UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

Civil Action No. 1:18-CV-00398-WO-JEP

CARPET SUPER MART, INC., a North Carolina corporation, ARTHUR C. JORDAN, JR., and JOYCE J. MOBLEY,	)
Plaintiffs,	)
vs.	)
BENCHMARK INTERNATIONAL COMPANY SALES SPECIALIST, LLC, a Florida limited liability company, DARA SHAREEF, an individual, and BRIAN LOCKLEY, an individual,	)
Defendants.	)

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS COMPLAINT OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

Defendants Benchmark International Company Sales Specialist, LLC ("Benchmark"), Dara Shareef, and Brian Lockley (collectively, "Defendants") submit this Memorandum of Law in support of its Motion to Dismiss, or in the alternative, Motion for Summary Judgment (the "Motion") against all claims asserted by Plaintiffs' Carpet Super Mart, Inc., Arthur C. Jordan, and Joyce J. Mobley (collectively, "Plaintiffs").

Preliminary Statement

Plaintiffs' claims fail to state a claim upon which relief can be granted and, accordingly, should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Simply put, each of Plaintiffs' claims is predicated on the assertion that Plaintiff did not receive, and that Benchmark intentionally concealed, the Standard Terms and Conditions for Benchmark's Terms of Engagement (the "Standard Terms"), which were expressly referenced in and incorporated into the parties' Terms of Engagement. (*See, e.g.*, Doc. 3, Compl. ¶¶ 38, 61, 61, 75, 75-89, Ex. A.) The application of the Standard Terms appears on the face of the Terms of Engagement that Plaintiffs admit they signed. (Doc. 3, Compl. ¶ 25, Ex. A.) This fact defeats each of Plaintiffs' claims as a matter of law.

Plaintiffs' state law RICO claim also fails for two alternative reasons. The sole alleged "predicate act" is "wire fraud," which is insufficient as a matter of law to establish a "pattern of racketeering activity." In addition, Plaintiffs fail to allege the condition precedent of notifying the Attorney General as required by North

Carolina's RICO statute.

Additionally, correspondence referenced by Plaintiffs and integral to the Complaint renders the entirety of Plaintiffs' claims implausible. For these reasons, as explained further below, the Court should dismiss the Complaint with prejudice. In the alternative, the Court should enter summary judgment in favor of Defendants as no genuine issues of material fact exist as to whether Benchmark sent Plaintiffs the Standard Terms that defeat their claims.

Statement of Facts

The following is a concise statement of facts based on the allegations in the four corners of the Complaint and correspondence integral to and referenced in the Complaint, the authenticity of which cannot be disputed:

1. Benchmark is a business broker that locates potential buyers for businesses for which Benchmark has a listing agreement. (Doc. 3, Compl. ¶¶ 5, 19.)

2. Plaintiffs Arthur C. Jordan, Jr. ("Jordan") and Joyce J. Mobley ("Mobley") operated a business Carpet Super Market, Inc. ("CSM") (collectively, "Plaintiffs"), which sold and installed carpet and flooring products. (*Id.* at ¶¶

17-18.)

3. In 2014, Plaintiffs "decided to enter into a listing agreement with Benchmark," and the parties "agreed to meet at CSM's office on May 27, 2014 to sign the listing agreement." (*Id.* at ¶¶ 22-23.)

4. As alleged in the Complaint, "[p]rior to the meeting, Arthur asked Neil to send him a copy of the proposed listing agreement so he could review it before signing it." (*Id.* at ¶ 23.)

5. On May 27, 2014, the parties entered into Terms of Engagement reflecting the brokerage agreement between Benchmark and Plaintiffs. (Doc. 3, Compl., Ex. A.)

6. Plaintiffs admit they signed the Terms of Engagement. (Doc. 3, Compl. ¶ 31.)

7. The Terms of Engagement state: "This Agreement is made subject to Benchmark's Standard Terms and Conditions which are incorporated herein by reference." (Doc. 3, Compl., Ex. A.)

8. The commissions formula to compensate Benchmark for its services appears in the incorporated Standard Terms, which Plaintiffs received and attached to their Complaint as

Exhibit B. (*See* Doc. 3, Compl. ¶ 40, Ex. B.)

9. The "Transaction Value" of the sale provides the basis upon which to calculate Benchmark's commission payment. Section 5 of the Standard Terms provides that Transaction Value "shall be based on the total benefit received by the Client and any related parties pursuant to the Transaction regardless of the form of such consideration, and that, for the avoidance of doubt, such consideration may consist of any or all of the following:

(i) all cash paid to Client or any related party at the time of, or as a result of, a Transaction;

(ii) any non-cash asset issued to, transferred to, or retained by Client or any related party at the time of, or as a result of, a Transaction;

(iii) any liability of the Business which is included in the Transaction, or which is assumed, paid, assigned, guaranteed or forgiven by the Prospect at the time of, or as a result of, a Transaction;

(iv) the maximum payment which may be made by the Prospect within five years of the closing of a Transaction, if any part of the Transaction is deferred, contingent, or derived as a royalty, license, franchise fee, salary, bonus, earn out, retention payment, incentive compensation, or the like;

(v) any asset of the Business which is not purchased by a Prospect and the benefit of which is retained or transferred to any Client or any related party prior to, at, or subsequent to the date of the Transaction; and

(vi) the total consideration payable by a Prospect, including any consideration that is or would be payable under any option to acquire more of the Business than is acquired during the Transaction."

(Doc. 3, Compl., Ex. B, § 5.)

10. Plaintiffs admit that Benchmark successfully procured a buyer for the sale of Plaintiffs' business. (Doc. 3, Compl. ¶¶ 17, 48.)

11. Plaintiffs now claim, however, that they were unaware of the Standard Terms when they signed the Terms of Engagement, and further claim that they understood that Benchmark would base its commission upon the "sales price," rather than the "Transaction Value," of the sale. (*Id*. at ¶¶ 26, 29.)

12. Attempting to prevent the application of simple contractual terms to calculate Benchmark's commission, Plaintiffs spin the contractual dispute above into accusations of "racketeering," "wire fraud," and the like. (*Id.* at ¶¶ 92-93.)

Procedural History

On April 2, 2018, Plaintiffs filed a lawsuit, in Guilford County North Carolina State Court, against Defendants, purporting to assert claims for declaratory judgment and

fraud, and claims under North Carolina's RICO and unfair and deceptive trade practices statutes. (Doc. 3.) Defendants were served on April 11, 2018. On May 10, 2018, Defendants timely removed the case to this Court. (Doc. 1.)

Legal Standard

Federal Rule of Civil Procedure 12(b)(6) protects against meritless litigation by requiring plaintiffs to plead sufficient factual allegations that "raise a right to relief above the speculative level so as to nudge the claims across the line from conceivable to plausible." *Zander v. Saxon Mortg. Serv., Inc.*, 1:14CV857, 2015 WL 3793276, at *6 (M.D.N.C. June 18, 2015) (citations and internal marks omitted) (Osteen, Jr., J.), *aff'd sub nom.*, 622 Fed. Appx. 254 (4th Cir. 2015).

Under Rule 12(b)(6), plaintiffs bear an "obligation to provide the grounds for [their] entitlement to relief," which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and internal marks omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual

matter, accepted as true, to 'state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Twombly*, 550 U.S. at 570).

In *Iqbal*, the Supreme Court emphasized that courts considering a motion to dismiss should utilize a two-step analysis. *Iqbal,* 556 U.S. at 679. First, courts must "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 679. Next, the court must determine whether the factual allegations "plausibly give rise to an entitlement to relief." *Id.* In order for a claim to be facially plausible, a complaint must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable" and must demonstrate "more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678.

Argument

I. THE TERMS OF ENGAGEMENT EXPRESSLY INCORPORATE THE STANDARD TERMS AND, THEREFORE, NEGATE EACH OF PLAINTIFFS' CLAIMS.

It is well-settled that parties may incorporate contractual terms by reference. *E.g., Booker v. Everhart*, 294 N.C. 146, 152, 240 S.E. 2d 360, 363–64 (1978) ("To

incorporate a separate document by reference is to declare that the former document shall be taken as part of the document in which the declaration is made, as much as if it were set out at length therein.") (citations omitted); *see also Chandler v. Forsyth Tech. Cmty. Coll.*, 294 F. Supp. 3d 445, 459 (M.D.N.C. 2018) (recognizing under North Carolina law that handbooks are "part of the employer-employee contract when they are explicitly included by reference therein") (citations omitted) (Osteen, Jr., J.).[1] Here, the

[1] This is true regardless of whether the party challenging the incorporated terms actually received them—an assertion Plaintiffs attempt to muster but is belied by the exhibit attached to their own Complaint and the facts set forth below. *Ziptronix, Inc. v. Ostendo Techs., Inc.*, 5:11-CV-160-FL, 2013 WL 1246741, at *5 (E.D.N.C. Mar. 26, 2013) ("[P]laintiff failed to attach the terms and conditions to its quote…. This failure, however, is not fatal to the incorporation by reference.") (citations omitted); *World Fuel Services Trading, DMCC v. Hebei Prince Shipping Co., Ltd.*, 783 F.3d 507, 518–19 (4th Cir. 2015) ("The Bunker Confirmation plainly expresses that it incorporates the terms of another specific document, the General Terms. Consequently, Tramp Maritime, along with any other reader of the Bunker Confirmation, was immediately put on notice of the existence of a specific additional document that contained provisions that were also part of the Bunker Confirmation."); *Logan & Kanawha Coal Co., LLC v. Detherage Coal Sales, LLC*, 514 Fed. Appx. 365, 368 (4th Cir. 2013) ("[T]he party challenging incorporation need not have actually received the incorporated terms in order to be bound by them, especially when both parties are sophisticated business entities.") (citations omitted).

Terms of Engagement expressly incorporate the Standard Terms. Those Standard Terms, in turn, include the definition of "Transaction Value" that forms the basis of Benchmark's commission.

This incorporation defeats Plaintiffs' First Claim for declaratory judgment. That count queries whether there was a meeting of the minds on the contractual terms, what the material terms are, and the manner of calculating the commission and its amount. (Doc. 3, Compl. ¶ 64.) The contract between the parties answers each of these questions beyond any reasonable dispute. Plaintiffs admit that they signed the Terms of Engagement. Those terms state: "This Agreement is made subject to Benchmark's Standard Terms of Conditions which are incorporated herein by reference." (Doc. 3, Compl., Ex. A.) Plaintiffs indisputably received the Standard Terms and attached them to their Complaint as Exhibit B. (*See* Doc. 3, Compl. ¶ 40, Ex. B.) The Standard Terms, in turn, expressly define the commission calculation according to "Transaction Value." (*Id.*) As a result, there are no colorable questions left to be answered, and there is nothing for the Court to declare in a judgment.

The remaining counts fail for similar reasons. Plaintiffs base their Second Claim for Fraud and Misrepresentation on the allegation that "at no time did the [sic] any of the Defendants inform any of the Plaintiffs that a different commission would be owed." (Doc. 3, Compl. ¶ 75.) To the contrary, the document that Plaintiffs' signed--the Terms of Engagement--provided every reason to conclude otherwise. That document incorporated the Standard Terms that expressly contradict Plaintiffs' fraud claim. Even if there were a dispute over Plaintiffs' receipt of the document--which, as set forth below, there is not--it is clear that Plaintiffs' were on notice of the incorporation of Standard Terms.

Under these circumstances, there is no plausible basis to assert a fraud or misrepresentation claim. *See Abbington SPE, LLC v. U.S. Bank, Nat'l Ass'n*, 7:16-CV-249-D, 2016 WL 6330389, at *5 (E.D.N.C. Oct. 27, 2016) (dismissing plaintiff's claims for fraud and negligent misrepresentation and explaining that both causes of action fail as a matter of law "when a plaintiff alleges misrepresentations that are 'directly contrary' to the express terms of a written

contract") (citations omitted), *aff'd*, 698 Fed. Appx. 750 (4th Cir. 2017); *PNC Bank, N.A. v. Welsh Realty, LLC*, 5:13-CV-203-BO, 2014 WL 4386064, at *2–3 (E.D.N.C. Sept. 5, 2014) (dismissing counterclaim for fraud and explaining "[e]ven accepting that plaintiff orally agreed to the conditions, defendant cannot establish that it justifiably relied on that misrepresentation as a matter of law, because the conditions were not in the subsequently executed loan agreements"); *see also Scolieri v. John Hancock Life Ins. Co.*, 2:16-CV-690-FTM-38CM, 2017 WL 700215, at *5 (M.D. Fla. Feb. 22, 2017) ("it is well established that '[a] party cannot recover for alleged false misrepresentations that are adequately dealt with or expressly contradicted in a later written contract").[2]

[2] The Standard Terms include a choice-of-law clause requiring the application of Florida law. (Doc. 3, Compl., § 7(i).) Because this term is validly incorporated by reference under North Carolina law, Florida law should control the disposition of Plaintiffs' claims based upon the Terms of Engagement. *See Generation Companies, LLC v. Holiday Hosp. Franchising, LLC*, 2015 WL 7306448, at *4 (E.D.N.C. Nov. 19, 2015) (applying Georgia choice-of-law clause and rejecting plaintiff's argument "that the terms of the 2006 License Agreement, including the provisions regarding choice of law, do not apply to it because plaintiff is not a party to the 2013 Addendum" because "the 2013 Addendum supplemented the 2006 License Agreement's terms and incorporated the Guaranty's terms"). As demonstrated by the cases cited above,

Similarly, Plaintiffs base their Third and Fourth Claims, state law claims under the North Carolina RICO and Unfair and Deceptive Trade Practices Acts, on allegations that Benchmark's application of the Transaction Value formula was "fraudulent" and reflected a "reckless disregard for the truth." (Doc. 3, Compl. ¶¶ 91, 97.) Again, the document defining "Transaction Value" appears directly on the face of the document that Plaintiffs signed. Simply put, a broker cannot have committed fraud regarding its commission fee when the basis for that fee appears in a document that the sellers incorporated in a signed agreement. *See, e.g., Bendfeldt v. Window World, Inc.*, 5:17CV39-GCM, 2017 WL 4274191, at *7 (W.D.N.C. Sept. 26, 2017) (dismissing RICO claims where "Plaintiffs fail to allege any fraudulent intent" and explaining "RICO claims have been described as 'the litigation equivalent of a thermonuclear device' and Plaintiffs' attempt to deploy that claim here in the context of an ordinary business dispute simply fails to launch") (citations omitted); *Abbington SPE, LLC*, 2016 WL 6330389, at

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however, the outcome is the same under either North Carolina or Florida law.

*8 (where contract "plainly stated" relevant obligation, the allegedly deceptive statements "did not have the capacity to deceive" and UDTPA claim failed as a matter of law); *Welsh Realty, LLC*, 2014 WL 4386064, at *3 ("As defendants' fraud claim fails to state a claim as a matter of law, the unfair practices claim is unsupportable and similarly warrants dismissal.").

II. THE RICO CLAIM ALSO FAILS FOR LACK OF PREDICATE ACTIVITY AND PLAINTIFFS' FAILURE TO FULFILL A CONDITION PRECEDENT.

The Fourth Circuit has cautioned that it "will not lightly permit ordinary business contract or fraud disputes to be transformed into federal RICO claims," *Flip Mortg. Corp. v. McElhone*, 841 F.2d 531, 538 (4th Cir. 1988), and North Carolina law "did not intend to provide NC RICO with a broader remedial stroke than its federal counterpart." *Kaplan v. Prolife Action League of Greensboro*, 475 S.E.2d 247, 254 (N.C. Ct. App. 1996), *aff'd,* 347 N.C. 342, 493 S.E.2d 416 (1997). Here, not only do the parties' express contractual arrangements defeat the RICO claim as discussed above, but Plaintiffs fail to establish the most basic requirement for a RICO claim: a predicate act supporting a "pattern of racketeering activity."

North Carolina law does not permit a predicate act to consist solely of wire and mail fraud.

> Plaintiffs also alleged a state law RICO claim, based on N.C. Gen.Stat. §§ 75D–1, *et seq.* The civil remedy provided by North Carolina law, however, defines a "pattern of racketeering activity" as requiring "that at least one act of racketeering activity be an act of racketeering activity *other than* (i) an act indictable under 18 U.S.C. § 1341 [mail fraud] or U.S.C. § 1343 [wire fraud], or (ii) an act which is an offense involving fraud in the sale of securities." N.C. Gen.Stat. § 75D–8(c).

Synergy Fin.., L.L.C. v. Zarro, 329 F. Supp. 2d 701, 714 (W.D.N.C. 2004) (emphasis in original). Here, Plaintiffs allege "wire fraud" as their sole basis to establish a predicate act under the RICO statute. (Doc. 3, Compl. ¶ 92.) This claim fails as a matter of law under *Zarro* and the North Carolina RICO statute cited above. *Zarro*, 329 F. Supp. 2d at 714 ("[B]ased on the content of the complaint, the only such acts which may be divined relate solely to mail or wire fraud. As a result, no cause of action is stated.") (citations omitted).

"Moreover, there is no proof that the Plaintiffs complied with the statute by concurrently notifying the Attorney General in writing of the commencement of the action." *Id.*

(citing N.C. Gen.Stat. § 75D–8(c)). As in *Zarro*, Plaintiffs here fail to satisfy this basic condition precedent. Nowhere in the Complaint do Plaintiffs allege satisfaction of this condition. As a result, the Court should dismiss the Plaintiffs' state law RICO claim for this alternative reason as well.

III. ADDITIONALLY, CORRESPONDENCE REFERENCED BY PLAINTIFFS AND INTEGRAL TO THE COMPLAINT CONTRADICT PLAINTIFFS' CLAIMS, REQUIRING DISMISSAL.

Plaintiffs' Complaint references communications preceding the parties' execution of the Terms of Engagement. According to Plaintiffs, Plaintiff Jordan requested "a copy of the proposed listing agreement so he could review it before signing it." (Doc. 3, Compl. ¶ 23.) Further, Plaintiffs claim that the Standard Terms that they attached to their Complaint as Exhibit B

> are materially different from the statements, representations, and agreements Benchmark's vice president, Neil Boyles, made prior to and contemporaneously with the execution of the listing agreement regarding the amount, manner, and method of calculating Benchmark's commission expressed in the listing agreement as a 'Transaction Fee of 5% of the Transaction Value.'

(*Id.* at ¶ 39; *see also id.* at ¶ 40, Ex. B.) Although integral to their claims and explicitly referenced therein, Plaintiffs

neglect to attach the relevant correspondence to the Complaint. The correspondence, however, renders the entirety of Plaintiffs' claims implausible and subject to dismissal.

Plaintiffs base the entirety of their claims on the correspondence prior to execution, such that it is integral to the Complaint.[3] Because this correspondence is integral to the Complaint and authentic, the Court can consider it on this motion to dismiss without converting it into a motion for summary judgment. *See Nazarova v. Duke Univ.*, 1:16CV910, 2017 WL 823578, at *2, n. 1 (M.D.N.C. Mar. 2, 2017) (Osteen, Jr., J.), *appeal dismissed,* 696 Fed. Appx. 639 (4th Cir. 2017); *Bell v. McDonald*, 1:14CV188, 2015 WL 3463479, at *3,

[3] Based upon Plaintiffs' claim that Defendants misrepresented the manner and method of calculating Benchmark's commission in the communications prior to the execution of the Terms of Engagement, Plaintiffs purport to assert their four causes of action, which claim: (i) the "parties did not have a meeting of the minds on all material terms of the listing agreement" (*Id.* at ¶ 68(a)); (ii) Defendants "concealed from the Plaintiffs the fact that the Defendants had no intention of abiding by the construction and meaning the Plaintiffs ascribed to phrase 'Transaction Fee of 5% of the Transactional Value.' (*Id.* at ¶ 85); (iii) a "fraudulent scheme to induce the Plaintiffs to enter into the listing agreement" (*Id.* at ¶ 91); and (iv) that Defendants made "misrepresentations for the purpose first of inducing the Plaintiffs to enter into the listing agreement." (*Id.* at ¶ 98.)

n. 6 (M.D.N.C. June 1, 2015) (Osteen, Jr., J.); *E. Sav. Bank, FSB v. Dugger*, 1:14CV849, 2015 WL 4878207, at *4, n. 5 (M.D.N.C. Aug. 14, 2015)(Osteen, Jr., J.).[4]

Prior to the parties' execution of the Terms of Engagement, Benchmark provided the Standard Terms that Plaintiffs now claim that Defendants concealed and misrepresented. As set forth in the Affidavit of Clinton Johnston in Support of Defendants' Notice of Removal, Benchmark sent its Standard Terms as an attachment to an email in which Benchmark's Vice President Neil Boyles stated: "As promised I have attached a few documents for your consideration and review, **including our Standard Terms and Conditions**." (Doc. 1-1, ¶ 6.) Benchmark sent this email on April 16, 2014, prior to the May 27, 2014 date when the parties executed the Terms of Engagement. (*Id.*; Doc. 3, Compl. ¶ 31, Ex. A.)

Moreover, again on May 28, 2014, the day after the

[4] Additionally, as "pertinent documents that the plaintiffs have failed to attach to a complaint," the Court can consider the correspondence without converting this motion into one for summary judgment, particularly because "they are referred to in the complaint." *Lindsay v. Nichino Am., Inc.*, 202 F. Supp. 3d 524, 532 (M.D.N.C. 2016) (citations omitted) (Osteen, Jr., J.).

parties executed the Terms of Engagement in-person, Benchmark provided Plaintiffs with a copy of the executed Terms of Engagement and the Standard Terms incorporated therein, as an attachment to an email in which Benchmark's Vice President Neil Boyles stated: "**I have attached the digital copy of the contracts … for your records**." (Doc. 1-1, ¶ 10.) Thus, Plaintiffs twice received the document incorporated by reference into the contract they signed, which they claim they never received.

As their claims depend upon Defendants' purported misrepresentations of the terms that Plaintiffs in fact possessed and received from Defendants, and which provide for the commission due and owing to Defendants, Plaintiffs have not stated plausible claims for relief. *See Dugger*, 2015 WL 4878207, at *4-5 (finding counterclaimants had not stated a plausible claim for relief where they could not challenge "the validity of any of the agreements entered into by the parties" and could not "explain why it was improper for the ESB to retain the money paid pursuant to this 'distinct and independent contract'"). Plaintiffs therefore cannot "'raise a reasonable expectation that discovery will reveal evidence'

of the misconduct alleged." *Id.* at *3 (quoting *Twombly,* 550 U.S. at 556). As such, the Complaint should be dismissed.[5]

CONCLUSION

WHEREFORE, Defendants request that the Court dismiss the Complaint and award Defendants their attorneys' fees and costs incurred in defending this action.

Respectfully submitted,

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[5] Alternatively, even if the correspondence referenced by the Complaint and attached to the Affidavit of Clinton Johnston in Support of Defendants' Notice of Removal necessitates converting this motion into one for summary judgment, the Court should enter summary judgment in favor of Defendants because Plaintiffs cannot present any facts that could defeat summary judgment based upon the material facts set forth above. *See Boyd v. Guiterrez*, 214 Fed. Appx. 322, 323 (4th Cir. 2007); *Starnes v. Veeder-Root*, 1:15CV1002, 2017 WL 913633, at *1 (M.D.N.C. Mar. 7, 2017) (Osteen, Jr., J.), *aff'd,* 694 Fed. Appx. 200 (4th Cir. 2017); *Jacobs v. Dees-Dees Law Firm*, 5:17-CV-104-FL, 2017 WL 6541507, at *7 (E.D.N.C. Dec. 21, 2017).

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.3(d)(1), the undersigned certifies that the word count for this memorandum is less than 6,250 words. The word count excludes the case caption, signature lines, cover page, and required certificates of counsel. In making this certification, the undersigned has relied upon the word count of the word-processing system used to prepare the brief.

/s/ M. Cabell Clay
M. Cabell Clay

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing corrected version of the **MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT** was electronically filed with the Clerk of Court using the CM/ECF system, and was served on counsel for Plaintiffs via United States Mail by placing same in a first-class postage prepaid envelope, addressed as follows:

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This 18th day of May, 2018.

/s/ M. Cabell Clay
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