lied about to the Department of Labor, authorizing $150,000 in medical expenses then refusing to pay for them for 3 years, causing him to lose his furniture, house, and to be put out on the street homeless, lying the whole time about not paying the bills. Doctors would no longer work with him or his nurse provider, and he had no psychiatrist for 2 years despite his extreme PTSD and brain injury. DynCorp pretended to offer him a job as an ombudsperson, induced him to make improvements to his home (before he lost it) and to travel to their headquarters and to CNA's headquarters, costing him in total around

[3] SAC ¶¶ 3-14, 39-71, as more fully outlined in each of Plaintiffs' facts from ¶¶72-560.

$20,000. They reneged after inducing him to rely on promises. He lost his wife and his children became estranged as a result of the problems created by Defendants.[4]

Mr. Mercadante, injured severely while working for Blackwater, was told that medical treatment procedures were approved, but then denied payment for those procedures, or when he showed up to appointments would be informed by doctors that treatment was not covered, or his appointment had been canceled by CNA. As a result of these misrepresentations, and more, Mr. Mercadante's injuries have been made worse, and his psychological issues have been greatly exacerbated. His injuries are life-threatening, yet CNA still refused treatment that should have been automatic. The SAC also describes incidents where CNA's attorney misrepresented vital information to the official DOL examiner regarding benefits. These claims are corroborated by Dr. Afield who is 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." Dr. Afield went on to note, "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]

Merlin Clark suffered massive injuries from an explosion of ordnance he was clearing for WSI/Ronco. His injuries were covered and accepted by Ronco and CNA, but CNA and Ronco have repeatedly lied to Mr. Clark regarding benefits that were due to him or benefits that were supposedly paid, but never were, and on several occasions, approved benefits for Mr. Clark during hearings, but then refused to pay them thereafter. The SAC lists several other misrepresentations made by CNA and Ronco.[6] CNA and Ronco agreed to settle Mr. Clark's claim, but then changed the terms of the agreement. Ronco agreed to continue to employ Mr.

[4] SAC ¶¶ 345-68.
[5] SAC ¶¶ 130-66.
[6] *Id.* ¶¶ 100-10.

Clark, but then terminated him on September 1, 2010. As a result of these misrepresentations, Mr. Clark has given up appropriate medical treatment, financial stability, psychological stability and treatment, and medications and other medical devices needed for recovery. Additionally, Marcie Clark has given up her career in order to care for Mr. Clark, and they have both lost enjoyment of life. Mr. Clark's daughter has also suffered from the financial and psychological hardship on the Clark family. All the while, CNA and Ronco have gained the premiums paid to them by the United States and taxpayers. She speaks for the hundreds of spouses and children who were intentionally and foreseeably harmed as Defendants indiscriminately beat them into submission when they stepped in to care for their catastrophically injured and psychologically scarred loved ones.[7]

Plaintiff Holguin-Luge was sexually assaulted by Mr. Asad, an employee for KTTC (Khudairi) who threatened to kill her if she told anyone about the incident.[8] Plaintiff Biddle was willfully injured when he was refused his TBI treatment by Blackwater and CNA, who misrepresented his condition to the Department of Labor in order to avoid paying him and providing him with proper medical care.[9] Plaintiff Thompson was refused PTSD treatment after KBR and AIG asked their own doctor to redo his report to claim he was exaggerating symptoms, thus demonstrating a bad-faith refusal to pay compensation.[10] Plaintiff Busse received benefits and the Department of Labor Administrative Judge ordered benefits paid, and no appeal was taken, yet relying on medical care and benefits was delayed for three years while Defendant SEII and AIG fraudulently sought multiple opinions from doctors when they did not like what they heard from one, which caused him to suffer new conditions requiring additional surgery and

[7] *Id.* ¶¶111-1l6; Declaration of Marcie Hascall Clark attached to Memorandum in Opposition to WSI/RONCO's Motion to Dismiss, incorporated herein by reference as if set out in full.
[8] SAC ¶ 322, 325, 328.
[9] *See id.* ¶ 283.
[10] *See id.* ¶ 187.

great expense, and AIG sent him a forged a check that cost him dearly at the bank and through a federal investigation.[11] Plaintiff Pool was blackballed by most of the medical providers in South Africa after CNA's refusal to settle accounts it said it would, causing her humiliation.[12] Plaintiff Louw was greatly harmed as a result of DynCorp's/CNA's neglect to accept her psychological disability and refusal pay her accordingly.[13] Injuries suffered by Plaintiffs were the direct result of Defendants' conduct. There are no intervening or superseding causes to which Defendants may point that breaks the chain of causation. Defendants made promises to pay. They broke those promises. And, Plaintiffs have suffered tremendously as a result.[14]

ARGUMENT

Defendants must show beyond doubt that Plaintiff can prove no set of facts in support of his claim that would entitle him to relief, and the court must construe the complaint in the light most favorable to plaintiff and assume the allegations to be true.[15] "The court should construe a plaintiff's allegations liberally because the rules require only general or notice pleading rather than detailed fact pleading." *Moore's Manual: Federal Practice and Procedure* § 11.24 (2000). A complaint must merely present "enough facts to state a claim to relief that is plausible on its face" and "above the speculative level."[16] The Court must "accept as true all of the factual allegations contained in the complaint," and grant a plaintiff "the benefit of all inferences that can be derived from the facts alleged."[17]

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[11] See *id.* ¶ 260-65.
[12] *See id.* ¶ 412.
[13] *See id.* ¶ 488.
[14] SAC ¶¶ 39 – 71, and with specificity as to each named representative Plaintiff ¶¶ 72 – 560.
[15] *Johnson-El v. District of Columbia*, 579 A.2d 163, 166 (D.C. 1990). *See also Aktieselskabet AF 21 November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008).
[16] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
[17] *Atherton v.District of Columbia*, 567 F.3d 672, 681 (D.C. Cir. 2009); *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994).

I. THE DEFENSE BASE ACT'S STATUTORY REMEDIES AND PENALTY PROVISIONS DO NOT BAR PLAINTIFFS' CLAIMS BECAUSE THEY ARE NOT THE EXCLUSIVE REMEDY AVAILABLE TO THEM

While the Defense Base Act ("DBA") and Longshore and Harbor Workers' Compensation Act ("LHWCA") grant covered employers[18] immunity from state law tort claims, numerous courts recognize an exception to the Acts' exclusivity provisions where the conduct at issue would have been **actionable regardless of whether the plaintiff was entitled to compensation** under the LHWCA.

Furthermore, the exclusive remedy bar under sections 905(a) of the LHWCA and 1651(c) of the DBA only exists as to damages **"on account of the injury or death"** claimed under the DBA, not for injuries and damages intentionally and fraudulently and in bad faith inflicted by insurance companies after they have accepted the claim and are paying benefits and/or benefits have been paid. As will be seen, all of the claims in this case are outside the scope of the express language of the exclusive remedy provisions and also within the case law exceptions developed by courts, under the LHWCA/DBA, as well as under analogous to state workers' compensation exclusive remedy provisions and in the arena of RICO.

A. The Purpose And Spirit Of The DBA Does Not Bar Plaintiffs' Claims

1. The Purpose Of The DBA/LHWCA Is To Promote Public Policy

Creating an additional hardship for employees was definitely not the intended scope of the DBA and LHWCA. Neither was creating an inaccessible system. The LHWCA, expressly incorporated by the DBA, was enacted due to "a sentiment existing in the mind of the public to do an act of justice."[19] Several congressmen agreed that this is the purpose of the LHWCA and in

[18] *See, e.g.,* Atkinson v. Gates, McDonald & Co., 838 F.2d 808, 811 (5th Cir. 1988) (holding that an employer's immunity from suit extends to insurance carriers and third-party administrators).
[19] *See* Mr. Graham, 68 Cong. Rec. 5410 (69th Cong. 2d Sess.).

turn, the DBA.[20] Thus for instance, when employers do not provide employees with accessible insurance, they fail to secure compensation for their employees within the meaning of the DBA, as enacted. Social justice is the major cornerstone of these provisions. A 1984 House Report clarifies this:

> "All parties should approach the compensation system in *good faith*, with the objective of insuring that a disabled worker receives the compensation to which he or she may be entitled due to the work-related injury or disease. *Misrepresentation of material facts deny claimants justice under the act, and present an unnecessary and costly burden on the compensation system.*"[21]

Case law provides backbone to this view. In *Carl v. Children's Hosp.*, it was held in a wrongful termination casethat the employer at-will doctrine does not supersede public policy when the employee is terminated for testifying on proposed tort reform and taking a position contrary to the employer's interests.[22] The employee's only burden is to "make a clear showing, based on some identifiable policy … that a new exception is needed" and that the allegedly wrongful termination be proved by a "close fit" between the policy and the conduct at issue.[23] *Carl* paved the way for a case-by-case analysis on such issues, and District Courts including the District of Columbia adopted a more liberal interpretation of the wrongful discharge claim. Following *Carl*, the Court in *Liberatore v. Melville Corp.* held that the employee's allegations supported a claim for wrongful discharge because he internally reported store conditions that violated both federal and D.C. laws, i.e. condition of certain stored drugs was adversely

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[20] *See* Mr. Underhill, 69 Cong. Rec. 5412 (69th Cong. 2d Sess.) ("It is economic as well as humanitarian. It is for the benefit of society and industry just as much as it is for the *benefit of the worker*. . . . It eliminates to a large extent the delay, suffering, hardship and expense incident to the long time in which it took to reach a case after it was submitted to the court. . . .") (emphasis added); *See also* Mr. O'Connor, 68 Cong. Rec. 5412 (69th Cong. 2d Sess.) ("*Social justice is the keynote* of this legislation. . . . After 42 states in the Union, three territories and the United States have adopted workmen's compensation as a necessary part of our social system, it is surprising to find even one man at this late date who contends against it. Workmen's compensation is as definitely fixed as an institution in the United States as any *one of the great humanitarian and progressive measures that have been adopted* in the last generation.") (emphasis added).

[21] *See* H.R. REP. 98-570, 17, 1984 U.S.C.C.A.N. 2734, 2750, 1984 WL 37419, 15.

[22] 702 A.2d 159 (D.C. 1997).

[23] *Id.* at 164.

affected.[24] In *Riggs v. Home Builders Institute*, it was similarly held that the employee had a valid claim against his employer when he was wrongfully terminated for refusing to participate in political and legislative activities that violated federal tax laws and for raising concerns that the company was not conforming to such laws.[25] Both *Liberatore* and *Riggs* involved valid public policy concerns addressed under the *Carl* standard. Other case law concurs.[26]

In this case, the very purpose and underpinnings of the Act have been violated, the insurers have acted in bad faith based on the well-pleaded complaint, have harmed Plaintiffs and those similarly situated by engaging in a concerted scheme to make benefits difficult to get, surgeries very difficult to get, money difficult to get, even when the insurers have allegedly accepted the claim or have had a court order benefits and the insurers have not appealed the claims. Therefore, insurer defendants' claims that the purpose of the DBA establishes an exclusive remedial framework is unwarranted in the light of public policy concerns arising in this case; **the exclusive remedy is only exclusive in as far as public policy is not violated.**

2. The Exclusive Remedy Provisions Of The DBA/LHWCA

The exclusive remedy provision of the LHWCA reads, in relevant part:

"The liability of an employer prescribed in section 904[27] of this title shall be *exclusive*

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[24] 168 F.3d 1326 (D.C. Cir. 1999).
[25] 203 F.Supp.2d at 5.
[26] *See Fingerhut v. Children Nat'l Med. Ctr.*, 738 A.2d 799, 807 (D.C. 1999) (public policy concerns exist where a medical center security officer is terminated for reporting a bribery scheme his company was involved in related to a construction deal); *Washington v. Guest Services*, 718 A.2d 1071, 1073 (D.C. 1998) (terminating a retirement home aide for internally protesting specific safety, health and food code violations by the employer results in a public policy issue); *Boone v. MountainMade Foundation*, ___F.Supp.2d___, 2012 WL 1494925, at 5 (April 30, 2012) (Civ. A. No. 08-1065 CKK) ("the existence of a civil remedy in the [False Claims Act] does not preclude Plaintiffs from also raising a claim for wrongful discharge in violation of public policy", and West Virginia law "recognizes an exception to the discretion of employers to terminate at-will employees when the motive for the termination violates substantial public policy").
[27] Section 904 of the DBA reads: "(a) Every employer shall be liable for and shall secure the payment to his employees of the *compensation payable under sections 907, 908, and 909 of this title*. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the

> *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 secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, 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…"[28]

Additionally, the exclusive remedy provision found in the DBA follows the same structure in regards to the employer's liability, demonstrating that it is **not statutorily broader** than the exclusive remedy found in the LHWCA as Defendants propose:

> "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**[29], 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."[30]

Accordingly, insurer defendants' claims that the text and structure of the DBA provide the exclusive remedy for all claims arising in regards to plaintiffs' injuries is also unwarranted. The DBA, as statutorily enacted, only provides the exclusive remedial framework for damages on account of injury of death; however, plaintiffs' claims outside those already incurred on account of injury of death and outside the scope of the DBA do not appertain to the exclusive remedy therewith. Defendants' argument that the DBA is somehow broader to give immunity to suit for all other liability of such employer generally, and not limited by the "in respect to the injury or

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benefit of the subcontractor. (b) Compensation shall be payable irrespective of fault as a cause for the injury." (emphasis added)

[28] 33 U.S.C. § 905(a). (emphasis added)

[29] Section 1651(a), to which the 'within the purview of this chapter' proviso refers, reads: "Except as herein modified, the provisions of the Longshore and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended [33 U.S.C. 901 et seq.], shall apply **in respect to the injury or death** of any employee engaged in any employment..." (emphasis added).

[30] 42 U.S.C. § 1651(c). (emphasis added)

death" language of the DBA and the "on account of such injury" limitation of the LHWCA, is without any support in case law. The DBA supports plaintiffs' claims here precisely because they are not an injury or death arising out of and in the course and scope of employment, but relate to misconduct and harm after they were no longer in the course of employment.

3. Insurer Defendants Cannot Commit Malicious And Tortious Acts, Defy The Law, And Hide Behind The Exclusive Remedy

The Supreme Court has long recognized that malicious employer behavior cannot be tolerated. In *TXO Production Corp. v. Alliance Resources Corp*., a case dealing with calculation of punitive damages, it held that "[i]t is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct … caused to its intended victim [when] the wrongful plan had succeeded, as well as the possible harm to other victims that might … resul[t] if similar future behavior [is] not deterred."[31] In other words, employers cannot intentionally and maliciously harm their employees and expect courts to grant them immunity from foreseeable and expected harm. Entertaining this idea is just wrong. Furthermore, in *State Farm Mut. Auto. Ins. Co. v. Campbell*, the Supreme Court outlined some factors evidencing guilt:

> "To determine a defendant's reprehensibility … a court must consider whether: the harm was *physical rather than economic*; the tortious conduct evinced an *indifference to or a reckless disregard of the health or safety of others*; the conduct involved *repeated actions*…; and the harm resulted from *intentional malice, trickery, or deceit*…"[32]

The Alabama Supreme Court in *Gentry v. Swann Chemical Co.* followed this rationale:

> "'[Having established that] every person for any injury done to him in his land, goods, person or reputation shall have a remedy by due process of law' it cannot be said that for an injury done [to] a person, not within the provisions of the Workmen's Compensation Act, that it was the legislative intent by the enactment of said law, to deny such person a remedy, if under the common law … or other statute he was entitled to maintain an action

[31] 509 U.S. 443, 460 (1993) (original emphasis). See also *Al Shimari v. CACI Premier Tech., Inc*., 657 F. Supp. 2d 700, 715 (E.D. Va. 2009) ("[A] core belief of American jurisprudence [is] that individuals must be held accountable for their wrongful acts.")

[32] 538 U.S. 408, 409 (2003) (emphasis added).

therefor."[33]

Although *Gentry* has been abrogated more recently by the state's decision in *Britt v. Shelby County Health Care Auth.*[34] for other reasons, that court still held that the Workers' Compensation Act did not bar employee's negligence claim, affirming the principle set forth in *Campbell.* More directly, in *Leathers v. Aetna Cas. & Sur. Co.*[35], the Mississippi Supreme Court found that a bad-faith refusal to pay compensation by an employer or insurer resulted in a loss of the defense of workers' compensation exclusivity to an employee's tort action for bad faith.

Even if certain employers' tortious conduct is protected or offered limited liability under a statutory codification, the court must enforce punishment for anything beyond the protected behavior. In *Linn v. United Plant Guard Workers of America, Local 114*, the Supreme Court held that "[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….".[36] Since the DBA limits employer liability **only for damages on account of injury or death**, its remedy is not an exclusive remedy for Plaintiffs here.

B. Plaintiffs' Claims Are Not Preempted By The Defense Base Act's Exclusive Remedy

1. Doctrine Of Federal Preemption

The preemption doctrine derives from the Supremacy Clause of the federal Constitution, stating that the "Constitution and the laws of the United States…shall be the supreme law of the

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[33] 234 Ala. 313, 319 (1937).
[34] 850 So.2d 322 (Ala. Civ. App. 2001).
[35] 500 So. 2d 451 (Miss. 1986).
[36] 383 U.S. 53, 61-62 (1966) (*citing United Construction Workers, etc. v. Laburnum Construction Corp*., 347 U.S. 656, 665 (1954)).

land…". Accordingly, *any* federal law or regulation trumps *any* conflicting state law or state claims. Preemption can be either expressly[37] or impliedly[38] manifested. Federal "occupation of the field" occurs, according to the Supreme Court in *Com. of Pa. v. Nelson*, when there is "no room" left for state regulation.[39] Courts are to consult certain factors, including the pervasiveness of the federal scheme of regulation, the federal interest at stake, and the danger of frustrating federal goals in making the determination as to whether a challenged state law can stand.[40] However, *Nelson* never said that state law is always preempted; contrarily, when federal goals and interests are not frustrated by an appropriate state law, claims under the state law are not forbidden. Put another way, there is a longstanding proposition from *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta* that a local law only "is nullified to the extent it actually conflicts with federal law."[41] In this case, there is no conflict in the federal and state law claims brought vis a vis the DBA.

2. Courts Do Not Dismiss Plaintiffs' State Law Claims When Defendants' Conduct Is Not In Accord With That Prescribed By The DBA and Federal Acquisition Regulations

In the case of Plaintiffs, a government contract as well as a personal contract with Plantiffs was entered into for work overseas that included the rights afforded under the FARs of the defense contracting, which Defendants were subject to, requiring they provide DBA insurance and not deprive the Plaintiffs of those benefits. The **FAR, § 52.228-7** "Insurance-Liability to Third Persons" shows a recognition that Contractors would be liable for any willful acts on the part of directors, agents, and others in the contracting company.

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[37] The only issue for courts is determining whether the challenged state law is one that the federal law is expressly intended to preempt, according to Congress' manifestation in the language of the federal law.
[38] Implied preemption is judicially analyzed by looking beyond the express language of federal statutes to determine whether Congress has "occupied the field" in which the state is attempting to regulate, whether a state law directly conflicts with federal law, or whether enforcement of the state law might frustrate federal purposes.
[39] 350 U.S. 497 (1956).
[40] *Id.* at 502-506.
[41] 458 U.S. 141, 152–53 (1982).

(e) The Contractor shall not be reimbursed for liabilities (and expenses incidental to such liabilities)—

(1) For which the Contractor is otherwise responsible under the express terms of any clause specified in the Schedule or elsewhere in the contract;

(2) For which the Contractor has failed to insure or to maintain insurance as required by the Contracting Officer; or

(3) That result from willful misconduct or lack of good faith on the part of any of the Contractor's directors, officers, managers, superintendents, or other representatives who have supervision or direction of—

(i) All or substantially all of the Contractor's business;

(ii) All or substantially all of the Contractor's operations at any one plant or separate location in which this contract is being performed; or

(iii) A separate and complete major industrial operation in connection with the performance of this contract.

The Contractor in conspiracy with the carriers did cause harm from willful misconduct, lack of good faith on the part of the Company's directors, officers, and agents. The Plaintiffs were beneficiaries of the government contract, in which the government required Defendants to abide by the requirements of federal workers compensation (FAR § 28.305 and § 28.307-2) as well having DBA insurance (§ 28.301).

These became part of the contracts between Defendants and Plaintiffs. They were express and implied contractual rights. In bad faith, Defendants breached those rights.

i. Tort of Detrimental Reliance

The tort of detrimental reliance teaches that when the employer's action causes foreseeable harm to the employee because of the employee's reasonable reliance on the employer to do what was promised, a tort occurs. A commentary to Restatement Third of Torts offers backbone to the theory:

> "If contract law provides a remedy for mere promises, tort law should also do so when *breach of the promise causes personal injury or property damage*. The crux of a duty based on a promise is that *the actor engage in behavior that leads another person to forgo available alternatives for protection*. Whether that behavior consists of action or a promise should not matter."[42]

[42] RESTATEMENT OF THE LAW, THIRD, TORTS: *Liability for Physical Harm (Basic Principles)* § 43 cmt. e (Draft No. 3). (emphasis added)

Plaintiffs here were injured in numerous ways due to their reliance on the Defendants' promises to cover bills they had authorized. Insurer defendants proceeded to lie to authorities and engaged in elaborate ruses to harm Plaintiffs and their families, homes, finances, credit, bank accounts, and person, and the circumstances here do not excuse a complete denial of payments on which the Plaintiffs justifiably relied. Plaintiffs' RICO, covenant of good faith and fair dealing, fraud, and other theories incorporate this reality. Whether it is delay, complete stoppage, or minimization of bills, or schemes to deny they have stopped payment or pretend they have wired money when they have not by Defendants, such actions fall outside the exclusive remedy provisions, and accordingly Plaintiffs should not be barred from having their claims upheld. Defendants could have reasonably foreseen that stopping payments would cause intentional and malicious harm. Delay of payments have also caused Plaintiffs to become worse off – continual suffering of injurious effects, worsening of injuries over time, inability to make certain medical required payments – due to their reliance on Defendants' compensational promises. Even minimization of compensation disadvantaged Plaintiffs, as a now-reduced compensation was insufficient to prevent the incoming foreseeable harm: Plaintiffs renounced prior alternatives due to their reliance on insurer defendants' promises to make necessary payments.

In *Ross v. Dyncorp*, the United States District Court for the District of Columbia found that where Plaintiffs can demonstrate intentional infliction of emotional distress and outrageous intent or recklessness on the part of the employer, this would entitle Plaintiffs to compensation beyond the exclusive remedy provisions.[43] Even though in *Ross* the Plaintiffs were unable to establish these, the facts in the current case sufficiently plead facts, and reasonable inferences

[43] 362 F.Supp.2d 344, 364-65 (D.D.C. 2005).

from those facts, to present valid claims. Further, in *Fisher v. Halliburton*, the Fifth Circuit concluded that the exclusive remedy bar applied due to 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*. Nor does this case present a situation in which an *employer has subjected his employee to the acts of a third party with the specific desire that the third party harm the employee*."[44]

In this case, however, such scenarios present themselves: insurer defendants' failure to make the proper compensation payments resulted in the infliction of harm on Plaintiffs, which *insurer defendants could have reasonably anticipated*; insurer defendants subjected plaintiffs to *reliance on compensational payments* for medicine and treatment; insurer defendants' *delay, termination, and/or minimization of compensation* have aggravated plaintiffs' injuries. In addition, use of third parties in South Africa, Iraq, Afghanistan and elsewhere as pleaded in the SAC showing the intent to harm individuals, conspiring between contractors and carriers to deny any transport for saving lives, or permitting testing and operations that would have saved portions of bodies (SAC Clark, Tablai, Swart, Steenberg, Mercadante, Bell, and many others), as well as intentional acts to harm plaintiffs in their medications, ability to access psychiatrists, obtain reimbursements for medical payments and medications and travel that resulted in severe financial consequences to their credit, ability to live, loss of homes. The lying to the government and to medical providers that disrupted or prevented operations, medications, or delayed such to cause greater injuries such as in McLean, Thompson, Steenberg, Mercadante, Clark, and many others.

Other cases support the availability of remedies in this case: *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

[44] 667 F.3d 602, 620 (5th Cir. 2012) (emphasis added). The presence of the missing requirements in *Fisher* would have precluded the application of the exclusive remedy under the Court's judicial outlook.

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 and 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). Accordingly, insurer defendants' failure to keep promises demonstrates a clear instance where the exclusive remedy bar is not preemptive.

ii. Insurer defendants' tortious conduct towards plaintiffs and in investigating claims makes the exclusive remedy unavailable

The exclusive remedy is no longer available when the insurer exhibits tortious conduct towards plaintiffs and in investigating the claims. Such conduct is clearly evidenced by, among other things, interference with medical treatment or with the doctor-patient relationship, hiring of doctors to lie under oath, threats to the claimants and/or their families, manifesting bad faith, and contesting claims with the intent of wearing down the claimant into a low settlement. These actions merit cautious attention: common law or state/federal law typically presents a remedy for such conduct, so an inquiry into whether plaintiffs are owed anything under the DBA becomes irrelevant as the exclusivity provision does not bar claims of this nature.

Numerous courts uphold the tenet that torts other than negligence do not subject themselves to the remedy under the DBA exclusivity provision. For instance, in *Bowen v. Aetna Life and Casualty Company*, the Court relying on *Martin*, permitted suit to go forward on an allegation of intentional infliction of emotional distress due to insurer's intentional and malicious refusal to pay benefits in a Defense Base Act case. The Court reasoned that the LHWCA exclusivity provision was limited to accidental injury, not intentional torts, thus broadening the

employer's liability for injuries employees incur as part of their relationship.[45] Likewise, in *Kane v. Federal Match Corp.,* the Court held that an claimant's injury – not arising from an accident – is not limited to compensation under the provisions of a state's workers' compensation act.[46] Thus, even workers compensation provisions cannot legally preempt relevant common-law claims.

Several other cases concur, granting Plaintiffs' claims under similar circumstances: *Gallagher v. Bituminous Fire & Marine Insurance Co.*, 303 Md. 201 (Md. App. 1985) (workers' compensation law does not operate to bar common-law action based on intentionally tortious failure to pay workers' compensation benefits); *Hastings v. Fireman's Fund Insurance Cos*., 404 N.W.2d 374 (Minn. App. 1987) (common-law claims allowed where workers' compensation carrier intentionally engaged in outrageous and extreme conduct); *Crosby v. SAIF Corp*, 73 Or.App. 372 (Or. App. 1985) (accord); *Wolf v. Scott Wetzel Services Inc.*, 113 Wash.2d 665 (1989) (workers' compensation act is not the exclusive remedy in the event insurer injures employee intentionally); *Houston v. Bechtel Assoc. Prof'l Corp.*, 522 F.Supp. 1094, 1095-96 (D.D.C. 1981) (when employer/insurer inflicts intentional or malicious injury on claimant beyond gross negligence, the LHWCA § 905(a) exclusive remedy might not apply due to the fact that the exclusivity provision applies only to claims for injury on the job but not to infliction of injury by an intentional employer/insurer act).

iii. The exclusive remedy provisions of the DBA/LHWCA do not preempt Plaintiffs' claims of conspiracy, tortious termination, breach of contract, and breach of the covenant of good faith and fair dealing

The Fourth Circuit in *Moss v. Dixie Mach. Welding & Metal Works, Inc.* held that it was possible for a state wrongful discharge remedy to coexist with a LHWCA wrongful discharge

[45] 512 So.2d 248 (Fla.App. 3 Dist. 1987).
[46] 5 F. Supp. 507 (D.C. 1934).

remedy, thus the former was not preempted by the latter.[47] In *LaCour v. Lankford Co., Inc.*, the Court found that the exclusive remedy provisions did not bar the Plaintiff's wrongful discharge claim.[48]

Bringing claims for wrongful or retaliatory discharge outside of the scope of LHWCA exclusive remedy provisions is not barred. For instance, § 948 provides a nominal remedy for claimants who are wrongfully terminated, thus numerous courts have tolerated claimants' claims against the employer/insurer on such matters. In *Reddy v. Cascade General, Inc*, the court held that the remedy offered under § 948 of the LHWCA 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."[49] Similarly, in *Herbert v. Mid South Controls & Services* it was held that just because a claimant obtained a judgment from the Benefits Review Board under the LHWCA exclusive remedy, the claimant was not barred from also bringing a retaliatory discharge claim under state law.[50] This demonstrates the limited nature of the exclusive remedy Defendants rely upon. To say the exclusive remedy of the DBA/LHWCA is the sole remedy for being terminated would be to dismiss the discriminatory, wrongful, and intentional discharge for exercise of rights under the DBA.

Plaintiffs' claims here coexist with any benefits they are entitled to under the DBA. Defendants CNA and Ronco demanded that Plaintiff Clark work beyond his doctor's restriction, repeatedly misrepresented and lied to DOL officials in regards to payments for medical treatments surrounding his life threatening medical conditions, and discriminated against him by interfering with his doctors' treatment and *utterly refusing to pay for his treatment*. *See* SAC ¶¶

[47] 617 So.2d 959, 961 (La.Ct.App. 4th Cir.).
[48] 287 S.W.3d 105, 110-11 (Tex. App. 2009).
[49] 227 Or.App. 559, 571-72 (Or. App. 2009).
[50] 688 So.2d 1171 (La. App. 1996).

102-103, 109. Plaintiff Kreesha was *wrongfully terminated* by GLS after Zurich and it stopped his TTD benefits by falsely insisting he disappeared and they could not contact him. *See id.* ¶ 202. Plaintiff Alsaleh was also discriminated against by Zurich by not being send to an experienced doctor for his Leishmaniasis condition, thus experiencing inadequate care, and *his TTD benefits were abruptly cut off* by Zurich. *See id.* ¶ 211, 214.

Furthermore, as noted by *Fisher* above, conspiring to harm a claimant is also a tort in need of remediation outside the exclusive remedy provision. The DBA and LHWCA do not provide an express remedy for such conduct. Civil conspiracy has four elements in the District of Columbia: "(1) an agreement between two or more persons; (2) to participate in an unlawful act, or lawful act in an unlawful manner; [and] (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; (4) … pursuant to, and in furtherance of, the common scheme."[51] In *Riggs*, supra, the court declined to dismiss a claimant's civil conspiracy claim where it was shown the defendants conspired together to terminate his employment because he refused to engage in employer's agenda through means prohibited by federal tax laws and DOL regulations.[52] In *Griva v. Davison*, the court observed the four civil conspiracy elements also noted in *Halberstam,* supra, and held that civil conspiracy is proven when these four factors are met.[53]

Defendants CNA and Ronco have conspired together to fire Plaintiff Clark after he settled his disability claims. *See* SAC ¶ 111. Plaintiff Thompson was conspired against by KBR and AIG when they asked their hired doctor to write an email to their own hired psychologist asking him to redo his report on Thompson because he was exaggerating symptoms and malingering. *See id.* ¶ 187. ACE and AIG both conspired with ITT to refuse paying Plaintiff

[51] *See Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983).
[52] 203 F.Supp.2d 1 (D.D.C. 2002).
[53] 637 A.2d 830, 847 (D.C.1994).

Ambrose his TTD benefits, even though ITT never asserted it was not obligated to pay disability benefits and provide medical care. *See id.* ¶ 240-241. Plaintiff Griffin was called a malingerer and faker by KBR and AIG, receiving benefits for his injuries only when a judge found he had legitimate injuries. *See id.* ¶ 288. Plaintiff Brink was conspired against by CNA and DynCorp when they bankrupted him and his nurse case manager was blackballed by providers in South Africa because CNA and DynCorp refused to pay what they authorized her to incur. *See id.* ¶ 365, 367. CNA and DynCorp also conspired against Plaintiff Steenberg by refusing to pay his PTD payments required by order. *See id.* ¶ 384.

The LHWCA is not preemptive of other remedies if they are not for negligence for the physical or psychological injury sustained while on the job. When a party to the contract evades the spirit of the contract, willfully renders imperfect performance, or interferes with performance by the other party, the breaching party may be held liable for breaching the implied covenant of good faith and fair dealing.[54] Both the claims for breach of contract and breach of the implied covenant of good faith and fair dealing are valid here. Therefore, the express DBA/LHWCA remedies do not occupy the field of claims that can be brought. The Supreme Court in *Friederischen v. Renard* held that the LHWCA and state workers' compensation claims are not mutually exclusive, but rather complementary and can be pursued successively by litigant.[55] Similarly, in *Davis v. Rockwell Intern. Corp.*, an identical ruling was delivered.[56] Several other case law decisions concur, offering plausible circumstances when the exclusive remedy **can be breached**.[57]

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[54] *Hais v. Smith*, 547 A.2d 986, 987 (D.C. 1988).
[55] 247 U.S. 207 (1918).
[56] 596 F.Supp. 780, 787 (D. Ohio 1984).
[57] *See 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

It also follows that intentional and malicious behavior by insurers may entitle employees to file a claim for punitive damages. The rubric for punitive damages under *Choharis v. State Farm Fire & Cas. Co.* is satisfied when insurers demonstrate malicious and wanton behavior, tinged with intimidation and dishonesty, and essentially behave like thugs by threatening and intimidating claimants for bringing injury claims.[58] Punitive damages are also recognized in other case law under similar circumstances.[59]

Plaintiffs' current claims do not aim to seek the sole remedial aid of the DBA/LHWCA. Rather, Plaintiffs seek compensation based on insurer defendants' behavior that is not remediated under the DBA/LHWCA. Accordingly, the exclusive remedy provisions of these Acts are not preemptive and find no application to this case.

C. Injuries Sustained Outside The Course Or Scope Of Employment Are Offered No Exclusive Remedy Protection, and Plaintiffs' Causes Of Action Do Not Stem From DBA Injury Claims ForBenefits

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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*, supra (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…*"); *Pettengill v. Curtis*, 584 F. Supp. 2d 348 (D. Mass. 2008) (sexually abused public library worker's claim against the city for negligent infliction of emotional distress was not barred by the exclusivity provision of the Massachusetts Workers' Compensation Act); *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); *Leathers v. Aetna Cas. & Sur. Co.*, 500 So.2d 451 (Miss. 1986) (an employer's or insurer's bad faith refusal to pay compensation to an employee resulted in a loss of the defense of workers' compensation exclusivity to that employee's tort action for bad faith); *Houston v. Bechtel Assoc. Prof'l Corp.*, 522 F.Supp. 1094, 1096 (D.D.C. 1981) (LHWCA exclusivity provision can be avoided when an employee shows that the employer possessed a 'specific intent to injure' him); *Jones v. Halliburton Co.*, 791 F.Supp.2d 567, 588 (D.C.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.").

[58] 961 A.2d 1080, 1090 (D.C. 2008).

[59] *See Houston*, 522 F.Supp. at 1096-97 (when there is aggravated and malicious employer/insurer behavior, claimants' claims for punitive damages are also possible).

The DBA concerns itself with "**injury or death of any employee engaged in any employment**"[60], and so the "liability of an employer, contractor, [or any affiliated entity…] shall be exclusive and in place of all other liability of such employer…"[61]. The key here is that the DBA only defines the liability for compensation resulting out of work-related injuries, and contains no provision dealing with or prescribing a remedy for conduct that discriminates for loss of job.

It follows then that the LHWCA must then be analyzed individually for any guidance on what constitutes a proper exclusive remedy in this case. Analyzing the exclusive remedy provision of the LHWCA, we find that it is **only directed at claims for injury under the Act, and not at claims for injury outside the Act**.[62] This is a critical distinction as it prescribes § 904 treatment – exclusive liability in place of all other liability – only to those circumstances where a § 902(2) injury[63] is present. § 904 liability is limited to compensation payable under § 907 (medical services and supplies), § 908 (compensation for disability), and § 909 (compensation for death). This is compensation payable with respect to injury or death under § 905(a). In this case, however, a vast majority of Plaintiffs make no §§ 907-909 claims; rather, they seek compensation for injuries outside the DBA/LHWCA provisional remedies.

It is important to note that nowhere in case law or in the statutes is there any concise evidence that the exclusive remedy provision was intended to extend to compensations on account of injury or death **outside** the course of employment. Since plaintiffs' causes of action

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[60] 42 U.S.C. § 1651(a).
[61] 42 U.S.C. § 1651(c).
[62] 33 U.S.C. § 905(a). Provision reads: "The liability of an employer prescribed in [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**…" (emphasis added).
[63] 33 U.S.C. § 902(2). This provision reads: "The term 'injury' means **accidental injury or death arising out of and <u>in the course of employment</u>**, and such **occupational disease or infection as arises <u>naturally out of such employment</u>** or as naturally or unavoidably results from such accidental injury, and includes an **injury caused by the willful act of a third person <u>directed against an employee because of his employment</u>**." (emphasis added)

do not stem from claims for DBA benefits, but for injuries sustained outside those covered by the DBA exclusivity-of-remedy provision, the exclusive remedy does not apply to Plaintiffs in this case.

D. Exceptions To The DBA Exclusivity Provision Apply to Allow Plaintiffs' Claims to Go Forward

1. The *Martin/Atkinson* Exception

The First Circuit in *Martin v. Travelers Ins. Co.*[64] ruled that the exclusivity provision of the LHWCA *does not* prohibit a tort action for deliberate harm inflicted from unjustifiably withholding payment of benefits acknowledged to be due. It found that the LHWCA does not encompass the manner and timing of the payment, further noting that the harm caused by a withdrawal of payment was not a matter mentioned anywhere in the LHWCA.[65] When the actionable damage does not arise out of or in the course or employment, and is not "on account of" the workers compensation injury under section 905(a) of the LHWCA, the employer is no longer protected under the exclusive remedy provision of the LHWCA.

Other courts post-*Martin* have agreed with the rationale and outcome of the case. Relying on *Martin*, the court in *Bowen v. Aetna Life & Casualty Co.*, 512 So.2d 248 (1987) permitted suit to go forward on an allegation of intentional infliction of emotional distress due to insurer's intentional and malicious refusal to pay benefits in a Defense Base Act case. *Atkinson v. Gates, McDonald & Company*[66], held:

> "[I]t is perhaps possible to construe *Martin* as involving a situation where the conduct complained of, issuing and delivering drafts and then stopping payment on them after they had been deposited and checks drawn against them, *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

[64] 497 F.2d 329 (1st Cir. 1974).
[65] *Id.* at 330.
[66] 838 F.2d 808 (5th Cir. 1988).

> *where the plaintiff's recovery would not depend on a determination that he was owed compensation under the LHWCA or that the defendant violated the LHWCA*."[67]

Atkinson further stated that in order "to recover for bad faith or malicious failure to pay compensation benefits[,] there must [be] an entitlement to such benefits or a violation of the compensation statute in the [employer's] failure to pay them."[68] Since there is an entitlement to those benefits here, the exclusive remedy bar exception recognized by the *Martin/Atkinson* courts applies to compensate Plaintiffs' claims in this case that do not seek anything but what they could recover for tortious acts independent of any benefit under the DBA. In another case, *Sample v. Johnson*[69], the court built on and recognized the validity of *Martin* also, though it limited compensation to cases "where a carrier *deliberately stops payments already made*, when it should have known that *acute harm* might follow."[70]

Defendants are correct that some courts have taken a dim view of the *Martin/Atkinson* line of cases, wishing to avoid allowing ends around the exclusive remedy doctrine by recasting of garden variety claims of occasional mishandling of claims into a tort cause of action. But that is not what this case presents. Far from it, it represents a concerted scheme to harm Plaintiffs and those similarly situated in ways that are intentional, deliberate and will foreseeably harm the financial, family, and property interests of individuals who have been made dependent and vulnerable by being in the care of Defendants in the "zone of special danger" overseas in highly dangerous environments. What the courts were concerned about in extending Longshore cases to provide remedies for any person who doesn't like the way claims are handled has nothing to do with the far-reaching and clearly actionable wrongs of Defendants (which are to be taken as true on the well pleaded complaint).

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[67] *Id.* at 813. (emphasis added)
[68] *Id.* at 814.
[69] 771 F.2d 1335 (9th Cir. 1985).
[70] *Id.* at 1347. (emphasis added)

Plaintiffs have valid claims under the *Martin/Atkinson* standard and its progeny, including stop payment of checks, forging of checks, termination of medical benefits and medications after creating reliance of such, starting benefits for death claims and capriciously stopping them after creating reliance and causing great havoc financially, personally, and medically, including increased medical problems, new conditions not caused by the original injury but by the Contractor and Insurance carrier's deliberate and fraudulent acts and then misrepresentations to government officials. Examples of these are in Plaintiffs Bell, Merlin and Marcie Clark, Fred Busse, Brewer, Mercadante, Byars, Thompsen, Kreesha, Alsaleh, Jones, Ambrose, Steenberg, Bezuidenhout, Brink and Pool.[71] Other plaintiffs not listed above experienced similar situations of distress at the hands of Defendant insurance carriers.

Defendants get freedom from tort actions only in exchange for limited liability in regards to damages "on account of the injury or death" claimed under the DBA, and only when they do not deliberately defraud claimants and the government. This compromise only takes into account claims arising under, not outside, the DBA. Plaintiffs' claims are for injuries sustained outside the scope of the DBA, so the balance here is not impacted negatively.

2. Insurer Defendants' Failure To Secure Payment Of Compensation Through False Statements And Representations Equates The Failure To Secure Compensation Under LHWCA § 932(a), Thus Another Exception Arises

In order for employers/insurers to retain their protection under LHWCA § 905(a), they must secure payment of compensation or otherwise face civil liability. The LHWCA can be summarized to mean that employers and/or insurers who attempt avoiding the payment of compensation through false statements and representations, or other similar means, are no different from those employers/insurers who fail to secure compensation as prescribed by §

[71] *See* SAC ¶¶ 81, 88, 103,122, 133, 175, 187, 200-01, 212, 225, 240, 260-68, 353, 355-60; 373-83; 386-94.

932(a)[72]. Defendants argue the LHWCA provides an exclusive remedy under § 931(c), so their failure to secure compensation "shall be punished by a fine not to exceed $10,000, by imprisonment not to exceed five years, or by both."[73] However, since their method of denying Plaintiffs their due compensation constitutes behavior not taken into account by the DBA/LHWCA, the exclusive remedy cannot bar any liability derived from such 'external' behavior. Defendant insurers do not even make an effort to secure compensation to numerous Plaintiffs: their outright intent to deprive Plaintiffs of future benefits, upon which they knew Plaintiffs relied on, is a tort that falls outside the scope of the DBA/LHWCA that further inflicts injustice on the claimants. Legislative history also strengthens the point that compensation is due when the exclusive remedy provision is meshed with inadequate employer/insurer conduct:

> "All parties should approach the compensation system in *good faith*, with the objective of insuring that a disabled worker receives the compensation to which he or she may be entitled due to the work-related injury or disease. *Misrepresentation of material facts deny claimants justice under the act, and present an unnecessary and costly burden on the compensation system.*"[74]

3. The DBA Exclusive Remedy Is Unavailable Where The Injury Is Not Accidental but Specifically Intended by the Employer or Carrier

The DBA exclusive remedy is inappropriate when an injury is not the result of an accident[75]. In *Kane v. Federal Match Corp.*, the Court held that an claimant's injury – not arising from an accident – is not limited to compensation under the provisions of a state's workers'

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[72] Section 932(a) reads: "**Every employer shall secure the payment of compensation under this chapter** - (1) By insuring and keeping insured the payment of such compensation with any stock company or mutual company or association, or with any other person or fund, while such person or fund is authorized (A) under the laws of the United States or of any State, to insure workmen's compensation, and (B) by the Secretary, to insure payment of compensation under this chapter; or (2) By furnishing satisfactory proof to the Secretary of his financial ability to pay such compensation and receiving an authorization from the Secretary to pay such compensation directly…." (emphasis added).

[73] 33 U.S.C. § 931(c).

[74] *See* H.R. REP. 98-570, 17, 1984 U.S.C.C.A.N. 2734, 2750, 1984 WL 37419, 15 (emphasis added).

[75] *See* LHWCA (injury as an accidental injury or death arising out of and in the course of employment).

compensation act.[76] When accidental harm results to a claimant, the DBA itself is the exclusive remedy; however, upon a satisfactory finding that the injury is not accidental – but rather a reasonable person would have grounds or reasons for believing the particular injury was likely to occur – the exclusivity provision of the DBA no longer applies, thus carving out another exception to the exclusive remedy bar. Insurer defendants here had sufficient grounds to know the termination or denial of benefits to Plaintiffs would cause them acute harm. Thus, defendants' indifference is not accidental.

E. The Exclusive Remedy Provisions Of The DBA And LHWCA Require Employment Status And Only Pertain To Injuries Sustained In The Course Of Employment

1. Employment Status Is Required

No exclusive remedy provision exists for an independent contractor who sues an entity he once had a contract with for bad faith, RICO, etc. because the DBA and LHWCA assume employment status, and independent contractors are not covered by DBA provisions, including the Act's exclusivity provision. The Blackwater contract, for instance, provides for DBA coverage; however, it never mentions employee status, instead giving independent contractors coverage through the contract itself. Case law affirms this principle. In *Gordon v. Commissioned Officers' Mess, Open*, it was held that a worker must be an "employee" in order for the individual to be entitled to workers' compensation benefits and for the employer to be entitled to the immunity against tort suits provided by the Act.[77] Other case law upholds the reasoning in *Gordon*.[78]

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[76] 5 F. Supp. 507 (D.C. 1934).
[77] 8 BRBS 441 (1978).
[78] *See Cardillo v. Mockabee*, 102 F.2d 620 (D.C. Cir. 1939) (accord); *Burbank v. K.G.S., Inc*, 12 BRBS 776 (1980) (the true nature of the employment relationship is determinative, not the label placed on it by a contract).

The Supreme Court in *Nationwide Mut. Ins. Co. v. Darden* held that when a "statute containing the term does not helpfully define it…[the term] employee…[refers to the] conventional master-servant relationship as understood by common-law agency doctrine."[79] Even dating all the way back to 1932, the Supreme Court in *Crowell v. Benson* held the LHWCA "applies only when the relation of master and servant exists,"[80] and "the DBA's incorporation of the LHWCA [coupled with] the DBA's explicit use of the word 'employee', [lead to the conclusion that the] DBA [does not apply] to independent contractors."[81] The District of Columbia has also held the LHWCA does not appertain to independent contractors.[82] This results from the premise that an independent contractor is not officially an employee.

Plaintiffs sue CNA Financial Corp not as the insurance company for Plaintiffs; rather, as the records indicate, Continental Insurance, Fidelity and Casualty Company, CNA International, and CNA Global are the respective insurers.[83] AIG Insurance is also not the insurance company for Plaintiffs; the Insurance Company of the State of Pennsylvania, Chartis, and Worldsource are the actual insurance companies in that situation. ACE is being sued, but ESIS, Inc. is the actual insurance company. All these demonstrate specific instances where the actual insurer is not being sued under the *Darden* and *Crowell* standard, so the exclusive remedy is not available.

Additionally, Defendants make no attempt to explain how Marcie Hascall Clark is an employee of Ronco or the Insurance Carriers, or how Nicky Pool (the authorized nurse for Daniel Brink) was an employee of DynCorp or CNA. They did not even argue these individuals had no independent claims. They just lumped them in with injured contractors. The DBA and

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[79] 503 U.S. 318, 323 (1992).
[80] 285 U.S. 22, 54-55 (1932).
[81] *Irby v. Blackwater Security Consulting, et. al.*, 44 BRBS __, BRB No. 09-0548, at 16 (2010). Accordingly, under the Supreme Court's guidance, "one must be an 'employee' under a common law 'master-servant' test in order to be covered under the DBA as 'an employee engaged in any employment'." *Id.*
[82] *See Cardillo v. Mockabee*, 102 F.2d 620 (D.C. Cir. 1939).
[83] See Declarations of Scott J. Bloch and Marcie Hascall Clark, attached hereto as Exhibits A and B.

LHWCA do not provide any avenue for spouses and children, or any third parties other than the workers themselves, to obtain any rights or remedies under the DBA – and thus are not subject to its exclusive remedy provisions.[84]

2. Injuries Sustained Outside The Course Or Scope Of Employment Are Not Within the Exclusive Remedy Bar

The DBA concerns itself with "**injury or death of any employee engaged in any employment**"[85], and so the "liability of an employer, contractor, [or any subcontractor…] shall be exclusive and in place of all other liability of such employer…"[86]. The key here is that the DBA only defines the liability for compensation resulting out of work-related injuries, and contains no provision dealing with or prescribing a remedy for conduct that discriminates for loss of job.

It follows then that the LHWCA must then be analyzed individually for any guidance on what constitutes a proper exclusive remedy in this case. Analyzing the exclusive remedy provision of the LHWCA, we find that it is **only directed at claims for injury under the Act, and not at claims for injury outside the Act**.[87] This is a critical distinction as it prescribes § 904 treatment – exclusive employer liability in place of all other employer liability – only to those circumstances where a § 902(2) injury[88] is present. § 904 employer liability is limited to

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[84] 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) which ALJ opinion can be accessed the Department of Labor website, at http://www.oalj.dol.gov/Decisions/ALJ/LHC/2005/AL_v_BATH_IRON_WORKS_2005LHC01625_(OCT_28_2009)_143602_MODIS_SD_files/css/AL_v_BATH_IRON_WORKS_2005LHC01625_(OCT_28_2009)_143602_MODIS_SD.HTM.

[85] 42 U.S.C. § 1651(a).

[86] 42 U.S.C. § 1651(c).

[87] 33 U.S.C. § 905(a). Provision reads: "The liability of an employer prescribed in [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**…" (emphasis added).

[88] 33 U.S.C. § 902(2). This provision reads: "The term 'injury' means **accidental injury or death arising out of and in the course of employment**, and such **occupational disease or infection as arises naturally out of such**

compensation payable under § 907 (medical services and supplies), § 908 (compensation for disability), and § 909 (compensation for death). This is compensation payable with respect to injury or death under § 905(a). In this case, however, Plaintiffs make no §§ 907-909 claims; rather, they seek compensation for injuries outside the DBA/LHWCA provisional remedies. For instance, Plaintiffs Holguin-Luge, Thompsen, Alsaleh, Jones, Busse, Biddle, Bell, Porch III, Griffin, and McAnally are all seeking compensation outside the DBA.[89]

It is important to note that nowhere in case law or in the statutes is there any concise evidence that the exclusive remedy provision was intended to extend to compensations on account of injury or death **outside** the course of employment. Therefore, the exclusive remedy does not apply to Plaintiffs in this case.

II. PLAINTIFFS SECOND AMENDED COMPLAINT SUFFICIENTLY PLEADS FACTS AND ASSERTIONS FOR A CAUSE OF ACTION IN RICO

The Plaintiffs rely on those arguments and authorizes in the Common Brief on behalf of Plaintiffs in Opposition to the Common Brief of Contractors filed by KBR. Those arguments on RICO are incorporated herein by reference as if set out in full, and all of them apply with equal force to the enterprise, conspiracy, causation and damage to Plaintiffs under by the RICO claims. See also Brief in Opposition to Motion to Dismiss filed by CNA Financial Corp.

III. PLAINTIFFS STATE VALID RETALIATION CLAIMS

Wrongful discharge and discrimination by employers/insurers is relevant here as § 948 of the LHWCA provides a remedy for claimants who are wrongfully terminated. § 948a delineates a non-exclusive remedy for two instances of discrimination for individuals who, when

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employment or as naturally or unavoidably results from such accidental injury, and includes an **injury caused by the willful act of a third person directed against an employee because of his employment**." (emphasis added)

[89] *See* Second Amended Complaint, passim. This is specifically delineated throughout by the phrase: "[Plaintiff] does not seek any amounts compensable under the DBA in this action."

terminated for bringing a claim are able to work, and for individuals terminated for testifying in a DBA or LHWCA proceeding:

> "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, or because he has testified or is about to testify in a proceeding under this chapter…. Any employer who violates this section shall be liable to a penalty…. *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*….**The employer alone and not his carrier shall be liable for such penalties and payments**. Any provision in an insurance policy undertaking to relieve the employer from the liability for such penalties and payments shall be void."[90]

It follows from the statutory text above that since employee discrimination due to a compensation claim tolerated under § 948a does not equate the injury prescribed under § 902(2), this discrepancy becomes noteworthy: the inability of discrimination to fall under injury renders such action outside the plain language of the exclusive remedy provision found in § 905(a). Furthermore, insurer defendants claim that because the § 948a states carriers are not held liable for retaliation penalties and payments, they are immune from punishment here. However, defendants' reading of the statute is inaccurate once again. § 948a only absolves their liability from penalties and payments **for damages on account of injury or death**, since that is all the exclusive remedy permits. Since plaintiffs are claiming compensation particularly for injuries resulting from malicious and tortious insurer conduct, § 948a cannot be interpreted to exculpate insurer defendants since § 948a does not cover such claims in the first place.

To the extent Defendant Insurers believe Plaintiffs are suing them for retaliatory discharge, they are not liable for that, since they are not the employer and never employed Plaintiffs and are not complicit in the termination of any Plaintiffs from employment. Plaintiffs agree with Defendants on that count. But to the extent insurers conspired with the employer to

[90] 33 U.S.C. § 948(a). (emphasis added)

discriminate, retaliate or otherwise punish the employees because of their pursuit of claims, Plaintiffs have a claim against the Insurer. The SAC makes such allegations.

The Court in *Reddy*, supra, held that a "remedy afforded under [§ 948 of the LHWCA] is not adequate to protect the rights of employees [partially] because it *does not provide for compensatory damages for emotional distress, mental anguish, or feelings of degradation*…".[91] Similarly, the Court in *Herbert*, supra, contrasted the remedy available under the LHWCA with the state law remedy a Plaintiff may pursue, in that case Louisiana law:

> "[T]he penalty is paid to a special fund administered under the LHWCA, rather than to the employee, [and the] employee's relief consists of reinstatement to his job and compensation for lost wages. The corresponding [state] statute allows the employee to recover the civil penalty, which is defined as the equivalent of his loss of income…; reasonable attorney fees; and court costs."[92]

Even if Plaintiffs were barred from holding insurer defendants liable under the LHWCA and DBA provisions, they are definitely not barred from holding them liable under state statutes. Intentionally depriving plaintiffs of compensation due – and harming plaintiffs even more as a result – is an action that the DBA and LHWCA do not intend to address and do not provide an exclusive remedy for. The above facts on specific plaintiffs – i.e. Clark, Kreesha, Alsaleh, Brewer, Ambrose, Mercadante, Thompsen, Jones, Bell – demonstrate instances where insurance defendants, together with contractor defendants, worked together to discriminate against and retaliate against claimants.

A. Plaintiffs are Not Required to Exhaust Administrative Remedies for claims and damages they cannot assert in DBA and for which the Act is non-exclusive

The LHWCA affords claimants certain administrative remedies, including Congress' intent "to encourage the prompt and efficient administration of compensation claims" through

[91] 227 Or.App. 559, 567 (Or. App. 2009) (emphasis added).
[92] 688 So.2d 1171, 1175 (La. App. 1996).

the Act.[93] Administrative remedies, therefore, supersede any arguments for exclusivity by insurer defendants once it has been shown the language of the DBA/LHWCA does not particularly deal with the actions brought forth by the claimants. Accordingly, these administrative remedies further serve as a 'replacement rule or law'. When insurer defendants' conduct is malicious and they intentionally harm plaintiffs by fraudulently failing to comply with their responsibilities, plaintiffs should receive the statutory administrative remedies available to vindicate the detrimental effects of such conduct. Although the DBA and LHWCA provide employees with exclusive remedies, these are limited to accidental injuries and damages on account of injury or death, not intentional torts or damages for which they cannot seek any remedy within the DBA/LHWCA. In *Bowen*, supra, the Court reasoned as follows:

> "[Insurer Defendant] argues that the penalty provision for late payment or refusal to pay a valid claim is an implied preemption of a common law tort remedy. We disagree. *The statutory penalty applies in any wrongful nonpayment cases even where the failure to pay was the result of ordinary negligence or a good faith belief that the insurer had no obligation to pay*."[94]

An administrative remedy offering claimants relief from employer/insurer tortuous conduct draws breath from a well-recognized case law intentional tort exception to the exclusivity provisions of the DBA and LHWCA.[95] For instance, the LHWCA's penalty provisions are not the sole remedy claimants have for bad faith handling of their claims by insurers.

Plaintiffs here suffer from multiple injuries, ranging from no compensation received to worsened injuries to intentional infliction of emotional distress. Although not an exclusive list, it suffices to demonstrate the serious impact insurer defendants' tortuous conduct has had on them.

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[93] *Rodriguez v. Compass Shipping Co., Ltd.*, 451 U.S. 596, 612 (1981).
[94] 512 So.2d at 249-250. (emphasis added)
[95] *See Hastings*, supra (common-law claims not barred where carrier intentionally engages in outrageous and extreme conduct towards the claimant)**;** *Crosby*, supra (accord); *Wolf*, supra (workers' compensation act does not act as an exclusive remedy [or as an exhaustion of administrative remedies] in the event insurer injures employee intentionally).

The administrative remedies under the Act – i.e. state-law claims that compliment already existing benefits paid under the DBA – serve to redress plaintiffs' claims. Plaintiffs here focus on and seek these remedies.

IV. PLAINTIFFS' HAVE PLEAD FACTS AND ALLEGATIONS TO SUPPORT THEIR STATE LAW CLAIMS AGAINST DEFENDANT INSURERS.

Plaintiffs state law claims need only meet the pleading requirement of Rule 8(a)(2).[96] To prevail on a motion to dismiss for failure to state a claim, Defendant must show beyond doubt that Plaintiff can prove no set of facts in support of his claim that would entitle him to relief.[97]

> In reviewing the dismissal of a complaint, [the court] must construe the complaint in the light most favorable to the Plaintiff and assume, for purposes of the motion, that the allegations in the complaint are true. . . . Any ambiguities or doubts concerning the sufficiency of the claim must be resolved in favor of the pleader. . . . Moreover, a complaint should not be dismissed on grounds that the court doubts that the Plaintiff will prevail.[98]

"The court should construe a plaintiff's allegations liberally because the rules require only general or notice pleading rather than detailed fact pleading."[99] Even under the newer rubric of *Twombly,* a complaint must merely present "enough facts to state a claim to relief that is plausible on its face" and "above the speculative level."[100] In considering a 12(b)(6) motion, the Court must construe the complaint "'liberally in the plaintiff's favor,' 'accept[ing] as true all of the factual allegations'" alleged in the complaint.[101]

Defendant Insurance Carriers neglect to make any specific argument, case law attack or other specific motion to dismiss concerning breach of covenant of good faith and fair dealing, prima facie tort, fraud, or outrage. They simply lump all Plaintiffs' state law claims together and

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[96] Fed. R. Civ. P. 8(a)(2).
[97] *Johnson-El v. District of Columbia*, 579 A.2d 163, 166 (D.C. 1990).
[98] *Id.* (citations and internal quotations omitted).
[99] *Moore's Manual: Federal Practice and Procedure* § 11.24 (2000)
[100] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
[101] *Aktieselskabet AF 21 November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008) (alteration in original) (quoting *Kassem v. Wash. Hosp. Ctr.*, 513 F.3d 251, 253 (D.C. Cir. 2008)).

say they are not pleaded sufficiently. Contrary to their assertions, once a party has sufficiently factually pleaded, it is unnecessary to restate the exact same facts within the counts so long as it is otherwise clear what facts, misrepresentations and predicate acts support the claim. In any event, if the Court believes any of the claims have not been sufficiently particular, Plaintiffs should be given leave of court, which should be liberally granted under Fed.R.Civ.P. 15(a)(2), to file a Third Amended Complaint to cure pleading defects.

Plaintiffs have met the above standards and more because the Complaint is detailed in dates, facts, and specifics of events above the notice pleading requirements and completely rebuts Defendants' version of the facts, states legally cognizable claims, and puts Defendants on notice of plausible facts concerning the claims made against them.

A. Plaintiffs' Have Plead Sufficient Facts To Show That Defendants Engaged in A Civil Conspiracy To Deny Benefits

Defendants specifically use Civil Conspiracy to attempt to show a lack of sufficient pleading. Defendant Contractors have conspired with their insurance carriers and, in some cases, with their subsidiary companies to intentionally commit the acts set forth in the SAC and cause injury to Plaintiffs. Their acts amount to civil conspiracy to defraud the public and harm Plaintiffs, to deprive injured and disabled workers of DBA benefits, to commit fraud, and to breach their contractual agreements with employees. Defendant Insurers have incorrectly stated that the District of Columbia does not recognize a claim of civil conspiracy. In fact, civil conspiracy in The District of Columbia has four elements: "(1) an agreement between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; (4) which overt act was done pursuant to and in furtherance of the common scheme."[102] The

[102] *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983).

elements for a civil conspiracy claim are similar in those states in which the named Plaintiffs reside including Florida,[103] California,[104] and others. In *Riggs v.Home-Builders Inst*., 203 F.Supp.2d 1 (D.D. 2002), the court declined to dismiss a civil conspiracy claim where the plaintiff claimed that the defendants conspired together to refused to advance legislative agenda through means prohibited by federal tax laws and DOL regulations. The court held that plaintiff had satisfied the elements of a claim of civil conspiracy, i.e., "(1) an agreement between two or more persons; (2) to participate in an unlawful act, or in a lawful act in an unlawful manner, and (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement (4) pursuant to, and in furtherance of, the common scheme."[105] Here, Plaintiffs have shown that Defendant Contractors and Insurers have conspired together to refuse the appropriate payment of benefits that are due, likely to deter future claims from being made by other injured employers.

Furthermore, the United States Court of Appeals for the District of Columbia made it clear that "[t]he essence of conspiracy is an agreement—together with an overt act—to do an unlawful act, or a lawful act in an unlawful manner."[106] Additionally, the overt act must cause some harm to plaintiffs.[107] Therefore civil conspiracy establishes vicarious liability for those defendants who conspired in furtherance of the underlying tortious conduct that resulted in injury.[108]

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[103] Florida requires (1) a conspiracy between two or more parties; (2) to do an unlawful act or a lawful act by unlawful means; (3) the doing of some overt act in the pursuance of a conspiracy; and (4) damage to the plaintiff as a result of the acts done under this conspiracy. *Kent v. Kent*, 431 So. 2d 279, 281 (Fla. Dist. Ct. App. 1983).
[104] California generally requires three elements: (1) formation of the conspiracy (an agreement to commit wrongful acts); (2) operation of the conspiracy (commission of the wrongful acts); and (3) damage resulting from the operation of the conspiracy. *People v. Beaumont Inv., Ltd.*, 111 Cal. App. 4th 102 (6th Dist. 2003).
[105] *Griva v. Davison*, 637 A.2d 830, 848 (D.C. 1994) (citing H*alberstam v.Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983)). *Wesley v. Howard Univ.*, 3 F.Supp.2d 1, 4 (D.D.C. 1998).
[106] *Halberstam v. Welch*, 705 F.2d 472, 479 (D.C. Cir. 1983)(quoting *Cooper v. O'Conner*, 99 F.2d 135, 142 (D.C. Cir. 1983)).
[107] *See* Halbertstam, 705 F.2d at 479.
[108] *Id.*

Each of the elements of a civil conspiracy are sufficiently plead in Plaintiffs' SAC, though perhaps not in the exact wording of the elements. Nevertheless, the facts and allegations giving rise to a claim for civil conspiracy are contained in the Complaint. Many times over the Complaint discusses instances where Defendant contractors and Defendant insurance carriers conspired together to deny benefits that had been promised, misrepresent facts to the DOL relating to DBA claims resulting in lost benefits, defraud employees and defraud the United States, and breach employment contracts. As a direct result of their conduct, Plaintiffs have suffered injury. And, all of Defendants' actions were done in furtherance of their common scheme to deny claims, and reap the benefits of doing so.

B. Plaintiffs Identify Which Allegations Are Being Made Against Each Defendant.

Defendant insurers assert that the SAC does not identify which Plaintiffs are making which claims against which Defendant, however they do so incorrectly. Count I (Retaliatory Discharge and Discrimination), Count II (RICO), Count III (Bad Faith, Tortious Breach of Covenant of Good Faith), Count IV (Unconscionable, Fraudulent and Deceptive Trade Practices), Count V (Civil Conspiracy), Count VII (Outrage), and Count IX (Seeking Preliminary and Permanent Injunctive Relief) are each plead by all of the named plaintiffs and those similarly situated against each of the defendants. The SAC sets out specific allegations in paragraphs 72-560 by each of the named plaintiffs that satisfy the elements of each of the above claims against each and every defendant as a whole, and the specific Defendant is identified by name in reference to each of the named Plaintiffs in those paragraphs. Each detailed account contained within the SAC lists the particular employer and insurer that the Plaintiff is asserting a claim against. For example, "On [Mr. Bell's] return to the United States **KBR and its insurance carrier, AIG,** immediately began to discriminate against him…," (SAC ¶ 75), "[o]ver the course

of the last seven years, **CNA and Ronco** have repeatedly misrepresented and lied to the [DOL] officials concerning paying for medical treatment for Mr. Clark…" (SAC ¶ 103), "**USIS and AIG** utilized wire and mail to perpetuate their fraud…" (SAC ¶ 122), "**CNA and Blackwater** mischaracterized and as a result of these intentional delays by the carrier…" (SAC ¶ 145), "**CNA and DynCorp** cut off [Mr. Byars] medical and TTD benefits…" (SAC ¶ 175), "**KBR and AIG** denied [Mr. Thompsen's] claim…" (SAC ¶ 186), etc…. These are just a few examples of the specific named Defendants that each named Plaintiff has asserted their claims against.

Furthermore, Count VI (Violation of the American with Disabilities Act) is only asserted by Plaintiffs Harbee Kreesha, Merlin Clark, and Mason Alsaleh, and the SAC makes that clear in paragraph 610.[109] Additionally, the SAC names the specific Defendants against whom Plaintiffs assert this claim in paragraphs 608 – 618. The named Plaintiffs making these claims represent the class of plaintiffs making these claims against their employers who have taken the same discriminatory action against them.

Lastly, Count VIII (Wrongful Death) is obviously only charged against those Defendants who employed (Defendant Contractors) and provided insurance for (Defendant Insurers) those Plaintiffs who have died as a result of said Contractor's conduct. Specifically, this includes - named Plaintiffs Sarita Swart, Marlene Gericke, Desire Tablair, and Gisela Fourie and their respective Defendant Contractors and Insurers. With regard to Margaretha Bezuidenhout, she is not claiming wrongful death herein, but rather misconduct by Defendants in connection with handling of her husband's dead body afterwards, misrepresentations and other egregious conduct outlined in the Complaint. Defendants' assertion that they cannot identify which claim is being asserted against them is clearly unsupported as shown above. The allegations made against each

[109] "Plaintiffs Harbee Kreesha, Merlin Clark, and Mason Alsaleh were qualified individuals with disabilities who could work with reasonable accommodations at the time of their discharge.

one of them provides ample notice to all Defendants, allowing them to defend against the claims made against them.

C. State Law Further Applies to Foreign National Plaintiffs

Defendants argue that plaintiffs who are foreign nationals cannot make state law claims because they are not state citizens. Defendants, however, make an arrogant argument here. Although these plaintiffs are not state residents, they have the same rights as American citizens to bring these claims against defendants since they are specifically covered in the LHWCA and DBA acts.[110] Furthermore, because insurer defendants are subject to the laws of the United States, RICO, state laws, and common law claims, any actions by insurer defendants within the United States to foreign nationals must subject themselves to these laws as well.

As the SAC makes clear, insurer defendants harmed plaintiffs from their offices in the United States and also conspired with contractor defendants to harm foreign national plaintiffs in the United States. Foreign workers are actually paid to not enter the system, a decision made by defendant contractors and insurance carriers in the United States. *See* SAC ¶ 51. Plaintiff Steenberg's medication payments have been revoked by CNA several times, and CNA also misrepresented its payment of bills in the United States. *See id.* ¶ 377, 378. Plaintiff Hadi, an Iraqi who came to live in America under a refugee program, was refused psychiatrist and psychological counsel by AIG numerous times while residing in the United States, and he seeks compensation for the mistreatment in the United States. *See id.* ¶ 535, 546, 550.

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[110] *See* 42 U.S.C. § 1651(a): "Except as herein modified, the provisions of the Longshore and Harbor Workers' Compensation Act…shall apply in respect to the injury or death of any employee engaged in any employment…(2) upon any lands occupied or used by the United States for military or naval purposes in any Territory or possession **outside** the continental United States…(3) upon any public work in any Territory or possession **outside** the continental United States…if such employee is engaged in employment at such place under the contract of a contractor…with the United States…(4) under a contract entered into with the United States…where such contract is to be performed **outside** the continental United States…
irrespective of the place where the injury or death occurs, and shall include any injury or death occurring to any such employee during transportation to or from his place of employment…" (emphasis added).

Additionally, the United States District Courts do not make a distinction on citizenship of individuals who bring claims against American companies for wrongs committee on United States soil. This remains constant even if the harm occurred in a foreign country to people from other foreign countries. Holding otherwise would result in discrimination against foreign citizens when the very laws used to harm these individuals specifically contemplate them having rights equal to American citizens.[111] Benefits cannot be enjoyed without the consequences.

D. Plaintiffs' State Law Claims Are Recognized Claims In The District of Columbia And In States From Where The Choice of Law Could Be Adopted

Each of the state law claims that Plaintiffs have alleged is recognized by the District of Columbia including: Bad Faith Breach of Covenant of Good Faith (Count III),[112] Unconscionable, Fraudulent and Deceptive Trade Practices (Count IV),[113] Civil Conspiracy or Prima Facie Tort (Count V),[114] Outrage or Intentional Infliction of Emotional Distress (Count VII),[115] and Wrongful Death (Count VIII).[116] In deciding which state's law is applicable the District of Columbia courts apply another state's laws "when (1) its interest in the litigation is substantial, and (2) 'application of District of Columbia law would frustrate the clearly

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[111] With one exception, the DBA and LHWCA provide equal rights and benefits to foreign nationals covered by their provisions as those going to Americans. The only exception is that a carrier can "commute" benefits of a foreign citizen by paying the lifetime benefits that would be owing in a lump sum, and cut the lifetime benefits in half for paying them up front. The carriers do not have a right to do that here.

[112] D.C. Code § 28:1-203 (2001)

[113] D.C. Code § 28-3904(2001)

[114] "A complaint alleging a civil conspiracy must 'allege the formation and operation of the conspiracy, wrongful acts done in furtherance of the common scheme, and damages suffered as a result.'" *Higgs v. Higgs*, 472 A.2d 875, 877 (D.C. 1984)).

[115] D.C. Code § 2-1403.16 (2001) Under District of Columbia law, claim for intentional infliction of emotional distress requires the plaintiff to show (1) extreme and outrageous conduct by the defendant which (2) intentionally or recklessly (3) causes the plaintiff severe emotional distress. *Ben-Kotel v. Howard University*, 156 F.Supp.2d 8, affirmed 319 F.3d 532 (D.C.C. 2003). As Defendants in their combined brief for the Insurers, do not explicitly attack the Outrage or other state law claims, Plaintiffs would point the court to the Individual briefs of Defendant Contractors and Plaintiffs Memoranda In Opposition for a fuller delineation of how Plaintiffs state law claims satisfy the standards in Fed.R.Civ.P. 12(b)(6). See, e.g., brief concerning WSI/Ronco and Academi, LLC.

[116] D.C. Code § 16-2701 (2001)

articulated public policy of that state."[117] In a tort case, the District of Columbia employs a "governmental interest analysis."[118] Here, The District of Columbia has the most substantial interest as the United States contracting laws and the DBA which requires purchase of insurance by contractors working on bases in foreign countries, has the most nexus with the laws here. Because the District of Columbia has the most substantial interest in adjudicating the claims, and because the District of Columbia recognizes each of the claims set forth by the Complaint, Defendant's assertion that the state law claims are not recognized is inapplicable.

Even if, however, this Court finds that some other State law applies, the relevant States also recognize the state law claims alleged in the complaint, with few exceptions. For example, all of the relevant states recognize claims for bad faith breach of covenant of good faith (Count III), Unconscionable, Fraudulent and Deceptive Trade Practice (Count IV), Outrage or Intentional Infliction of Emotional Distress (Count VII), and Wrongful Death (Count VII), and most, albeit not all, of the concerned states recognize Civil Conspiracy or Prima Facie Tort (Count V). Defendant Insurers allegations that "many states" do not recognize certain claims is simply incorrect, and amounts to an attempt to deceive this Court.

E. Plaintiffs Have Plead Sufficient Facts And Allegations To Support Their Claim For Unconscionable, Fraudulent and Deceptive Trade Practices.

A claim for unconscionable, fraudulent and deceptive trade practices, is not a claim sounding in fraud such that it requires a heightened pleading standard. While Defendant Insurers attempt to convince this court that "Plaintiffs are *required* to meet Rule 9(b)'s heightened

[117] *Herbert v. District of Columbia*, 808 A.2d 776, 779 (D.C. 2002)(quoting *Kaiser-Georgetown Cmty. V. Stutsman*, 491 A.2d 502, 509 (D.C. 1985).
[118] *Vaughan v. Nationwide Mut. Ins. Co*., 702 A.2d 198, 202 (D.C. 1997)(citing *District of Columbia v. Coleman*, 667 A.2d 811, 816 (D.C. 1995)).

pleading standard," (emphasis added) by relying on *Stires v. Carnival Corp.*,[119] a decision from the middle district of Florida, they fail to acknowledge that more recent Florida Courts have disagreed with that approach.[120] In *Siever v. BW Gaskets, Inc.*, the Middle District of Florida applied only Rule 8(a)(2) pleading standards "because Rule 9(b) only applies to FDUTPA claims grounded in fraud."[121] In *State of Fla., Office of Attorney Gen., Dep't of Legal Affairs v. Tenet Healthcare Corp*, the Southern District of Florida concluded "that compliance with Rule 9(b) was not required because FDUTPA plaintiffs did not need to prove elements of fraud."[122] Plaintiffs' SAC alleges that Defendants were deceptive and engaged in unfair trade practices by indicating that they would provide all benefits as provided by the law, when in fact they never intended to do so.[123]

Even assuming, *arguendo*, that this Court finds that Plaintiffs must plead with particularity, the SAC meets that threshold and goes well beyond. 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.[124]

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[119] 243 F. Supp. 2d 1313, 1322 (M.D. Fla. 2002) (stating that "most courts construing claims allegving violations of the Federal Deceptive Trade Practices Act or its state counterparts have required the heightened pleading standard requirements of Rule 9(b).")

[120] *Taylor v. Homecomings Fin., LLC*, 738 F. Supp. 2d 1257, 1263 (N.D. Fla. 2010).

[121] *Siever v. BWGaskets, Inc.*, No. 6:08–cv–1388–Orl–19GJK, 2009 WL 528624, at *3 (M.D.Fla. Mar. 2, 2009)

[122] *State of Fla., Office of Attorney Gen., Dep't of Legal Affairs v. Tenet Healthcare Corp.*, 420 F.Supp.2d 1288, 1310–11 (S.D.Fla.2005)

[123] Second Am. Compl. ¶ 597

[124] With regard to Mr. Bell, see SAC ¶ 78, ¶ 83-88 showing the times and places of misrepresentation, deception, damage, or the misrepresentations regarding AIG, chapter and verse as to Merlin Clark at SAC ¶¶ 104-111 resulting in damages to Mr. Clark and his wife and their daughter. Mr. Brewer was subjected to misrepresentations, lies, non-payment of benefits, and loss as a result, at SAC ¶¶104-07. Mr. Mercadante's damages from misrepresentations, SAC ¶¶ 135-57; nearly two-hundred thousand dollars of medical expenses were incurred by Mr. Brink and his approved nursing company, Nicki Pool, and then CNA simply refused to pay, denied they had not paid, feigned ignorance before the Department of Labor on various dates of hearings, stopped payment on a check and caused Mr. Brink's wheelchair to be repossessed out from underneath him, caused him to lose his house, and lied about the payments to the Department of Labor and to medical providers, causing him to be blackballed from services of doctors, all outlined in the Complaint. Ms. Pool was also blackballed. The SAC gives specific dates, where possible, names, content of the misrepresentations, and cites specifically what has been lost by Mr. Brink as a result. CNA paid for Mr. Brink's personalized wheel chair that cost in excess of $7,000 USD, gives the date (February 6, 2007), gives the content of the misrepresentation (Dyncorp stopped payment on the check), and explains what Mr.

The policy considerations behind requiring a heightened standard of pleading when alleging fraud is to allow the Defendant to identify the allegations being made against them so that they can prepare an adequate defense to the charges being levied against them. Here, Plaintiffs have met that obligation and more.

Each Plaintiff was deceived regarding the benefits, payments, communications with medical personnel, fact of payment, refusal to investigate payment, and so forth, which are in the custody and control of adjusters of the insurance carriers. Plaintiffs understood, when agreeing to work with their respective employers, that benefits were available if they were injured. Systematically, those benefits were denied to Plaintiffs and to their families causing great strife and peril in their lives. The misrepresentations made specifically to each Plaintiff regarding benefits they should receive, but were denied; and the misrepresentations, generally, made to all Plaintiffs about the availability of disability and injury compensation and benefits when they agreed to work for Defendants, were and are fraudulent misrepresentations by Defendants to Plaintiffs. Plaintiffs have relied on the availability of those benefits in agreeing to work for defendant employers and in seeking medical treatment and rehabilitation for injuries sustained while working overseas.

For each named Plaintiff and those similarly situated the requirements of Rule 9(b) have been met and more. Specifics regarding the time, place, and content of the misrepresentations, as well as the facts misrepresented and the results thereof have all been pled with sufficiency.

Brink suffered as a result (the chair was repossessed). SAC ¶ 353. This is just one example of the continual conduct engaged in by Dyncorp, CNA, and all other named Defendants. This fraud is patent and well outlined, as is that of other plaintiffs. *See* ¶¶ 321-344 and 453-464. Plaintiffs could go through all of the forty odd plaintiffs and other insurance carriers to show with particularity the circumstances under which the insurance companies and the contractors damaged Plaintiffs through fraud and deceit. Doing so, however, is unnecessary as the sample provided gives this Court ample evidence of the sufficiency of the Complaint. Any factual information, including dates, places, or circumstances that have not been specifically pled will be identified through discovery.

Moreover, Defendants can easily ascertain from the information provided the allegations being made against them so as to be able to prepare their defense against the allegations.

CONCLUSION

For all of the foregoing reasons, and in the interests of justice, Plaintiffs request that the Court overrule the Motions to Dismiss by the Defendant Contractors who have perpetrated this far reaching scheme to harm the many individuals before the Court and many others behind them. In the alternative, the Court should grant Plaintiffs leave to file a Third Amended Complaint to cure any pleading defects.

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Respectfully Submitted,

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