

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.J. MERCADANTE, ROBERT BIDDLE,)
JOHNNY JEFFERSON, PHILLIP W.)
OHARA, Individually and on behalf of)
Similarly situated persons,)

Plaintiffs,)

v.)

Case No: 1:11-cv-01044(CKK)

XE SERVICES, LLC,)
U.S. TRAINING CENTER, INC., AKA)
BLACKWATER LODGE AND)
TRAINING CENTER, INC.,)
BLACKWATER SECURITY)
CONSULTING, LLC,)
BLACKWATER WORLDWIDE)
TRUST, HEALTH AND WELFARE)
PLAN AND TRUSTEES,)

Defendants.)

BREACH OF CONTRACT, FRAUD,
ERISA BREACH OF FIDUCIARY DUTY
Demand Jury Trial
Individual and class action
on behalf of all similarly situated
employees

**FIRST AMENDED COMPLAINT FOR DAMAGES
AND DECLARATORY AND INJUNCTIVE RELIEF AND CLASS RELIEF**

I. PRELIMINARY STATEMENT

Plaintiffs, individually and on behalf of all persons similarly situated, for their complaint allege:

1. This is an action arising under the Class Action Fairness Act, 28 U.S.C. § 1332, in that the estimated damages involved in United States claims will exceed \$5,000,000 and the parties to this action are residents of different states and under the following laws: (1) the common law of fraud and deceit; (2) breach of employment contract and implied contract; (3)

breach of fiduciary duty under ERISA, and (4) statutory violation of wage law, (5) fraudulent and deceptive trade practices (consumer protection statutes); (6) civil conspiracy and prima facie tort; and (7) preliminary and permanent injunctive relief, as set forth later herein.

2. This complaint is filed due to actions and omissions of Defendants, in conspiracy with each other, to defeat the right of American Citizens and Foreign Nationals to receive their lawful benefits and compensation under ERISA, their contracts of employment, and to have their FICA tax paid by their employer, the Defendants hereunder. Billions of dollars are lost each year to the federal treasury as well as to individuals due to misclassification of employees as independent contractors in order to avoid paying lawful taxes, withholding, and plan benefits.

3. This suit seeks to vindicate the rights of Plaintiffs as a member of the public and a citizen of the United States, to prevent lawlessness and utter lack of accountability on the part of the Defendants in contracting practices, to prevent continuing and irreparable harm, and to cause a temporary and preliminary injunction to issue enforcing a federal tax law to require the Defendants to pay Plaintiff's payroll taxes including FICA, FUTA, state unemployment compensation fund arrears, arrears for plan benefits for Defendants' health, welfare, disability, and pension plans for all years for which Plaintiffs and the class of similarly situated workers in Iraq and Afghanistan should have received since 2001, for out of pocket expenses, interest and damages, punitive damages, attorneys fees and such other relief as the court deems equitable and fair.

II. JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over the asserted claims under 28 U.S.C. § 1331 (Federal Question), under ERISA and the Class Action Fairness Act, 28 U.S.C. § 1332, in that the estimated damages involved in United States claims will exceed \$5,000,000 and the parties to this action are residents of different states, and under 28 U.S.C. § 1332 (Diversity of Citizenship). The Court has personal jurisdiction over the Defendants because they are subject to the District of Columbia long-arm statute, D.C. Code § 13-423 and because Defendants are present and transact business in the District of Columbia, and because the acts and omissions complained of occurred, on information and belief, in the District of Columbia through contracts of Defendants with the U.S. Departments of State, Defense, and such contracts were entered into in the District of Columbia or were to be partially performed in the District of Columbia; and because the matters concern disputes with the Internal Revenue Service who made decisions concerning classification of Plaintiffs and those similarly situated as employees and not independent contractors, and misrepresentations regarding the same were made in the District of Columbia by agents of Defendants. The Court has supplemental jurisdiction over deceptive and fraudulent trade practices of Florida, District of Columbia, North Carolina Wage and Hour claims, and claims of individuals in states such as Massachusetts, Illinois, and Maryland and other states, where misclassification carries a right to civil penalty, treble damages, and attorneys fees.

5. Venue is proper in the United States District Court for the District of Columbia under 28 U.S.C. § 1391(b) and (c).

6. These proceedings are brought pursuant to the provisions of the Class Action Fairness Act in that Plaintiffs and those similarly situated bring claims in excess of \$5,000,000, on behalf of 4,000 employees per year employed by Defendants going back to 2004, with each person claiming in excess of \$10,000 in damages, and under the Employee Retirement Income Security Act of 1974 [hereinafter ERISA], 29 U.S.C. § 1001 et seq. This Court has subject matter jurisdiction pursuant to the provisions in 29 U.S.C. § 1132 (e) (1) in that this action is brought by participants and/or beneficiaries in the Health, Disability and Welfare Plans For Employees of Blackwater, Prince, and Xe Companies ("Plan").

7. In this Class Action Complaint, Plaintiffs brings this action for injunctive relief and damages due to Defendants' refusal to make payments and/or direct payments to be made that were obligated to be made pursuant to Plan language and that they agreed, in their discretion, to make and/or direct to be made prior to Plaintiffs' medical treatment.

8. Plaintiffs also bring this action due to Defendants' failure to include them in the health care, pension, and disability plans, such as they may be, of Defendants' corporations. Defendants thereby breached their fiduciary duties pursuant to 29 U.S.C. § 1132(a) (2), 29 U.S.C. § 1109(a), and 29 U.S.C. § 1002(21)(A), entitling Plaintiff to recover benefits, costs and attorney fees, and to obtain declaratory and injunctive relief.

9. The Class of persons consists of all persons designated as independent contractors under contracts with Defendants to perform services for Defendants in Iraq and Afghanistan and other foreign countries, and beneficiaries of Health, Pension, Disability and Welfare Plans for Employees of all Defendants ("The Plans") after April 1, 2001.

10. Venue is proper in the District of Columbia to 29 U.S.C. § 1132(e)(2) in that Defendants had the IRS approve said plans in the District of Columbia, had it determined in the District of Columbia that the persons classified as independent contractors were actually employees, and these employee were paid through dollars paid by the United Sates Government under contracts for services in foreign countries in support of the Global War on Terror, Operation Enduring Freedom, and Operation Iraqi Freedom. Alleged breaches of the Plaintiffs' Plan and Defendants' fiduciary duties, including the failure to pay and/or direct payments, to be made to Plaintiffs and the retirement plans or for medical care, hospital care, doctor's care, occurred, in part, within the District of Columbia. Joinder of these claims of the named Plaintiffs is proper under F.R.C.P. 20(a) and F.R.C.P. 23 because each of Plaintiff's claims arises out of the same transactions or series of transactions with regard to these Defendants.

11. Defendants may be found, have agents in, and/or transacted business in the District of Columbia.

12. Each of the named Plaintiffs in this Class Action Complaint are, or have been, employees of Defendant Blackwater and its subsidiary companies and should have been classified as employees and thus should have been beneficiaries of the Plans by and through their employment with Blackwater Worldwide, Xe, and Blackwater Security Consulting, LLC and represent Plaintiffs from many of the fifty states of the United States who have no health insurance, retirement plans, employee stock options, disability benefits and/or have been denied health care treatment because of the misclassification of Defendants as independent contractors.

13. Plaintiffs have standing to sue pursuant to 29 U.S.C. § 1132(a)(2) and the Class Action Fairness Act, 28 U.S.C. § 1332 because they are citizens of different states and the amount in controversy is over \$5,000,000.00.

14. The Plans may be sued under 29 U.S.C. § 1132(d)(1).

15. Each of the Defendants may be sued under 29 U.S.C. § 1002(21)(A) for exercising discretionary duties. Blackwater Health, Welfare and Disability Plan and its successors may be sued under 29 U.S.C. § 1132.

III. PLAINTIFFS

16. Plaintiff CJ Mercadante is a citizen of the State of Florida and of the United States, residing at 382 NE 191st Street Unit 53975, Miami, FL 33179.

17. Plaintiff Robert Biddle is a citizen of the State of South Carolina and of the United States, residing at 1030 Waterside Landing Wy, Summerville, SC 29485.

18. Plaintiff Johnny Jefferson is a citizen of the State of South Carolina and of the United States, residing at 129 Hidden Terr., Swansea, SC 29160.

19. Plaintiff Phillip W. OHara is a citizen of the United States, residing at 500/161 Laguna Home Phase 5, Amphur Sansai, Chiang Mai, Thailand 50210.

IV. DEFENDANTS

20. Defendants Xe Services, LLC, U.S. Training Center, Inc., aka Blackwater Lodge and Trainingn Center, Inc., Blackwater Security Consulting, LLC, Blackwater Worldwide, and Blackwater Trust and Plan Trustees, are limited liability companies and corporations organized under the laws of Delaware. Their principal and registered offices are located at 850 Puddin

Ridge Road, Moyock, North Carolina, 27958 and they regularly carry on business in the District of Columbia through government contracts with the United States of America. Defendants are part of the family of entities now doing business as “Xe” which until early 2009 were doing business as “Blackwater Worldwide” and “Blackwater USA.” Xe Services is the successor entity to EP Investments, LLC. Xe Services is the central entity in the “Xe” family of entities. Xe and its predecessor and sister companies maintain ERISA qualified plans that prohibit discrimination among employees, under such plans as a health and welfare, disability, and pension and profit sharing plans.

V. FACTUAL & LEGAL ALLEGATIONS

21. The United States employs some 30,000 private security contractors annually in Iraq and Afghanistan State Department and Departments of Army and other branches of government.¹ Plaintiffs worked for Defendants as security contractors in Iraq and Afghanistan and are among approximately 4,000 persons per annum who have done so for Defendants in support of the global War on Terror since 2001, with around 1,000 private security contractors in Iraq on behalf of Defendants at any given time. They signed annual contracts to work for Defendants under contracts with the United States Department of State and other departments such as the Department of Defense, providing protection and other classified services. They were often working for the Central Intelligence Agency or the Department of State under diplomatic passports.

¹ See M. Schwartz, “Defense’s Use of Private Security Contractors in Afghanistan and Iraq: Background, Analysis, and Options for Congress,” Congressional Research Service, May 13, 2011, which can be found at <http://www.fas.org/sgp/crs/natsec/R40835.pdf>.

22. The contracts Plaintiffs and those similarly situated that Defendants required them to sign was characterized as Independent Contractor agreements. Said contracts called for payment of a daily rate and in many cases a completion or partial completion bonus. All withholding or other payroll taxes were set forth as the responsibility of the contractor. Defendants also characterized Plaintiffs and those similarly situated as employees with the Department of State, the United States government, and the insurance carriers Defendants were required to pay to cover their “employees” under the Defense Base Act. In other respects, Plaintiffs and those similarly situated were treated as employees. For instance, many of those in the class, including Plaintiff Mercadante, were working for other contractors such as DynCorp when Blackwater and related Defendants were substituted in as the responsible “employer” and took over the contract. They were told to report to North Carolina and would become employees of Blackwater. Only after entering into the relationship were many of the Plaintiff class required to fill out forms calling them Independent Contractors. DynCorp and most others operating under Defense and State Department contracts paid security workers as employees, did withholding for workers, and sent them W-2s.

23. The so-called independent contractor agreements were for contracts on which Defendants earned billions of dollars providing services to the United States, which services were paid pursuant to contracts between the United States and one of the Defendant entities or its successors.

24. Provision of the services by Plaintiffs and those similarly situated was an essential aspect of Defendants’ businesses.

25. Each of the Plaintiffs and those similarly situated were trained by Defendants in facilities owned or controlled by Defendants, assigned duties by Defendants in Iraq or Afghanistan, including being assigned gear, weapons, protective gear, clothing, and instructions. At all times Defendants had the right to control how plaintiffs performed work, when they performed work, where they performed work, and their dates of being absent from work for rest and recreation, all pursuant to their contracts.

26. Plaintiffs and those similarly situated were required to be trained at Defendants' training facilities in North Carolina in the United States as well as overseas, including controlling when they were required to shoot on the shooting range overseas to keep current.

27. Defendants would assign to plaintiffs which security detail to work. For example, when a government dignitary or celebrity came to the country in which Plaintiffs worked, Defendants would inform the plaintiffs or those similarly situated which dignitary they would be assigned to and what intelligence there was concerning dangers to the wellbeing of the assigned protection detail. Defendants instructed Plaintiffs and those similarly situated on what to do, how to do it, where to go, how to be dressed, groomed, and what standards to apply in given situations.

28. Plaintiffs and many of those similarly situated came home wounded physically and psychologically from Iraq, Afghanistan, and other countries, and needed health insurance to take care of difficulties for themselves and their families, often because Defendants and their workers compensation (Defense Base Act) carriers refused to provide benefits until forced to do so after drawn out disputes in administrative courts. The Plaintiffs and those similarly situated

were sent 1099s rather than W-2s annually and were required to pay their own self-employment tax and had no monies paid into federal, state or local governments for unemployment, income tax withholding or other withholding.

29. It was widely publicized in 2007 that the United States Congress investigated Defendants for tax evasion for their misclassification of Plaintiffs and those similarly situated as independent contractors rather than employees. See, e.g., Klaus Marre, "Waxman: Blackwater may have engaged in tax evasion," *The Hill*, October 22, 2007.

30. Plaintiff Mercadante worked for Defendant Blackwater from 2006-08. He applied to the IRS for a determination of tax status on the form SS-8 and received a determination on February 8, 2011 informing him that he was an employee for purposes of tax status. The IRS also stated that Mercadante was also an employee for work purposes as well. The other representative plaintiffs worked for Defendants in 2006-2009. Plaintiff Phillip OHara has applied for determination of tax status on form SS-8, but has not yet received a determination. The other representative Plaintiffs have not received a determination of employee status status, and it is clear from the IRS's position this issue has been properly addressed in the past. Some of Plaintiffs, including Plaintiff Mercadante and Biddle, and those similarly situated, have been injured while working for Defendants and, to varying degrees, have been determined to be employees under the Defense Base Act, 42 U.S.C. §§ 1651-5, and paid some medical and disability benefits.

31. As a result of this determination by IRS of employee status, Plaintiffs and those similarly situated must file amended tax returns for each of the years when they worked for Blackwater, and may owe taxes, interest and penalties as well as professional accounting fees.

32. Even after these determinations by IRS, on information and belief, Plaintiffs allege that Defendants continued to require security specialists and similarly titled employees to sign independent contractor agreements notwithstanding their being under the right of control of Defendants and having to take instructions for when they work, where they work, and how they work from employer, as well as receiving all of their gear and weapons.

33. Each of the plaintiffs was induced by fraud and deceit to enter into alleged agreements foregoing rights as employees, foregoing other valuable rights. They were told by their instructors that they were going to be taken out of training for a period of time and to sign documents without questions or be faced with losing their jobs. They were each herded into an office at the training center of Blackwater in Moyock, North Carolina, in a line with 20 plus other individuals, made to fill out documents, told to sign automatic deposit documents, security clearance and national security documents, and their contracts, which were 3-5 page agreements containing information on pay, workers compensation insurance, and other matters, but containing no arbitration clause or other agreements. They were given approximately 20 minutes to go through the stations in the line in the office main building in Moyock, North Carolina and not permitted to read a document pertaining to confidentiality, and other documents. After this suit was filed, Defendants produced 17-page agreements purporting to be Independent Contractor Service Agreements containing arbitration provisions, indemnification provisions and

the like, which plaintiffs had never read and were refused a copy of after allegedly signing. They lacked any bargaining power, were under duress in signing the alleged 17-page Independent Contractor Service agreements and indemnification agreements.

THE PLAINTIFF CLASS

34. Plaintiffs bring this action pursuant to Rules 23 (a) and 23 (b)(3) of the Federal Rules of Civil Procedure on behalf of themselves and all other similarly situated throughout the United States who worked for Defendants from 2001 to the present, and who are or should be beneficiaries of the Blackwater Plans.

35. The above-described class is so numerous that joinder of all members is impracticable.

36. Joinder of the members of the class is additionally impeded by geographic concerns because class members reside in several states.

37. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact common to the Class are:

(a) Whether the Class was misclassified as independent contractors rather than employees for purposes of taxes, withholding, and Plan documents of the retirement and health and welfare plans of Defendants;

(b) Whether Defendants thereby breached their fiduciary duties pursuant to 29 U.S.C. § 1132(a)(2); and

(c) Whether Defendants knew, or should have known, that they were misclassifying and misrepresenting the nature of the relationship to the Class or failed to disclose facts it should have to inform the Class of the benefits they were entitled to if they were deemed employees;

(d) If so, whether the Class members are entitled to recover benefits, costs and attorneys fees, and to obtain declaratory and injunctive relief.

38. Named Plaintiffs claims are typical of the claims of the members of the Class. Named Plaintiffs and all members of the Class are persons who should have been classified as employees and had withholding and taxes paid by Defendants and been participants and beneficiaries of the Plans of Defendants who have suffered financial losses due to Defendants' wrongful common course of conduct.

39. Plaintiffs will fairly and adequately protect the interests of the Class and have retained counsel who are competent and experienced in class litigation. Plaintiffs have interests that are not antagonistic to, or in conflict with, those interests Plaintiffs seek to represent as the Class representatives.

40. Defendants refuse to act on grounds usually applicable to the Class, thereby making it appropriate for final injunctive and declaratory relief to be granted with respect to the Class as a whole.

41. A class action is superior to other available methods for the fair and efficient adjudication of this controversy because joinder of all members is impracticable. Because the damages suffered by individual members of the class may be relatively small, the expense and

burden of individual litigation make it impracticable for the members of the class to pursue individual litigation in order to vindicate their rights. In the absence of a class action, Defendants will retain the benefits of their wrong doing despite serious violations of the law. Plaintiffs envision no difficulties likely to be encountered in the management of this litigation as a class action.

42. Each of Plaintiffs is a proper representative of the class of those similarly situated as they enjoyed various levels of seniority with Defendants, are experienced security specialists, had previous extensive military experience and were all damaged in the same ways for which class relief is being sought.

43. The class satisfies the requirements of Rule 23 in that the class is sufficiently (1) numerous, in that there are in excess of 3,000 such former and current security specialists who worked for Defendants, (2) common in fact and law, in that the interests of Plaintiffs is identical to that of the rest of the class in that all suffered the same damage calculable by easy mathematical calculation of percentages of income for FICA and other withholding, state unemployment taxes, state income withholding, and health and welfare and disability and pension benefits, (3) typical of all claims in that each of the Plaintiffs has the same type of claim as other plaintiffs concerning loss of benefits, calculation of taxes and withholding, and so on, and (4) there is adequacy of representation in that they will adequately represent the interests of the class and they have secured class counsel with experience in class litigation and complex litigation.

CLAIMS FOR RELIEF

COUNT I

(Declaratory Judgment)

44. Plaintiffs repeat and incorporate by reference each allegation set forth in paragraphs 1 through 43 above.

45. Plaintiff seeks a declaration that the Defendants improperly classified Plaintiffs and those similarly situated to them as independent contractors when in fact they were employees of Blackwater Security Consulting, LLC.

46. Plaintiffs seeks a further declaration that the IRS determined that Defendants misclassified said Plaintiffs and failed in their duty to notify all similarly situated persons that they were entitled to reimbursement for payment of FICA and other taxes, and that Defendants failed to reimburse the accounts of Plaintiffs, failed to include plaintiffs and those similarly situated in the plans of Blackwater Worldwide, Prince Group or other retirement, insurance and benefit plans under ERISA, and for an order restoring all benefits and monies owing to Plaintiffs and those similarly situated.

COUNT II

(Breach of Contract, Express and Implied)

47. Plaintiffs repeat and incorporate by reference each allegation set forth in paragraphs 1 through 46 above.

48. Defendants entered into express agreements to employ Plaintiffs and those similarly situated in Iraq or Afghanistan, and in other foreign countries, in exchange for pay. Defendants were in a superior bargaining position and Plaintiffs relied on Defendants to properly

and lawfully classify, pay, do appropriate withholding, and to otherwise provide benefits to them in a manner that was non-discriminatory and in compliance with federal contracting principles and federal and state laws concerning ERISA benefits, as well as state unemployment compensation. Defendants breached their implied and express contracts with Plaintiffs and former and current employees of Defendants, by failing to pay them benefits paid to other employees, forced them to pay taxes for FICA and other state withholding for unemployment and disability insurance, failed to provide retirement and other benefits paid to other employees of Defendants. Defendants breached the covenant of good faith and fair dealing implicit in every contract with Plaintiffs and those similarly situated.

49. As a direct and foreseeable result of Defendants' breach, Plaintiffs and those similarly situated have been subjected to damages of out of pocket expenses of payment of FICA withholding and other payroll taxes, costs of incorporation as independent contractor, costs of hiring accountants, costs of refiling of tax returns and costs associated therewith, interest, penalties, as well as loss of benefits of employment including vacation, sick leave, and health insurance, disability insurance, pension and other retirement benefits, and other foreseeable consequential damages.

COUNT III

(Intentional and Negligent Misrepresentation and Fraud)

50. Plaintiffs repeat and incorporate by reference each allegation set forth in paragraphs 1 through 49 above.

51. Defendants fraudulently induced Plaintiffs and those similarly situated to enter into agreements for employment as Independent Contractors through deceit, trickery, and

unconscionable behavior described above. Plaintiffs were induced through negligent and intentional misrepresentation, according to Defendants representations, to sign agreements signing away their legal rights, and prevented them from reading or taking a copy of said alleged agreements. Defendant required persons already being paid to do the identical job as employees of other contractors to sign agreements saying they were independent contractors, after they were already working for Defendants, including already being on Blackwater's payroll, having left Iraq or Afghanistan to train in North Carolina, and only after training was almost complete were they told they were required to sign an agreement making them independent contractors.

52. Despite inquiry by Plaintiffs and those similarly situated into employment benefits, insurance, and withholding that Defendants should have performed and paid for, Defendants intentionally or negligently mislead the Plaintiffs and the IRS concerning the obligation of the employer to pay payroll taxes, withholding, state unemployment insurance withholding, health and welfare, and pension or retirement benefits, private disability insurance.

53. Defendants had superior bargaining power and presented the Plaintiffs and those similarly situated with the contracts on a take it or leave it basis. Defendants withheld information from Plaintiffs and those similarly situated that, under the circumstances, they should have disclosed in Plaintiffs' decisions concerning filing of taxes, payment of self-employment tax and other issues that caused them damages and loss as a result of the lack of disclosure by Defendants who were under a duty to disclose.

54. Plaintiffs reasonably relied on the Defendants to properly determine the tax status of them as employees or independent contractors, and further relied on representations and failures to disclose in official communications depicting Plaintiffs as employees of Defendants.

55. Plaintiffs were damaged as a result of said reliance, including loss of money, incurring obligations to refile tax returns, loss of unemployment benefits, loss of pension and other retirement benefits, loss of health insurance benefits, and loss of treatment and care for them and their families for health conditions upon their return from deployment abroad in working for Defendants. Defendants knew that the classification for Plaintiffs and those similarly situated was incorrect and had been so instructed by employees and by government officials.

56. Defendants fraudulently sought to prevent Plaintiffs and others similarly situated from bringing to the attention of government and other persons the misclassification, and to prevent them from cooperating with congressional officials looking into misclassification and other issues.

57. Defendants misrepresented the jobs Plaintiffs would perform, including requiring them to engage in illegal activities that will only be described to the Court under seal, which activities were fundamentally at odds with the jobs for which they thought they were being hired.

58. Defendants' conduct was wanton, willful, and reckless, justifying an award of punitive damages, and treble damages for losses incurred and proved by Plaintiffs and those similarly situated through submission of mathematical formulae for such damages, pursuant to state statutes applicable to each plaintiff or class member.

COUNT IV

(Unconscionable, Fraudulent and Deceptive Trade Practices)

59. Plaintiff repeats and incorporates by reference each and every allegation set out in paragraphs 1 through 58.

60. Defendants owed duties to properly inform Plaintiffs of rights, refrain from misleading them about what they were signing, what their duties would be, what their pay would be, the nature of the work they were performing, and other right to benefits of employees.

61. Defendants misrepresented and deceived Plaintiffs as well those similarly situated as aforesaid.

62. Plaintiffs and those similarly situated, including officials of the United States and state government, relied on the misrepresentations of Defendants.

63. Defendants are engaged in interstate and foreign commerce, and as such engaged in deceptive trade and consumer practices, that damaged the Plaintiffs and those similarly situated.

64. In all the actions described in this complaint, defendants acted through their agents, officers, attorneys, representatives, insurance carriers through their officers, agents, attorneys and insurance adjustors and managers, which were acting in the course and scope of employment or agency or representation for defendant contracting companies and insurance carriers, and which defendant companies ratified all of the acts described in this complaint.

65. Defendants engaged in deceptive, unconscionable acts and practices by representing they provided all benefits covered under law, when in fact they did not intend to provide such, and did directly misrepresent and act with deception toward Plaintiffs concerning

the characteristics of their work, the pay for their work, overtime, employee benefits, right to read and review documents and obtain copies, and other valuable rights, misleading Plaintiffs as to their status through various contradictory representations to the United States government and to them as employees, waiting until after they were employed and performing duties with Defendants to unilaterally force Plaintiffs and those similarly situated to sign take it or leave it agreements showing them as independent contractors, making them sign agreements they were not allowed to read or given time to read, refusing to give copies of same to Plaintiffs, misleading them as to the effect of signing said agreements, threatening to terminate individuals if they questioned the agreement or what they were being required to sign, and a variety of other deceptive and unfair trade practices in connection with obtaining these contracts to hire Plaintiffs or take over their contracts in midstream, as well as in connection with performance of the agreements. Defendants' managers represented to some of those employed with them that they were really employees but just called Independent Contractors. Plaintiffs have been damaged in their persons, property, and out of pocket expenses, and attorneys fees, and they are entitled to recover under consumer protection statutes, including recovery under the District of Columbia unfair and deceptive trade practices legislation, as well as deceptive acts and trade practices within the meaning of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) (Fla.Stat. § 501.201 *et seq.*) for Plaintiff Mercadante and others in Florida similarly situated, and under the North Carolina Unfair and Deceptive Trade Practices Act (UDUPTA), N.C. GEN. STAT. § 75-1.1 (2005), and the D.C. Consumer Protections and Procedures Act, for failing to "state a material fact if such failure tends to mislead." 28 D.C. Code § 28-3904(f) and "fail to

supply to a consumer a copy of a sales or service contract, lease, promissory note, trust agreement, or other evidence of indebtedness which the consumer may execute.” 28 D.C. Code § 28-3904(q), and the California Unfair Competition Law (UCL), Cal. Bus. Code § 17200 et seq, in engaging in the above unlawful, fraudulent and unfair practices. The trade and business practices of trying to make Plaintiffs and those similarly situated liable for acts contained in fraudulent agreements, and to refrain from allowing Plaintiffs to read or obtain a copy of such may constitute violations of the Act, when done in combination with a Government Contract wherein, as in this case, the representation that Plaintiffs were employees was made, to induce the United States to enter into such agreements.

66. Defendants actions were fundamentally unfair and deceptive toward Plaintiffs and those who are similarly situated. They were designed to damage Plaintiffs in their finances, prevent them from obtaining overtime pay, unemployment in the event they lost employment which many in the class did, prevent them from having their withholding and tax affairs in order, and otherwise create confusion and difficulty for them in their personal and economic affairs at a time when they were vulnerable to such harm by being overseas, working full time in combat conditions.

67. Defendants actions and business dealings relating to the Plaintiffs and those similarly situated are in interstate commerce or affect commerce, and as such engaged in deceptive trade and consumer practices, that damaged the Plaintiffs and those similarly situated.

68. As a direct result of the actions of Defendants, Plaintiffs and those similarly situated suffered actual damages, costs, and attorneys fees, together with treble damages.

69. In addition, the actions of Defendants was willful and deliberate, and therefore for each deceptive and unfair act are liable for treble damages, punitive damages and or a \$10,000 - \$15,000 penalty per act.

COUNT V
(Breach of Fiduciary Duty under ERISA)

70. Plaintiffs repeat and incorporate by reference each allegation set forth in paragraphs 1 through 69 above.

71. This claim is brought pursuant to 29 U.S.C. § 1132(a) (1) (B) and (a) (2), which provides that “[a] civil action may be brought – (1) by a participant or beneficiary . . . (B) to recover benefits due to him under the terms of his plan . . .” and “(2) by a participant [or] beneficiary . . . for appropriate relief under section 1109 of this title.”

72. Defendants health, welfare, and retirement plans had a fiduciary relationship with Plaintiffs and each member of the Class under 29 U.S.C. §§ 1104 and 1109, including decisions to include Plaintiff Class in the plans for healthcare, retirement, disability and other forms of benefits.

73. Defendants conspired with one another to mislead, defraud, confuse, and defeat the Plaintiffs and all employees of Defendants to keep them from knowing of the plan and their right to participate in it as actual employees of Defendants. Defendants failed to fund or otherwise permit Plaintiffs from participating in and enjoying the benefits of the Plan.

74. Defendants thereby breached their fiduciary duties to Plaintiffs. These breaches of duty were done with the knowledge that the classification of Plaintiffs as Independent Contractors was improper and fraudulent and at odds with the intent of the plan to cover all

employees who genuinely were employees of Blackwater and its related entities. For example, in Afghanistan, persons performing jobs side by side that were essentially the same were classified alternatively under contracts of employment with employee benefits, and also as Independent Contractors, excluding the individual from the benefits they enjoyed while employees in the same location, doing the same job.

75. As a direct result of said breaches of fiduciary duty, Defendants have misused Plan assets, the Plan has suffered losses, and Plaintiffs and the Class have been denied benefits and will continue to suffer financial losses in excess of medical bills, including loss of continuous insurance coverage, making Plaintiff Class members uninsurable for pre-existing medical conditions, a fact that Defendants knew or should have known would result from their refusal to disclose the known breaches to the rights of Plaintiff Class by failing to offer them the health coverage available to other employee plan participants, and by failing to provide disability coverage and retirement contributions on behalf of Plaintiffs.

76. This Court has the authority to issue a judgment finding that the Defendants' conduct is in violation of the provisions of ERISA, to enjoin such practices, to require Defendants to make payments and to adequately disclose information regarding such payments to Plaintiffs and the Class, to allow Plaintiffs to recover all benefits due to them, and to allow Plaintiffs to recover all damages incurred as a result of Defendants' conduct.

77. Plaintiffs pray that the court issue a judgment upon any finding of inappropriate conduct of Defendants.

COUNT VI

(Wage Payment for Overtime, FLSA and North Carolina Wage and Hour Act, Massachusetts and Illinois Misclassification laws, and California Unfair Competition Law)

78. Plaintiff repeats and incorporates by reference each and every allegation set out in paragraphs 1 through 77 above.

79. Each of the Plaintiffs and those similarly situated were required to train in North Carolina and perform some of their jobs in North Carolina. The alleged agreements they were fraudulently induced to sign without being given an opportunity to read it required that their employment be construed under the laws of North Carolina.

80. Plaintiffs and those similarly situated worked under contracts between Defendants and the Department of State, working in Embassies in Afghanistan and in Iraq. As such, they worked either at the facility of Defendants in Moyock, North Carolina, or on United States soil at United States Embassies abroad under contracts with the United States government. In addition, each of the Plaintiffs and those similarly situated were provided with government orders from the Department of State that said they were employees of the United States government Department of State with diplomatic passports and the equivalent of GS-14 ranks.

81. Plaintiffs and those similarly situated were required to work 70 hours per week or more under their agreements with Defendant. They were denied overtime over the 40 hours per six day work week.

82. Plaintiffs are entitled to unpaid overtime under the Fair Labor Standards Act, FLSA, because from approximately 2005 until the present, Plaintiffs and those similarly situated were employed as a full-time personal security specialists or other designations relating to

security specialists and trainers for personal security specialist, as well as snipers, who worked in excess of 40 hours per week in North Carolina and throughout the world.

83. Defendants are all enterprises engaged in commerce with annual gross receipts of more than \$500,000. Defendants Blackwater and successor companies are covered employers under the Fair Labor Standards Act. Defendants were engaged in interstate commerce when they employed Plaintiffs. Defendants failed to post a notice explaining the FLSA in conspicuous places where Plaintiffs, and those similarly situated, were employed.

84. Plaintiffs and those similarly situated were subject to the same policies, procedures, and practices, including the same classification, timekeeping, and payroll policies, procedures, and practices as those classified as employees who worked alongside them.

85. The Plaintiffs and others similarly situated were non-exempt employees, eligible for overtime compensation, under the FLSA who had the following duties: training, protective details, driving, delivering personnel to various locations, filling out reports, conducting operations as assigned, providing briefings as assigned, providing personal security detail services when assigned, responding to threats at the Embassy or around the embassy. Their primary duties did not consist in management of Blackwater facilities or personnel, did not regularly and customarily direct the work of two or more other employees, and did not have authority to hire or fire other employees, and their suggestions were not given particular weight on the hiring, firing, advancement, promotion or other change in status of other employees.

86. Plaintiffs and those similarly situated, were required to work 70 hours or more as exempt employees in any given week but were not paid overtime.

87. The misclassification of Plaintiffs and those similarly situated was intentional, willful and knowing, and subjects Defendants to liquidated damages, penalties, and interest.

88. Alternatively, under the North Carolina Wage and Hour Law, § 95-25.4, Plaintiffs and those similarly situated are non-exempt employees of a North Carolina business who entered into an agreement for employment in North Carolina, to be partly performed in North Carolina, and misclassified Plaintiffs and other similarly situated as independent contractors who were required to or suffered to work more than 40 hours per week, and who were not paid overtime.

89. Upon information publicly available, and during the times relevant to this Action up until now, Defendants employed and continue to employ as many as four thousand (4,000) similarly situated Independent Contractors like Plaintiffs world wide per year.

90. Alternatively, in states in which similarly situated employees of Defendants had residence in Massachusetts, Massachusetts Independent Contractor Law ("MICL"), M.G.L. c. 149, §148B, Maryland Workplace Fraud Act, and other states, there is a right to obtain treble damages, attorneys fees and other penalties for misclassification of employees. Those plaintiffs and class members from those states are entitled to claim under those laws. Under the Illinois Employee Classification Act (ECA), 820 ILCS 185/1-999, misclassification as an independent contractor entitles a misclassified employee to sue for lost wages, benefits, liquidated damages, compensatory damages, costs and attorneys fees, and under the Illinois Consumer Fraud and Deceptive Business Practices Act, an employee may recover for deceptive and fraudulent business practices depriving the employee of wages, benefits, civil penalties, treble damages, and attorneys fees.

91. Plaintiffs and those similarly situated are entitled to have pay for overtime, liquidated damages, penalties, and interest, plus attorneys fees as provided by the FLSA and the North Carolina Wage and Hour Law, and treble damages and attorneys fees for those similarly situated class members from Massachusetts, Illinois and Maryland's misclassification laws.

COUNT VII

(Civil Conspiracy to Defraud Plaintiffs and those Similarly Situated)

92. Plaintiff repeats and incorporates by reference each and every allegation set out in paragraphs 1 through 91 above.

93. Defendants conspired one with another, and with third parties, making agreements among themselves to misclassify Plaintiffs and those similarly situated, making agreements to prevent them from knowing what they were signing or from having copies, instructing them to refrain from raising questions about independent contractor status, what they were signing and other issues related to their legal rights.

95. The Defendants and other third persons conspired to defraud the Plaintiffs and those similarly situated as to the benefits of employment to which they were due, and undermined their rights and the fruits of their labors by so conspiring.

96. Defendants conspired with their subsidiary companies, to commit the acts aforesaid against the Plaintiffs and those similarly situated. Their acts amount to a civil conspiracy to defraud the public and harm Plaintiffs, and a conspiracy to deprive them of employment benefits. It is also a conspiracy to commit fraud. It is also a conspiracy to breach contracts with Plaintiffs and those similarly situated.

97. Defendants intentionally deprived Plaintiffs and their families of benefits, which caused damages including loss of property, loss of savings, loss of income from unemployment benefits, and other damages. This conduct by Defendants was without justification, which would otherwise be lawful, and constitutes a prima facie tort, and conspiracy to commit a tort.

98. The conspiracy to commit these torts, breaches of duty, and prima facie tort actually caused the damages set forth herein.

99. In all the actions described in this complaint, defendants acted through their agents, officers, attorneys, representatives, insurance carriers through their officers, agents, attorneys and insurance adjusters and managers, which were acting in the course and scope of employment or agency or representation for defendant companies and plan administrators, and which defendant companies ratified all of the acts described in this complaint.

100. Plaintiffs have been damaged in their persons, property, and out of pocket expenses, and attorneys fees.

101. The conduct of Defendants was wanton, willful, malicious, oppressive, intentional, fraudulent, and beyond the bounds of acceptable behavior in a civilized society, justifying an award of punitive damages to punish this conduct and deter others from doing the same in the future.

COUNT VIII
(Preliminary and Permanent Injunctive Relief)

102. Plaintiff repeats and incorporates by reference each and every allegation set out in paragraphs 1 through 101 above.

103. This claim is brought pursuant to 29 U.S.C. § 1132(a) (3), which provides that:

[a] civil action may be brought – (3) by a participant [or] beneficiary . . . (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan

and pursuant to 29 U.S.C. § 1132 (a) (2) allowing a participant or beneficiary to bring suit for appropriate relief under 29 U.S.C. § 1109.

104. This Court has the authority to issue a declaratory judgment finding that the Defendants' conduct is in violation of the provisions of ERISA, to enjoin such practices, to require Defendants to make payments and to adequately disclose information regarding payments and benefits to Plaintiffs and the Class, and to allow Plaintiffs to recover benefits due to them.

RELIEF REQUESTED

WHEREFORE, Plaintiffs pray for judgment for Plaintiffs and for the following relief:

- (a) Judgment against Defendants for the Amount of benefits, FICA and FUTA withholding, withholding for state unemployment, withholding for federal local and state income tax if any, lost unemployment benefits, premiums for health and disability policies, employee stock options, or other out of pocket expenses and benefits denied Plaintiffs;
- (b) Judgment against Defendants for foreseeable breach of contract, implied contract and covenant of good faith and fair dealing;
- (c) Judgment against Defendants for intentional and negligent misrepresentation;
- (d) Judgment against Defendants finding that their practices violate 29 U.S.C. § 1132 (a)(2), (3) and corresponding provisions;
- (e) Judgment against Defendants prohibiting them from engaging in similar conduct with regard to Plaintiffs and other beneficiaries;
- (f) Judgment against Defendants for civil conspiracy and prima facie tort, damages,

and punitive damages;

(g) Reasonable attorneys' fees, civil penalties, liquidated damages, treble damages, and costs of the action;

(h) Damages in the amount of \$120,000,000.00 for Plaintiffs' economic and noneconomic damages;

(i) Any other relief consistent with the goals of ERISA which the Court deems just and proper; and,


(j) Punitive damages in the amount of \$120,000,000.00.

JURY DEMAND

Plaintiff demands trial by jury on all issues so triable as a matter of law.

Dated: September 19, 2011

Respectfully submitted,



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