**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA**
**RICHMOND DIVISION**

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| **ASHLEY TURNER** | : | |
| **Plaintiff,** | : | |
| **v.** | : | Civil No. 3:21cv30 (DJN) |
| **FABER & BRAND, LLC,** *et al.*, | : | |
| **Defendant.** | : | |

**DEFENDANTS FABER & BRAND, LLC, JARED L. BUCHANAN AND JEREMY FORREST'S MEMORANDUM IN RESPONSE TO PLAINTIFF'S OPPOSITION TO THEIR MOTION TO DISMISS THE AMENDED CLASS ACTION COMPLAINT UNDER FEDERAL RULE 12(b)(6)**

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## INTRODUCTION

Plaintiff's Opposition to the Motion to Dismiss ignores salient facts that defeat her claim against the Faber & Brand Defendants for alleged violations of § 1692e of the Fair Debt Collections Practice Act ("FDCPA"). when mailed her an application for a Warrant in Debt that he had sent to the with the appropriate filing fee. Those facts are: (1) the application for a Warrant in Debt that Jared Buchanan ("Buchanan") mailed to Plaintiff did not falsely state that it had been issued by the Clerk of the Dinwiddie General District Court (the "Clerk") and thus, it did not purport to summons Plaintiff to appear at the court, (2) Buchanan's signature on the Warrant in Debt merely certified that he had mailed it to Plaintiff, as permitted by Virginia law, (3) the mailing of the Warrant in Debt to Plaintiff did not purport to be service of process by a sheriff or other authorized person, and (4) Buchanan brought the action identified in the Warrant in Debt, as a matter of law, by mailing to the Clerk with the appropriate filing fee an identical copy of the application for Warrant in Debt that he had mailed to Plaintiff. , ,

Ignoring these facts, Plaintiff's Opposition delves into a misguided and utterly erroneous analysis of Virginia law on service of process. She argues that she was compelled to appear at the return date listed on the Warrant in Debt because she contends the mere ***mailing*** of a Warrant in Debt that has not been issued by the Clerk provides sufficient grounds for entry of a default judgment. Not only is Plaintiff's argument legally flawed, but it also does nothing to advance her claim. Nevertheless, her legally flawed arguments may explain why her lawyer showed up at the courthouse on the return date, when even the least sophisticated consumer would know by reading the Warrant in Debt that she had not been summoned to appear before the court because the Warrant in Debt had not been signed by Clerk and she had not been served with the Warrant in Debt by a "authorized officer."

Plaintiff then makes the unsupported argument that the FDCPA "can be violated by failing to retract a communication once it is known to be false[.]" (ECF at p. 11). Not only is Plaintiff's retraction or duty to update argument unsupported by case law, it does nothing to advance her claim here. The purported duty to retract or update a communication could only exist under Plaintiff's theory if the initial representation was ***true***, but later made untrue by subsequent events. In this case, that would mean that the communication (the mailing of an application for a Warrant in Debt), accurately portrayed (1) Buchanan's intent to file a Warrant in Debt with the Clerk on behalf of their client, the Petersburg Hospital Company, LLC (the "Hospital"), (2) the Clerk had not yet issued the summons (an executed Warrant in Debt), (3) Plaintiff had not been served with process, and therefore, (4) Plaintiff was not compelled to appear at court. Accordingly, when the Clerk returned the Warrant in Debt, the Faber & Brand Defendants had no reason to believe that Plaintiff would appear on the return date because there had been no service of process. Thus, there was no reason to tell her not to appear – she knew that already. Nevertheless, it is clear that the Faber & Brand Defendants intended to pursue the action on behalf of their client because they subsequently filed a Warrant in Debt against Plaintiff for the same debt. Accordingly, Clerk's action in returning the Warrant in Debt and filing fee did not render false any representation in the application for a Warrant in Debt mailed to Plaintiff, it only caused a delay in the Clerk's acceptance of the filing of the action, and Plaintiff was only compelled to respond to that action once she was served with process. Accordingly, Plaintiff's FDCPA claim is meritless and should be dismissed.

Plaintiff's common law fraud claim is likewise meritless. Plaintiff grounds her fraud claim on a concealment theory that has no application to the facts of this case. Concealment requires active measures, by words or conduct, to prevent a party from learning the truth. Here, Plaintiff

fails to allege any facts to establish that the Faber & Brand Defendants took any active steps to conceal the fact that the Clerk had returned their application for a Warrant in Debt to be issued against Plaintiff. Moreover, Plaintiff's allegations defeat any claim that she justifiably relied on the purported representation in the Warrant in Debt mailed to her that she was compelled to appear in court on the return date, because she hired counsel. Having hired counsel, she is charged with the knowledge that any lawyer licensed in Virginia would know: the mere mailing of a Warrant in Debt that has not been issued by the Court does not compel a party to appear in court much less evidence that in fact a legal proceeding had been filed or instituted in the court.

Accordingly, Plaintiff's claims should be dismissed with prejudice.

## ARGUMENT

### A. Plaintiff Fails to Allege Any Act or Omission by Jeremy Forrest That Can Give Rise to an FDPCA Violation.

Plaintiff's Opposition ignores the legal elements necessary to assert a cause of action against Jeremy Forrest ("Forrest") for an alleged violation of the FDCPA. To assert a plausible claim for violation of the FDCPA against Forrest, Plaintiff must allege facts demonstrating that Forrest "engaged in an act or omission prohibited by the FDCPA." *Penn v. Cumberland,* 883 F. Supp.2d 581, 587 (E.D. Va. 2012). That is, Plaintiff must allege facts establishing that Forrest used a "false, deceptive, or misleading representation or means in connection with the collection of any debt" owed by Plaintiff. 15 U.S.C. § 1692e.

Plaintiff does not allege that Forrest made a false, deceptive or misleading misrepresentation. Buchannan mailed Plaintiff the application for a Warrant in Debt that forms the basis of her claim. The mailed Warrant in Debt merely identified Forrest as one of the Hospital's lawyers.

Essentially, Plaintiff argues that Forrest should be held vicariously liable for the actions others at Faber & Brand. Plaintiff argues that because Forrest's name appears in the Warrant in Debt mailed to Plaintiff, he is "an attorney of record suing Plaintiff on behalf of the [H]ospital." (ECF 43, at p. 3). Plaintiff also argues that the "Amended Complaint … alleges Defendants, which includes Mr. Forrest, knew that [the] General District Court had rejected Warrants in Debt they had sent consumers, and they never took any steps to inform those consumers that no action had been instituted." *Id.* at pp. 3-4 (citing ECF 32, at ¶¶ 55-66). However, what Plaintiff actually alleges in her Amended Complaint is that "Defendants knew [the Warrant in Debts] had been rejected because the Dinwiddie General District Court sent them back with a cover letter in the form attached here as Exhibit B." (ECF 32 at ¶ 56). Exhibit B to the Amended Complaint reveals that the Clerk sent a letter addressed to "To Whom it May Concern:" informing who ever received the letter at Faber & Brand during the pandemic that "Due to the recent outbreak of the coronavirus the office has had to continue several cases to another docket." The Amended Complaint alleges no facts to suggest that the Clerk sent that letter to Forrest, that he received it, or that he had actual knowledge that Warrant in Debt had been returned to Faber & Brand.

In essence, Plaintiff asks this Court to draw unreasonable inferences from the actual document attached to the Amended Complaint; inferences which are not supported by law. *See Carey v. Throwe*, 957 F.3d 468, 474 (4th Cir. 2020)(court "need not accept as true unwarranted inferences, unreasonable conclusions or arguments"). While "Virginia follows the general rule that knowledge of an agent gained while executing the agency is imputed to the principal," *Doe v. Nat. Sec. Agency*, 165 F.3d 17, 1998 WL 743665, at * 2 (4th Cir. 1998)(citations omitted), the converse is not the rule. See Restatement (Second) Agency, § 350, cmt. b ("The knowledge of another agent or of the principal does not affect the liability of the agent.").

Plaintiff offers no facts in her Amended Complaint to establish that Forrest ever knew the Clerk's office had returned the application for a Warrant in Debt to Faber & Brand. To the contrary, the Amended Complaint alleges that Forrest appeared in the Dinwiddie General District Court on the return date set forth in the Warrant in Debt mailed to Plaintiff and that cases involving the Hospital were called that day.

Accordingly, Plaintiff fails to state a claim against Forrest. This Court should dismiss the claims against him with prejudice.

**B. Plaintiff Fails to Allege a Violation of the FDCPA by Buchanan and Faber & Brand.**

In her Opposition, Plaintiff argues that "[w]hen a debt collector gives a consumer a false impression that a lawsuit has been commenced when **it knows** that one has not been commenced, the debt collector violates the FDCPA." (ECF 43, at p. 5) (emphasis added). While that may be true, that argument has no bearing on this case because Plaintiff fails to allege any facts establishing that Buchanan knew the Clerk would return the application for the Warrant in Debt to Faber & Brand as unexecuted when he mailed a copy of that application to Plaintiff.

Rather, the allegations in the Amended Complaint establish that on the cusp of a global pandemic, Buchanan mailed Plaintiff an application for a Warrant in Debt that he intended to file with Court and to have the Clerk issue for service by the Sheriff. (ECF 32-1, 32-2); see also ECF 35-1 (complete copy of Clerk's letter, returning Faber & Brand's letter with accompanying Warrant in Debt and filing fee). They also establish that he did just that by filing the application with the Clerk's office along with the filing fee. Under Virginia law, the action was deemed brought once the Clerk received the Warrant in Debt with the proper filing fee. Va. Code §16.1-86. Plaintiff does not dispute this, much less address it in her Amended Complaint.

As Plaintiff concedes, Virginia law permits the practice of mailing an application for Warrant in Debt prior to or along with filing the application with the Clerk. See Va. Code § 8.01-296(2)(b) ("In any civil action brought in a general district court, the mailing of the *application* for a warrant in debt . . . , *whether yet issued by the court or not*, which contains the date, time and place of the return, *prior to* or after filing such pleading in general district court, shall satisfy the mailing requirements of this section.") (emphasis added). However, under the extraordinary circumstances attending the initial stages of the pandemic, the Clerk did not treat the action as filed, but instead returned the Warrant in Debt to Faber & Brand. (ECF 32-2).

Accordingly, the mailing of the application for a Warrant in Debt to Plaintiff did not contain a false, deceptive, or misleading representation" that violated the FDCPA. 15 U.S.C. § 1692e. Indeed, Plaintiff concedes that the "Warrant in Debt is authorized by Va. Code § 16.1-79." (ECF 43, at p. 4). The face of the Warrant in Debt that Buchanan mailed to Plaintiff reveals that it had not been issued by the Clerk's office nor was it being served by the Sheriff's office. ECF 32-1. The unexecuted Warrant in Debt did not summon or command Plaintiff to appear at court. Nor was the mailing a false representation of the Faber & Brand Defendants' intent to have the Warrant in Debt issued by the Clerk, because they made an attempt to have it filed with Court by mailing the Clerk the application for Warrant in Debt with the appropriate filing fee. (ECF 32-2); *see also* (ECF 35-1).

Plaintiff seeks to avoid the devastating impact of these facts on her case through circular reasoning that completely misstates Virginia law. On the one hand, Plaintiff argues that the Warrant in Debt she received in the mail misled her into believing that she was compelled to appear at the return date or suffer a default judgment. (ECF 43 at p. 8). On the other hand, she argues that the mere receipt of an application for a Warrant in Debt that had not been issued by the Clerk's

office would establish a legal basis for Faber & Brand to obtain a default judgment on behalf of its client. Plaintiff argues: "the fact that the Warrant in Debt has not yet been issued by the Court is of no consequence. If the person does not show up on that day, a default judgment up to $25,000 could be taken against [her]." (ECF 43, at p. 7). Plaintiff then goes on at length in a separate part of her Opposition arguing that "'service is effective if it reaches the person to whom it is directed within the time prescribed by law.'" (ECF 43, at p. 14)(quoting Va. Code § 8.01-288). If Plaintiff's argument was legally correct, it would defeat her claim as well, because in order to obtain a default judgment, the action must have been ***brought***.

Nevertheless, Plaintiff's argument is the proverbial red-herring that not only misstates the law, but it also ignores the fundamental issue raised on the Motion to Dismiss. The fundamental issue is whether Buchanan made a false, deceptive or misleading statement in violation of the FDCPA when he mailed Plaintiff the application for Warrant in Debt and transmitted the application to the Clerk's office for filing with the appropriate filing fee. He did not. However, because Plaintiff's Opposition completely mischaracterizes what constitutes legal service of process under Virginia law, the Faber & Brand Defendants feel compelled to address Plaintiff's flawed arguments.

It goes without saying that the mailing of an application for a Warrant in Debt that is not issued by the Clerk's office "is not service of process" under Virginia law. "'Process to commence an action is normally an order (summons) to a court official (sheriff) to notify (summons) a defendant to answer plaintiff's complaint at the time and place mentioned in the order.'" *Bendele ex rel. Bendele v. Commonwealth, Dept. of Medical Assistance Services*, 512 S.E.2d 827, 830 (Va. App. 1999)(quoting Kent Sinclair & Leigh B. Middleditch, Jr., *Virginia Civil Procedure* § 7.1, at 333 (3d ed. 1998)). In General District Court, the Court's summons is a Warrant in Debt issued

by the Clerk. See Va. Code § 16.1-79 ("A civil action in a general district court may be brought by warrant directed to the sheriff or to any other person authorized to serve process in such county or city, requiring the person against whom the claim is asserted to appear before the court on a certain date, not exceeding sixty days from the date of service, to answer the complaint of the plaintiff set out in the warrant.").

The face of the Warrant in Debt Plaintiff received in the mail makes clear that because the Clerk did not issue it, Plaintiff had not been summoned by an authorized officer to appear before the Court to answer the Hospital's complaint. (ECF 32-1). Accordingly, there was no "process," and Virginia's cure statute for defective process, Va. Code § 8.01-285, does not apply. As Judge Morgan explained in *Campbell v. Hampton Roads Bankshares, Inc.*, 925 F. Supp.2d 800, 806, n. 10 (E.D.Va. 2013), "Virginia courts have made it abundantly clear that the operation of the [cure] statute, [Va. Code 8.01-285], requires that the defendant have received court issued process…" (citing *Muse Const. Group, Inc. v. Com. Bd. for Contractors,* 61 Va.App. 125, 141–42, 733 S.E.2d 690, 697–98 (2012)). Accordingly, unless the defendant receives issued process, Va. Code § 8.01-285 is ineffective to cure defective process.

The purpose of mailing the application for a Warrant in Debt is not to "cure" defective service of process, but instead, to satisfy the statutory requirements under Virginia law to obtain a default judgment ***if*** service of court-issued process is accomplished properly through "substituted" service of process. *See* Va. Code § 8.01-296(2)(providing means for "substituted service," including by posting a copy of such process at the front door). Section 8.01-296(2)(b) of the Code further provides that a party can obtain a judgment of default against a defendant for whom ***substituted service was achieved*** if, in the circumstance where the action is in the general district court, the plaintiff mails a "copy of the application for a warrant in debt . . . whether yet issued by

the court or not, which contains the date, time and place of the return, prior to or after filing such pleading in the general district court[.]" Thus, to obtain a judgment of default in accordance with Va. Code § 8.01-296(2)(b), a plaintiff in General District Court must satisfy two conditions: (1) a Warrant in Debt must be issued by the Clerk summoning the defendant to appear at the date, time and place of the return that is served by person authorized to do so on the defendant by posting a copy of the process at the front door (substituted service), and 2) the plaintiff must mail the defendant a copy of the Warrant in Debt.

Accordingly, the mere mailing of a Warrant in Debt that is not issued by the Clerk is not "service" of process, and contrary to Plaintiff's arguments, cannot provide a basis for obtaining a default judgment because Plaintiff was never successfully served by substituted service of process. Nor was the mailing of the unissued Warrant in Debt "legal process in this instance," as Plaintiff argues. (ECF 43, at p. 13).

Plaintiff's flawed, contradictory, and misguided attempt to convert the mailing of an unissued Warrant in Debt into "service of process" reveals the bankrupt nature of Plaintiff's claims. The application for a Warrant in Debt that Plaintiff received in the mail did not falsely represent the character, amount or legal status of the Plaintiff's debt in violation of § 1692e. That is, the application did not seek to collect a satisfied debt. Nor did the application falsely state that it had been issued by the Clerk or create a false impression as to its source in violation of § 1692e(9). The Warrant in Debt clearly indicated that it was being sent to plaintiff by the Hospital's counsel and plainly showed it had not been signed by the Clerk.

Likewise, the mailing of the application for a Warrant in Debt is not a false or deceptive means to collect a debt in violation of § 1692e(10), because Virginia law authorizes the practice. Finally, the application did not falsely represent or imply that it was legal process in violation of

§ 1692e(13) because it clearly showed it had ***not*** been issued by the Clerk, and therefore, there was not summons compelling Plaintiff's appearance in court.

Plaintiff's reliance on the Court's decision in *Wiener v. Bloomfield*, 901 F. Supp. 771 (S.D. N.Y. 1995) is of no help to Plaintiff because the facts of that case are clearly distinguishable from this case. In *Wiener,* 901 F.Supp. at 774, the debt collector sent a series of letters to the plaintiff in an attempt to collect the debt. The second letter threatened immediate litigation if the plaintiff did not respond by a certain deadline. *Id.* Enclosed with the letter were copies of documents captioned "Summons" and "Verified Complaint", and "Summons & Complaint: Service Pursuant to CPLR 312–a" and "Acknowledgment of Receipt of Summons and Complaint." *Id.* The letter warned that the debt collector was ready to turn the documents over to a process server for service upon the plaintiff. *Id.* The plaintiff in *Wiener* contended the documents falsely suggested defendant had brought suit against the plaintiff. The debt collector responded that his letter accompanying the documents made it clear the documents had not actually been served on plaintiff and therefore, the debt collector had not misrepresented the summons and complaint as authorized by a court or as legal process. The district court agreed with the plaintiff.

However, unlike this case, the Summons and Verified Complaint mailed to the debtor in *Wiener* represented that the suit was filed or was to be filed in the New York State Supreme Court in the Bronx, however, "the 'threat to file in the Bronx was a threat to do something which could not legally be done…" because the debtor did not reside in the Bronx and the contract giving rise to the debt was not signed in the Bronx. *Id.* at 776. Furthermore, unlike this case, the debt collector in *Weiner* did not attempt to actually file the action in the New York State Supreme Court in the Bronx, while Faber & Brand provided the Clerk with the application for a Warrant in Debt with the appropriate filing fee, and therefore, did institute legal proceedings against Plaintiff. As noted

above, under Virginia law, the action was deemed brought at that time. Va. Code § 16.1-86. Furthermore, the mailing of the application for a Warrant in Debt did not "simulate" documents authorized by a court, but in fact was authorized by the court and Virginia law. Va. Code § 8.01-296(2)(b). Moreover, in *Wiener*, the debt collector had provided the consumer with a document purporting to be a "Summons & Complaint: Service Pursuant to CPLR 312–a." The Faber & Brand Defendants did not provide Plaintiff with any paper purporting to be summons or service of a summons.

Accordingly, unlike the circumstances in *Wiener*, the facts alleged in the Amended Complaint and the pertinent documents detailing the communications with the debtor the Clerk establish that the Faber & Brand Defendants did not falsely represent that Plaintiff was being summoned to appear in a court action that had not been brought.

Doubling down on her contradictions, Plaintiff argues that one violates the FDCPA by failing to retract a communication once it is known to be false. (ECF 43, at p. 11) (citing *Laporte v. Midland Funding, LLC*, No. 5:19 -cv-73, 2020 WL2814184, at * 6 (W.D. Va. May 29, 2020). That is, Plaintiff argues that even if the mailing of the Warrant in Debt was not an unfair, abusive, and deceptive debt collection practice, it subsequently became so, when through no fault of the Faber & Brand Defendants, the Clerk returned the Warrant in Debt to Faber & Brand, and Faber & Brand took no steps to inform Plaintiff that she was not being compelled to appear at the return date, or that the action had not actually been opened by the Clerk's office. This is where Plaintiff's circular arguments collapse into contradictions.

Under Plaintiff's purported duty to update theory, the mailing of the application for Warrant in Debt to Plaintiff did not amount to a false, deceptive or misleading representation but it only became false once the Clerk returned the application for the Warrant in Debt back to Faber

& Brand. However, if the initially mailed Warrant in Debt did not contain a false or misleading statement (which it didn't), then Plaintiff knew it had not been issued by the Clerk, and that she had not been served with process, and thus, she was not being compelled to appear in court. Thus, when Faber & Brand received the letter from the Clerk, it had no reason to believe that Plaintiff would appear at the courthouse. Moreover, Faber & Brand intended to refile the Warrant in Debt, which it did. (ECF 35-3). Accordingly, there was no reason to "update" the communication because the return of the Warrant in Debt had only caused a delay in filing. Once re-filed and served with the Warrant in Debt for the refiled action, Plaintiff would be compelled to appear in court.

Moreover, the FDCPA imposes no duty upon a debt collector to update a prior non-misleading communication based on subsequent events. Section 1692e proscribes false or deceptive communications with debtors *when* the communication is made. As explained by one court, "[t]he gist of § 1692e is that 'where some aspect of a debt collector's communication – whether explicit or implied – has the purpose or effect of making a debtor more likely to respond, the FDCPA requires it to be true.'" *Sparks v. Phillips & Cohen Assoc., Ltd.*, 641 F. Supp.2d 1234, 1248 (S.D. Ala. 2008)(quoting *Campuzano-Burgos v. Midland Credit Management*, 497 F.Supp.2d 660, 665 (E.D.Pa. 2007)). The Warrant in Debt represented true facts when Buchanan mailed it to Plaintiff. Accordingly, the FDCPA was not violated.[1]

[1] Grasping at straws, Plaintiff resorts to a hypothetical related to the service of subpoenas for trial that is completely inapplicable to this case. (ECF 43 at p. 9). This case concerns private enforcement of a statute that creates liability for specific conduct prohibited by the FDCPA. What a court may or may not due in response to failure of a lawyer to notify persons who had been served with a subpoena in the even a case is continued has no bearing on interpretation and application of the FDCPA. Moreover, hypothetical assumes that subpoena was properly issued and properly served on the witnesses. Here, the Warrant in Debt was not issued by the Clerk nor was it properly served on Plaintiff.

Plaintiff's citation to the Court's decision in *Laporte*, 2020 WL 2814184, does not stand for the proposition that debt collectors have an ongoing duty under the FDCPA to update true, non-deceptive communications with debtors that are later rendered false by subsequent events. Indeed, Plaintiff cites no case holding that is the case, and exhaustive research by Faber & Brand's counsel has found no such authority.

In *Laporte*, the plaintiff asserted that following receipt of a communication representing to her that if she paid a certain amount of the debt that she owed to Citibank by a specified date, then she would be released from her debt obligation. *Id.* at * 1. The plaintiff made the payment within the specified time. *Id.* Despite the payment, the plaintiff later received notice that her employer was served with a wit of garnishment. *Id.* at *1, and * 5. The Court found that plaintiff's debt had been satisfied by the time that the plaintiff's employer communicated to the plaintiff that her wages would be garnished, and therefore, the representation in the writ had been rendered false in violation of the FDCPA § 1692e(2)(A). *Id.*

*Laporte* does not stand for the proposition that a debt collector has a duty to update a prior communication, but rather it stands for the proposition that each communication by the debt collector must not be false, deceptive or misleading. The *Laporte* court considered whether the communication from the employer – based on the Writ of Garnishment filed by the debt collector – accurately represented the legal status of her debt at the time. It did not. The debt had been satisfied. Indeed, notwithstanding the satisfaction of the plaintiff's debt, the Notice of Satisfaction of the debt was filed much later, and the plaintiff's wages "were garnished and … they continued to be garnished even after she called to contest the collection[.]" *Id.* at * 5.

The facts at issue in *Laporte* stand in stark contrast to those at issue here. The unissued application for Warrant in Debt that Plaintiff received in the mail did not compel or summon her

to appear at court. There was no further communication with Plaintiff after she was mailed a copy of the application for Warrant in Debt. Subsequently, a Warrant in Debt was re-filed with Clerk, who issued the Warrant in Debt against Plaintiff. (ECF 35-3). Thus, the Faber & Brand Defendants made no misrepresentation nor did they engage in deceptive means to collect the debt owed by Plaintiff.

**C. Plaintiff's Common Law Fraud Claim Fails as a Matter of Law.**

Plaintiff relies on three purported so-called "core" allegations in her Amended Complaint to support her common law fraud claim. (ECF 43 at pp. 16-17). First, Plaintiff cites as one of her "core" allegations that by "sending the Warrants in Debt and then concealing that no such actions were actually filed Defendants falsely represented that Plaintiff … had been sued, when in fact no such legal actions had been instituted." (ECF 43 at p. 16)(citing ECF 32, ¶ 95). Plaintiff also relies on paragraph 97 of the Amended Complaint, which asserts essentially the same conclusory allegation that Defendants purportedly did not tell Plaintiff that the Clerk had rejected the application for Warrant in Debt so that Plaintiff "would rely" on it and "think an action had been filed against [her], and then be concerned about that action." *Id.* (citing ECF 43 at¶ 97). These allegations do not support a fraud claim because the Amended Complaint makes clear that when Buchanan mailed the application for the Warrant in Debt to Plaintiff, he had also mailed the application for Warrant in Debt to the Clerk, with the appropriate filing fee. (ECF 32-2); *see also* ECF 35-1 (complete letter from the Clerk returning Warrants In Debt and filing fee). Under Virginia law, when the Clerk received the application for Warrant in Debt with the appropriate filing fee, the action was deemed brought. Va. Code §16.1-86. Thus, the mailing of the application for Warrant in Debt did not involve a misrepresentation.

Plaintiff's conclusory statement that Defendants' "conceal[ed]" that no such action had been filed is unsupported by any factual allegations and thus, cannot forestall dismissal. As noted by the Supreme Court of Virginia in *Van Deusen v. Snead*, 247 Va. 324, 328, 441 S.E.2d 207, 209 (1994), "[c]oncealment is an *affirmative* act intended to be likely to keep another from learning a fact of which he would otherwise have learned. Such affirmative act is always the equivalent to a misrepresentation….'" (quoting Restatement (Second) of Contracts § 160 (1979)(emphasis added)); *Devine v. Buki*, 289 Va. 162, 176, 767 S.E.2d 459, 466 (2015)("If a party conceals a fact that is material to the transaction, knowing that the other party is acting on the assumption that no such fact exists, the concealment is as much a fraud as if the existence of the fact were expressly denied, or the reverse of it expressly stated.")(citations omitted). A person conceals something by words or conduct.

The Amended Complaint fails to identify any active steps Faber & Brand supposedly took to "conceal" the fact that Clerk had returned the Warrant in Debt. This is not a case where Plaintiff called Faber & Brand and asked about the status of the case. Accordingly, Plaintiff's allegation fails to state a claim for fraud by concealment.

The third core allegation Plaintiff cites in her Opposition is the assertion that "[b]y mailing the Warrants in Debt to persons then not informing them that no case had actually started," Defendants "misrepresented that Plaintiff … had been commanded to appear in a Virginia General District Court." (ECF 43 at pp. 16-17)(citing ECF 32 at ¶ 96). This allegation fails to support a claim for fraud by concealment, because as noted above, the application for the Warrant in Debt did not represent that the case had been filed or that a person is being compelled to appear at court, because it was not issued by the Clerk. Furthermore, "silence alone, absent a duty to speak, is generally not treated as an affirmative representation of anything." *Wooten v. Bank of America*,

*N.A.*, 290 Va. 306, 311, 777 S.E.2d 848, 851 (2015)(citation omitted); *see Commonwealth, Dept. of Labor and Industry v. E.A. Clore Sons, Inc.*, 281 S.E.2d 901, 904, 281 S.E.2d 901, 904 (1981)("Silence, however, cannot constitute fraud or misrepresentation unless 'there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading.'")(citations omitted). Plaintiff fails to allege facts creating a duty on the part of the Faber & Brand Defendants to speak.

Not only does Plaintiff fail to allege concealment, she also fails to allege justifiable reliance as required by Virginia law. *Sweely Holdings, LLC v. SunTrust Bank*, 296 Va. 367, 383, 820 S.E.2d 596, 605 (2018)(without such justifiable reliance, "no fraud is established.")(citing *Murayma 1997 Tr. v. NISC Holdings, LLC*, 284 Va. 234, 246, 727 S.E.2d 80 (2012) (emphasis and citation omitted). Plaintiff argues "[w]hen the false representation by the defendant is one that by its nature is likely to induce reliance, the evidentiary burden shifts to the defendant to prove the plaintiff did not rely on it." (ECF 43 at p. 18)(citing *White Sewing Mach. Co. v. Gilmore Furniture Co.*, 128 Va. 630, 105 S.E. 134, 138-39 (1920)). Plaintiff's argument misses the point. Plaintiff alleges in her Amended Complaint that she retained counsel "[u]pon receipt of" the Warrant in Debt that had not been issued by the Clerk. (ECF 32, at ¶ 28). She therefore conducted an investigation, and is charged with the knowledge the investigation reveals, or, if the investigation was incomplete, the knowledge that would have been revealed had the investigation been pursued diligently to the end." *Beck v. Smith*, 260 Va. 452, 457, 538 S.E.2d 312, 315 (2000)(citations omitted).

As explained above, any lawyer licensed in Virginia should know that the mere mailing of a Warrant in Debt that has not been issued by the Court does not compel a party to appear in court much less evidence that in fact a legal proceeding had been filed or instituted in the court. Because

Plaintiff engaged a lawyer to assist her concerning the Warrant in Debt, she is charged with his knowledge as well.

Accordingly, the Court should dismiss the Fraud claim with prejudice.

**CONCLUSION**

For the reasons stated above, this Court should dismiss the Amended Complaint against the Faber & Brand Defendants with prejudice.

Dated: July 15, 2021

Respectfully submitted,

**FABER & BRAND LLC,**
**JARED L. BUCHANAN**
**AND JEREMY FORREST**

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 15h day of July 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to counsel of record.

*/s/ Charles M. Sims*
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