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DEFENDANTS' MOTION TO DISMISS THE COMPLAINT¹

The Defendants hereby move to dismiss Plaintiff's Complaint on the grounds that Plaintiff's claims are preempted by the federal Oil Pollution Act and, in any case, fail to state a claim under Florida law.

INTRODUCTION

The Oil Pollution Act of 1990, 33 U.S.C. §§ 2701 *et seq.* ("OPA"), makes a party who is responsible for an oil spill strictly liable to individuals and businesses who are harmed thereby. It also requires a "responsible party" to establish a procedure for receiving damages claims for possible settlement, and requires persons and businesses claiming injury from the spill to present their claims first to the responsible party before they may seek recovery under OPA in court or present their claim to a fund administered by the Coast Guard. The overarching purpose of OPA's mandatory alternative dispute resolution process is "to encourage settlement and avoid litigation." *Boca Ciega Hotel, Inc. v. Bouchard Trans. Co.*, 51 F.3d 235, 240 (11th Cir. 1995).

BP Exploration & Production, Inc. ("BP") was designated by the U.S. Coast Guard as a "responsible party" for the spill in the Gulf of Mexico that began after the drilling rig Deepwater Horizon exploded and sank in April 2010. After initially establishing its own claims process, BP transferred its OPA claims processing responsibility to Kenneth R. Feinberg, who, with the law firm of Feinberg Rozen LLP, acts in the name of the Gulf Coast Claims Facility ("GCCF") to receive, assess, and possibly settle damages claims arising from the spill.

¹ On July 15, 2011, the Judicial Panel on Multidistrict Litigation conditionally transferred this case to MDL 2179, *In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010* (E.D. La.). Conditional Transfer Order (CTO-29), *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico on April 20, 2010*, FLM/2:11-cv-00375 (J.P.M.L. July 15, 2011). **In light of that Order, we submit that the Court should defer ruling on this motion to dismiss.** See, e.g., *Kline v. Earl Stewart Holdings, LLC*, No. 10-80912-CIV, 2010 WL 3432824, at *1 (S.D. Fla. Aug. 30, 2010) ("It is far better for judicial economy and the consistency of judicial rulings for any pretrial determination of jurisdiction to be handled by the transferee court selected by the JPML."); *Gavitt v. Merck & Co.*, No. 2:08-cv-755-FtM-UA-DNF, 2008 WL 4642782, at *1-2 (M.D. Fla. Oct. 20, 2008).

OPA says nothing about how a claims process should work. It simply requires that the claimant and the responsible party have a chance to consider a settlement before the claimant may sue. Nor does the Act provide for judicial review of a responsible party's denial of a claim or its offer of a settlement amount deemed insufficient by the claimant. If the responsible party denies a claim, or if a claim is not settled by a payment within 90 days of the date the claim was presented to the responsible party, the claimant's only alternatives under OPA are to sue the responsible party in court or seek recovery from the Oil Spill Liability Trust Fund, a federal fund created by OPA and administered by the Coast Guard's National Pollution Funds Center ("NPFC").²

Plaintiff alleges that he submitted a claim to BP on July 22, 2010 (Complaint ¶ 31), and subsequently re-submitted his claim in the same amount to the GCCF on August 25, 2010 (*id.* ¶ 35). Plaintiff further alleges that the GCCF denied his claim on April 22, 2011, on the ground that it was insufficiently documented. *Id.* ¶ 61. Accepting these allegations as true, as the Court must for purposes of this motion to dismiss,³ Plaintiff has only two options available to him under OPA: he can sue BP in court, where he can recover any damages he can prove, or he can submit a claim to the NPFC. Rather than pursue these OPA-prescribed courses, however, Plaintiff has filed this suit for damages alleging noncompliance by the Defendants with what Plaintiff contends are various procedural requirements of the OPA claims process.

This suit should be seen for what it is – an effort to end-run Congress' carefully constructed scheme for the recovery of damages arising from an oil spill. Plaintiff is unhappy with the claims process, yet he is unwilling to sue BP (and join the multidistrict litigation now

² The Oil Spill Liability Trust Fund was created to ensure the availability of federal funds for oil spills should the responsible party be unable or unwilling to pay claims.

³ *E.g., Heckert v. 2495 McCall Rd. Corp.*, No. 2:07-cv-310-FtM-34SPC, 2008 U.S. Dist. LEXIS 12981, at *19 (M.D. Fla. Feb. 21, 2008).

pending in the Eastern District of Louisiana), or submit his claim to the NPFC. Instead, he seeks to recover his alleged losses caused by the spill by masquerading them as losses allegedly caused by the Defendants' supposedly tortious administration of the OPA claims process.

Allowing these claims to proceed would defeat Congress' explicit goal of encouraging private settlements and reducing – not increasing – the involvement of the courts. Indeed, if each of the more than 500,000 individuals and businesses that have so far submitted claims to the GCCF were permitted to sue the Defendants in various courts throughout the country to enforce their own view of how a claims procedure should work, the GCCF's operations would be gravely impeded if not brought to a halt, thereby undermining Congress' goal of expediting the payment of claims for damages arising from oil spills. Moreover, because OPA is silent on how a claims process should be structured and administered, the Defendants would potentially be subject to wildly divergent procedural requirements imposed by different courts across the country. As set forth herein, under the well-established doctrine of "conflict preemption," state law is preempted where, as here, it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Plaintiff's claims should also be dismissed because he asserts Florida law causes of action that on their face do not lie and/or because they depend for their success on supposed duties under OPA which do not exist. Moreover, because Plaintiff may now sue BP in court, where he can recover all of his proven damages – plus statutory interest running from 30 days after he presented his claim to the GCCF – he can prove no damages from Defendants' alleged violation of the OPA claims process. For this reason as well Plaintiff's state law claims should be dismissed.

STATEMENT

A. OPA's Goal of Encouraging Settlements.

Congress enacted OPA “to create a single Federal law providing cleanup authority, penalties, and liability for oil pollution.” S. Rep. No. 101-94, at 9 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 722, 730. OPA defines a category of “responsible parties” and makes them strictly liable for the payment of specified cleanup costs (referred to as “removal costs”) and damages that result from an incident. 33 U.S.C. §§ 2701(32), 2702(a), (b).⁴ *See Gabarick v. Laurin Maritime (America) Inc.*, 623 F. Supp. 2d 741, 744 (E.D. La. 2009) (“A responsible party * * * is strictly liable for removal costs and damages.”) (footnote omitted).

The Act mandates that the parties consider a settlement before a claimant may bring suit. It requires responsible parties to establish a procedure for receiving claims for removal costs and damages resulting from the spill, and it requires claimants to present their claims under that procedure before resorting to court. Thus, Section 2713(a) provides that “all claims for removal costs or damages shall be presented first to the responsible party.” Section 2705 further provides, in relevant part:

The responsible party shall establish a procedure for the payment or settlement of claims for interim, short-term damages. Payment or settlement of a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled shall not preclude recovery by the claimant for damages not reflected in the paid or settled partial claim.

The claims procedure required by Sections 2705 and 2713(a) is understood to apply to claims for final payments as well as interim payments and, as explained below, the GCCF accepts both interim and final claims.

⁴ Unless otherwise indicated, all statutory references herein are to Title 33 of the United States Code.

If a claim presented to the responsible party is denied or not settled by a payment within 90 days of the date it was presented , *then* “the claimant may elect to commence an action in court against the responsible party” or “to present the claim to the” Oil Spill Liability Trust Fund administered by the NPFCL § 2713(c). The claimant is generally entitled to interest running from 30 days after it first presented its claim to the responsible party.⁵

Congress intended the OPA presentment requirement and the claims process to function as a form of alternative dispute resolution that would *minimize* the involvement of the judiciary; thus, the claims procedure reflects “a congressional desire to encourage settlement and avoid litigation.” *Boca Ciega Hotel, Inc. v. Bouchard Trans. Co.*, 51 F.3d 235, 240 (11th Cir. 1995). The court in *Boca* cited the statements of Representative Hammerschmidt (“The system of liability and compensation * * * is intended to allow for quick and complete payment of reasonable claims without resort to cumbersome litigation.”) and Representative Lent (“The thrust of this legislation is to eliminate, to the extent possible, the need for an injured person to seek recourse through the litigation process, which – as we all know – can take years.”). 135 Cong. Rec. H7962, 7965 (daily ed. Nov. 2, 1989). *Accord Gabarick, supra*, 623 F. Supp. 2d at 747-48 (“[T]he legislative intent of OPA was to encourage settlement and reduce litigation in oil spill cases.”); *Johnson v. Colonial Pipeline Co.*, 830 F. Supp. 309, 310-11 (E.D. Va. 1993) (“The purpose of the claim presentation procedure is to promote settlement and avoid litigation.”).

⁵ Section 2705 provides, with certain exceptions, that the responsible party “is liable to a claimant for interest on the amount paid in satisfaction of a claim under this Act * * * [from] the 30th day following the date on which the claim is presented to the responsible party.”

Other than the provisions cited above, and a requirement that the responsible party advertise the opportunity to file a claim,⁶ OPA says nothing about the claims process the responsible party must establish – nothing, for example, about the procedures themselves, about the participation of anyone other than the responsible party in their formulation, about claims forms, about staffing claims offices, about communications with claimants, about possible internet claims submissions, about security measures to protect confidential claimant information, about the methodologies for evaluation of claims, about the form of releases when settlements are made, or anything else.

By contrast, the Act does instruct the President to promulgate “regulations for the presentation, filing, processing, settlement, and adjudication of claims under this Act against the [Oil Spill Liability Trust] Fund.” § 2713. Those regulations, published by the Coast Guard, appear at 33 C.F.R. Part 136.⁷ They include a reference to OPA’s presentment requirement and advise claimants to submit their claims first to the responsible party (“RP”). However, the NPFC’s Claimant’s Guide, which was published to assist claimants in submitting claims to the NPFC, cautions that “[t]his guide does not address procedures for submitting claims to the RP. The RP must establish and advertise those procedures.” National Pollution Funds Center, Claimants Guide: A Compliance Guide For Submitting Claims Under the Oil Pollution Act of 1990, at 4 (Apr. 2003), *available at* <http://www.uscg.mil/npfc/Claims/default.asp>. No other Coast Guard regulation says anything about the procedures to be adopted by the responsible party.

⁶ See § 2714(b) (responsible party must advertise the claims procedure within 15 days of being designated the responsible party); 33 C.F.R. § 136.309 (Coast guard sets “the specific requirements for advertisement for each incident”).

⁷ Regulation 136.1(a) states that it “prescribes regulations for (1) Presentation, filing, processing, settlement, and adjudication of claims authorized to be presented to the Oil Spill Liability Trust Fund.”

B. BP's Transfer To The Defendants, And The GCCF's Operations.

The Coast Guard designated BP a "responsible party" under OPA with respect to the Deepwater Horizon spill. BP accepted the designation, promptly initiated its OPA claims process, and ran it for four months. After a meeting with President Obama, BP on August 23, 2010 transferred its responsibility to receive and process individual and business claims to Kenneth R. Feinberg, who along with his firm, Feinberg Rozen LLP, acts in the name of the GCCF.

The GCCF, and Mr. Feinberg as Claims Administrator, exercise their own judgment with respect to evaluation and payment of claims.⁸ As of July 20, 2011, the GCCF had received claims from 522,742 individuals and businesses and had paid almost \$4.8 billion in claims.⁹ The GCCF has offered claimants several options. From August 23 to November 23, 2010, claimants could submit non-final, interim requests for Emergency Advance Payments for damages caused by the spill, and could accept payment without having to sign a release. From January 2011 through August 22, 2013, claimants may submit Interim Claims once each calendar quarter for documented *past* damages caused by the spill, again without a release. A claimant who received an Emergency Advance Payment or an Interim Payment may request a final Quick Payment, which allows a claimant, upon the signing of a release, to be paid \$5,000 if an individual or \$25,000 if a business without having to submit any further documentation or undergo any further claims review. Finally, a claimant may submit a Full Review Final Claim for a lump-sum single payment for all losses and damages recoverable under OPA, both past and future, caused by the

⁸ See Gulf Coast Claims Facility Frequently Asked Questions, Questions 1, 3 and 4, <http://www.gulfcoastclaimsfacility.com/faq> (last visited June 30, 2011).

⁹ Overall GCCF Program Statistics, Status Report as of June 29, 2011, at 1, <http://www.gulfcoastclaimsfacility.com/reports> (last visited July 21, 2011).

spill, which requires the submission of documents that prove that the claimed losses or injuries were “suffered as a result of the spill,” and the signing of a release.¹⁰

C. The Complaint.

The Complaint alleges that Plaintiff Selmer M. Salvesen presented a Final Payment claim to BP for \$175,760.00 on July 22, 2010 and then, at the instruction of BP, re-filed his claim with the GCCF on August 25, 2010. Complaint ¶¶ 31, 35. The Complaint further alleges that Mr. Salvesen revised his claim several times, submitting revised Final Payment claims to the GCCF on September 15, 2010 and on January 4, 2011. *Id.* ¶¶ 36, 44. Then, on January 24, 2011, following a meeting with GCCF representative Defendant William G. Green,¹¹ Plaintiff submitted a Full Review Final Payment Claim to the GCCF for \$645,7600. *Id.* ¶¶ 45-47.

Plaintiff further alleges that he submitted a revised Full Review Final Payment Claim for \$737,656 on March 22, 2011, *id.* ¶ 56, and that on April 22, 2011 the GCCF denied Plaintiff’s claim due to insufficient documentation. *Id.* ¶ 61. Accepting these allegations as true, under OPA Plaintiff may now sue BP in court or submit his claim to the NPFC.

The Complaint alleges that the Defendants have failed in various respects to comply with OPA in handling the claims Mr. Salvesen presented to the GCCF. Thus, Plaintiff alleges that the Defendants –

have fraudulently stated that the protocol under which GCCF operates is “structured to be compliant with OPA and apply the standards of OPA” (*id.* ¶¶ 3, 32, 66, 70);

have impermissibly “reset” the 90-day period under OPA because “OPA does not allow the responsible party to ‘re-advertise’ a claim

¹⁰ See BP Defendants’ Memorandum in Support of BP Defendants’ Motion to Dismiss Plaintiffs’ First Amended Master Complaint, at 6, *In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010*, MDL No. 2179 (E.D. La. February 28, 2011) (No. 1440-1).

¹¹ Defendant Green is an employee of Hammerman & Gainer, Inc., which is a subcontractor retained to act as a liaison for the GCCF, a role which requires it to understand the GCCF’s guidelines and processes and meet with claimants to help guide them through and understand the process.

through any other entity, for the purpose of ‘resetting’ this period” (*id.* ¶ 6);

have fraudulently delayed payment to Plaintiff by requiring him to resubmit to the GCCF the claim he originally submitted to BP (*id.* ¶ 7);

have committed fraud by failing to advise Plaintiff that “no claimant should receive any less compensation in the GCCF claims process than they are entitled to under OPA” and that “under OPA * * * any acceptance for a lesser amount [than the claim submitted] *shall not* preclude the claimant from pursuing future recovery” in court or from the federal Oil Spill Fund (*id.* ¶ 11; emphasis in original);

have fraudulently required Plaintiff to prove “proximate causation between [his] damages and the Deepwater Horizon oil spill incident” when “OPA is a strict liability statute” and requires only that a claimant “show that his or her damages ‘resulted from’ the oil spill” (*id.* ¶¶ 72, 73);

have fraudulently “failed to provide a procedure for the payment or settlement of claims for interim, short-term damages beyond 90 days” because “[a] single six-month emergency advance payment for lost income is in violation of OPA” (*id.* ¶¶ 76, 80);

have, “in violation of OPA, provide[d] for a single final settlement payment” (*id.* ¶ 81);

have fraudulently stated “that no claim may be submitted to the GCCF ‘more than three years after the date the Protocol becomes operative’” because OPA permits claims brought “within three years after the date on which the loss” and its connection with the spill is discoverable (*id.* ¶¶ 84-85);

have fraudulently failed to advise Plaintiff of certain information about the OPA claims procedure (*id.* ¶¶ 88-92, 99);

have fraudulently failed to pay interest required by OPA (*id.* ¶¶ 94-95);

have fraudulently required a full release of claims in return for payment, in violation of OPA (*id.* ¶¶ 96-99); and

have fraudulently delayed payment to Plaintiff by holding his claim under review indefinitely in violation of OPA (*id.* ¶¶ 100-101).

The seven counts of the Complaint purport to state claims under Florida common law, but they all allege and depend on finding that Defendants have a duty to claimants under OPA and breached that duty in their interactions with Plaintiff. We discuss the claims (for gross negligence, negligence, negligence *per se*, fraud, fraudulent inducement, promissory estoppel, and unjust enrichment) in greater detail below.

D. The Multidistrict Litigation.

BP and other companies associated with the Deepwater Horizon spill are defendants in numerous suits that have been consolidated before Judge Barbier in the Eastern District of Louisiana in MDL 2179, *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010*. In response to a request by Judge Barbier for briefing of the subject of GCCF's compliance with OPA, the United States submitted a brief on February 18, 2011. That brief, attached hereto at Tab A, contains a useful discussion of OPA, the genesis of the GCCF, and the role of courts in the OPA claims process.¹²

ARGUMENT

As this Court recently noted, *Ashcroft v. Iqbal*, 129 S. Ct.1937 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007),

significantly changed the pleading standard required previously. The old regime of *Conley v. Gibson* * * * mandated that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim." [355 U.S.] at 45. The Court's opinion in *Twombly* "retired" *Conley's* "no set of facts" language and insisted on "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Twombly* at 545. The Court demanded "enough facts to state a claim to relief that is plausible on its face." *Id.* * * * "*Twombly* and *Iqbal* have transformed the function of a complaint from *Conley's* limited role by imposing a more demanding standard

¹² Several defendants in the MDL proceeding have moved to dismiss complaints therein on alternate preemption grounds that are not relevant here and therefore not addressed herein. *See, e.g.*, BP Defendants' Memorandum in Support, *supra* note 8, at 26-35.

that requires a greater factual foundation than previously was required.” * * * Because of the necessity to show plausibility, the past practice of construing the complaint in the light most favorable to the pleader and drawing all inferences in his favor has been replaced by construing a pleading *against* the pleader. This circuit has begun implementing the new plausibility standard. *Am. Dental Ass’n v. Cigna Corp.*, 605 F.3d 1283, 1296 (11th Cir. 2010) (affirming dismissal of the case for failure to state a claim) * * *.

Geller v. Von Hagens, No. 8:10-CIV-1688-EAK-AEP, 2010 U.S. Dist. LEXIS 129561, at *5-7 (M.D. Fla. Nov. 23, 2010) (Kovachevich, J.) (citing Arthur Miller, *From Conley to Twombly to Iqbal: a Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. (2010)).

With this standard in mind, we now show that Plaintiff’s Complaint should be dismissed because his claims are preempted by OPA and because, in the alternative, they are not plausible as a matter of law Florida law.

I. OPA PREEMPTS PLAINTIFF’S CLAIMS

A. General Principles.

The Supreme Court has recognized three kinds of federal preemption. Express preemption occurs when Congress in a statute “define[s] explicitly the extent to which its enactments pre-empt state law.” *English v. General Elec. Co.*, 496 U.S. 72, 78 (1990). Field preemption occurs when a state “regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.” *Id.* at 79. And conflict preemption, which applies in this case, occurs when state law conflicts with federal law and it is impossible “to comply with both state and federal requirements” (*id.*) or when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). *Accord Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (“[I]t

has been settled that state law that conflicts with federal law is ‘without effect.’”) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)).

The intent of Congress is “the ultimate touchstone in every pre-emption case.” *Gabarick, et al. v. Laurin Maritime (America) Inc.*, 623 F. Supp. 2d 741, 749 (E.D. La. 2009) (holding that OPA preempts federal maritime law) (quoting *Altria Group, Inc. v. Good*, 129 S.Ct. 538, 543 (2008)). Congress’ intent may be express or inferred. “Congress may indicate pre-emptive intent through a statute’s express language or through its structure and purpose.” *Altria*, 129 S. Ct. at 543.

B. State Tort Law Would Interfere With OPA’s Goal Of Promoting Settlement Without the Need for Judicial Intervention.

Numerous courts have recognized that “[t]he purpose of the [OPA] claim presentation procedure is to promote settlement and avoid litigation.” *Johnson*, 830 F. Supp. at 310-11; *see also* authorities cited at p. 7, *supra*. OPA’s text reflects that purpose. Responsible parties must establish and advertise procedures for the settlement of claims within a finite period. Claimants seeking recovery of claims for removal costs and damages must attempt to settle with the responsible party through the claims process. A claimant not satisfied with the settlement offered by the responsible party may sue the responsible party in court, and also may sue if the claim is not paid within 90 days.

This process is intended to proceed quickly and without judicial intervention. *See* 135 Cong. Rec. H7965 (daily ed. Nov. 2, 1989) (OPA is intended “to allow for quick and complete payment of reasonable claims without resort to cumbersome litigation.”). Claimants have no right to a judicial appeal from a responsible party’s refusal or failure to settle their claim within 90 days: their options are expressly limited by OPA to suing the responsible party in court or presenting their claim to the NPFC. 33 U.S.C. § 2713(c). Congress’ intentional denial of a right

of judicial appeal strongly suggests that Congress also meant to deny claimants a right to challenge the claims procedures adopted by responsible parties, for if the end result is unreviewable it would hardly make sense to provide review for supposed deficiencies in the procedure leading to that result.

The brief of the United States to which we referred at page 12 above, submitted in the *Deepwater Horizon* MDL proceeding in response to Judge Barbier's request for briefing on the GCCF's compliance with OPA, strongly supports dismissal of the Complaint. After describing the statutory scheme set out above, the United States noted that claims submitted to the NPFC and paid by the Oil Spill Liability Trust Fund are assigned (subrogated) to the Justice Department for pursuit against the responsible party. The United States then said:

The Responsible Party thus has incentives to resolve claims through its claims process, because any valid claims that it fails to settle will be pursued by the United States. Similarly, claimants have the incentive to seek reasonable settlements from the Responsible Party, armed with the knowledge that they have a subsequent opportunity to submit their claim to the NPFC or in court if their claim is not resolved.

The OPA leaves this extra-judicial claims settlement process largely in the parties' hands. While regulations provide considerable detail about procedures for submission of claims to the NPFC, *neither the OPA nor its implementing regulations provide similar requirements for private claims processes.* Rather than dictating how and what specific claims parties must resolve, the OPA relies on its incentives – strict liability on the Responsible Parties, the backstop of the NPFC/Fund and the courts where resolution was not reached, and the clear benefits of expeditious out-of-court settlements – to encourage Responsible Parties to fairly compensate those harmed by an oil spill.

* * *

Finally, the OPA does not envision court management of a claims process. Rather, the OPA claims process is intended as a mechanism by which parties may avoid litigation – not a mechanism that will generate litigation or open up new forum for disputes.

Statement of the United States, Exhibit A, at pp. 2-3 (emphasis added).

Finally, just considering the consequences of allowing actions like this one to proceed is enough to stop the idea in its tracks. The GCCF has received more than 520,000 claims so far. Its doors remain open until August 2013. OPA says nothing about how a responsible party should set up a claims procedure. Hence, every claimant and every court would be free to imagine – and in the case of courts, to impose – whatever procedures they deem required to assure that the process is “fair,” or comports with due process, or whose implementation would not constitute a breach of duty under state law. The first case would invite the second and the second would open the floodgates. The GCCF would be seriously distracted from its claims settling purpose by having to litigate these cases, and its operations would be gravely impaired if it found itself subject to disparate procedural requirements ordered by courts across the country. It is hard to imagine a stronger case of state law “stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000).

In short, as the United States has concluded, “the OPA does not envision court management of a claims process.” Instead, OPA preempts efforts based on state law to impose particular requirements on responsible parties in their discharge of their settlement duties under the Act.

C. OPA’s Allowance of Some State Law Claims Does Not Save Plaintiff’s Claims.

Section 2718 of OPA preserves certain State law claims imposing additional liability or requirements with respect to oil spills. This case, however, asserts state law claims not for damages resulting from an oil spill, but for a violation of OPA’s supposed claims processing requirements. As we have shown, OPA *does* preempt those claims because they would seriously disrupt the claims procedure, invite judicial interventions, impede the congressional goal of minimizing the role of the courts, and thereby obstruct “the accomplishment and execution of the

full purposes and objectives of Congress.” *Crosby*, 530 U.S. at 372.¹³ Accordingly, OPA preempts rather than preserves Plaintiff’s claims in this case.

II. PLAINTIFF’S CLAIMS ARE INVALID UNDER FLORIDA LAW

All seven of the Complaint’s counts relate to the operations of the GCCF under OPA. Many of them are based on a supposed duty that OPA allegedly imposes on the Defendants to handle claims in a particular way. As we have seen, the only duty OPA imposes on responsible parties is to establish and advertise a process for receiving claims; **OPA does not require that the responsible party actually settle the claims.** In this case, as alleged in the Complaint, all of OPA claims processing requirements were fulfilled: a claims process was established, the Plaintiff submitted a claim, and Defendants denied Plaintiff’s claim. The Plaintiff can still pursue remedies under OPA that will make him whole if he should later prevail in a court case against the responsible party. (He can also submit additional documentation to the GCCF in support of his GCCF claim.) In short, the Defendants cannot have breached any duty to Plaintiff with respect to the manner in which they administered the claims process, and the Plaintiff cannot show any damages caused by the Defendants’ conduct. For this fundamental reason, and others set out below, none of Plaintiff’s seven counts states a valid claim for relief.

A. Plaintiff Fails to State a Claim for Gross Negligence or Negligence (Counts I, II).

Counts I and II, for gross negligence and negligence, assert that Defendants owe Plaintiff a duty “to exercise reasonable care in regard to the operation of Defendant GCCF’s claims intake, claim review, claim evaluation and claim settlement and payment services” (Complaint ¶¶ 112, 120), and that Defendants have breached that duty “in their negligent operation of

¹³ It is not uncommon for the same federal statute to preempt some state law claims but not others. Thus, for example, *Zeran v. America Online, Inc.*, 958 F. Supp. 1124, 1134 (E.D. Va. 1997), held that, although not all state law claims concerning interactive computer services were preempted by the Communications Decency

Defendant GCCF's claim intake, claim review, claim evaluation and claim settlement and payment services in" various manners, including "Inadequate Claim Processing," "Inadequate Claim Investigation," "Delay in Payment," and "Unreasonable Denial of Claim." *Id.* ¶¶ 114, 122.

As we have seen, nothing in OPA creates a duty of care that a responsible party must observe in operating its claims process. Moreover, Counts I and II are deficient on their face as a matter of Florida law. A defendant may be liable for gross negligence under Florida law only if it knew of circumstances which constitutes a "clear and present danger" and yet still undertook "a conscious, voluntary act or omission * * * which is likely to result in injury."¹⁴ Defendants' processing of Plaintiff's claims under OPA is not a circumstance constituting a "clear and present danger" to Plaintiff. Nor have Defendants undertaken any conscious, voluntary act or omission which is likely to result in injury to Plaintiff, since Plaintiff may yet sue BP (or present his claims to the Coast Guard) and recover his provable damages with interest.

A plaintiff alleging simple negligence under Florida law must establish (1) a duty requiring the defendant to conform to a certain standard of conduct for the protection of others against unreasonable risks; (2) a breach of the duty; (3) proximate cause; and (4) actual loss or damage. *Clay Elec. Coop., Inc. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2003). Nothing in OPA imposes a duty on the Defendants to conform to a certain standard of conduct for claims intake, review, evaluation, or settlement of claims. Nor can the Defendants' actions proximately cause Plaintiff to suffer actual damages, for he remains free to recover his damages in a suit against BP or a claim to the NPFC. Accordingly, Counts I and II should be dismissed.

Act, plaintiff's negligence claim was preempted because state law liability was "an obstacle to the accomplishment of the full purposes and objectives of Congress" in enacting the statute.

¹⁴ *Hager v. Live Nation Motor Sports, Inc.*, 665 F. Supp. 2d 1290, 1294 (S.D. Fla. 2009) (citing *Central State Transit & Leasing Corp. v. Jones Boat Yard, Inc.*, 206 F.3d 1373, 1377 (11th Cir. 2000) (quoting *Sullivan v. Streeter*, 485 So. 2d 893, 895 (Fla. Dist. Ct. App. 1986))).

B. Plaintiff Fails to State a Claim for Negligence *Per Se* (Count III).

Count III of the Complaint, alleging negligence *per se*, alleges that “Defendants’ conduct with regard to the operation of Defendant GCCF’s claim intake, claim review, claim evaluation and claim settlement and payment services is governed by the Oil Pollution Act of 1990” which “creates statutory standards that are intended to protect and benefit Plaintiff,” and that “Defendants’ violations of these statutory standards constitute negligence *per se*.” *Id.* ¶¶ 127-29.

Two categories of statutory violations constitute negligence *per se* Under Florida law: “(1) violation of a strict liability statute designed to protect a particular class of persons who are unable to protect themselves”; [and] (2) violation of a statute establishing a duty to take precautions to protect a particular class of persons from a particular type of injury.”¹⁵ To find negligence *per se*, a private right of action must be explicitly or implicitly stated in a statute.¹⁶ Where the statute displays “no evidence in the language or the legislative history of a legislative intent to create a private remedy,” negligence *per se* claims must be dismissed.¹⁷

OPA’s text provides no private right of action for violations of the claims procedure, and, as we have seen, the legislative history shows that OPA was passed by Congress in order to encourage settlement and avoid litigation. *Boca Ciega Hotel, Inc.*, 51 F.3d at 240; *Gabarick*, 623 F. Supp. 2d at 747-48; *Johnson*, 830 F. Supp. at 310-11. Hence permitting a private right of action for alleged violations of OPA’s claims procedure would frustrate Congress’ goal of preventing litigation. Accordingly, Count III, alleging negligence *per se*, should be dismissed.

¹⁵ *Northern Ins. Co. of New York v. Pelican Point Harbor, Inc.*, No. 3:05cv184/MCR/MD, 2006 WL 1285078, at *7 (N.D. Fla. May 5, 2006) (denying negligence *per se* claim because statute defendant allegedly violated did not explicitly provide for a private right of action) (citing *Grand Union Co. v. Rucker*, 454 So.2d 14, 15 (Fla. Dist. Ct. App. 1984)).

¹⁶ *Welker v. Southern Baptist Hosp. of Florida, Inc.*, 864 So. 2d 1178, 1182 (Fla. Dist. Ct. App. 2004).

¹⁷ *Murthy v. N. Sinha Corp.*, 644 So. 2d 983, 985-87 (Fla. 1994); *Florida Physicians Union v. United Healthcare of Fla., Inc.*, 837 So. 2d 1133, 1137 (Fla. Dist. Ct. App. 2003).

C. Plaintiff Fails to State a Claim for Fraud (Count IV).

Count IV asserts that Defendants have falsely represented that “[t]he protocol under which Defendant GCCF operates is structured to be compliant with OPA and apply the standards of OPA.” Complaint ¶ 132. To state a claim for fraud under Florida law, a plaintiff must establish through particular, ultimate facts: (1) a false statement concerning a material fact; (2) the speaker’s knowledge of falsity; (3) the speaker’s intent to induce another to act on the false statement; and (4) reliance on the false statement to the injury of the other party. *C & J Sapp Publ’g Co. v. Tand-Corp.*, 585 So. 2d 290 (Fla. Dist. Ct. App. 1991). A fact is *material* if, but for the misrepresentation, the party would not have acted as it did. *Riback v. Centex Real Estate Corp.*, 702 So. 2d 1316, 1317 (Fla. Dist. Ct. App. 1997).

Plaintiff has failed to state a cause of action for fraud because (1) OPA has no “standards” by which responsible parties have to administer a claims procedure, and (2) Plaintiff cannot show that he detrimentally relied on any statements made by the Defendants, false or true. He contends that he “relied on Defendants’ representations rather than elect to commence an action in court against the responsibility party or to present the claim to the” NPFC. Complaint ¶ 134. This allegation is not plausible under *Iqbal* and *Twombly*. First, OPA *required* Plaintiff to submit his claim to the GCCF (*see* § 2713(c)) and a representation is immaterial if the actions would have been taken whether the statement had been made or not. *Riback*, 702 So. 2d at 1317; *Morris v. Ingraffia*, 154 Fla. 432 (1944). Second, OPA *authorizes* Plaintiff now to sue BP or present his claim to the NPFC (a choice he has not yet made), and thus Plaintiff has not *as a matter of law* lost that right and cannot show any detriment from any purported reliance on Defendants’ alleged misrepresentations.

D. Plaintiff Fails to State a Claim for Fraudulent Inducement (Count V).

Count V alleges that Defendants made false statements of material fact with respect to the GCCF claims process, the Emergency Advance Payment (“EAP”) claims process, and Plaintiff’s claim “for the purpose of either inducing Plaintiff Salvesen to enter into a settlement agreement with Defendant GCCF or furthering their ‘Delay, Deny, Defend’ strategy.” Complaint ¶¶ 137, 139.

Additionally, Count V alleges that Plaintiff’s “[r]eliance on these false statements of material fact did *** induce Plaintiff Salvesen to refrain from commencing an action in court against the responsible party or presenting the claim to the” NPFC. *Id.* ¶ 141.

A plaintiff alleging fraudulent inducement under Florida law must prove (among other things) reliance on the false statement to the injury of the plaintiff. *Rose v. ADT Sec. Servs., Inc.*, 989 So. 2d 1244 (Fla. Dist. Ct. App. 2008). Plaintiff cannot establish reliance because he was required by OPA to submit his Final Payment claim to the GCCF, and he can prove no damages because he is free to sue BP and present his claim to the NPFC. Hence Count V should be dismissed.

E. Plaintiff Fails to State a Claim for Promissory Estoppel (Count VI).

Count VI alleges that Defendant GCCF made statements that claims would be timely paid yet has not timely paid Plaintiff’s claim. Complaint ¶¶ 143-44. To state a cause of action for promissory estoppel under Florida law, a plaintiff must prove (1) a representation as to a material fact that is contrary to a later-asserted position; (2) a reasonable reliance on that representation; and (3) a change in position detrimental to the party claiming estoppel caused by the representation and reliance thereon. *FCCI Ins. Co. v. Cayce’s Excavation, Inc.*, 901 So. 2d 248, 251 (Fla. Dist. Ct. App. 2005) (citing *Almerico v. RLI Ins. Co.*, 716 So. 2d 774 (Fla.1998)). Plaintiff’s promissory estoppel claim suffers from the same fatal flaws as his fraud claims: he

cannot establish reliance (because OPA requires presentation to the responsible party) or damages (because he can still sue BP or present to the NPFC). Accordingly, Count VI should be dismissed.

F. Plaintiff Fails to State a Claim for Unjust Enrichment (Count VII).

Count VII alleges that the GCCF, Mr. Feinberg and/or Mr. Green have been enriched by delaying payment of Plaintiff's claims which has "allowed Defendants to save thousands of dollars in costs" (Complaint ¶ 151) and has allowed Defendants Feinberg, Feinberg Rozen and Green to receive "a monthly payment for services which did not rise to the standards expected of their profession." *Id.* ¶ 152.

A plaintiff alleging unjust enrichment under Florida law must prove (1) a benefit conferred on the defendant by the plaintiff, (2) the defendant's appreciation of the benefit, and (3) the defendant's acceptance and retention of the benefit under circumstances that make it inequitable for him to retain the benefit without paying the value thereof. *Rollins, Inc. v. Butland*, 951 So. 2d 860 (Fla. Dist. Ct. App. 2006).

Plaintiff cannot establish unjust enrichment because he has conferred no benefit on any of the Defendants – certainly none that the Defendants have appreciated. The monies paid in settlement by the GCCF come from the fund established (and funded) by BP. Even if the Defendants *had* delayed paying Plaintiff's claims, that could not possibly have enriched them (and would not have enriched BP either, since it remains liable for Plaintiff's provable damages in a suit in court). Moreover, Plaintiff's claim that the Defendants have received payment from BP "for services which did not rise to the standards expected of their profession" cannot support a claim for unjust enrichment by Plaintiff because it relates to matters entirely encompassed by the written agreement between BP and Feinberg Rozen, which confers no rights on the Plaintiff.

Accordingly, Plaintiff's unjust enrichment claim should be dismissed.

CONCLUSION

Defendants' Motion to Dismiss should be granted.

Dated: July 26, 2011

Respectfully submitted,

/s/ Eric S. Adams

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing was sent by CM/ECF on this 26th day of July, 2011 to the following counsel:

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/s/ Eric S. Adams_____

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