

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Southern Division)**

THOMAS L. MOFFETT, II, ET AL.,

Plaintiffs

v.

COMPUTER SCIENCES CORP., ET AL.*

Defendants.

**Civil Action No.
PJM05CV1547**

* * * * *

**MEMORANDUM IN SUPPORT OF DEFENDANT
JERRY DUBYAK’S MOTION TO DISMISS COUNT I**

MAY IT PLEASE THE COURT:

Defendant, Jerry Dubyak, respectfully submits this Memorandum in Support of his assertion that the allegations of Count I of the Plaintiffs’ First Amended Complaint fail to set forth any cause of action upon which relief may be granted by this Honorable Court. For the reasons assigned herein, Dubyak prays that this Honorable Court will dismiss Count I, with prejudice and at the Plaintiffs’ cost.¹

¹ Mr. Dubyak has filed a separate Motion to Dismiss and Memorandum in Support with respect to the four other counts of the Plaintiffs’ Complaint.

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I. EXECUTIVE SUMMARY

This brief should be viewed as supplementary to the briefs concerning Count I (the *Bivens* claim) of the Complaint filed by the federal Defendants, and by Computer Sciences Corporation (CSC). It would be most easily understood if it was read after those two briefs have already been considered by the Court.

Jerry Dubyak is the lone Defendant in this case who is not directly connected to either the government or to CSC, but who is included within Count I. As the Complaint asserts at paragraph 41, Dubyak was a “claims examiner” employed by Omaha Property and Casualty Insurance Company during the relevant time frame. In opposition to the claims against him in Count I, Dubyak will address the following five topics:

First, and principally adopting the legal arguments presented in the briefs of the federal Defendants and CSC, Dubyak asserts that given the comprehensive nature of the statutory and regulatory scheme under which the NFIP is governed and operated, there is no prior caselaw that would support adding an “implied” *Bivens* claim as an additional damages remedy in every piece of NFIP litigation. Plaintiffs’ effort to have a federal court allow the assertion of an implied *Bivens*-type cause of action in the context of an NFIP claims dispute is no different than their other efforts at other counts of the Complaint to ask this Court to allow them to pursue various state and federal-law-based tort and extra-contractual claims. With respect, Plaintiffs have attempted every conceivable claim imaginable, for the purpose of seeing what might be accepted by the Court. From Dubyak’s perspective, the Plaintiffs’ efforts are nothing other than attempts to circumvent years of virtually uniform jurisprudence, as well as FEMA’s express preemption clause, both of which have made clear that NFIP participants have only those rights and remedies expressly granted to them by the Program’s statutes and regulations.

Second, if *Bivens* claims are to now be available in the context of NFIP-related litigation, and assuming one can bring such claims against private citizens, what is the “act under color of law” that was committed by Dubyak? Just as in actions arising against state or municipal officials under 42 U.S.C. §1983, a *Bivens* defendant must be shown to have exercised some power possessed by virtue of the office held. (For example, a police officer exercising his arrest powers.) Even if Plaintiffs seek to evade this requirement via their conspiracy claims, they must establish an act under color of law by an actual official, which qualifies under the relevant Supreme Court precedents, and then, connect Dubyak to that act.

Third, Dubyak asserts that even if every NFIP participant can add a *Bivens* claim in every NFIP-related lawsuit, this Complaint fails to actually allege a constitutional violation. As per consistent holdings of the Supreme Court governing constitutional tort litigation, determining whether the Plaintiffs’ Complaint actually asserts facts that, if proven true, would establish a violation of the Constitution, is the first inquiry. Here, Dubyak asks a straightforward question: What is the particular “process” that Plaintiffs allege that they were “due,” which was allegedly “denied”?

Fourth, it is clear that Plaintiffs have failed to allege causation. Given that constitutional tort analysis is an individualized inquiry, Plaintiffs’ group approach is wholly improper. The burden upon the Plaintiffs is to allege that Jerry Dubyak (and every other Count I Defendant) personally acted in a way that did cause an actual constitutional injury to a particular Plaintiff. Absent this, no claim has been stated.

Fifth, Dubyak finally asserts that even if *Bivens* is available against him, he is entitled to invoke the doctrine of qualified immunity. As will be explained later herein, private persons sued for constitutional torts are precluded from asserting qualified immunity only when the defendant acted

purely out of self interest and not while engaging in a quasi-public activity. Given the lengths to which the Complaint has gone to assert that Dubyak worked (1) for a FEMA fiscal agent and (2) intimately with federal officials to “conspire” in an allegedly inappropriate means of operating the NFIP, he certainly can invoke the doctrine in this case. As such, unless the Plaintiffs can meet their burden to establish in their pleadings that Dubyak violated a constitutional right that was clearly established in the law in the particularized sense mandated by the Supreme Court before the date of the acts in question, then he is entitled to an immediate dismissal from this proceeding under the doctrine of qualified immunity.

II. THE PLEADED FACTS

The only pleaded facts that inform the Court who Jerry Dubyak is, and why he being sued, are at paragraph 41 of the Complaint. Paragraph 41 explains that Dubyak is a “claims examiner,” and that he was an employee of a WYO Program insurance company. He is not alleged to have had any governmental position or power. Moreover, absolutely no facts from which anyone could actually reach a conclusion that any sort of conspiracy occurred, are actually pleaded. All that the Court has is Plaintiffs’ repetitive use of that word.

The supposed wrongful conduct attributed to Dubyak is that he wrongfully and intentionally (1) “denied many of Plaintiffs’ flood loss claims,” (2) “provided misinformation to some of the Plaintiffs regarding coverage,” and (3) “train[ed] claims adjusters and sales agents contrary to the stated intent of the NFIP.” (Complaint, ¶41) These are the exact same amorphous claims raised against many of the other Defendants. However, Dubyak, inexplicably, is the only person not connected to CSC and/or the federal government who is included in Count I.

As for the pleading of *Bivens* cause of action itself, no facts are pleaded at all. Paragraphs 67 through 70 all repeatedly state the same thing, which is nothing beyond legal conclusions. Significantly, Dubyak is among those alleged at paragraph 69 to have misused their “respective offices.” What “office” did Dubyak hold?

III. ARGUMENT

A. IMPLYING *BIVENS* INTO THE NFIP

The federal Defendants and CSC have provided ample caselaw establishing that a *Bivens* remedy should not be implied in the context of a comprehensive statutory scheme where the Congress has already decided what remedies are to be available. Dubyak adopts by reference their entire argument. In addition, he adds these three points:

First, it is irrefutable that the statutory scheme does include an express private right of action extending exclusive jurisdiction to the federal courts to resolve claims disputes. 42 U.S.C. §4072; *Till v. Unifirst Fed. Sav. & Loan*, 653 F.2d 152, 160 (5th Cir. 1981). As evidenced by that statute, the Congress that created the Program decided that the only private right of action available under these circumstances would be a lawsuit in federal court seeking additional covered benefits under the Program. *Id.* That the Congress chose to not provide for other forms of relief does not mean that the courts can add to those remedies by implying into the statutory scheme a *Bivens* claim. Such would violate the various precedents discussed in the federal Defendants and CSC briefs, and, it would violate the Supreme Court’s prohibition in *Lynch v. United States*, 54 S.Ct. 840 (1934), where the Court held that it is for the Congress to provide what remedies are available in federal insurance programs, not the courts.

In these regards, Dubyak respectfully contends that when one fully appreciates the Program’s statutory and regulatory scheme, it does not matter whether a claims examiner wrongfully denied a

claim; it does not matter if he explained the coverages wrong; and it does not matter whether he taught it wrong to others. Even if all of these things did occur (which is denied), this Court is still empowered to decide objectively, by looking at the policy and the amount of the claimed damage, what additional benefits might be due. The opinions about the law, etc., of a claims examiner, do not control anything.

Second, it is obvious that the Plaintiffs' effort to bring a *Bivens* claim is part of the Plaintiffs' overall effort to essentially plead anything in an attempt to circumvent FEMA's express preemption provision. Notably, these Plaintiffs are not the first to attempt to circumvent the express preemption clause adopted by FEMA in the year 2000 by attempting to assert *federal* extra-contractual causes of action. The first attempt may be found in *Scratchfield v. Omaha*, 341 F.Supp.2d 675 (E.D. Tex. 2004). There, the court held that federal law could not be used to support any additional claims for relief in the context of the NFIP. The second attempt is the now-pending *Howell* matter, where those plaintiffs are asserting that federal common law provides a route to extra-contractual and tort recovery for NFIP participants. The third known attempt is the matter at bar. With respect, if any of these efforts to have the courts create wholly new damages remedies in the context of the NFIP succeed, then not only is the *Lynch* decision violated, but FEMA's express preemption provision will have been circumvented and rendered a dead letter. After such a ruling, every plaintiff will simply plead, under a "federal" label, the exact same claims that FEMA just preempted.

Third, it should be considered that adding a *Bivens* remedy would actually slow down the resolution of such disputes, and delay the completion of meritorious claims. Consider that under Plaintiffs' Complaint, every NFIP lawsuit throughout the United States should include all of these Defendants and claims. According to Plaintiffs' Complaint, the alleged wrongdoing was system-wide, and not just targeted at Maryland. If this Court validates their theory, then all NFIP lawsuits will quickly

also include all of these types of constitutional claims.

B. WHAT WAS DUBYAK'S "ACT UNDER COLOR OF LAW"?

The implied *Bivens* claim is intended to work in a similar fashion to claims arising under 42 U.S.C. §1983. *Dachman v. Shalala*, 950 F.Supp. 708, 710 (D.Md. 1997). The elements of a §1983 action - - like a *Bivens* claim - - are straightforward. The plaintiff must prove that (1) a person (2) acting under color of [federal] law (3) subjected the plaintiff or caused the plaintiff to be subjected (4) to the deprivation of a right secured by the Constitution or laws of the United States. *City of Oklahoma City v. Tuttle*, 105 S.Ct. 2427, 2439 (1985)(in concurring opinion). Regarding the "under color of law" element, and in the context of §1983 actions, the Court has long restricted the scope of what qualifies as an "act taken under color of law." Under color of law requires "exercise" of power possessed by virtue of an office held. *West v. Atkins*, 108 S.Ct. 2250 (1988). "[A] person acts under color of state law only when exercising power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Polk County v. Dodson*, 102 S.Ct. 445, 449 (1981). See also, *United Brotherhood of Carpenters and Joiners v. Scott*, 103 S.Ct. 3352, 3358 (1983)("As we have consistently held, 'the Fourteenth Amendment protects the individual against *state action*, not against wrongs done by *individuals*.'")

There is nothing within the Complaint that alleges a qualifying "act under color of law" by Dubyak. As such, no claim under *Bivens* is stated as to him.

Alternatively, Plaintiffs may concede that Dubyak did not himself act under color of law, and then claim that he conspired with federal officers who did so. However, Dubyak would caution here that the Fourth Circuit takes a dim view of assertions of a "conspiracy worthy of an Oliver Stone

screenplay.” *Hutchinson v. Statton*, 994 F.2d 1076 (4th Cir. 1993).² Even if Plaintiffs do go the “conspiracy route,” Plaintiffs must still show this Court how their Complaint asserts an act under color of law by those officials, and how Dubyak is connected to that act. As noted in *Hale v. Townly*, 45 F.3d 914 (5th Cir. 1995), “a conspiracy claim is not actionable without an actual violation of §1983.” *Id.* at 920. The same would hold true in an implied *Bivens* claim.

In these regards, Dubyak fails to see where Plaintiffs plead an act under color of law even by the federal officials. “Mere employment by a state or municipality does not automatically mean that a defendant’s action are taken under the color of state law.” *Kearn v. City of Rochester*, 93 F.3d 38, 43 (2nd Cir. 1996). Also, “[i]t is not enough for an individual to purport to exercise official power in order to trigger §1983 liability, but rather the individual must actually be engaged in the abuse of official power granted by the government.” *Parrilla-Burgos v. Hernandez-Rivera*, 108 F.3d 445 (1st Cir. 1997). In other words, not every single act committed by a government official qualifies as an act under color of law. These Plaintiffs must establish to this Court that their Complaint put at issue a qualifying act.

C. IS A CONSTITUTIONAL VIOLATION ACTUALLY PLEADED?

The first step in any constitutional tort case is to determine if the Plaintiffs’ pleadings, assuming all alleged facts are indeed true, actually state a violation of federal constitutional rights. *Graham v. Connor*, 109 S.Ct. 1865, 1870 (1989)(“the first inquiry in any §1983 suit is ‘to isolate the precise constitutional violation with which [the defendant] is charged.’”); *Siegert v. Gilley*, 111 S.Ct. 1789, 1793-94 (1991)(“a necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is ‘clearly established’ at the time the defendant acted is the determination of

² Plaintiffs have claimed attorney’s fees against Dubyak under Count I, presumably under 42 U.S.C. §1988. If Plaintiffs persist with their dubious claims against Dubyak, he hereby places them on notice that he will seek fees against them under the same statute.

whether the plaintiff has asserted a violation of a constitutional right at all.”); and *Albright v. Oliver*, 114 S.Ct. 807, 811-812 (1994)(“the first step in any such claim is to identify the specific constitutional right allegedly infringed.”)

Here, Plaintiffs assert under the Fifth Amendment that they were (1) deprived, (2) of liberty (their health), (3) and property (their homes), without (4) due process of law. (Complaint ¶67) Each different part of this claim will now be addressed.

1. As to each Plaintiff, how does the Complaint assert that that Plaintiff was “deprived” of a constitutional right? A basic precept of all procedural due process jurisprudence is that one cannot claim to have been “denied” a process that one has never “requested.” Absent a request of something, there can be no denial of that thing. See for instance *Rathjen v. Litchfield*, 878 F.2d 836 (5th Cir. 1989), where the plaintiff sued alleging that she had been denied due process because she had not been afforded a pretermination hearing. The court rejected the argument and reversed the court below, holding that one cannot assert that a particular right had been denied, when that right had never been sought. *Id.* at 839-40.

In the matter at bar, the Complaint asserts that the losses at issue occurred over two years ago, on September 18, 2003. Also, the Complaint asserts that “all” of the adjusters were “low-balling” all of the claims. (Complaint, ¶55) Moreover, throughout the Complaint the Plaintiffs assert that the estimates that the adjusters were providing them were nowhere near high enough to pay for sufficient repairs to restore the Plaintiffs to their “pre-flood condition.”

Assuming any of this actually occurred, Plaintiffs possessed the right to come to this Court immediately and to invoke the process they are now invoking, that being a suit before this Court pursuant to §4072 asking this Court to examine the questions presented. Alternatively, assuming that the

issue actually was “low-balling” and not a Plaintiff attempting to be paid for something that was not covered, the policyholder could have invoked the policy’s appraisal clause, found at 44 C.F.R. Pt. 61, App. A(1), Art. VIIP.³ The SFIP appraisal clause is specifically tailored to resolve pricing disputes, that being precisely what these Plaintiffs claim that they had. However, nowhere within the Complaint do these Plaintiffs assert that they requested either the process of appraisal, or to come to this Court, and were then impeded in any way by any Defendant in that objective.

Simply put, each Plaintiff who desires to press a procedural due process claim, must show this Court how their Complaint asserts that they did request a particular process that they claim was due, and that the said request was thereafter denied by each Defendant against whom the claim was being made.

Second, on what do the Plaintiffs base their claim of a liberty/health interest? The NFIP protects only property, and only property directly damaged by a flood. *West v. Harris*, 573 F.2d 873, 883 (5th Cir. 1978), *cert. denied*, 99 S.Ct. 1424 (1979). As such, on what do Plaintiffs base their claim of an entitlement to a liberty interest that is actionable in this case? If the Plaintiffs assert that this right arises from the delay in the handling of their claims, then this runs afoul of standard principles of insurance law. Under those principles, an insured does not possess the right to simply delay making repairs to their home because an insurer refuses to pay. *Real Asset Mgmt., Inc. v. Lloyds of London*, 61 F.3d 1223, 1229-30 (5th Cir. 1990). Instead, the insured has a duty to mitigate his or her damages. *Royal Ins. Co. of America v. Miles & Stockbridge, P.C.*, 133 F.Supp.2d 747, 757 (D.My. 2001).

Even more clearly, the insured would not have the right to continue to live in an unhealthy environment for no other reason than the insurer was unwilling to pay a disputed claim. Further still, what is the rationale justification - - assuming all of Plaintiffs’ allegations of being “low-balled” are

³ For a description of when the appraisal clause may be invoked, and when it may not, see *De la Cruz v. Bankers*, 237 F.Supp.2d 1370 (S.D. Fla. 2002).

actually true - - that they have waited so long to file their lawsuit? When an NFIP breach of contract action is filed without all of the baseless extra-contractual and tort claims, the proceeding can happen very fast. If these Plaintiffs were serious about their breach of contract claims, they could have brought those actions more than a year ago, and likely the case would have long ago been ended, one way or another, long before the current lawsuit was filed.

Third, how has any Plaintiff been deprived of property? The only property interest at issue in this case is the value, if any, of the insured Plaintiff's SFIP claim for additional benefits. Every such Plaintiff has now come to this Court to resolve that dispute. This Court is fully empowered to do so. Where is the problem? Where is the "denial" of a "process" which is "due"?

Fourth, as to the claim of "without due process of law," what process are we discussing, and on what basis is it "due" in terms of constitutional rights? Defendants agree that Plaintiffs have the right to come to this Court pursuant to §4072. However, no Plaintiff claims that process was denied them. In fact, they allege that they were encouraged by federal officials to avail themselves of their rights to come to this Court. (Complaint, ¶33)

As such, even if this Court does hold that the implied *Bivens* remedy can be added by the judiciary to the remedies devised by Congress and FEMA by statute and regulation, and even if this Court agrees that the Complaint puts at issue an act "under color of law" that could trigger Jerry Dubyak's potential liability, then Dubyak also asserts that these Plaintiffs' claim still fails to assert any constitutional violation at all. Under *Siegert*, Count I fails and should be dismissed.

D. WHAT DAMAGES DID DUBYAK "CAUSE"?

The next element of the implied *Bivens* cause of action that the Plaintiffs' Complaint fails to assert is the element of causation. The Plaintiffs, instead of actually pleading that Mr. Dubyak caused a

constitutional deprivation to a particular fellow citizen, instead asserts all of their claims on a group basis. This group effort is untenable, particularly in light of the individualized nature of our constitutional system and traditions. As an example, in *Chuman v. Wright*, 76 F.3d 292, 294 (9th Cir. 1996), the Ninth Circuit held that the lower court had erred in instructing the jury that “[w]hen the deprivation of the rights is the result of a ‘team effort’ all members of the ‘team’ may be held liable.” The Ninth Circuit held that such a standard “allows the jury to lump all of the defendants together, rather than require to base each individual’s liability on his own conduct.” *Id.* at 295.

As per the Supreme Court, “[a] public official is liable under §1983 only ‘if he *causes* the plaintiff to be subjected to deprivation of his constitutional rights.’” *Baker v. McCollan*, 99 S.Ct. 2689, 2693 (1979)(emphasis in original). See also *City of Oklahoma City v. Tuttle*, 105 S.Ct. 2427, 2433 (1985), where the Court held that “§1983 only imposes liability for deprivations ‘cause[d]’ by a particular defendant.”

Dubyak submits that the Plaintiffs have strived for volume and for drama at the expense of individualized pleadings. They have sought to add as many possible Plaintiffs and as many possible Defendants as they could, and failed to actually plead any individual claim for or against anyone. No Plaintiff’s allegations actually “connect the dots” as to any Defendant against whom Count I is asserted. Plaintiffs desire to claim that their individual rights were trampled, but seem content to have this Court provide no respect for the individual rights to due process of each different Defendant.

Similarly, none of the non-policyholder Plaintiffs has any claim at all. In constitutional tort litigation, it is exceptionally rare for a court to hold that anyone other than the individual person whose rights are directly at issue, may sue. For instance, in *Soto v. Flores*, 103 F.3d 1056 (1st Cir. 1997), the court held that, “The death of a family member will not ordinarily give those still alive a cognizable due

process claim under §1983.” *Id.* at 1062. In *Archuleta v. McShan*, 897 F.2d 495 (10th Cir. 1990), it was held that a child could not bring a civil rights lawsuit over his emotional distress at witnessing a police officer’s beating of his father during an arrest. As was recognized by the Supreme Court in *Metro Media v. City of San Diego*, 101 S.Ct. 2882, 2912 (1981), “constitutional rights are personal and may not be asserted vicariously.” In other words, only the policyholder Plaintiffs, if anyone, would have the right to invoke a *Bivens* claim arising out of the Defendant’s activities with respect to either the purchase of or claims handling under such a policy.

E. DUBYAK INVOKES QUALIFIED IMMUNITY

Plaintiffs can be expected to argue that under *Wyatt v. Cole*, 112 S.Ct. 1827 (1992), private individuals such as Jerry Dubyak are precluded from asserting the doctrine of qualified immunity. However, in *Kennedy v. Widdowson*, 804 F.Supp. 737 (D.My. 1992)(J.Legg), the Court noted this about the then very recent decision in *Wyatt*:

The Supreme Court recently held that qualified immunity is unavailable for private defendants faced with §1983 liability for invoking a state replevin, garnishment, or attachment statute. *Wyatt v. Cole*, 112 S.Ct. 1827 (1992). The Court did not, however, foreclose the possibility that under certain circumstances a private defendant could be entitled to an affirmative defense based on qualified immunity. *Id.* at 741, FN 4.

In addition, the Supreme Court has itself expressed that *Wyatt* was a very limited holding. As the Court explained in *Richardson v. McKnight*, 117 S.Ct. 2100, 2104 (1997), “*Wyatt* did not consider its answer to the question before it as one applicable to *all* private individuals - - irrespective of the nature of their relation to the government, position, or the kind of liability at issue.”

Examples of cases where the courts held that a private individual sued along with public officials could assert the doctrine of qualified immunity, include these *Camilo-Robles v. Hoyos*, 151 F.3d 1 (1st

Cir. 1998)(psychiatrist acting under contract with police department in the evaluation of police officers); and *Heinrich v. Sweet*, 62 F.Supp.2d 282 (D. Mass. 1999).

In the matter at bar, Defendant Dubyak is sued for having acted as the employee of a FEMA fiscal agent, concerning matters plainly arising out of his employer's "Arrangement" with the government. Further, he is alleged to have "acted in concert" with the highest officials of the same agency charged by the Congress to make the NFIP a success. According to the Complaint, Dubyak's acts were all taken in conjunction with high-ranking federal officials, and all regarded the question of how should the NFIP be properly operated. More particularly, he is being sued for his decision that United States Treasury funds should not be paid to certain persons. His actions fall well within the types of activities to which the doctrine of qualified immunity has been extended to private individuals sued for constitutional torts for actions allegedly taken under color of law.

Next, not only is it the case that qualified immunity does apply to this case, but it is also the case that it is the Plaintiffs who bear the burden of persuasion to overcome Dubyak's assertion of it. Dubyak has no burden of persuasion whatsoever. *Bryant v. Muth*, 994 F.2d 1082, 1086 (4th Cir. 1993)("once the defendant raises a qualified immunity defense, the plaintiff carries the burden of showing that the defendant's alleged conduct violated the law and that such law was clearly established when the alleged violation occurred.") *Bennett v. City of Grand Prairie, Texas*, 883 F.2d 400, 408 (5th Cir. 1989)(the party seeking damages from an official asserting qualified immunity bears the burden of overcoming that defense.); *Foster v. City of Lake Jackson*, 28 F.3d 425, 428 (5th Cir. 1994)(same).

Not only is it the plaintiff who has the burden of persuasion, but also the plaintiff's burden is exceptionally high. To overcome the doctrine of immunity, the plaintiff must persuade the court that the violation at issue was clearly established in controlling caselaw before the events at issue occurred.

Harlow v. Fitzgerald, 102 S.Ct. 2727, 2738 (1982). Subsequent to *Harlow*, the Supreme Court explained in *Anderson v. Crighton*, 107 S.Ct. 3034, 3038-39 (1987) that the true meaning of *Harlow* was that a plaintiff would have to show that the law on point had become clear in a very particularized sense:

It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been “clearly established” in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see *Mitchell, supra*, 472 U.S. at 535, n. 12, 105 S.Ct. at 2820, note 12; but it is to say that in the light of preexisting law the unlawfulness must be apparent. *Id.*

In the Fourth Circuit, the court has reviewed the various Supreme Court decisions governing the doctrine of qualified immunity, and has squarely held that for the doctrine to be overcome, “*Harlow’s* ‘clearly established’ standard demands that a bright line be crossed.” *Gooden v. Howard County*, 954 F.2d 960, 968 (4th Cir. 1992).

In the matter at bar, there is absolutely no prior caselaw that would have put Defendant Dubyak (or any other Count I Defendant) on notice that any of his activities implicated federal constitutional rights at all, much less in the particularized sense required before a court could strip him of qualified immunity. He therefore asserts that there is no way that the Plaintiffs could actually meet their burden to overcome his assertion of immunity, and that he is entitled to dismissal under this doctrine even if every other argument raised within this brief is rejected by the Court.

In these regards, Dubyak can go no further in asserting his defense of qualified immunity, for the Plaintiffs must first explain how they believe that they can overcome it. Once they have made their effort to meet their burden, then Dubyak will respond in his reply brief.

CONCLUSION

Dubyak respectfully submits that Plaintiffs' *Bivens* claim is nothing but one of a whole host of different types of tort and extra-contractual claims being attempted by these Plaintiffs to seek to bolster their chances of success upon their breach of contract action. Their effort is both untenable and inappropriate. He asks that this Court dismiss the *Bivens* claim and every other extra-contractual and tort-based claim to be found within the Plaintiffs' Complaint, and leave to proceed further in this case only the breach of contract action, and that claim only involving policyholder Plaintiffs, and policy-issuing Defendants. As Dubyak is not the issuer of any SFIPs, he prays for a complete dismissal from this case with prejudice, and at the Plaintiffs' cost.

Dated: October 31, 2005

Respectfully submitted,

/s/

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