IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALAN GROSS

and

JUDITH GROSS,

Plaintiffs,

v.

DEVELOPMENT ALTERNATIVES, INC.

and

THE UNITED STATES OF AMERICA,

Defendants.

Case No. 12-cv-1860-JEB

DEFENDANT DEVELOPMENT ALTERNATIVES, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION AND FAILURE TO STATE A CLAIM

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January 15, 2013

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Defendant Development Alternatives, Inc. ("DAI"), respectfully submits this Memorandum of Law in Support of its Motion to Dismiss pursuant to Federal Rules of Civil Procedure ("FRCP") 12(b)(1) and 12(b)(6).

INTRODUCTION

Plaintiff Alan Gross is a U.S. citizen who was detained by Cuban government authorities in December 2009 and imprisoned in Cuba for allegedly committing "acts against the integrity and independence of the state." The "acts" charged by the Cuban government amount to nothing more than trying to help peaceful people gain access to the internet. Both the United States Government ("Government") and the United Nations have deemed Mr. Gross's detention to be unjust and in violation of his human rights.[1] Secretary of State Hillary Clinton expressed the U.S. Government's views on Cuba's actions—which DAI has echoed—as follows:

> Mr. Gross should not even be incarcerated in Cuba. Mr. Gross was not a spy. Mr. Gross was not an intelligence agent. Mr. Gross worked for a development group that was helping Cubans, principally in their small Jewish community in Cuba, to have access to the internet. And Mr. Gross, in our view, is being held without justification and has been detained already far too long . . . .
>
> I am deeply distressed and unhappy for the Gross family. I've met with Judy Gross. People in the State Department stay in close touch with her and with her family. They have been incredibly brave in the face of this injustice. But the Cuban Government has

[1] Press Briefing by White House Press Secretary Jay Carney (Dec. 3, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/12/03/press-briefing-press-secretary-jay-carney-12032012; Statement from National Security Council Spokesman Tommy Vietor (Aug. 5, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/08/05/statement-national-security-council-spokesman-tommy-vietor-alan-gross; State Department Press Statement (Mar. 12, 2011), *available at* http://www.state.gov/r/pa/prs/ps/2011/03/158235.htm; U.N. Human Rights Council, Working Group on Arbitrary Detention, U.N. DOC. A/HRC/WGAD/2012/69 (Sep. 11, 2012), *available at* http://www.bringalanhome.org/newsroom/Newsroom-2013-01-08a.pdf.

> released political prisoners, which is something we'd like to see them do with Mr. Gross.[2]

The Cuban government, reprehensibly, has sought to manipulate its detention of Mr. Gross to strengthen its hand in dealings with the United States. This has included seeking to exchange Mr. Gross's release for the U.S. Government's release of five Cuban spies.[3] As Congresswoman Ileana Ros-Lehtinen observed, "[t]he Cuban dictatorship is clearly using Mr. Gross to strengthen its grip on power and gain leverage with the United States."[4]

Against this backdrop, Plaintiffs have filed the present tort suit seeking monetary damages from the Defendants.[5] The fundamental premise of the Complaint is that Plaintiffs may bring tort claims against the Defendants based on the tragic harm that has befallen Mr. Gross. This premise is wrong. Plaintiffs' allegations are inextricably intertwined with Federal laws and policies that bar Plaintiffs' claims, and also fail to state a claim on which the Court can grant relief. Plaintiffs' claims must be dismissed for eight distinct reasons, any one of which would justify dismissal.

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[2] Interview of Secretary of State Hillary Clinton (May 8, 2012), *available at* http://security.blogs.cnn.com/2012/05/08/clinton-on-jailed-american-in-cuba/ (hereinafter "Clinton interview").

[3] Clinton Interview, *supra* note 2; *see also* Editorial, *U.S. shouldn't hand Cuba an Alan Gross-for-spies deal*, Wash. Post, Dec. 5, 2012; Matthew H. Brown, *Family takes case of Md. man imprisoned in Cuba to public*, Balt. Sun, Nov. 28, 2011.

[4] Press statement, Congresswoman Ileana Ros-Lehtinen (Aug. 5, 2011), *available at* http://ros-lehtinen.house.gov/press-release/ros-lehtinen-condemns-rejection-cuban-dictatorship-alan-gross%E2%80%99-appeal-says-obama.

[5] As described in various sections of this brief, DAI has been actively working with the Government to secure additional compensation for Mr. and Mrs. Gross under the existing statutory framework applicable to contractor employees who are injured or detained while working overseas pursuant to a Government contract (*i.e.*, the Defense Base Act and the War Hazards Compensation Act), as well as by other means. DAI will continue to vigorously seek Government compensation for Mr. and Mrs. Gross, but DAI respectfully disagrees that the present lawsuit is legally sound.

STATEMENT OF FACTS

A. The Origin of This Case in U.S. Government Policy Toward Cuba

This case arises out of the Cuba Democracy and Contingency Planning Program (the "Cuba Program"), a foreign policy program of the U.S. Government. The Cuba Program seeks to foster changes in the leadership of the Cuban government and to hasten a peaceful transition to democracy in Cuba. Congress authorized the Cuba Program pursuant to the Cuban Democracy Act of 1992, 22 U.S.C. §§ 6001–10, and the Cuban Liberty and Democratic Solidarity Act of 1996, 22 U.S.C. §§ 6021–91 (commonly referred to as the "Helms-Burton Act" and hereinafter referred to as "Helms-Burton"). Helms-Burton includes a wide variety of assistance programs "to facilitate a peaceful transition to representative democracy and a market economy in Cuba and to consolidate democracy in Cuba." 22 U.S.C. § 6061(6).

A discussion of U.S. policies toward Cuba under Helms-Burton and implemented by the Cuba Program can be found in the 2008 Congressional Research Service Report on Cuba presented to Congress.[6] **Exhibit 1** (Congressional Research Service, *Cuba: Issues for the 110th Congress* (Sept. 24, 2008)). Traditionally, the Government implemented Helms-Burton activities through grants awarded to and self-administered by humanitarian organizations and individuals based in the United States and other countries. *Id.* at 42-43; *see also* **Exhibit 2** (U.S. Government Accountability Office, *Continued Efforts Needed to Strengthen USAID's Oversight of U.S. Democracy Assistance for Cuba* (November 2008), at 5-6 (hereinafter, "GAO Report")).

[6] Under FRCP 12(b)(1), the Court is "free to consider material outside the pleadings for purposes of resolving jurisdictional issues." *Caesar v. United States*, 258 F. Supp. 2d 1, 2 (D.D.C. 2003); *see also Jackson v. Dist. of Columbia Dep't of Health*, No. 06-1347, 2007 WL 1307891, at *1 (D.D.C. May 3, 2007). The Court can consider these materials without converting this Motion into one seeking summary judgment. *See Kaempe v. Myers*, 367 F.3d 958, 965 (D.C. Cir. 2004); *BHC Interim Funding II, L.P. v. F.D.I.C.*, 851 F. Supp. 2d 131, 134 (D.D.C. 2012).

The United States Agency for International Development ("USAID") issued many of these grants implementing Helms-Burton. GAO Report at 7. When USAID's reliance on these self-administered grants was criticized, USAID shifted away from a grant program to a prime contract delivery system with "strengthen[ed] management and oversight of the Cuba Program's democracy assistance." *See id.* at 3, 9.

B. The Cuba Program Task Order Under USAID

On May 8, 2008, USAID sought contractor support for implementation of the Cuba Program through a Request for Task Order Proposals ("RFTOP") issued to DAI and other companies holding awards under USAID's multiple-award Indefinite Quantity Contract ("IQC") for Instability, Crisis and Recovery Programs ("ICRP").[7] *See* **Exhibit 3** (Cuba Program RFTOP). The RFTOP contained a detailed and prescriptive "Implementation Plan" and "Scope of Work" ("SOW"). *See id.* at 12-20. The SOW detailed USAID's objectives, the manner in which the awardee would satisfy USAID's objectives, and the precise actions the awardee would take to implement the Cuba Program. *Id.* DAI was one of the companies that submitted a proposal in response to the RFTOP.

On August 14, 2008, USAID awarded Task Order No. DFD-I-03-05-00250-00 (the "Cuba Program Task Order") to DAI. *See* **Exhibit 4** (Cuba Program Task Order) (confidential portions redacted).[8] Consistent with Helms-Burton's goals, the Cuba Program Task Order had the following principal objectives:

[7] USAID awarded the ICRP IQC to DAI on September 27, 2005 (the "IQC Contract"). USAID was to issue task orders for specific scopes of work under DAI's IQC.

[8] The Complaint refers to this and other contract documents, the authenticity of which has not been contested. *E.g.* Compl. ¶ 22. The Court should consider those materials in deciding a 12(b)(6) motion without converting the motion into one seeking summary judgment. *See Kaempe*, 367 F.3d at 965; *BHC Interim Funding II*, 851 F Supp. 2d at 134.

- "Support the [Government]'s primary objective of hastening a peaceful transition to a democratic, market-oriented society, by providing additional humanitarian assistance and support to civil society." *Id.* at 3.

- "Provide the analytical foundation for verifying the on-island conditions, opportunities and programmatic interventions that will best support and complement activities that hasten the transition to democracy as well as transition planning and subsequent national development." *Id.*

- "Develop and, legal conditions and other circumstances permitting, activate plans for launching a rapid-response programmatic platform that will meet USAID's interests for having, and coordinating an on-island programming presence." *Id.*

After awarding the Cuba Program Task Order, USAID eliminated certain components of the program (primarily the rapid-response and on-Island programming presence component) to focus on the use of "new media" to implement the Cuba Program. *See* **Exhibit 5** (Modification 6) (confidential portions redacted). New media activities were to use information and communications technology to support and strengthen civil society organizations in Cuba. *See* **Exhibit 6** (Cuba Program Start-Up Meeting Notes) (confidential portions redacted).

The Cuba Program Task Order required DAI to accomplish these objectives by stepping into USAID's shoes to administer grants and subcontracts in accordance with strict oversight, direction, and approval requirements by USAID. Specifically, as described in **Exhibit 7** (DAI Declaration ("DAI Decl.")):

- The Cuba Program Task Order required DAI to engage in an extensive vetting process with USAID before contacting potential grantees and subcontractors. DAI was required to conduct due diligence on potential grantees, develop a list of possible organizations, and bring that list to USAID for extensive discussion. DAI Decl. ¶ 8.

- USAID had its own list of acceptable grantees. In some cases, USAID even directed issuance of grants to certain organizations outside of the list DAI had created, where such applicants and their proposals met pre-established criteria. DAI Decl. ¶ 9.

- DAI participated in weekly status meetings with USAID officials, usually at DAI's headquarters in Bethesda, Maryland, that DAI employees contemporaneously memorialized in written notes and memoranda to file which, in the normal course of business, were made available to USAID. DAI Decl. ¶ 11.

- During the weekly status meetings, the DAI project team would inform USAID in detail about the progress of the Cuba Program Task Order—everything from basic project administration, getting invoices paid, concepts under consideration for potential grants and subcontracts, discussions with potential partner organizations, and activities being implemented, as well as travel to Cuba, or elsewhere, by subcontractors and/or grantees. DAI Decl. ¶ 12.

- USAID, by its officials, including the Contracting Officer's Technical Representatives, exercised discretion over DAI's planned implementation down to the smallest detail, including approval or disapproval of planned travel. *See* DAI Decl. ¶¶ 7, 13, 14, 15.

- Specific to travel, DAI and USAID would discuss all anticipated, planned, and completed travel to Cuba in connection with the Cuba Program, as well as a summary of all significant events that occurred during ongoing or recently concluded travel. DAI Decl. ¶ 14.

- USAID had final decision-making authority with respect to travel, and DAI was required to discuss and obtain USAID approval on all travel. On multiple occasions, USAID refused to grant travel requests for a variety of reasons, including safety considerations. DAI Decl. ¶ 15.

- USAID directed, supervised, and closely managed DAI's performance of the Cuba Program Task Order. DAI's team was not allowed to act without USAID's approval. DAI Decl. ¶ 7.

- DAI understands from discussions with USAID Contracting Officer's Technical Representatives that USAID's management of the Cuba Program was part of a Federal inter-agency working group on U.S.-Cuba relations that also included the Department of State, the Department of Commerce, the Department of the Treasury, the National Security Council, and other Government agencies. DAI Decl. ¶ 16.

During the initial meeting between USAID and DAI following award of the Cuba Program Task Order, USAID's Cuba Office Director established DAI's working premise: the contracted work "is risky because of the security threats"; "USAID approval is needed for everything." **Exhibit 6** (Start-Up Meeting Notes).

C. The Subcontract with JBDC

One of DAI's first priorities in executing the Cuba Program Task Order was to solicit offerors interested in the "new media" component. On October 21, 2008, DAI sent a Preliminary Grantee Vetting form to USAID describing Mr. Gross's experience designing, installing, commissioning, and managing internet-based satellite telecommunications services in furtherance of transition initiatives in environments such as Afghanistan, Armenia, and Iraq, as well as Cuba. **Exhibit 8** (Preliminary Grantee Vetting) (confidential portions redacted). On December 29, 2008, Mr. Gross, acting on behalf of JBDC, LLC ("JBDC"), submitted a proposal to DAI for promoting communication and information dissemination by and between various communities in Cuba.[9] Compl. ¶¶ 56, 57. On January 28, 2009, USAID formally approved DAI to subcontract with JBDC for a firm-fixed price.[10] **Exhibit 10** (USAID Consent to Subcontract) (confidential portions redacted). On or about February 10, 2009, DAI entered into Subcontract No. 5835-001-05S-010-01 with JBDC (the "Subcontract"). **Exhibit 11** (DAI-JBDC Subcontract) (confidential portions redacted).

The Subcontract identified Helms-Burton as the authority for the Cuba Program Task Order. *Id.* at Appendix A ¶ 7. The Subcontract's scope of work was based entirely on JBDC's

[9] DAI is an employee-owned company comprised of humanitarian and development professionals working to assist countries around the world in the areas of water and natural resources management, energy and climate change, governance and public sector management, private sector development and financial services, economics and trade, agriculture and agribusiness, crisis mitigation and stability operations, and HIV/AIDS and avian influenza control. The contents of JBDC's proposal are subject to a non-disclosure agreement to protect the parties' business interests and also to protect on-Island beneficiaries from harm. DAI Decl. ¶ 17.

[10] USAID has stated, in response to questions from the U.S. Senate, that it selected subcontractors and grantees who "understand the security constraints on the island, consciously keep their profiles as low as possible, and follow their organization's security protocols." **Exhibit 9** (USAID Q&A for U.S. Senate).

proposal—as prepared by Mr. Gross and approved by USAID—to carry out the objectives and policies of the Government with respect to "new media" that would hasten a peaceful transition to democracy in Cuba. *Id.* at Appendix D. The Subcontract authorized four separate trips to Cuba. *Id.* With respect to this travel, the Subcontract provided that, "[g]iven the nature of the Cuban regime and the political sensitivity of the USAID Program, USAID and DAI cannot be held responsible for any injury or inconvenience suffered by individuals traveling to the island under USAID funding." *Id.* at 7.

JBDC satisfied the requirements of the Subcontract, including four trips by Mr. Gross to Cuba and reports summarizing the results of those trips. DAI Decl. at ¶ 18. DAI paid JBDC the full amount owed under the Subcontract for completed deliverables, and USAID subsequently reimbursed DAI for amounts paid to JBDC pursuant to the cost-reimbursable Cuba Program Task Order. *Id.* at ¶ 19. Prior to completion of the initial Subcontract SOW, Mr. Gross, on behalf of JBDC, sought to expand and extend the Subcontract services, prompting DAI to send a request to USAID on October 2, 2009, requesting approval to that effect. **Exhibit 12** (Request for JBDC Follow-On Work) (confidential portions redacted). On October 8, 2009, USAID accepted the proposal and directed DAI to modify the Subcontract and increase its value by $332,334. **Exhibit 13** (Consent for Mod. of JBDC Subcontract) (confidential portions redacted). DAI did so in Modification No. 5 to the Subcontract on October 26, 2009. **Exhibit 14** (Subcontract Modification No. 5) (confidential portions redacted).

D. The Cuban Government's Detention and Imprisonment of Mr. Gross

Under Modification No. 5 to the Subcontract, Mr. Gross travelled to Cuba a fifth time in late November 2009. Compl. ¶¶ 77, 84, 94, 101, 112. During the trip, Cuban government authorities arrested Mr. Gross while he was carrying out work commissioned by, paid for, and controlled by the U.S. Government. *Id.* ¶ 112. On March 4-5, 2011, a Cuban court tried

Mr. Gross for committing acts against the independence of the territory of Cuba. *See* **Exhibit 15** (Judgment of Popular Provincial Court, Havana, No. 2-2011) (confidential portions redacted). The court convicted and sentenced him to fifteen years in prison in Cuba. *Id.* at 38. The written judgment presents a lengthy recitation of Mr. Gross's alleged activities in Cuba under Helms-Burton and the U.S. Government's Cuba Program as the basis for the conviction. *Id.*

E. The Present Complaint

Mr. Gross and his wife Judith Gross have alleged tort claims against the Government and DAI related to Mr. Gross's imprisonment in Cuba. The Complaint alleges negligence, gross negligence, negligent infliction of emotional distress, and grossly negligent infliction of emotional distress as to Mr. Gross, as well as a claim for loss of consortium, and seeks damages in the amount of $60 million.

F. DAI's Response to Plaintiffs' Allegations

Plaintiffs have asserted, both in the media and in the present Complaint, that the Cuban government's imprisonment of Mr. Gross is unjust because he was merely carrying out humanitarian work on behalf of the U.S. Government. DAI has supported this position in public statements and in meetings with Congress and Executive Branch officials. Plaintiffs have also expressed their view that the U.S. Government has betrayed the Gross family by failing to secure Mr. Gross's release and to address their other concerns. DAI has and will continue to urge the U.S. Government to secure his release as soon as possible, and to meet further with the representatives of the family and seek to resolve their issues. DAI has repeatedly expressed concerns in communications with both Plaintiffs' counsel and numerous Government officials that the discovery process in this litigation may bring the unintended consequence of making the Cuban government <u>less</u> willing to release Mr. Gross. DAI is also deeply concerned that the

development of the record in this case over the course of litigation could create significant risks to the U.S. Government's national security, foreign policy, and human rights interests.

Nevertheless, the present procedural posture of this case demands that DAI respond with this Motion to Dismiss. DAI has based its factual presentation herein, to the greatest extent possible, on documents previously released to the public either by the Government or by Plaintiffs in their Complaint and on their website http://www.bringalanhome.org.

ARGUMENT

Plaintiffs' claims, as alleged, are outside of the Court's subject-matter jurisdiction under FRCP 12(b)(1) and fail to state a claim upon which relief can be granted under FRCP 12(b)(6). Applying settled legal standards, DAI articulates eight separate grounds for dismissing this case in its entirety.

I. The Complaint Must Be Dismissed Because the Court Lacks Subject-Matter Jurisdiction Pursuant to FRCP 12(b)(1).

The Court lacks subject-matter jurisdiction for four independent reasons: (1) the Defense Base Act, 42 U.S.C. §§ 1651–55 ("DBA"), bars Plaintiffs' state tort claims; (2) Plaintiffs' claims are non-justiciable under the Political Question Doctrine; (3) the Government Contractor Defense immunizes DAI and/or preempts state tort law that significantly conflicts with key Federal policies; and (4) the doctrine of Derivative Sovereign Immunity extends the Government's sovereign immunity to DAI in its performance of functions delegated by the Government.

A. Legal Standard Under FRCP 12(b)(1).

Subject-matter jurisdiction is required by Article III of the U.S. Constitution and Federal statutes; therefore, "no action of the parties can confer subject-matter jurisdiction upon a federal court." *E.g.*, *Ins. Corp. of Ir, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702

(1982). Plaintiffs have the burden to establish subject-matter jurisdiction. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Although factual allegations are presumed true, the Court "need not accept as true 'a legal conclusion couched as a factual allegation,' nor inferences that are unsupported by the facts set out in the complaint." *Isenbarger v. Farmer*, 463 F. Supp. 2d 13, 17-18 (D.D.C. 2006) (quoting *Trudeau v. Federal Trade Comm'n*, 456 F.3d 178, 193 (D.C. Cir. 2006)). The complaint must be dismissed if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Richardson v. United States*, 193 F.3d 545, 549 (D.C. Cir. 1999) (internal quotation marks and citation omitted).

B. The Defense Base Act Bars Plaintiffs' State Tort Claims Against DAI, Requiring Dismissal of This Case.

The Defense Base Act, 42 U.S.C. §§ 1651-1655, is the exclusive legal remedy available to Plaintiffs for the harms alleged in the Complaint.

1. Where Applicable, the DBA Creates the Exclusive Remedy for Worker Injuries.

The DBA provides workers' compensation insurance for categories of workers who are injured while engaged in overseas employment under qualified contracts and subcontracts for the U.S. Government. *See* 42 U.S.C. § 1651(a). Congress enacted the DBA in response to the Government's need for civilian contractor employees working overseas on military bases or on specified types of contracts. *See id.* § 1651(a)(1)-(6); *see also Republic Aviation Corp. v. Lowe*, 69 F. Supp. 472, 479-80 (S.D.N.Y. 1946). Like other workers' compensation statutes, the DBA represents a legislated compromise between the interests of employees and their employers. With the DBA, "[e]mployers relinquished their defenses to tort actions in exchange for limited and predictable liability." *Morrison-Knudsen Constr. Co. v. Dir., Office of Workers' Comp. Programs*, 461 U.S. 624, 636 (1983).

The DBA is a general-reference statute that incorporates the federal workers' compensation scheme of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-905 ("LHWCA"). *See* 42 U.S.C. § 1651(a); *Colon v. U.S. Dep't of Navy*, 223 F. Supp. 2d 368, 370 (D.P.R. 2002); *see also Davila-Perez v. Lockheed Martin Corp.*, 202 F.3d 464, 466-68 (1st Cir. 2000); *Afia/Cigna Worldwide v. Felkner*, 930 F.2d 1111, 1112-13 (5th Cir. 1991). The DBA system is administered by the U.S. Department of Labor ("DOL") pursuant to statute, and is implemented under the LHWCA's detailed administrative procedures for the filing, adjudication, and payment of workers' compensation claims. *See* 33 U.S.C. §§ 919, 921(b)(3).

Two exclusivity provisions provide irrefragable tort-suit immunity to DBA/LHWCA employers and insurers. First, the exclusivity of remedy provision of § 905(a) of the LHWCA provides that workers' compensation benefits shall be the exclusive remedy for an injured employee whose employer has complied with § 904(a)'s requirement of securing such compensation. In pertinent part, Section 905(a) specifically provides:

> The liability of an employer prescribed in section 4 [33 U.S.C. § 904] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . .

33 U.S.C. § 905(a). In addition, the DBA contains its own exclusivity provision regarding an employer's liability:

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

42 U.S.C. § 1651(c).

Courts, including this Court, have consistently and unanimously held that, so long as an employer has secured DBA coverage for its employees, tort claims by the employees against that employer are barred by the DBA. *See Brink v. Xe Holding, LLC*, No. 11-1733, 2012 WL 6628946, at *13 (D.D.C. Dec. 21, 2012) (dismissing on DBA exclusivity grounds purported class action alleging, among other causes of action, infliction of emotional distress); *Ross v. DynCorp*, 362 F. Supp. 2d 344, 352 (D.D.C. 2005) (noting, in dismissing negligence-based claims on exclusivity grounds, that the DBA "destroys any underlying tort liability . . . it necessarily displaces all derivative common-law causes of action based on the injury or death of a covered employee caused by employer negligence"); *see also Fisher v. Halliburton*, 667 F.3d 602, 621 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 96 (2012) ("[W]e conclude that all of the Plaintiffs' state-law claims are barred by the DBA . . . ."); *Davila-Perez*, 202 F.3d at 469 (affirming dismissal on LHWCA exclusivity grounds of an action for personal injury/negligence).

2. Under the DBA, DAI Is Mr. Gross's Statutory Employer, and Mr. Gross Is a Covered Employee.

Pursuant to Section 904(a) of the LHWCA, a general contractor is considered the "statutory employer" of its subcontractor's employees whenever that subcontractor has failed to obtain DBA insurance for its own employees. *Sketoe v. Exxon Co., USA*, 188 F.3d 596, 598 (5th Cir. 1999). Here, Mr. Gross was an employee of JBDC, *see* Compl. ¶ 63, a subcontractor to DAI, *see id.* JBDC did not procure DBA insurance for Mr. Gross's work in Cuba, but DAI procured DBA insurance for all of its USAID projects (including the Cuba Program Task Order and the Subcontract) through DBA Policy Number AID 0413852927, issued by The Continental Insurance Company, effective December 1, 2009 (and through a corresponding, preceding

policy). *See* **Exhibit 16** (DBA Policy Number AID 0413852927, issued by The Continental Insurance Company, effective December 1, 2009). Hence, DAI became the statutory employer of Mr. Gross pursuant to Section 904(a).

Additionally, Mr. Gross is an "employee," as defined by the DBA. Section 1651(a) of the DBA applies the DBA to "any employee engaged in any employment" as follows:

> (4) under a contract entered into with the United States or any executive department, independent establishment, or agency thereof (including any corporate instrumentality of the United States), or any subcontract, or subordinate contract with respect to that contract, where such contract is to be performed outside the continental United States and at places not within the areas described in subparagraphs (1)-(3) of this subdivision, for the purpose of engaging in such public work . . . ;
>
> (5) under a contract approved and financed by the United States or any executive department, independent establishment, or agency thereof (including any corporate instrumentality of the United States), or any subcontract or subordinate contract with respect to such contract where such contract is to be performed outside the continental United States, under the Mutual Security Act of 1954 as amended . . . .

42 U.S.C. § 1651(a).

The Cuba Program Task Order—and, therefore, the Subcontract—is within DBA coverage. Under Section 1651(a)(5), any contract either with or financed by the Government pursuant to the Foreign Assistance Act of 1961, 22 U.S.C. §§ 2151, *et seq.*,[11] is covered by the DBA. *See Ross,* 362 F. Supp. 2d at 353-358. The Cuba Program Task Order prominently states that it was "NEGOTIATED PURSUANT TO THE FOREIGN ASSISTANCE ACT OF 1961." **Exhibit 4** (Cuba Program Task Order). Furthermore, the Subcontract is a "subcontract . . . with respect to such contract." As such, both the Cuba Program Task Order and JBDC's Subcontract

[11] The Foreign Assistance Act is the cornerstone for U.S. foreign assistance policy and programs, and is the successor to/replacement of the Mutual Security Act of 1954.

are covered by the DBA. Alternatively, Mr. Gross is considered an employee of DAI for DBA purposes based on the language of Section 1651(a)(4). *See also Vance v. CHF Int'l*, Civ. No. RWT-11-3210, 2012 WL 2367075, *6–8 (D. Md. June 20, 2012). The IQC Contract and the Cuba Program Task Order are "entered into" with USAID, "the United States or any . . . agency thereof." 42 U.S.C. § 1651(a)(4). In addition, for DBA purposes, the IQC Contract and the Cuba Program Task Order satisfy the definition of a "public work,"[12] and could be viewed as contemplating work done for "national defense" purposes under the DBA. *See* 42 U.S.C. § 1651(b)(1). And again, JBDC's Subcontract is a "subcontract . . . with respect to that contract." As such, both the Cuba Program Task Order and the Subcontract are covered by the DBA.

In fact, the U.S. Department of Labor has already found that the present circumstances come within the DBA's statutory scheme. On October 28, 2010, DAI initiated a DBA claim on behalf of Mr. Gross by filing appropriate claims documentation with the DOL Office of Workers' Compensation Programs ("OWCP"). **Exhibit 17** (LS-202, Employer's First Report of Injury or Occupational Illness) (confidential portions redacted). Mr. Gross's legal counsel entered an appearance supporting the claim for DBA benefits and identifying DAI as Mr. Gross's employer. **Exhibit 18** (Letter from Ivan J. Snyder to Richard Robilotti, April 30, 2012) (confidential portions redacted). Upon review of Mr. Gross's case, OWCP District Director Richard Robilotti—the DOL official tasked pursuant to statutes and regulations with making factual findings and issuing recommendations and orders as to DBA coverage issues—found that (1) DAI is Mr. Gross's statutory employer for DBA purposes; (2) Mr. Gross is a

[12] A "public work" is an improvement or project "involving construction, alteration, removal or repair for the public use of the United States or its allies, including but not limited to projects or operations under service contracts and projects in connection with the national defense or with war activities[.]" 42 U.S.C. § 1651(b)(1).

covered employee for DBA purposes; and (3) Mr. Gross's arrest and imprisonment in Cuba "come[] under the provisions of the Defense Base Workers' Compensation Act." **Exhibit 19** (DOL OWCP Findings of Fact).[13] Mr. Robilotti also found that Mr. Gross lacked medical evidence supporting entitlement to benefits for bodily injuries, *id.*, but that he may be entitled to "detention benefits." **Exhibit 20** (Letter from R. Robilotti, Aug. 21, 2012). DAI understands that Mr. Gross's attorney is currently pursuing those benefits within this statutory framework. *See* **Exhibit 20** (Letter from Robilotti) ("Case is at the Federal Employees' Compensation Act office for [c]onsideration of detention benefits.").

3. Plaintiffs' Claims Against DAI Are Fully Barred by Applicable DBA Exclusivity Provisions.

Because Mr. Gross's circumstances fall squarely within DBA coverage, the DBA is Plaintiffs' exclusive remedy for any claims brought by or on behalf of Mr. Gross against DAI. As discussed above, by statute, when a general contractor is deemed the employer of its subcontractor's employees for DBA purposes, the general contractor has immunity from tort claims under LHWCA Section 905(a) (and 42 U.S.C. § 1651(c)). Here, the Complaint alleges negligence-based causes of action against DAI arising from injuries that occurred in the course and scope of Mr. Gross's DBA-covered employment. *See* Compl. ¶¶ 59-63. Plaintiffs seek damages for Mr. Gross's pain and suffering, loss of income, future medical care, and emotional distress experienced as a direct result of work-related injuries. They also seek damages for loss of consortium caused by the alleged negligence of DAI. But these causes of action are exactly those that are contemplated by the LHWCA and DBA exclusivity provisions and that have been

[13] District Director Robilotti's finding is in line with other judicial determinations finding DBA coverage for employees of USAID contractors. *See, e.g.*, *Madden v. James M. Montgomery Consulting Engineers Inc.*, 1985-LHC-00923, 19 BRBS 651 (ALJ March 5, 1987).

dismissed by this Court—and all other courts—on exclusivity of remedy grounds. *See Ross*, 362 F. Supp. 2d at 352 (explaining that, as the DBA "destroys any underlying tort liability[,] . . . it necessarily displaces all derivative common-law causes of action based on the injury or death of a covered employee caused by employer negligence, including wrongful death and survivorship actions"); *Brink*, 2012 WL 6628946 at *10 (stating that, "[b]ased on the binding authority from this Circuit, as well as persuasive authority from several other circuits, the Court finds that all of Plaintiffs' state law claims are barred by the exclusive scheme set forth in the DBA and the LHWCA"); *see also Hall v. C&P Tel. Co.*, 809 F.2d 924, 926 (D.C. Cir. 1987) (holding that claims were barred by exclusivity provision in case under D.C. Workers' Compensation Act, an extension of LHWCA).

Accordingly, because the exclusivity provisions of the LHWCA and DBA mandate that the compensation scheme provided under those statutes is the sole remedy to which the Plaintiffs are entitled, Plaintiffs' allegations and claims against DAI must be dismissed in full, as they are barred by the DBA and LHWCA exclusivity provisions.

C. This Case Must Be Dismissed Because It Presents Non-Justiciable Political Questions.

Plaintiffs' tort claims would require the Court to adjudicate decisions that the Constitution commits to Congress and the Executive Branch. Accordingly, the Court must dismiss the Complaint as non-justiciable under the Political Question Doctrine in accordance with *Baker v. Carr*, 369 U.S. 186 (1962), and its progeny.[14]

[14] The Political Question Doctrine is a substantive basis requiring dismissal of the present action against DAI. This is true regardless of whether the Government elects to seek dismissal on this basis.

1. The Court Lacks Jurisdiction Over Political Decisions Committed to the Executive and Legislative Branches.

The Political Question Doctrine derives from the Federal Government's separation of powers and the Constitution's limitation on the "judicial power of the United States" to "cases" or "controversies." *See* U.S. Const. art. III, § 2; *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 840-41 (D.C. Cir. 2010) (en banc). It "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986); *see also Harbury v. Hayden*, 522 F.3d 413, 418-21 (D.C. Cir. 2008); *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005).

In *Baker*, the Supreme Court explained that a claim presents a non-justiciable political question if any one of the following six characteristics is present:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly fit for non-judicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217; *Schneider*, 412 F.3d at 194 ("To find a political question, we need only conclude that one factor is present, not all.").

2. At Least Four of the *Baker* Factors Are Present and Bar Judicial Review.

While DAI need demonstrate the existence of only one of the *Baker* factors, Plaintiffs' tort claims are inextricably intertwined with at least four factors.

a) The Complaint Requires the Court to Question Matters Committed to Congress and the Executive Branch.

This suit would require the Court to question sensitive foreign policy judgments and decisions outside of the judiciary's purview. The Supreme Court has cautioned that "[m]atters relating to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Regan v. Wald*, 468 U.S. 222, 242 (1984) (internal citation and quotation marks omitted); *see also Haig v. Agee*, 453 U.S. 280, 292 (1981); *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918). Disputes involving foreign policy choices made by the political branches are therefore "quintessential sources of political question" over which courts have no jurisdiction. *Bancoult v. McNamara*, 445 F.3d 427, 433 (D.C. Cir. 2006); *see also El-Shifa*, 607 F.3d at 842 ("[S]trategic choices directing the nation's foreign affairs are constitutionally committed to the political branches . . . ."); *Center for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918, 932 (D.C. Cir. 2003).

As such, courts have dismissed tort suits against government contractors where the suits required an examination of national security decisions entrusted to other branches of Government. *See Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402, 410-12 (4th Cir. 2011); *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1281-83, 1288-96 (11th Cir. 2009); *Harris v. Kellogg, Brown & Root Servs., Inc.*, No. 08-563, 2012 WL 2886674, at *28-44 (W.D. Pa. July 13, 2012); *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277, 1281-82 (M.D. Ga. 2006); *Smith v. Halliburton Co.*, No. H-06-0462, 2006 WL 2521326, at *2-7 (S.D. Tex. Aug. 30, 2006). For example, in *Carmichael*, the Eleventh Circuit barred claims that a contractor's alleged negligence caused the plaintiff's injury in an accident on a convoy transporting fuel in Iraq. 572 F.3d at 1296. The court emphasized that the military, not

the contractor, ultimately decided when to organize and how to execute the convoys under dangerous conditions. *Id.* at 1281-83, 1288-96. These decisions included, first, "calibrat[ing] the risks associated with the mission and . . . balanc[ing] those risks against its basic need for fuel," then making "numerous notable tactical determinations." *Id.* at 1282. The accident's circumstances were "so thoroughly pervaded by military judgments and decisions" that the negligence claims could not be evaluated "without bringing those essential military judgments under searching judicial scrutiny"—precisely what the Political Question Doctrine forbids. *Id.* at 1282-83; *see also Tozer v. LTV Corp.*, 792 F.2d 403, 406 (4th Cir. 1986) (noting that, when the Government and a contractor work closely together, "it is nearly impossible to contend that the contractor [acted negligently] without actively criticizing" the Government's actions).

Here, Plaintiffs' claims and DAI's defenses are inextricably intertwined with foreign policy and national security decisions committed to Congress and the Executive Branch. Mr. Gross's activities and injuries occurred in pursuit of foreign policy objectives authorized by Congress in Helms-Burton and implemented by USAID in its Cuba Program. USAID and the Government were intimately involved in assessing the potential risks in pursuing Congress's objectives, and in determining whether and how to carry them out. *See* DAI Decl. ¶¶ 7, 13, 15, 16. Moreover, Plaintiffs concede that "USAID maintained the right, and duty, to direct and oversee the Cuba Project," including "the right to redirect activities in response to . . . changes in the political situation . . . ." Compl. ¶ 47(a). The Complaint details USAID's use of "sensitive and sometimes classified information" in its program, and its corresponding security activities. *Id*. ¶¶ 23-35. Indeed, as pled, USAID's coordination of information gathered through governmental intelligence activities is at the heart of Plaintiffs' claims.

Further, the non-justiciable questions in this case rival any in case law considering the Political Question Doctrine. Mr. Gross's detention and imprisonment, and therefore any decisions of corresponding liability or damages, remain areas of disputed foreign policy. Cuba arrested Mr. Gross, and Cuba still determines the nature and extent of his confinement. *See* **Exhibit 15** (Judgment of Popular Provincial Court, Havana, No. 2-2011). Even now, Cuba is retaining Mr. Gross to put an end to USAID's Cuba Program, and to negotiate an exchange of Mr. Gross for five Cuban intelligence operatives convicted of spying on the United States. *See supra* note 2. Congress has employed the very subject matter of Plaintiffs' allegations—Mr. Gross's imprisonment by Cuban authorities—in debate regarding the Government's programs in Cuba, and in challenges to Executive Branch foreign policy. *See Cuba's Global Terror Network*: *Hearing Before H. Foreign Affairs Subcomm. on West. Hemisphere*, May 18, 2012 (statement of Rep. Connie Mack, Chairman, Subcomm. on West. Hemisphere); *Fiscal 2012 Appropriations: State, Foreign Operation & Related Programs: Hearing Before H. Approp. Subcomm. on State, Foreign Ops., and Related Programs*, Apr. 14, 2011 (statement of Rep. Donna Edwards).

For all of these reasons, it is evident that the Court would be required to re-evaluate the conduct of the Cuba Program, including an examination of the Government's risk assessments and determinations of the precautions warranted in carrying out the Cuba Program. These judgments were made in the first instance by the Executive and Legislative Branches, and they remain under debate by these branches now. Thus, these are matters that remain committed to other branches of the Government under the Political Question Doctrine.

b) The Court Lacks Judicially Discoverable and Manageable Standards for Adjudicating the Complaint.

Allowing this lawsuit to proceed would require the Court to determine the reasonableness of Congress's and USAID's actions, including whether Congress or USAID anticipated or

should have anticipated the harm that befell Mr. Gross. The Court is fundamentally ill-equipped to decide these questions. There is no standard by which the Court can decide the value of "democracy-building efforts for Cuba" as pursued through support for "independent democratic groups in Cuba." *See* 22 U.S.C. § 6039(a)(1). As such, there is no way for the Court to decide what risks were reasonable in light of this project. *See Schneider*, 412 F.3d at 197 (finding no judicially discoverable and manageable standards for Government's use of covert operations in conjunction with political turmoil in another country); *see also Carmichael*, 572 F.3d at 1288–89; *Smith*, 2006 WL 2521326 at *6 (finding political question where "court would have to assess what intelligence had been gathered regarding potential threats and evaluate whether the security measures implemented were reasonable in light of the potential threats"). A court "cannot second-guess the degree to which the executive was willing to burden itself by protecting the [plaintiff's] well-being while pursuing the foreign policy goals of the United States; we may not dictate to the executive what its priorities should have been." *Bancoult*, 445 F.3d at 437; *see also Harris*, 2012 WL 2886674 at *40 (refusing to examine "the military's risk assessment"); *Smith*, 2006 WL 2521326 at *5 (finding political question where review would require court to examine "whether the military gathered adequate intelligence regarding the threat of terror attacks, whether it conveyed this threat to defendants, how the military planned for and implemented base access measures, and whether the implementation of force protection measures was reasonable when measured against the risk assessment level"). Lastly, the Court has no standards by which to effectively adjudicate Plaintiffs' allegations of liability and damages where, as here, the nature and length of Mr. Gross's confinement are subject entirely to U.S.-Cuba foreign relations.

c) The Court Cannot Resolve This Case Without Making Policy Determinations Beyond Its Discretion.

Additionally, any decision by the Court would require a reconsideration of foreign policy determinations made in connection with execution of the Cuba Program—including whether Congress's enactment of Helms-Burton and the Executive Branch's implementation of its Cuba Program were worth the risks to persons executing the program. Just as in *Bancoult*, entertaining Plaintiffs' claims "would require the court to judge the validity and wisdom of the executive's foreign policy decisions, as [DAI's] acts were inextricably part of those policy decisions." 445 F.3d at 438; *see also El-Shifa*, 607 F.3d at 844 ("[C]ourts cannot reconsider the wisdom of discretionary foreign policy decisions."); *Schneider*, 412 F.3d at 197 (third factor implicated because court "would be forced to pass judgment on the policy-based decision of the executive" to achieve a foreign policy objective). Such a determination would amount to "meddling in foreign affairs beyond [the Court's] institutional competence." *Bancoult*, 445 F.3d at 437; *see also Smith*, 2006 WL 2521326 at *5 (dismissing on political question grounds where "[t]he court would substitute its judgment for that of the military on the issue of whether adequate force protection measures were in place").

d) Resolution of This Case Would Require the Court to Disregard Respect Due Congress and the Executive Branch.

Finally, the Court cannot review the merits of this matter while maintaining the respect due Congress and the Executive Branch in their decisions regarding the Cuba Program, and who continue to debate this Program even now. Plaintiffs' negligence claims would necessitate a finding that the Defendants owed a legal duty to act differently than they have here. But this question is fundamentally itself a policy decision, even under state law: "'[D]uty' is . . . an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." *Jacques v. First Nat. Bank of Md.*, 307 Md. 527, 533 (1986)

(quoting Prosser & Keeton on the Law of Torts, § 53, at 357 (1984)).[15] Thus, any ruling on the merits of these claims would amount to a reconsideration of policy judgments committed by the Constitution to other branches of the Government. Avoiding this result is a "dominant consideration" under the Political Question Doctrine. *See Baker*, 369 U.S. at 210 ("[T]he appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." (quoting *Coleman v. Miller*, 307 U.S. 433, 454-55 (1939))). Thus, the Court should defer to the policy determinations of Congress and the Executive Branch, and it should dismiss the Complaint.

For these reasons, Plaintiffs' tort claims satisfy any one of four *Baker* factors, each of which justifies dismissing this case as non-justiciable under the Political Question Doctrine.

D. The Government Contractor Defense Also Bars Plaintiffs' State Tort Claims Against DAI, Requiring Dismissal of This Case.

In *Boyle v. United States Techs. Corp.*, 487 U.S. 500 (1988), the Supreme Court established the "Government Contractor Defense" to protect contractors working at the Government's direction where state tort liability presents a "significant conflict" with Federal policy. That defense applies here to bar Plaintiffs' state tort claims against DAI.

In *Boyle*, the personal representative of a U.S. Marine helicopter pilot who died in a crash brought a state-law tort claim against the helicopter manufacturer. 487 U.S. at 502. The Supreme Court held that the state-law liability of a contractor to the Federal Government, "in some circumstances," presents "a 'significant conflict' with federal policy and must be displaced." *Id.* at 512. Thus, the Court created the Government Contractor Defense, holding that

[15] As discussed in Part II.A, Maryland tort law applies to the underlying claims.

state tort law is "displaced" when: (1) a dispute involves an area of "uniquely federal interest"; and (2) there is a "significant conflict" between a Federal policy or interest and the operation of state law, or the application of state law must "'frustrate specific objectives' of federal legislation." *Id.* at 504-10, 512.[16] The Government Contractor Defense applies equally to product manufacturing and services performed by contractors for the Government. *See, e.g.*, *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009); *Hudgens v. Bell Hel./Textron*, 328 F.3d 1329, 1334-35 (11th Cir. 2003); *see also Al Shimari v. CACI Int'l, Inc.*, 658 F.3d 413, 417-20 (4th Cir. 2011) (vacated on other grounds).

1. DAI's Conduct on a Contract to Implement USAID's Cuba Program Under Helms-Burton Implicates Uniquely Federal Interests.

The first element of the Government Contractor Defense is easily met. Plaintiffs challenge DAI's performance of a contract to implement USAID's Cuba Program "developed pursuant to the Helms-Burton Act," Compl. ¶ 21, establishing *ab initio* under *Boyle* that "uniquely federal interests" are implicated, *see* 487 U.S. at 505-06. The Cuba Program Task Order affirms that the Cuba Program was explicitly contemplated and authorized by Congress. **Exhibit 4** § C.1. Further, DAI acted as USAID's proxy in implementing the Cuba Program Task Order. *See id.*; *see also id.* § C.2.B ("This program is part of a broader USAID strategy to hasten the transition to democracy in Cuba."); *id.* § C.2.K ("[DAI] shall have primary responsibility for ensuring that activities conducted under this program contribute to USAID's assistance strategy for Cuba and achieve the anticipated results.").

[16] Federal courts have treated the Government Contractor Defense as both preemption and immunity. *See, e.g.*, *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 217-18 (4th Cir. 2012) ("State law claims are preempted under *Boyle* . . . ."); *id.* at 259-60 (Niemeyer, C.J., dissenting) (detailing how "virtually every court that has considered the government contractor defense set forth in *Boyle* takes it as . . . immunity"). In either case, though, the final result here is the same.

2. Plaintiffs' State Tort Allegations Would Frustrate Specific Objectives of Helms-Burton and Present "Significant Conflicts" with Federal Policy and U.S. Programs Related to Cuba.

Additionally, Plaintiffs' allegations satisfy the second element of the Government Contractor Defense: a significant conflict between the asserted torts and Federal policy and interests. In *Boyle*, the Supreme Court found that "the state-imposed duty of care [that] was the asserted basis of the contractor's liability . . . [was] precisely contrary to the duty imposed by the Government contract." 487 U.S. at 509. The Court applied the Federal Tort Claims Act's ("FTCA") discretionary function exception to assess the scope of the conflict, using a three-prong test to measure the conflict between state law and the discretionary function exception. *Id.* at 512. Even so, since *Boyle*, Federal courts have recognized such a conflict in other statutory contexts, where this three-prong test is inapposite. *See Saleh*, 580 F.3d at 6-8 (applying FTCA's combatant activities exception); *see also Al Shimari*, 658 F.3d at 419 (vacated on other grounds) (applying combatant activities exception).

Here, a significant conflict exists between Plaintiffs' claims and Federal interests and policy in three distinct areas: (a) Helms-Burton and USAID's Cuba Program; (b) the FTCA's discretionary function exception; and (c) the FTCA's foreign country exception. Each of these conflicts individually satisfies the second element of the Government Contractor Defense.

a) Plaintiffs' Claims Significantly Conflict with Helms-Burton and USAID's Cuba Program.

Plaintiffs' claims essentially take issue with the Government's policies toward Cuba under Helms-Burton aimed at "hasten[ing] Cuba's peaceful transition to a democratic society." Compl. ¶ 22. In response, Cuba declared any activity in Cuba under Helms-Burton to be illegal, including Mr. Gross's activities in furtherance of the Cuba Program. *See* **Exhibit 15** (Judgment of Popular Provincial Court, Havana, No. 2-2011) at 4 ("The [DAI] project was sponsored by

USAID, an institution that responds to the special services interests of its Government [and that] seeks among its objectives to overthrow the Socialist Revolution . . . ."). It was precisely because Mr. Gross was implementing U.S. policy toward Cuba that the Cuban government imprisoned him for "acts against the independence or territorial integrity of the state." *See id.* at 34. Yet Plaintiffs now seek, impossibly, to inject state tort claims in this foreign policy *tête-à-tête*, a sensitive area where "the very imposition of any state law" could further complicate U.S. policy efforts in and toward Cuba. *See Saleh*, 580 F.3d at 13 (emphasis omitted). As such, these claims cannot proceed because they would complicate, impede, and frustrate the specific objectives of the U.S. Government's policy related to Cuba.[17]

b) Plaintiffs' Claims Conflict with the Federal Policies of the FTCA Discretionary Function Exception.

As discussed, in *Boyle*, the Supreme Court specifically considered the FTCA's discretionary function exception to assess the conflict between Federal policy and state law.[18] *See* 487 U.S. at 511-12. That analysis involved a three-prong test that can be applied as follows: (1) whether the Government approved "reasonably precise" procedures; (2) whether DAI

[17] The Court also could find that Plaintiffs' state tort claims are preempted by Helms-Burton. Preemption prevents state law from interfering with the traditional, constitutionally-committed areas of the Federal Government. *See Saleh*, 580 F.3d at 11-12. State law can be preempted where it actually conflicts with Federal law, or merely where it attempts to regulate conduct in a field Congress intends the Government to occupy exclusively. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990). Foreign policy is a quintessential area of preemption's application; indeed, "[o]ur system of government . . . imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941); *see also Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 n.11 (2003). For example, where the application of state law presents a "clear conflict" with Federal foreign policy, the state law at issue is preempted. *Saleh*, 580 F.3d at 12-13. On occasion, "the very imposition of any state law" can conflict "with federal foreign policy interests," requiring preemption. *Id.* at 13 (emphasis in original).

[18] The application of the discretionary function exception to the Government's sovereign immunity, for purposes of Derivative Sovereign Immunity flowing to DAI, is addressed in greater detail in Section I.E.1, *infra*.

"conformed" to those procedures; and (3) whether the Government was on notice of any dangers that might arise due to the procedures. *See id.* at 512; *Hudgens*, 328 F.3d at 1335. The facts here satisfy each of these prongs, demonstrating a conflict between the Plaintiffs' claims and the discretionary function exception.

Here, the Government's "reasonably precise" procedures and direction to DAI satisfy the first prong. USAID awarded the Cuba Program Task Order, "task[ing] DAI with responsibility for [the] day-to-day management and implementation" of humanitarian support in Cuba. Compl. at ¶¶ 43, 45. DAI acted as USAID's proxy in implementing the Cuba Program Task Order, with significant USAID oversight, involvement, and approval. *See* (DAI Decl.). For example:

- The Cuba Program Task Order required DAI to engage in an extensive vetting process with USAID before contacting potential grantees and subcontractors. DAI was required to conduct due diligence on potential grantees, develop a list of possible organizations, and bring that list to USAID for extensive discussion. DAI Decl. ¶ 8.

- USAID had its own list of acceptable grantees. In some cases, USAID even directed issuance of grants to certain organizations outside of the list DAI had created, where such applicants and their proposals met pre-established criteria. DAI Decl. ¶ 9.

- DAI participated in weekly status meetings with USAID officials, usually at DAI's headquarters in Bethesda, Maryland, that DAI employees contemporaneously memorialized in written notes and memoranda to file which, in the normal course of business, were made available to USAID. DAI Decl. ¶ 11.

- During the weekly status meetings, the DAI project team would inform USAID in detail about the progress of the Cuba Program Task Order—everything from basic project administration, getting invoices paid, concepts under consideration for potential grants and subcontracts, discussions with potential partner organizations, and activities being implemented, as well as travel to Cuba, or elsewhere, by subcontractors and/or grantees. DAI Decl. ¶ 12.

- USAID, by its officials, including the Contracting Officer's Technical Representatives, exercised discretion over DAI's planned implementation down to the smallest detail, including approval or disapproval of planned travel. DAI Decl. ¶¶ 7, 13, 14, 15.

- Specific to travel, DAI and USAID would discuss all anticipated, planned, and completed travel to Cuba in connection with the Cuba Program, as well as a summary of all significant events that occurred during ongoing or recently concluded travel. DAI Decl. ¶ 14.

- USAID had final decision-making authority with respect to travel, and DAI was required to discuss and obtain USAID approval on all travel. On multiple occasions, USAID refused to grant travel requests for a variety of reasons, including safety considerations. DAI Decl. ¶¶ 14, 15.

- USAID directed, supervised, and closely managed DAI's performance of the Cuba Program Task Order. DAI's team was not allowed to act without USAID's approval. DAI Decl. ¶ 7.

DAI satisfies the second prong of the *Boyle* test because DAI "actually implemented the discretion of its government counterpart." *Haltiwanger v. Unisys Corp.*, 949 F. Supp. 898, 904 (D.D.C. 1996). A contractor must have "conformed" to the procedures, specifications, and requirements of its contract. *Boyle*, 487 U.S. at 512; *see also Hudgens*, 328 F.3d at 1337. Here, as explained *supra*, DAI was subject to USAID's strict control and oversight. *See* **Exhibit 6** (Cuba Program Start-Up Meeting Notes); DAI Decl. ¶¶ 7, 13, 14, 15. As discussed, every action DAI took under its task order was approved by USAID and closely tracked by agency officials. *See* DAI Decl. ¶ 7. In fact, Plaintiffs do not allege that DAI engaged in unauthorized conduct. Rather, Plaintiffs concede that "USAID remained responsible for directing and overseeing various aspects of specific projects or task orders" by, among other things, providing "technical direction," verifying DAI reports, and approving international travel. Compl. ¶ 41. Further, "USAID maintained the right, and duty, to direct and oversee the Cuba Project." *Id.* ¶ 47. Mr. Gross worked "subject to USAID approval," *id.* ¶ 65, and USAID approved the Work Plan and Performance Monitoring and Evaluation Plan for Mr. Gross, *id.* ¶ 72. DAI "communicate[d] regularly" with USAID regarding Mr. Gross's activities, *id.* ¶ 71, and in fact provided Mr. Gross's "trip memorand[a]" to USAID, *id.* ¶¶ 79, 86, 96, 103. According to Plaintiffs, USAID did not direct DAI to take action in response to the trip memoranda. *See id.* ¶¶ 82, 92,

99, 106. When DAI allegedly proposed "follow-on" activities for DAI and Mr. Gross, USAID "consented . . . [and] approv[ed] additional funding," *id.* ¶ 108.

DAI also has satisfied the third prong of the *Boyle* test. This factor requires "notice," *i.e.*, that the Government be aware of dangers associated with performance. *Boyle*, 487 U.S. at 512; *Hudgens*, 328 F.3d at 1336; *Haltiwanger*, 949 F. Supp. at 904-05. Here, USAID was aware that the Cuban government made Helms-Burton activities in Cuba *per se* illegal. During the initial meeting between USAID and DAI following award of the Cuba Program Task Order, USAID's Cuba Office Director stated that the baseline premise of the Cuba Program was that implementing a democracy-building program in Cuba was far from risk-free. DAI Decl. ¶ 10. Yet the Government (and Mr. Gross) still chose to implement the Cuba Program Task Order. If the Government is "aware of a risk and [chooses] to act regardless of that knowledge," the Government Contractor Defense still applies. *Haltiwanger*, 949 F. Supp. at 904.

c) Plaintiffs' Claims Conflict with the Federal Policies of the FTCA Foreign Country Exception.

Finally, the imposition of tort liability on DAI is *per se* contrary to the FTCA's "foreign country" exception. *Accord Saleh*, 580 F.3d at 7 (noting that imposition of "non-federal tort duty" is "precisely contrary" to policy of eliminating tort concepts from battlefield with combatant activities exception) (citing *Boyle*, 487 U.S. at 500). DAI addresses the applicability of the "foreign country" exception below. *See infra* Section I.E.1.

In conclusion, DAI has established that this matter presents a uniquely Federal interest, and that there is a significant conflict between Plaintiffs' claims and Federal interests and policies. DAI has further satisfied the three-prong test articulated in *Boyle*. Therefore, all of Plaintiffs' claims are barred by the Government Contractor Defense and must be dismissed.

E. This Case Must Be Dismissed Because Derivative Sovereign Immunity Bars Claims Arising from DAI's Performance of Delegated Government Functions.

The United States enjoys sovereign immunity from Plaintiffs' claims, and that sovereign immunity correspondingly flows to DAI under either of two tests of Derivative Sovereign Immunity. Below, DAI addresses the FTCA's foreign country exception and discretionary function exception insofar as the Court first requires a showing of the Government's immunity.

1. The Government Is Immune from Plaintiffs' Tort Claims.

As sovereign, the Government is immune from claims unless it has waived immunity. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980). With the passage of the FTCA, ch. 753, 60 Stat. 842 (1946) (codified in sections of 28 U.S.C.), the United States waived its immunity subject to thirteen exceptions codified in 28 U.S.C. § 2680. Here, two of those exceptions—the "foreign country exception" and the "discretionary function exception"—apply.[19]

The "foreign country exception" applies to "[a]ny claim arising in a foreign country." *Id.* § 2680(k). The Supreme Court has interpreted this exception as barring "all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred." *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004). This exception applies here because Plaintiffs concede that Mr. Gross's injuries occurred solely in Cuba, where he was detained and imprisoned.[20] Compl. ¶¶ 112-116, 128-30. Further, Mrs. Gross's tort claims are based entirely

[19] Because either FTCA exception would deprive the Court of subject-matter jurisdiction, the Court may dismiss the Complaint on either ground even if the United States fails to raise it. *See, e.g., Evans v. Suter*, No. 09-5242, 2010 WL 1632902 (D.C. Cir. April 2, 2010) (affirming dismissal on subject-matter grounds without responsive pleading).

[20] It is not enough that some wrongful conduct purportedly occurred in the United States, as Plaintiffs allege. These allegations are within the "headquarters doctrine," which "typically involve[s] some allegations of negligent guidance in an office within the United States of employees who cause damage while in a foreign country, or of activities which take place in a (continued…)

on Mr. Gross's claims, and they likewise are barred. *See Harbury v. Hayden*, 444 F. Supp. 2d 19, 43-44 (D.D.C. 2006), *aff'd*, 522 F.3d 413 (D.C. Cir. 2008) (citing *Sosa* in applying the foreign county exception to spouse's claims based on injuries suffered by husband in Guatemala). Thus, the "foreign country exception" applies, and the Government retains its sovereign immunity from Plaintiffs' claims.

The "discretionary function exception" applies where claims are "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). The Supreme Court has established a two-part test for judging whether a Government action is protected as a discretionary function. *United States v. Gaubert*, 499 U.S. 315, 322-23 (1991); *see also Sloan v. U.S. Dep't of Housing & Urban Dev.*, 236 F.3d 756, 759-60 (D.C. Cir. 2001). First, the acts must be "discretionary in nature," in that they "involv[e] an element of judgment or choice," not conduct required by "statute, regulation or policy." *Gaubert*, 499 U.S. at 322. Second, the discretionary judgment must be "of the kind" fit for the exception; in this regard, the exception "protects only government actions and decisions based on considerations of public policy." *Id.* at 323. Case law supports the position that the implementation of foreign policy and national security functions, by their very nature, satisfy these standards. *See, e.g.*, *Macharia v. United States*, 334 F.3d 61, 64-68 (D.C. Cir. 2003) (involving the extent of security measures at the U.S. embassy in Kenya); *Industria Panificadora, S.A. v. United States*, 763 F. Supp. 1154, 1156-59 (D.D.C. 1991) (Panamanian

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foreign country." *See Sosa*, 542 U.S. at 701 (quotation omitted). The Supreme Court considered and rejected this doctrine, holding that the "foreign country exception bars all claims based on an injury suffered in a foreign country, regardless of where the tortious act or omission occurred." *Id*. at 712.

security details); *see also Goldstein v. United States*, No. 01-0005, 2003 WL 24108182, at *3-4 (D.D.C. Apr. 23, 2003) (protection of Holocaust victims). In this case, Plaintiffs' tort claims arise from USAID's administration of the Cuba Program under Helms-Burton. Compl. ¶¶ 19-22. Thus, Plaintiffs' allegations are squarely within the "discretionary function exception," a second basis for the Government's sovereign immunity.[21]

2. Sovereign Immunity Extends to Contractors Performing Delegated Functions.

For over seventy years, Federal courts have found that, where the Government enjoys sovereign immunity, contractors working on behalf of the Government are entitled, in certain circumstances, to Derivative Sovereign Immunity. *See Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20-21 (1940). In *Yearsley*, the Supreme Court considered whether a contractor could be liable for damages caused by the construction of dikes pursuant to a contract with the Government. *Id.* at 20. The Supreme Court found that the contract was a delegation by a Government agency for the contractor to implement a project that was "validly conferred" by an act of Congress. *Id.* The Court held that, where the work performed "was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will." *Id.* at 20-21. As is relevant here, since *Yearsley*, Federal courts have developed two distinct lines of cases covering the circumstances in which the same immunity enjoyed by the Government also extends to contractors.

The first line of cases is credited for the concept of "derivative sovereign immunity." These cases reach back to *Yearsley* to hold that, where a contractor acts according to authority

[21] DAI understands that the Government might not assert the "discretionary function" exception at this stage of the proceeding. Nonetheless, that exception still applies for the stated reasons and, as noted *infra*, is a basis for derivative sovereign immunity flowing to DAI.

"validly conferred" by the Government, the sovereign immunity of the Government flows to the contractor. The Fourth Circuit Court of Appeals has described the policy justifying derivative sovereign immunity under *Yearsley* as follows:

> This public interest remains intact when the government delegates that function down the chain of command. As a result, courts define the scope of sovereign immunity by the nature of the function being performed—not by the office or the position of the particular employee involved. . . . Imposing liability on private agents of the government would directly impede the significant governmental interest in the completion of its work. As a result, courts have extended derivative immunity to private contractors, "particularly in light of the government's unquestioned need to delegate government functions."

Butters v. Vance Int'l, Inc., 225 F.3d 462, 466 (4th Cir. 2000) (internal citations omitted) (emphasis added). In other words, if a contractor is performing a Government function, it rightly has the immunity of the Government as well.

Accordingly, Federal courts recognize that a contractor has immunity where it (a) was acting pursuant to authority validly conferred by Congress and a Federal agency, and (b) was acting within the scope of its contract. *Id.* With these two factors, the contractor's acts are deemed to be "the act[s] of the government," *Yearsley*, 309 U.S. at 20-21; *Butters*, 225 F.3d at 466, and "sovereign immunity exists because it is in the public interest to protect the exercise of certain governmental functions," *Butters*, 225 F.3d at 466. These *Yearsley/Butters* cases do not delve into how the contractor performed the contract, so long as the contractor was acting within the scope of authority "delegated [] down the chain of command" to the contractor.[22] *Id.*; *see also Yearsley*, 309 U.S. at 20-21.

[22] According to *Butters*, sovereign immunity derives from "the nature of the function performed," not the "office" or "position" of a party. 225 F.3d at 466. Hence, derivative sovereign immunity does not demand the "office" or "position" of common law agency. *See id.* (stating that derivative sovereign immunity applies to both "contractors and common law agents" (continued…)

The second line of cases draws from the Supreme Court's decision in *Westfall v. Erwin*, which recognized that Government officials exercising discretion within their official duties are immune from tort liability if the benefits of the immunity outweigh the costs. 484 U.S. 292, 295-98, 296 n.3 (1988). Following *Westfall*, Federal courts have extended this "official" immunity (sometimes referred to as "absolute official" immunity) to contractors that exercise discretion within the scope of a contract with the Government. *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1447-48 (4th Cir. 1996); *see In re Series 7 Broker Qual. Exam Scoring Lit.*, 510 F. Supp. 2d 35, 45 (D.D.C. 2007); *see also Beebe v. Wash. Metro. Area Transit Auth.*, 129 F.3d 1283, 1289 (D.C. Cir. 1997). In *Mangold*, for example, a U.S. Air Force officer and his wife sued a government contractor, alleging it defamed them and inflicted emotional distress by voluntarily cooperating with a government investigation into the officer's activities. 77 F.3d at 1445. As it did in *Butters*, the Fourth Circuit found that "[e]xtending immunity to private contractors to protect an important government interest is hardly novel," and that, "no matter how many times or to what level [a Government] function is delegated, it is a small step to protect that function when delegated to private contractors, particularly in light of the government's unquestioned need to delegate governmental functions."[23] *Id.* at 1447-48.

(emphasis added)). The Fifth Circuit also has rejected the need to establish common law agency for derivative sovereign immunity. *See Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 205-06 (5th Cir. 2009) (stating that neither *Yearsley* nor courts following *Yearsley* require a "traditional agency relationship"). Although the 11th Circuit has required an agency relationship, its holding is limited to the 11th Circuit. *See McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1343 (11th Cir. 2007) ("[I]n this circuit, the entity . . . must . . . have been a common law agent . . . ." (emphasis added)). But even so, to the extent required, the facts show a common law agency relationship, as DAI can demonstrate.

[23] The official immunity recognized by *Mangold* does not apply solely to testimony or participation in government investigations. It protects discretionary conduct, whatever the circumstance. *See Mangold*, 77 F.3d at 1447-48. Courts have applied the same immunity when considering private parties' discretionary actions in performing government-delegated (continued…)

Thus, under *Westfall/Mangold*, the test for official immunity is whether: (1) the challenged conduct was an act of discretion pursuant to the contractor's official duties; and (2) the public benefits of immunity outweigh its costs. *Id*. at 1447; *see also Murray v. Northrop Grumman Info. Tech., Inc.*, 444 F.3d 169, 174-75 (2d Cir. 2006) (holding that contractor was immune from tort liability for exercising discretion in performance of government function under contract); *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 71-73 (2d Cir. 1998) (same); *Midland Psychiatric Assoc., Inc. v. United States*, 145 F.3d 1000, 1005 (8th Cir. 1998) (barring tort suit against Medicare insurer based on common-law official immunity). As such, these cases and "official" immunity are tied to the "discretionary action" of the contractor when working at the Government's request, provided the public benefits weigh in favor of immunity.

3. DAI Has Derivative Sovereign Immunity Because Plaintiffs' Claims Are Based on DAI's Performance of Functions Contracted by USAID.

Plaintiffs' factual allegations require that sovereign immunity extend to DAI under both the *Yearsley*/*Butters* and *Westfall/Mangold* lines of cases. The Complaint states that Mr. Gross was detained in Cuba while performing JBDC's Subcontract for DAI pursuant to the Cuba Program Task Order implementing Helms-Burton. Compl. ¶¶ 19-20, 37, 51, 54-56, 62, 63, 65. Plaintiffs recognize that, while DAI was responsible for delegated functions, "USAID maintained the right, and duty, to direct and oversee the Cuba Project," *id.* ¶ 47, and "USAID remained responsible for directing and overseeing various aspects of specific projects or task orders," providing "technical direction," verifying reports, and approving travel, *id.* ¶ 41. Mr. Gross worked "subject to USAID approval," *id.* ¶ 65, and USAID approved a Work Plan and Performance Monitoring and Evaluation Plan for Mr. Gross, *id.* ¶ 72. In sum, Plaintiff

disciplinary and regulatory functions. *See Series 7*, 510 F. Supp. 2d at 39-45; *see also Beebe*, 129 F.3d at 1289 (applying official immunity to discretionary conduct in reorganizing office).

alleges that DAI was acting under the Government's delegation and direction, or in concert with USAID, at all times for purposes of Mr. Gross's Subcontract. *See id.* ¶¶ 136-71. There can be no real dispute that DAI was "executing [Congress's] will" under *Yearsley*, 309 U.S. at 21, and was acting within its scope of work and discretion in performing its contract duties under *Mangold*, 77 F.3d at 1447.[24]

Furthermore, the Government has a significant interest in DAI's immunity. If the Court were to disregard DAI's entitlement to immunity, USAID would have difficulty finding contractors willing to undertake risky humanitarian projects. The Government needs to be able to rely on contractors and for those contractors to receive the same benefits that Federal agencies and their employees would have in performing these same functions delegated by Congress. This public benefit of immunity clearly outweighs the costs. *Id.*; *see also Series 7*, 510 F. Supp. 2d at 45.

Ultimately, these two lines of Derivative Sovereign Immunity bar Plaintiffs' tort claims against DAI, requiring the dismissal of these claims for lack of subject-matter jurisdiction. *Chesney v. Tenn. Valley Auth.*, 782 F. Supp. 2d 570, 586 (E.D. Tenn. 2011) (granting motion to dismiss); *Ackerson*, 589 F.3d at 207 (finding that dismissal was proper where *Yearsley* was "established on the face of the Plaintiffs' complaint").

[24] Plaintiffs make no allegations that DAI acted "against the will" of USAID, nor are there any allegations that DAI breached its contractual duties or acted negligently as to USAID. *See generally* Compl. In this respect, the present case is easily distinguishable from *In re Fort Totten Metrorail Cases Arising Out of the Events of June 22, 2009*, No. 10-314, 2012 WL 3834877 (D.D.C. Sept. 5, 2012), where the court held that derivative sovereign immunity does not shield claims alleging that a contractor "acted against the 'will of the sovereign'" by breaching "contractual duties . . . and by performing negligently under the contract." *Id.* at *19.

II. The Court Must Dismiss the Complaint Because Plaintiffs Fail to State a Claim upon Which Relief Can Be Granted.

Even if the Court determines that it has subject-matter jurisdiction, the Complaint fails to plead sufficient facts to support any of the alleged claims.

A. Legal Standard Under Rule 12(b)(6).

A court may dismiss a complaint on a Rule 12(b)(6) motion if the complaint does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). In ruling on this Rule 12(b)(6) motion, the Court must accept factual allegations in the Complaint as true, but this "tenet . . . is inapplicable to legal conclusions." *Id.* at 678. "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.*

The Court should apply Maryland law in judging the legal sufficiency of Plaintiffs' claims. In a diversity case like this, the U.S. District Court District for the District of Columbia employs a "modified 'governmental interest analysis'" to "determine which jurisdiction's policy would be most advanced by having its laws applied to the facts in the case." *Lopez v. Council on Am.-Islamic Rel. Action Net., Inc.*, 741 F. Supp. 2d 222, 234 (D.D.C. 2010) (applying the conflicts of laws rules of the District of Columbia); *see also Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). Because the Complaint alleges tort claims, the Court should choose the law of "the state with the most significant relationship to the case," based on "where the injury occurred, the place where the conduct causing the injury occurred, the residence, domicile, place of incorporation or place of business of the parties, and the place where the parties' relationship, if any, is centered." *Lopez*, 741 F. Supp. 2d at 234. Here, nearly all of these factors

support the choice of Maryland law.[25] The alleged tortious conduct of DAI occurred in Maryland. Plaintiffs, DAI, and JBDC were citizens of Maryland at all times relevant to the dispute. JBDC listed a Maryland address for notifications in the Subcontract that defined its relationship with DAI, and JBDC agreed to arbitration in Maryland for disputes under the Subcontract. Thus, Maryland is the state with the most significant relationship to the case, and the Court should apply Maryland law.

B. Plaintiffs Fail to State a Claim for Negligence and Gross Negligence.

The Complaint fails to state a claim for negligence because DAI had no duty to protect an independent contractor's employee from the acts of Cuban government officials. To state a claim of negligence, Plaintiffs must establish, *inter alia*, that "the defendant was under a duty to protect the plaintiff from injury . . . ." *Rhaney v. Univ. of Md. E. Shore*, 880 A.2d 357, 363 (Md. 2005); *see also Griesi v. Atlantic Gen. Hosp. Corp.*, 360 Md. 1, 12 (2000) ("[T]here can be no negligence where there is no duty that is due." (quotation omitted)). The Complaint's conclusory allegations that DAI "had a duty . . . to protect Mr. Gross," Compl. ¶¶ 118, 143, are precisely the type of "[t]hreadbare recital[]" that does not suffice to state a claim, *see Iqbal*, 556 U.S. at 678. Thus, the Complaint fails to allege that DAI owed a duty to Plaintiffs.

Two principal factors control whether a duty was owed: "[1] the nature of the legal relationship between the parties and [2] the likely harm that results from a party's failure to

[25] Although the injury occurred in Cuba, applying Cuban law is not supported by a governmental-interest analysis. *See, e.g., Rong Yao Zhou v. Jennifer Mall Res., Inc.*, 534 A.2d 1268, 1270 (D.C. 1987) ("[I]t is not the place of the injury that necessarily determines which law is to be applied."). Nor could this case's single connection to D.C.—the current domicile of Mrs. Gross—be a basis for choosing D.C. law rather than Maryland law, particularly given that Mrs. Gross acquired that domicile after the alleged torts were completed. Compl. ¶ 2 ("Mrs. Gross became domiciled in the District of Columbia during the summer of 2010, shortly after Mr. Gross's detention in Cuba.").

exercise reasonable care within that relationship." *Griesi*, 360 Md. at 12. Here, neither factor shows that DAI owed a duty to Mr. Gross with respect to the alleged harm. The Complaint characterizes the harm as "detention and imprisonment in Cuba and the injuries and damages suffered as a result." Compl. ¶¶ 145, 152. Therefore, the Complaint is premised on intervening acts of the Cuban government, a third party, which is detaining Mr. Gross in an attempt to gain political leverage against the U.S. Government. Yet Maryland law does not recognize a duty to protect an independent contractor from a third party "absent a special relationship." *Rhaney*, 880 A.2d at 364.

As the employee of DAI's independent contractor, *see* Compl. ¶ 63, Mr. Gross was not in the kind of "special relationship" with DAI in which a duty arises to protect from third-party acts, *see* Restatement (Second) Torts §§ 314A-314B. Although the Complaint obscures that fact by substituting Mr. Gross's name for JBDC's when quoting the Subcontract, Compl. ¶¶ 67-68, DAI dealt with Mr. Gross only as an employee of an independent contractor, *see id.* ¶ 63. The general rule is that a contractor or landowner has no duty to protect an independent contractor's employee from harm. *Rowley v. Mayor & City Council of Balt.*, 505 A.2d 494, 496-97 (Md. 1986). Plaintiffs may not avoid this rule by disavowing the entity through which Mr. Gross chose to conduct business. *See* Compl. ¶ 64.

Further, Maryland law has largely restricted the exceptions to this general rule found in §§ 410-414 of the Restatement Second of Torts to situations where third parties, not employees, are injured. *See, e.g.*, *Rowley*, 505 A.2d at 499-503 (discussing vicarious liability); *Brady v. Ralph M. Parsons Co.*, 609 A.2d 297, 300-01 (Md. 1992) (expressing doubt that Restatement exceptions were intended to apply to employees of independent contractors); *see also Wells v. General Elec. Co.*, 807 F. Supp. 1202, 1206 n.4, 1208-09 (D. Md. 1992) (same). Where

Maryland courts have considered applying the Restatement exceptions, the cases have involved a landowner who was sued for an accident on his property—*i.e.*, circumstances wholly inapposite to this case. *See Le Vonas v. Acme Paper Board Co.*, 40 A.2d 43, 44-45 (Md. 1944); *Cutlip v. Lucky Stores*, 325 A.2d 432, 433-35 (Md. Spec. App. 1974); *see also Wells*, 807 F. Supp. at 1203.

Nor does Plaintiffs' assertion that DAI had "superior knowledge," *see* Compl. ¶¶ 118-19, 143, 150, support that DAI exerted control over Mr. Gross such that he could not have protected himself from the risk of injury, *see Wells*, 807 F. Supp. 1206-08 (finding no liability under Restatement § 414 in the absence of control over "the very thing from which the injury arose"). Plaintiffs concede that Mr. Gross (acting on behalf of JBDC) designed the work plan, and that the work took place in Cuba. *Id.* ¶¶ 57-58, 69, 77, 84, 94, 101, 112. DAI retained little authority over the manner in which the work was done. *Id.* ¶¶ 57-58 (describing Mr. Gross's proposal to complete the project); *id.* ¶¶ 61, 70 (describing DAI's rights to approve and inspect Mr. Gross's plans); *cf. Wells*, 807 F. Supp. at 1208 (building owner not liable to independent contractor's employee unless it retained control beyond the kind "usually reserved to employers"). Moreover, DAI did not mandate that Mr. Gross travel to Cuba personally. Indeed, the Complaint admits that DAI inquired who JBDC would send if Mr. Gross could no longer personally travel to Cuba. Compl. ¶ 89. Thus, the idea that DAI controlled Mr. Gross to a degree sufficient to make it responsible for his protection in Cuba is implausible.

Finally, the "peculiar risk" exception at Restatement § 410 cannot be applied here even if it is legally available. Assuming for purposes of this motion that the work involved "a peculiar unreasonable risk of physical harm to others," the Complaint does not, and cannot, allege that DAI failed "to provide in the contract that the contractor shall take [special] precautions." In

fact, the Subcontract explicitly states "[t]he Subcontractor shall take all reasonable precautions to prevent damage, injury, or loss to all persons performing services hereunder, the Work, all materials and equipment utilized therein, and all other property at the site of the Work and adjacent thereto." § 7.3. Thus, § 410 is inapplicable on its face, and the general rule restricting liability to independent contractor employees should prevail.

In sum, DAI had no duty to protect Mr. Gross from the type of injury he suffered, and no exception to this rule is applicable given his admitted status as an employee of an independent contractor. *See* Compl. ¶ 63. Whether his injury was foreseeable is a factual question that does not change this analysis. The Maryland Court of Appeals recently reiterated as follows: "'[F]oreseeability' must not be confused with 'duty.' The fact that a result may be foreseeable does not itself impose a duty in negligence terms." *Barclay v. Briscoe*, 47 A.3d 560, 574 (Md. 2012) (quoting *Ashburn v. Anne Arundel County*, 510 A.2d 1078, 1083 (1986)). Thus, the Court may accept as true for purposes of this motion that DAI had "superior knowledge," and still find that DAI owed no duty to prevent harm to Mr. Gross. *See* Compl. ¶¶ 78, 85, 95, 102.

C. Plaintiffs Fail to State a Claim for Negligent Infliction of Emotional Distress and Grossly Negligent Infliction of Emotional Distress.

These claims fail because, simply put, Maryland does not recognize a cause of action for negligent or grossly negligent infliction of emotional distress. *See, e.g.*, *Hamilton v. Ford Motor Credit Co.*, 502 A.2d 1057, 1065 (Md. App. 1986) ("Neither this court nor the Court of Appeals ever suggested that Maryland recognizes or should establish such a tort."). Thus, the Court should dismiss this count or direct that any emotional distress be proven as an element of damages arising from any surviving claims of negligence. *See Hamilton*, 501 A.2d at 1066.

Alternatively, even if the Court chooses to consider either of these claims as a misworded cause of action for intentional infliction of emotional distress premised on recklessness, the

Court should nevertheless dismiss the claim for failure to plead its necessary elements. This tort holds a person liable only when "the injury is inflicted by extreme and outrageous recklessness." *Hamilton*, 501 A.2d at 1066 (quoting *Vance v. Vance*, 396 A.2d 296, 302 (Md. Spec. App. 1979), *rev'd in part*, 408 A.2d 728 (Md. 1979) (emphasis added)). Here, however, even if the Complaint pleads recklessness, *see* Compl. ¶ 149 ("gross negligence and willful disregard"), it does not claim DAI's actions were "extreme and outrageous." Such an allegation is insufficient as a matter of law because approving a subcontract to carry out a congressional program cannot be construed as conduct "beyond all possible bounds of decency, . . . atrocious, and utterly intolerable in a civilized community." *Vance*, 408 A.2d at 736 (quoting Restatement (Second) of Torts § 46, cmt. d); *Baltimore v. District of Columbia*, 10 A.3d 1141, 1155 (D.C. 2011) (same). Accordingly, these claims should be dismissed.

D. Plaintiffs Fail to State a Claim for Loss of Consortium.

Plaintiffs' seventh claim seeks damages for loss of consortium. This claim must be dismissed if the substantive claims are dismissed. A loss of consortium is dependent upon the existence of an underlying tort; it does not constitute a separate cause of action. *Owens-Illinois, Inc. v. Cook*, 872 A.2d 969, 980 (Md. 2005) (citing *Deems v. W. Md. Ry. Co.*, 231 A.2d 514, 525 (1967)). As explained above, because Plaintiffs have failed to state a recognized or valid tort claim, Plaintiffs may not maintain a claim for loss of consortium against DAI. *Id.* at 981; *see also Massengale v. Pitts*, 737 A.2d 1029, 1033 (D.C. 1999). In other words, Plaintiffs' other claims are not actionable; thus, Plaintiffs' claim for loss of consortium should be dismissed.

E. Plaintiffs Fail to State a Claim for Punitive Damages.

Finally, the eighth claim for relief seeking punitive damages should be dismissed because the Complaint does not allege the requisite standard of conduct under Maryland law. The Complaint states that "DAI acted recklessly and with willful disregard toward Mr. Gross'[s]

rights and safety." Compl. ¶ 171 (emphasis added). Maryland courts have rejected this standard for punitive damages. *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633 (Md. 1992).

In *Zenobia*, the Maryland Court of Appeals overruled *Smith v. Gray Concrete Pipe Co.*, 297 A.2d 721 (Md. 1972), and its holding that punitive damages were available upon a showing of "gross negligence" or "reckless disregard of the rights of others." 601 A.2d at 652. The *Zenobia* court reasoned that a test based on reckless, wanton, or flagrant conduct was overbroad and, in fact, had not been applied consistently. *Id.* Now, a plaintiff must show "actual malice"—"evil motive, intent to injure, ill will, or fraud." *Id.* (emphasis added). Further, Maryland courts have held that "[p]roof of negligence alone, no matter how gross, wanton or outrageous, is not sufficient to prove punitive damages." *Bell v. Heitkamp, Inc.*, 728 A.2d 743, 752 (Md. Spec. App. 1999) (quoting *Owens-Corning Fiberglass Corp. v. Balt. City*, 670 A.2d 986 (Md. Spec. App. 1996)); *Darcars Motors of Silver Spring, Inc. v. Borzym*, 818 A.2d 1159, 1165 (Md. Spec. App. 2003) ("What has now been decided, at the very least, is that the malice necessary to support an award of punitive damages must arise out of tortious conduct that is intentional and not out of a tort based on negligence, even gross negligence.").

Plaintiffs have not stated a plausible claim that DAI intended that Mr. Gross be arrested in Cuba. *See* Compl. at 3. In the absence of allegations of such intentional conduct, punitive damages are unavailable under Maryland law. Thus, Plaintiffs' claim for punitive damages should be dismissed.

CONCLUSION

DAI deeply regrets that Mr. and Mrs. Gross have suffered harm due to the actions of the Cuban government while Mr. Gross was undertaking activities in Cuba to further the U.S.

Government's foreign policy. For the reasons stated above, however, the Complaint against DAI must be dismissed in its entirety and with prejudice.

January 15, 2013

Respectfully submitted,

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