IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IFTIKHAR SAIYED, Plaintiff, -v.- COUNCIL ON AMERICAN-ISLAMIC RELATIONS ACTION NETWORK, INC., Defendant.	CIVIL NO: 1:10-cv-00022-PLF-AK
RENE ARTURO LOPEZ., *et al.*, Plaintiffs, -v.- COUNCIL ON AMERICAN-ISLAMIC RELATIONS ACTION NETWORK, INC., Defendant.	CIVIL NO: 1:10-cv-00023-PLF-AK

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rules of Civil Procedure 56, Local Civil Rules 7(d), and this Court's Minute Entry dated January 15, 2013, Plaintiffs hereby reply in support of Plaintiffs' Rule 56(f) *de facto* motion for summary judgment (Doc. Nos. 70 & 76)[1] ("Motion")[2] on the following grounds: (1) Defendant has failed to present admissible or credible evidence to rebut Plaintiffs' Separate Statement of Issues and Undisputed Facts (Doc. No. 70) filed in support of the Motion;

[1] Unless otherwise noted, all docket numbers will reference the docket entry in the Lead Case of this consolidated matter, Case No. 1:10-cv-0022-PLF-AK.

[2] For clarity, it should be noted that this reply brief is filed pursuant to this Court's Minute Entry dated January 15, 2013. In effect, the parties and the Court have consistently treated Plaintiffs' responsive opposition brief to Defendant's motion for summary judgment as a *de facto* motion for summary judgment pursuant to Rule 56(f) of the Federal Rules of Civil Procedure. (*See, e.g.*, Minute Entries dated November 30 and December 27, 2012, and especially Minute Entry granting Plaintiffs' unopposed motion to file this reply brief in support of Plaintiffs' motion for summary judgment [Doc. No. 81], which in turn was based in part on the fact that Defendant has termed, treated, and acquiesced to the characterization of Plaintiffs' opposition to Defendant's motion for summary judgment as a *de facto* cross-motion for summary judgment).

(2) Defendant's legal and factual arguments relating to agency simply misstate the law and mischaracterize the factual record in this case; (3) Defendant effectively concedes *alter ego* liability by failing to even address the factual or legal underpinnings of this theory of liability; and (4) Defendant's arguments about damages continue to ignore the factual record and the law in the Commonwealth of Virginia on emotional damages arising from independent torts that exist beyond or notwithstanding a claim of intentional infliction of emotional distress.

Thus, as set forth herein and in the Motion, and as supported by Plaintiffs' Separate Statement of Issues and Undisputed Facts filed in support of the Motion, Plaintiffs respectfully submit that pursuant to Rule 56(f)(1) the Court should enter summary judgment on the issue of liability for Plaintiffs against Defendant on Counts Two (Virginia Consumer Protection Act), Three (common law fraud), and Four (breach of fiduciary duty) of the Amended Complaint insofar as there are no disputed material facts precluding summary judgment.

Respectfully submitted,

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PLAINTIFFS' REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In Plaintiffs' unopposed motion seeking leave to file this reply brief (Doc. No. 81), Plaintiffs represented to the Court that they would endeavor to file a focused 15-page brief in support of its motion for summary judgment (Doc. Nos. 70 & 76)[3] ("Motion"). Plaintiffs intend to abide by that representation. As such, rather than treat separately each of Defendant's factual assertions and objections to Plaintiffs' Separate Statement of Issues and Undisputed Facts (Doc. No. 70) filed in support of the Motion ("Plaintiffs' Facts" and cited as "Pls.' Facts"), and rather than treat separately the evidentiary shortcomings of each of the new declarations filed with Defendant's brief (a brief that serves as both a reply brief in support of its motion for summary judgment and an opposition to Plaintiffs' cross-motion for summary judgment [Doc. No. 80]) ("Opposition Brief" and cited as "Def.'s Opp'n Br."), Plaintiffs will treat the factual record and evidentiary issues in the context of each of the new matters raised by Defendant's Opposition Brief. Thus, we will treat each section of Defendant's Opposition Brief in turn, treating both the legal and evidentiary/factual issues as necessary.

I. Defendant's Motion for Summary Judgment Was Neither Properly Served Nor Timely Filed.

The first section of Defendant Council on American-Islamic Relations Action Network, Inc.'s[4] Opposition Brief is an argument that its original motion for summary judgment was

[3] Unless otherwise noted, all docket numbers will reference the docket entry in the Lead Case of this consolidated matter, Case No. 1:10-cv-0022-PLF-AK.

[4] Throughout, Defendant is referred to as "CAIR" or "CAIR National." "CAIR" is the acronym used by Defendant to identify itself in its motion for summary judgment. (Def.'s Mot. [Doc. No. 80, re-filed not under seal improperly only in Member Case, Case No.. 1:10-cv-0023-PLF-AK] at 1). Throughout discovery, CAIR also refers to itself as "CAIR National." For purposes herein, "CAIR-F" shall mean CAIR-Foundation, Inc., an entity related to CAIR, which operates out of the same offices as CAIR. (Mem. Order, July 13, 2011 [Doc. No. 42] at 4). CAIR and CAIR-F are also referred to by Defendant collectively as "CAIR National." "CAIR-VA" refers to a satellite office of Defendant sometimes referred to as "CAIR-Maryland/Virginia" and

properly served and timely filed. (Def.'s Opp'n Br., § I at 2). Plaintiffs will not pause long here for the reason that this reply brief properly addresses only Defendant's Opposition Brief, not its original motion. However, a pause is still in order in that the argument posed here continues a course of conduct Defendant has observed throughout this litigation—a course of conduct that manifests an absolute disregard of the procedural rules of the federal courts generally, the Local Rules of this Court in particular, and the rules of professional conduct incumbent on any member of the legal profession practicing before this Court.

Specifically, there is absolutely no dispute that Defendant failed to file its original motion for summary judgment until October 12, 2012, notwithstanding the Court-ordered deadline of October 11, 2011. (*See* Pls.' Mot. at 1-3 [discussing issue]). There is no dispute that Defendant did not serve its original motion upon Plaintiffs' counsel until October 12, 2012, by email. Indeed, the email service was defective for the reasons set forth in Plaintiff's Motion. (Pls.' Mot. at 2-3). In a previous filing, however, Defendant represented to the Court that it filed its original motion for summary judgment on October 11, 2012. (Def.'s Opp'n to Pls.' Mot. to Unseal [Doc. No. 64] at 4 ["CAIR filed its Motion for Summary Judgment on October 11, 2012."])

Only now does Defendant concede that there was no such filing on October 11, 2012. Rather, Defendant admits that it only filed a Notice of Filing Motion Under Seal (Doc. No. 66)[5] on October 11, 2012. Similarly, Defendant now concedes that it only filed documents with the Clerk of the Court the following day, October 12. Also, noteworthy is Defendant's failure to

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sometimes as "CAIR-Virginia." (*See* Pls.' Separate Statement of Disputed & Undisputed Facts ["Pls.' Facts"] at 5, n.2).

[5] The Notice of Filing Motion Under Seal was apparently not filed in the lead case of this consolidated action, *Saiyed v. Council on Am.-Islamic Relations Action Network, Inc*., Case No. 1:10-cv-0022-PLF-AK ("Lead Case"), but is Doc. No. 66 in the consolidated member case of *Lopez et al. v. Council on Am.-Islamic Relations Action Network, Inc*., Case No. 1:10-cv-0023-PLF-AK ("Member Case").

acknowledge to the Court even now that it only sent an email with the attached Motion to Plaintiffs' counsel on October 12. (*See* Pls.' Mot. at 1).

So it is that we're now informed by Defendant that "[i]t is standard practice in this jurisdiction that the Notice of Intent to File under Seal is treated as the date of filing." (Def.' Opp'n Br. at 2). Defendant, of course, cites no rule or legal precedent or even some ECF filing instruction for such pronouncement. And, the reason Defendant fails to do so is that this is simply not the case. Nowhere in Rule 5 of the Federal Rules of Civil Procedure, nowhere in the Local Rules of this Court, and nowhere in the instructions for ECF filings promulgated by the Clerk of the Court does this Court consider a document filed when it has neither been filed with the Clerk nor served upon opposing counsel. Defendant's assertions to the contrary are simply not true.

II. Defendant's Evidentiary Documents Have Not Been Authenticated Nor Are They Admissible Hearsay.

In the next section of Defendant's Opposition Brief (Def.'s Opp'n Br. § II at 2-3), Defendant responds to Plaintiffs' evidentiary objections to documents proffered by Defendant in support of both its original motion for summary judgment and now, by implication, Defendant's Opposition Brief filed in response to Plaintiff's Motion. (*See* Pls.' Mot. at 3-5 [presenting legal discussion of these objections]; Pls.' Facts at 5-36 [asserting objections to Defendant's specific evidentiary proffers]). Defendant now wishes to rely upon the stipulation by Defendant's counsel in open court, provided only after Plaintiffs' counsel objected to Defendant counsel's production of documents by both Defendant and several non-party subpoenaed witnesses (also represented by Defendant's counsel) as one amorphous mass of documents without detailing which documents were possessed and produced by whom. As a result, Defendant's counsel, Ms. Al-Khalili, as prodded by the Magistrate Judge, stipulated to the authentication of all documents

produced by Defendant on its own behalf or on behalf of the other witnesses represented by Defendant's counsel. (*See, e.g.*, Yerushalmi Decl. at ¶ 29 & Ex. 26 [Doc Nos. 70-2 & 70-28, respectively] [discussing matter in full]).

Defendant apparently now wishes to rely upon this stipulated authentication, which has been utilized by Plaintiffs to authenticate documents in support of the Motion. Indeed, all things being equal, that would be acceptable. *See, e.g., Minn. Lawyers Mut. Ins. Co. v. Hahn*, 355 F. Supp. 2d 104, 109 (D.D.C. 2004) (providing authentication by way of admission by opposing party). Certainly, what is good for the goose is good for the gander. The problem with Defendant's new claim of authentication, however, is that the stipulation on its face applies only to documents produced to Plaintiffs in discovery by Defendant on its own behalf and on behalf of the other witnesses. By way of example, in support of their Motion, Plaintiffs included the declaration of its counsel, David Yerushalmi, to provide the foundation for the applicability of the stipulation of authentication for each of the documents proffered in their Motion. This was done in the Yerushalmi declaration either directly or by citing to the actual deposition testimony of a witness, who in turn provided the authentication for a specific document used as a deposition exhibit . (*See, e.g.*, Yerushalmi Decl. at ¶¶ 29, 30-37 [Doc No. 70-2]).

Defendant, however, has provided no declaration, by counsel or any other declarant, to provide the necessary foundation that any of its purported documentary evidence falls within the parameters of the stipulation for authentication—that the purported documents were in fact the documents provided to Plaintiffs during discovery by Defendant and its other affiliated witnesses. *See Ragsdale v. Holder*, 668 F. Supp. 2d 7, 16 (D.D.C. 2009) ("[T]o be considered for or against summary judgment, a document must be authenticated, either by an affidavit that meets the requirements of Rule 56(e) [of the] Federal Rules of Civil Procedure, or in accord with

the Federal Rules of Evidence. Indeed, for the Court to accept anything less would defeat the central purpose of the summary judgment device, which is to weed out those cases insufficiently meritorious to warrant the expense of a jury trial.") (internal quotation marks, parentheses, and citations omitted); *see also Moncada v. Peters*, 579 F. Supp. 2d 46, 51-52 (D.D.C. 2008) (Friedman, J.) (allowing certifications from custodians of records and affidavits from "knowledgeable employees" to identify and explain all of the exhibits that are not self-explanatory"). Defendant's failure to even feign an effort at providing any foundation or authentication should preclude the use of these documents as relevant and admissible for either Defendant's motion for summary judgment or its Opposition Brief.

Moreover, with regard to Plaintiffs' objections to specific documents on the grounds of inadmissible hearsay, Defendant only makes one feeble attempt to overcome Plaintiffs' hearsay objection, and this effort only applies to one small subset of its supporting documents. Specifically, in Defendant's Opposition Brief, it argues that certain purported emails represent corporate minutes of board meetings and are therefore admissible hearsay as a business record. (Def.'s Opp'n Br. at 7-8). Beyond the problem of authentication discussed above, Defendant has in fact provided no declaration by anyone to establish that these emails operated as actual minutes for the corporation. Indeed, at best these emails appear as possible drafts of minutes, but there is no indication in any document that these minutes were approved by any relevant board of directors nor are they signed by a corporate secretary or any other officer. In fact, there is no evidence in the record that these versions of "minutes" were accepted by the other board members as even remotely accurate. In short, the Rules of Evidence relating to the admissibility of records of regularly conducted activity require at least an effort to show that the following requisites have been met:

> (A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
> (C) making the record was a regular practice of that activity;
> (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
> (E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

Fed. R. Evid. 803(6). Defendant has not only failed to supply any kind of declaration to meet these requirements, Defendant's brief does not even do so, but only vaguely cites to *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), which itself requires certain evidentiary conditions to admit such documents as "minutes" of meetings under Rule 803(6). First, the Third Circuit found that the documents were produced by defendants in discovery. Second, the appellate court found that the documents came from a source that would have been the proper custodian of these types of records. And third, the court found that the documents actually came from a physical storage site that housed other records of this type. None of these elements are present in this case precisely because Defendant has made no effort to authenticate these documents or provide their relevance in the context of Rule 803(6). *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d at 286.

In short, Defendant has failed to present to this Court any admissible documentary evidence that would either support its motion for summary judgment or that would rebut in any material way Plaintiffs' Motion and the factual record presented in Plaintiffs' Facts. For these reasons alone, Plaintiffs respectfully ask the Court to deny Defendant's motion for summary judgment and grant Plaintiffs' Motion on the issues of liability set forth therein.

III. Defendant Is Liable for Morris Days' Bad Acts Because Morris Days Was Defendant's Agent.

Defendant's entire approach to resist the inevitable *respondeat superior* liability demonstrated by Plaintiffs' Motion is to attempt to take the entirety of the factual record presented by the Motion and reduce it all to three items of evidence. (Def.'s Opp'n Br., § III at 3-7). Plaintiffs will not be drawn into Defendant's factual fallacy and will rely on Plaintiffs' Facts and the supporting factual record to establish *respondeat superior* liability. However, it is incumbent on Plaintiffs to address the three issues expressly raised by Defendant.

A. CAIR's Rule 30(b)(6) Deposition Testimony Conceding that Days Was an Employee-Agent of Defendant.

On May 11, 2011, Khadija Athman testified as Defendant's Rule 30(b)(6) deponent. In the context of Defendant's adamant stance that Days was neither its employee-agent nor the employee-agent of Defendant's Herndon, Virginia branch office, the question was posed why Defendant entered into agreements to pay some of the Days' victims. Defendant answered quite clearly that because Days was its employee and he had hurt these victims, Defendant had an obligation to "right a wrong." (Pls.' Mot. at 12).

Indeed, given the entirety of the factual record, that was both an honest and a reasonable answer to a very straightforward and quite anticipated question. That answer remained Defendant's sworn testimony until January 10, 2013, when Defendant filed Khadija Athman's declaration in support of Defendant's Opposition Brief. (Def.'s Opp'n Br., Ex. EE at 15-16 [Doc. No. 80-2] [hereinafter "Athman Decl."]). What is clear, however, is that Athman's declaration in the form of an untimely *errata* submitted 20 months after her testimony is more damaging than helpful.

But, before addressing the substantive argument, Plaintiffs take this opportunity to note

the procedural and evidentiary futility of Defendant's revisionism. First, neither Defendant nor Athman explain why Defendant did not correct this error during the time-period allotted under the Rules for reviewing and correcting errors in a transcript. (Fed. R. Civ. P. 30(e)). Second, neither Defendant nor Athman explain why they did not correct this testimony at CAIR's second Rule (30(b)(6) deposition on June 13, 2012, insofar as counsel for Defendant would have been permitted to follow-up with direct examination after Plaintiffs' cross-examination. (Yerushalmi Decl. at ¶ 3 [Doc. No. 70-2]) Defendant made no such effort.

As the federal courts have made clear, deposition testimony is not a "take home exam." *SEC v. Parkersburg Wireless LLC*, 156 F.R.D. 529, 536 (D.D.C. 1994) (stating that "[a] deposition is not a take home exam") (citing *Greenway v. Int'l Paper Co.*, 144 F.R.D. 322 (W.D. La. 1992)). What makes Defendant's conduct to alter live testimony by way of a contrived declaration even more egregious in this case is that it is not an *errata* provided under Rule 30(e), but an attempt to simply avert the consequences of its uncorrected and quite reasonable testimony. As this Circuit has held:

> A party opposing summary judgment may submit affidavits in support of its position provided such affidavits meet the requirements of Federal Rule of Civil Procedure 56(e). Virtually every circuit has adopted a form of the so-called "sham affidavit rule," which precludes a party from creating an issue of material fact by contradicting prior sworn testimony unless the "shifting party can offer persuasive reasons for believing the supposed correction" is more accurate than the prior testimony.

Galvin v. Eli Lilly & Co., 488 F.3d 1026, 1030 (D.C. Cir. 2007).

In this case, Athman's testimony was a quite reasonable explanation for Defendant's conduct. Days held himself out as a CAIR National lawyer. Defendant held Days out as a CAIR National lawyer at its website. CAIR-VA held Days out as its "Resident Attorney" and in turn held itself, CAIR-VA, out as very much a part of Defendant CAIR National as a single national

organization. In Athman's contrived explanation for this testimony as it appears in her declaration, she claims that she misspoke when she used the possessive pronoun "our" in the phrase "our employee." Rather, she meant to say that she considered all employees of any organization that uses CAIR's name and shares its mission as "together" in her mind. (Athman Decl. at ¶ 6). But that is exactly the point of the agency theory and indeed the *alter ego* theory addressed in Plaintiffs' Motion. Given all of the facts taken together, there is little doubt that Days, the public, Plaintiffs, and indeed Defendant CAIR itself, "think of them together" as a single unit. Given the other many indices of control either exercised *in actu* or *in potentia* by Defendant over Days and CAIR-VA, Athman's "take-home exam" answer remains supportive of Defendant's *respondeat superior* liability. (*See* Pls.' Mot. at 9-24).

B. Defendant CAIR National Held Out Days as a CAIR National Lawyer.

Defendant claims there is no evidence of agency between Defendant CAIR and Days because there is no evidence of mutual consent. (Def.'s Opp'n Br. at 5-6). This argument deserves little response because Defendant proffers absolutely no evidence that contradicts this mutual agreement that Days would work as a CAIR National lawyer out of Defendant's Herndon, Virginia offices. First, Days represented to *each* Plaintiff that he was a CAIR National lawyer with all of the power and prestige that would bring to his or her case. (Pls.' Facts at ¶¶ 64). Second, Defendant CAIR National itself promoted Days as a CAIR lawyer by posting articles at its website naming Days as a CAIR lawyer. (Pls.' Facts at ¶¶ 81-86).

Defendant, however, claims, that its own actions in selecting specific articles and posting them for the world to see identifying Days as a CAIR lawyer should be ignored by this Court and not treated as evidence of Defendant's own conception of its relationship to Days. That is simply preposterous.

Moreover, CAIR-VA, in a document actually edited and approved by Iqbal, while serving as a paid officer of Defendant CAIR, identified Days as CAIR-VA's "Resident Attorney" and, in turn, CAIR-VA as an integral part of Defendant CAIR National as a single nation-wide organization. (Pls.' Facts at ¶¶ 85-91). Days' employment/agency with CAIR-VA most assuredly ties him to Defendant. To suggest otherwise in the absence of any evidence to the contrary is meritless.

C. Defendant CAIR's Receipt and Treatment of the CAIR Victims' Legal Files Is Additional Evidence of Agency.

Defendant's last argument in the third section of its Opposition Brief also requires little response. There is no question that Defendant CAIR accepted the numerous legal files of the CAIR/Days' victims. It is also not disputed by any admissible evidence that Defendant did not take any substantial steps to contact the victims and actually do anything with these legal files but conceal them. (Pls.' Facts at ¶¶ 119-34). It is undisputed that Defendant never made any effort to inform the victims that Days was not an attorney even after Defendant admits it knew this as fact in March 2008—at least not until September 2008 when the story went public. It is undisputed that Defendant actually furthered the fraud by publicly representing that Days was neither its employee nor even CAIR-VA's, but an independent contractor. (Pls.' Facts at ¶¶ 108-12). Defendant operates as a legal service provider with a bevy of in-house counsel. The fact that Defendant and its in-house counsel felt no constraints about taking the legal files without any expressed authorization from the clients themselves is very probative evidence of dominion and control arising out of Days' and CAIR-VA's respective agency relationships to Defendant. Moreover, Defendant offers literally no evidence to contradict this evidence and the legal conclusions drawn from it.

IV. Defendant Is Liable for Morris Days' Bad Acts because Morris Days Was an Employee-Agent of CAIR-VA and CAIR-VA Was an Agent and/or *Alter Ego* of Defendant.

All of § IV of Defendant's Opposition Brief is dedicated to an argument that simply misses the point because it ignores the law of agency in the Commonwealth of Virginia. (Def.'s Opp'n Br., § IV at 7-12). Indeed, the declarations of members of CAIR-VA's now defunct board of directors filed in support of Defendant's Opposition Brief also do little to address the relevant law.[6]

Specifically, the issue of control in the context of agency law in the Commonwealth of Virginia is about the right to control, not the actual exercise of control. "'Actual control, however, is not the test; it is the right to control which is determinative.'" *Perry v. Scruggs*, 17 Fed. Appx. 81, 89 (4th Cir. 2001) (quoting *Whitfield v. Whittaker Mem'l Hosp.*, 210 Va. 176, 169 S.E.2d 563, 567 (Va. 1969)). Plaintiffs' Motion made a concerted and demonstrative showing that Defendant CAIR had the absolute right to control CAIR-VA. Indeed, the ultimate control that was entirely and arbitrarily within the control of Defendant was the very right of CAIR-VA to exist as an entity. That agreement allowing CAIR-VA to operate was entirely an at-will, oral accommodation provided by Defendant to CAIR-VA. The moment Defendant pulled the plug, CAIR-VA would not only effectively cease to exist, it would literally have to

[6] Each of the declarations of Ahmad, Iqbal, Jaka, and Zhussanbay simply repeat the mantra. (The Ahmad, Iqbal, Jaka, and Zhussanbay Declarations were filed in support of Defendants' Opposition Brief as Exhibits AA, BB, CC, and DD, respectively). That is, each of the declarants merely opine that they ***felt*** and ***believed*** that they as Board members were in charge of CAIR-VA. But, none of these declarations address the ***fact*** that Defendant controlled CAIR-VA's very existence based upon an oral, at-will contract that gave Defendant unfettered and ultimate control over CAIR-VA. Moreover, these declarations do not address the fact that Iqbal actually ran the day-to-day operations, and in doing so, served two masters. Indeed, the master we know as Defendant CAIR National was Iqbal's sole source of a salary and was, simultaneously, the master over the very existence of CAIR-VA and its very association as a CAIR entity. The failure of these declarations to even address these points render them effectively meaningless. (*See also* Pls.' Mot. at 16-19 [discussing legal implication of an agent serving two masters]).

cease existing to the extent of its very name, its corporate charter, its IRS non-profit status under 26 U.S.C. § 501(c)(3), and all of its activities that were intricately and so intimately linked to Defendant CAIR National. Moreover, precisely because this arrangement as a CAIR branch office was nothing more than an oral, at-will accommodation extended by Defendant to CAIR-VA, the terms could be altered at any moment, not merely terminated. In such a case, the CAIR-VA board's only alternative would be to do as Defendant CAIR demanded or cease to exist. That is precisely the control exerted by a principal with unlimited control over its hapless agent: do what I demand or the relationship is terminated. Indeed, the agent does not even have the refuge of legal action to justify its refusal to capitulate to the will of the principal on the grounds that the principal demanded acts beyond the contractual agency. CAIR-VA simply operated at the whim of Defendant CAIR. Given all of the facts before this Court, including Khalid Iqbal's dual role, his salary paid exclusively by Defendant, and Defendant's own documents evidencing clear admissions against interest that Defendant considered itself the master of CAIR-VA, to argue with a straight face that Defendant did not have the right to control CAIR-VA requires a willful if not clinical disassociation from reality. (Pls.' Mot. at 21-22; Pls.' Facts at ¶¶ 87-105).

Finally, it is worth noting that Defendant does not address the issue of *alter ego* liability at all. Specifically, and as addressed in Plaintiffs' Motion, *alter ego* liability in the Commonwealth of Virginia is based in large measure on utilizing a scheme to cover-up bad acts by an associated entity or person. (Pls.' Mot. at 20-24). It is not surprising that Defendant chose to ignore this specie of liability insofar as Defendant would have had to account for its scheme with CAIR-VA to cast Days as an independent contractor. Defendant's silence on this issue speaks volumes. *Hopkins v. Women's Div.*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003) ("It is well understood in this Circuit that when a [party] files an opposition to a dispositive motion and

addresses only certain arguments raised by the [moving party], a court may treat those arguments that the [non-movant] failed to address as conceded.").

V. Defendant's Remaining Arguments Relating to IIED and Damages Are Nothing Short of Frivolous.

Defendant's remaining arguments, which take up more than half of the total pages dedicated to argument, are in effect an argument with this Court's earlier ruling denying Defendant's motion to dismiss, an argument with the undisputed facts, and an argument with the law in the Commonwealth of Virginia. (Def.'s Opp'n Br., §§ V-VI at 12-23). These issues have all been carefully addressed in Plaintiffs' Motion. In the main, Defendant has added nothing new. However, as a point of emphasis to underscore the raw absurdity of Defendant's remaining arguments, Plaintiffs would be remiss not to at least point to three arguments raised by Defendant that might be considered newly raised.

Much of § V of Defendant's Opposition Brief is an argument against allowing the IIED claims to go to a jury. In part this makes sense at least tactically because Plaintiff's Motion requests a judgment of liability against Defendant based upon *respondeat superior* liability for whatever IIED damages a jury would find were proximately caused by Days' conduct. Moreover, there are additional and distinct bad acts by Defendant that would separately go to a jury so as to determine Defendant's direct liability for IIED. Thus, part of Defendant's claim is that no jury could possibly find that Days (and/or Defendant) acted outrageously in the fraud and subsequent cover-up. (Def.'s Opp'n Br. at 18-19). Yet, at the very conclusion of Defendant's introduction to its Opposition Brief, Defendant quite emphatically and rightly agrees with Plaintiffs that Days' conduct was outrageous: "Days was wrong for what he did. ***But the outrage at his actions—which Defendant shares***—is not enough to establish Defendant's liability." (Def.'s Opp'n Br. at 2) (emphasis added). Defendant clearly let this Freudian slip get

past them, and the reason Defendant's team of lawyers did not even take note is that they all know, quite viscerally, that there is no jury in America that would not find this kind of fraudulent and deceptive behavior outrageous. And, precisely because lawyers are fiduciaries of the highest order, the public and Defendant's peers, sitting as jurors, would most certainly consider Defendant's behavior in the cover-up just as outrageous—if not more so—than Days' outrageous conduct.

The second of the newly raised arguments among the remaining arguments in Defendant's Opposition Brief is a claim that Plaintiffs' expert testimony is inadmissible hearsay. (Def.'s Opp'n Br. at 18-19). Not surprisingly, once again, Defendant makes no actual argument and raises no *Daubert* challenge other than positing the conclusory view that an expert's testimony is inadmissible hearsay as to "causation and severity or other elements" of Plaintiffs' IIED claim. What Defendant's lawyers have ignored—purposefully or otherwise—is that a properly qualified expert opinion predicated upon a reliable and valid methodology may in fact posit expert opinions as to emotional harm, the extent of the harm as characterized by the clinical diagnosis, and the proximate cause of that harm and rely upon out-of-court statements by others (that in other instances would be inadmissible hearsay) as long as the expert's reliance is part of the valid methodology relied upon in the field of expertise. *See* Fed. R. Evid. 701-05; *see also FTC v. Whole Foods Mkt., Inc.*, Case No. 07-1021-PLF, 2007 U.S. Dist. LEXIS 102365, at *3-*8 (D.D.C. July 27, 2007) (Friedman, J) (discussing procedure of a Rule 702 motion); *Webb v. Hyman*, 861 F. Supp. 1094, 1103 (D.D.C. 1994) (relying expressly on psychologists expert testimony to support finding of IIED claim as to severity and causation). And, while it is true that the Court is the "gatekeeper" for the admissibility of such expert opinions, Defendant has neither moved under Rule 702 to exclude the expert opinions nor has it provided a valid basis for

doing so.[7] (Fed. R. Evid. 702).

The final of the remaining newly raised arguments in Defendant's Opposition Brief is the claim that because Plaintiffs Saiyed and Turner testified that they had preexisting medical issues that were exacerbated by the Days-CAIR fraud, these Plaintiffs have no cognizable injury. (Def.'s Opp'n Br. at 18). The problem with this argument, of course, is that it contradicts the ages-old maxim of the common law that the tortfeasor takes the plaintiff as is. This is also the law in the Commonwealth of Virginia. *Bradner v. Mitchell*, 234 Va. 483, 489 (1987) ("It is axiomatic that a defendant who causes injuries to a plaintiff with a preexisting condition must take the plaintiff as he finds him. Although not responsible for the preexisting condition itself, he is liable for any exacerbation of it caused by his tortious conduct.").

There is yet one final issue to address relating to damages and this Court's jurisdiction, although hardly newly raised in Defendant's Opposition Brief. Defendant claims time and again that the emotional distress damages (whether arising from the IIED claims or the independent torts of breach of fiduciary duty and fraud) could not possibly satisfy the jurisdictional amount of $75,000. (*See* 28 U.S.C. § 1332). This argument was of course addressed and rejected by this Court in its opinion denying Defendant's motion to dismiss. (*See* Pls.' Mot. at 27-30). Today, with the expert formally diagnosing the severe clinical depression all Plaintiffs are suffering and setting forth that diagnosis in his opinions, and with Plaintiffs' own testimony as to their suffering, it would seem that Defendant would put this claim to rest. Defendant's blind persistence, however, not only ignores all of the above, it avoids addressing the jury award survey cited in Plaintiffs' opposition to Defendant's motion to dismiss, demonstrating the kinds

[7] It is noteworthy that Defendant complains generally about the introduction of expert opinions even though it continues to challenge this Court's jurisdiction, arguing that there are insufficient damages for a diversity claim. (Def.'s Opp'n Br. at 20-23).

of damage awards juries have rendered in the region for emotional distress arising out of non-IIED claims and without evidence of physical harm. (*See* Doc. Nos. 14-2 & 16 [filed in Member Case prior to consolidation]). These verdicts ranged from $10,250 to $1,250,000, with an average well above the $75,000 threshold. There is simply no credible basis at this point in the litigation to argue that Plaintiffs have not met the jurisdictional amounts to establish this Court's jurisdiction.

CONCLUSION.

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion, finding for Plaintiffs on all liability issues for Counts Two, Three, and Four of the Amended Complaint. Plaintiffs also request a ruling that Defendant CAIR is vicariously liable for any damages—to be determined by a jury—arising out of Days' IIED. The remainder of Plaintiffs' claims should go to the jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2013, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: none.

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