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Pursuant to Rules 5:26 and 5:29, TC MidAtlantic Development, Inc. ("TCM"), by counsel, respectfully submits this Reply Brief:

## ARGUMENT

### I. THE CIRCUIT COURT SUBSTANTIVELY MISINTERPRETED SECTION 47 (ASSIGNMENT OF ERROR NO. 1(B)).

With respect to the substantive merits of this appeal, it is significant that DGS admits not just once, but twice, that TCM's interpretation of Section 47 is essentially correct. Both of DGS's recitations of the requirements of Section 47 comport with TCM's interpretation:

> 1. Give written notice of an intent to file a claim ... at the time of occurrence or before beginning the work on which the claim is based [TCM's step 1].
>
> 2. Submit a written claim along with all practically available supporting evidence and documentation for a final decision by the agency within 60 days after final payment [TCM's step 2].
>
> 3. Obtain a final decision denying the claim or allow the time for a final decision to expire resulting in a deemed denial.
>
> 4. Initiate a legal action within six months of the final decision to avoid the decision from becoming final and conclusive [TCM's step 3].

See Opposition, at 7, 20. It is regrettable that DGS did not share this interpretation of Section 47 with the Circuit Court – which would have possibly obviated this appeal altogether. Indeed, in its December 17th

Order, the Circuit Court reached a fundamentally different – and incorrect – interpretation of step 2 of Section 47.

After improperly evaluating the "evidence" on demurrer, the Circuit Court held that TCM "did not file **suit** in this Court until April 24, 2007, more than **sixty days** after [DGS's] February 16, 2007 termination letter." App 427 (emphasis added). However, as TCM and DGS both agree, step 2 of Section 47 requires TCM to submit its formal **claim** within 60 days of final payment. TCM did just that when it sent DGS its Claim Letters on March 23, 2007 – within 60 days of DGS's February 16th Letter. App 108 (AC, ¶¶ 18, 19); App 68-75. TCM was not required, as the Circuit Court held, to "file suit in this Court" within 60 days after DGS's February 16th Letter. Instead, step 3 of Section 47 requires that a suit be filed within *six months* of the date the owner issues its written decision on the claim. App 1.

The Circuit Court also found that TCM "failed to file any other form of final complaint" with DGS. App 427. Under Section 47, TCM is not – and was never – required to file a formal complaint with DGS. It was only required to submit the formal claim to DGS (which was done on March 23, 2007). TCM was required to file a formal complaint with the Circuit Court, which it did on April 24, 2007. Finally, the Circuit Court found that DGS's February 16th Letter "marked the beginning of the sixty-day time period for

[TCM] to file a formal complaint" and that TCM did not "submit any documentation or make reference to a formal claim submitted within the sixty-day time period." App 429. Again, step 2 of Section 47 requires the submission of a formal claim (not a formal complaint) within 60 days.

The Circuit Court obviously conflated the "claim" and "complaint" steps and the deadlines associated with those steps in interpreting Section 47 and sustaining DGS's demurrer. Moreover, the Circuit Court could not have properly found that the "evidence of compliance" with Section 47 was "insufficient" given its misinterpretation of the requirements of Section 47 in the first place. DGS attempts to explain the Circuit Court's conflation of steps 2 and 3 by stating that the Circuit Court simply "interchang[ed]" the phrase "filing a formal complaint with [DGS]" with "filing a claim with DGS." Opposition, at 33 (emphasis in original). That, of course, is not what the Circuit Court itself concluded and, if left undisturbed on appeal, would invite continuing misapplication of the procedures delineated in Section 47.

## II. THE CIRCUIT COURT FAILED TO EVALUATE TCM'S ALLEGATIONS (ASSIGNMENT OF ERROR NO. 1(A)).

### A. The Circuit Court Failed To Consider The Facts Expressly And Impliedly Alleged As Well As Those Fairly Inferred.

The Circuit Court ignored the requirement that it not only accept as true those facts expressly alleged, but also "those which fairly can be

viewed as ***impliedly alleged***, and those which ***may be fairly and justly inferred*** from the facts alleged." See Catercorp, Inc. v. Catering Concepts, Inc., 246 Va. 22, 24, 431 S.E.2d 277, 279 (1993) (emphasis added); Ogunde v. Prison Health Servs., Inc., 274 Va. 55, 65, 645 S.E.2d 520, 526 (2007). DGS argues repeatedly that the Circuit Court was strictly limited to considering only the express allegations in the Complaint. See, e.g., Opposition, at 17.[1] This is not the applicable standard. Even if it were, the Circuit Court does not mention in its December 17th Order any of the allegations in TCM's Amended Complaint, much less analyze whether those allegations – and all facts impliedly alleged and which can be fairly and justly inferred from them – satisfy the requirements of Section 47 if taken as true. DGS's heavy reliance on Main v. Dept. of Highways, 206 Va. 143, 142 S.E.2d 524 (1965), is misplaced. In Main, the plaintiffs did not allege (and could not allege) that they had complied with the pre-suit requirements, unlike here, where TCM expressly pleaded that it did. App 107-08 (AC, ¶¶ 17-19); see also App 68-75. Moreover, the circuit court allowed the plaintiffs two opportunities to amend their complaint and only

[1] Ironically, even the case cited by DGS for this principle recognizes that a demurrer admits "any facts that may be reasonably and fairly implied and inferred from" the facts alleged. Philip Morris USA, Inc. v. The Chesapeake Bay Found., Inc., 273 Va. 564, 572, 643 S.E.2d 219, 223 (2007).

dismissed the action after they declined to amend for a second time. 206 Va. at 147, 142 S.E.2d at 528. In any event, even if TCM had not proffered the Claim Letters, the Circuit Court could have reasonably implied or inferred that TCM satisfied step 2 of Section 47 given TCM's allegations in Paragraphs 18 and 19. App 108. Instead, the Circuit Court drew inferences *against* TCM because it had not proffered supporting "evidence" of its claims. The one case cited by DGS, Pulte Home Corp. v. Parex, Inc., 265 Va. 518, 523, 579 S.E.2d 188, 190 (2003), does not hold that a circuit court can draw a negative inference from a party's failure to attach exhibits. In that case, the circuit court sustained the demurrer because the plaintiff failed to comply with the court's order granting oyer of the key document.

DGS also attempts to draw a legal distinction between TCM's use of the word "claim" in Paragraph 17 and "demand" in Paragraphs 18 and 19. Opposition, at 24-25. However, there is no such distinction under the law. This Court has defined these words to be interchangeable in a context similar to this case: "[A] 'claim' or 'demand' is a call ... to pay an amount alleged to be due. ... A 'claim' is defined as ... 'a demand of a right or supposed right[.]' ... Similarly, a 'demand' is 'a thing or amount claimed to be due.'" Stamie E. Lyttle Co., Inc. v. Hanover Co., 231 Va. 21, 26, 341

S.E.2d 174, 178 (1986) (citation omitted).[2] Both the Circuit Court and DGS rely on these definitions, making DGS's argument particularly unpersuasive. App 428; Opposition, at 20-21.

Similarly, the decision in Dr. William E.S. Flory Small Bus. Dev. Ctr., Inc. v. Commonwealth, 261 Va. 230, 541 S.E.2d 915 (2001), is unhelpful to DGS. In Flory, this Court found that the applicable statute "acknowledges that not all claims will arise under the same circumstances," and, therefore, "the timing and form of an alleged notice of intent ... requires an examination of the circumstances of each case." Id., at 238, 541 S.E.2d at 919.[3] This Court did not find in Flory that a "demand" is insufficient to constitute a claim, as DGS alleges. Opposition, at 21. DGS fails to cite any legal authority supporting its argument that the word "claim" is "a term of art in public contracts," and this Court's decision in Flory holds otherwise. Most troubling is DGS's attempt to distinguish Welding. This Court

---

[2] DGS's description of this case is incorrect. Stamie does not hold that a Section 47 claim cannot be made by letter; it does not even involve Section 47, and the Court held that a letter did, in fact, constitute the plaintiff's pre-suit demand on the government. 231 Va. at 26-27, 341 S.E.2d at 178. A separate letter was deemed not to be a claim, but only because the letter presented a settlement offer rather than demanding payment -- i.e., because of the letter's content, not its form. Id.

[3] DGS's reliance on the decision in Flory is also misplaced because it was not decided on demurrer; the circuit court substantively decided the merits of the claims in a Plea in Bar. Id., at 234, 541 S.E.2d at 917.

reversed the circuit court's finding that Welding's allegations in the amended pleading were insufficient to plead compliance with the statutory dispute procedures. Welding, Inc. v. Bland County Serv. Auth., 261 Va. 218, 541 S.E.2d 909 (2001). TCM's allegations of compliance with Section 47 were at least as specific as those set forth in Welding's amended pleadings. DGS misrepresents this point. More importantly, DGS ignores the portion of the holding that provides that the allegation regarding the form of compliance is "not [a] matter[] of pleading a cause of action, but of resolving the merits of the cause." Id., at 228, 541 S.E.2d at 914.

### B. Even Though Not Required To Do So, TCM Presented The Circuit Court With Evidence Of Section 47 Compliance.

TCM is not required at the pleading stage to present evidence of compliance with Section 47. Instead, on demurrer, TCM need only show that its allegations state a claim for relief. TCM was not required to attach the Claim Letters to its Amended Complaint. See Ogunde, 274 Va. at 65, 645 S.E.2d at 526 (statute did not "change[] the rules governing pleadings and motions in Virginia" as it did "not require the filing of additional documentation or affidavits with a pleading"); Hubbard v. Dresser, Inc., 271 Va. 117, 119, 624 S.E.2d 1, 2 (2006) ("A demurrer tests the legal sufficiency of facts alleged in pleadings, *not the strength of proof*") (emphasis added). TCM presented oral argument to the Circuit Court prior

to its December 17th Order that referred to the Claim Letters. App 344:21-345:6 (inadvertently referring to the Claim Letters as dated March 16th); and TCM submitted the Claim Letters with its Request for Suspension or Vacation ("Vacation Motion") and Reconsideration Motions only because the Circuit Court had erroneously found that TCM had submitted "insufficient evidence" of compliance with Section 47.

### C. Despite Multiple Opportunities To Do So, The Circuit Court Failed To Correct Its Error.

The Circuit Court had numerous opportunities to correct its error but, for some unknown (and, therefore, arbitrary) reason, chose not to do so. First, upon receiving the Circuit Court's December 17th Order, TCM filed its Vacation Motion requesting that the Circuit Court vacate and reconsider its Order. App 431. TCM intentionally attached the Claim Letters to that Motion to show that the Circuit Court erred in finding "insufficient evidence" of compliance with Section 47. To date, the Circuit Court has never ruled on TCM's Vacation Motion. By failing to rule on this Motion and address this evidence, the Circuit Court plainly abused its discretion.

Second, on January 4, 2008, TCM filed its Reconsideration Motion. App 445. To eliminate any ambiguity about compliance with Section 47, TCM again attached its Claim Letters to the Motion. App 454. On January 7, 2008, the Circuit Court denied the Motion ***before it was even opposed***.

App 465. The Circuit Court failed to provide any explanation or basis for its denial. Clearly, this was an abuse of discretion. Winston v. Commonwealth, 268 Va. 564, 620, 604 S.E.2d 21, 53 (2004).

Finally, the Circuit Court had the opportunity to correct its interpretive error on May 29, 2008, when TCM filed its Motion to Amend Order dated December 17, 2007. As argued by TCM in that Motion, the Circuit Court had the ***duty*** to correct the errors in its December 17th Order:

> [I]f it appears upon the face of the record that an interlocutory order or decree is erroneous and this fact is called to the attention of the trial court before final judgment or decree, it not only has the power, but it is its duty, to correct the error.

Kirn v. Bembury, 163 Va. 891, 902, 178 S.E. 53, 57 (1935); see also Freezer v. J. T. Miller, 163 Va. 180, 197 n.2, 176 S.E. 159, 165 (1934) ("'An interlocutory judgment or decree made in the progress of a cause, is always under the control of the court until the final decision of the suit'") (citation omitted). The Circuit Court denied the Motion to Amend on July 10, 2008 without first receiving any opposition from DGS.[4] In its denial, the

[4] DGS incorrectly argues that Rule 1:1 prohibited the Circuit Court from granting TCM's Motion to Amend because it was filed after the December 17th Order became "final" 21 days later. Rule 1:1 only limits the circuit court's ability to revisit *final* judgments and orders. The December 17th Order was interlocutory, not final, as recognized by this Court. App 470. Therefore, Rule 1:1 did not prevent TCM from seeking to amend the December 17th Order or the Circuit Court from revisiting it.

Circuit Court merely held that, "In reality, the Motion is a request that this Court reconsider a prior decision." App 495. The Circuit Court, however, had a duty to correct any erroneous prior Orders – whether presented by a motion to amend or a motion for reconsideration.

DGS also argues that the Reconsideration Motions were improper. Opposition, at 38. Motions for reconsideration are disfavored only if they seek to reargue issues already decided. See Hechler Chevrolet, Inc. v. Gen. Motors Corp., 230 Va. 396, 403, 337 S.E.2d 744, 749 (1985) (motion to reconsider properly denied where same arguments would be rehashed and motion was "fruitless"); accord Above the Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99, 101 (E.D.Va. 1983) (motion to reconsider merely reiterated previous arguments). In this instance, as recognized in Above the Belt, motions for reconsideration that address errors by the trial court are not only favored, *they are necessary judicial tools*.

> [Justice] Cardozo ... commented specifically on the importance of the motion to reconsider. ... 'A grievous wrong may be committed by some misapprehension or inadvertence by the judge for which there would be no redress, if this power did not exist.' It is clear, then, that there are circumstances when a motion to reconsider may perform a valuable function.

99 F.R.D. at 101. The Reconsideration Motions were the mechanism TCM used to ask the Circuit Court to correct its erroneous interpretation of

Section 47, which it was required to do. See App 483; Section IV, infra.

This Court itself has recognized that motions for reconsideration are an important tool by which a litigant may present new issues so as to preserve them for appeal. See Williams v. Gloucester (County of) Sheriff's Dept., 266 Va. 409, 411, 587 S.E.2d 546, 548 (2003) (instructing that party should have filed motion for reconsideration to preserve issues). This Court's decision in Torloni v. Commonwealth – which is procedurally indistinguishable from this case – is to the same effect. See id., 274 Va. 261, 265, 645 S.E.2d 487, 490 (2007) (where plaintiff made new arguments in a motion for reconsideration filed months after the Commonwealth's demurrer was sustained, plaintiff was able to present those arguments on appeal "because ... the trial court ruled on the motion by denying it"). To the extent the Reconsideration Motions presented new arguments, – as DGS admits (Opposition, at 36-37) – the Motions were proper.

**D. TCM Did Not Invite Error.**

DGS misstates the rule against approbation and reprobation and misrepresents TCM's arguments below. The rule prohibits a litigant from (1) arguing one position to the circuit court; (2) allowing the circuit court to rule in light of that position; and (3) on appeal, attempting to reverse the circuit court by adopting a different and contradictory position that the

circuit court was unable to consider. See Cangiano v. LSH Bldg. Co., L.L.C., 271 Va. 171, 180-81, 623 S.E.2d 889, 895 (2006). The rule, however, does not prevent a litigant from asserting alternative positions *to the circuit court*. Matthews v. Matthews, 277 Va. 522, 528-29, 675 S.E.2d 157, 160 (2009) (widow did not approbate and reprobate by offering two mutually exclusive wills for probate; noting that Rule 1:4(k) "allows a party to 'plead alternative facts and theories of recovery'").

Here, TCM's single and consistent position was that it alleged that it complied and, in fact, proved compliance with Section 47, although TCM emphasized different allegations and evidence of its compliance in its various briefs to the Circuit Court. See Matthews, 277 Va. at 529, 675 S.E.2d at 160 (despite offering multiple wills, widow's "consistent position was that her husband died testate"). It is irrelevant that TCM adjusted its presentation of its allegations and the evidence in its Reconsideration Motions because the Circuit Court was presented with those arguments and ruled on them. See Torloni, 274 Va. at 265, 645 S.E.2d at 490.[5]

[5] It is also irrelevant that TCM did not assign error to the January 7th Order in its prior petition for appeal, which this Court dismissed without prejudice. App 470. The decision of Angstadt v. Atlantic Mut. Ins. Co., 254 Va. 286, 492 S.E.2d 118 (1997), is inapposite because it involved appellants who failed to assign error in their first (accepted) appeal, then attempted to assign error for the first time in a second appeal.

## III. TCM'S PHASE II CLAIMS WERE ERRONEOUSLY DISMISSED (ASSIGNMENT OF ERROR NO. 2).

DGS's assertion that Cangiano prevents TCM from arguing its Assignment of Error No. 2 is erroneous and misrepresents the record. Cangiano holds that an appellant may not take a new position on appeal that contradicts its position before the circuit court. 271 Va. 171, 623 S.E.2d 889. TCM, however, never argued below that Section 47 applies to TCM's Phase II claims. TCM only argued that it complied with Section 47 with respect to its Phase I claims. App 259. When TCM addressed its claims as a whole, it argued that it "complied with all prerequisites to its filing suit" "whether TCM's claims arise under the Agreement [i.e., Phase II claims] or the Design Build Contracts [i.e., Phase I claims] incorporated therein[.]" Id. TCM consistently argued to the Circuit Court precisely what it has argued to this Court: that Section 47 does not apply to TCM's claims for Phase II. See App 432-33, ¶¶ 4-7 (Vacation Motion); App 447-52 (Motion for Reconsideration); App 474, 484 (Motion to Amend Order).

Recognizing the Circuit Court's error, DGS now argues for the first time on appeal that TCM's Phase II claims are subject to procedural requirements in the CPSM and several statutes and that TCM failed to satisfy those requirements. Opposition, at 40-41. DGS failed to raise this

argument below and, therefore, has waived it on appeal.[6] In any event, the CPSM is inapplicable by its own terms (CPSM § 326 provides: "The Owner's Dispute Resolution Procedures [Section 25] shall apply if in writing and if attached to the contract"). Moreover, TCM complied with Virginia Code §§ 2.2-814, 2.2-815 and 8.01-192. See App 129 (AC, ¶ 118).

DGS is also incorrect that TCM failed to present argument in support of its Assignment of Error No. 2 (the Circuit Court erred because it improperly applied Section 47 to TCM's Phase II claims). Opening Brief, at 9. TCM presented this argument to the Circuit Court in its Vacation Motion and both of its Reconsideration Motions. App 432-33, 449-52, 484. TCM presented argument in support of this Assignment in its opening Brief at 28-29 and cited Sections 47 and 25 of the Agreement as its authorities. Therefore, TCM fully complied with Rule 5:27.

## IV. THE CIRCUIT COURT ERRED IN DENYING LEAVE TO AMEND (ASSIGNMENT OF ERROR NO. 3).

In its December 17th Order, the Circuit Court ruled that "[TCM's] Amended Complaint is dismissed ***without leave to amend***." See App 429 (emphasis added). Because the trial court preemptively denied TCM an

[6] See Whitehead v. Commonwealth, 278 Va. 101, 115, 677 S.E.2d 265, 270 (2009) (an appellee may not assert on appeal a new argument that requires factual determinations that were not made by the trial court).

opportunity to amend, TCM could not have sought to amend without disregarding – if not disobeying – the December 17th Order. Unable to amend, TCM instead moved to vacate or suspend the December 17th Order (App 431-44), to reconsider it (App 445-64), and to amend it (App 474-94). Contrary to DGS's claims, TCM did not "decline" leave to amend.

The two cases cited by DGS are distinguishable because the plaintiffs in those cases were allowed to amend, but chose not to do so. See Legg v. County Sch. Bd. of Wise County, 157 Va. 295, 301, 160 S.E. 60, 61 (1931) (demurrer sustained with leave to amend); Main, 206 Va. 143, 142 S.E.2d 524 (plaintiffs that failed to allege compliance with required notice procedure were allowed multiple opportunities to amend after demurrers were sustained; case was ultimately dismissed after plaintiffs elected not to amend a second time).[7]

## CONCLUSION AND RELIEF SOUGHT

For the reasons set forth above as well as in TCM's opening Brief, TCM respectfully requests that that this Court reverse the Circuit Court's Orders and remand the case so that TCM can litigate its claims.

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[7] The other cases cited by DGS, Jones v. Ford Motor Co., 263 Va. 237, 559 S.E.2d 592 (2002) (errors during jury trial required remand for new trial), and P.L. Farmer, Inc. v. Cimino, 185 Va. 965, 41 S.E.2d 1 (1947) (jury verdict upheld), do not even involve demurrers or attempts to amend and, therefore, are irrelevant.

Dated: January __, 2010 TC MIDATLANTIC DEVELOPMENT, INC.

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## CERTIFICATE OF SERVICE

Pursuant to Rules 5:26(d) and Rule 5:29 of the Rules of the Supreme Court of Virginia, I hereby certify that on this ___ day of January, 2009, 15 copies and one electronic copy of the foregoing Reply Brief of Appellant were filed by hand delivery with the Clerk of the Court; and that three copies of the Reply Brief of Appellant were served by first-class mail, postage prepaid, on the following:

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