IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

JENNIFER FORD, ERIC BEARD, and **BRIAN OTTERS**, individually and on behalf of all others similarly situated**,**	**Case No. 1:23-cv-756-CCE-LPA**
Plaintiffs,	**CLASS ACTION**
v.	**JURY TRIAL DEMAND**
VETERANS GUARDIAN VA CLAIM CONSULTING, LLC,	
Defendant.	

PLAINTIFFS' SUPPLEMENTAL BRIEF ON CHOICE OF LAW

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I. THE CHOICE-OF-LAW PROVISION SHOULD BE INTERPRETED AS A WHOLE AND GIVEN EFFECT ACCORDING TO ITS TERMS.

Under North Carolina law, contracts must be interpreted to give effect to all provisions and to avoid constructions that render contractual language meaningless or surplusage. *See, e.g., Pike v. Wachovia Bank & Trust Co*., 274 N.C. 1, 11, 161 S.E.2d 453, 462 (1968). ("The heart of a contract is the intention of the parties, which is to be ascertained from the language they employed."); *Woods v. Nationwide Mut. Ins. Co*., 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978) (contracts should be construed so that each provision is given effect where possible).

The Veterans Guardian Consulting Service Agreement (the "Agreement") provides:

> This agreement is entered into and shall be governed by the laws of the State of North Carolina and said state's courts shall have exclusive jurisdiction to adjudicate any dispute arising out of or relating to this agreement.

[ECF No. 73-3].

This provision contains three distinct but related components: (1) the Agreement is "entered into" in North Carolina; (2) the Agreement is "governed by the laws of the State of North Carolina"; and (3) North Carolina courts possess "exclusive jurisdiction" over "any dispute arising out of or relating to this agreement."

The Court should interpret these components together, rather than treating any part of the clause as a bare or "generic" choice-of-law provision divorced from the remainder of the clause. *Gee v. Delta Speir Plantation LLC*, 2022 WL 575589, at *2 (4th Cir. Feb. 25, 2022) (quoting *Christenbury Eye Ctr., P.A. v. Medflow, Inc*., 802 S.E.2d 888, 892 (N.C.

2017) (Contracts are construed as a whole, and "[e]ach clause and word is considered with reference to each other and is given effect by reasonable construction.").

A. The Parties Expressly Agreed That the Agreements Were "Entered Into" In North Carolina.

The provision first states that the Agreement "is entered into" in North Carolina. The Court should give meaning to that language. As the Court knows and is clear from the factual record, Defendant performs its services largely through online remote interactions with its clients who are located throughout the globe. Thus, the phrase, "is entered into" is particularly significant here, where in such circumstances, disputes frequently arise concerning where a contract was formed. Rather than leave that question open or subject to later litigation, Defendant expressly provided that the Agreement was entered into <u>in</u> North Carolina. The Court need not resort therefore to default conflict-of-laws principles to determine the location of the contractual relationship because the parties to the contract explicitly addressed and agreed to that issue in the Agreement. *Bueltel v. Lumber Mut. Ins. Co.*, 134 N.C.App. 626, 631, 518 S.E.2d 205, 209 (1999) (quoting *Tanglewood Land Co. v. Byrd*, 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980) ("Our Supreme Court has held that 'the interpretation of a contract is governed by the law of the place where the contract was made.'")).

That contractual designation forms part of the broader North Carolina-centered framework reflected throughout the choice-of-law provision: the Agreement is entered into in North Carolina, governed by North Carolina law, and subject to the exclusive jurisdiction of North Carolina courts.

B. The Parties Mutually Agreed That North Carolina Law Governs.

The Agreement further provides that it "shall be governed by the laws of the State of North Carolina." North Carolina courts routinely enforce contractual choice-of-law provisions and honor the parties' expressed intent regarding the law governing their contractual relationship. *Tanglewood*, 261 S.E.2d at 656–57 ("Where the parties to a contract have agreed that a given jurisdiction's substantive law will govern the interpretation of the contract, then a North Carolina court will give effect to that provision."); *Bueltel*, 518 S.E.2d at 209. To give "effect" to a choice-of-law clause is "to ensure, where possible, that its 'basic objectives, namely those of certainty and predictability,' are achieved." *Volvo Group North America, LLC v. Forja de Monterrey S.A. de C.V.*, No. 16-CV-114, 2019 WL 4919632, at *3 (M.D.N.C. Oct. 4, 2019) (citing Restatement (Second) Conflict of Laws § 187(3) cmt. h; *Bueltel*, 518 S.E.2d at 209 (when confronted with a choice-of-law clause, "the parties' intent must rule")).

The Court has already indicated its preliminary view that North Carolina law governs interpretation of the provision. ECF No. 177. That conclusion is consistent with decisions holding that questions concerning the scope of a choice-of-law clause are themselves matters of contract interpretation governed by the law selected by the parties. *See Volvo*, 2019 WL 4919632, at *3–5; *Bunker Holdings, Ltd. v. Green Pacific A/S*, 346 F. App'x 969, 973 (4th Cir. 2009) ("The scope of the choice-of-law provisions ... must be determined by the law of the state chosen by the parties in the contract."). North Carolina courts recognize that "[i]t is the simple law of contracts that as a man consents to bind himself, so shall he be bound." *Volvo,* 2019 WL 4919632, at *3 (citing *Tillman v.*

Commercial Credit Loans, Inc., 655 S.E.2d 362, 377 (N.C. 2008) (citation and quotation omitted)). To that end, "[p]arties' choice of law is generally binding on the interpreting court as long as they had a reasonable basis for their choice and the law of the chosen [s]tate does not violate a fundamental policy of the state of otherwise applicable law." *Volvo,* 2019 WL 4919632, at *3 (citing *Cable Tel Servs., Inc., v. Overland Contracting, Inc.*, 574 S.E.2d 31, 34 (N.C. Ct. App. 2002) (citation omitted)). A North Carolina court interpreting a choice-of-law provision would, therefore, aim to give effect to the intent of the parties, unless the provision is unreasonable, unlawful, or contrary to public policy. *See id.*; *Tanglewood*, 261 S.E.2d at 656.

Accordingly, North Carolina law generally, including the NCUDTPA and NCDCA, applies to all contracts and all Veterans Guardian customers, wherever they are located.

C. The Parties Further Mutually Agreed that North Carolina Courts Would Resolve Disputes Arising Out Of or Relating To the Agreements.

The final component of the provision at issue grants North Carolina courts exclusive jurisdiction over "any dispute arising out of or relating to this agreement." That language is broad. It is not limited to breach-of-contract claims. Nor is it limited to disputes requiring interpretation of a particular contractual term. By choosing language dictating that "any dispute" related to the agreement or "arising from" the agreement should be resolved by a North Carolina court applying North Carolina law, Defendant made its intention clear, and the Parties mutually agreed to the provision.

As both the cases and the scholarly commentaries cited by the Court recognize, courts frequently distinguish between narrow clauses directed solely to contract claims or interpretations and broader clauses extending to disputes "arising out of" or "relating to" an agreement. *See Volvo*, 2019 WL 4919632, at *3–5; *Brimer v. MDElite Laser & Aesthetic, LLC*, 770 F. Supp. 3d 876, 886 (E.D. N.C. 2025); *John F. Coyle, The Canons of Construction for Choice-of-Law Clauses*, 92 Wash. L. Rev. 631, 666–73 (2017); *Tanya Monestier, The Scope of Generic Choice of Law Clauses*, 56 U.C. Davis L. Rev. 959, 972–82 (2023). But nevertheless, the consistent theme is "fidelity to the contracting parties' intent." *Volvo*, 2019 WL 4919632, at *5.

When the provision here is read as a whole, the Parties' mutual intent is clear and the Court should enforce all three components of it.

II. VETERANS GUARDIAN'S PRIOR INVOCATION OF THE CLAUSE CONFIRMS THAT NORTH CAROLINA LAW GOVERNS ALL CLASS MEMBERS' CLAIMS.

As stated above, "[t]he heart of a contract is the intention of the parties…" *State v. Philip Morris USA, Inc.,* No. 98CVS 14377-I, 2006 WL 3490937, at *5 (N.C. Super. Dec. 4, 2006) (quoting *Pike v. Wachovia Bank & Trust Co.,* 274 N.C. 1, 11, 161 S.E.2d 453, 462 (1968). Accordingly, this Court should take into account compelling direct evidence of Veterans Guardian's intent that North Carolina law be applied to all customers.

In 2024, when a Montana veteran and his spouse sued Veterans Guardian in a Montana federal court, asserting a claim under Montana's consumer protection laws, Veterans Guardian invoked the Agreement's choice of law provision to make two arguments. First, it argued that the provision required the case to be transferred to this Court. *See* **Exhibit. A**, Defendant's Memorandum of Law in Support of its Motion to Transfer or Dismiss, at 22, 25-26, in *Young, et al. v. Veterans Guardian*, No. 1:24-cv-

00014-SPW-TJC (D. Mont.); **Exhibit B**, Defendant's Reply in Support of Motion to Transfer or Dismiss, at 14, in *Young, et al. v. Veterans Guardian*, No. 1:24-cv-00014-SPW-TJC (D. Mont.). Second, Veterans Guardian moved to dismiss Young's Montana consumer protection law claim and expressly argued that "[b]ecause North Carolina law governs, Plaintiffs' claim under the Montana Consumer Protection Act (Claim III) should be dismissed." Ex. A, at 25-26. Veterans Gurdian's Motion to Transfer was successful and the *Young* case was transferred to this Court.

After transfer to this Court, Veterans Guardian continued to argue that its Choice of Law provision prohibited the Youngs from applying Montana law:

> "[T]he Contract's choice-of-law provision should be enforced and North Carolina law should govern all of Plaintiffs' state-law claims."
> *
> "The claims thus 'aris[e] out of' the Contract, as the District of Montana recognized, … or at a minimum relate to it. The choice of law clause, which encompasses 'any dispute arising out of or relating to' the Contract, therefore encompasses all of Plaintiffs' claims and should be enforced…. Accordingly, pursuant to the Contract's choice-of-law clause, North Carolina law governs."

Exhibit C, Defendant's Memorandum of Law in Support of its Motion to Transfer at p. 10-11, *Young, et al. v. Veterans Guardian*, No. 1:24-cv-01021-CCE-LPA (M.D. NC)

Defendant argued separately that the Youngs' Montana Consumer Protection Act count should be dismissed as inapplicable:

> "Because North Carolina law governs Plaintiffs' claims, as discussed immediately above, the Montana Consumer Protection Act is inapplicable. Plaintiffs' claim under that act (Claim III), therefore, should be dismissed.

Id.

Defendant also argued that the Youngs' common law claims of negligent or intentional infliction of emotional distress were also governed exclusively by North Carolina law although the Youngs were obviously located in Montana. *Id.* at p. 16.

These prior interpretations matter because they confirm the clause's intended scope by its drafter. Courts construing contracts seek to give effect to the parties' intent, and Defendant's prior invocation of its choice-of-law provision is probative of how the drafter understood the clause to operate. The fact that Veterans Guardian now takes a contrary view should be weighed against judicial estoppel principles, which counsel against allowing a litigation-driven reversal of position. *See New Hampshire v. Maine*, 532 U.S. 742, 749–51 (2001) (identifying factors for application of judicial estoppel including whether party seeking "clearly inconsistent" position would derive unfair advantage or impose unfair detriment on opposing party if not estopped).

Having argued that North Carolina law applies to all customers in the *Young* case, Defendant cannot now credibly characterize the provision as allowing each customer to apply the law of her home state.

III. PLAINTIFFS' CLAIMS ARISE FROM DEFENDANT'S NORTH CAROLINA-BASED CONDUCT AND AGREEMENTS ENTERED INTO IN NORTH CAROLINA.

After arguing to the contrary in the *Young* case, and when faced with the possibility of a nation-wide class, Defendant changed its legal analysis and argued in opposing class certification and in moving for summary judgment that the law of each Class Member's home state should apply. ECF No. 94; ECF No. 104. That approach fails to properly analyze the claims being advanced when considering the Choice of Law provision. When the claims and the contract are analyzed together, the application of North Carolina law to all claims and class members becomes apparent.

In *Guzman v. Diamond Candles, LLC*, No. 1:15-cv-422, 2016 WL 5679451, at *2 (M.D.N.C. Sept. 30, 2016), the court recognized that Chapter 75 claims are "neither wholly tortious nor wholly contractual," and therefore examined the actual nature of the claim being advanced. After doing so, the court concluded that the plaintiff's UDTPA allegations did not involve "any issue of contractual construction, interpretation, or enforceability," and declined to apply the *contractual* provision because the UDTPA claim advanced in that case was more akin to a tort. *Id.* at *4.

But this case is far different from *Guzman*. The *Guzman* court did not hold that contractual choice-of-law provisions are categorically inapplicable to NCUDTPA claims, or that a tort analysis or a contract analysis is always appropriate. *Id*. Indeed, applying that same analysis here leads to the opposite result.

Plaintiffs' UDTPA claim is not based on alleged deception or individualized reliance. Rather, Plaintiffs contend that Defendant engaged in an unfair trade practice by charging veterans for claim-preparation and claim-presentation services that federal law reserves to accredited representatives. The unfairness arises from conduct that clearly violates established federal statutes, regulations, and public policy governing representation of veterans before the VA for compensation.

Defendant's conduct was implemented through its Agreements. The Agreements describe the services Defendant provides, define the fees that Defendant charges, and repeatedly asserts that Defendant's activities do not constitute claim preparation, presentation, or prosecution requiring accreditation under federal law. The Agreements thus provide the framework through which Defendant carries out the unfair trade practice that Plaintiffs contend is unlawful.

Unlike *Guzman*, the Agreements are not merely incidental to Plaintiffs' claims. Here, the Court cannot determine whether Defendant engaged in an unfair trade practice without examining the services described in the Agreements, the fee obligations purportedly created by the Agreements, and Defendant's asserted contractual right to charge veterans for those services under the Agreement. *See Volvo,* 2019 WL 4919632, at *4 (*citing*, *e.g., Masters Grp. Int'l, Inc. v. Comerica Bank*, 352 P.3d 1101, 1115–16 (Mont. 2015) (applying choice of law provision to tort claims because without contracts there would be no tort claims)); *see also Superior Edge*, *Inc. v. Monsanto Co*., 964 F. Supp. 2d 1017, 1032 (D. Minn. 2013) (concluding that claims for fraud, deceptive trade practices, and misappropriation of trade secrets were so "closely related" to the contract claim that they were covered by a choice-of-law provision).

Indeed, Plaintiffs' theory is that federal law rendered those contractual fee obligations unlawful given that Defendant lacked legal authority to charge for the services it provided because it was not accredited. The Agreements themselves describe the services Defendant would provide and include numerous unfair and deceptive representations regarding accreditation and the nature of Defendant's services.

For example, the Agreement provides several references to Federal Law which is the foundation of Plaintiffs' claims:

> This agreement is for the provision of VA benefit pre-filing and post-filing consulting services only and is in accordance with Chapter 59, Title 38, United States Code and Tile 38, Code of Federal Regulations § 14.

ECF No. 73-4, Section 1, a.

> Pre-filing consulting services are provided to the client prior to any decision on the part of the client to initiate a claim for VA benefits and an individual becoming a "claimant" under the definition as found in 38 CFR § 14.627(h).

Id., Section 1, b.

> Federal code and VA regulations do allow an entity to provide pre-filing and post-filing consulting services as these services occur outside a preceding before the Department of Veterans' Affairs on a claim for benefits.

Id., Section 1, f.

> All pre-filing services provided are IAW with regulations and limitations identified in Chapter 59, Title 38, United States Code and Title 38, Code of Federal Regulations, section 14.

Id., Section 2.a.2) a).

> All post-filing services provided are IAW with regulations and limitations identified in Chapter 59, Title 38, United States Code and Title 38, Code of Federal Regulations, section 14.

Id., Section 2.a.3) a).

Thus, unlike *Guzman*, because the Plaintiffs' NCUDTPA claims are tort-like claims that are related to and arise from the Parties' Agreement, the Supreme Court of North Carolina would likely decide that the best way to give effect to the intent of the parties would be to construe the choice of law clause as encompassing Plaintiffs' NCUDTPA claims. *Volvo*, 2019 WL 4919632, at *5.

A. The NCDCA Claims Arise from Debts Created by the Agreements.

The NCDCA claim presents an equally strong basis for applying North Carolina law. An NCDCA claim requires the existence of a "consumer debt." N.C. Gen.Stat. § 75–50(1)–(3). Here, the debts that Defendant sought to collect arose solely from the Consulting Service Agreements. Without those Agreements there would be no alleged debt, no invoices, and no debt collection activity.

Plaintiffs contend that Defendant lacked any lawful right to collect those debts because federal law prohibited Defendant from charging fees in the first instance. Resolution of that claim necessarily requires the Court to determine the nature, validity, and enforceability of obligations in Agreements expressly entered into in North Carolina and governed by North Carolina law.

Accordingly, the NCDCA claims cannot be divorced from the Agreements themselves. The NCDCA claim therefore falls squarely within the parties' contractual decision to center their relationship in North Carolina. *See Brimer,* 770 F. Supp. 3d at 889 *(*citing *Hitachi Credit America Corp. v. Signet Bank*, 166 F. 3d 614, 628 (4th Cir. 1999) (courts may honor intent of parties to choose applicable law for "contract-related tort claims"). Fidelity to the contracting parties' intent requires the Court to construe the choice of law clause as encompassing Plaintiffs' NCDCA claims. *Volvo*, 2019 WL 4919632 at *5.

Date: June 24, 2026

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I hereby certify pursuant to Local Rule 7.3(d)(1) of the Middle District of North Carolina, that the foregoing Brief complies with the 3,000-word limit according to the word processing system used to process this brief.

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2026, a copy of the foregoing document was filed using CM/ECF which will serve an electronic copy on all counsel of record.

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IN THE UNITED STATES DISTRICT COURT
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BILLINGS DIVISION

DAVID YOUNG and RACHEL YOUNG, Plaintiffs, -vs- VETERANS GUARDIANS VA CLAIM CONSULTING, LLC, Defendant.	Cause No. CV 24-14-BLG-SPW-TJC **DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO TRANSFER OR, IN THE ALTERNATIVE, MOTION TO DISMISS**

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INTRODUCTION

Owned and operated by veterans, Veterans Guardian VA Claim Consulting LLC ("Veterans Guardian") helps disabled veterans obtain the benefits owed them as a result of their honorable service to the nation. The company boasts a 90% record of success and charges a fee only if a client succeeds in obtaining an increase in monthly disability benefits from the U.S. Department of Veterans Affairs ("VA"). Plaintiff David Young is among the tens of thousands of veterans who achieved an increase with Veterans Guardian's help. Despite that success, he and his spouse, Rachel Young, now maintain that Veterans Guardian's claims-assistance services violate federal law and constitute unfair and deceptive trade practices.

Their claims, however, do not belong in this Court. When Mr. Young contracted with Veterans Guardian for its services, he agreed that North Carolina courts would have exclusive jurisdiction over disputes arising under or relating to that contract. Plaintiffs fail to meet their burden of identifying any facts that would warrant not transferring this action to a North Carolina court. Veterans Guardian is headquartered in the Middle District of North Carolina, and this action should therefore be transferred to that District pursuant to 28 U.S.C. § 1404(a).

Even if this action were to remain in this Court, it should be dismissed under Federal Rule of Civil Procedure 12(b)(6). Plaintiffs' claims rest largely on the erroneous contention that Veterans Guardian's services violate federal law governing veterans' disability benefits. But Plaintiffs cannot sue based on the federal statute because it provides no private right of action. In any event, Veterans Guardian's services and fees are not covered by the federal statute and regulations on which Plaintiffs rely and, consequently, there is no violation of federal law. Beyond that fundamental flaw, Plaintiffs' factual allegations are insufficient to state a claim that Mr. Young's contract with Veterans Guardian is invalid, or for unfair or deceptive practices, or any of the other state law causes of action they assert.

Plaintiffs' Complaint should be transferred to the Middle District of North Carolina or, in the alternative, dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

FACTUAL BACKGROUND

A. Veterans Guardian's Services

Veterans Guardian was founded in North Carolina by U.S. Army veterans Scott Greenblatt and William Taylor (both Lieutenant Colonels, U.S. Army, retired).[1] Like its founders, most employees of Veterans Guardian have deep connections to the military—75% are veterans, spouses of veterans, spouses of or active-duty military members.[2] Lt. Cols. Greenblatt and Taylor created the company to help

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[1] Veterans Guardian, About Us, https://vetsguardian.com/about-us/ (last visited Apr. 22, 2024).

[2] *Id.*

veterans navigate the often confusing and difficult process of applying for VA disability benefits.[3] With Veterans Guardian's expert assistance, 90% of its clients achieve an increase in benefits.[4]

The company's pre-filing consultation services include "a VA benefits assessment, a medical assessment to identify possible service[-]connected conditions, development of medical evidence, identification of VA benefit claim strategies, and education and information on how to prepare and submit a claim." Decl. of William Taylor, Ex. A ¶ 1.b (David Young–Veterans Guardian Consulting Service Agreement). Post-filing services include "a review of any decisions made by the VA pursuant to a benefit claim filed by the client, an updated VA benefits assessment and identification of future VA benefit claim strategies." *Id.*, Ex. A ¶ 1.c.

Veterans Guardian is transparent about the services it does and does not provide, as well as the fact that it is not accredited by the VA. Its agreement with clients states prominently on the first page that Veterans Guardian is not accredited by the VA, that it is not a client's representative to the VA, and that free services through veterans services organizations are available to support veterans in seeking

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[3] *See* Veterans Guardian, A Few Common Myths and the Facts that Debase Them, https://www.vetsknowthefacts.com/ (last visited Apr. 22, 2024).

[4] *See* Veterans Guardian, https://vetsguardian.com/ (last visited Apr. 22, 2024).

disability benefits. Taylor Decl., Ex. A ¶ 1.d–e.[5] The agreement also states that (1) "Veterans Guardian is not a law firm, does not have an attorney on staff, and is not licensed to practice law in any jurisdiction[,]" and (2) while its consulting services "may include verbal or written discussions of legal issues and procedures," "any communications are understood to be only Veterans Guardian's opinion and do[] not constitute legal assistance or advice." *Id.*, Ex. A ¶ 2.c(6).

Veterans Guardian is transparent about its fee structure, as well. The company does not charge up-front fees; it takes all the risk at the outset and charges a fee only if the veteran's claim is successful. Taylor Decl., Ex. A ¶¶ 2.a(6), 3.a. When a client secures disability benefits, the fee is the monthly payment amount times five. *Id.*, Ex. A ¶ 3.b. The veteran may pay this fee in one lump sum at a 10% discount, on a five- or ten-month schedule, or through a custom payment plan with no interest or additional fees. *Id.*, Ex. A ¶ 4.d.

B. Plaintiffs David and Rachel Young

As alleged in the Complaint, David Young is a veteran with nearly nine years' service in the United States Army, through which he incurred disabilities. Compl. ¶¶ 1–2. Rachel Young is Mr. Young's spouse and helps him, including with

[5] *See also* Veterans Guardian, https://vetsguardian.com/ (last visited Apr. 22, 2024) (providing link to VA search tool for free services).

paperwork, coordinating appointments, and researching "potentially helpful disability processes and opportunities." *Id.* ¶ 7.

Mr. Young alleges he first contacted Veterans Guardian through its website, communicated with company representatives by telephone and email, and then entered into a "Consulting Service Agreement" with Veterans Guardian on November 9, 2022 (the "Contract"). Compl. ¶¶ 14–15. The Contract expressly provides that it "shall be governed by the laws of the State of North Carolina and said states courts shall have exclusive jurisdiction to adjudicate any dispute arising out of or relating to [it]." Taylor Decl., Ex. A ¶ 8.

At Veterans Guardian's recommendation, Mr. Young obtained a psychological evaluation by a provider the company recommended, for which he paid $290. Compl. ¶ 24. Plaintiffs allege that Mr. Young also submitted to Veterans Guardian unspecified documentation from civilian doctors that supported a claim for total unemployability benefits. *Id.* ¶ 28.

Veterans Guardian assisted Mr. Young with a claim that resulted in a disability rating increase from 70% to 80%. Compl. ¶¶ 27, 30. That translates to $314 of increased monthly disability benefits, which over ten years is $37,680 and over thirty-five years is $131,880. *See id.* ¶¶ 30–31. The company charged a consulting fee of $1,570, in accordance with the Contract, which equates to 4.17% of the increased benefits Mr. Young will receive over the next ten years, and 1.19% of the increased benefits he will receive over the next 35 years. *See id.* To date, Plaintiffs have paid $157. *See id.* ¶ 33.

ARGUMENT

I. The Court Should Transfer this Action to the Middle District of North Carolina

A. The Contract's Forum-Selection Clause Applies to Plaintiffs' Claims

Mr. Young agreed when he signed the Contract that courts of North Carolina would have "exclusive jurisdiction to adjudicate any dispute arising out of or relating to this agreement." Taylor Decl., Ex. A ¶ 8. All of Plaintiffs' claims concern interpretation of the Contract, the validity of it, and/or Veterans Guardian's actions under it. Accordingly, all claims "arise out of" or "relat[e] to th[e] agreement" and the forum selection clause applies. *See Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1086 (9th Cir. 2018) ("[F]orum-selection clauses covering disputes 'arising out of' a particular agreement apply . . . to disputes 'relating to the interpretation and performance of the contract itself" while "forum-selection clauses covering disputes 'relating to' a particular agreement apply to any disputes that reference the agreement or have some 'logical or causal connection' to [it].")).

B. The Court Should Enforce the Forum-Selection Clause

1. Legal Standard

"When the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause." *Atl.*

Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Tex., 571 U.S. 49, 62 (2013). "[A] proper application of [28 U.S.C.] § 1404(a) requires that a forum-selection clause be given controlling weight in all but the most exceptional cases." *Id.* at 59–60.[6] "Only under extraordinary circumstances unrelated to the convenience of the parties should a § 1404(a) motion be denied." *Id.* at 62.

Parties' agreement to forum may be repudiated only for three reasons: "(1) the clause is invalid due to 'fraud or overreaching,' (2) 'enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision,' or (3) 'trial in the contractual forum will be so gravely difficult and inconvenient that [the litigant] will for all practical purposes be deprived of his day in court.'" *Sun*, 901 F.3d at 1088 (alteration in original) (quoting *The Bremen v. Zapata Off-Shore Co*., 407 U.S. 1, 15, 18 (1972)). Plaintiffs appear to rely on the first two grounds, *see* Compl. ¶¶ 13, 48–49, 53,[7] but meet their burden on neither.

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[6] *See* 28 U.S.C. § 1404(a) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.").

[7] The Complaint contains no allegations relating to the third ground for repudiation.

2. Plaintiffs Fail to Show that Enforcement of the Forum-Selection Clause Would Contravene Montana Public Policy

Starting with the second ground on which a forum-selection clause may be repudiated, Plaintiffs identify no basis for concluding that enforcement of the Contract's forum-selection clause would contravene Montana public policy. Their assertion that Montana public policy is "against forum-selection clauses[,]" Compl. ¶ 13, is simply wrong. In Montana, "forum selection clauses are not presumptively void as against public policy." *Polzin v. Appleway Equip. Leasing, Inc.*, 191 P.3d 476, 482 (Mont. 2008); *see also Bjorgen v. Marco Techs., LLC*, No. 17-cv-134-M-DLC, 2018 WL 2023543, at *4 (D. Mont. May 1, 2018) (recognizing that federal law governs forum selection and, in any event, *Polzin* held that forum-selection clauses are not void under public policy).

Nor does Montana's policy promoting the welfare of veterans and their families prevent transfer pursuant to the forum-selection clause. Montana and North Carolina have similar public policies regarding veteran disability benefits. *Compare* Mont. Code Ann. § 10-2-102(1)(b)–(c) (Montana Board of Veterans Affairs "assist[s] veterans and their families who are residents of this state in filing claims for the benefits to which they are entitled[,]" among other things) *with* N.C. Gen. Stat. Ann. § 143B-1211(5), (9) (North Carolina Department of Military and Veterans Affairs is responsible for providing outreach "to support and assist North Carolina's veterans in identifying and obtaining the services, assistance, and support to which

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they are entitled" and "to monitor and encourage the timely and accurate processing of veterans' benefit requests . . . , including requests for service connected to . . . disability payments."). Accordingly, there is no affront to the public policy of Montana worked by a transfer to North Carolina.

3. Plaintiffs Fail to Meet the Heightened Pleading Standard for Fraud

Plaintiffs fare no better on the first ground. To repudiate a forum selection clause due to "[f]raud or [m]istake," a plaintiff must comply with Rule 9(b)'s requirement that fraud be "state[d] with particularity . . . ." Fed. R. Civ. P. 9(b); *see Kearns v. Ford Motor Co*., 567 F.3d 1120, 1124–25 (9th Cir. 2009) ("Averments of fraud must be accompanied by the 'who, what, when, where, and how' of the misconduct charged.")). Plaintiffs do not identify any false representation or concealment of any material fact about the services Veterans Guardian would provide, the fees it would charge, or otherwise, let alone allege a fraudulent act "with particularity." For example, Plaintiffs do not claim that Veterans Guardian represented that Mr. Young would obtain more than a 10% disability rating increase or that the company would assist with a claim for total unemployability. Nor do they identify any documentation that Veterans Guardian represented it would use to support Mr. Young's claim but did not use. And contrary to Plaintiffs' contention, Veterans Guardian's services and fees are legal, as explained in section II.B.2 below.

C. Plaintiffs Cannot Meet Their Burden of Showing Transfer Is Unwarranted

A forum-selection clause requires district courts to adjust their usual venue analysis in three ways. *Atl. Marine Constr.*, 571 U.S. at 63; *Bjorgen*, 2018 WL 2023543, at *5. First, "the plaintiff's choice of forum merits no weight." *Atl. Marine Constr.*, 571 U.S. at 63; *accord Bjorgen*, 2018 WL 2023543, at *5. "[T]he plaintiff must bear the burden of showing why the court should not transfer the case to the forum to which the parties agreed." *Atl. Marine Constr.*, 571 U.S. at 64; *accord Bjorgen*, 2018 WL 2023543, at *5. Second, the court "must deem the private-interest factors to weigh entirely in favor of the preselected forum[,]" and "[a]s a consequence … may consider arguments about public-interest factors only[,]" such as ease of access to sources of proof. *Atl. Marine Constr.*, 571 U.S. at 64 & n.6; *accord Bjorgen*, 2018 WL 2023543, at *5. Third, "transfer of venue will not carry with it the original venue's choice-of-law rules[,]" which may affect public-interest considerations. *Atl. Marine Constr.*, 571 U.S. at 64; *accord Bjorgen*, 2018 WL 2023543, at *6. "Because [the public-interest] factors will rarely defeat a transfer motion, the practical result is that forum-selection clauses should control except in unusual cases." *Atl. Marine Constr.*, 571 U.S. at 64; *accord Bjorgen*, 2018 WL 2023543, at *6.

Plaintiffs allege no facts that would meet their burden to show that transfer pursuant to the Contract's forum-selection clause is unwarranted. They identify no public-interest factor that favors resolution in this Court. In fact, North Carolina has an interest in enforcing contracts in accordance with parties' expectations, which weighs in favor of transfer. *See Republic-Franklin Ins. Co. v. Pasour*, No. 3:11CV181, 2011 WL 5169426, at *6 (W.D.N.C. Oct. 31, 2011) ("North Carolina has made clear its interest in the execution of contracts within this state."); *see also Bjorgen*, 2018 WL 2023543, at *6 (finding that the public-interest factor favored transfer to Minnesota because that state had an interest in enforcing contracts in accordance with parties' expectations).

As Veterans Guardian is located in the Middle District of North Carolina, *see* Compl. ¶ 8, this action should be transferred to the U.S. District Court there, where three actions asserting claims similar to those here are pending.[8] *See City of Albany v. CH2M Hill, Inc.*, 924 F.3d 1306, 1308 (9th Cir. 2019) (A forum selection clause that vests "exclusive jurisdiction and venue" in the courts in a state provides venue in both the state and federal courts located in that state. (quoting *Simonoff v. Expedia, Inc.*, 643 F.3d 1202 (9th Cir. 2011))).

II. Alternatively, the Court Should Dismiss Plaintiffs' Claims Under Rule 12(b)(6)

The Complaint fails to state any claim upon which relief can be granted.

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[8] *Ford v. Veterans Guardian*, No. 23-cv-756 (M.D.N.C. filed Sept. 1, 2023); *Patterson v. Veterans Guardian*, No. 23-cv-762 (M.D.N.C. filed Sept. 8, 2023); *Beard v. Veterans Guardian*, No. 23-cv-1080 (M.D.N.C. filed Dec. 8, 2023).

Consequently, if the Court were to deny the request to transfer this action, it should dismiss it pursuant to Federal Rule of Civil Procedure 12(b)(6).

A. Legal Standard

To survive a Rule 12(b)(6) motion to dismiss, a party must plead facts demonstrating a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007))). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

B. Plaintiffs' Federal-Law Claim Fails

1. No Private Right of Action Authorizes a Claim Based on 38 U.S.C. § 5901 or 38 C.F.R. § 14.629(b)(1)

"Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Without congressional intent "to create not just a private right but also a private remedy … a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id*. at 286–87; *see also Johnson v. Interstate Mgmt. Co.*, 849 F.3d 1093, 1097 (D.C. Cir. 2017) ("[T]he Supreme Court [is] very hostile to implied causes of action." (collecting cases)). Lack of a private right of action "is fatal to the plaintiffs' claim."

Bauer v. Elrich, 8 F.4th 291, 299 (4th Cir. 2021); *accord Rodriguez v. Sony Comput. Ent. Am., LLC*, 801 F.3d 1045, 1053 (9th Cir. 2015) (affirming dismissal of the plaintiff's claim for lack of a private right of action).

The federal statute on which Plaintiffs rely—38 U.S.C. § 5901[9]—does not expressly confer a private right of action. *See* 38 U.S.C. § 5901 *et seq*. Nor does the statute evidence any congressional intent to confer a private right of action based on the statute or its implementing regulations. *See id.* Section 5901 "grants no private rights to any identifiable class[,]" *Bauer*, 8 F.4th at 299 (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283–84 (2002)) and "focus[es] on the person regulated rather than the individuals protected[,]" *Sandoval*, 532 U.S. at 289. Accordingly, it implies no private right of action to support Plaintiffs' Claim I.

2. Veterans Guardian Does Not Violate Federal Law

Plaintiffs' first claim also fails on the merits. That claim is premised on Plaintiffs' contention that Veterans Guardian's services violate federal statutes and regulations, but the provisions they cite apply only to those individuals and entities that act as representative "agents" or "attorneys," not anyone who consults with a veteran about a claim. Because Veterans Guardian's employees are not "agents" or

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[9] The Complaint incorrectly cites the statute as "30 U.S.C. § 5901." ECF No. 1 at 12–13. Because a right of action can only be created by Congress, no private right could exist under 38 C.F.R. § 14.629(b)(1), which was issued by the VA.

"attorneys," the provisions Plaintiffs cite are not applicable. But Plaintiffs' interpretation of federal law suffers from another flaw. If adopted, it would offend Veterans Guardian's free-speech rights, as well as the petition and association rights of the company's veteran clients. Accordingly, even if Veterans Guardian's interpretation of applicable law were not the better reading, it is at least "fairly possible" and thus must be accepted to avoid the constitutional infirmity inherent in Plaintiffs' interpretation. *Jennings v. Rodriguez*, 583 U.S. 281, 296 (2018).

a. Plaintiffs' Interpretation of Federal Law Omits Key Terms

Every statutory and regulatory provision on which Plaintiffs rely is specifically limited to the actions of "agents" or "attorneys." The foundational rule set out in section 5901 of title 38 provides that "no individual may act as an agent or attorney in the preparation, presentation, or prosecution of any claim under laws administered by the [VA] unless such individual has been recognized for such purposes by the Secretary." 38 U.S.C. § 5901(a) (emphasis added). 38 C.F.R. § 14.629(b)(1) states that "[n]o individual may assist claimants in the preparation, presentation, and prosecution of claims for VA benefits as an agent or attorney unless he or she has first been accredited by VA . . . ." *Id*. (emphasis added).

Neither the restrictions surrounding assistance to veterans, nor the "agent or attorney" limitation is a modern innovation—both have been a part of federal law governing assistance to veterans dating back to the Civil War. Since then, Congress has repeatedly used the phrase "agents and attorneys" to indicate a relationship marked by the agent's responsibility to *represent* a veteran before the agency. In 1862, for example, Congress allowed "agents or attorneys" to charge no more than "one dollar and fifty cents" for "each affidavit . . . executed *and forwarded*" to the Commissioner of Pensions, making clear its expectation that agents and attorneys would file claims on their clients' behalf. 12 Stat. 566, 568 (1862) (emphasis added). In 1936, Congress similarly defined "agents and attorneys" as claimants' "representatives." 49 Stat. 2031, 2032 (1936) (Administrator may "recognize agents and attorneys in the preparation, presentation, and prosecution of claims" and require a showing of qualification "before being recognized as *representatives* of claimants . . . ." (emphasis added)).

Congress's historical use of the phrase "agents and attorneys" as encompassing *representation* of veterans is consistent with common understandings of an agency relationship. Black's Law Dictionary defines "agent" as "[s]omeone who is authorized to act for or in place of another." BLACK'S LAW DICTIONARY (11th ed. 2019). Under the Restatement, "[a]gency" refers to a "fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf." RESTATEMENT (THIRD) OF AGENCY § 1.01; *see also Dearborn v. Mar Ship Operations, Inc.*, 113 F.3d 995, 997 (9th Cir. 1997) (quoting definition of "'agent' as one who is 'employed as a fiduciary, acting for a principal with the principal's consent and subject to the principal's overall control and direction in accomplishing some matter undertaken on the principal's behalf'"').

Veterans Guardian does not engage in tasks consistent with the role of an agent or attorney and does not act in a representative capacity. As shown in the company's Consulting Service Agreement, Veterans Guardian "is not the client's representative to the VA and does not file claims or any other documents or responses with the VA on behalf of the client." Taylor Decl., Ex. A ¶ 1.e. Instead, Veterans Guardian is a consulting service that limits its work to assisting veterans with the filing of their own claims. The Complaint demonstrates that Veterans Guardian's work with Mr. Young was entirely consistent with those parameters. Compl. ¶¶ 23–28 (showing that Veterans Guardian did not file Mr. Young's claims or represent him in his interactions with the VA).

Indeed, despite recognizing that the legal restrictions on which they rely apply to agents and attorneys, *see*, *e.g.,* Compl. ¶ 36, Plaintiffs do not actually allege that Veterans Guardian acted as either. They instead ignore the "agent or attorney" qualifier in the statute and regulations, reading those provisions to bar unaccredited entities from assisting veterans in the preparation of their claims in all respects. *See id.* ¶ 41 (alleging that Veterans Guardian violated federal law by "assist[ing] . . . with the preparation, presentation, and prosecution of claims"). But by eliding key words, Plaintiffs' reading runs afoul of "a cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word . . . ." *Williams v. Taylor*, 529 U.S. 362, 404 (2000). Veterans Guardian's interpretation, by contrast, "give[s] effect," *id.*, to the words "agent or attorney" by recognizing that they limit federal law's restrictions on assisting veterans to those individuals and entities that *represent* veterans before the VA, rather than merely advising or consulting a veteran who (like Mr. Young) files his own claim.

b. Plaintiffs' Construction of Federal Law Raises First Amendment Concerns

Plaintiffs' argument faces an additional hurdle: if their understanding of federal law were correct, the statutory scheme would violate the First Amendment.[10] In Plaintiffs' reading, the applicable federal statutes and regulations prohibit Veterans Guardian from advising veterans—a speech-defined activity—on a particular subject: their claims for benefits. So understood, the statutory scheme would impose an impermissible, content-based restriction on speech.

[10] Despite accepting that Veterans Guardian's representatives "are not attorneys and do not act as their clients' agents," a federal district court recently declined two individual veterans' and Veterans Guardian's request to preliminarily enjoin on First Amendment grounds a state law prohibiting compensation for advising veterans with disability benefits claims. Mem. Op., *Veterans Guardian v. Platkin*, No. 3:23-cv-20660 (D.N.J. Jan. 5, 2024). Veterans Guardian is appealing. No. 24-1097 (3d Cir. filed Jan. 19, 2024).

In *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), the Supreme Court considered a challenge to a federal law that barred "material support" to organizations designated for government sanctions, to include "expert advice or assistance." *Id*. at 18, 21 (quoting 18 U.S.C. § 2339B). The Court unanimously rejected the government's argument "that the only thing truly at issue in [the] litigation [was] conduct, not speech[,]" citing in particular the plaintiffs' "communicat[ion] [of] advice derived from 'specialized knowledge' . . . ." *Id.* at 26–27; *see also id*. at 61 (Breyer, J., dissenting) ("[T]he majority properly rejects the Government's argument that the plaintiffs' speech-related activities amount to 'conduct' and should be reviewed as such.").

In *Pacific Coast Horseshoeing School v. Kirchmeyer*, the Ninth Circuit applied that precedent to find that a law restricting enrollment in certain post-secondary education courses implicated the First Amendment. 961 F.3d 1062, 1070 (9th Cir. 2020). "There can be little question that vocational training is speech protected by the First Amendment[,]" the court found. *Id.* at 1069. Like in *Humanitarian Law Project*, such training "imparts a 'specific skill' or communicates advice derived from 'specialized knowledge.'" *Id.* (quoting *Humanitarian L. Project*, 561 U.S. at 27); *see also Full Circle of Living & Dying v. Sanchez*, No. 20-cv-1306, 2020 WL 7714200, at *7 (E.D. Cal. Dec. 29, 2020) (prohibition on advice regarding end-of-life care likely violated First Amendment).

Under binding precedent, therefore, the advice and instruction Veterans Guardian provides to its clients *is speech.* And it makes no difference that Veterans Guardian's speech is related to the provision of paid professional services. In *National Institute of Family & Life Advocates v. Becerra*, 585 U.S. 755 (2018) ("*NIFLA*"), the Supreme Court rejected holdings from multiple courts of appeals, including the Ninth Circuit, subjecting so-called professional speech—*i.e.*, speech to clients based on "expert knowledge and judgment"—to a lesser standard of scrutiny. *See id.* at 766–67 (abrogating *Pickup v. Brown*, 740 F.3d 1208, 1227–29 (9th Cir. 2014)). "Speech is not unprotected[,]" the Court explained, "merely because it is uttered by 'professionals.'" *Id.*

Indeed, if Plaintiffs' reading of federal law were correct, the restriction on Veterans Guardian's speech would be subject to the most exacting standard of review—strict scrutiny—because it is *content based*. The Supreme Court has explained that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). As Plaintiffs would have it, federal law prohibits Veterans Guardian from accepting compensation for communicating with veterans on only one topic—their claims for benefits. Such "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* at 165.

2. As understood by Plaintiffs, the federal scheme would not only burden Veterans Guardian's First Amendment rights, it would offend the First Amendment rights of the company's veteran clients. Veterans undoubtedly have a First Amendment right to petition the VA for benefits owed them. *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011) ("This Court's precedents confirm that the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes."). Moreover, the First Amendment protects the "right to associate for the purpose of engaging in those activities protected by the First Amendment . . . ." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). If Plaintiffs were right that federal law prohibits Veterans Guardian's activities, the statutory scheme would deprive the company's clients of effective claims-assistance services, thereby undermining the veterans' likelihood of success before the VA and infringing their right to associate with an entity they believe will help them vindicate their rights. *See United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 223–25 (1967) (State Bar rule could not preclude union from paying fees to lawyer representing its members).

3. When "'a serious doubt' is raised about the constitutionality of an Act of Congress, 'it is a cardinal principle that [a] Court [should] first ascertain whether

a construction of the statute is fairly possible by which the question may be avoided.'" *Jennings*, 583 U.S. at 296. As explained above, Veterans Guardian's interpretation of federal law "give[s] effect" to every word in the applicable provisions, *Williams*, 529 U.S. at 404, and thus corrects the textual flaws in Plaintiffs' interpretation. And by not restricting Veterans Guardian's ability to offer advice and counseling to veterans, nor veterans' rights to petition the government and to associate with Veterans Guardian for that purpose, that interpretation also avoids the *constitutional* pitfalls that impair Plaintiffs' reading. Accordingly*,* the cannon of constitutional avoidance compels this Court to adopt Veterans Guardian's "fairly possible" reading of the relevant federal statutes and regulations to save them from constitutional infirmity. *United States v. Hansen*, 599 U.S. 762, 781 (2023).

C. Plaintiffs' State Law Claims Fail

1. North Carolina Law Governs

As previously referenced, the Contract includes a choice-of-law clause providing that North Carolina law governs disputes "arising out of or relating to" the Contract. Taylor Decl., Ex. A ¶ 8.[11] If the case is not transferred, the enforceability

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[11] The Court may consider the Contract because the Complaint relies on it, it is "central" to Plaintiffs' claims, and its "authenticity" is not in dispute. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) ("[A] court may consider evidence on which the complaint necessarily relies if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion."); *see Fox v.*

of the choice-of-law clause is governed by the rules of Montana as the forum state. *Cal. Dep't of Toxic Substances Control v. Jim Dobbas, Inc.*, 54 F.4th 1078, 1089 (9th Cir. 2022). Montana courts follow the choice-of-law approach described in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *Barber v. Bradford*, 539 P.3d 648, 651 (Mont. 2023), which requires enforcement of a choice-of-law provision unless three factors are satisfied: "(1) but for the choice of law provision, Montana law would apply under § 188 of the Restatement; (2) Montana has a materially greater interest in the particular issue than the parties['] chosen state; and (3) application of the chosen state's law would contravene a Montana fundamental policy." *Masters Grp. Int'l, Inc. v. Comerica Bank*, 352 P.3d 1101, 1113 (Mont. 2015) (alteration in original) (quoting *Polzin*, 191 P.3d at 480).

If a choice-of-law provision does not violate Montana public policy, there is no reason to analyze factors (1) and (2). *Id.* As described above, Plaintiffs identify no basis for concluding that the Contract's choice-of-law provision contravenes any policy of Montana. Accordingly, the Contract's choice-of-law provision should be enforced and North Carolina law should govern all of Plaintiffs' state-law claims. *See Masters Grp. Int'l*, 352 P.3d at 1113.

Plum Creek Timber Co., No. 12-cv-2-M-DLC-JCL, 2012 WL 6933199, at *1 n.1 (D. Mont. Nov. 19, 2012) (considering contract attached to Rule 12(b)(6) motion).

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2. Plaintiffs Fail to State a Claim that the Contract is Invalid

North Carolina's Declaratory Judgment statute authorizes courts to determine the validity of a contract. N.C. Gen. Stat. § 1-254. But none of Plaintiffs' arguments that Mr. Young's contract with Veterans Guardian is invalid hold water, and their claim for declaratory judgment therefore fails.

Plaintiffs' contention that Veterans Guardian's services and fees violate federal law, Compl. ¶ 45, fails for the reasons previously discussed. That erroneous argument underpins their mistake of law claim, *id.* ¶ 47, dooming it as well.

Plaintiffs' mistake of fact and fraud claims fail to meet Rule 9(b)'s heightened pleading standard, which again requires a plaintiff to "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b); *see Kearns*, 567 F.3d at 1124–25 (particularity requires "the 'who, what, when, where, and how' of the misconduct charged").

As to Plaintiffs' claims of actual and constructive fraud, beyond the meritless contention that Veterans Guardian's services are not legal, Plaintiffs fail to allege any particular facts that would demonstrate fraud. *See Topshelf Mgmt., Inc. v. Campbell-Ewald Co.*, 117 F. Supp. 3d 722, 726 (M.D.N.C. 2015) ("[F]raud requires a '(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.'" (second alteration in original) (quoting

Forbis v. Neal, 649 S.E.2d 382, 387 (N.C. 2007))). Instead, they allege in only vague and conclusory terms that Veterans Guardian "suggested and asserted" it would provide "relevant information not otherwise available to Plaintiff" that would support Mr. Young's disability benefits claim. Compl. ¶ 48. Plaintiffs fail to identify the "relevant information" they reference, the identity of the person who allegedly conveyed that Veterans Guardian would provide it, what that person allegedly said or wrote, or the time or place of the alleged communication. The allegations in support of the assertion of constructive fraud are comparably conclusory. Plaintiffs allege that Veterans Guardian "misled" Mr. Young to believe that he would achieve "appropriately increased disability benefits . . . based on the use of all civilian and military documentation[,]" *id.* ¶ 49, without identifying: the contents of the representation that allegedly misled Mr. Young; the person who made it; how, when or where it was made; what would constitute an appropriate increase of disability benefits; or what documentation allegedly was not used.

Similarly with Plaintiffs' mistake of fact claim, the only support is the conclusory assertion that Mr. Young "mistakenly understood the terms of the Contract to include preparation and presentation of a disability claim for total unemployability . . . ." Compl. ¶ 46. The Complaint fails to identify any of the circumstances that allegedly led Mr. Young to believe that Veterans Guardian's services included pursuit of a claim for total unemployability, let alone allege them with particularity. *See McGuire v. LORD Corp.*, 456 F. Supp. 3d 729, 745 (E.D.N.C. 2020) ("[I]n order to affect the binding force of a contract, the mistake must be of an existing or past fact which is material; it must be as to a fact which enters into and forms the basis of the contract, or in other words it must be of the essence of the agreement, the sine qua non, or, as is sometimes said, the efficient cause of the agreement, and must be such that it animates and controls the conduct of the parties." (quoting *MacKay v. McIntosh*, 153 S.E.2d 800, 804 (N.C. 1967))).

Plaintiffs' additional theories of invalidity—lack of consent and contrary to Montana public policy—also fail to state a claim. Plaintiffs' contention that Mr. Young lacked consent to enter into the Contract is predicated on their claims of mistake and fraud, Compl. ¶ 50, and thus fails for the same reasons those claims fail. Their claim that the Contract is contrary to Montana policy fails because it is predicated on their erroneous contention that Veterans Guardian's services are contrary to federal law. *Id.* ¶ 53.

Plaintiffs' claim that the Contract is invalid is thus unsupported by the allegations of the Complaint, and their claim for declaratory relief (Claim II) should be dismissed.

3. Plaintiffs Fail to State a Consumer Protection Claim

Because North Carolina law governs, Plaintiffs' claim under the Montana Consumer Protection Act (Claim III) should be dismissed. *See Masters Grp. Int'l*, 352 P.3d at 1113; *see also M.D. Russell Constr., Inc. v. Consol. Staffing, Inc.*, No. 22-1420, 2023 WL 8798086, at *6 (4th Cir. Dec. 20, 2023) (finding that plaintiff's unfair and deceptive trade practices claim "can be readily disposed of" because they were governed by Virginia law).

Even if Plaintiffs alleged unfair and deceptive trade practices under North Carolina's Unfair and Deceptive Trade Practices Act ("UDTPA"), their claim would fail because they do not allege facts that would establish injury proximately caused by "an unfair or deceptive act or practice . . . ." *Mann v. Huber Real Est., Inc.*, 889 S.E.2d 524, 532–33 (N.C. Ct. App. 2023) (three elements of a UDTPA claim are: (1) "an unfair or deceptive act or practice"; (2) "the action in question was in or affecting commerce"; and (3) "the act proximately caused injury to the plaintiff"). "Whether an act or practice is unfair or deceptive is a question of law[,]" so properly decided at the motion-to-dismiss stage. *Id.* at 533.

a. Plaintiffs Allege No Unfair or Deceptive Act

Under the UDTPA, "[a] practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers . . . ." *Bumpers v. Cmty. Bank of N. Va.*, 747 S.E.2d 220, 228 (N.C. 2013). "A practice is deceptive if it possesse[s] the tendency or capacity to mislead, or create[s] the likelihood of deception." *Poor v. Hill*, 530 S.E.2d 838, 845 (N.C. Ct. App. 2000) (alterations in original). "[O]nly practices that involve '[s]ome type of egregious or aggravating circumstances' are sufficient to violate the U[D]TPA." *S. Atl. Ltd. P'ship of Tenn., L.P. v. Riese*, 284 F.3d 518, 535 (4th Cir. 2002) (second alteration in original) (quoting *Dalton v. Camp*, 548 S.E.2d 704, 711 (N.C. 2001)); *see also Pan-Am. Prods. & Holdings, LLC v. R.T.G. Furniture Corp.*, 825 F. Supp. 2d 664, 700 (M.D.N.C. 2011) (Egregious or aggravating circumstances include "intentional misrepresentation for the purpose of deceiving another and which has a natural tendency to injure the other.").

None of Plaintiffs' allegations support a reasonable inference of any unfair or deceptive act, let alone one that rises to the level of "egregious" or involves aggravating circumstances so as to be actionable under the UDTPA. Veterans Guardian's services are legal and do not offend federal or state policy, as discussed. But even if that were not so, "a party's [incorrect] statement of a legal position or an assertion about its rights or position under the law is *not* an actionable misrepresentation for purposes of a UDTPA claim." *Cross v. Ciox Health, LLC*, 438 F. Supp. 3d 572, 585 (E.D.N.C. 2020) (emphasis added). Plaintiffs' suggestion that Veterans Guardian agreed to assist Mr. Young with a total unemployability claim, Compl. ¶ 61, is entirely unsupported. Plaintiffs fail to identify any provision of the Contract requiring Veterans Guardian to prepare such a claim, and indeed, there is none. *See* Taylor Decl., Ex. A.

b. Plaintiffs Allege No Injury

North Carolina courts have repeatedly explained that "[r]ecovery will not be had [under the UDTPA] where the complaint fails to demonstrate that the act [complained of] proximately resulted in some adverse impact or actual injury to the plaintiffs." *Walker v. Sloan*, 529 S.E.2d 236, 245 (N.C. Ct. App. 2000); *accord, e.g.*, *Hill v. Equifax Info. Servs., LLC*, No. 1:11CV107, 2014 WL 12955582, at *5 (M.D.N.C. Sept. 11, 2014) (quoting *Walker*, 529 S.E.2d at 245).

It is apparent on the face of the Complaint that Plaintiffs cannot allege "actual injury" or "harm" as a result of Mr. Young having contracted for services with Veterans Guardian. Because the company only charges fees when its clients succeed in obtaining a lifetime of increased benefits, Mr. Young necessarily incurred a financial benefit from engaging Veterans Guardian, not an injury. With Veterans Guardian's help, his disability rating increased from 70% to 80%—a 10% increase that correlates to $314 of increased monthly disability benefits, which over ten years is $37,680 and over 35 years is $181,330. *See* Compl. ¶¶ 30–31. The fee of the monthly benefits increase times five that Veterans Guardian charged ($1,570) is just 4.17% of the benefits Mr. Young will receive over the next ten years, and only 1.19% of the benefits he will receive over the next thirty-five years. Subtracting Veterans Guardian's fee from the value of the monthly benefits that Mr. Young will receive for the rest of his life, he reaped a substantial economic benefit using Veterans

Guardian's services. Plaintiffs' contention that the Contract "seems to require" payment to the company for future benefit increases based on future claims, Compl. ¶ 32, is unsupported by any factual allegations or the Contract itself.[12] *See* Taylor Decl., Ex. A.

To the extent Plaintiffs claim that Mr. Young would have received the same benefits without any fees had he used a free service (*see* Compl. ¶ 3), their claim depends on a number of assumptions, specifically that: (1) Mr. Young would actually have sought those benefits; (2) he would have obtained benefits using free services; (3) the benefit amount would have been the same as or exceeded the amount secured using Veterans Guardian's services; and (4) Mr. Young would have obtained the benefit in the same amount of time, or the amount would have exceeded the amount achieved using Veterans Guardian by enough to offset the decrease in the time value of money. That speculation does not suffice to survive a Rule 12(b)(6) motion. *See Iqbal*, 556 U.S. at 678; *Painter's Mill Grille, LLC v. Brown*, 716 F.3d 342, 350 (4th Cir. 2013) ("It is now well established that mere conclusory and speculative allegations are not sufficient to withstand a motion to dismiss.").

[12] Any claim concerning other payment is also entirely speculative and unripe.

4. Plaintiffs Fail to Allege Proximate Cause

Any UDTPA claim would fail for the additional reason that Plaintiffs' allegations fail to establish proximate cause, which is an independent ground for dismissal. *See Rosen v. Club at Longview, LLC*, 821 S.E.2d 901 (Table) (N.C. Ct. App. 2018) (affirming 12(b)(6) dismissal of UDTPA claim for failure to allege proximate cause). Insofar as the Complaint seeks to establish proximate cause through the contention that Veterans Guardian's services and fees violate federal law, Compl. ¶ 63, it fails because it alleges no facts that would establish a violation of federal law, as discussed.

Insofar as Plaintiffs assert proximate cause based on alleged misrepresentation of Veterans Guardian's services, they would have to show "reliance." *Bumpers*, 747 S.E.2d at 226; *accord Rosen*, 821 S.E.2d 901. This includes (1) actual reliance, meaning "if it were not for the misrepresentation, the plaintiff would likely have avoided the injury altogether," and (2) reasonable reliance, meaning "plaintiff could [not] have discovered the truth of the matter through reasonable diligence . . . ." *Bumpers*, 747 S.E.2d at 227. Plaintiffs allege no facts to show either.

The Complaint does not explain why Mr. Young decided to enter into the Contract other than to imply that it was to obtain disability benefits, which he accomplished. And Plaintiffs do not allege that he could not have discovered relevant facts about Veterans Guardian through reasonable diligence. Rather, the fact that Veterans Guardian is not accredited, charges a fee, and provides pre- and post-filing consulting services is publicly available on the Veterans Guardian website, which Mr. Young accessed before engaging Veterans Guardian, and was disclosed in the Contract. Compl. ¶¶ 14–19; Veterans Guardian VA Claim Consulting, vetsguardian.com; Taylor Decl., Ex. A ¶¶ 1.b, 1.e, 2.b(6), 3. Plaintiffs do not allege any facts that would support a conclusion that Veterans Guardian represented it would assist Mr. Young with a claim for total unemployability.

D. Plaintiffs' Unjust Enrichment Claim Fails

A claim for unjust enrichment may not be brought "[i]f there is a contract between the parties," as "the contract governs the claim and the law will not imply a contract." *Se. Shelter Corp. v. BTU, Inc.*, 572 S.E.2d 200, 206 (N.C. Ct. App. 2002). Because Plaintiffs fail to allege any facts that would invalidate the Contract between Mr. Young and Veterans Guardian, the unjust enrichment claim (Claim IV) is precluded. *See id.* at 206–07 (explaining that "plaintiffs may not maintain a claim for unjust enrichment" because "the law will not imply a contract" when one exists between the parties).

E. Plaintiffs' Infliction of Emotional Distress Claim Fails

Plaintiffs fail to allege facts that would meet the high showing necessary for a claim of either negligent or intentional infliction of emotional distress. "[T]o state a claim for negligent infliction of emotional distress, a plaintiff must allege that

(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress . . . and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Glenn v. Johnson*, 787 S.E.2d 65, 70 (N.C. Ct. App. 2016) (quoting *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 395 S.E.2d 85, 97 (N.C. 1990)). For intentional infliction of emotional distress, a plaintiff must allege "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another." *Id.* at 72 (quoting *Dickens v. Puryear*, 276 S.E.2d 325, 335 (N.C. 1981)). "[C]onduct is extreme and outrageous when it is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* Plaintiffs' allegations fail to establish either claim, and their Claim V should be dismissed.

a. Plaintiffs' negligent infliction of emotional distress claim fails for lack of alleged negligent conduct and foreseeability of severe emotional distress. Plaintiffs identify no duty that Veterans Guardian undertook or was obligated to perform, but failed to perform. *See Glenn*, 787 S.E.2d at 71 ("[T]he first element of [a negligent infliction of emotional distress] claim requires allegations that the defendant failed to exercise due care in the performance of some legal duty owed to [the] plaintiff under the circumstances[.]" (second and third alterations in original) (quoting *Horne v. Cumberland Cnty. Hosp. Sys., Inc.*, 746 S.E.2d 13, 19 (N.C. Ct.

App. 2013))). Insofar as they assert that Veterans Guardian should have helped Mr. Young prepare a claim for total unemployability, the assertion is unsupported by any factual allegations and therefore insufficient. *See Iqbal*, 556 U.S. at 678; *Painter's Mill Grille*, 716 F.3d at 350.

The claim negligent infliction of emotional distress fails for the additional reason that Plaintiffs do not allege any action or failure to act by Veterans Guardian that was "reasonably foreseeable . . . [to] cause [either of them] severe emotional distress . . . ." *Glenn*, 787 S.E.2d at 70; *see Oldham v. Univ. of N.C.*, No. 1:22CV513, 2023 WL 3984031, at *21 (M.D.N.C. June 13, 2023) ("[T]o state a claim for negligent infliction of emotional distress a plaintiff must allege more than conclusory statements enumerating the elements of the claim.").

b. Plaintiffs do not allege that Veterans Guardian *intended* to inflict emotional distress on either Plaintiff. For that reason alone, their claim for intentional infliction of emotional distress fails. *See Glenn*, 787 S.E.2d at 72. The intentional infliction of emotional distress claim also fails for lack of factual allegations that would establish "extreme and outrageous conduct." *Id.* Instead, Plaintiffs allege only that Veterans Guardian prepared Mr. Young's disability benefits claim that succeeded in achieving a 10% disability rating increase and directed him to take actions related to the preparation. Compl. ¶¶ 23–34.

Further, Plaintiffs do not allege any facts connecting any conduct of Veterans Guardian to Mr. Young's alleged emotional distress so as to establish causation. *See Glenn*, 787 S.E.2d at 72. The Complaint makes only the conclusory assertion that he suffered emotional distress "as a result of the requirements of the contractual arrangement with Defendant." Compl. ¶ 71. That is insufficient to survive a Rule 12(b)(6) motion. *See Iqbal*, 556 U.S. at 678; *Painter's Mill Grille*, 716 F.3d at 350.

c. Vis-à-vis Rachel Young, the intentional and negligent infliction of emotional distress claim fails for the additional reason that it is unsupported by any factual content that would establish the requisite severity of emotional distress. The unadorned, conclusory assertions that she has experienced "mental, emotional, and financial stress[,]" Compl. ¶ 7, and "mental anguish and suffering[,]" *id*. ¶ 72, are insufficient. *See Moschos v. Moschos*, 882 S.E.2d 401, 404 (N.C. Ct. App. 2022) ("[W]ithout factual allegations regarding the type, manner, or degree of severe emotional distress a plaintiff claims to have experienced, a plaintiff's complaint fails to sufficiently allege severe emotional distress."); *see also id.* ("Allegations that fail to identify a severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so are not sufficient.").

F. Plaintiffs' Breach of Contract Claim Fails

A claim for breach of contract requires "(1) existence of a valid contract and (2) breach of the terms of that contract." *Poor*, 530 S.E.2d at 843. But Plaintiffs identify no term of the Contract that Veterans Guardian did not satisfy. They do not identify any documentation or records that Veterans Guardian agreed to review but did not review. Nor do they identify any medical condition that Veterans Guardian did not consider. Their conclusory allegations that the company failed to provide "services" that are not identified and "to determine all possible medical conditions that could qualify for service connection and a disability rating" without identifying any such alleged condition, Compl. ¶¶ 77–78, do not suffice under Rule 12(b)(6). *Iqbal*, 556 U.S. at 678; *Painter's Mill Grille*, 716 F.3d at 350. And as discussed, the assertion that Veterans Guardian undertook to assist with a claim of total unemployability is unsupported by any factual content. Plaintiffs thus fail to allege a factual basis for a conclusion that Veterans Guardian breached any term of the Contract, and their Claim VI should be dismissed.

G. Plaintiffs' Duty of Good Faith and Fair Dealing Claim Fails

Where a plaintiff's claim of breach of the duty of good faith and fair dealing centers on alleged breach of contract terms, the claim "rise[s] and fall[s] with the underlying claim[] for breach of contract." *BioSignia, Inc. v. Life Line Screening of Am., Ltd.*, No. 1:12CV1129, 2014 WL 2968139, at *5 (M.D.N.C. July 1, 2014) (recognizing that the "weight of North Carolina authority" does not treat breach of contract and breach of covenant of good faith and fair dealing as separate claims). Because Plaintiffs' allegations in support of their claim of breach of the duty of good faith and fair dealing—that Veterans Guardian deprived Mr. Young of the benefits of their contract and failed to pursue a total unemployability disability claim, Compl. ¶¶ 84–85—fail to state a claim for breach of contract, they "fall with th[at] underlying claim[] . . . ." *BioSignia*, 2014 WL 2968139, at *5. Plaintiffs' Claim VII therefore should be dismissed under Rule 12(b)(6).

CONCLUSION

For the foregoing reasons, the Court should transfer this action to the Middle District of North Carolina or, in the alternative, dismiss it with prejudice.

Date: April 23, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. Civ. P. 7.1(D)(2)(E), and the Court's Order granting leave to file an overlength brief (Doc. 12), I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced, with left, right, top, and bottom margins of one inch; and that the word count calculated by Microsoft Word is 8,492 words, excluding the Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service.

_/s/ Stephanie Baucus_________________
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EXHIBIT B

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

DAVID YOUNG and RACHEL YOUNG, Plaintiffs, -vs- VETERANS GUARDIANS VA CLAIM CONSULTING, LLC, Defendant.	Cause No. CV 24-14-BLG-TJC **DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO TRANSFER OR, IN THE ALTERNATIVE, MOTION TO DISMISS**

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INTRODUCTION

Plaintiffs fail to identify a basis for not enforcing David Young's agreement when he engaged Veterans Guardian VA Claim Consulting, LLC ("Veterans Guardian") that North Carolina courts would be the forum for any dispute relating to the agreement. This action belongs in the Middle District of North Carolina, and the Court should transfer it there pursuant to 28 U.S.C. § 1404(a).

Even if Plaintiffs' claims were to proceed in this Court, they should be dismissed pursuant to Rule 12(b)(6). There is no private right of action, express or implied, for their federal law claim. And while Mr. Young's agreement to North Carolina law should be enforced, Plaintiffs' claims under state law fail regardless of whether North Carolina or Montana law applies. Veterans Guardian's services and fees comport with federal law, and the Complaint's factual allegations are insufficient to establish the elements of any of Plaintiffs' claims.

ARGUMENT

I. THIS CASE BELONGS IN THE MIDDLE DISTRICT OF NORTH CAROLINA.

As an initial matter, "[i]n federal court, federal law controls the question of whether a forum-selection clause is enforceable." *Bjorgen v. Marco Techs., LLC*, No. 17-cv-134-M-DLC, 2018 WL 2023543, at *4 (D. Mont. May 1, 2018) (citing *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir. 1988)). The analysis is based on 28 U.S.C. § 1404(a). *Atl. Marine Constr. Co. v. U.S. Dist. Ct.*

for W. Dist. of Tex., 571 U.S. 49, 60 (2013). Plaintiffs' reliance on Montana state law, Opp'n 6, is misplaced. *See Bjorgen*, 2018 WL 2023543, at *4 (argument that Montana has a strong policy against forum-selection clauses is inapposite since "the guiding policy in adjudicating federal venue provisions is by federal rule, and not Montana state law").

"[F]orum-selection clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances." *Bjorgen*, 2018 WL 2023543, at *4. Federal law controls whether a forum-selection clause is enforceable, and enforcement is unreasonable only: "(1) if the inclusion of the clause in the agreement was the product of fraud or overreaching; (2) if the party wishing to repudiate the clause would effectively be deprived of his day in court were the clause enforced; and (3) if enforcement would contravene a strong public policy of the forum in which suit is brought." *Id*. (quotation and citation omitted); *accord Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1088 (9th Cir. 2018).

A. The Contract and Forum Selection Clause are Valid and Reasonable.

1. Veterans Guardian Does Not Violate Federal Law.

Plaintiffs contend that Mr. Young's Consulting Services Agreement with Veterans Guardian ("Contract") and its forum selection clause are void under Mont.

Code Ann. § 28-2-602 because federal law does not permit Veterans Guardian to contract with veterans to assist with their claims. Plaintiffs are wrong.

As Veterans Guardian explained, the restrictions articulated in federal law regarding assistance with claims are limited to those who act as "agents" or "attorneys." The foundational rule states that "no individual may act *as an agent or attorney* in the preparation, presentation, or prosecution of any claim under laws administered by the [VA] unless such individual has been recognized for such purposes by the Secretary." 38 U.S.C. § 5901(a) (emphasis added). The section governing fees includes an identical limitation: "[A] fee may not be charged, allowed, or paid *for services of agents and attorneys* with respect to services provided before the date on which a claimant is provided notice of the agency of original jurisdiction's initial decision …." *Id.* § 5904(c)(1) (emphasis added); *see also* 38 C.F.R. § 14.629(b)(1).

Plaintiffs' argument ignores that critical limitation, even though Veterans Guardian's Motion discussed it at length. Def.'s Mot. 14–17 (Dkt. 14) ("Mot."). The Department of Veterans Affairs ("VA") interpretation reflected in Plaintiffs' exhibits similarly fails to account for the statutory limitation to agents and attorneys. Dkt. 27-1 at 2. Notwithstanding Plaintiffs' assertion, that interpretation is not entitled to deference. For one thing, the Supreme Court has long held that interpretation in an "opinion letter[] . . . do[es] not warrant *Chevron*-style deference."

Christensen v. Harris County, 529 U.S. 576, 587 (2000). For another, *Chevron* deference has been overruled. *Loper Bright Enters. v. Raimondo*, No. 22-451, 2024 WL 3208360 (June 28, 2024). But most important, the statute is not ambiguous and thus its plain terms control, including the language limiting the restrictions on claims assistance to those who "act as . . . agent[s] or attorney[s] …." *See* 38 U.S.C. § 5901(a); *see also Williams v. Taylor*, 529 U.S. 362, 404 (2000) ("[C]ourts must give effect, if possible, to every clause and word of a statute ….").

The Complaint is devoid of any facts that would support a conclusion that Veterans Guardian engaged in activities of "agent" or an "attorney." And the plain terms of the Contract make clear that Veterans Guardian acts as neither. Mot. Ex. A, ¶ 2.b(5) ("Veterans Guardian is not the client's representative to the VA and does not file claims or any other documents or responses with the VA on behalf of the client."); *see also id.* ¶ 2.c(6) (making clear that the Company's employees are not lawyers). That is not Veterans Guardian's "opinion" of its role, Opp'n 23, it is the natural import of the Complaint's allegations and the Contract. *See* Restatement (Third) of Agency § 1.01 ("Agency" refers to a "fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act *on the principal's behalf* …." (emphasis added)); *see also* Mont. Code Ann. § 10-2-102 ("A board employee officially *acting as an agent on behalf of a claimant* must be properly accredited and recognized …." (emphasis added)).

Plaintiffs' footnoted assertion that Veterans Guardian "walks like a duck[,]" Opp'n 3 n.1, comes nowhere close to showing otherwise. *See United States v. Alameda Gateway Ltd*., 213 F.3d 1161, 1168-69 (9th Cir. 2000) (party "waived [an] issue" where it "present[ed] th[e] argument in a lone footnote and fail[ed] to cite any authority in support").

Plaintiffs likewise have no response to Veterans Guardian's argument, Mot. 17-21, that the canon of constitutional avoidance requires rejection of their reading of federal law. As Veterans Guardian explained, a law that precludes it from advising clients—an activity that *is speech* under binding precedent, *see Holder v. Humanitarian L. Project*, 561 U.S. 1, 18 (2010); *see also Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1070 (9th Cir. 2020)—raises significant First Amendment concerns. Without analysis, Plaintiffs reference *Veterans Guardian v. Platkin*, No. 3:23-cv-20660 (D.N.J. Jan. 5, 2024), and *Montana Supreme Court Commission on Unauthorized Practice of Law v. O'Neil*, 147 P.3d 200, 329-30 (Mont. 2006), but neither decision helps them. The former, which is on appeal, is inconsistent with the Supreme Court and Ninth Circuit precedents just cited. The latter predated those decisions by several years and thus had no occasion to grapple with them in its (minimal) First Amendment analysis. *See O'Neil*, 147 P.3d at 329-30.

2. Plaintiffs Fail to Sufficiently Allege Fraud.

To the extent Plaintiffs claim that the forum selection clause is unenforceable as the product of fraud rests on their contention that Veterans Guardian's services are unlawful, the claim fails for the reasons just described.

To the extent Plaintiffs claim the Company engaged in fraud because it did not prepare a claim of total unemployability, Opp'n 16–17, that assertion fails as well. Plaintiffs do not allege Veterans Guardian ever agreed to assist with a total unemployability claim, and the Contract, Mot. Ex. A, makes no reference to total unemployability. Moreover, the eligibility criteria and application for total unemployability (called "Individual Unemployability" by the VA) differ from those based on the regular disability rating schedule, so Veterans Guardian's agreement to assist with Mr. Young's disability rating claim did not mean it agreed to assist with a total unemployability claim. *Steckler v. McDonough*, No. 21-1634, 2022 WL 1420863, at *6 (Vet. App. May 5, 2022) ("Unlike the regular disability rating schedule, which is based on the average work-related impairment caused by a disability, entitlement to [Individual Unemployability] is based on an individual's particular circumstances [including,] education, training, and work history.") (quotation omitted); VA, Individual Unemployability, https://www.va.gov/disability/eligibility/special-claims/unemployability/ (eligibility for Individual Unemployability does not change a veteran's disability rating and linking to two forms required to apply). Indeed, Plaintiffs' allegation that Mr. Young "mistakenly understood the terms of the Contract to include preparation and presentation of a disability claim for total unemployability," Compl. ¶ 46, undermines their assertion that Veterans Guardian agreed to assist with such a claim.

Plaintiffs thus fail to allege any misconduct meeting the heightened pleading standard for fraud. *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124-25 (9th Cir. 2009) ("Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged.").

3. The Contract is Not One of Adhesion.

Plaintiffs' argument that the Contract is unenforceable as an adhesion contract is also unavailing. "[M]ere disparity in bargaining power does not equate to unenforceability and not all standardized contracts are unenforceable as adhesion contracts." *Junkermier, Clark, Campanella, Stevens, P.C. v. Alborn, Uithoven, Riekenberg, P.C.*, 380 P.3d 747, 756 (Mont. 2016) (quotation omitted); *see also Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593 (1991) (rejecting notion "that a nonnegotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining"). And Plaintiffs fail to allege facts that would establish either of the circumstances warranting nonenforcement of the forum selection clause based on the Contract's standardized nature—that enforcement is "not within the[] reasonable expectations" of the party or is "within the[] reasonable expectations [of the party], but, when considered in its context, [is] unduly oppressive, unconscionable, or against public policy." *Zigrang v. U.S. Bancorp Piper Jaffray, Inc.*, 123 P.3d 237, 241 (Mont. 2005).

Plaintiffs allege no facts supporting a conclusion that Mr. Young lacked a reasonable expectation the forum selection clause would be enforced. The conclusory assertion that he "did not fully understand the meaning of the choice of law and forum selection clause," Opp'n 12, is unsupported by the cited allegation, Compl.¶ 4, which says nothing about that clause, or other allegations.

Plaintiffs' assertion that "[f]orcing" Mr. Young to travel to North Carolina would be unconscionable and contrary to Montana and federal policy, Opp'n 12, relies on unwarranted speculation that travel would be necessary; Defendant has demonstrated the case should be dismissed under Rule 12(b)(6). But more fundamentally, "[w]hen parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient …." *Atl. Marine*, 571 U.S. at 64; *see also id.* ("[w]hatever 'inconvenience' [the parties] would suffer by being forced to litigate in the contractual forum as [they] agreed to do was clearly foreseeable").

B. Enforcement of the Forum Selection Clause Would Not Contravene Montana Public Policy.

Plaintiffs identify no Montana policy that would be contravened by enforcing the Contract's forum selection clause because they identify no appreciable difference between Montana's and North Carolina's policies of supporting veterans in seeking VA disability benefits. *See* Mont. Code Ann. § 10-2-102(1)(b)–(c)[1] & N.C. Gen. Stat. Ann. § 143B-1211(5), (9) (both quoted in Mot. 8). North Carolina's statutory reference to assisting North Carolina veterans in seeking such benefits does not suggest the state values veterans from other states any less.

Montana and North Carolina also have similar consumer protection statutes. *See* Mont. Code Ann. § 30-14-103 ("Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful."); N.C. Gen. Stat. § 75-1.1(a) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."). Plaintiffs' suggestion that North Carolina's statute does not cover practices contrary to established public policy like Montana's, Opp'n 10, is simply wrong. *See Bumpers v. Cmty. Bank of N. Va.*, 747 S.E.2d 220, 228 (N.C. 2013) ("A practice is unfair [within the meaning of North Carolina's Unfair and Deceptive Trade Practices Act] when it offends established public policy….").

C. The Court Should Transfer This Action to the Middle District of North Carolina.

Because the forum-selection clause is valid and enforcement is reasonable, Plaintiffs' choice of forum is entitled to no weight, and the private-interest factors of

[1] 2003 Montana Laws Ch. 491, cited by Plaintiffs, Opp'n 14, amended Mont. Code Ann. § 10-2-102(1)(b)–(c). 2003 Montana Laws Ch. 491 § 2 (S.B. 401).

the § 1404(a) analysis are construed to weigh entirely in favor of transfer. *See Atl. Marine*, 571 U.S. at 63-64; *Bjorgen*, 2018 WL 2023543, at *4. Plaintiffs must therefore show this action should not be transferred based only on public-interest factors, and they fall far short. As discussed, Plaintiffs identify no Montana policy contravened by transfer, and failing to transfer would flout North Carolina's policy favoring enforcement of contracts in accordance with parties' expectations. *See Republic-Franklin Ins. Co. v. Pasour*, No. 3:11CV181, 2011 WL 5169426, at *6 (W.D.N.C. Oct. 31, 2011).

II. PLAINTIFFS' CLAIMS FAIL UNDER RULE 12(b)(6)

A. Plaintiffs Fail to State a Claim for Violation of Federal Law.

1. Veterans Guardian Does Not Violate Federal Law.

As already explained, Veterans Guardian does not violate federal law. That alone defeats Plaintiffs' first claim.

2. Plaintiffs Lack an Implied Right of Action.

Plaintiffs' federal-law claim fails for the additional reason that the statutes on which they rely do not imply a private right of action. Plaintiffs' assertion to the contrary cannot be reconciled with the long-established principle that "private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Because all parties agree the statute does not expressly provide a private right of action, "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Id.*; *accord Lil' Man in the Boat, Inc. v. City & Cnty. of S.F.*, 5 F.4th 952, 958 (9th Cir. 2021). Plaintiffs identify nothing resembling the "'clear and unambiguous terms' [that] are 'required for Congress to create new rights enforceable under an implied private right of action.'" *Lil' Man*, 5 F.4th at 958.

a. Although, as Plaintiffs recognize, courts apply the four-factor test announced in *Cort v. Ash*, 422 U.S. 66, 78 (1975), to determine whether a statute implies a private right of action, congressional intent is "'a supreme factor,' and *Cort*'s other three factors are merely used to decipher congressional intent." *Id.* Here, analysis of the first two factors—whether the statute creates a federal right for Plaintiffs and whether there is any indication of legislative intent to create a remedy—is sufficient to demonstrate the VA statutes at issue do not afford a private right of action. *See California v. Sierra Club*, 451 U.S. 287, 297 (1981) ("[C]onsideration of the first two *Cort* factors is dispositive.").

i. Regarding the first, "[s]tatutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *Sandoval*, 532 U.S. at 289; *accord Lil' Man*, 5 F.4th at 958. The relevant statutory provisions focus on agents and attorneys who represent veteran claimants rather than claimants themselves. *See*

38 U.S.C. § 5901 (titled "Prohibition against acting as claims agent or attorney"); *id.* § 5904 (titled "Recognition of agents and attorneys generally").

ii. As to the second, Plaintiffs identify no indication of legislative intention to create a remedy. "A statute must [] display an intent to create a private remedy in order to create an implied right of action[,]" and "[t]he absence of remedial language is a key clue that Congress did not intend to imply a private right of action." *Lil' Man*, 5 F.4th at 959. Here, not only is there no evidence Congress intended to create a remedy under applicable statute—there is evidence Congress intended the opposite. The only provision articulating recourse for *any* actor against those who unlawfully assist veterans with claims was a prior version of section 5905, which authorized criminal penalties (not private lawsuits). 38 U.S.C. § 5905 (1991). That provision was expressly repealed in 2006. Pub. L. 109-461, § 101(g), 120 Stat. 3408 (2006); *see* Opp'n 21 n.2 (citing legislation to reinstate penalties).

In this respect, the relevant provisions are similar to the statute at issue in *Lil' Man.* The court found the statute's "express prohibition on the conduct of non-federal entities" "strongly suggest[ed] that [it] is 'the kind of general ban' that carries no implied intent 'to confer rights on a particular class of persons'" unlike those statutes that "target a class of beneficiaries as their subject." *Lil' Man*, 5 F.4th at 959-60 (quoting *Sierra Club*, 451 U.S. at 294). The lack of remedial language in the relevant sections of Chapter 59 and the restrictions surrounding agents and attorneys "strongly suggest" those sections do not imply intent to confer rights on claimants. By contrast, the statute at issue in *First Pacific Bancorp, Inc. v. Helfer*, on which Plaintiffs rely, obligated regulated entities to make and preserve annual reports for the benefit of bank shareholders, demonstrating the statute was "enacted for the benefit of the shareholders." 224 F.3d 1117, 1123 (9th Cir. 2000).[2]

b. Because analysis of the first two *Cort* factors reveals no congressional intent to imply a private right of action, the Court need not go further. *See Sierra Club*, 451 U.S. at 297. But the other two factors are also no help to Plaintiffs. The third factor—whether the remedy Plaintiffs seek is consistent with the statute's purpose—weighs against them because federal law does not bar Veterans Guardian's activities. The fourth factor—whether the cause of action is traditionally relegated to state law—does not tip either way since state consumer protection laws have a role to play in this space. *See Lil' Man*, 5 F.4th at 962 (where fees at issue were sometimes challenged under state law as well as federal law, the last *Cort* factor "d[id] not materially affect [the court's] analysis"); Opp'n 21 n.2 (citing three consumer actions pending in the Middle District of North Carolina).

[2] In addition, *Helfer* was decided the year before *Sandoval*, and thus did not address the private-right-of-action question under the current standard.

B. The Court Should Apply North Carolina Law to Plaintiffs' State-Law Claims.

Under Montana law, courts will apply the parties' chosen state law unless *all three* of the established factors are met: "(1) but for the choice of law provision, Montana law would apply under § 188 of the Restatement [(Second) of Conflict of Laws]; (2) Montana has a materially greater interest in the particular issue than the parties['] chosen state; and (3) application of the chosen state's law would contravene a Montana fundamental policy." *Masters Grp. Int'l, Inc. v. Comerica Bank*, 352 P.3d 1101, 1113 (Mont. 2015); *id.* ("All three conditions must be met."); *accord Modroo v. Nationwide Mut. Fire Ins. Co.*, 191 P.3d 389, 400 (Mont. 2008).

Plaintiffs cannot establish the third factor. Application of a choice of law provision will violate Montana public policy only "when its application would occasion a result that is clearly forbidden by Montana law." *Dunluck v. Assicurazioni Generali S.P.A.*, 590 F. Supp. 3d 1293, 1301-02 (D. Mont. 2022). Plaintiffs identify no such "clearly forbidden" result from application of North Carolina law to their claims. As discussed below, Montana's and North Carolina's consumer protection statutes are comparable.

C. Even if Montana Law Applied, Plaintiffs' State-Law Claims Would Fail.

Under North Carolina law, Plaintiffs' state-law claims fail and should be dismissed for the reasons previously set forth, Mot. 23-36, and not addressed by

Plaintiffs. But the claims would fail for the same reasons under Montana law because the two states' contract and consumer-protection laws overlap. Moreover, regardless of which state's law applies, Plaintiffs' claims fail because they rest on the erroneous premise that Veterans Guardian's services violate federal law.

1. Plaintiffs' Claim for Declaratory Judgment Should be Dismissed.

Plaintiffs' contention that "there exists 'uncertainty and insecurity' regarding the validity of the Contract," Opp'n 25, is unsupported by any factual content in the Complaint, as previously explained. *See* Mot. 23-25. Plaintiffs fail to respond to that explanation and therefore concede it. *See Rose v. Montana*, No. 20-cv-58, 2021 WL 5905980, at *3 (D. Mont. Dec. 14, 2021). And as discussed, the Contract is valid under federal law. Plaintiffs thus fail to state a claim under Montana's Uniform Declaratory Judgments Act.

2. Plaintiffs Fail to State a Claim Under the Montana Consumer Protection Act.

A claim under the Montana Consumer Protection Act ("MCPA") requires an injury, specifically "any ascertainable loss of money or property, real or personal." *Bratton v. Sisters of Charity of Leavenworth Health Sys., Inc.*, 461 P.3d 127, 134 (Mont. 2020). While actual damages are not required, Plaintiffs allege no loss of money or property so as to state a MCPA claim. *See id.* at 135 (rejecting MCPA claim where plaintiff failed to demonstrate ascertainable loss).

The $157 Mr. Young paid Veterans Guardian, Compl. ¶ 33, pales in comparison to the $314 he will receive every month for the rest of his life, *see id.* ¶¶ 30-31. Plaintiffs fail to allege any basis for a conclusion that Veterans Guardian should have assisted with a claim of total unemployability, as previously discussed, *supra* pp. 6-7. They cite no authority supporting their suggestion that emotional distress constitutes loss of "money or property" under the MCPA, Opp'n 25 & 26 n.3, and their allegations are insufficient to make out that claim in any event, *see infra* pp. 17-19; Mot. 31-34. By contrast, in *Vulles v. Thies & Talle Management, Inc.*, on which Plaintiffs rely, Opp'n 26, the plaintiff alleged financial loss in the form of "foregoing her right to find a cheaper dwelling and suffering higher rent …." No. CDV-2020-587, 2021 WL 6931081, at *4 (D. Mont. Feb. 23, 2021).

3. Plaintiffs' Claim of Unjust Enrichment Fails.

The valid contract between Mr. Young and Veterans Guardian precludes Plaintiffs' claim for unjust enrichment. *See Associated Mgmt. Servs., Inc. v. Ruff*, 424 P.3d 571, 595 (Mont. 2018) ("[A] valid contract defines the obligations of the parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment." (quoting Restatement (Third) of Restitution § 2(2))). Further, Plaintiffs fail to allege any facts that would show Veterans Guardian's acceptance of Mr. Young's $157 payment after he received a 10% disability rating increase—which translates to $314 in additional benefits every month for the rest of his life, *see* Compl. ¶¶ 30-31—is inequitable, an "essential element[] of an unjust enrichment claim." *Ruff*, 424 P.3d at 595. Veterans Guardian's services are also lawful, as discussed, and Plaintiffs fail to allege any financial or emotional injury, *see infra* pp. 17-19; Mot. 31-34.

4. Plaintiffs' Claim for Infliction of Emotional Distress Fails.

Under Montana law, claims for negligent and intentional infliction of emotional distress "require that the same basic elements be proven"—"serious and severe emotional distress as a reasonably foreseeable consequence of a defendant's [negligent or] intentional act or omission." *Czajkowski v. Meyers*, 172 P.3d 94, 101 (Mont. 2007) (intentional); *accord Sacco v. High Country Indep. Press, Inc.*, 896 P.2d 411, 428 (Mont. 1995) (negligent). "The difference … lies, not in the elements of the tort, but in the nature and culpability of the defendant's conduct." *Sacco*, 896 P.2d at 911. For intentional infliction of emotional distress, "'extreme and outrageous conduct' … must be the root cause of the requisite severe emotional distress." *Schurg v. United States*, 584 F. Supp. 3d 893 (D. Mont. 2022) (citing *Czajkowski*, 172 P.3d at 101). Conduct is "extreme and outrageous" when it goes "beyond all possible bounds of decency, and [is] regarded as atrocious, and utterly intolerable in a civilized community." *Czajkowski*, 172 P.3d at 101.

Plaintiffs do not allege facts that would support a finding of culpable conduct by Defendant, let alone "extreme and outrageous" conduct as is required to establish intentional infliction of emotional distress. Their infliction of emotional distress claim hinges on their contentions Veterans Guardian failed to provide services it contracted to provide, provided illegal services, imposed "excessive fees," and engaged in fraud. Opp'n 28-29, 31-32. But the first two contentions are not supported by factual content in the Complaint, *supra* pp. 15-16; Mot. 32-33, and the third fails because Veterans Guardian's fees are far from excessive, *see* Mot. 5-6. Plaintiffs' contentions are therefore insufficient under Rule 12(b)(6). *See Sacco*, 896 P.2d at 911.

The claim as to Rachel Young fails for the additional reason that the Complaint's vague and conclusory allegations of "mental, emotional, and financial stress" and "mental anguish and suffering"—the only allegations of harm to her—are insufficient to survive a Rule 12(b)(6) motion to dismiss. *See Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 834 (9th Cir. 2012) ("We accept all factual allegations …. However, conclusory allegations and unwarranted inferences are insufficient to defeat a motion to dismiss.").

5. Plaintiffs' Breach-of-Contract Claim Fails.

Plaintiffs' assertions that Veterans Guardian failed to conduct a full review of pertinent documents and medical records and research current medical opinions, Opp'n 33, are unsupported by factual content. The Complaint does not identify any pertinent documents or medical records Veterans Guardian did not review or any current medical opinions it failed to research. And as discussed, Plaintiffs' assertion that Veterans Guardian agreed to assist Mr. Young with a claim for total unemployability is unsupported. Plaintiffs' conclusory assertions are insufficient to establish a claim for breach of contract. *See Oklevueha Native Am. Church*, 676 F.3d at 834.

6. Plaintiffs Fail to State a Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing.

Plaintiffs' implied covenant of good faith and fair dealing claim relies on the same unsupported contentions as their other claims—that Veterans Guardian's services are unlawful, it did not assist Mr. Young with a total unemployability claim, and it failed to include documentation supporting his disability claim. Opp'n 34-35. Like the other claims, the lack of supporting factual content in the Complaint dooms the claim. *See Oklevueha Native Am. Church*, 676 F.3d at 834.

The Complaint alleges no facts that would support a conclusion Veterans Guardian failed to act with "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." *House v. U.S. Bank Nat'l Ass'n*, 481 P.3d 820, 831 (Mont. 2021) (quoting Mont. Code Ann. § 28-1-211)). The claim for breach of the implied covenant of good faith and fair dealing claim should be dismissed pursuant to Rule 12(b)(6).

CONCLUSION

For these reasons and those previously set forth, the Court should transfer this action to the Middle District of North Carolina or, alternatively, dismiss it with prejudice.

DATED this 2nd day of July, 2024.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion is double-spaced, is in 14 point type, and contains 4,466 words, excluding caption, signature, certificate of service, and compliance.

By: / s / Stephanie Baucus
STEPHANIE BAUCUS
BOBBI K. OWEN

ATTORNEYS FOR DEFENDANT

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EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

DAVID YOUNG and RACHEL YOUNG, Plaintiffs, v. VETERANS GUARDIAN VA CLAIM CONSULTING, LLC, Defendant.	Case No. 1:24-cv-01021-CCE-LPA

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

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INTRODUCTION

Owned and operated by veterans, Veterans Guardian VA Claim Consulting LLC ("Veterans Guardian") helps disabled veterans obtain the benefits owed them as a result of their honorable service to the nation. The company boasts a 90% record of success and charges a fee only if a client succeeds in obtaining an increase in monthly disability benefits from the U.S. Department of Veterans Affairs ("VA"). Plaintiff David Young is among the tens of thousands of veterans who achieved an increase with Veterans Guardian's help. Despite that success, he and his spouse, Rachel Young, now maintain that Veterans Guardian's claims-assistance services violate federal law and constitute unfair and deceptive trade practices.

Plaintiffs' Complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(6). First, Plaintiffs cannot sue based on the federal statute and regulations governing representation of veterans before the VA because neither provides a private right of action. In any event, Veterans Guardian's services and fees are not covered by the federal statute and regulations and, consequently, there is no violation of their provisions. Second, Plaintiffs' factual allegations are insufficient to state a claim that Mr. Young's contract with Veterans Guardian is invalid, for breach of contract, or other state law claims.

FACTUAL BACKGROUND

Veterans Guardian was founded in North Carolina by U.S. Army veterans Scott Greenblatt and William Taylor (both Lieutenant Colonels, U.S. Army, retired).[1] Like its founders, most employees of Veterans Guardian have deep connections to the military—75% are veterans, spouses of veterans, or spouses of active-duty military members.[2] Lt. Cols. Greenblatt and Taylor created the company to help veterans navigate the often confusing and difficult process of applying for VA disability benefits.[3] With Veterans Guardian's expert assistance, 90% of its clients achieve an increase in benefits.[4]

As alleged in the Complaint, David Young is a veteran with nearly nine years' service in the United States Army, through which he incurred disabilities. Compl. ¶¶ 1–2. Rachel Young is Mr. Young's spouse and helps him, including with paperwork, coordinating appointments, and researching "potentially helpful disability processes and opportunities." *Id.* ¶ 7.

Mr. Young alleges he first contacted Veterans Guardian through its website, communicated with company representatives by telephone and email, and then entered into a "Consulting Service Agreement" with Veterans Guardian on November 9, 2022 (the

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[1] Veterans Guardian, About Us, https://vetsguardian.com/about-us/ (last visited Dec. 18, 2024).

[2] *Id.*

[3] *See* Veterans Guardian, A Few Common Myths and the Facts that Debase Them, https://www.vetsknowthefacts.com/ (last visited Dec. 18, 2024).

[4] *See* Veterans Guardian, https://vetsguardian.com/ (last visited Dec. 18, 2024).

"Contract"). Compl. ¶¶ 14–15. At Veterans Guardian's recommendation, Mr. Young obtained a psychological evaluation by a provider the company recommended, for which he paid $290. *Id.* ¶ 24. Plaintiffs allege that Mr. Young also submitted to Veterans Guardian unspecified documentation from civilian doctors that supported a claim for total unemployability benefits. *Id.* ¶ 28.

Veterans Guardian assisted Mr. Young with a claim that resulted in a disability rating increase from 70% to 80%. Compl. ¶¶ 27, 30. That translates to $314 of increased monthly disability benefits, which over ten years is $37,680 and over thirty-five years is $131,880. *See id*. ¶¶ 30–31. The company charged a consulting fee of $1,570, in accordance with the Contract, which equates to 4.17% of the increased benefits Mr. Young will receive over the next ten years, and 1.19% of the increased benefits he will receive over the next 35 years. *See id.* To date, Plaintiffs have paid $157. *See id*. ¶ 33.

PROCEDURAL BACKGROUND

Plaintiffs filed the Complaint on February 2, 2024, in the District of Montana. *See* Docket, No. 1:24-cv-00014 (D. Mont.). On October 29, 2024, that Court granted Defendant's motion to transfer the case to this Court and denied its alternative motion to dismiss, without prejudice. *See id.* On December 5, 2024, this Court docketed the case.[5]

[5] Veterans Guardian has filed this Motion to Dismiss within 14 days of this action being docketed in this Court. Because the District of Montana closed the action after granting the transfer motion and denying the alternative motion to dismiss without prejudice, and because this Court did not docket the action until December 5, 2024, Veterans Guardian could not have filed its motion to dismiss within 14 days of the District of Montana's denial of the motion without prejudice. Consistent with the Court's Order of

QUESTIONS PRESENTED

1. Whether a private right of action exists based on 38 U.S.C. § 5901 or 38 C.F.R. § 14.629(b)(1).

2. Whether Plaintiffs allege that Veterans Guardian acted as an agency or attorney in assisting Mr. Young with his VA disability benefits claim.

3. Whether North Carolina law governs Plaintiffs' state law claims.

4. Whether Plaintiffs fail to state a claim that Mr. Young's Consulting Services Agreement with Veterans Guardian is invalid.

5. Whether Plaintiffs fail to state a claim for breach of contract.

6. Whether Plaintiffs fail to state a claim for breach of the duty of good faith and fair dealing.

7. Whether Plaintiffs fail to state a claim for unjust enrichment.

8. Whether Plaintiffs fail to state a claim for infliction of emotional distress.

ARGUMENT

I. Legal Standard

To survive a Rule 12(b)(6) motion to dismiss, a party must plead facts demonstrating a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007))). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the

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December 6, 2024, Defendant's counsel have endeavored to confer with Plaintiffs' Montana counsel regarding next steps in this case—including by emails on December 10, 16, and 19, and by telephone on December 19—but have received no response as to their availability.

reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

II. No Private Right of Action Authorizes a Claim Based on 38 U.S.C. § 5901 or 38 C.F.R. § 14.629(b)(1)

"Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Without congressional intent "to create not just a private right but also a private remedy . . . a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id*. at 286–87; *see also Johnson v. Interstate Mgmt. Co.*, 849 F.3d 1093, 1097 (D.C. Cir. 2017) ("[T]he Supreme Court [is] very hostile to implied causes of action." (collecting cases)). Lack of a private right of action "is fatal to the plaintiffs' claim." *Bauer v. Elrich*, 8 F.4th 291, 299 (4th Cir. 2021).

The federal statute on which Plaintiffs rely—38 U.S.C. § 5901[6]—does not expressly confer a private right of action. *See* 38 U.S.C. § 5901 *et seq*. Nor does the statute evidence any congressional intent to confer a private right of action based on the statute or its implementing regulations. *See id.* Section 5901 "grants no private rights to any identifiable class[,]" *Bauer*, 8 F.4th at 299 (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283–84 (2002)), and "focus[es] on the person regulated rather than the individuals

[6] The Complaint incorrectly cites the statute as "30 U.S.C. § 5901." ECF No. 1 at 12–13. Because a right of action can only be created by Congress, *Sandoval*, 532 U.S. at 286, no private right could exist the VA's regulation 38 C.F.R. § 14.629(b)(1).

protected[,]" *Sandoval*, 532 U.S. at 289. Accordingly, it implies no private right of action to support Plaintiffs' Claim I.

III. Plaintiffs Do Not Allege Veterans Guardian Acted as An Agent or Attorney in Violation of Federal Law

Plaintiffs' first claim also fails on the merits because it is premised on Plaintiffs' contention that Veterans Guardian's services violate federal statutes and regulations. The provisions they cite apply only to those individuals and entities that act as representative "agents" or "attorneys," not anyone who consults with a veteran about a claim. Because Plaintiffs do not allege that Veterans Guardian's employees act as "agents" or "attorneys," the Complaint fails to state a federal law violation.

The statutory and regulatory provisions on which Plaintiffs rely are specifically limited to the actions of "agents" or "attorneys." The foundational rule set out in section 5901 of title 38 provides that "no individual may act as an agent or attorney in the preparation, presentation, or prosecution of any claim under laws administered by the [VA] unless such individual has been recognized for such purposes by the Secretary." 38 U.S.C. § 5901(a). Relatedly, 38 C.F.R. § 14.629(b)(1) states that "[n]o individual may assist claimants in the preparation, presentation, and prosecution of claims for VA benefits as an agent or attorney unless he or she has first been accredited by VA . . . ." *Id*. (emphasis added). As this Court has recognized, "[t]o the extent the plaintiffs might contend the defendants do not have to act as agents to violate federal law, the statute says otherwise." *Ford v. Veterans Guardian VA Claim Consulting, LLC*, No. 1:23-CV-756, Order (July 16, 2024), ECF No. 30.

Plaintiffs do not allege that Veterans Guardian acted "as an agent" in connection with their claims. 38 U.S.C. § 5901(a). Black's Law Dictionary defines "agent" as "[s]omeone who is authorized to act for or in place of another." BLACK'S LAW DICTIONARY (11th ed. 2019). Similarly, the Third Restatement defines "agency" as "[t]he fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Restatement (Third) of Agency, § 1.10. *See also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 755–56 (1998) (using Restatement to interpret Title VII provision applying to "agent[s]"). According to the Notes to the Restatement, "[n]ot all relationships in which one person provides services to another satisfy the definition of agency." Restatement (Third) of Agency § 1.10 (Notes: Elements of Agency); *see Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 659 (4th Cir. 2019) (looking to Third Restatement of Agency in defining agency). Rather, "a relationship of agency always 'contemplates three parties—the principal, the agent, and the third party with whom the agent is to deal.'" *Id.* (citing 1 Floyd R. Mechem, A Treatise on the Law of Agency § 27 (2d ed. 1914)). "[I]f a service provider simply furnishes advice and does not interact with third parties as the representative of the recipient of the advice, the service provider is not acting as an agent." *Id.*[7]

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[7] Plaintiffs' construction of the federal law would violate the First Amendment by prohibiting Veterans Guardian from advising veterans—a speech-defined activity—on a particular subject: their claims for benefits, and thereby imposing an impermissible, content-based restriction on speech. Defendant recognizes that the Court has found that, if

The Complaint is devoid of any allegation that Veterans Guardian acted on Mr. Young's behalf as his agent. Instead, its allegations are consistent with Veterans Guardian's role as a consulting service that assists veterans in preparing VA disability benefits claims that veterans file themselves. Specifically, the Complaint alleges that Veterans Guardian prepared a claims package for Mr. Young that he submitted to the VA. Compl. ¶ 27. The Complaint additionally alleges that Veterans Guardian "required and instructed Plaintiff David Young" to take actions relating to his claims—completing forms and paperwork, obtaining a psychological evaluation, and submitting his claims package to the VA. *Id.* ¶¶ 23–25. It also alleges Veterans Guardian requested that Mr. Young consult with the company for advice before his Compensation and Pension examination. *Id.* ¶ 26. Because the Complaint does not allege that Veterans Guardian acted "as an agent," the federal-law claims fail to state a claim. *See* 38 U.S.C. § 5901(a); 38 C.F.R. § 14.629(b)(1).

IV. Plaintiffs' State Law Claims Fail

A. North Carolina Law Governs

The Contract includes a choice-of-law clause providing that North Carolina law governs disputes "arising out of or relating to" the Contract. *See* ECF No. 34 at 2 ("This agreement is entered into and shall be governed by the laws of the State of North Carolina and said states courts shall have exclusive jurisdiction to adjudicate any dispute arising out

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the federal law is properly construed to require action as an agent (or attorney) for violation, "it is highly unlikely that there is a First Amendment problem." *Ford*, No. 1:23-CV-756, Order (July 16, 2024), ECF No. 30. Defendant includes its First Amendment argument here to preserve it.

of or relating to this agreement." (quoting ECF No. 14-1 at 12)).[8] Because the district court in Montana transferred this case to this Court pursuant to 28 U.S.C. § 1404(a), the transferor court's choice-of-law rules apply. *Pender v. Bank of Am. Corp.*, 788 F.3d 354, 369 (4th Cir. 2015).

Montana courts follow the choice-of-law approach described in the Restatement (Second) of Conflict of Laws, *Barber v. Bradford Aquatic Grp., LLC*, 539 P.3d 648, 651 (Mont. 2023), which requires enforcement of a choice-of-law provision unless three factors are satisfied: "(1) but for the choice of law provision, Montana law would apply under § 188 of the Restatement; (2) Montana has a materially greater interest in the particular issue than the parties['] chosen state; and (3) application of the chosen state's law would contravene a Montana fundamental policy." *Masters Grp. Int'l, Inc. v. Comerica Bank*, 352 P.3d 1101, 1113 (Mont. 2015) (alteration in original) (quoting *Polzin v. Appleway Equip. Leasing, Inc.*, 191 P.3d 476, 480 (Mont. 2008)). If a choice-of-law provision does not violate Montana public policy, there is no reason to analyze factors (1) and (2). *Id.*

The District of Montana rejected Plaintiffs' contention that the Contract's forum-selection clause violates Montana policy as unsupported by their allegations. ECF No. 34

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[8] The Court may consider the Contract because the Complaint relies on it, it is integral to Plaintiffs' claims, and there is no basis to challenge its authenticity. *See, e.g.*, *Maness v. Village of Pinehurst*, 522 F. Supp. 3d 166, 168 n.1 (M.D.N.C. 2021) (recognizing that "a court may consider certain extrinsic evidence in ruling on a 12(b)(6) motion if it was 'integral to and explicitly relied on in the complaint' and the opposing party does not challenge its authenticity" (quoting *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004))).

at 11–14. Plaintiffs' allegations similarly identify no basis for concluding that the Contract's choice-of-law provision contravenes any policy of Montana. Montana and North Carolina have similar public policies regarding veteran disability benefits. *Compare* Mont. Code Ann. § 10-2-102(1)(b)–(c) (Montana Board of Veterans Affairs "assist[s] veterans and their families who are residents of this state in filing claims for the benefits to which they are entitled[,]" among other things) *with* N.C. Gen. Stat. Ann. § 143B-1211(5), (9) (North Carolina Department of Military and Veterans Affairs is responsible for providing outreach "to support and assist North Carolina's veterans in identifying and obtaining the services, assistance, and support to which they are entitled" and "to monitor and encourage the timely and accurate processing of veterans' benefit requests . . . , including requests for service connected to . . . disability payments."). Accordingly, the Contract's choice-of-law provision should be enforced and North Carolina law should govern all of Plaintiffs' state-law claims. *See Masters Grp. Int'l*, 352 P.3d at 1113.

All of Plaintiffs' claims concern interpretation of the Contract, the validity of it, and/or Veterans Guardian's actions under it. *See* Compl., Claims I–VII. According to Plaintiffs, "[t]hrough the Contract and [Defendant's] actions associated with the Contract, Defendant has harmed Plaintiff David Young, including by causing mental, emotional, and financial stress that exacerbated his PTSD and MDD disabilities" and "[t]hrough the Contract and [Defendant's] actions associated with the Contract, Defendant has harmed Plaintiff David Young, including by causing mental, emotional, and financial stress." *Id.* ¶¶ 6–7. The claims thus "aris[e] out of" the Contract, as the District of Montana recognized, ECF No. 34 at 1, or at a minimum relate to it. The choice of law clause, which encompasses "any dispute arising out of or relating to" the Contract, therefore encompasses all of Plaintiffs' claims and should be enforced. *See Republic Indus., Inc. v. Atl. Veneer Corp*., 166 F.3d 1210 (Table), 2 (4th Cir. 1999) ("In North Carolina, as in most other states, parties to a contract may agree in advance as to the choice of law that will govern any disputes that arise between them." (citing *Perkins v. CCH Computax, Inc*., 423 S.E.2d 780, 1783 n.1 (1992))); *Volvo Grp. N. Am., LLC v. Forja de Monterrey S.A. de C.V*., No. 1:16-CV-114, 2019 WL 4919632, at *5 (M.D.N.C. Oct. 4, 2019) (applying choice of law clause to contract and related tort claims where parties intentionally contracted to it).

Accordingly, pursuant to the Contract's choice-of-law clause, North Carolina law governs.

B. Plaintiffs' Claim under the Montana Statute Should be Dismissed

Because North Carolina law governs Plaintiffs' claims, as discussed immediately above, the Montana Consumer Protection Act is inapplicable. Plaintiffs' claim under that act (Claim III), therefore, should be dismissed.

C. Plaintiffs' Contract and Tort Claims Fail

1. Plaintiffs Fail to State a Claim that the Contract is Invalid

North Carolina's Declaratory Judgment statute authorizes courts to determine the validity of a contract. N.C. Gen. Stat. § 1-254. But none of Plaintiffs' arguments that Mr. Young's contract with Veterans Guardian is invalid hold water, and their claim for declaratory judgment therefore fails.

Plaintiffs' contention that Veterans Guardian's services and fees violate federal law, Compl. ¶ 45, fails for the reasons previously discussed. That erroneous argument underpins their mistake of law claim, *id*. ¶ 47, dooming it as well.

Plaintiffs' mistake of fact and fraud claims fail to meet Rule 9(b)'s heightened pleading standard, which again requires a plaintiff to "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b); *see Philipps v. Fruchterman*, No. 1:23-CV-845, 2024 WL 3212684, at *4 (M.D.N.C. Apr. 8, 2024) ("Under Rule 9 (b), a plaintiff must plead with particularity the 'who, what, when, where, and how of the alleged fraud.'" (quoting *United States ex rel. Wilson v. Kellogg Brown & Root, Inc*., 525 F.3d 370, 379 (4th Cir. 2008))). As to Plaintiffs' claims of actual and constructive fraud, beyond the meritless contention that Veterans Guardian's services are illegal, Plaintiffs fail to allege any particular facts that would demonstrate fraud. *See Topshelf Mgmt., Inc. v. Campbell-Ewald Co*., 117 F. Supp. 3d 722, 726 (M.D.N.C. 2015) ("[F]raud requires a '(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.'" (second alteration in original) (quoting *Forbis v. Neal*, 649 S.E.2d 382, 387 (N.C. 2007))).

Instead, Plaintiffs allege in only vague and conclusory terms that Veterans Guardian "suggested and asserted" it would provide "relevant information not otherwise available to Plaintiff" that would support Mr. Young's disability benefits claim. Compl. ¶ 48. Plaintiffs fail to identify the "relevant information" they reference, who allegedly conveyed that

Veterans Guardian would provide it, what that person allegedly said or wrote, or the time or place of the alleged communication. The allegations in support of the assertion of constructive fraud are comparably conclusory. Plaintiffs' allegations that Veterans Guardian "misled" Mr. Young are unaccompanied by any facts about: the contents of the allegedly misleading representation; the person who made it; how, when or where it was made; what would constitute an appropriate increase of disability benefits; or what documentation allegedly was not used. *Id.* ¶ 49.

Similarly, Plaintiffs' only support for their mistake of fact claim is the conclusory assertion that Mr. Young "mistakenly understood the terms of the Contract to include preparation and presentation of a disability claim for total unemployability . . . ." Compl. ¶ 46. The Complaint fails to identify, let alone allege with particularity, any of the circumstances that allegedly led Mr. Young to believe that Veterans Guardian's services included pursuit of a claim for total unemployability. *See McGuire v. LORD Corp.*, 456 F. Supp. 3d 729, 745 (E.D.N.C. 2020) ("[I]n order to affect the binding force of a contract, the mistake must be of an existing or past fact which is material; it must be as to a fact which enters into and forms the basis of the contract, or in other words it must be of the essence of the agreement, the sine qua non, or, as is sometimes said, the efficient cause of the agreement, and must be such that it animates and controls the conduct of the parties." (quoting *MacKay v. McIntosh*, 153 S.E.2d 800, 804 (N.C. 1967))).

Plaintiffs' additional theories of invalidity—lack of consent and conflict with Montana public policy—also fail to state a claim. Plaintiffs' contention that Mr. Young lacked consent to enter into the Contract is predicated on their claims of mistake and fraud, Compl. ¶ 50, and thus fails for the same reasons those claims fail. Their claim that the Contract is contrary to Montana policy fails because it is predicated on their erroneous contention that Veterans Guardian's services are contrary to federal law. *Id.* ¶ 53.

Plaintiffs' claim that the Contract is invalid is thus unsupported by the allegations of the Complaint, and their claim for declaratory relief (Claim II) should be dismissed.

2. Plaintiffs' Breach of Contract Claim Fails

A claim for breach of contract requires "(1) existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 530 S.E.2d 838, 843 (N.C. Ct. App. 2000). But Plaintiffs identify no term of the Contract that Veterans Guardian did not satisfy. They do not identify any documentation or records that Veterans Guardian agreed to review but did not review. Nor do they identify any medical condition that Veterans Guardian did not consider. Their conclusory allegations that the company failed to provide "services" that are not identified and "to determine all possible medical conditions that could qualify for service connection and a disability rating" without identifying any such alleged condition, Compl. ¶¶ 77–78, do not suffice under Rule 12(b)(6). *Iqbal*, 556 U.S. at 678; *Painter's Mill Grille, LLC v. Brown*, 716 F.3d 342, 350 (4th Cir. 2013). And as discussed, the assertion that Veterans Guardian undertook to assist with a claim of total unemployability is unsupported by any factual allegation. Plaintiffs thus fail to allege a factual basis for a conclusion that Veterans Guardian breached any term of the Contract, and their Claim VI should be dismissed.

3. Plaintiffs' Duty of Good Faith and Fair Dealing Claim Fails

Where a plaintiff's claim of breach of the duty of good faith and fair dealing centers on alleged breach of contract terms, the claim "rise[s] and fall[s] with the underlying claim[] for breach of contract." *BioSignia, Inc. v. Life Line Screening of Am., Ltd.*, No. 1:12CV1129, 2014 WL 2968139, at *5 (M.D.N.C. July 1, 2014) (recognizing that the "weight of North Carolina authority" does not treat breach of contract and breach of covenant of good faith and fair dealing as separate claims). Because Plaintiffs' allegations in support of their claim of breach of the duty of good faith and fair dealing—that Veterans Guardian deprived Mr. Young of the benefits of their contract and failed to pursue a total unemployability disability claim, Compl. ¶¶ 84–85—fail to state a claim for breach of contract, they "fall with th[at] underlying claim[] . . . ." *BioSignia*, 2014 WL 2968139, at *5. Plaintiffs' Claim VII therefore should be dismissed under Rule 12(b)(6).

4. Plaintiffs' Unjust Enrichment Claim Fails

A claim for unjust enrichment may not be brought "[i]f there is a contract between the parties," as "the contract governs the claim and the law will not imply a contract." *See Shelter Corp. v. BTU, Inc.*, 572 S.E.2d 200, 206 (N.C. Ct. App. 2002). Because Plaintiffs fail to allege any facts that would invalidate the Contract between Mr. Young and Veterans Guardian, the unjust enrichment claim (Claim IV) is precluded. *See id.* at 206–07 (explaining that "plaintiffs may not maintain a claim for unjust enrichment" because "the law will not imply a contract" when one exists between the parties).

5. Plaintiffs' Infliction of Emotional Distress Claim Fails

Plaintiffs fail to allege facts that would meet the high showing necessary for a claim of either negligent or intentional infliction of emotional distress. "[T]o state a claim for negligent infliction of emotional distress, a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress . . . and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Glenn v. Johnson*, 787 S.E.2d 65, 70 (N.C. Ct. App. 2016) (quoting *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 395 S.E.2d 85, 97 (N.C. 1990)). For intentional infliction of emotional distress, a plaintiff must allege "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another." *Id.* at 72 (quoting *Dickens v. Puryear*, 276 S.E.2d 325, 335 (N.C. 1981)). "[C]onduct is extreme and outrageous when it is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* Plaintiffs' allegations fail to establish either claim, and their Claim V should be dismissed.

a. Plaintiffs' negligent infliction of emotional distress claim fails for lack of alleged negligent conduct and foreseeability of severe emotional distress. Plaintiffs identify no duty that Veterans Guardian undertook or was obligated to perform, but failed to perform. *See Glenn*, 787 S.E.2d at 71 ("[T]he first element of [a negligent infliction of emotional distress] claim requires allegations that the defendant failed to exercise due care in the performance of some legal duty owed to [the] plaintiff under the circumstances[.]"

(second and third alterations in original) (quoting *Horne v. Cumberland Cnty. Hosp. Sys., Inc.*, 746 S.E.2d 13, 19 (N.C. Ct. App. 2013))). Insofar as they assert that Veterans Guardian should have helped Mr. Young prepare a claim for total unemployability, the assertion is unsupported by any factual allegations and therefore insufficient. *See Iqbal*, 556 U.S. at 678; *Painter's Mill Grille*, 716 F.3d at 350.

The negligent infliction of emotional distress claim fails for the additional reason that Plaintiffs do not allege any action or failure to act by Veterans Guardian that was "reasonably foreseeable . . . [to] cause [either of them] severe emotional distress . . . ." *Glenn*, 787 S.E.2d at 70; *see Oldham v. Univ. of N.C.*, No. 1:22CV513, 2023 WL 3984031, at *21 (M.D.N.C. June 13, 2023) ("[T]o state a claim for negligent infliction of emotional distress a plaintiff must allege more than conclusory statements enumerating the elements of the claim.").

b. Plaintiffs do not allege that Veterans Guardian *intended* to inflict emotional distress on either Plaintiff. For that reason alone, their claim for intentional infliction of emotional distress fails. *See Glenn*, 787 S.E.2d at 72. The intentional infliction of emotional distress claim also fails for lack of factual allegations that would establish "extreme and outrageous conduct." *Id.* Instead, Plaintiffs allege only that Veterans Guardian prepared Mr. Young's disability benefits claim that succeeded in achieving a 10% disability rating increase and directed him to take actions related to the preparation of that claim. Compl. ¶¶ 23–34.

Further, Plaintiffs do not allege any facts connecting any conduct of Veterans Guardian to Mr. Young's alleged emotional distress so as to establish causation. *See Glenn*, 787 S.E.2d at 72. The Complaint makes only the conclusory assertion that he suffered emotional distress "as a result of the requirements of the contractual arrangement with Defendant." Compl. ¶ 71. That is insufficient to survive a Rule 12(b)(6) motion. *See Iqbal*, 556 U.S. at 678; *Painter's Mill Grille*, 716 F.3d at 350.

c. Vis-à-vis Rachel Young, the intentional and negligent infliction of emotional distress claim fails for the additional reason that it is unsupported by any factual allegations that would establish the requisite severity of emotional distress. The unadorned, conclusory assertions that she has experienced "mental, emotional, and financial stress[,]" Compl. ¶ 7, and "mental anguish and suffering[,]" *id.* ¶ 72, are insufficient. *See Moschos v. Moschos*, 882 S.E.2d 401, 404 (N.C. Ct. App. 2022) ("[W]ithout factual allegations regarding the type, manner, or degree of severe emotional distress a plaintiff claims to have experienced, a plaintiff's complaint fails to sufficiently allege severe emotional distress."); *see also id.* ("Allegations that fail to identify a severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so are not sufficient.").

CONCLUSION

For the foregoing reasons, Plaintiffs fail to state a claim under federal law or state law. The Court should dismiss this action with prejudice.

Date: December 19, 2024

Respectfully submitted,

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<u>**CERTIFICATE OF WORD COUNT**</u>

The undersigned attorney hereby certifies that this Brief complies with LR 7.3(d) of the Rules of Practice and Procedure of the United States District Court for the Middle District of North Carolina with respect to its length. This Brief was created using Microsoft Word. Based upon the word count function of Microsoft Word, this Brief contains less than 6,250 words exclusive of the caption, signature block, Certificate of Service and this Certification of Compliance.

This the 19th day of December 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2024, I sent a copy of the foregoing document by e-mail to counsel who represented Plaintiffs in this matter before the United States District Court for the District of Montana prior to transfer, and that I will send a copy of the foregoing by Federal Express to Plaintiffs' Montana counsel and Plaintiffs' last-known mailing address tomorrow during business hours.

Respectfully submitted,

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