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)

PLAINTIFF'S MEMORANDUM IN SUPPORT OF THEIR OPPOSITION TO DEFENDANT CONTRACTORS' MOTION TO DISMISS

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PLAINTIFF'S MEMORANDUM IN SUPPORT OF THEIR OPPOSITION TO DEFENDANT CONTRACTORS' MOTION TO DISMISS PURSUANT TO RULES 12(b)(1) AND 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Defendants' Motion to Dismiss should be denied because Defendants have not carried their burden to show no claims exist. 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" and not while performing under a defense base contract in Iraq; they in no way preempt common law breach of contract claims, RICO, fraud or other claims for deliberate and malicious acts committed after employment ended and for which no workers compensation benefits are sought.

The injuries Plaintiffs suffered in this action occurred after they suffered job related injuries. Plaintiffs' purpose in bringing this action to stop the Defendants from continuing to engage in a course of conduct by which Defendants have calculatedly and systematically cheated the United States and the entire class of persons whose care and compensation for injuries has been confided to the DBA. By way of analogy: If an automobile manufacturer is contractually obligated, as a part of the purchase price, to service cars it sells by changing the oil, a failure to

properly do so in a particular instance might be a breach of contract, or a breach of warranty. But if the facts are that, system wide, the manufacturer has instructed its dealers and mechanics to only pretend they are performing the service, while falsifying service records, all in order to reduce operating costs and thereby increase profit, then the claim becomes very different. The manufacturer would not be heard to say its customers are limited to warranty claims and warranty claim periods. So here, 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]

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

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 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

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

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 $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

[4] SAC ¶¶ 345-68.
[5] SAC ¶¶ 130-66.

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. 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,

[6] *Id.* ¶¶ 100-10.
[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.

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 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 and 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

[10] *See id.* ¶ 187.
[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).

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]

I. THE DEFENSE BASE ACT'S REMEDY 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. In other words, where the defendant's behavior entitles the plaintiff to bring a remedial claim, entitlement to compensation under such an action becomes a minimal concern in light of the defendant's wrongful conduct. Plaintiffs here are entitled to such claims.

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 contractors and insurance companies after they have accepted the claim and are paying benefits and/or benefits have been paid

Defendants attempt to say that if the Court were to allow Plaintiffs to obtain any justice outside of the DBA workers compensation system, it would make a mockery of the workers

[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).
[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).

compensation scheme set up by Congress. It is Defendants who have made a mockery of that system by deliberately circumventing its provisions in an attempt to harm Plaintiffs, and conspired with the insurance carriers to create a system that gives them utter impunity to inflict financial ruin on Plaintiffs and their families, cause them new injuries through deliberately dishonest behavior and to circumvent the law without making much excuse. This flies in the face of the purpose of the DBA and LHWCA, and also in the face of over two hundred years of jurisprudence, that malicious behavior that harms individuals should be provided a remedy.

Even if certain employers' tortious conduct is protected or offered limited liability under a statutory codification, the court should not more broadly construe the exclusive remedy for anything beyond that which it protects. 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….".[19] 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. The exclusive remedy provision of the LHWCA reads, in relevant part, as follows:

> "The liability of an employer prescribed in section 904[20] of this title shall be *exclusive and in place of all other liability of such employer to the employee*, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty **on account of such injury or death**, *except that* if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative

[19] 383 U.S. 53, 61-62 (1966) (*citing United Construction Workers, etc. v. Laburnum Construction Corp*., 347 U.S. 656, 665 (1954)).

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

> 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.[21]

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**[22], 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."[23]

1. The *Martin/Atkinson* Exception to the Exclusive Remedy Doctrine

The First Circuit in *Martin v. Travelers Ins. Co.*[24] 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.[25] 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 agree. 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

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[21] 33 U.S.C. § 905(a). (emphasis added)

[22] 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).

[23] 42 U.S.C. § 1651(c). (emphasis added)

[24] 497 F.2d 329 (1st Cir. 1974).

[25] *Id.* at 330.

emotional distress due to insurer's intentional and malicious refusal to pay benefits in a Defense Base Act case. *Atkinson v. Gates, McDonald & Company*[26], 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 *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*."[27]

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."[28] Since most of the Plaintiffs have an entitlement to benefits accepted by Employer and Carrier, the exception to the bar recognized by the *Martin/Atkinson* courts applies to compensate Plaintiffs.

In *Sample v. Johnson*[29], 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."[30]

In this case, Plaintiffs have valid claims under the *Martin/Atkinson* standard, 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

[26] 838 F.2d 808 (5th Cir. 1988).
[27] *Id.* at 813. (emphasis added)
[28] *Id.* at 814.
[29] 771 F.2d 1335 (9th Cir. 1985).
[30] *Id.* at 1347. (emphasis added)

Busse, Brewer, Mercadante, Byars, Thompsen, Kreesha, Alsaleh, Jones, Ambrose, Steenberg, Bezuidenhout, Brink and Pool.[31] Other plaintiffs not listed above experienced similar situations of distress at the hands of Defendants.

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. Defendants' Failure To Secure Payment Of Compensation Through False Statements And Representations Estops Their Assertion of the Bar

In order for employers to retain their protection under LHWCA § 905(a), they must secure payment of compensation or face civil liability. The LHWCA does not allow Employers to perpetrate a scheme that denies entire classes of persons effective right to timely benefits or any benefits at all, through false statements and representations, and then claim the exclusive remedy bar. These Employers and carriers forfeit their right to claim the bar and are no different from those employers/insurers who fail to secure compensation as prescribed by § 932(a).[32] 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."[33] However, since their method of denying Plaintiffs their due

[31] *See* SAC ¶¶ 81, 88, 103,122, 133, 175, 187, 200-01, 212, 225, 240, 260-68, 353, 355-60; 373-83; 386-94.
[32] 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).
[33] 33 U.S.C. § 931(c).

compensation constitutes behavior not taken into account by the DBA/LHWCA, the exclusive remedy cannot bar any liability derived from such 'external' behavior.

When a contractor and insurer combine to prevent persons from accessing benefits, it is the same as if they did not have any insurance available to cover injuries. This is true of a whole class of persons represented in this action by the foreign ctractors, including Plaintiffs Tablai, Swart, Hadi, were specifically misdirected from any benefits. The defendants and their carriers engaged in concerted fraudulent scheme to avoid ever making such benefits available to thousands of foreign contractors, explaining or informing foreign contractors, third country nationals, Afghanis, Ugandans, South Africans, Iraqis, and others that they could access benefits, denied to investigators that persons had been killed or injured, and when confronted with evidence of such, denied such persons were covered by them. (See, e.g., SAC ¶¶ 524-60.)

In other cases, they withheld visas, passports, transport, or other care necessary to quickly obtain diagnosis or medications to individuals in Iraq and Afghanistan as set forth in numerous Plaintiffs' descriptions such as Merlin Clark, Marcie Clark, CJ Mercadante, Miguel Tablai, Surita Swart, Malik Hadi,, and Mark McLean. Sometimes the failure to secure any care was part of the "zone of special danger" in which Defendants had placed Plaintiffs which discouraged or prevented any effective medical care under pain of termination – i.e. DynCorp with Steenberg, Swart, Tablai; Ronco with Clark; Blackwater with Mercadante.[34]

[34] *See O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504, 507 (1951) (the employee, while spending the afternoon in employer's recreational facility near the shoreline in Guam, drowned when attempting to rescue two men in a dangerous channel, finding DBA coverage: "[a]ll that is required is that the obligations or conditions of employment create the zone of special danger out of which the injury arose." *Accord O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 365 (1965) (DBA "zone of special danger" doctrine covers employee who drowned in a lake in South Korea during a weekend outing away from the job because employee had to work "under the exacting and dangerous conditions of Korea."); *Ford Aerospace & Communications Corp. v. Boling*, 684 F.2d 640 (9th Cir. 1982) (heart attack while off duty in barracks provided by employer in Thule, Greenland, is covered under zone of special danger test).

Defendants do not even make an effort to secure compensation to numerous Plaintiffs and actively misled them about their rights: 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 employers' exclusive remedy provision is meshed with inadequate employer 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.*"[35]

3. The DBA Exclusive Remedy Is Unavailable Where The Injury Is Not Accidental

The DBA exclusive remedy is inappropriate when an injury is not the result of an accident[36]. In *Kane v. Federal Match Corp.*, the Court held that an employee's injury – not arising from an accident – is not limited to compensation under the provisions of a state's workers' compensation act.[37] When accidental harm results to an employee, 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. 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.

A. <u>Plaintiffs' Claims Are Not Preempted By The DBA's Exclusive Remedy</u>

[35] *See* H.R. REP. 98-570, 17, 1984 U.S.C.C.A.N. 2734, 2750, 1984 WL 37419, 15 (emphasis added).
[36] *See* LHWCA (injury as an accidental injury or death arising out of and in the course of employment).
[37] 5 F. Supp. 507 (D.C. 1934).

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 land…". Accordingly, *any* federal law or regulation trumps *any* conflicting state law or state claims. Preemption can be either expressly[38] or impliedly[39] 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.[40] 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.[41] 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."[42] Here, there is no conflict with the DBA and federal and state law claims.

a. Claims Outside the DBA Lie When the Conduct Falls Outside what is Prescribed By The Act and Does not Conflict with DBA,

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:

[38] 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.
[39] 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.
[40] 350 U.S. 497 (1956).
[41] *Id.* at 502-506.
[42] 458 U.S. 141, 152–53 (1982).

> "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."[43]

Plaintiffs here were injured in numerous ways due to their reliance on the Defendants' promises to cover bills the carrier had authorized, as well as when the contractor had promised medical treatment but then caused further injury by intentionally withholding and or delaying treatment. This was true of CNA/Ronco regarding Merlin Clark, DynCorp/CNA regarding Tablai, Brink, Swart, Steenberg, Bezuidenhout, Blackwater regarding Mercadante and Biddle, SEII/AIG regarding Thompson, McLean, Bell, and others, ACE regarding Theunissen and Ambrose, and numerous others, GLS/Zurich regarding Alsaleh and Kreesha, USIS/AIG regarding Patrick Brewer, 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

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

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 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.[44] Even though in *Ross* the Plaintiffs were unable to establish these, the facts in the current case sufficiently posit the foundation for such 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*."[45]

In this case, Defendants' failure to make the proper compensation payments resulted in the infliction of harm on Plaintiffs, which *Defendants could have reasonably anticipated*; Defendants subjected Plaintiffs to *reliance on compensational payments* for medicine and treatment; Defendants' *delay, termination, and/or minimization of compensation* have aggravated Plaintiffs' injuries. The concerns of courts that reject tort claims is that too often, as in *Fisher*, the Plaintiff is merely trying to recast negligence into an intent to injure. But when as in this case the Plaintiff can show deliberate harm, foreseeable by any reasonable insurer and contractor – this is not covered under the exclusive remedy provision concerning accidental injury.

[44] 362 F.Supp.2d 344, 364-65 (D.D.C. 2005).
[45] 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.

Other cases support the availability of remedies in this case: *Hernandez v. General Adjustment Bureau,* 199 Cal. App.3d 999, 245 Cal.Rptr 288 (1988) (plaintiff's cause of action not barred where defendant knew of plaintiff's susceptibility to profound mental distress and repeated suicide attempts and still intentionally delayed payment of workers' compensation disability benefits); *Correa v. Pennsylvania Manufacturers Association Insurance Co.*, 618 F. Supp 915 (D. Del. 1985) (recognizing right of employee to maintain suit to redress intentional 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, Defendants' failure to keep promises demonstrates a clear instance where the exclusive remedy bar is not preemptive.

ii. Defendants' tortious conduct towards Plaintiffs and in investigating claims makes the exclusive remedy unavailable

The exclusive remedy is no longer available when the carrier exhibits tortious conduct towards its employees 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.

Houston v. Bechtel Assoc. Prof'l Corp., recognized that when an employer inflicts intentional or malicious injury on an employee 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 act.[46] To take things further, the United States District Court for the District of Columbia also recognized that aggravated or malicious behavior on the part of the employer could result in punitive damages awarded to the employee.[47]

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 found 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.[48] 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).

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

[46] 522 F.Supp. 1094, 1095-96 (D. D.C. 1981).
[47] *Id*. at 1097.
[48] 512 So.2d 248 (Fla.App. 3 Dist. 1987).

Wrongful discharge and discrimination by employers is also relevant as § 948 of the LHWCA comes into play to provide a remedy for employees who are wrongfully terminated. § 948(a) delineates a non-exclusive remedy for discrimination:

> "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*…."[49]

If follows from the statutory text above that since employee discrimination due to a compensation claim tolerated under § 948(a) does not equate the injury prescribed under § 902(2). Retaliatory discharge is not "on account of the injury or death" and renders such action outside the plain language of the exclusive remedy provision found in § 905(a).

The Court in *Reddy v. Cascade General, Inc.* 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*…."[50] Similarly, the Court in *Herbert v. Mid South Controls & Services* 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."[51]

Furthermore, 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

[49] 33 U.S.C. § 948(a). (emphasis added)
[50] 227 Or.App. 559, 567 (Or. App. 2009) (emphasis added).
[51] 688 So.2d 1171, 1175 (La. App. 1996).

discharge remedy, thus the former was not preempted by the latter.[52] In *LaCour v. Lankford Co., Inc.,* the Court found that the exclusive remedy provisions did not bar the Plaintiff's wrongful discharge claim.[53]

Bringing claims for wrongful or retaliatory discharge outside of the scope of LHWCA exclusive remedy provisions is not barred. § 948 provides a nominal remedy for employees who are wrongfully terminated, thus numerous courts have tolerated employee claims against the employer on such matters. Referring back to *Reddy*, 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."[54] Similarly, in *Herbert* it was held that just because an employee obtained a judgment from the Benefits Review Board under the LHWCA exclusive remedy, the employee was not barred from also bringing a retaliatory discharge claim under state law.[55] 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.

Defendants KBR and AIG discriminated against Plaintiff Bell by withholding his personal goods, threatening to sell them, *terminating his medical benefits,* failing to send him timely COBRA notices, and causing him and his wife great hardship upon his return to the United States. 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

[52] 617 So.2d 959, 961 (La.Ct.App. 4th Cir.).
[53] 287 S.W.3d 105, 110-11 (Tex. App. 2009).
[54] *Reddy,* at 571-72.
[55] *Herbert,* 688 So.2d 1171.

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*. 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. 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.[56]

Adams v. George W. Cochran & Co. held that when an employee is terminated because he refused to violate a particular law, he has the right to bring a wrongful discharge action against his employer.[57] Furthermore, as noted by *Fisher* above, conspiring to harm an employee 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. In *Riggs v. Home Builders Institute,* the court declined to dismiss an employee'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.[58] 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.[59]

In the SAC, Plaintiffs have pleaded such conspiracy and acts of third party administrators to deprive Plaintiffs of their benefits, assault them, come onto their property, refuse them medication when it has been approved by the insurance carrier, threaten them, and so forth. These actions are all done by agents of Defendant employers/contractors. Defendants CNA and

[56] *See* SAC ¶¶ 75, 102-103, 109. 202, 211, 214.
[57] 597 A.2d 28, 30 (D.C. 1991).
[58] 203 F.Supp.2d 1 (D.D.C. 2002).
[59] 637 A.2d 830, 847 (D.C.1994).

Ronco have conspired together to fire Plaintiff Clark after he settled his disability claims.[60] CNA claims that Blackwater will not provide them with any medical records for Plaintiff Mercadante and KBR send no records at all, thus hiding documentation confirming a work injury that would demonstrate a need for treatment. 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. ACE and AIG both conspired with ITT to refuse paying Plaintiff Ambrose his TTD benefits, even though ITT never asserted it was not obligated to pay disability benefits and provide medical care. 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. 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. CNA and DynCorp also conspired against Plaintiff Steenberg by refusing to pay his PTD payments required by order.[61]

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.[62] 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.

[60] *See, e.g.,* SAC ¶ 111.
[61] *See id.* ¶ 133, 187, 240-41, 288, 365, 367, 384.
[62] *Hais v. Smith*, 547 A.2d 986, 987 (D.C. 1988).

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.[63] Similarly, in *Davis v. Rockwell Intern. Corp.*, an identical ruling was delivered.[64] Several other case law decisions concur, offering plausible circumstances when the exclusive remedy is not a bar.[65] The willful injury exception, as seen by case law in the prior footnote, is one such circumstance.

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. *See* SAC ¶ 322, 325, 328. 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. *See id.* ¶ 283. Plaintiff Thompsen was refused PTSD treatment after KBR and AIG asked their own doctor to redo his report because he was

[63] 247 U.S. 207 (1918).
[64] 596 F.Supp. 780, 787 (D. Ohio 1984).
[65] *See Ladner v. Secretary of H.E.W.*, 304 F.Supp. 474 (S.D. Miss. 1969) (plaintiffs may pursue benefits under social security for same disability in addition to DBA/LHWCA claim); *Palermo v. Letourneau Tech., Inc.*, 542 F.Supp.2d 499 (S.D. Miss. 2008) (the LHWCA does not occupy the field of wrongful discharge and employment so as to preempt a state law claim for wrongful discharge for pursuit of workers compensation benefits); *Machado v. National Steel & Shipbuilding Co.*, 9 BRBS 803 (1978) (an administrative judge lacks the power to make a determination regarding breach of contract claims, even if plaintiffs could proceed under Section 948(a) of the DBA); *Winburn v. Jeffboat, Inc.*, 9 BRBS 363 (1978) (an administrative judge has no authority under Section 49 to determine whether or not an employee was dismissed for justifiable cause under employment contract terms; rather, he only has the authority to determine the existence of discriminatory animus for filing a compensation claim); *Hais*, supra (an 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, supra* at 1096 (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.").

exaggerating symptoms, thus demonstrating a bad-faith refusal to pay compensation. *See id.* ¶ 187. 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. *See id.* ¶ 488. Plaintiff Louw was greatly harmed as a result of DynCorp's and CNA's neglect to accept her psychological disability and refusal pay her accordingly. *See id.* ¶ 412.

It also follows that intentional and malicious behavior by employers 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 employers demonstrate malicious and wanton behavior, tinged with intimidation and dishonesty, and essentially behave like thugs by threatening and intimidating employees for bringing injury claims.[66] Punitive damages are also recognized in other case law under similar circumstances.[67]

Plaintiffs seek compensation based on Defendants' behavior that cannot be remediated under either the DBA or the LHWCA. Accordingly, the exclusive remedy provisions of these Acts are not preemptive and find no application to this case.

B. The Exclusive Remedy Does Not Apply to Non-Employees And Only Pertain To Injuries Sustained In The Course Of Employment

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 and USIS contracts, for instance, provides for DBA coverage; however, they explicitly make Plaintiffs independent contractors. In *Gordon v. Commissioned Officers' Mess, Open*, it was held that a worker must be an "employee" in order

[66] 961 A.2d 1080, 1090 (D.C. 2008).
[67] *See Houston*, 522 F.Supp. at 1096-97 (D.D.C. 1981) (when there is aggravated and malicious employer behavior, employees' claims for punitive damages are also possible).

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.[68] Other case law upholds the reasoning in *Gordon.*[69] 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."[70] 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."[71] As such, "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."[72] The District of Columbia has also held the LHWCA does not appertain to independent contractors.[73] This results from the premise that an independent contractor is not officially an employee.

Although KBR is being sued by certain Plaintiffs here, it is not the employer; SEII is the employer. SEII is an offshore company, but Plaintiffs have sued KBR (Kellogg-Brown & Root, LLC or Inc).[74] Plaintiff Christine Holguin-Luge is suing KBR and Khudairi Trading, who is not her employer but a subcontractor of KBR whose employee committed intentional torts against her, and following her ordeal, KBR inflicted intentional and deliberate acts against her to intensify her suffering and harass her and intensify her suffering, and following her breakdown and leaving Iraq, utterly refused to provide any relief for her or acknowledge her injuries as part

[68] 8 BRBS 441 (1978).
[69] *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).
[70] 503 U.S. 318, 323 (1992).
[71] 285 U.S. 22, 54-55 (1932).
[72] *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.*
[73] *See Cardillo v. Mockabee*, 102 F.2d 620 (D.C. Cir. 1939).
[74] SAC ¶¶ 25, 72, 257.

of their responsibility.[75] KBR was not the actual employer, and Plaintiffs will need to amend to show the exact employment relationship. See Declaration of Scott J. Bloch, attached **Exhibit 1**. In the case of Ronald Bell, well after his employment in Iraq for SEII ended, and his knee injury was accepted as work related, KBR employees showed up at his house in Lubbock, Texas, to threaten him and warned him to drop his PTSD claims or else, prompting him to file a Sheriff's report. His attorney wrote to KBR's counsel, who did not deny the incident occurred.[76]

Where AECOM is being sued, CSA Ltd. is the actual employer, an off-shore company.[77] Academi is the defendant contractor at issue with some Plaintiffs, yet the actual employers in those cases are Blackwater USA and Blackwater Lodge Security. DynCorp International is the contractor, however the employer is DynCorp International FZ, or UAE Company where appropriate. The same is true with Northrop Grumman; they are being sued whereas the actual employer is Vinnel Arabia. Furthermore, the independent contractors being sued – i.e. Academi (Plaintiff Mercadante), USIS (Plaintiff Brewer) – are not employees by status and cannot be offered the protection of the exclusive remedy. All these demonstrate specific instances where no employment relationship exists as defined by *Darden* and *Crowell*, so the exclusive remedy is not available.[78]

1. Injuries Outside The Course Or Scope Of Employment and Suits Against Carriers who did not Provide the Insurance are Not Barred

The DBA concerns itself with "**injury or death of any employee engaged in any employment**"[79], and so the "liability of an employer, contractor, [or any subcontractor…] shall

[75] *Id.* ¶¶ 321-44.
[76] *Id.* ¶¶ 77-79.
[77] *Id.* ¶ 31.
[78] See Responses of Plaintiffs to Individual Briefs of Academi, USIS, DynCorp, Exelis, AECOM/CSA, and Northrop Grumman, .
[79] 42 U.S.C. § 1651(a).

be exclusive and in place of all other liability of such employer…"[80] The DBA only defines the liability for compensation resulting out of work-related injuries. 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[81] is present. § 904 employer 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, Plaintiffs make no §§ 907-909 claims; rather, they seek compensation for injuries outside the DBA/LHWCA remedies. For instance, Plaintiffs Holguin-Luge, Thompsen, Alsaleh, Jones, Busse, Biddle, Bell, Porch III, Griffin, Mercadante, and McAnally are all seeking compensation outside the DBA.[82] There is no law extending exclusive remedy provision to claims on account of injury or death **outside** the course of employment. Therefore, the exclusive remedy does not apply to numerous Plaintiffs in this case including Nicky Pool, Marcie Clark, the foreign contractor DynCorp employees, those who worked for SEII, CSA, Vinell Arabia, Blackwater, USIS, because the employer has not been sued. This is true also of CNA Financial Corp, ESIS, AIG, as they are not the insurers.

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

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), § 1962, makes it:

> (b) … "unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

[80] 42 U.S.C. § 1651(c).
[81] 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 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)
[82] *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."

> (c) … unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) … unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."[83]

Rule 9(b) of the Federal Rules of Civil Procedure require that a plaintiff plead allegations of fraud with particularity.[84] "This means the who, what, when, where, and how: the first paragraph of any newspaper story."[85] However, the particularity requirements of Rule 9(b) must be read in harmony with the requirement to make out a "short and plain" statement of the claim.[86] Thus, the particularity requirement is satisfied if the complaint "identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations."[87] Plaintiffs' SAC complies with this standard because it establishes that Defendants did create or maintain an enterprise that conducted at least two of the predicate acts for the common purpose of defrauding Plaintiffs of their entitled benefits, and substantially effected interstate and foreign commerce while doing so. Defendants have been given sufficient information to answer the complaint and prepare to defend against the allegations.

A. Plaintiffs Have Standing To Assert A Claim Under RICO

Plaintiffs asserting a cause of action sounding in RICO must satisfy the requirements of standing as set forth in section 1964(c) of the RICO statute.[88] That section confers standing upon Plaintiffs that can show an injury to their business or property as a result of Defendants' conduct

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[83] 18 U.S.C. 1962.
[84] Fed. R. Civ. P. 9(b).
[85] *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990).
[86] Fed. R. Civ. P. 8(a)(2)
[87] *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 540 (9th Cir. 1989); *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) ("Rule 9(b) demands that, when averments of fraud are made, the circumstances constituting the alleged fraud be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong.") (internal quotation marks and citations omitted)
[88] *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992).

in violation of the RICO statutes.[89] The courts have interpreted this language to require that (1) Plaintiffs suffered an injury to their business or property, and (2) that the injury was proximately caused by the behavior of the Defendants.[90] Defendants' motion to dismiss incorrectly identifies the basis for Defendants' recovery as stemming from the personal injuries that triggered the entitlement to benefits under the Defense Base Act in the first place.[91] Plaintiffs, however, assert their RICO claims stemming from injuries that occurred as a result of the deprivation of benefits to which they were promised, which case law has clearly established gives Plaintiffs a property interest in those benefits.[92] Defendants' withholding of benefits to which Plaintiffs had an established property interest directly lead to the injuries that Plaintiffs have suffered in their persons, property, credit, and relationships.

1. Plaintiffs Have Sustained An Injury To Their Business or Property

In a civil action for violations of RICO, Defendant is liable for treble damages, costs, and attorney's fees where an injury to a person's business or property has been shown.[93] Therefore, to recover, Plaintiff must show that they have sustained an injury to their business or property. In *Brown et al. v. Cassens Transport Co. et al.* the United States Court of Appeals for the Sixth District made clear that a "nondiscretionary worker's compensation scheme creates a property interest in the expectancy of statutory benefits following notice to the employer of injury."[94] In that case, some of the claimants had not yet received any benefits for which they were entitled, yet the Court held that even "the plaintiff's *claim* for benefits is an independent property interest, the devaluation of which also creates an injury to property within the meaning of RICO."[95]

[89] *See* 18 U.S.C. 1964(c).
[90] *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F. 3d 235, 246 (3d. Cir. 2012).
[91] Doc. No. 80-1, p. 23-25
[92] *Brown et al. v. Cassens Transport Co. et al*, 675 F. 3d 946, 958 (6th Cir. 2012).
[93] 18 U.S.C. 1964(c).
[94] 675 F. 3d at 958.
[95] *Id.*

Furthermore, the Court made clear that a person already receiving benefits for which he is statutorily entitled "has a statutorily created property interest in the continued receipt of those benefits."[96] Therefore deprivation of a person's benefits to which he is entitled under the DBA—whether or not the claimant has actually received benefits yet but has at least filed a claim—is a deprivation of that person's property as defined under RICO, entitling that person to all relief permitted under RICO, so long as the injured claimant is, in fact, entitled to the benefits.

The language of the DBA creates such an entitlement to an employee who has been injured or suffered occupational diseases, or death while on foreign soil in support of defense activities under the DBA. The Act provides that the provisions within shall be construed "liberally to provide benefits," and "[c]ompensation shall be payable irrespective of fault as a cause for the injury."[97] Additionally, the Longshore Act, for which the DBA operates under, attaches a presumption to the allegations in support of the claim, in the absence of "substantial evidence to the contrary."[98] Based on these terms, it is clear that an injured worker who files a claim for compensation under the DBA is entitled to those benefits immediately after having filed, absent evidence that disputes an injury has occurred. Additionally, Defendants' misrepresentations to Plaintiffs by saying that benefits had been approved and then denying the disbursement of those benefits deprives Plaintiffs of benefits to which they were promised and therefore had a property interest in. Plaintiffs, here, have each filed such claims for benefits, yet have not been given their benefits to which they are entitled by the DBA, and promised by Defendants, whereby causing a deprivation of property as defined by RICO.

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[96] *Id.*(quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 60 (1999)) (citing *Goldberg v. Kelly*, 397 U.S. 254, 262 & n.8 (1970)); *Perry v.Sindermann*, 408 U.S. 593, 601 (1972); *Logan*, 455 U.S. at 428; *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *see also Williams v. Hofley Mfg. Co.*, 424 N.W.2d 278, 282, 283 n.16 (Mich. 1988) (relying on federal due process law articulated in *Logan*, 455 U.S. at 428).

[97] 33 U.S.C. § 904.

[98] 33 U.S.C. § 901.

Additionally, employers are obligated to pay compensation—including compensation for permanent total disability, temporary total disability or permanent partial disability—regardless of whether an employee files an administrative claim,[99] and requires that such compensation "be paid periodically, promptly, and directly to the person entitled thereto."[100] Therefore, even when an employee fails to file a claim for compensation, that employee is still entitled to those benefits under the language of the DBA, and is therefore deprived of their property interest under the terms of RICO when an employer or carrier denies the injured worker compensation, or reduces or delays compensation to an injured employee when such benefits should be paid "promptly." This approach is consistent with the Sixth Circuit's interpretation of due process rights as they relate to expected workers' compensation benefits.[101] In *Brown*, the Sixth Circuit held that "[f]ederal due process law [ ] recognizes a property interest in benefits that have not yet been awarded if the party asserting the property entitlement can point to some policy, law, or mutually explicit understanding that both confers the benefits and limits the discretion of the [other party] to rescind the benefit."[102] The language of the DBA is such a law or policy that confers benefits while limiting discretion to avoid paying.

In *Brown*, Michigan workers sued, under RICO, for compensation benefits that were due to them, but had been denied as part of a scheme between the carriers, employers, and a doctor to avoid paying such claims. The Sixth Circuit decided that deprivation or diminution of their benefits to which they were entitled was a deprivation of their property interest created by the statute entitling them to such benefits.[103] Therefore, Plaintiffs had sustained sufficient injury to

[99] *see* 33 U.S.C. §§ 904(a) and 914(a)
[100] *id.* at § 914(a)
[101] *See Brown*, 675 F.3d at 962.
[102] *Id.* (internal quotations omitted)
[103] *Id.* at 958-965.

have standing to sue under RICO.[104] Plaintiffs here also have a property interest in their expected benefits. Defendants have, and continue to, deprive Plaintiffs of their property interests as described above. Paragraphs 1-560 of Plaintiff's Second Amended Complaint spell out with sufficient detail the deprivation and diminution of benefits to Plaintiffs, of which they are entitled. Based on those assertions, Plaintiffs have shown that they were entitled to compensation that qualify as property interests under the terms of RICO, and Defendants, through their willful and malicious actions denied them of those property interests causing injury and making Defendants liable under RICO.

Moreover, claimants have a property interest in the fair adjudication of their claims.[105] "Even if a person cannot ultimately satisfy the criteria to receive the statutory entitlement, she still has a property interest in her statutory right to raise the claims and be subject to a fair proceeding on the merits of her claims.[106] Here, claimants were afforded no such "fair proceeding." Defendants unscrupulously declined Plaintiffs' claims without properly investigating the merits, and even once determining that the claim was meritorious, still denied claims. Not only were claimants denied proper treatment of their claims, but they were also denied the benefits after their claims had been deemed appropriate. Therefore, Plaintiffs have proper standing because they have sustained injury to their property interest as required under RICO.

2. Plaintiffs Have Suffered From Injuries That Are Directly And Proximately Caused By The Conduct of Defendants

The injury to Plaintiffs' property interest as established above is directly and proximately caused by Defendants' conduct. The United States Supreme Court makes clear that in order to

[104] *Id.*
[105] *Brown*, 675 F. 3d at 966.
[106] *Id.*

state a claim under RICO, the Plaintiff must show that the Defendants' conduct "not only was a 'but for' cause of his injury, but was the proximate cause as well."[107] The Court explained that proximate cause "should be evaluated in light of its common-law foundations," requiring that Plaintiffs show a direct link between the behavior and the harm.[108]

Here, Defendants repeatedly assured Plaintiffs that they were entitled to benefits, that benefits had been paid, or that benefits would be paid. Having made such promises, Defendants then, without informing Plaintiffs, never paid what they had promised. The resulting injury was a deprivation of Plaintiffs' property rights that led to additional physical harms, psychological and mental harms, social harms, and financial harms that are independent from the initial injuries that triggered the DBA to begin with. There is no other reason whatsoever that caused Plaintiffs to be deprived of the benefits that they were promised other than the direct refusal to pay by Defendants. But for the refusal of Defendants to pay due compensation, Plaintiffs would not have suffered the injuries for which they seek redress.

Furthermore, the 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.[109] Therefore, Plaintiffs have established the causal relationship between Defendants' actions and their injuries sufficiently to establish proper standing for their claims under RICO.

B. Plaintiffs Have Properly Plead RICO Predicate Acts and RICO Enterprise

Plaintiff's SAC pleads sufficient facts and allegations to establish that Defendants acquired and/or maintained an interest in or control of an enterprise of individuals that were

[107] *Hemi Group, LLC v. City of New York, N.Y.*, 130 S. Ct. 983, 989 (2010)(citing *Holmes*, 503 U.S. at 268).
[108] *Id.*
[109] SAC at paragraphs 39 – 71, and with specificity as to each named Plaintiff in paragraphs 72 – 560.

associated in fact. That enterprise did engage in at least two of the predicate acts that are itemized in the RICO statute by wire or by mail, which did affect interstate and foreign commerce and cause injury to Plaintiffs, in violation of 18 U.S.C. §§ 1961-1968.

A "pattern of racketeering activity" is established when there is at least two predicate acts that "amount to or pose a threat of continued criminal activity."[110] The predicate acts that meet the requirements of the RICO statute are listed in § 1961(1) and include, in part, any act indictable under section 1341 (relating to mail fraud) and section 1343 (relating to wire fraud) of title 18 of the United States Code. To establish a pattern, the predicate acts must bear some relation to each other or to some other external motivation , but Congress "indeed had a fairly flexible concept of a pattern in mind."[111] Therefore, to show that a pattern of racketeering exists, a plaintiff must show at least two predicate acts that bear some relation to each other or to an external scheme which the acts further.[112]

The establishment of continued criminal activity is dependent upon the individual facts of each case.[113] In *H.J. Inc.*, The Supreme Court gave several examples of situations that would constitute continued activity including "where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO 'enterprise.'"[114]

Plaintiffs' SAC pleads facts that establish how Defendants have each engaged in predicate acts sufficient to establish a "pattern of racketeering." Although the RICO statutes

[110] *Robertson v. Cartinhour*, --- F. Supp. 2d ---- (2012)(quoting *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989)).
[111] *H.J. Inc.*, 492 U.S. at 238-239.
[112] *See Id.*
[113] *H.J. Inc.*, 492 U.S. at 242.
[114] *Id.* at 243.

require merely two predicate acts that "amount to or pose a threat of continued criminal activity," Plaintiffs' allege numerous acts of mail or wire fraud that satisfy the requirements of RICO and show continuous and ongoing criminal activity, spread over several years, with multiple contracts with the government and with Plaintiffs, including exclusive contracts of insurers. Defendants, through their agents, officers, attorneys, representatives, adjustors, and managers by using telephone , email, and fax as well as regular mail made specific misrepresentations to Plaintiffs, Department of Labor OWCP and OALJ, and others regarding issues of compensability of claims and distribution of benefits so that they could collect large premiums from the United States, but do not pay out claims as they are required by the DBA and other laws, stopping payment and paying with forged checks, using wire transfers to understate amounts owing. This behavior amounts to fraud and it is well plead in paragraphs 72-560 of the SAC, showing clearly numerous predicate acts constituting a pattern of racketeering behavior by Defendants.

All of the predicate acts discussed above and those that are pled in the SAC, as well as those acts against persons similarly situated to Plaintiffs were conducted by Defendants who did acquire and/or maintain, directly or indirectly, an interest or control of a RICO enterprise who were associated in fact, all in violation of section 1962(b) of the RICO statutes. Defendants, cooperatively and individually, each committed at least two predicate acts in furtherance of the common scheme to defraud Plaintiffs and pocket hundreds of millions of dollars.

Defendant's conduct is also in violation of section 1962(c) because they conducted and/or participated in, either directly or indirectly, in the conduct of the affairs of the RICO enterprise, associated in fact, that engaged in and continues to engage in activity that constitutes a pattern of racketeering as explained above. The SAC alleges enough detail to satisfy the plausibility requirement of *Twombly*, and the particularity requirement of Rule 9(b), at least two RICO

predicate acts of which each Defendant conducted or participated in that place them in direct violation of section 1962(c). Defendants jointly and severally conducted and participated in activities such as denying claims without cause to persons entitled to benefits; suspending, terminating, or delaying benefits while investigating claims despite clearly established rules that require benefits to be paid promptly without such delays; requiring proof of causation where causation is presumed; stopping payment of benefit checks; underpayment of required amounts; wrongfully terminating employment in response to the filing of claims by injured employees; misrepresentation of information to claimants, Department of Labor, Examiners, and others; miscalculations of TTD, TPD, PTD, and PPD benefits; and other acts specified in the Second Amended Complaint all through the use of mail and wire in violation of United States Rico Statutes sections 1621-1628.

Additionally, the predicate acts by Defendants show continuity because they were done as a regular way of conducting an ongoing legitimate business (in the sense that Defendants' businesses are not businesses that exist for the purpose of conducting criminal activity) as described by the Supreme Court in *H.J. Inc.* (*supra*). The sheer volume of misrepresentation by Defendants indicate that such misrepresentation was the regular way in which Defendants' conducted their ongoing businesses.

Defendants also committed the predicate acts of fraud and misrepresentation to the United States Government and the Department of Labor. Contractors, in accepting contracts to work with the United States in foreign countries, did agree to adhere to the terms of the DBA and to provide required benefits to injured workers, however, Defendants failed to do so. Although Defendant contractors secured the insurance as required by the DBA, they failed to administer it properly and made it all but impossible for claimants to receive the benefits to which they were

entitled to and promised. Those persons who were able to receive benefits were threatened, harassed, and mistreated by the enterprise of contractors and insurance carriers causing additional injury to workers. Additionally, foreign workers were left with essentially no means to apply for or receive benefits for their injuries. Necessary forms and other channels of communication were often provided only in English or not provided at all, which made it impossible for foreign nationals to assert their right to benefits after being injured. Contractors and insurance carriers conspired together to prevent workers from claiming benefits or denying benefits once a claim had been made.

Moreover, Defendants and insurance carriers have defrauded the United States and its taxpayers by accepting payment from the United States Government for claims, but then refusing to pay benefits to the claimants after promising to do so during phone conversations, in emails, during informal hearings with the Department of Labor, and in person. Defendants pocketed hundreds of millions of dollars in profits that should have been paid to injured workers. The SAC provides extensive information elicited from Congressional hearings that corroborate these assertions as well as detailed accounts of individual instances of denial of claims of which should have been paid. These acts constitute fraud and were done via mail, email, and telephone and in violation of RICO statutes.

An "enterprise" for the purposes of RICO includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[115] This definition is "obviously broad, encompassing '*any* … group of individuals associated in fact.'"[116] The use of the term "any" creates a wide reach of

[115] 18 U.S.C. § 1961(4).
[116] *Boyle v. U.S.*, 129 S. Ct. 2237, 2243 (2009)(emphasis added).

possibilities that would meet the definition of "enterprise" for the purposes of RICO.[117] An association in fact can be described simply as a "group of persons associated together for a common purpose of engaging in a course of conduct."[118] Although the association must have a purpose,[119] members do not need to have a fixed role and there is no necessity for a chain of command.[120] Furthermore, the statue itself instructs that the terms are to be "liberally construed to effectuate its remedial purposes."[121] The remedial purpose of RICO is "nowhere more evident than in the provisions of private action for those injured by racketeering activity."[122]

Defendants did associate with a RICO enterprise of individuals, associated in fact, for the common purpose of engaging in a course of conduct designed to reduce, delay, or deny compensation due to Plaintiffs who were entitled to benefits as a result of injuries that were sustained while working under a contract with the United States of the sort that guaranteed protection under the DBA. Employers were hostile to claims as were the insurance companies, and they banded together to create this scheme, this enterprise that has harmed many thousands of American and foreign contractors. The enterprise consists of insurance carriers named in the SAC as well as employers all of which used mail or wire to defraud plaintiffs by depriving them of their entitled benefits, and in doing so did affect interstate and foreign commerce, all in violation of Rico laws at 18 U.S.C. § 1961-1968.

The SAC establishes that Defendants, through their common schemes to willfully and intentionally deprive plaintiffs of benefits and to inflict harm deliberately after inducing reliance by vulnerable Plaintiffs and their families, formed an association in fact because they are a group

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[117] *Id.*
[118] *Id.*
[119] *id.* at 2244
[120] *id.* at 2245.
[121] *Id.*
[122] *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 498 (1985).

of persons that associated with one another for a common purpose of engaging in a course of conduct. Through collaborative efforts the carriers and employers listed above used the telephone, mail, and email systems to misrepresent to injured parties and to the DOL important information regarding the compensability of injuries, extent or seriousness of known injuries, payment of entitled benefits, and other vital information regarding claims in order to deny claims, or reduce them, and fraudulently inherit millions of dollars. These allegations are pled with sufficient factual information to meet the plausibility standard established in *Twombly*, and the particularity requirement of Rule 9(b).[123] The SAC lists specific times and dates where possible, includes the content of the misrepresentations, the facts that were misrepresented, and the damages caused as a result of Defendants' behavior.

C. <u>Plaintiffs Have Properly Plead A RICO Conspiracy</u>

Plaintiffs properly plead facts to support their claim of a RICO conspiracy under section 1962(d). To show that a conspiracy exists, a plaintiff must show either (1) that the Defendant agreed to commit two predicate acts, or (2) that the Defendant simply agreed to the overall objective of the conspiracy.[124] "If the [plaintiff] can prove an agreement on an overall objective, it need not prove a defendant personally agreed to commit two predicate acts."[125]

Here, the SAC states specific allegations of Defendants' predicate acts including promising to provide benefits and then refusing, being instructed to provide benefits by the Department of Labor and then refusing to do so, paying benefits for treatment and then stopping payment on the check, and telling victim who have been injured that they will be treated and then

[123] Congress held hearings on the abuses by the contractors and their carriers, SAC ¶¶ at 46-51, and KBR sent employees to threaten former employees with harm if they didn't drop PTSD claims. The carriers and employer are both parties to all proceedings before the Department of Labor. This plausibility of the enterprise is patent.
[124] *U.S. v. Harriston*, 329 F. 3d 779, 785 (11th Cir. 2003)(citing *U.S. v. Abbell*, 271 F. 3d 1286, 1299 (11th Cir. 2011), *cert. denied*, 537 U.S. 813 (2002).
[125] *Id.*

hiring doctors they expect to misrepresent facts in court in order to avoid having to pay to name a few. The contractors and insurance carriers work together to accomplish the "overall objective" of depriving Plaintiffs of benefits, and in doing so are liable for their conspiracy to do so.[126]

Furthermore, Defendants improper characterize the requirements for dismissing a claim for a Rico conspiracy under section 1962(d). Defendants assert that a RICO conspiracy claim should be dismissed when Plaintiff has not shown that a specific Defendant has committed at least two of the underlying predicate acts.[127] The United States Supreme Court rejected that view in *Salinas v. U.S.*, where they held that "[a] conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. The partners in the criminal plan must agree to pursue the same criminal objective and may divide up the work…If conspirators have a plan which calls for some conspirators to perpetrate the crime and other to provide support, the supporters are as guilty as the perpetrators."[128] Moreover, "[a] person…may be liable for conspiracy even though he was incapable of committing the substantive offense."[129]

Although Defendants here have all taken affirmative action in furtherance of the conspiracy to deprive Plaintiffs of benefits, it is not necessary that each of them have in order to find that a conspiracy exists to which each Defendant is part. Assuming *arguendo* that this Court finds that one or more of the Defendants did not commit a predicate act, their involvement in the overall scheme is sufficient for finding them liable for a RICO conspiracy under section 1962(d).

III. PLAINTIFFS HAVE PLEAD SUFFICIENT FACTS TO SUPPORT A CLAIM UNDER THE AMERICAN WITH DISABILITIES ACT.

[126] SAC ¶¶ 82, 136, 188-92, 353.
[127] "As Plaintiffs have failed to plead RICO violation under 18 U.S.C. §§ 1962(b) or (c), as described above in Section III. B., Plaintiffs' RICO conspiracy claim brought under 18 U.S.C. § 1962(d) also should be dismissed." Doc. No. 80-1, p. 31
[128] 522 U.S. 52, 63-64 (1997)
[129] *Id.*

The American with Disabilities Act of 1990 ("ADA"), prohibits an employer from discriminating against an "individual with a disability" who could perform the essential functions of their job if given "reasonable accommodations."[130] In an ADA case with no direct evidence of discrimination, the District of Columbia courts apply the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).[131] Under this rubric the Plaintiff must show that "he had a disability within the meaning of the ADA, that he was qualified for the position with or without a reasonable accommodation, and that he suffered an adverse employment action because of the disability."[132] Under the ADA, a "disability" is a "physical or mental impairment that substantially limits one or more of the major life activities of [an] individual."[133]

Plaintiffs' SAC sets out more than enough facts to show a plausible claim against Defendants for violation of sections 12111(8) and 12112(a) and (b)(5)(A) of the ADA. The SAC identifies three named Plaintiffs that are representative of the class, namely Harbee Kreesha, Merlin Clark, and Mohson Alsaleh,[134] and sets forth the way in which they were discriminated against in violation of the ADA.[135] Each of these class representatives, representing all Plaintiffs that have been similarly discriminated against in their employment in violation of the ADA, and

[130] 42 U.S.C. § 12112(a) and (b) (1994 ed.)
[131] *See Marshall v. Federal Express Corp.*, 130 F. 3d 1095, 1099 (D.C.Cir. 1997)(stating that the burden-shifting framework should be used where there is no direct evidence of discrimination, and the defendant denies that its decisions were based on the defendant's disability).
[132] *Duncan v. Washington Metropolitan Area Transit Authority*, 240 F. 3d 1110, 1114 (D.C.Cir. 2001).
[133] 42 U.S.C. § 12102(2).
[134] Second Am. Compl. ¶ 610
[135] *See id.* ¶ 203 (stating that Mr. Kreesha was fired while on medical leave without being given the opportunity to continue his employment as a translator, which he was able to do), ¶ 113 (stating that Mr. Clark was fired from his job immediately after settling his DBA claim because of his disability and because he pursued a claim for his disability), and ¶ 215 (stating that Mr. Alsaleh was terminated for not returning from medical leave despite his experience and recommendations and ability to continue to work, and discovered a "do not pursue, do not rehire" note on his employment file).

each received Right to Sue Letters from the EEOC.[136] The SAC explains that each of these Plaintiffs were qualified persons under the ADA that were able to continue their employment "with or without reasonable accommodations," and were therefore wrongly terminated because of their disabilities.

With regard to Harbee Kreesha, the SAC establishes he was disabled with PTSD while working for GLS that qualify under ADA because his conditions substantially limits his major life activities,[137] and also suffered physical disabilities continuing to this day."[138] As a result of these injuries, Mr. Kreesha was terminated from his employment when he was clearly qualified and could have continued his employment as a translator in a modified role or in the United States.

Merlin Clark was physically disabled as a result of an explosion that left him critically wounded.[139] As a result of the explosion, Mr. Clark also suffered a traumatic brain injury resulting in PTSD, increased stress, depression, and other symptoms.[140] These injuries qualify Mr. Clark as having a disability under the ADA. He returned to work for Ronco in November 2004, working from his home in Melbourne, Florida.[141] Then, immediately after settling his DBA claim, Ronco terminated Mr. Clark's employment with them because of his disabilities.[142] Mr. Clark has obtained a Right to Sue letter from the EEOC regarding his discriminatory termination under the ADA.

Mohson Alsaleh contracted disabling conditions on the job.[143] These physical injuries qualify him as a person with a disability under the ADA. While dealing with his medical problems, Mr. Alsaleh was fired by his employer, GLS, for not returning from his medical leave.[144] He was told he was a great candidate for employment in December 2010 but was later labeled as a "do not

[136] *See id.* ¶¶ 203, 113, and 215.
[137] *See id*. ¶ 193-195
[138] *See id.* ¶ 198
[139] *See id.* ¶ 90-99
[140] *See id.* ¶ 100
[141] *See id.* ¶ 101
[142] *See id.* ¶ 111
[143] *See* Second Am. Compl. ¶¶ 209-213
[144] *See id*. ¶ 215

pursue, do not rehire" candidate. He was clearly qualified and could have returned to his work in a modified role or in the United States. He has obtained a Right to Sue letter by the EEOC. Each of the named Plaintiffs listed above have plead with sufficient facts a claim of discrimination in their employment under the rubric of the ADA, that when taken as true, show plausible claims for ADA relief.

IV. PLAINTIFFS PLEAD SUFFICIENT FACTS OF CIVIL CONSPIRACY

Defendant 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 to harm Plaintiffs, to deprive injured and disabled workers of DBA benefits, to commit fraud, and to breach their contractual agreements with employees. In the District of Columbia,[145] civil conspiracy 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."[146] The elements for a civil conspiracy claim are similar in those states in which the named Plaintiffs reside including Florida,[147] California,[148] and others. In *Riggs v. Home-Builders Inst*., 203 F.Supp.2d 1 (D.D.C. 2002), the court declined to dismiss a

[145] When looking at choice of law, the court would look to the law of the District of Columbia's choice of law. See *Houlahan v. World wide Associationof Specialty Programs and Schools*, 677 F.Supp. 2d 195, 198 (D.D.C. Jan. 5, 2010) (If there is any conflict among applicable legal standards, the court looks at which jurisdiction has the `more substantial interest' in the resolution of the issues. In tort cases, the substantial interest inquiry requires consideration of (1) "the place where the injury occurred," (2) "the place where the conduct causing the injury occurred," (3) "the domicile, residence, nationality, place of incorporation and place of business of the parties," and (4) "the place where the relationship" was centered).

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

[147] 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).

[148] 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).

civil conspiracy claim where the plaintiff claimed that the defendants conspired together to advance a 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."[149] 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."[150] Also, the overt act must cause harm to plaintiffs.[151] Therefore civil conspiracy establishes vicarious liability for those defendants who conspired in furtherance of the underlying tortious conduct that resulted in injury.[152]

The Complaint shows multiple instances where contractors and insurance carriers conspired to deny benefits that had been promised, misrepresent facts to the DOL relating to DBA claims resulting in lost benefits, defrauding employees and the United States, breach of employment contracts. See, for example, allegations of Clark, Mercadante, and Bell. All of Defendants' actions were in furtherance of their common scheme to harm Plaintiffs.[153]

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[149] *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).
[150] *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)).
[151] *See* Halbertstam, 705 F.2d at 479.
[152] *Id.*
[153] At the end of the Combined Brief for Contractors, KBR drops footnote 12 stating that none of the other state law causes of action are sufficiently pleaded with specific facts set forth in them. Without citing any specific issues or caselaw, Defendants cannot bring a motion to dismiss the other state law causes of action through footnote

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 Contractors. 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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generalizations. The Plaintiffs would point the Court to its response to the combined Brief of Insurance Companies as well as Responses to Individual Contractors briefs and CNA's brief, as if set forth herein, to show that the other state claims are sufficiently pleaded and the facts set forth in the SAC support the claims.