VIRGINIA: IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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**Sara A. McCorkle**, by and through her )

Next Friend, Allen D. McCorkle )

 )

 Plaintiff )

 )

 v. )

 )

**Erickson Senior Living LLC**  ) Law No. CL22-4439

 )

and )

 )

**Greenspring Village Inc** )

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 )

**Plaintiff’s Memorandum in**

**Opposition to Defendants’ Demurrer**

 COMES NOW Plaintiff, by counsel, and files, her Memorandum in Opposition to

Defendants’ Demurrer and in support thereof, states as follows:

1. **Summary of Argument**

Consumer Protection claims need not be pled to the standards of a common law fraud claim. Plaintiff’s detailed complaint, in combination with the attached assisted living documents, more than satisfy Virginia’s notice pleading requirements. The allegations clearly put Defendants on notice as to the nature of Plaintiff’s Virginia Consumer Protection Act (“VCPA”) claim and the facts supporting the claim.

Contrary to Defendants’ assertions, the individuals who made the misrepresentation are referenced in the complaint, along with the time period and specific facts supporting the factual basis for such misrepresentations. These specific factual misrepresentations, when viewed in the context of Plaintiff entire complaint, are not opinions or mere puffery. Consistent with the intended broad reach and remedial nature of the VCPA, Virginia Courts have consistently overruled demurrers under similar factual scenarios. To grant a demurrer under these circumstances would interject reversible error in this case and contravene the very purpose of the VCPA.

1. **Argument**
2. **The Standard for a Demurrer**

Due to the preliminary nature of the demurrer, the Supreme Court of Virginia has expressed a desire that trial courts refrain from incorrectly “short-circuit[ing] litigation pretrial.” [*Catercrop, Inc. v. Catering Concepts, Inc.,* 246 Va. 22, 24, 431 S.E.2d 277 (1993)](http://web2.westlaw.com/find/default.wl?mt=Virginia&db=711&rs=WLW12.10&tc=-1&rp=%2ffind%2fdefault.wl&findtype=Y&ordoc=2028540740&serialnum=1993122324&vr=2.0&fn=_top&sv=Split&tf=-1&pbc=25A9EE40&utid=1) (quoting [*Renner v. Stafford,* 245 Va. 351, 352, 429 S.E.2d 218 (1993)](http://web2.westlaw.com/find/default.wl?mt=Virginia&db=711&rs=WLW12.10&tc=-1&rp=%2ffind%2fdefault.wl&findtype=Y&ordoc=2028540740&serialnum=1993087133&vr=2.0&fn=_top&sv=Split&tf=-1&pbc=25A9EE40&utid=1)). Since a demurrer goes to the whole pleading to which it is addressed, **it should be overruled if any part of the pleading is good in substance.** *See**Virginia & N. C. Wheel Co. v. Harris*, 103 Va. 708, 49 S.E. 991 (1905) (emphasis added). As such, if any of the multiple factual misrepresentations are found to be sufficient, this demurrer must be denied. The Court may also consider any exhibits referenced in the pleadings. *Flippo v. F & L Land Co*, 241 Va. 15, 16 (1991).

Defendants have filed a demurrer as to Count II, Plaintiff’s claim under the VCPA. They argue that Plaintiff’s complaint “fails to allege facts with the requisite specificity, including the identify of agents, officers and employees of Defendants who are alleged to have made allegedly misleading statements and the details of time and place.” (Demurrer at p. 7). They also argue Plaintiff fails to allege statements of existing fact or that the misleading statements were made to Plaintiff. Defendants do not argue that a VCPA claim cannot be maintained against an assisted living facility.[[1]](#footnote-1)

1. **Pleading Requirements of Common law Fraud Do Not Apply to VCPA claims**

As the VCPA is remedial in nature, it should be liberally applied, not narrowly construed. See, *Holmes v. LG Marion Corp*., 521 S.E.2d 528, 258 Va. 473 (1999).

When considering Defendants’ Demurrer, it is important to recognize that a cause of action for deceptive practices under the VCPA is analytically distinct from a common law fraud action, both substantively and procedurally. *See, e.g.*, *Ballagh v. Fauber Enterprises, Inc*., 290 Va. 120, 124 (2015) (holding that “The VCPA creates a new, statutory cause of action that is distinct from and in addition to common law fraud.”). As the Court explained in *Owens v. DRS Automotive Fantomworks, Inc*., 288 Va. 489 (2014), a claim under the VCPA is not the same as a common law fraud claim:

Proof of fraud in a consumer transaction is alone sufficient to establish a violation of the VCPA, but the **legislative purpose underlying the VCPA was, in large part, to expand the remedies afforded to consumers** and to relax the restrictions **imposed upon them by the common law**. That remedial purpose would be nullified by an interpretation of the VCPA that construed it as merely declarative of the common law…. Therefore, we agree with the plaintiffs' argument that the VCPA's proscription of conduct by suppliers in consumer transactions extends considerably beyond fraud.

*Id*. at 497 (emphasis added). In addition, the actionable misrepresentations under the VCPA need not be pleaded with the same degree of specificity as their common law fraud counterparts. *See, e.g.,* [*Patten v. Chrysler Corp.,* 1997 WL 1070537, \*2 (Va. Cir. Ct.1997)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997253763&pubNum=0000999&originatingDoc=Ie7ebcbb253e011d9b17ee4cdc604a702&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.RelatedInfo)); \*554 [*Debrew v. Lexus,* 1997 WL 1070613, \*2 (Va. Cir. Ct.1997)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997253839&pubNum=0000999&originatingDoc=Ie7ebcbb253e011d9b17ee4cdc604a702&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.RelatedInfo)).[[2]](#footnote-2)  Representations are also fraudulent when they are made without a present intention to insure their truth. *Colonial Ford. V. Schneider*, 228 Va. 671, 677 (1985). In addition, false statements about present quality or character, although expressed as opinion, are actionable. *Tate v. House Builders, Inc*. 257 Va. 78, 83-84, 508 S.E.2d 597, 600 (1999)(Statements that house was free from structural defects was a representation about the present quality or character of the property).

1. **Plaintiff Has Alleged Sufficient Facts to Support a VCPA Claim**

Virginia is a notice pleading state. “Even a flawed complaint will survive demurrer if it is drafted so that the defendant is on notice of the nature and character of the claim.”[[3]](#footnote-3) The Supreme Court has upheld a pleading to be sufficient where it alleged that the defendant’s actions “proximately caused injury to the plaintiff, both mental and physical.” *Moore v. Jefferson Hospital Inc.* 208 Va. 438, 439, 158 S.E.2d 124, 126-27 (1967)(Reversing the ruling of trial court, which found that plaintiff had not stated a cause of action for a tort alleging intentional infliction of emotional distress).

Defendants’ argument that Plaintiff failed to disclose the source or time period of the misrepresentations is simply inaccurate. First, Plaintiff has partially relied upon the assisted living disclosure agreement as supporting factual misrepresentation regarding, *inter alia*, management of chronic conditions on a regular basis, staff assistance for activities of daily living and incontinence care. (Complaint, § 40). Plaintiff further explains that the “manager of Garden Ridge misrepresented to the McCorkle family that Sara’s daily care needs (including toileting and bathing) would be met by the direct care staff.” *Id*., ¶41.

 Second, Plaintiff alleges that on November 25, 2020, “Plaintiff’s daughter met with Don Wright, Manager, who stated the family would not need private duty nurses as the staff would be able to provide all of her ADL and related care. This misrepresentation was consistent with what the family was told when they were evaluating the transition from independent to assisted living, namely that the assisted living staff would provide for her daily care needs, including the need for supervision, fall prevention, bathing and toileting.” *Id.*, ¶ 14.

The above allegations clearly identify the persons making the alleged misrepresentations’ along with the relevant time period. Even if Defendants’ staff members had not been identified, Defendants’ assisted living disclosures alone would be sufficient to support at VCPA claim. See,

*Abi-Najm v. Concord Condo. LLC*, 280 Va. 350, 699 S.E.2d 483 (2010), where Plaintiff pursued a VCPA claim based on a purchase agreement which stated that Oak hardwood would be used for flooring, but Defendants later substituted prefabricated hardwood.[[4]](#footnote-4)

Defendants also argue that the complaint fails to allege that the misrepresentations were made to Plaintiff. This is also factually inaccurate, as Plaintiff clearly states that Defendants “**intentionally misrepresented various facts to Plaintiff and her family** in an effort to induce them into transferring to the assisted living section and remaining within Erickson’s community.” Complaint, ¶ 37(emphasis added). While some of those misrepresentations were made to family members, Plaintiff, who suffered from dementia, explains that she was acting through her lawful agents, including her son Allen, who was acting as her POA since July of 2011. *Id.* ¶¶ 5 & 35.[[5]](#footnote-5)

1. **Plaintiff’s Alleged Misrepresentations Involve Existing Facts that**

**Are Actionable Under the VCPA**

 Defendant’s reliance on *Lambert v. Downtown Garage*, 262 Va. 707, 553 S.E.2d 714 (2001) is misplaced. In *Lambert* the Court simply held that Defendant’s representation that the vehicle was in “excellent condition” was an opinion akin to puffery. In dicta, the Court did use the term “existing fact,” which has been clarified to include future promises.

 Plaintiff’s allegations of factual misrepresentation involve existing fact, as those representations related to Defendants’ current ability to provide services to meet Ms. McCorkle’s care needs. Defendants misrepresented, *inter alia*, the following:

* That upon paying the $335,000 entrance fee, residents could age in place

within the community by providing a corresponding higher level of

care to meet the resident’s increasing needs. (Complaint, ¶ 36)

* That Defendant’s trained staff could meet Sara’s needs in providing

all ADL care, including the assistance and extensive supervision she required to

safely bath and toilet. (*Id*., ¶¶ 37, 38 & 41)

* That’s Defendants had a pullcord and 24-hour emergency response service (*Id.,* ¶ 40)
* That Defendants had the ability to provide assistance with all ADL activities, including incontinence care, toileting, bathing and fall prevention. (*Id.,* ¶ 43)
* That Defendant’s direct care staff would include 26 staff members on the

day shift, 24 staff from 3 to 11 p.m. and 16 staff from 11 pm to 7 a.m.

*(Id.,* ¶ 39)

* That Defendant would provide licensed nurse management of chronic conditions on a regular basis and regularly scheduled licensed nurse reviews and assessments.

(*Id*., ¶ 40)

 In *Beaty v. Manor Care, 2003 U.S. Dist. LEXIS 25044, Law* No. 2-1720, (E.D. Va. 2003), Plaintiff sued under the VCPA based on the misrepresentation that the Fairfax nursing home claimed they had “high staffing ratios” and “highly trained staff who provided 24-hour supervision” of Alzheimer’s patients to ensure their safety. (Exh. No. 1, pp 1 & 2). Defendants argued that these misrepresentations were opinions and relative terms subject to interpretation. The Court disagreed, noting,

 [A]s the Supreme Court of Virginia has directed, the Court must take into

 consideration the meaning of the language used, as applied to the subject

 matter and as interpreted by the surrounding circumstances. . . In this case

 Plaintiffs were looking for a place to put an 83-year-old man with Alzheimer’s

 who had a propensity for wandering at night. Defendants’ representations,

 in response to Plaintiff’s inquiries, took on the meaning inherent from the

 circumstances.

(*Id*., p. 3). Here, the circumstances are almost identical, as Plaintiff was also seeking assurances that the staff had the ability to care for the increasingly demented Ms. McCorkle, as she was prone to get up and self-toilet.[[6]](#footnote-6)

 The *Beaty* Court also explained that a future promise is actionable if there is no intention to perform when the promise is made. *Id.,* citing *Colonial Ford Truck Sales v. Schneider*, 228 Va. 671, 676, 325 S.E.2d 91, 94 (1985). This ruling is consistent with the language of the VCPA, which includes a “false promise” as being actionable. Va. Code 59.1-200 (14).

 Other Virginia Courts, including this one, have allowed VCPA claims based upon similar allegations. *Henderson v. Hickory Hill Retirement Community*, Law CL19-187 (VCPA claim stated against assisted living facility where Defendants allegedly made fraudulent misrepresentations about their ability to care for Mr. Henderson, in an effort to lure Plaintiff into the facility) (Exh. No. 2); *Corrales v. HHC Poplar Springs*, Law No. 15000378 (Petersburg 2015)(VCPA claim stated where Defendants misrepresented expertise in treating PTSD patients and providing a secure and therapeutic military unit)(Exh. No. 3). H*umphrey v. Leewood HealthCare Center* 73 Va. Cir. 346 (Fairfax 2007)(Holding that Plaintiff could pursue a VCPA claim against a nursing facility that failed to prevent a patient from elopement, where Defendants promised to provide a level of care appropriate for Plaintiff’s needs.[[7]](#footnote-7)

Consistent with the liberal application of consumer protection statutes, courts from other jurisdictions have found claims involving healthcare providers to be covered under their state’s consumer protection acts. *Dorn v. McTigue*, 157 F. Supp. 2d 37 (D.D.C. 2001) (holding that the District of Columbia Consumer Procedures and Protection Act applied to health care providers if plaintiff satisfied the threshold requirements of the Act); *Chapman v. Wilson*, 826 S.W.2d 214 (Tex Ct. App.)(Dentist who made false statements regarding his expertise in wisdom tooth extractions and use of general anesthesia could be sued under the Deceptive Trade Practices Act).

 *Ikuno v. Yip*, 912 F.2d 306, 312 (9th Cir. 1990) (holding that “both the practice of law and medicine may give rise to CPA [Consumer Protection Act] claims”); *Chalfin v. Beverly Enter.*, 741 F. Supp. 1162, *reconsideration denied*, 745 F. Supp. 1117 (E.D. Pa. 1989) (holding that health care services provided by a nursing home were within the scope of the Pennsylvania unfair trade practices and consumer protection laws); *Quimby v. Fine*, 724 P.2d 403 (Wash. Ct. App. 1986)(Physician’s failure to disclose accurate information to the patient supported an unfair and deceptive trade practice claim).

1. **Conclusion**

The case precedents cited above clearly support a VCPA claim under these facts and Defendants have cited no case law requiring a different result. Plaintiff has alleged all the elements of a VCPA claim, including a consumer transaction (Complaint, ¶ 35), a false representation of a material fact (*Id*. ¶¶ 43 & 44), made intentionally and knowing, with intent to mislead (*Id*.) reliance by the party misled (*Id*., ¶ 44) and resulting damages (*Id*. ¶ 45). See, *Richmond Metro Auth. V. McDevitt St. Bovis, Inc*., 256 Va. 553, 557-558, 507 S.E.2d 344 (1988).

When the Complaint is considered in the context of all attachments and Plaintiff is given the benefit of all inferences, she has set forth sufficient facts to meet Virginia’s pleading requirements. Granting a demurrer under these circumstances would interject error in this case and effectively elevate pleading standards for VCPA claims to an impossible threshold. Such a ruling runs contrary to Virginia’s notice pleading standards and the remedial nature of the VCPA statute.

Dated: June 9, 2022 Respectfully submitted,

 Plaintiff, by Counsel

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**CERTIFICATE OF MAILING**

I hereby certify that a true copy of the foregoing Plaintiff’s Opposition to Defendant’s Demurrers, was served upon Defendants, by sending a copy of this Memorandum, with attachments, via e-mail, this 9th day of June 2022, to the following:

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**Exh. No. 1**

**Exh. No. 2**

**Exh. No. 3**

1. Defendants are precluded from basing their demurrer arguments on any grounds not specifically stated in their written demurrer. Va. Code § 8.01-273 (A). [↑](#footnote-ref-1)
2. . The specificity requirement does not apply to a VCPA cause of action. *Patten v. Chrysler Corp,* 1997 WL 1070537, \*2 (Va. Cir. Ct.1997); [*Debrew v. Lexus,* 1997 WL 1070613, \*2 (Va. Cir. \*554 Ct.1997)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997253839&pubNum=0000999&originatingDoc=Ie7ebcbb253e011d9b17ee4cdc604a702&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.RelatedInfo)). [↑](#footnote-ref-2)
3. 3 *Lodal v. Verizon Va. Inc,* 74 Va. Cir. 110, 112 (Fairfax Cir. Ct. 2007), citing *Cetercorp, Inc. v. Catering Concepts, Inc.,* 246 Va. 22, 24, 431 S.E.2d 277, 279 (1993); *Boy Blue Inc. v. Brown,* 74 Va. Cir. 4, 14, 2007 Va. Cir. Lexis 165 (Essex Co. Cir. Ct. 2007)(Holding that in order to withstand demurrer, notice pleading requires only allegations sufficient to inform defendants of the nature and character of the claim being made without the necessity of having to provide details). [↑](#footnote-ref-3)
4. The fact that the conduct in substituting the prefabricated wood occurred after the misrepresentation did not change the result. [↑](#footnote-ref-4)
5. POA Allen McCorkle also signed the transfer addendum to the assisted living agreement on behalf of Ms. McCorkle on November 25, 2020. (Complaint, Exh. B). Defendants’ argument that the family members cannot be considered consumers is a red herring. Demented residents are not going to recall staff misrepresentations. Under Defendant’s logic, a demented person who relied upon her family or Power of Attorney during the admission’s process could never make a claim under the VCPA. [↑](#footnote-ref-5)
6. By referencing actual numeric staffing levels, Plaintiff has pled even more factually based misrepresentations than were alleged in Beaty. While Defendants attempt to confuse the issue by arguing that those staff members were spread out on different wings, Plaintiff has alleged that were was repeatedly no staff members available to assist Ms. McCorkle in the morning hours, when she would rise and shower. (Complaint, ¶ 18) When these allegations are read in context and Plaintiff is given the benefit of all related inferences, such allegations are more than sufficient to satisfy Virginia’s notice pleading standards. [↑](#footnote-ref-6)
7. In *Humphrey*, given the lack of detailed misrepresentations, Plaintiff voluntarily agreed to amend the complaint to allege additional misrepresentations supporting his VCPA claim. [↑](#footnote-ref-7)