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' MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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I. PROCEDURAL AND EVIDENTIARY OBJECTIONS.

A. Defendant's Motion for Summary Judgment Not Timely Filed.

Defendant Council on American-Islamic Relations Action Network, Inc. ("CAIR" or "CAIR National")[1] filed a Notice of Filing Motion Under Seal (Doc. No. 66)[2] on October 11, 2012. On October 12, 2012, Defendant's counsel, Nadhira Al-Khalili, emailed Plaintiffs' counsel and wrote as follows:

> Attached, please find the Motion and the Proposed Order which we filed in the clerk's office this morning.
>
> We also filed 409 pages of exhibits, which have all previously been produced in this case—there was nothing new added. Nonetheless, here is a secure Dropbox link for them. I'll leave them there until Monday morning.
>
> https://www.dropbox.com/s/4fopbbs75fbafpd/Exhibits.pdf

(Yerushalmi Decl. at ¶ 38, at Ex. A). Attached to Ms. Al-Khalili's email was a PDF copy of Defendant's motion for summary judgment.

The Certificate of Service attached to the motion falsely certifies that it was served on October 11, 2012 "via ECF." (Def.'s Mot. at 60). As of the date of filing this opposition, the Clerk of the Court has yet to docket the motion. Plaintiffs have received no ECF service of

[1] "CAIR" is the acronym used by Defendant to identify itself in its motion for summary judgment. (Def.'s Mot. at 1). Throughout discovery, CAIR also refers to itself as "CAIR National." For purposes of this opposition, "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 sometimes as "CAIR-Virginia." (*See* Pls.' Separate Statement of Disputed and Undisputed Facts ["Pls.' Facts"] at 5, n.2).

[2] 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"). Unless specifically noted, all future references to docket numbers shall be the dockets numbers in the Lead Case.

Defendant's motion.

As such, Defendant's motion was neither timely filed nor filed pursuant to a motion for leave to file after the deadline set by this Court. Specifically, this Court's Scheduling Order (Doc. No. 29) provided that Defendant should file a motion for summary judgment within 30 days of the close of fact discovery. Fact discovery closed on September 11, 2012, pursuant to the Magistrate Judge's order, which (i) allowed Plaintiffs to retake the depositions of CAIR and Khalid Iqbal only upon full production of documents by Defendant, (ii) extended fact discovery for 90 days after those depositions, and (iii) provided for any dispositive motions 30 days after the close of fact discovery. (Order [Doc. No. 46] at 1-2). Thus, the deadline for Defendant's motion was October 11, 2012. Per Ms. Al-Khalili's email, Defendant's motion was filed under seal on October 12, 2012, without seeking leave of this Court for an extension of time to file.

B. Defendant's Motion for Summary Judgment Not Properly Served.

As noted above, Defendant's Certificate of Service falsely certifies that Defendant's served the motion upon Plaintiffs "via ECF" service. Defendant has yet to properly serve the motion upon Plaintiffs. While Defendant emailed Plaintiffs' counsel the motion document on October 12, 2012, Defendant never properly served the exhibits. In fact, Defendant simply provided a link to documents on a non-ECF, private third-party web site for downloading large documents, but those documents were only available for downloading until the following Monday, October 15, 2012. There is no Local Rule that permits such a service of documents without an agreement with counsel. *See* Fed. R. Civ. P. 5(b)(2)(E)-(F) (requiring consent in writing before using alternative methods of service). There was no such agreement between counsel to effect service in this manner. (Yerushalmi Decl. at ¶ 39 at Ex. A).

And, while Plaintiffs' counsel downloaded documents from this third-party, non-ECF

website, Plaintiffs have no idea if these documents are indeed the documents Defendant uploaded or that they were not altered in the interim. While Plaintiffs assume not, these questions are precisely why service of filed documents must conform to the Federal Rules of Civil Procedure and any applicable Local Civil Rules.

C. Defendant's Motion Is Supported Almost Entirely by Inadmissible Documentary Evidence.

On its face, Rule 56 requires the factual record upon which a motion is predicated to be admissible evidence. Fed. R. Civ. P. 56(c)(2). While it is true that the evidence need not necessarily be in admissible form at the summary judgment stage, the evidence must be such that it is apparent to the court that it can be converted into admissible form for purposes of a trial. *Akers v. Liberty Mut. Group*, 744 F. Supp. 2d 92, 95-96 (D.D.C. 2010) ("At the summary judgment stage, supporting and opposing affidavits shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . . Because the objective of summary judgment is to prevent unnecessary trials, and because '[v]erdicts cannot rest on inadmissible evidence,' it follows that the evidence considered at summary judgment must be capable 'of being converted into admissible evidence.'") (quoting *Greer v. Paulson*, 505 F.3d 1306, 1315 (D.C. Cir. 2007)).

More particularly, unsworn and unauthenticated documents cannot be considered for summary judgment. As this Court has ruled:

> "[U]nsworn, unauthenticated documents cannot be considered on a motion for summary judgment." *Orsi v. Kirkwood*, 999 F.2d 86, 92 (4th Cir. 1993) (citing *Hal Roach Studios, Inc. v. Richard Feiner and Co.*, 896 F.2d 1542, 1550-51 (9th Cir. 1990); *Martz v. Union Labor Life Ins. Co.*, 757 F.2d 135, 138 (7th Cir. 1985)); *see also Carmona v. Toledo*, 215 F.3d 124, 131 (1st Cir. 2000) (stating that "[d]ocuments supporting or opposing summary judgment must be properly authenticated" (citing Fed. R. Civ. P. 56(e)); *Stuart v. Gen. Motors Corp.*, 217

> F.3d 621, 636 (8th Cir. 2000) (stating that "[t]o be considered on summary judgment, documents must be authenticated by and attached to an affidavit made on personal knowledge setting forth such facts as would be admissible in evidence or a deposition that meets the requirements of [Rule] 56(e)" and that "[d]ocuments which do not meet those requirements cannot be considered"); *Nnadili v. Chevron U.S.A., Inc.*, 435 F. Supp. 2d 93, 104-05 (D.D.C. 2006) (refusing to consider on summary judgment the "maps on which [the defendant] relies" because they were "presented without any affidavit explaining who prepared them, how they were prepared, and whether they [address the issue at stake]").

Akers, 744 F. Supp. 2d at 97.

Finally, even if a document might on its face or with other evidence be sufficiently authenticated to pass the evidentiary barrier for authentication, if the document amounts to an out-of-court statement presented for the truth of the matter asserted in the document, and if there is no applicable exception to the hearsay rule, it is inadmissible and inappropriate for a motion for summary judgment. *Id.* at 96 ("Hearsay, which is a statement, other than one made by the declarant . . . offered in evidence to prove the truth of the matter asserted, Fed. R. Evid. 801(c), is inadmissible unless it falls within a statutory exception, ... '[S]heer hearsay . . . counts for nothing on summary judgment.'") (citations omitted); *see also Greer*, 505 F.3d at 1315 (same); *Gleklen v. Democratic Cong. Campaign Comm., Inc.*, 199 F.3d 1365, 1369 (D.D.C. 2000) (same); *Tinsley v. Gen. Motors Corp.*, 227 F.3d 700, 703 (6th Cir. 2000); *Macuba v. DeBoer*, 193 F.3d 1316, 1322-23 (11th Cir. 1999) (reversing the lower court's denial of summary judgment because the district court erred in considering the plaintiff's hearsay testimony as substantive evidence); *Md. Highways Contractors Ass'n, Inc. v. Maryland*, 933 F.2d 1246, 1252 (4th Cir. 1991) (relying on decisions by other circuits which conclude that hearsay evidence, which is inadmissible at trial, cannot be considered on a motion for summary judgment).

As set forth with particularity in Plaintiffs' Facts, Defendant's motion is predicated upon a statement of facts that is not only contentious in the extreme, it is almost entirely based upon

inadmissible documentary evidence. Specifically, while the supporting evidence includes a few documents that appear to be state agency documents or tax filings of various corporate entities, the vast majority of the documents are emails, letters, and similar documents. Defendant, however, has provided no declaration or testimonial evidence to authenticate any of the documents or to provide any foundation for any of the documents' specific relevance to the matter at issue. Moreover, in literally every case, Defendant presents these documents to establish the truth of the matters purportedly asserted in the documents. Yet, Defendant has not proffered an exception to the hearsay rule for any of the documents, nor do the documents themselves even remotely appear to fall within an obvious exception to the hearsay rule (with the possible exception of the documents purportedly representing government agency documents).

In conclusion, even assuming the motion was in fact filed under seal on October 12, 2012, it was untimely and filed without leave of the Court, it did not include a proper certificate of service, it was not properly served upon Plaintiffs, and it is predicated in all material respects on incurably inadmissible evidence. For these reasons alone Plaintiffs respectfully request that the Court deny Defendant's motion for summary judgment.

II. DEFENDANT'S STATEMENT OF UNDISPUTED FACTS ARE CONTRARY TO THE RECORD AND DO NOT MERIT SUMMARY JUDGMENT FOR DEFENDANT.

A. Overview.

Defendant's motion is a meandering and contradictory account of a fraud begun by Morris Days, Defendant CAIR's agent, and ultimately embraced by Defendant CAIR. Defendant's embrace of the fraud was an effort to cover-up the fraud to avoid the negative fall-out and liability Defendant would incur should Plaintiffs, and other CAIR victims, discover the truth about Days and CAIR's intimate legal relationship with him. To be sure, Defendant's

motion is based upon a transparently contentious rendition of "undisputed facts." But even more than this, the motion is an abject lesson in self-contradiction—at one point denying elements of Plaintiffs' case and moments later conceding the very elements denied a page or two earlier.

So it is that in the "Introduction" to the motion, Defendant begins by conceding that "Plaintiffs and Defendant are in agreement that Morris Days is liable for Plaintiffs' injuries. Where the parties differ is with respect to whether anyone else is." (Def.'s Mot. at 5). True enough. Defendant then asserts that Defendant's Virginia chapter office, known as CAIR-Maryland and Virginia ("CAIR-VA"), should not be liable for Days's conduct because "Plaintiffs had a good reason to know that Days was engaging in this misconduct for himself, not amidst (sic) the ordinary course of CAIR-VA's business." (Def.'s Mot. at 5). Notwithstanding the troubling fact that Defendant makes this assertion based upon an absolutely false characterization of the record (as detailed in Plaintiffs' Facts), Defendant reverses itself and subsequently makes it clear that Days's bad acts are fully attributable to CAIR-VA. (Def.'s Mot. at 33 ["The injuries that Days caused Plaintiffs—though not actually authorized by CAIR-VA, as demonstrated below—were done 'in the course of his employment' with CAIR-VA."]). Indeed, over the next two pages of the motion, Defendant sets out some, but certainly not all, of the facts establishing CAIR-VA's liability under the doctrine of *respondeat superior*. (Def.'s Mot. at 33-35). In the midst of this factual recitation—a factual recitation that directly contradicts major themes of Defendant's earlier "Statement of Undisputed Facts" (Def.'s Mot. at 8-32)[3]—Defendant explains: "Every injury that any plaintiff claims to have suffered was caused in the

[3] Yet another example of Defendant's habit to contradict not only the actual facts in the record, but also to contradict its own statement of facts is Defendant CAIR's assertion that "[t]he position that Days served for CAIR-VA was not as an attorney." (Def.'s Mot. at 14) Yet, moments later, as it were, Defendant is forced to concede that CAIR-VA marketed Days as its "Resident Attorney." (Def.'s Mot. at 34).

first instance by Days's failure to provide legal services. But the only reason Days was in a position to convince [Plaintiffs] Turner, Lopez, Saiyed, Nur, and Abdussalaam that they should each entrust their legal issues to him was because CAIR-VA gave Days the responsibility and authority to work as an advocate for 'individuals who came to CAIR-MD/VA after having suffered civil rights violations.'" (Def.'s Mot. at 34). Finally, Defendant comes full circle and concedes what it denied in its earlier "Introduction": "Thus, because Days's actions were 'in the course of his employment' with CAIR-VA, those actions are attributable to CAIR-VA alone." (Def.'s Mot. at 35). Granted, Defendant throws in gratuitously the word "alone" to suggest that the facts demonstrate that CAIR-VA and not Defendant CAIR must shoulder this burden exclusively. However, as Plaintiffs' Facts set out in detail, and as further explained below in the context of the legal analysis, the word "alone" is not only gratuitous, it is nothing short of meaningless.

Similarly, Defendant's motion begins by rendering as "undisputed fact" that Days was an "independent contractor," thus trying to insulate Defendant CAIR and its Herndon, Virginia office of vicarious liability for Days's bad acts. (Def.'s Mot. at 14). In fact, this is in line with Defendant CAIR's public position (and cover-up) when Defendant CAIR and CAIR-VA were forced to fire Days when too many clients were threatening Defendant CAIR with litigation. Thus, to convince Plaintiffs and other victim-clients that Defendant CAIR had no responsibility for Days's tortious conduct, it constructed the narrative that Days was not an agent-employee, but rather an independent contractor. (Pls.' Facts at ¶¶ 11, 38, 108-11, 128). But alas, Defendant CAIR has apparently recognized that this position is factually and legally indefensible and later in its motion concedes that CAIR-VA would be liable even though it had previously asserted that

Days acted only as an independent contractor. (Def.'s Mot. at 33-35; *see also infra* at § II.B.2).[4]

Thus, to fashion an argument for summary judgment, Defendant's motion ignores the particulars and the aggregate of the factual record, which demonstrate that Days held himself out as a lawyer for Defendant CAIR; that Defendant CAIR itself held out to the public that both Days and CAIR-VA were its agents, providing what Defendant CAIR described as extraordinary legal services to the public; that Defendant CAIR took possession of Plaintiffs' (and other victims') legal files from CAIR-VA without notice to or authorization from Plaintiffs or the other victim-clients, thus evidencing its dominion over CAIR-VA's clients' legal files; and that Defendant paid off some of the more threatening victim-clients and did so because it recognized expressly that Days was its employee and ultimately its responsibility. (Pls.' Facts at ¶¶ 81-105). Indeed, the actual factual record leaves little doubt: Defendant CAIR is not only responsible for the fraud and damages to Plaintiffs carried out by Days, but also responsible for its own conduct in furthering the fraud and breaching its fiduciary duties to Plaintiffs by lying and refusing to accept responsibility for Days's conduct. And, even assuming *arguendo* that the record does not mandate summary judgment for Plaintiffs, the question of Defendant's liability for all of Plaintiffs' damages most assuredly deserves to be presented to a jury at trial, and as such, Plaintiffs respectfully request this Court deny Defendant's motion.

B. The Genuine Issues and the Actual Undisputed Material Facts.

As noted above, Defendant CAIR concedes that Morris Days defrauded Plaintiffs.

[4] It should come as no surprise then that after arguing in its "Introduction" to the motion that CAIR-VA was not liable for Morris Days's conduct (Def.'s Mot. at 5), only to concede that CAIR-VA was in fact responsible for Days's conduct as its agent with apparent authority (Def.'s Mot. at 33-35), Defendant's motion returns to its earlier theme that CAIR-VA could not be liable for Days's conduct because Days had no actual or apparent authority to act as a lawyer. (Def.'s Mot. at 42-45). As noted in the text, Defendant's motion is at once both incoherent and self-contradictory and treats its rendition of "undisputed facts" as an opportunity to fabricate a factual record that does not exist.

(Def.'s Mot. at 5). Defendant's motion also concedes that, to the extent Days would be liable to Plaintiffs,[5] CAIR-VA would be liable pursuant to the doctrine of *respondeat superior*. (Def.'s Mot. at 33-35). Defendant, however, seeks desperately to immunize itself from liability by arguing that it is vicariously liable neither for Days's bad acts nor CAIR-VA's tortious conduct. As set forth below, Defendant's arguments to avoid vicarious liability are transparently deficient because they present a tall tale entirely disassociated from the record in this case. Moreover, Defendant CAIR ignores entirely its direct liability for breach of fiduciary duty and intentional infliction of emotional distress.

1. Defendant CAIR Is Vicariously Liable to Plaintiffs for Morris Days's Fraud, Breach of Fiduciary Duties, and Intentional Infliction of Emotional Distress Under the Doctrine of *Respondeat Superior*.

a. Morris Days Was an Agent of Defendant CAIR: Apparent Authority.

(1) Legal Standard.

In the Commonwealth of Virginia, agency is established by facts evidencing consent by the principal to employ the agent and by the agent to act as such. Moreover, the principal's control over the agent is an important factor in determining agency. *Reistroffer v. Person*, 247 Va. 45, 48, 379 S.E.2d 450, 454 (Va. 1994) ("Agency is a fiduciary relationship resulting from one person's manifestation of consent to another person that the other shall act on his behalf and subject to his control, and the other person's manifestation of consent so to act. The power of control is an important factor in determining whether an agency relationship exists.") (citations

[5] Defendant's argument that even if Days engaged in tortious conduct giving rise to liability for violations of statutory and common law fraud (Counts Two and Three of Am. Compl.) and breach of fiduciary duty (Count Four of Am. Compl.), Plaintiffs have not suffered sufficient damages to satisfy the jurisdictional requirements of this Court is dealt with below in § II.B.3. Defendant's argument that Plaintiffs have not met their burden to establish liability for intentional infliction of emotional distress (Count Five of Am. Compl.) is addressed below in § II.B.2.

omitted); *see also Murphy v. Holiday Inns, Inc.*, 216 Va. 490, 492, 219 S.E.2d 874, 876 (VA. 1975) (same).

However, it is the right to control, not the control actually asserted, that is dispositive. Indeed, in *Perry v. Scruggs*, 17 Fed. Appx. 81, 89 (4th Cir. 2001), the court stated, "Under Virginia law, 'agency has been defined as the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the agreement by the other so to act.'" (quoting *Raney v. Barnes Lumber Corp.*, 195 Va. 956, 81 S.E.2d 578, 584 (Va. 1954)). "'Actual control, however, is not the test; it is the right to control which is determinative.'" *Perry*, 17 Fed. Appx. at 89 (quoting *Whitfield v. Whittaker Mem'l Hosp.*, 210 Va. 176, 169 S.E.2d 563, 567 (Va. 1969)) (emphasis added).

Once an agency relationship is established, the principal is liable for the bad acts of its agent arising from the position of agency, including and extending to the agent's "apparent authority." This "apparent authority" exists even when the agent acts without the knowledge of the principal and when the agent acts for its own benefit. The Virginia Supreme Court has explained this extension of liability as follows:

> The amended motion for judgment did not specifically allege that [defendant] Rawlings directly breached its fiduciary duty. [Plaintiff] Allen sought to hold Rawlings responsible for Holbert's acts on the theory that those acts were incident to the scope of Holbert's employment and within his "apparent authority."
>
> Two of our cases are relevant to this theory. In *Jefferson Standard Life Insurance Co. v. Hedrick*, 181 Va. 824, 27 S.E.2d 198 (Va. 1943), defendant's agent falsely told plaintiff that he had sent plaintiff's loan application to defendant's home office. Affirming a judgment against defendant, we held that a principal is liable to third persons for wrongful acts an agent commits within the scope of his employment, even if the principal does not approve or know of the misconduct, for the principal holds his agent out as trustworthy. *Id*. at 834, 27 S.E.2d at 202.
>
> In the other relevant case, *Dudley v. Estate Life Insurance Co.*, 220 Va. 343, 257 S.E.2d 871 (Va. 1979), we considered the question of scope of authority in respect to a fraud perpetrated by an agent. Defendant's agent lured plaintiffs into

> a fraudulent insurance sales scheme, then absconded with their money. At the conclusion of plaintiff's evidence, the trial court granted defendant's motion to strike the evidence and entered summary judgment for defendant. On appeal, we rejected defendant's contention that since the agent committed the fraud solely for his personal gain, he acted beyond the scope of his authority. We held that plaintiffs had made a *prima facie* case. Approving principles set forth in Restatement (Second) of Agency, §§ 261 and 262, as being in accord with principles already established in Virginia, we explained that defendant had put the agent in a position that facilitated the fraud by giving him credentials indicating to the public that he was a legitimate agent. *Id*. at 349-52, 257 S.E.2d at 875-76. We could not say as a matter of law that plaintiffs had notice that the agent was acting for his own purposes. *Id*. at 351, 257 S.E.2d at 876. We pointed out that an agent is not *ipso facto* acting outside his authority merely because he is "acting fraudulently for his own benefit." *Id.* at 353, 257 S.E.2d at 877. *See also In Matter of F.W. Koenecke & Sons, Inc*., 605 F.2d 310 (7th Cir. 1979).

Allen Realty Corp. v. Holbert, 227 Va. 441, 447-448, 318 S.E.2d 592, 596 (Va. 1984).

Moreover, "[w]here an agency relationship has been established, the burden is on the principal to prove that the agent was not acting within the scope of his authority when he committed the acts complained of, and when the evidence leaves the question in doubt it becomes a factual issue for determination by the jury." *United Bhd. of Carpenters & Joiners v. Humphreys*, 203 Va. 781, 787 (Va. 1962) (quotation marks and citations omitted).

(2) Analysis of Defendant's Arguments.

The evidence in the record establishes that Defendant CAIR represented to the public that Morris Days was acting as its attorney in its Herndon, Virginia office, and that Plaintiffs were aware of this representation. (Pls.' Facts at 64-65, 81-83).

The record also establishes that Days represented to Plaintiffs that he was acting as an attorney for and on behalf of the national organization, Defendant CAIR. (Pls.' Facts at ¶¶ 64, 81).

Moreover, the record further establishes that Defendant CAIR took possession of and control over the legal files of the CAIR victim-clients without notice to or authorization from the

clients, thereby asserting what Defendant CAIR evidently considered its pre-existing dominion and control over sensitive and confidential attorney-client communications. (Pls.' Facts at ¶¶ 118-120). This pre-existing dominion and control had to have come through either Days's agency or CAIR-VA's agency,[6] either or both in the service of Defendant CAIR.

Finally, Defendant CAIR chose to take the lead in directing and paying settlements to the most threatening clients and testified expressly that it did so because it had a responsibility "***to right a wrong by one of our employees***." (Pls.' Facts at ¶¶ 84, 120, 128, 132-34). Quite simply, Defendant CAIR's testimony concedes this point definitively in Plaintiffs' favor.

As noted above,[7] notwithstanding Defendant's motion conceding apparent authority (Def.'s Mot. at 33-35), Defendant attempts to reverse itself (and contradict its earlier concession) and claim that Plaintiffs acted unreasonably by relying upon Days's apparent authority as a CAIR National attorney. (Def.'s Mot. at 43-47). Defendant's argument, however, fails because it literally mugs the factual record and confounds the essential fraud at issue in this case.[8]

We begin with an outline of Defendant CAIR's argument that Plaintiffs unreasonably relied on Days's apparent authority as an agent of Defendant CAIR. Defendant's motion begins this argument by claiming that CAIR-VA had a policy not to charge its clients. However, the only indication in the record that this policy was anywhere but in the hidden consciousness of the CAIR-VA employees, if at all, was testimony by Iqbal that after he had learned that Days was taking fees for legal work performed by Days on behalf of CAIR clients, he posted a listing of

[6] CAIR-VA's agency is discussed *infra*, § II.B.1.b.(2)(b).
[7] *See* note 4, *supra*.
[8] As noted *infra* in § II.B.1.d.(2), Defendant CAIR's argument of unreasonable reliance might also be considered an argument against liability for fraud (*i.e.*, reasonable reliance), although Defendant's motion mentions nothing of the reasonable reliance element applicable to the fraud count. Our treatment here applies *mutatis mutandis* to any extension of the argument that Plaintiffs did not reasonably rely on Day's apparent authority to the fraud context.

office rules outside Days's office. (Pls.' Facts at ¶¶ 29-30, 94, 96). But, this posting did not occur by Iqbal's own admission until sometime in October 2007.

Indeed, what Defendant's motion ignores entirely is that when Iqbal learned in July 2007 that Days had charged a CAIR client fees, Iqbal's response to Days was not that this was wrong, but only that Days should work with Iqbal to establish a policy for accepting such cases. (Pls.' Facts at ¶¶ 29-31, 68, 92, 112). Defendants also ignore the fact that before July 2007, Plaintiffs Abdussalaam, Turner, and Lopez had already paid Days "filing" fees for entirely fictitious filings. (Pls.' Facts at ¶ 68). In other words, at the time three of the Plaintiffs had paid Days for CAIR's legal representation, there was no policy precluding either Days's representation or the fact that he was charging CAIR clients.

Defendant's motion then claims, in a patent misrepresentation of the record, that the posting of these rules outside of Days's office took place "prior to any of the acts of misconduct that Plaintiffs' allege caused them their injuries." (Def.'s Mot. at 43). But, as just noted, Days had already taken funds from Plaintiffs Lopez, Turner, and Abdussalaam prior to October 2007. But beyond this, the facts simply contradict any assertion that this "posting" put anyone on notice of anything. First, the actual document is a memorandum expressly addressed to the CAIR-VA staff, not to the clients. (Pls.' Facts at ¶ 112). Second, there is no indication anywhere in the record that any of the Plaintiffs saw or read this notice—and, in fact they did not. (Pls.' Facts at ¶¶ 29-31, 68, 92, 112). Third, the record indicates that Plaintiffs were never told of this policy during Days's tenure. (Pls.' Facts at ¶¶ 29-31, 68, 92, 112). And fourth, not one Plaintiff actually visited Days at his office after September 2007. (Pls.' Facts at ¶ 68). It is simply not credible that the posting of an employee memorandum setting forth rules that none of the Plaintiffs saw or knew anything about would somehow act retroactively to nullify Days's

apparent authority.

Beyond this argument of the posting of some unknown and unseen rules, Defendant's motion appears to confuse the taking of legal fees by Days as the essential fraud in this matter. (Def.'s Mot. at 45-47). While the taking of legal fees as a non-lawyer was certainly fraudulent and contributes to Plaintiffs' damages, the essential fraud in this case is Days's and Defendant CAIR's fraudulent representation that Days was a lawyer who was performing legal services for Plaintiffs. Undisputedly, these representations were false and were reasonably relied upon by Plaintiffs. (*See, e.g.*, Def.'s Mot. at 33-35). Defendant's motion, however, attempts to argue that the payment of fees directly to Days somehow put Plaintiffs on notice that he did not have the apparent authority that Defendant concedes[9] Days had. (Def.'s Mot. at 45-47). But how would Plaintiffs, all very unsophisticated legal consumers without any knowledge of how Defendant CAIR operated its offices and charged for its legal services, be on notice that Days was not acting within the scope of his authority simply because Plaintiffs were asked to pay him directly? In fact, it does not. (This also ignores the fact that Plaintiff Nur did not pay Days for his legal services and was not even conceivably aware of this payment arrangement.)

Moreover, all of the payments to Days were paid in the context of an attorney who publicly worked for Defendant CAIR out of CAIR-VA's offices; used Defendant CAIR's offices in Herndon, Virginia; wrote correspondence on CAIR-VA's letterhead; and was contacted by Plaintiffs through CAIR-VA's offices. (Pls.' Facts at ¶¶ 64, 66, 111). Defendant CAIR also ignores the fact that Days had told Plaintiffs that he was acting as their counsel on behalf of Defendant CAIR and Defendant CAIR was publicly holding Days out as their lawyer, and Plaintiffs were aware of these representations. (Pls.' Facts at ¶¶ 64-65, 82-86). Yet,

[9] (Def.'s Mot. at 33-35).

notwithstanding all of these facts, Defendant CAIR raises this "notice" argument to the level of an undisputed fact that would render Plaintiffs' reliance on Days as a CAIR National attorney unreasonable as a matter of law. Plaintiffs respectfully submit that this so-called "notice" argument fails as a matter of law and most certainly does not take this issue out of the hands of a jury.

Another argument raised by Defendant's motion is that Plaintiffs must have known that Days was in fact not authorized to act as an attorney on behalf of Defendant CAIR and CAIR-VA because "'for every case that [CAIR-VA] would accept . . . there was a form that the clients need[ed] to sign' which explained that CAIR-VA does 'not represent people legally.'" (Def.'s Mot. at 44). This statement is false, and it is false because (1) that is not what the form states and (2) Defendant's motion deletes how Iqbal actually begins this sentence: "***I think*** every case that we would accept as CAIR Maryland and Virginia, there was a form that the clients need to sign." (Pls.' Facts at 35) (emphasis added).

To begin, the form only states that CAIR-VA is "not a legal services organization." It does not say that its employee "Resident Attorney" is not authorized to represent clients on behalf of Defendant CAIR (or even CAIR-VA). Further, only Plaintiff Nur and Saiyed actually signed this form, but the record testimony clearly indicates that these clients understood directly from Days that he, ***acting as a CAIR National attorney***, was representing them.

Specifically, given the public representations by Defendant CAIR that Days was representing CAIR clients, and given Days's continued representations that he was acting on behalf of Plaintiffs' as a CAIR National attorney, an unexplained form asserting that CAIR-VA was not a legal services law firm underscores and adds to the evidence that it was Defendant CAIR that was the operative law firm (principal) for whom Days was acting.

In addition, when Plaintiff Abdussalaam received this document from Iqbal, it was long after the fraud and was simply part of the cover-up. And, true to form, Days, as Abdussalaam's lawyer, told him to ignore it and not to sign it. (Pls.' Facts at ¶ 64 [Abdussalaam Decl. at ¶ 20, Ex. C]). Moreover, there is nothing in the record to indicate that Days explained the meaning of this document, whether it contradicted Days's continual representations to the contrary or whether it was even meaningful that CAIR-VA purportedly did not act as a legal service provider when Days had represented to Plaintiffs that he was a CAIR National attorney (*i.e.*, an attorney of Defendant CAIR). (Pls.' Facts at ¶ 64).

Once again, Plaintiffs respectfully submit that this so-called "notice" argument fails as a matter of law and most certainly does not take this issue out of the hands of a jury.

b. Morris Days Was an Agent of Defendant CAIR: Control.

(1) Legal Standard.

As noted above, the control over the agent is the important factor in establishing agency in the Commonwealth of Virginia. The question raised by Defendant's motion is whether Iqbal—who indisputably (1) was employed by Defendant CAIR as its director of operations to supervise Defendant's chapter offices, including CAIR-VA, and (2) was acting as Days's supervisor at CAIR-VA—was controlling Days as an agent of Defendant CAIR, CAIR-VA, or both. Before we treat the factual record, we will examine the applicable law.

The Restatement of Agency sets out the common law rule on the role of an agent acting on behalf of two masters: "A person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other." Restatement (Second) Agency, § 226. In other words, even though an agent has two very distinct masters controlling his behavior, the same act by the agent may be for the benefit of

both masters and establish *respondeat superior* liability for both.

While the Virginia courts have not had occasion to expressly adopt this rule, there is no reason to doubt its application in Virginia given the Virginia Supreme Court's uninhibited use of the Restatement (Second) of Agency as an authoritative guide to the law of agency. *See, e.g.*, *Allen Realty Corp. v. Holbert*, 227 Va. 441, 447-48, 318 S.E.2d 592, 596 (Va. 1984).

Moreover, Defendant's own motion, in asserting that Iqbal's dual roles for Defendant CAIR and CAIR-VA does not mean he was controlling Days for both masters, actually cites to a U.S. Supreme Court case and a Fourth Circuit case that expressly stand for the opposite proposition—that is, that an agent may indeed serve two very distinct masters at one time arising out of the very same conduct. (Def.'s Mot. at 39-40). The first instructive case is *NLRB v. Town & Country Elec*., 516 U.S. 85 (1995), where the Court was called upon to determine if federal labor law relating to an "employee" applied when the employee was actually engaged in conduct for another non-employer master (*i.e.*, a union). The Court first determined that the federal statute's use of the word "employee" incorporated the common law notion of master-servant/agent-principal, and then explained as follows:

> The Restatement's hornbook rule (to which the quoted commentary is appended) says that a "person may be the servant of two masters . . . at one time as to one act, if the service to one does not involve abandonment of the service to the other." Restatement (Second) of Agency § 226, at 498 (emphasis added). The [National Labor Relations] Board, in quoting this rule, concluded that service to the union for pay does not "involve abandonment of . . . service" to the company.
>
> And, that conclusion seems correct. Common sense suggests that as a worker goes about his ordinary tasks during a working day, say, wiring sockets or laying cable, he or she is subject to the control of the company employer, whether or not the union also pays the worker. The company, the worker, the union, all would expect that to be so. And, that being so, that union and company interests or control might sometimes differ should make no difference.

NLRB, 516 U.S. at 94-95 (citation to the administrative record omitted).

Defendant's motion also cites to *Sharpe v. Bradley Lumber Co.*, 446 F.2d 152, 155 (4th Cir. 1971), to make the following assertion: "'inclusion of [a person] on the payroll' of one entity 'would not, standing alone, suffice to establish an agency relationship.'" (Def.'s Mot. at 39-40). But this is just a dishonest citation. *Sharpe*, which was interpreting North Carolina law, follows the Restatement on dual masters and the court actually ruled that an employee-agent paid by another, given the relationship between the two masters and the overlapping purposes of the work, was in fact an agent for both masters. Thus, the court held:

> We agree with the appellee that the inclusion of Lewis on the payroll of Bradley Lumber Company would not, standing alone, suffice to establish an agency relationship, although that fact has been given significant probative force. But when Bradley Lumber Company's consistent treatment of Lewis as its employee is combined with Lewis' regular employment in hauling lumber for the company, and the close business relationship that existed between Ronnie Grindstaff and Bradley, the conclusion is inescapable that a principal-agent relation was present. Lewis' immediate supervisor was not only a partner in a concern dependent on Bradley Lumber Company for half its income, but was the Vice President and a director of the lumber company itself. Pierce Bradley's belated disavowal of Lewis as an employee after the accident that injured the Sharpes cannot prevail over the clear evidence to the contrary in this record.
>
> Nor do we think that the admission by the Grindstaff partnership that Lewis was their employee shields Bradley Lumber Company from liability. The North Carolina courts have explicitly recognized that an agent can be in the service of two principals simultaneously, provided both have a right to exercise some measure of control, and there is a common or joint participation in the work and benefit to each from its rendition. *See* Restatement (Second) of Agency, § 226 (1958). These features were present here and the appellants are entitled to judgment against Bradley Lumber Company as well as R. K. Grindstaff & Son.

Sharpe, 446 F.2d at 155 (case citations and footnote omitted).[10]

[10] The only other case cited by Defendant for the proposition that Iqbal could not be working for two masters simultaneously is inapposite because it only stands for the proposition that the mere fact that an officer or director serves as such for the parent company and its subsidiary does not *ipso facto* establish an alter ego or agency relationship. *United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998). (Def.'s Mot. at 40). Plaintiffs do not argue that the mere presence of Iqbal serving as the executive director of CAIR-VA renders Defendant CAIR liable for the liability of CAIR-VA. The argument of Defendant CAIR's liability for the liability of CAIR-VA is based upon a

Finally, it is worth noting that the question of control is not one that needs to be actually asserted *but one that the principal has the right to assert*. *See Perry*, 17 Fed. Appx. at 89. In the case at bar, both the right to control and actual control were asserted. Iqbal was Days's direct supervisor and, as such, Iqbal—as servant to his master, Defendant CAIR, which was paying his salary and serving as his employer in his capacity as director of operations—controlled Days. Moreover, given the record in this case it is simply not credible to believe that Defendant CAIR could not order Iqbal to terminate Days or to impose controls over him. (*See infra* § II.B.1.b.(2)(b) for the discussion of CAIR-VA as agent/alter ego of Defendant CAIR).

(2) Analysis of Defendant's Arguments.

(a) Morris Days Was an Agent of Defendant CAIR Directly.

The factual record demonstrates that Iqbal was not only serving two masters at the same time arising out of the same conduct, but, like in *Sharpe*, Iqbal's mission as executive director for CAIR-VA, including his supervision of Morris Days, was a mission executed on behalf of Defendant CAIR. Specifically, Defendant CAIR sent Iqbal to serve as executive director to save a moribund Virginia operation. (Pls.' Facts at ¶¶ 99-103). Further, Defendant CAIR specifically paid for Iqbal's salary, which included Iqbal's salary for his position as director of operations at Defendant CAIR and as executive director of CAIR-VA. (Pls.' Facts at ¶¶ 87-89, 91, 100-03). The same pay for the two roles intimately linked.

Moreover, Iqbal's time and work for his two masters were not separated by any kind of dividing wall. Indeed, his role as director of operations at Defendant CAIR *included* his role to supervise the operations of its Virginia chapter, CAIR-VA. (Pls.' Facts at ¶¶ 87-101). And, to underscore this point, Iqbal was in touch often simultaneously with CAIR National officers and

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broader argument of agency and alter ego as discussed *infra* at § II.B.1.b.(2)(b).

directors and CAIR-VA directors, using his CAIR National email, letterhead, and title for his duties supervising Days. (Pls.' Facts at ¶¶ 92-93).

In sum, there can be little doubt that Days was acting as an agent for Defendant CAIR when Days purported to be an attorney acting as a fiduciary for Plaintiffs and the other victim-clients. Iqbal's supervisory role over Days was financed by and on behalf of Defendant CAIR and fully aligned with his role at Defendant CAIR to supervise CAIR-VA as a chapter office. To argue, as Defendant has, that Days was not an agent for Defendant CAIR as a matter of law is preposterous.

(b) Morris Days was an Agent of Defendant CAIR through the Agency/Alter Ego Status of CAIR-VA.

It undisputed that CAIR-VA, through Iqbal, controlled Days and as such CAIR-VA is liable for Days's bad acts. (Def.'s Mot. at 33-35). The factual record is certainly sufficient to conclude as a matter of law that CAIR-VA acted as an agent of Defendant CAIR, thus rendering Defendant CAIR equally liable for Days's bad acts via the control provided by CAIR-VA. (Pls.' Facts at ¶¶ 87-111).

As noted above, consent and control are the factors to establish that an agency relationship exists. Control is also an important element to establish the alter ego doctrine that would render CAIR-VA a surrogate for Defendant CAIR. *See, e.g., Beale v. Kappa Alpha Order*, 192 Va. 382, 396-97, 64 S.E.2d 789, 797 (Va. 1951) (holding that control and a resulting injustice permit the application of the alter ego doctrine even if corporate formalities are observed). Specifically, the record in this case easily establishes an agency relationship between Defendant CAIR and CAIR-VA:

- **Consent:** Defendant CAIR represented to the public that it was a national

organization ("CAIR National"), and that it consisted of its chapter offices across the country. (Pls.' Facts at ¶¶ 82-83).

- **Consent:** CAIR-VA published its own public documents making it clear that it was acting on behalf of and as part of Defendant CAIR, the national organization. One of these documents, provided to Plaintiffs by Days to entice them to utilize his and CAIR National's legal services, reads in pertinent part as follows:

About Our Organization…

The Council on American-Islamic Relations (CAIR) is a non-profit grassroots organization dedicated to presenting an Islamic perspective on issues of importance to the American public. CAIR is the largest American Muslim civil rights and advocacy organization in the United States, serving the interests of more than seven million American Muslims with 32 chapters and offices nationwide and in Canada.

(Pls.' Facts at ¶ 85). The "About Our Organization" is describing CAIR-VA.

- **Control:** Defendant CAIR was prepared to resuscitate a moribund CAIR-VA chapter by providing Iqbal to run the CAIR-VA's operations as executive director. (Pls.' Facts at ¶ 99).
- **Control:** Iqbal's salary as executive director of CAIR-VA was paid for by Defendant CAIR. (Pls.' Facts at ¶ 87).
- **Control:** Iqbal's responsibilities as executive director of Defendant CAIR included the supervision of CAIR-VA. (Pls.' Facts at ¶ 89).
- **Control:** Iqbal's duties at CAIR-VA included his supervision of and control over Days. (Pls.' Facts at ¶ 90).
- **Control:** But for Defendant CAIR's financial contributions to CAIR-VA, CAIR-VA would not likely exist. (Pls.' Facts at ¶¶ 100-03).
- **Control:** Defendant CAIR controlled the very existence of CAIR-VA and its use

of the name "CAIR," without any restrictions or guidelines because the authority to exist was not based on any specific agreement. (Pls.' Facts at ¶ 105). In effect, CAIR-VA existed solely at the discretion of Defendant CAIR. If CAIR-VA did not act exactly as Defendant CAIR required, Defendant CAIR could have terminated CAIR-VA's very right to operate as a chapter office of Defendant CAIR and/or to use the name "CAIR." (Pls.' Facts at ¶¶ 100-03, 105).

- **Control:** CAIR-VA was kept open by Defendant CAIR in 2005-2006 only to avoid the liabilities of its previous management. (Pls.' Facts at ¶ 102). Defendant CAIR expressly reserved the right to shut CAIR-VA down whenever it wished. (Pls.' Facts at ¶ 103)
- **Control:** When the Days matter blew up and became public in February 2008, Defendant CAIR took custody and control of all the legal files and treated them as Defendant CAIR's property. (Pls.' Facts at ¶¶ 119).
- **Control/Consent:** Defendant CAIR testified that it considered Days its employee and thus responsible to settle with its most adversarial victim-clients. (Pls.' Facts at ¶ 84).

But beyond an agency relationship, the factual record also demonstrates that Defendant CAIR utilized CAIR-VA as an alter ego to effect the fraudulent cover-up of Days's tortious conduct, and it did so at a time when Defendant CAIR owed Plaintiffs a fiduciary duty to disclose all material facts of the Days's fraud. To begin, we note that the Commonwealth of Virginia allows a court to pierce the corporate veil when the control by one entity over another is used to effect or protect a fraud. Thus, the Virginia Supreme Court explained:

> Just when a corporation will be regarded as the adjunct, creature, instrumentality, device, stooge, or dummy of another corporation is usually held to be a question

> of fact in each case. As above stated the general rule is that the separate corporate entity of corporations will be observed by the courts, even though one may dominate or control another, or may treat it as a mere department, instrumentality, agency, etc.; and courts will disregard the separate legal identities of the corporation only when one is used to defeat public convenience, justify wrongs, protect fraud or crime of the other.

Beale v. Kappa Alpha Order, 192 Va. 382, 399 (Va. 1951). The rule expressed in *Beale* fits hand-in-glove with the undisputed facts present in this case. First, CAIR-VA was not even operating legally under the name CAIR-Maryland and Virginia insofar as this was a fictitious name (*i.e*., a 'dba') and CAIR-VA had not applied for authority to operate as such. (Yerushalmi Decl. at ¶¶ 21-22, at Ex. A). Second, the chairman of the board of Defendant CAIR reminded CAIR-VA after the Days's blow-up that Defendant CAIR had only allowed CAIR-VA to survive past 2005-2006 to avoid incurring liability for the "mistakes" of previous CAIR-VA management. (Pls.' Facts at 102). Third, Iqbal testified that the only reason CAIR-VA reported Days as an independent contractor to the IRS was to avoid the employer contributions required of an employer. (Pls.' Facts at ¶ 110). *See, e.g.*, *United States v. Josephberg*, 562 F.3d 478, 499 (2d Cir. N.Y. 2009) (explaining that intentionally paying a common law employee as an independent contractor to avoid employer tax liability amounts to tax evasion). Fourth, Defendant CAIR aggressively, intentionally, and outrageously pursued the fraud that Days was an independent contractor for the sole reason to conceal CAIR-VA's and its own liability for Days's bad acts.[11] (Pls.' Facts at ¶ 111). And, fifth, Defendant CAIR and Iqbal attempted to conceal from Plaintiffs' counsel the July 30, 2007, email from Iqbal to Days—an email not only evidencing that Iqbal had been on notice that Days had taken legal fees months earlier than Iqbal had previously admitted at deposition, but also evidencing that Iqbal had accepted Days's legal

[11] *See infra* § II.B.2. for the treatment of Defendant's false statements relating to Days as an independent contractor.

representation of CAIR clients with equanimity and approval and was not even opposed to Days's charging legal fees as long as Days helped to develop a policy about how to accept such cases. (Pls.' Facts at ¶ 112).

The law and the factual record establish beyond question that Defendant CAIR exercised control over Days through Iqbal at the same time that Defendant CAIR represented to the public that Days was one of its purportedly super-performing lawyers and at the same time that Days was representing to Plaintiffs that he brought the power and office of Defendant CAIR National to the table as their attorney representative. Moreover, the factual record establishes that CAIR-VA was both an agent and an alter ego of Defendant CAIR in the perpetration and subsequent concealment of the Days fraud. As such, Defendant CAIR is liable for all of the damages caused by Days's tortious conduct, and Plaintiffs respectfully request that this Court grant Plaintiffs summary judgment on the question of liability for Counts Two, Three, and Four of the Amended Complaint pursuant to Fed. R. Civ. P. 56(f)(1).

c. Defendant CAIR Is Vicariously Liable for Morris Days's Statutory Fraud.

(1) Legal Standard.

The Virginia Consumer Protection Act ("VCPA")[12] provides for civil liability, statutory damages, and an award of attorneys fees and court costs for violations of Va. Code Ann. § 59.1-200. This Court has previously upheld a cause of action against Defendant CAIR based upon the allegations in the Amended Complaint. *Lopez v. Council on Am.-Islamic Relations Action Network, Inc.*, 741 F. Supp. 2d 222, 236 (D.D.C. 2010).

(2) Analysis of Defendant's Arguments.

Beyond the general argument on agency, Defendant's motion does not address its

[12] Va. Code Ann. § 59.1-196 *et seq*. referred to herein as "VCPA".

liability under the VCPA. In fact, the record in this case establishes liability because there is no dispute that Days fraudulently took fees and held himself out as a lawyer. It is also undisputed that Plaintiffs Saiyed, Turner, Lopez, Abdussalaam, and Nur suffered out of pocket damages as a result of Days's fraud. The only question remaining under Count Two of the Amended Complaint relative to these Plaintiffs is the extent of the damages and reasonable attorneys and costs.[13]

d. Defendant CAIR Is Vicariously Liable for Morris Days's Common Law Fraud.

(1) Legal Standard.

"Under Virginia law, the elements necessary to state a claim of actual fraud are: (1) a false representation (2) of a material fact (3) made intentionally or knowingly (4) with the intent to mislead; (5) reliance by the misled party; and (6) injury." *Lopez*, 741 F. Supp. 2d at 236.

(2) Analysis of Defendant's Arguments.

Beyond the general argument on agency, Defendant's motion does not address the elements of common law fraud, unless one attributes Defendant's argument about reasonable reliance on Days's apparent authority to operate as an argument that Plaintiffs did not reasonably rely upon his fraudulent representations.[14] To the extent Defendant's "notice" argument relating

[13] Indeed, the Amended Complaint alleges Defendant CAIR is directly liable for violations of VCPA because it joined the Days fraud as an actual co-conspirator by falsely and preposterously representing to Plaintiffs and to the public that Days was merely an "independent contractor" and thus not Defendant CAIR's or CAIR-VA's responsibility. (Am. Compl. at ¶¶ 98-109 [Lead Case]). *See, e.g.*, Va. Code Ann. §§ 59.1-200(A)(1) ("[m]isrepresenting goods or services as those of another"); 59.1-200(A)(2) ("[m]isrepresenting the source, sponsorship, approval, or certification of goods or services"). (*See infra* § II.B.2. for the treatment of Defendant's false statements relating to Days as an independent contractor).

[14] The Amended Complaint alleges Defendant CAIR is directly liable for common law fraud because it joined the Days's fraud as an actual co-conspirator by falsely and preposterously representing to Plaintiffs and to the public that Days was merely an "independent contractor" and thus not Defendant CAIR's or CAIR-VA's responsibility. (Am. Compl. at ¶¶ 110-115 [Lead

to apparent authority does migrate implicitly into an argument against the fraud count, Plaintiffs rely upon its arguments above at § II.B.1.a.(2). As such, Plaintiffs respectfully request that this Court grant Plaintiffs summary judgment on the issue of liability for fraud pursuant to Rule 56(f), or, at the very least, deny Defendant's motion.

e. Defendant CAIR Is Vicariously Liable for Morris Days's Breach of Fiduciary Duty.

(1) Legal Standard.

This Court has articulated the legal elements for breach of fiduciary duty as follows:

> To prevail on a claim for breach of fiduciary duty in Virginia, plaintiffs must prove facts sufficient to establish the following: (1) the defendant owed plaintiff a fiduciary duty; (2) defendant breached that duty; and (3) the breach proximately caused an injury. *Carstensen v. Chrisland Corp.*, 247 Va. 433, 442 S.E.2d 660, 10 Va. Law Rep. 1224 (Va. 1994). In Virginia, "[e]vidence of advice and counsel in business matters involving a degree of trust is necessary to show a fiduciary relationship." *Oden v. Salch*, 237 Va. 525, 379 S.E.2d 346, 351, 5 Va. Law Rep. 2248 (Va. 1989). An attorney has a fiduciary duty to his or her client. *Martin v. Phillips*, 235 Va. 523, 527, 369 S.E.2d 397, 4 Va. Law Rep. 3032 (1988).

Lopez, 741 F. Supp. 2d at 237.

(2) Analysis of Defendant's Arguments.

This Court has also addressed the issues relating to the factual record as it exists today:

> The defendant does not deny that the plaintiffs put their trust and confidence in Mr. Days or that there was a fiduciary relationship between Mr. Days and the plaintiffs. Instead, CAIR argues that it cannot be liable for breach of fiduciary duty because the plaintiffs put their trust in Mr. Days, not in CAIR. Regardless of whether CAIR itself had a fiduciary duty to the plaintiffs, the complaint alleges sufficient facts to suggest that Mr. Days had such a duty, that he breached it, and that CAIR is vicariously liable for his conduct. Plaintiffs therefore state a claim for breach of fiduciary duty against CAIR.

Id. (citation to the docket omitted). Defendant CAIR's argument in its motion is no different from the argument dismissed by the Court when raised in its motion to dismiss. And, Defendant

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Case]). (*See infra* § II.B.2. for the treatment of Defendant's false statements relating to Days as an independent contractor).

CAIR has presented no facts that would engender a different result now. As such, Plaintiffs respectfully request that this Court grant Plaintiffs summary judgment on the issue of liability for breach of fiduciary duty pursuant to Rule 56(f), or, at the very least, deny Defendant's motion.

f. Defendant CAIR Is Vicariously Liable for Morris Days's Intentional Infliction of Emotional Distress.

(1) Legal Standard.

This Court has also articulated the legal elements for a claim of intentional infliction of emotional distress ("IIED"):

> To establish a prima facie case for the tort of intentional infliction of emotional distress ("IIED") under Virginia law, plaintiffs must allege: "(1) the wrongdoer's conduct was intentional or reckless; (2) the conduct was outrageous and intolerable; (3) there was a causal connection between the wrongdoer's conduct and the emotional distress; and (4) the emotional distress was severe." *Hatfill v. The New York Times Co*., 532 F.3d 312 (4th Cir. 2008); *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145 (Va. 1974).

Lopez, 741 F. Supp. 2d at 237-38 (D.D.C. 2010).

(2) Analysis of Defendant's Arguments.

Defendant's motion makes four arguments to contest liability for Days's IIED (aside from the generalized agency argument). (Def.'s Mot. at 54-59). The first argument is that Days's conduct was not sufficiently outrageous. (Def.'s Mot. at 55-56).

The Court, however, has ruled on this issue:

> CAIR argues that the conduct of Mr. Days and of CAIR itself described in the complaint does not "rise to the level of 'outrageous' or 'intolerable.'" MTD at 32. The Court is not so certain. The plaintiffs allege that Mr. Days held himself out as an attorney; that they entrusted their legal problems, including a divorce petition and a personal immigration matter, to him; and that Mr. Days mishandled those problems while, in some cases, demanding fees for services he knew he would not provide. He did all of this when, it is alleged, he was not licensed to practice law. While reasonable minds could differ as to whether Mr. Days's conduct, for which CAIR may be vicariously liable, was extreme and outrageous, "it is for the jury . . . to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability." *Womack v.*

> *Eldridge*, 210 S.E.2d at 148 (citation and internal quotation marks omitted); *see also Perk v. Worden*, 475 F. Supp. 2d 565, 570 (E.D. Va. 2007).

Lopez, 741 F. Supp. 2d at 238.

All of the "alleged" facts cited by the Court to support its ruling that this matter must be adjudged by a jury remain not only undisputed, but also underscored and reified. Moreover, we now know that Defendant CAIR took possession of Plaintiffs' legal files and hid that fact and did not inform Plaintiffs of Days's bad acts or of the fact that Days was terminated for tortious and even criminal behavior. We also know that Defendant CAIR conspired with Days to lie to Plaintiffs by misrepresenting the fact that Days was an "independent contractor" as a fraudulent scheme to convince Plaintiffs that the only actor liable for Days's bad acts was Days.[15] Yet, Defendant CAIR, as an entity that provides legal services to the public knew, or should have known, this was false.

Defendant CAIR's second argument to avoid liability for IIED is that there is no evidence that Days acted with the requisite specific intent. (Def.'s Mot. at 56). This argument is specious. To begin, Virginia law requires a showing that Days knew or ***should have known*** that his conduct would cause severe emotional distress. *Womack v. Eldridge*, 215 Va. 338, 342, 210 S.E.2d 145, 148 (Va. 1974) ("We adopt the view that a cause of action will lie for emotional distress, unaccompanied by physical injury, provided four elements are shown: One, the wrongdoer's conduct was intentional or reckless. This element is satisfied where the wrongdoer had the specific purpose of inflicting emotional distress or where he intended his specific conduct and knew or should have known that emotional distress would likely result."). If a jury finds that Days's conduct was outrageous, it is just as likely that a jury would find that Days

[15] (*See infra* § II.B.2. for the treatment of Defendant's false statements relating to Days as an independent contractor).

should have known that this was a likely outcome, especially given the vulnerability of these Plaintiffs.

Defendant CAIR's third argument to avoid liability for IIED is that there was no severe emotional distress. (Def.'s Mot. at 56-58). The Court's prior ruling on this argument in response to Defendant's motion to dismiss is instructive:

> CAIR also contends that the plaintiffs have failed to allege that they have suffered sufficiently severe emotional distress. This is a close question. Because the tort of intentional infliction of emotional distress is disfavored under Virginia law, Virginia courts have defined the tort narrowly. *See, e.g., Ruth v. Fletcher*, 237 Va. 366, 377 S.E.2d 412, 415, 5 Va. Law Rep. 1915 (Va. 1989). In particular, to state a claim for IIED, a plaintiff must allege that she has experienced emotional injury so severe that "no reasonable person could be expected to endure it." *Russo v. White*, 241 Va. 23, 400 S.E.2d 160, 163, 7 Va. Law Rep. 1253 (Va. 1991).
>
> The complaint contains the same rote allegations of emotional distress with regard to each plaintiff in this action: the plaintiff is said to have "suffered severe emotional, mental, and physical distress . . . , including anxiety, lack of appetite, inability to sleep, relationship problems with . . . friends and family, inability to sustain employment resulting from . . . anxiety, and other manifestations." Compl. ¶¶ 79 (Mr. Abdussalaam); 96 (Ms. Turner and Mr. Lopez); 123 (Ms. Nur). Most of those alleged symptoms of distress fall into the category of injuries judged insufficient by the Virginia courts to rise to the level of severe distress required to state a claim for IIED. *See Russo v. White*, 400 S.E.2d at 163 (a plaintiff fails to allege sufficiently severe distress where she merely claims that "she was nervous, could not sleep, experienced stress and 'its physical symptoms,' withdrew from activities, and was unable to concentrate at work").
>
> On the other hand, allegations of emotional distress have been upheld as sufficient under Virginia law where they stated that the defendant's conduct "rendered [the plaintiff] functionally incapable of carrying out any of her work or family responsibilities." *Almy v. Grisham*, 273 Va. 68, 639 S.E.2d 182, 188 (Va. 2007). Here, the plaintiffs claim that Mr. Days's actions resulted in their "inability to sustain employment." *See* Compl. ¶¶ 79, 96, 123. At this stage of the litigation, such a statement alleges sufficient distress to satisfy the liberal pleading requirements of Rule 8 of the Federal Rules of Civil Procedure. Cf. *Hatfill v. New York Times Co.*, 416 F.3d 320, 337 (4th Cir. 2005) (under liberal pleading requirements of the federal courts, plaintiff alleged sufficient emotional distress under Virginia law where he merely claimed that he suffered "severe emotional distress"). Whether this claim can withstand a motion for summary judgment after discovery is a question for another day.

Lopez, 741 F. Supp. 2d at 238-239. That day has come, and the facts learned in discovery establish the kind of serious emotional distress that should be adjudged by a jury.

Specifically, Defendant CAIR itself cites some of the testimony that describes the kind of suffering Virginia courts find sufficient for an IIED claim (Def.'s Mot. at 56-58), including Plaintiffs' physical ailments, trouble maintaining work, dysfunctional family relationships, abusive drinking, and depression. (Pls.' Facts at ¶¶ 76-80). That Defendant CAIR chooses to discount these ailments speaks more to Defendant CAIR's attitude than it does to the factual record.

But beyond Plaintiffs' testimony, we now know that each Plaintiff has suffered clinical depression diagnosed after an exhaustive psychological analysis and testing by an accredited psychological expert. This expert's reports and scientific test results show that each of the Plaintiffs is suffering from severe psychological disorders proximately caused by Days's IIED. (Kimball Decl. at Ex. F). Defendant CAIR's argument that the record does not support the fact that Plaintiffs have each suffered severe emotion distress is transparently false.

Defendant CAIR's fourth and final argument is similarly specious. Here, Defendant CAIR claims there is no showing of proximate cause between Plaintiffs' emotional distress and Days's bad conduct. Once again, Defendant simply chooses to ignore Plaintiffs' sworn testimony. But beyond this, Plaintiffs' expert psychologist has unequivocally opined that such causal nexus exists and exists proximately. (Kimball Decl. at Ex. F).

Given the factual record and this Court's earlier ruling on IIED, Plaintiffs respectfully request that this Court deny Defendant's motion.

2. Defendant CAIR Is Directly Liable to Plaintiffs for Breach of Fiduciary Duties and Intentionally Infliction of Emotional Distress.

Defendant CAIR is directly liable to Plaintiffs for breach of fiduciary duty because as Days's principal, Defendant CAIR owed a fiduciary duty of honesty and disclosure to its clients. *Owen v. Shelton*, 221 Va. 1051, 1054-55, 277 S.E.2d 189, 191 (Va. 1981) ("[I]ncorporated in every contract between a fiduciary and his principal is an obligation, imposed by law upon the fiduciary, to disclose anything known to him which might affect the principal's decision whether or how to act. ***And, like the duty to follow instructions, the duty to disclose continues so long as*** [***the fiduciary***] ***relation continues***.") (internal quotation marks and citation omitted) (emphasis added).

Here, Defendant CAIR took possession of sensitive and confidential legal files belonging to Plaintiffs (and the other victim-clients) without notice to or authority from the clients. Defendant CAIR did so because as the principal for its agent Days, and as a legal services provider, it understood these client files were rightfully in their possession. Having taken actual possession of these legal files, Defendant-CAIR's fiduciary duties of full and honest disclosure continued. Yet, Defendant CAIR (1) said nothing to <u>any</u> Plaintiff about Days's taking legal fees improperly; (2) concealed the fact that Days was fired for bad conduct; and (3) affirmatively misrepresented to Plaintiffs that Days acted as an independent contractor, fraudulently attempting to avoid liability for Days's conduct. (Pls.' Facts at ¶¶ 119-34).

It is this affirmative (mis)representation that Days was an independent contractor that we focus on here to make the point of just how outrageous Defendant CAIR's breach of fiduciary duty was in this case. Defendant CAIR knew that Days was directly supervised and controlled by Iqbal. Defendant CAIR knew that Days had his own office at CAIR-VA, had a secretary employed by CAIR-VA to screen his calls, and that Days was titled as both Resident Attorney

and Civil Rights Manager. Moreover, Defendant CAIR knew that Days was charged with the responsibility to open CAIR-VA's daily mail and that he used a CAIR letterhead for his legal correspondence. Moreover, Defendant CAIR knew that the only reason Days was paid as an "independent contractor" rather than as an employee was to avoid paying the employer contributions and unemployment taxes. (Pls.' Facts at ¶ 111).

Given the law of agency in the Commonwealth of Virginia, there is simply no doubt from this record that Days was an agent-employee and not an independent contractor.[16] As such, Defendant CAIR's actions and representations to Plaintiffs (and to the public) that Days was an independent contractor and acting on his own during the time Defendant CAIR putatively represented Plaintiffs was an outrageous breach of fiduciary duty by a legal services firm. In fact, it was an outrageous and intentional lie in an effort to further deprive Plaintiffs of any justice or compensation. The fraud continued even to the point of running to Days while ill in the hospital to get him to sign a "confession" that he was an "independent contractor" as if Days would have understood the legal implications of that designation. This was all orchestrated by Defendant CAIR and its in-house counsel, Ms. Al-Khalili. (Pls.' Facts at ¶ 111). This breach of duty creates a direct liability for Defendant CAIR for both breach of fiduciary duty and IIED. As such, Plaintiffs respectfully request that Defendant CAIR's motion be denied and the jury be permitted to hear the evidence and determine Defendant CAIR's direct liability for these wrongful acts.

[16] The IRS itself applies the common law employee-independent contractor distinction to determine whether the employer must withhold taxes and pay its contributions on behalf of the employee. *See, e.g.,* IRS publication, "Independent Contractor (Self-Employed) or Employee?," located at http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-(Self-Employed)-or-Employee%3F (accessed November 19, 2012).

3. The Applicable Law and the Factual Record Establish that Plaintiffs Satisfy the Jurisdictional Requirement for Standing.

Defendant's Motion attempts to argue that Plaintiffs have no standing because they cannot meet the jurisdictional requirements of 28 U.S.C. § 1335 (requiring more than $75,000 damages for diversity action). The argument Defendant CAIR spends innumerable pages trying to make is that Plaintiffs' underlying legal cases, the cases Days should have handled for Plaintiffs, would not have resulted in damages, and thus Plaintiffs were not harmed by Days's fraud. (Def.'s Mot. at 47-54).[17] The problem with this argument is that it misses the point of this litigation almost entirely.

This is not a legal malpractice case. This is a case of fraud and breach of fiduciary duty that led to direct out-of-pocket losses by each Plaintiff and a case of IIED resulting in severe emotional damages. Further, and this is Defendant CAIR's fundamental error, under Virginia law, even if the IIED causes of action did not exist, Plaintiffs have extant and viable damage claims for any and all of their emotional damages proximately caused by the fraud and breach of fiduciary duty because the fraud and breach of fiduciary duty counts exist independent of a claim for emotional distress under the IIED count. Once these independent torts exist, Plaintiffs are entitled to damages for emotional distress. *Curtis v. Fairfax Hosp.*, 34 Va. Cir. 290, 294 (Va. Cir. Ct. 1994). The court in Curtis explains this aspect of damages as follows:

> While the co-defendants are technically correct in their declaration that torts seeking to recover for emotional distress are not favored in the law, *Ruth v. Fletcher*, 237 Va. 366, 372-373, 377 S.E.2d 412 (1989), Curtis is not seeking recovery for infliction of emotional distress. Curtis has sufficiently pled a separate tort, conspiracy to commit malpractice, and emotional distress is part of the injury resulting from that tort. *Howard v. Alexandria Hospital*, 245 Va. 346, 429 S.E.2d 22 (1993). *Sea-Land Service, Inc. v. O'Neal*, 224 Va. 343, 297 S.E.2d 647 (1982). "We have approved the recovery of damages for humiliation,

[17] It should be noted that this section does not address Plaintiff Saiyed at all and as such, even if it was relevant, it does not address or challenge Plaintiff Saiyed's standing.

> embarrassment, and similar harm to feelings, ***although unaccompanied by actual physical injury***, where a cause of action existed independently of such harm." *Sea-Land*, 224 Va. at 354.

Curtis, 34 Va. Cir. at 294. Here, Plaintiffs have claims for fraud and breach of fiduciary duty, have suffered out-of-pocket damages for these torts, and thus have a claim for emotional distress damages caused by these independent torts.

Given Plaintiffs' sworn testimony and the expert testimony relating to emotional damages now before the Court, the Court's prior ruling on standing should remain the law of this case. *Lopez*, 741 F. Supp. 2d at 232-34. Defendant CAIR's argument on standing is wrong as a matter of law, and it is based on a misconception of the causes of action in this case. As such, Plaintiffs respectfully request this Court deny Defendant CAIR's motion.

III. CONCLUSION.

We have now come full circle. Defendant CAIR's motion is based on a contentious rendering of the factual record in this case, an argument that at times is simply incoherent and at others self-contradictory, and it presents a patent example of willful blindness to the applicable law. As Defendant CAIR concedes, it is only entitled to summary judgment if there is <u>no</u> genuine issue as to any material fact and that summary judgment is required as a matter of law. (Def.'s Mot. at 8); *see* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). Yet, as set forth above, Defendant CAIR has not met this burden. Moreover, in deciding whether there is a genuine issue of material fact, the Court must view the record in the light most favorable to the party opposing the motion, giving the non-movant the benefit of all favorable inferences that can reasonably be drawn from the record and the benefit of any doubt as to the existence of any genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 331, n.2.

Given this burden, not only has Defendant CAIR's motion utterly failed to establish the propriety of a summary judgment, the factual record in this case demonstrates undisputedly that Plaintiffs are entitled to summary judgment pursuant to Rule 56(f) as to liability on its causes of action for fraud (Counts Two and Three), and breach of fiduciary duty (Count Four). Plaintiffs' IIED claim deserves to be heard by a jury.

WHEREFORE, for the foregoing reasons, Plaintiffs respectfully request that the Court deny CAIR Defendant's Motion and grant summary judgment for Plaintiffs on Counts Two, Three, and Four of the Amended Complaint. Plaintiffs also request a ruling that Defendant CAIR is vicariously liable for any damages arising out of Days's IIED.

Dated this 23rd day of November 2012.

Respectfully submitted,

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C**ERTIFICATE OF SERVICE**

I hereby certify that on November 23, 2012, 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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