In The

Supreme Court of Virginia

RECORD NO. 150278

CPM VIRGINIA, LLC,

Appellant,

v.

MJM GOLF, LLC,

Appellee.

BRIEF OF APPELLEE

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STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS IN THE TRIAL COURT

CPM Virginia, LLC ("CPM") filed a Complaint in the Chesapeake Circuit Court on March 5, 2013, alleging MJM Golf, LLC ("MJM") had breached the Contract for Sale and Purchase of Real Property ("Contract" or "Purchase Agreement") for certain property ("Property") located in Chesapeake, Virginia, by not paying the deferred purchase price note of $700,000.00. App. 2-4. Based on the alleged default on the Contract by MJM, CPM requested the trial court grant specific performance of a contractual remedy, allowing CPM to repurchase the Property for the amount of MJM's "net capital investment." App. 8, 214.

MJM filed an Answer and Counterclaim, alleging that CPM had violated the seller's environmental warranty provision of the Contract by failing to comply with the Property's Conditional Use Permit ("CUP") and state environmental regulations. App. 23-26. The CUP and state regulations mandated 18 inches of soil to be placed over the amended fly ash. App. 259. Due to CPM's non-compliance, MJM expended over $1,500,000.00 to properly cover the fly ash. Therefore, MJM asserted the equitable defense of set off and recoupment under Virginia Code § 8.01-422, and requested the trial court find that MJM had spent more than the amount due on the note to remedy the violation, rule that the note was

extinguished and the deed of trust released, and award money damages to MJM for any amount spent over the purchase price.

The trial court heard this matter as the fact finder on May 8, 2014. After the presentation of evidence, the parties submitted trial briefs for the court's consideration. The trial court ruled that CPM had violated the seller's environmental warranty in the Contract and MJM had expended a greater sum than the amount owed under the note, which effectively extinguished the note and released the deed of trust. The trial court also held the collateral source rule applied to the specific facts of this case and consequently awarded MJM damages in the amount of $694,357.60 plus interest. On November 20, 2014, the trial court entered its final order further detailing the specific basis for its ruling.

STATEMENT OF FACTS

The Statement of Facts presented by the Appellant in its Brief is inaccurate and misleading to the Court. MJM's more accurate recitation, as supported by the Record, is set forth below.

The matter in controversy deals with a parcel of real property in the City of Chesapeake that became the Battlefield Golf Club. It is without dispute that CPM was the developer of the course and owner of the Property. To move this project forward, Robert DiBerardinis, an employee

of CPM, applied for and obtained a Conditional Use Permit ("CUP") from the City of Chesapeake to build the golf course with fly ash. App. 233-41, 529. Subsequently, CPM entered into a contract with Dominion Virginia Power ("Dominion") for the utilization of fly ash[1] generated at Dominion's Chesapeake Energy Center to sculpt and shape the golf course. App. 242-51. Dominion agreed to provide 1,500,000 total tons of fly ash for the golf course project while paying CPM $4.50 per ton to place and cover the fly ash. App. 242. Consequently, CPM was paid approximately $6,750,000 over the five years it took to finish the placing of the fly ash. Also as part of its contract with Dominion, CPM stated affirmatively that it would "comply with all the stipulations set forth by the City of Chesapeake pertaining to placement of ash at the Project site." App. 246. CPM then developed an Operations Plan[2] for the project which states the final earthen cover placed over the fly will consist of 24 total inches of soil (later amended to 18 inches). App. 647.

CPM stands for "Combustion Products Management" and is in the business of utilizing fly ash for various types of projects. App. 513. Neil Wallace ("Wallace"), the managing and only member of CPM, is an

[1] Fly ash is a byproduct of the burning of coal to produce electric power.
[2] The golf course was originally called Etheridge Greens Golf Course.

attorney licensed in New York and Florida.[3] App. 503. Wallace formed an earlier CPM-named entity in 1997, for the specific purpose of "engaging in the coal ash business, utilization and disposal." App. 513. Prior to this golf course project, Wallace (through that earlier entity) was already working with Dominion to dispose of excess fly ash. App. 525. Wallace subsequently created CPM Virginia, LLC for this golf course project. App. 526-27.

MJM was originally formed by Mark Sawyers ("Sawyers"), Jason Hand ("Hand"), and Mike Dorfler ("Dorfler"). App. 82. All three members shared a common love of golf. App. 83. During rounds of golf, Sawyers, Hand, and Dorfler discussed the idea of owning a golf course. Id. Sawyers discussed this idea with Mike Waugh ("Waugh"), a local golf professional with many years of experience running golf courses. App. 84.

Waugh began looking for an opportunity for MJM and came across this fly ash golf course project being developed by CPM. App. 85. This soon led to negotiations with CPM. App. 86. Wallace and Sawyers handled the negotiations for CPM and MJM, respectively. Id. MJM did not

[3] Wallace does not possess a Virginia law license.

have any knowledge of what work CPM did to the course other than it was made with fly ash.[4] App. 87.

A purchase agreement was entered into by CPM and MJM on August 28, 2006, which called for a deferred purchase price of $700,000.00 to be paid in full by January 1, 2013. App. 212-23. MJM, in turn, was to complete the sculpted landscape into a playable golf course. Id.

CPM transferred title in fee simple to MJM in a deed recorded at the Chesapeake Circuit Court. App. 213, 217, 224-26. Also recorded was a Deed of Trust listing Wallace and Harold Wallace as trustees, as well as a Deed of Trust note. App. 227-32. The explicit terms of the Deed of Trust allowed the trustees to institute foreclosure proceedings in the case of a default. App. 228-29. Additionally, CPM agreed in the Contract to subordinate its Deed of Trust to a bank loan obtained by MJM for construction cost, making CPM's Deed of Trust the second Deed of Trust on the Property. App. 214. When MJM failed to pay the note, CPM chose to pursue the alternate contractual remedy of buying the Property back listed in the Contract as opposed to foreclosing on the Property. App. 214.

CPM's Statement of Facts alleges that MJM agreed, as part of this Contract, to assume development of the course, referring to language in

[4] In fact, none of the initial members of MJM had any experience with golf course management, nor any experience in dealing with fly ash. App. 83.

the Contract. Appellant Br. at 8. This is the first time CPM has made this allegation, and at no time did CPM preserve this issue in the record. As a result, this Court should disregard CPM's assertion. In the alternative, Exhibit D of the Contract (attached hereto as Exhibit 1 of Appellee's Brief) clearly sets forth CPM's responsibilities—including but not limited to "cover soil and cover soil placement"—in the development of the property. Appellee Br, Ex. 1 at 3. MJM's activities were outlined on page 3 of Exhibit 1 as follows: "Golf Course construction activities, including but not limited to Installation of irrigation systems; Construction of permanent access roads and parking lots; Driving Range construction; Club House and Maintenance Building construction; Construction of cart paths, tees, fairways, greens and sand traps; [and] Final Landscaping." CPM acknowledged that MJM's responsibility was "to make it a playable golf course." App. 557:18; see also App. 558:4-559:2.

Closing on the sale occurred on January 30, 2007. App. 222-32. A second addendum to the Contract allowed CPM to finish the placement and covering of the fly ash after closing, as required by its contract with

Dominion.[5] App. 222-23; see also App. 556-57. Once CPM's work was completed, it hired John Blake ("Blake") to certify compliance with the state regulations.[6] App. 103. Prior to CPM hiring him, Blake had absolutely no experience with fly ash or knowledge of the applicable state regulations. App. 104. At trial, Blake could not independently remember when he went to the golf course or what he did. App. 107. Blake also admitted that he had no recollection of where the samples were taken or the depth of each individual sample. App. 114. Notwithstanding the foregoing, he then drafted a letter certifying CPM's compliance with state regulations. App. 255-56. Blake was never offered as an expert witness, and CPM conceded at trial that Blake was not an expert witness. App. 119.

Gene Hatcher ("Hatcher") was called as an expert witness by MJM. App. 124. Hatcher testified that in his professional opinion, a qualified geotechnical engineer would have used a systematic procedure in a grid-pattern such as taking a sample every acre based on a map of the property. App. 129-30. Hatcher also testified that a geotechnical engineer

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[5] Initially, another company, VFL, was placing and shaping the golf course after the fly ash was treated with cement or lime kiln dust for binding; however, CPM was eventually responsible for the shaping of the course, as well. App. 542-43.

[6] This contradicts the CPM letter dated January 23, 2007, where it states "Midgette and Associates and John Blake [will] provide confirmation to the DEQ." App. 223.

would have kept records of where each hole had been dug and the results of each sample, which would have been the basis for an opinion on whether there was enough ground cover. App.127-28. Hatcher's opinion was that arbitrarily digging 20 to 40 holes[7] would not have been adequate to determine the cover depth to a reasonable degree of engineering certainty. App. 130.

MJM completed construction and opened the Battlefield Golf Club in October, 2007. App. 160. Within a year from the opening, MJM discovered that CPM had failed to place 18 inches of topsoil, as required by its contract with Dominion, the Contract with MJM including the second addendum, the CUP, and Virginia State law. In July 2008, a severe thunderstorm washed out a small portion of dirt adjacent to the haul road, leaving exposed fly ash. App. 139. As a result, the golf superintendent of the course, Willie Cooper ("Cooper"), was tasked with investigating areas of concern to determine if there was enough soil cover over the fly ash. App. 142.

At any area of concern, Cooper would go out in all directions until he found areas with at least 18 inches of soil cover. App. 145. Eventually, it was discovered that almost every hole on the golf course had areas with

[7] While having no independent memory of the number of holes he dug, Blake testified that it could have been in the range of 20 to 40. App. 107.

less than the required 18 inches of cover. App. 146. In total, about 45 acres of the 217-acre course required additional soil to get to 18 inches of cover. App. 176, 272-301. As shown at trial through MJM's exhibits and testimony, multiple areas had insufficient coverage on fairways and tee boxes where it was shown that MJM planted grass. App. 159, 167-77, 272-301. Based on selected portions of the testimony of Waugh and Willie Cooper, CPM states "the cover was significantly eroded due to washouts cause by 'gully washer' rain storms and MJM's failure to plant vegetative cover." Appellant Br. at 26. But this again is a mischaracterization of the testimony. Cooper testified under cross examination that the out-of-play areas of the course had natural cover in the form of weeds. App. 151. Waugh testified that areas of the course had natural cover, Bermuda grass, and weeds. App. 177.

From 2009-2013, MJM discovered that 45 acres of the golf course did not have 18 inches of soil cover. App. 176. In the areas lacking the 18 inches of required topsoil, the shortfall ranged from 3 to 15 inches. App. 272-301. At trial, MJM introduced Exhibit 11, which summarized the shortfalls in the topsoil on the Golf Course, the amount of replacement topsoil necessary to bring the property into compliance with the pertinent environmental regulations and the cost of the additional topsoil. Id. CPM

stipulated that Exhibit 11 accurately summarized the topsoil shortfall, the amount of dirt required to remediate that shortfall, and the resulting costs. App. 175:11-16. In total, approximately 6,050 truckloads of soil, weighing approximately 108,918 tons, were needed to correct CPM's failure to place the required 18 inches of topsoil cover over the fly ash on the property. App. 272-301. MJM spent $1,596,212.48 to purchase this topsoil and have it placed on the property. Id.

After MJM discovered the topsoil cover shortfall, it entered into a Maintenance Agreement with Dominion on August 5, 2008. App. 497-98. The Maintenance Agreement stated that "[c]oncerns have been raised in the community regarding the Fly Ash, and the Parties desire to address these concerns and ensure that the Property is in compliance with relevant laws and regulations." App. 497. To address these concerns, Dominion agreed to "promptly begin to provide MJM with funds to pay for its actual and verifiable out of pocket expenses reasonably incurred in complying with the Regulations relative to the Fly Ash." Id. In exchange, MJM agreed to "maintain the property in accordance with the Regulations and shall, to the extent not required by the Regulations, (i) maintain a minimum cover of 18 inches vegetated topsoil over the Fly Ash at all times, and (ii) properly care for such vegetated cover (e.g. regular watering) in order to insure its

integrity." Id. The agreement further provided that if MJM failed to comply with these requirements, "Dominion, in addition to any other remedies available to it at law or in equity, (i) shall have no obligation hereunder, and (ii) at its election, shall be entitled to an immediate refund of all amounts paid by Dominion to MJM." Id.

MJM did not pay the note when it became due because of CPM's breach of its obligation to provide 18 inches of soil cover. App. 68, 72. More specifically, MJM asserted that it no longer owed the money because of CPM's material breach of the warranty in the Contract. App. 210-11.

CPM filed suit against MJM seeking specific performance of its alternate contractual remedy under the Contract to purchase the Property back from MJM for its "net capital investment." App. 1-22. MJM denied the allegations of CPM's Complaint and filed a Counterclaim seeking set off and recoupment for the money expended to cure CPM's breach. App. 23-27

After hearing the evidence on May 8, 2014, and considering trial briefs and arguments, the trial court ruled in favor of MJM, ordered the note canceled, the Deed of Trust released, and awarded MJM damages in the amount of $694,357.60 plus interest. App. 735-37.

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES

I. The trial court did not err when it applied the collateral source rule to the facts of this case (Assignment of Error I).

CPM argues that the trial court erred by applying the collateral source rule to the warranty and indemnity provisions contained in the Purchase Agreement. Appellant Br. at 14. Throughout its Opening Brief, CPM quotes various statements from the transcript as being the trial court's "ruling". Not only are the quotes largely out of context, but "[t]his Court has stated on numerous occasions . . . that trial courts speak only through their written orders and that such orders are presumed to reflect accurately what transpired." See Temple v. Mary Washington Hosp., Inc., 288 Va. 134, 141, 762 S.E.2d 751, 754 (2014) (holding that because trial court's order did not expressly incorporate certain motions, objections, or previous rulings made by the court, those rulings could not be challenged on appeal). Accordingly, the Court's analysis of whether the trial court properly applied the collateral source rule in this case must begin and end with the trial court's Order.

In its Order, the trial court held that:

> the collateral source rule applies to the specific facts of this case. Specifically, CPM materially breached the Contract, and MJM incurred substantial monetary obligations to third parties to remedy that breach. The fact that Dominion advanced funds to MJM to pay off the debts that MJM incurred as a result of

> CPM's breach of warranty pursuant to the Maintenance Agreement . . . is irrelevant to this dispute under the collateral source rule. Specifically, CPM should not receive a benefit or credit in any fashion from the advancement of funds pursuant to the Maintenance Agreement from Dominion to MJM to pay debts incurred by MJM to cure the warranty breach by CPM. To hold otherwise would permit a windfall to CPM caused by its own breach of contract.

App. 736-37, at ¶ 6.

The trial court's application of the collateral source rule presents a question of law, which is subject to this Court's de novo review. See Marcus, Santoro & Kozak, P.C. v. Wu, 274 Va. 743, 749, 652 S.E.2d 777 (2007).

A. *The rationale underlying the collateral source rule is one of balancing the equities—not punishment—and the rule should be applied where it would prevent a wrongdoer from reaping a benefit to the detriment of an innocent party, regardless of whether the action sounds in tort or contract.*

This Court has long recognized the applicability of the collateral source rule in tort cases. See Acuar v. Letourneau, 260 Va. 180, 188, 531 S.E.2d 316, 320 (2000) ("The collateral source rule is a long-standing principle in Virginia tort law and has been applied in tort cases for more than a century."). Generally, the collateral source rule provides that "[c]ompensation or indemnity received by a tort victim from a source collateral to the tortfeasor may not be applied as a credit against the quantum of damages the tortfeasor owes." See Schickling v. Aspinall, 235

Va. 472, 474, 369 S.E.2d 172, 174 (1988). One of the recognized rationales behind the rule is that "[t]he wrongdoer cannot reap the benefit of a contract for which the wrongdoer paid no compensation." Acuar, 260 Va. at 193, 531 S.E.2d at 323 (citing Baltimore & Ohio R.R. Co. v. Wightman's Adm'r, 70 Va. (29 Gratt.) 431, 446 (1877)).

CPM argues that this Court has consistently limited the application of the collateral source rule to tort actions and has stated anecdotally that the collateral source rule does not apply to actions ex contractu. See Appellant Br. at 15. In reality, this Court has never taken the opportunity to address whether the collateral source rule applies to contract actions. Schickling 235 Va. at 475, 369 S.E. at 174. ("We have never had occasion to consider whether the collateral source rule applies to contract cases.") As this Court noted in its opinion, the facts in Schickling were inapposite to the collateral source rule. That case was decided on a purely contractual analysis. However, that analysis does have applicability here.

In Schickling, Aspinall and Schickling executed a Co-Ownership Agreement under which Aspinall was to receive 95% of the profits and incur 95% of the losses with the other 5% of profits and losses to be incurred by Schickling. Id. at 473, 369 S.E. at 173. Schickling rented the subject property, and having been relocated on his job, a sale was

necessitated, which resulted in a loss. Id. The money to cover the loss at closing was advanced by Schickling from funds he received under the terms of his Employment Contract with a third-party. Id. at 473-74, 369 S.E. at 173. Aspinall sought to recover 95% of those funds. Id. at 474, 369 S.E. at 173. The Court held that the sales shortfall was a loss and, pursuant to the Co-Ownership Agreement, Aspinall was subject to 95% of the losses, and, therefore, was required reimburse Schickling 95% of the money used to cover the shortfall. Id. at 475, 369 S.E. at 174. The Supreme Court, in holding for Schickling, held that the funds were received by Schickling pursuant to a contract with a third party, that those parties never intended for Aspinall to be a third-party beneficiary, and the contract was wholly unrelated to the co-ownership agreement upon which Aspinall based his suit against Schickling. Id.

In this case, MJM has received funds from Dominion pursuant to the Maintenance Agreement, a third-party contract to which CPM is not a party, nor a contemplated third-party beneficiary. Yet, CPM seeks the benefit of application of those funds to its own contractual obligations. The Maintenance Agreement funds have been used by MJM to satisfy a contractual obligation for which CPM was solely responsible. Under the express terms of the Purchase Agreement, CPM warranted that it had

complied with the CUP and State regulations in placing 18 inches of cover on the Property. The costs of that work were to have been borne by CPM under its contracts. It failed to do so. Accordingly, the fact that MJM has received Maintenance Agreement funds to cure CPM's breach does not entitle CPM to the benefits of any of those funds to satisfy its contract obligation with MJM. Just as Aspinall could not utilize the funds from Schickling's third-party employment contract to cover the losses for which he was responsible under the Co-Ownership Agreement, likewise, CPM cannot utilize the funds received by MJM from Dominion pursuant to the Management Agreement to satisfy its obligations to deliver a legally-compliant property under its Purchase Agreement with MJM.

Further, CPM completely ignores the policy behind the collateral source rule—that a party should be prohibited from gaining a windfall as a result of its own breach, wrongdoing, or attempt to avoid its contractual duties. The Court's ruling in Schickling, and its favorable discussion of the collateral source rule therein, demonstrates this policy, and while inapplicable to the facts of the Schickling case, the public policy of the collateral source rule was correctly held by the trial court to apply to the specific facts of this case. See App. 736-37, at ¶ 6.

CPM also mischaracterizes the application of the collateral source rule to the facts of this case as being punitive. In support of its position, CPM cites to Maryland appellate court cases stating "the collateral source rule is punitive; contractual damages are compensatory." See Appellant Br. at 16. To the contrary, this Court has specifically characterized the collateral source rule as being "consistent with the purpose of compensatory damages." See Acuar, 260 Va. at 192, 531 S.E.2d at 323. The purpose of compensatory damages is to make the victim whole. See id. The collateral source rule is not designed to inflict punishment; it is designed as a tool for weighing the equities in favor of the innocent party, especially where the wrongdoer stands to reap an inequitable windfall.

This Court has recognized that

> [t]he collateral source rule is designed to strike a balance between two competing principles of tort law: (1) a plaintiff is entitled to compensation sufficient to make him whole, but no more; and (2) a defendant is liable for all damages that proximately result from his wrong. A plaintiff who receives a double recovery for a single tort enjoys a windfall; a defendant who escapes, in whole or in part, liability for his wrong enjoys a windfall. Because the law must sanction one windfall and deny the other, it favors the victim of the wrong rather than the wrongdoer.

Schickling, 235 Va. at 474–75, 369 S.E.2d at 174. Thus, if any party reaps a "windfall", the law requires that the Court favor the victim—MJM.

Indeed, the record at trial established that the wrongdoer, CPM, would reap a windfall if it were granted the relief that it sought. Pursuant to the CPM/Dominion Contract, Dominion agreed to supply CPM with a minimum of 1,500,000 tons of fly ash between 2002 and 2007 through its ash management contractor VFL for CPM's use in the golf course project. App. 246. Dominion agreed to pay CPM $4.50 per ton of delivered fly ash, or at least $6,750,000. Id. CPM breached the CPM/Dominion Contract by failing to place sufficient top soil cover over the fly ash as required by the Contract and CUP. By failing to comply with the cover requirements, CPM kept its costs down and its profits up. CPM then breached the warranty provisions of the Purchase Agreement by continuing its failure to comply with the cover requirements. As a result of CPM's breach of the Purchase Agreement's warranty provisions, Dominion is now advancing funds pursuant to the Maintenance Agreement for MJM to do the same thing that it already paid CPM to do in the first place.

To grant the relief sought by CPM would violate the policy upheld by this Court in numerous cases—that a party should be prohibited from gaining a windfall as a result of its own breach or wrongdoing—regardless of whether this Court holds that the collateral source rule applies to the facts of this case. See Schickling, 235 Va. at 474-75, 369 S.E.2d at 174.

"That the breaching party in these cases is forced to pay damages in line with the expectations of the parties actually serves the maxim that a party should not profit more from breach of a contract than its full performance." John Munic Enters. v. Laos, 326 P.3d 279, 235 Ariz. 12, 18 (Ariz. Ct. App. 2014).

As demonstrated in further detail below, MJM has suffered extensive damages as a direct result of CPM's breach of the warranty provisions in the Purchase Agreement. Accordingly, the trial court correctly held that

> [t]he fact that Dominion advanced funds to MJM to pay off the debts that MJM incurred as a result of CPM's breach of warranty pursuant to the Maintenance Agreement . . . is irrelevant to this dispute under the collateral source rule. Specifically, CPM should not receive a benefit or credit in any fashion from the advancement of funds pursuant to the Maintenance Agreement from Dominion to MJM to pay debts incurred by MJM to cure the warranty breach by CPM. To hold otherwise would permit a windfall to CPM caused by its own breach of contract.

App. 736-37, at ¶ 6.

B. This Court has never completely foreclosed application of the collateral source rule to contract cases.

There is no blanket prohibition to applying the collateral source rule in contract actions. Indeed, the Court in Schickling did not advocate a blanket prohibition—it merely avoided determining whether the collateral source rule applied to contracts, while applying the same underlying policy to the

particular facts of that case. A blanket prohibition against applying the collateral source rule to contract actions is too broad. Rather, application of the collateral source rule requires a case by case analysis. See, e.g., John Munic Enters. v. Laos, 326 P.3d 279, 286, 235 Ariz. 12, 19, (Ariz. Ct. App. 2014) (noting that "[p]ersuasive scholarship . . . supports application of the collateral source rule . . . using a 'case by case analysis.'" (quoting Remedies § 12.6(4)).

Under certain circumstances, it is appropriate for the court to apply the collateral source rule to a contract action. Indeed, other jurisdictions have expressly extended the collateral source rule to actions ex contractu. See, e.g., NLRB v. Gullett Gin Co., 340 U.S. 361, 364-65, 71 S. Ct. 337 (1951) (declining to deduct unemployment compensation benefits from back pay award); Structural Metals, Inc. v. S&C Elec. Co., 2013 LEXIS 31226 (W.D. Tx. 2013) (holding that the collateral source rule applied to breach of warranty action and defendant would not receive a credit from insurance payments made to insured plaintiff where insurance was independently procured for plaintiff's own benefit and insurance company may have subrogation rights); Bangert v. Beeler, 470 So. 2d 817, 818, 1985 Fla. App. LEXIS 14529, at *2, (Fla. Dist. Ct. App. 1st Dist. 1985) (applying the collateral source rule in a contract action under the rationale

that the "breaching party should not be rewarded when the wronged party's collateral source is wholly independent of the breaching party."); Hall v. Miller, 465 A.2d 222, 226, 143 Vt. 135, 143 (Vt. 1983) ("[W]e think the better rule is that the collateral source rule should apply to actions sounding in contract, as well as in tort. The breaching party in a contract action or, as here, a breach of warranty action, may not be a wrongdoer in the same sense as is a tortfeasor. Nonetheless, as between the two parties, it is better that the injured plaintiff recover twice than that the breaching defendant escape liability altogether."); GNP Commodities, Inc. v. Walsh Heffernan Co., 420 N.E.2d 659, 668, 95 Ill. App. 3d 966 (Ill. App. Ct. 1981) (where contract secured by misrepresentations of breaching party, "no reason [exists] why the collateral source rule should not apply to bar defendants from reducing damages by proof that plaintiff has been compensated from a source to which they have not contributed").

Furthermore, the cases relied upon by CPM in its Opening Brief are factually dissimilar from the case at bar. Each of the cases cited by CPM involved a straight breach of contract action. See Appellant Br. at 14–15. On the contrary, this action is in one of breach of warranty provisions—specifically, CPM warranted to MJM that it had complied with "all applicable federal, state and local laws, regulations, ordinances." App. 216, at

¶ VIII(B). This was a misrepresentation and a breach of the warranty provisions in the Contract. The warranty provisions survived closing, and the breach of those warranties was ongoing. MJM was required to obtain funds from a third party to remedy CPM's breach of warranty.

A blanket prohibition would strip the courts of their ability to weigh the equities. See Acuar, 260 Va. at 193, 531 S.E.2d at 323 ("The wrongdoer cannot reap the benefit of a contract for which the wrongdoer paid no compensation."). Furthermore, if a blanket prohibition were adopted, as advocated by CPM, courts would be foreclosed from considering application of the collateral source rule to contract cases with facts that demonstrate the breaching conduct involved is tortious in nature.

Breach of warranty actions sound in both contract and tort. See, e.g., E.I. Du Pont Nemours & Co. v. Univ. Moulded Prods. Corp., 191 Va. 525, 535, 62 S.E.2d 233, 236 (1950) ("Here the action is based upon a breach of warranty, and, while the complainant may, if he chooses, waive the tort and sue upon contract, he is equally at liberty, where there is a breach of warranty, to sue in tort. . . ." (quoting Std. Paint Co. v. E.K. Vietor & Co., 120 Va. 595, 602, 91 S.E. 752, 755 (1917))). In deciding whether to apply the collateral source rule to a breach of warranty action, the court in Hall v. Miller specifically held:

> [W]e think the better rule is that the collateral source rule should apply to actions sounding in contract, as well as in tort. The breaching party in a contract action or, as here, a breach of warranty action, may not be a wrongdoer in the same sense as is a tortfeasor. Nonetheless, as between the two parties, it is better that the injured plaintiff recover twice than that the breaching defendant escape liability altogether.

Hall, 465 A.2d at 226, 143 Vt. at 143.

In that case, the plaintiff dairy farmers purchased certain cattle from the defendants, who operated a cattle dealership in Vermont. Id. at 222, 143 Vt. at 138. The cattle were expected to calve and would thereafter be used as milk cows; however, the cattle became sick with brucellosis and were required by the state to be sold for slaughter. Id. Pursuant to a state and federal indemnification program, the plaintiffs received a total payment of $9,275.50 for their loss. Id. at 226, 143 Vt. at 142. The plaintiffs brought suit against the defendants, alleging inter alia breach of implied warranty. Id. The defendants asserted that any recovery should be reduced by the amount received by the plaintiffs through the governmental indemnification program. Id. Using the rationale referenced above, the court applied the collateral source rule and held that the "defendants here may not offset their adverse judgment by the amount plaintiffs recovered from sources wholly independent from the defendants." Id. at 227, 143 Vt. at 144.

If the Court were to adopt CPM's position that there should be a blanket prohibition for contract cases, courts would not be able to exercise discretion in weighing the equities to determine whether the collateral source rule applies to a given set of facts. This is concerning, especially in warranty cases that sound in both contract and tort. See E.I. Du Pont Nemours & Co., 191 Va. at 535, 62 S.E.2d at 236.

This Court should rule that the collateral source rule should be applied on a case by case basis and, specifically, that the collateral source rule applies to the facts of this case.

C. The evidence at trial established that MJM incurred significant expenses to remedy CPM's breach.

CPM also claims that the collateral source rule is not applicable to the indemnification clause in the Purchase Agreement because MJM did not prove that it sustained any damages. In Section VIII(B) of the Purchase Agreement, CPM agreed to "hold harmless Buyer against any and all claims, losses, liabilities, damages, penalties, expenses which Buyer may incur as a result of any violation of this paragraph." App. 216. (emphasis added). The evidence at trial established that that MJM incurred the expenses to remedy CPM's breach, as MJM, not Dominion, "became legally obligated to pay" each of the invoices. See Va. Farm Bureau Mut. Ins. Co. v. Hodges, 238 Va. 692, 696, 385 S.E.2d 612, 614 (1989)

("An expense is . . . 'incurred' . . . when one has paid it or becomes legally obligated to pay it."). Indeed, Trial Exhibits 11 through 17 clearly demonstrate that MJM—not Dominion—was the contracting party for each and every one of the numerous invoices for expenses MJM incurred throughout the years in remedying CPM's breach. Dominion was never legally obligated to pay any of the invoiced expenses.[8] CPM is not entitled to claim a benefit based upon a wholly separate and distinct contract between MJM and Dominion to which CPM is not a party or third party benficiary. See Schickling, 235 Va. at 475, 369 S.E.2d at 174.

The source of the funds paid by MJM to remedy CPM's breach is irrelevant to this case. Indeed, the trial court so held. See App. 736-37, at ¶ 6 ("The fact that Dominion advanced funds to MJM to pay off the debts that MJM incurred as a result of CPM's breach of warranty pursuant to the Maintenance Agreement . . . is irrelevant to this dispute under the collateral source rule."). The Maintenance Agreement contains nothing that can lead a reasonable person to believe that Dominion accepted any legal responsibility to pay any supplier or contractors for the work being done.

[8] While MJM maintains that it has incurred expenses and the advances made by Dominion are neither relevant nor gratuitous, other jurisdictions have recognized that a "gift" can serve as a collateral source. See, e.g., Hurd v. Nelson, 714 P.2d 767, 771 (Wyo. 1986) (holding that gratuitous work performed by a church was a collateral source and would not diminish the defendant's liability where it would result in an inequity).

App. 497-98. MJM provided "actual and verifiable out of pocket expenses reasonably incurred in complying with the Regulations relative to the Fly Ash", and upon doing so, Dominion provided funds to MJM, retaining its right to recover the funds from MJM in the future. App. 497. The crucial and pertinent fact is that CPM breached the warranty provisions in the Purchase Agreement, resulting in MJM incurring expenses in excess of $1.5 Million. Therefore, the circuit court correctly held that MJM is entitled to have its contractual debt to CPM extinguished and satisfied by way a set off, and is entitled to a recoupment in the amount of no less than $684,357.60, plus interest and costs. See also App. 272-495.

Furthermore, far from demonstrating that MJM did not experience any damages as a result of CPM's breach, the Maintenance Agreement between MJM and Dominion actually demonstrates that MJM suffered damages. Specifically, had CPM performed its obligations under the Purchase Agreement, the Property that MJM received would have been in full compliance with applicable rules and regulations. MJM's duty was then to maintain the Property in accordance with the relevant state regulations. See 9 VAC 20-85-60 (stating that "[t]he owner or operator of the fossil fuel combustion products site who violates any provision of this chapter," including the 18-inch cover requirement of 9 VAC 20-85-120, "will be

considered to be operating an unpermitted facility as provided for in 9 VAC 20-81-40 of the Solid Waste Management Regulations and shall be required to either obtain a permit as required by Part V or close under Part III of 9 VAC 20-81“).

Because CPM breached its contract with MJM, MJM was forced to enter into the Maintenance Agreement with Dominion in order to meet its obligations under 9 VAC 20-85-60. In the agreement, MJM gave valuable consideration to Dominion in exchange for Dominion’s payments thereunder. Specifically, MJM agreed to pay Dominion liquidated damages equal to the payments made by Dominion should MJM thereafter fail to maintain the property in accordance with the state regulations. App. 497-98 (“The failure of MJM to comply with the provisions of paragraph shall be a material default under this Agreement in which event Dominion . . . shall be entitled to an immediate refund of all amounts paid by Dominion to MJM.”). At the time of trial, that contingent financial liability totaled approximately $1.5 million. (App. 189:13-17, 272-301.) This duty to Dominion and the corresponding contingent future liability would not have existed but for CPM’s breach of contract. Thus, MJM proved at trial that CPM’s breach placed MJM in a worse position than it would have been had CPM performed its obligations.

CPM did not introduce any evidence at trial to dispute MJM's calculations of its damages, and post-trial, it stipulated to the amount. App. 77:5-13, 735-38 (containing the trail court's final order and its finding that "CPM is liable to MJM in the sum of $694,357.60 for damages over and above the amount necessary to set off the pre-existing $700,000.00 debt"), 739-54 (containing CPM's "Exceptions to Trial Order" and failing to object to the trial court's calculation of MJM's damages).

Given CPM's failure to present such evidence at trial or to object to the trial court's findings with regard to the magnitude of MJM's damages, the only question before this Court on appeal is whether MJM proved that CPM's breach caused it damages sufficient to satisfy the elements of its breach of contract Counterclaim. McDonald v. Commonwealth, 274 Va. 249, 255, 645 S.E.2d 918, 921 (2007). The record proves sufficient damages were incurred and CPM, has demonstrated no basis to overturn the trial court's finding in this regard.

II. The Trial Court's factual determination that CPM failed to place 18 inches of soil cover on the Property is supported by the evidence (Assignment of Error II).

Whether CPM breached the warranty requirements in the Contract by failing to place the required 18 inches of topsoil on top of the fly ash on the Property is a question of fact reviewed by this Court only for clear error,

and the Court "must give due weight to inferences drawn from those factual findings." See Commonwealth v. Redmond, 264 Va. 321, 327, 568 S.E.2d 695, 698 (2002). "The factual findings of the trial court are accepted unless plainly wrong or without supporting evidence." Dorsey v. Commonwealth, 2007 Va. App. LEXIS 176, at *2 (Ct. App. 2007). The trial court's findings are entitled to great deference because the trial court is in the best position to evaluate the demeanor of the witnesses and determine what weight to give the evidence. See, e.g., Sapp v. Commonwealth, 263 Va. 415, 427, 559 S.E.2d 645, 651 (2002) ("[T]he trial court is in a unique position to evaluate the demeanor of the witness, and after proper inquiry, the decision of the trial court is entitled to great deference."); see also Addison v. Commonwealth, 224 Va. 713, 718, 299 S.E.2d 521, 524 (1983) (A "trial court [i]s in a unique position to resolve the conflicts in [witnesses'] testimony."). "The proper standard in reviewing the sufficiency of the evidence on this question of fact requires that the evidence be viewed in the light most favorable to the . . . prevailing party below, granting to it all reasonable inferences, and the judgment of the trial court must be affirmed unless it appears that it is plainly wrong, or without evidence to support it." Beavers v. Commonwealth, 245 Va. 268, 281-82, 427 S.E.2d 411, 421 (1993) (citing Va. Code § 8.01-680).

MJM established at trial that since the summer of 2008, almost every hole on the golf course has been found to have areas with less than the required 18 inches of soil. App. 146, 272-301. In total, about 45 acres of the 160-acre playing of the golf course required additional soil cover. App. 176, 272-301. At trial, the only evidence relied upon by CPM to counter MJM's evidence of the breach of warranty was Blake's letter,[9] which was totally unsupported by corroborating evidence. App. 255.

CPM had an affirmative responsibility under its contracts with both Dominion and MJM to meet the requirements of the CUP and state regulations, which mandate a minimum of 18 inches of earthen cover. App. 212-23, 259. Blake arbitrarily sampled a minimal unknown number of spots[10] on the 217-acre course in order to determine compliance. App. 106-07. He then drafted a letter to the DEQ, in which he certified CPM's compliance. App. 255. Blake further testified that he did not have any records showing where the samples were taken or the results of each sample. App. 110. Blake had no independent recollection of the

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[9] Blake was never proffered nor qualified to testify as an expert. Indeed, MJM called Blake during its case in chief to further demonstrate CPM's non-compliance with the state regulations and breach of warranty. App. 119.

[10] Blake had no independent recollection of how many holes he had dug, but estimated 20 to 40 based upon what he had heard prior in the proceeding. App. 107:4-12.

inspections he described in his letter to DEQ certifying compliance with state regulations or even how many holes he dug for samples. App. 107-08.

Waugh testified that he was present when Blake took a number of samples in 2007, but that the samples were done in the general area of the practice range and the first hole, as opposed to Blake's claim that he took samples without rhyme or reason throughout the course. App. 106, 160, 277. The record further reflects that the practice range area was found to be short of cover, and MJM had to add an average of 8 inches of soil in that area. App. 277.

Gene Hatcher with Timmons Group in Richmond, Virginia, testified on behalf of MJM as an expert witness in the area of geotechnical engineering. App. 124. Hatcher visited the golf course in 2014, and is familiar with Virginia's requirements concerning the use of coal combustion by-products App. 124-25. He testified that a qualified geotechnical engineer would have systematically gone about determining how many holes to dig by using a grid with a pattern to block off the Property. App. 126, 130. He further stated it was not unreasonable to dig at least one hole per acre App. 107. Hatcher's expert opinion was that it would have been proper to utilize a map of the Property or GPS to document the locations of

the holes, as well as keep a log for recording the results as supporting documentation App. 130. Hatcher also gave his expert opinion that the methods used by Blake in arbitrarily digging "20 to 40 holes" for 200 acres could not be used to determine the depth of the cover on the Property to a reasonable degree of engineering certainty. App. 127.

The evidence led the trial court to conclude that CPM had indeed breached the warranty and failed to properly cover the Property with the required amount of soil. Wallace, testifying as the corporate designee, stated that it was CPM's responsibility to place the soil cover. App. 543. Wallace also testified that once Bobby ("DiBerardinis")[11] left in 2004 or 2005, Wallace did not replace him. App. 550-51. DiBerardinis, as an agent of CPM, had agreed with the City of Chesapeake that CPM would comply with the state regulations requiring 18 inches of soil to cover the fly ash as a condition of the CUP. App. 240. Despite knowing about the requirements for soil cover under the CUP from the City as well as the state regulations dealing with soil cover, CPM did not have a procedure to determine how much soil was placed over the fly ash. App. 566-69. In fact, CPM relied entirely on its subcontractors to make sure enough soil was placed without any kind of oversight being performed by CPM. App.

[11] Bobby refers to Bobby DiBerardinis who was responsible for designing and constructing the golf course project. App. 528.

567. Despite having no idea how much cover was being placed over the fly ash, Wallace agreed to the warranty provision in the Contract stating CPM has been "fully compliant with all applicable federal, state, and local laws, regulations, ordinances, including without limitation, environmental laws." App. 216.

CPM, while arguing there was insufficient evidence for the trial court to make the ruling that it did, does not discuss its complete lack of evidence to show there could be another credible reason for the lack of cover. CPM relies on unproven theories and speculation as to how the soil cover became deficient. CPM asserts in its brief that the "MJM failed to present any evidence that the cover inadequacies in July 2008 were not caused by erosion or other environmental factors during the intervening year and a half after the closing." Appellant Br. at 26-27. CPM's argument regarding possible "erosion and environmental factors" fails because it did not present any evidence that rain or other such factors could actually wash away over 100,000 tons of topsoil from the Property between the time that CPM ceased topsoil operations in April 2007 and when MJM first discovered the shortfall in July 2008. That is, for the trial court to find that CPM had in fact placed the required 18 inches of topsoil on the Property, it would need to find that over 100,000 tons of topsoil disappeared in

the span of a year without MJM's noticing that fact. Such a finding is unsupported by the evidence presented at trial and common sense, and thus provides no basis to overturn the trial court's judgment in this matter.

CPM also wants this Court to rule that in order to prove that CPM did not place the 18 inches of soil on the Property, MJM must eliminate the potential existence of any other reason. This Court has held that, "[w]hen a plaintiff presents a prima facie case, the burden of producing evidence to overcome that prima facie case, also referred as to as the burden of moving forward, shifts to the defendant." Gibson v. Commonwealth, 287 Va. 311, 756 S.E.2d 460 (2014). In this case, CPM failed to make a Motion to Strike at the conclusion of MJM's evidence, consequently failing to preserve the issue about whether MJM had proven a prima facie case. Therefore, the only reasonable inference is that CPM itself believed that MJM had made a prima facie case. At that point, the burden to produce evidence shifted to CPM to show that the deficiency in the cover was caused by something other than CPM's complete lack of performance. CPM did not produce any other independent evidence and relied completely on Blake's letter.

It is clear that the trial court made its credibility determinations about the witnesses, weighed the evidence produced at trial, and considered

the post-trial briefs of both parties. The trial court ruled the evidence established that CPM failed to cover the fly ash with at least 18 inches of top soil as required by the warranty provisions in the Purchase Agreement; accordingly, the trial court properly held that CPM's failure constituted a breach of warranty. CPM cannot demonstrate in any manner that the trial court's ruling was clearly erroneous or plainly wrong, and as such, this Court should affirm the trial court's ruling.

III. The Trial Court correctly interpreted the contract by finding CPM warranted that 18 inches of soil cover was present on the Property when it finished placing the fly ash (Assignment of Error III).

The law in Virginia is clear that "[b]asic contract interpretation principles dictate that '[w]hen the terms in a contract are clear and unambiguous, the contract is construed according to its plain meaning.'" Orthopedic & Spine Ctr. v. Muller Martini Mfg. Corp., 61 Va. App. 482, 737 S.E.2d 544 (2013) (quoting Envtl. Staffing Acquisition Corp. v. B & R Constr. Mgmt., 283 Va. 787, 793, 725 S.E.2d 550 (2012)) (citation omitted). A question of a trial court's interpretation of a contract is a question of law and is reviewed de novo. Schuiling v. Harris, 286 Va. 187, 192, 747 S.E.2d 833, 836 (2013). The Court in Schuiling instructed that:

> [t]he question for the court is what did the parties agree to as evidenced by their contract. The guiding light in the construction of a contract is the intention of the parties as

> expressed by them in the words they have used, and courts are bound to say that the parties intended what the written instrument plainly declares.

Id. at 192-193 (quoting Wilson v. Holyfield, 227 Va. 184, 187, 313 S.E.2d 396, 398 (1984) (citation omitted).

Paragraph X.I. of the Contract provides: "The parties agree that the provisions of this contract and any collateral contract shall survive closing and not be deemed merged into the deed of conveyance." App. 218 (emphasis added). Wallace, a licensed attorney and managing member of CPM, negotiated the Contract on behalf of CPM and executed the Contract and Deed of Conveyance as its managing member. App. 212-23. There can be no dispute that CPM agreed to all the provisions of the Contract, including the extensive environmental warranties (Paragraph VIII(B)), which were in full effect after CPM completed the placement of fly ash, and are currently in effect now.

Contrary to CPM's assertions, the trial court did not "insert" any warranties into the Contract. The trial court ruled that CPM had breached the warranty provisions in the Contract that "require[d] 18 inches of topsoil on top of the amended ash on the property as mandated by the Conditional Use Permit and state regulations." App. 736. As part of the Contract, CPM warranted that "any activity involving the same has been fully compliant

with all applicable federal, state and local laws, regulations, ordinances[.]" App. 216. MJM had requested this warranty, and CPM agreed to it. App. Id. The "applicable federal, state and local laws, regulations, ordinances" included the requirement that there be no less than 18 inches of dirt cover over the layer of fly ash. App. 259, 269. The trial court was not "inserting" any warranties into the Contract; rather, it was identifying the specific conditions and regulations that CPM breached.

CPM asserts the warranty provisions of the Contract are trumped by the Due Diligence clause of the Contract despite agreeing that the provisions of the Contract would survive closing. App. 218. If this Court were to accept CPM's argument on this issue, every contract with a due diligence clause would become an "As-Is" contract, notwithstanding its inclusion of specific warranties surviving closing.

This Court addressed the issue of collateral agreements surviving the entry of the deed in Abi-Najm v. Concord Condo, LLC, 280 Va. 350, 699 S.E.2d 483 (2010). The plaintiff in that case had a contract for a specific kind of flooring to be installed in the condos it purchased, and the defendant breached the express terms of the contract by failing to use the specific kind of flooring that was agreed upon. Id. The Court held that deeds are merely instruments to transfer title and the flooring agreement

entered into by the parties, in that case, did not "affect the validity of the title conveyed, is not addressed in the deed, and does not conflict with the terms of the deed." Id. (citing Beck v. Smith, 260 Va. 452, 538 S.E.2d 312 (2000). Indeed, in Beck, there was a specific provision in the contract that stated the representations and warranties of the seller would be merged into the deed. Beck, 260 Va. at 455. Despite the language of the contract, the Court in Beck felt that the agreement "regarding the impact of utility easements on the intended use of the property was collateral to the transfer of title, was not merged into the deed, and survived the execution of the deed." Id. at 456. The environmental warranties in the Contract between CPM and MJM meet the three factors cited by Beck and Abi-Najm and, therefore, would have survived the closing of the Contract and the endorsement of the deed, even if not specifically stated in the terms of the Contract.

For the first time, CPM now argues that the "survival clause does not transform warranties of present condition into warranties of future performance." Appellant Br. at 30. CPM additionally states that MJM agreed to accept responsibility for activities dealing with the fly ash on the Property. Id. at 31. These contentions are meritless. These arguments are raised for the first time in the Brief and neither issue was preserved at

the trial nor in CPM's Exceptions to the Trial Court Order. App. 32-209, 739-54. This Court has stated multiple times that failure to timely preserve an issue on the record is deemed to have been waived and cannot be raised on appeal. Va. Sup. Ct. R. 5:25. The record clearly delineates the responsibility of MJM and CPM with regards to the Property, as stated on pages 5 through 6 of this Brief. See also Appellee Br., Ex. 1, at 3. CPM was the sole party responsible for the soil cover. Id.; see also App. 556:7-12.

Another meritless CPM argument asserts that the trial court erred by holding that "18 inches of topsoil cover was 'mandated by the Conditional Use Permit and state regulations' prior to the contract closing." Appellant Br. at 32. The evidence at trial establishes, without a doubt, that CPM knew at all times about the requirements of the CUP, state regulations, and Operations Plan, both before closing and in conjunction with its continued post-closing construction activities. App. 541-59, 647. Additionally, CPM did not even have a procedure to determine how much soil had been placed during its construction activities. App. 567.

CONCLUSION

For the foregoing reasons, the trial court's decision should be affirmed.

Respectfully submitted,

By: _____
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CERTIFICATE

I hereby certify that on the 13th day of August, 2015, in compliance with Rule 5:26(h), one electronic copy of the foregoing Brief of Appellee was filed, via VACES, and ten bound copes were hand-filed with the Clerk of the Supreme Court of Virginia. On this same day, one electronic copy of the same was served, via email, to the following:

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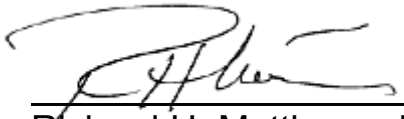

Richard H. Matthews, Esq.

EXHIBIT

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EXHIBIT
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AGREEMENT BETWEEN
VFL TECHNOLOGY CORPORATION
AND
CPM VIRGINIA LLC.

THIS AGREEMENT is entered into this 31st day of January, 2002, between **VFL TECHNOLOGY CORPORATION,** a Pennsylvania Corporation with offices located at 16 Hagerty Boulevard, West Chester, PA 19382 (hereinafter referred to as "VFL"), and **CPM VIRGINIA LLC,** a Virginia Limited Liability Corporation with offices located at 1229 Kingsbury Drive, Chesapeake, Virginia 23322 (herein after referred to as "CPM-Virginia").

WITNESSETH:

WHEREAS, CPM-Virginia has purchased property within the city limits of Chesapeake, Virginia and is planning to construct a golf course on this property ("Project") that will require a significant volume of fill material; and

WHEREAS, coal combustion fly ash from the silos and coal combustion fly ash/bottom ash from the on-site landfill (collectively referred to as "Ash") generated at the Chesapeake Energy Center ("CEC") owned by Virginia Electric and Power Company, that is amended with approximately 2% alkaline reagent (guaranteed minimum of 1.5%), is acceptable for use as a fill material on the Project; and

WHEREAS, Virginia Electric and Power Company (the "Company") has agreed to commit a minimum of 1,500,000 tons of unamended Ash from CEC for use in the Project; and

WHEREAS, Company has contracted with VFL to provide all Ash management services associated with CEC and has authorized VFL to supply Ash to the Project; and

WHEREAS, VFL and CPM-Virginia desire to execute an agreement that will allow for the Ash from CEC to be utilized on the Project;

NOW, THEREFORE, in consideration of the above recitals, which are incorporated herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, VFL and CPM-Virginia agree as follows:

GENERAL SCOPE RESPONSIBILITIES

CPM-Virginia shall be responsible for all of the activity required for the development of the Project, design of the golf course and associated infrastructure, permitting, state and local approvals (including zoning), overall project management, environmental compliance, and maintaining positive civic community relations. CPM-Virginia expects to begin receiving Ash in March 2002.

VFL shall be responsible for the activities associated with amending the Ash to meet the specifications of the Project, transportation of the amended Ash to the Project site, and placement of the Ash as directed by CPM-Virginia

EXHIBIT
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SPECIFIC SCOPE RESPONSIBILITIES

CPM-Virginia

Prior to the Project start date, CPM-Virginia shall provide the following specific items:

Establishment of a Quality Assurance/Quality Control Plan that has been reviewed and accepted by VFL, who may discuss such plan with the Company.

Establishment of a Land Disturbance & Erosion/Sediment Control Plan that has been reviewed and approved by the City of Chesapeake.

Completion of the Phase I Environmental Assessment for the property to ensure that there are NO jurisdictional wetlands regulated under Section 404 of the Clean Water Act in areas being developed, and that any such areas have been investigated and delineated.

Establishment of a Spill Prevention Control & Countermeasure Plan that has been reviewed and accepted by the appropriate local and/or state authorities (to be established jointly by CPM-Virginia and VFL).

Documentation from the Virginia Dept. of Games and Inland Fisheries that there are no impacts to endangered or threatened species (specifically the canebrake rattlesnake) resulting from the Project.

Documentation from the Dept. of Historic Resources that they will have no jurisdiction over development activities on the site.

Receipt of all additional state and local permits including but not limited to:

Virginia Pollutant Discharge Elimination System Permit (VPDES)
Sewage Disposal/Septic System Permit*
Groundwater Withdraw Permit**
Construction Permit

Note – *Not required until club house construction is initiated, which is anticipated to begin sometime in 2005-2006.
**Not anticipated to be received until mid 2002

Establishment of a Long Term Groundwater Monitoring Plan, as stipulated in item G.UP-01-03 of the City Council of the City of Chesapeake Meeting Minutes dated June 20, 2001, that has been reviewed, accepted and approved by the City of Chesapeake.
Establishment of an easement agreement with Company, which is satisfactory to Company, to allow for installation of and access to (at Company's expense) perimeter monitoring wells or other reasonable environmental monitoring equipment associated with the Project.

For the Project duration, CPM-Virginia shall provide the following specific items:

Completion of the road improvements to Centerville Turnpike and Whittamore Road required by City of Chesapeake mandate stipulated in item G.UP-01-03 of the June 20, 2001 Meeting Minutes (to be completed prior to the receipt of amended Ash).

All non-ash related site work for the Project, including but not limited to:

- Site preparation work
- Installation of storm water and erosion control system
- Excavation of two 14 acre sedimentation ponds (approximate)
- On-site management of excavation spoils
- Construction access roads
- Utilities for construction
- Cover soil and cover soil placement
- Provision for dust control water source located within convenient distance
- Provision for fuel storage and loading (CPM-Virginia and VFL to discuss joint facility)

Commitment to accept and utilize 300,000 tons of amended ash (+/- 5%) per year on the Project with an expected monthly utilization schedule of 25,000 tons (+/- 5%). Total commitment shall not exceed 1,500,000 tons (actual utilization schedule shall be subject to weather conditions and station outages).

Site supervision and technical support for ash placement activity including but not limited to:

- Surveying to establish grades and contours
- QA/QC services to monitor compaction performance
- Milestone and daily work activity scheduling
- Any additional site work required to support the amended ash placement schedule

Golf course construction activities, including but not limited to:

- Installation of irrigation system
- Construction of permanent access roads and parking lots
- Driving Range construction
- Club House and Maintenance Building construction
- Construction of cart paths, tees, fairways, greens, and sand traps
- Final Landscaping

<u>VFL</u>

For the supply of amended Ash to the Project, VFL shall provide:

Permitted processing facility consisting of a pugmill, reagent silo, and dedicated loader located at the Ash source with a capacity to produce a minimum of 1,500 tons of amended Ash per 8 hour day. Facility to include all labor and supervision required for operation and maintenance.

Commitment to provide 300,000 tons of amended Ash (+/- 5%) per year with an expected monthly delivery schedule of 25,000 tons (+/- 5%). Total commitment shall be a minimum of 1,500,000 tons (actual delivery schedule shall be subject to weather conditions and station outages).

Scheduling and purchasing of alkaline reagents (Lime Kiln Dust or Cement Kiln Dust) required for the fly ash amendment at an anticipated rate of approximately 2% (with a guaranteed minimum of 1.5%) in accordance with the Project specifications.

Quality Assurance/Quality Control at the pugmill site to monitor and document that the amended Ash product is produced in accordance with the proper reagent content and moisture content requirements of the Project specifications.

Certified weigh scale and weigh tickets to be utilized to provide a record of the tonnage supplied to Project and a basis for payment.

Delivery of the amended Ash to the Project site in trucks meeting all regulatory requirements for the transportation of Ash products in the State of Virginia.

For placement of the amended Ash (and other services as time permits with the equipment described below) at the Project site, VFL shall provide:

One Caterpillar D6 dozer (or equivalent) with operator, one 84 inch smooth drum vibratory compactor with operator, and one 4,000 gallon water truck with driver.

Equipment to be utilized primarily for the placement of amended Ash. In the event that additional hours of operation are available (not to exceed 40 hours per week or 8 hours per day or include weekends and holidays) equipment and personnel may be utilized for additional services subject to the terms of the attached Memorandum of Understanding between VFL and CPM dated September 17, 2001.

PRICING SCHEDULE

VFL shall provide the services and materials identified in the scope of work at no cost to CPM-Virginia. VFL shall compensate CPM-Virginia $ 4.50 for each ton of amended Ash delivered to the Project.

CPM-Virginia shall provide a series of performance bonds for benefit of Company (one bond for each year of the Project) in an amount not less than $350,000 each. The value of the bonds shall be determined annually and prior to the start of each year of the Project. The value of the initial bond shall be $350,000 and be adjusted based upon an assessment by VFL & Company of the anticipated construction activity on March 1 of each year thereafter. The Company shall be named as the beneficiary of any bond payments.

Total compensation to CPM-Virginia shall be based upon VFL certified weigh tickets or other mutually agreed upon method in the event that the weigh scale is inoperable. CPM-Virginia shall

invoice VFL on the 15th day and last day of each month with payment to be received for each invoice on a net 30 day basis.

Compensation to CPM-Virginia shall be adjusted on an annual basis and shall become effective January 1 of each year with the first escalation to be implemented January 1, 2003. Escalation shall be based upon a the Consumer Price Index as published by the United States Department of Labor, Bureau of Labor Statistics. Escalation shall be calculated from the Consumer Prices All Urban Consumers Index column entitled All- Not Seasonally Adjusted ("AI"). The calculation shall be based upon a baseline date of January 1, 2002.

Fuel cost shall be reviewed and subject to adjustment ("fuel surcharge") annually based upon the ***Consumer Price Index-Urban (CPI-U)*** column entitled Transportation Motor Fuel ("TMF"). The fuel surcharge shall be added to the compensation rate provided the TMF column is greater than the AI column. The fuel surcharge adjustment shall only apply to the fuel portion of the compensation rate and be limited to the differential between the TMF and AI columns. See Attachment A included in this Agreement.

TERM

The term of this agreement shall be from March 1, 2002 until February 28, 2007.

DEFAULT

In the event that CPM-Virginia defaults on its obligations under this Agreement, CPM-Virginia grants VFL a first right of refusal to purchase the property at a value not to exceed the original price of the unimproved property and CPM-Virginia agrees to expedite such documents as are necessary to grant this right of first refusal. Default shall be defined as three consecutive months of non-performance, not caused by circumstances outside of CPM-Virginia's control, and failure to remedy within 30 days written notice of default by VFL. VFL and CPM-Virginia shall meet, as a minimum, on a monthly basis at the Project site to review the progress and determine if performance requirements have been achieved. Progress shall be based upon the project design, construction schedule and sequence, all of which shall be provided to VFL prior to the start of the Project. Progress reports and a three-month projection of activity shall be issued to VFL prior to each monthly meeting. Non-performance, which shall be reasonably determined by VFL, is defined as failure to complete the activities identified in the monthly projections, as modified from time to time.

GENERAL

CPM-Virginia shall take title to the amended Ash upon delivery at the Project site and assume all environmental liability associated with the construction activities (except as it relates specifically to the placement of the amended Ash), utilization of amended Ash as a fill material, and operation of the golf course.

CPM-Virginia and VFL shall agree to negotiate in good faith to establish terms and conditions for VFL to provide services in addition to those identified in this agreement. CPM-Virginia shall provide VFL with a first right of refusal to provide all additional services that are to be

subcontracted by CPM-Virginia, provided VFL performs these services at a price considered as competitive by CPM-Virginia, and that based upon CPM-Virginia's sole discretion, VFL is experienced and competent to perform such services.

CPM-Virginia shall reserve the right to terminate the placement portion of VFL's scope or remove an employee for cause in the event that VFL fails to meet the performance requirements (compaction) of the specifications for placement of amended Ash or fails to meet other operational or safety performance requirements of this agreement. VFL shall be notified in writing of the non-performance, and CPM-Virginia's right to terminate shall become effective if VFL fails to remedy the non-performance within 30 days.

The provisions of this Agreement shall be construed under and enforced in accordance with the laws of the Commonwealth of Virginia.

The Parties agree that this agreement shall be subject to the establishment of mutually agreed upon general terms and conditions and that the agreed upon terms and conditions shall be made part of this agreement by addendum prior to March 1, 2002.

If any provision of this Agreement is held to be illegal, invalid or unenforceable under present or future laws effective while this Agreement is in effect, such provision shall be fully severable and this Agreement shall, to the extent possible and without destroying the intent hereof, be construed and enforced as if such illegal, invalid, or unenforceable provision had never comprised a part hereof, and the remaining provisions hereof shall remain in full force and effect.

IN WITNESS WHEREOF, VFL and CPM-Virginia, by their duly authorized representatives, execute this Agreement as of the date first set forth above.

CPM VIRGINIA LLC.

By:

Neil Wallace, President — Date: 1/31/02

VFL TECHNOLOGY CORPORATION

By:

Richard W. Patton, President — Date: 1/31/02

FIRST AMENDMENT TO AGREEMENT

THIS FIRST AMENDMENT is made as of ~~April~~ May 1, 2002 by and among **VFL TECHNOLOGY CORPORATION**, a Pennsylvania corporation ("VFL"), **CPM VIRGINIA LLC**, a Virginia limited liability company ("CPM-Virginia"), and **COMBUSTION PRODUCTS MANAGEMENT, INC.**, a New York corporation ("CPM").

RECITALS

VFL and CPM-Virginia entered into an Agreement dated January 31, 2002 (the "Agreement") which, in general, provided for the delivery by VFL of Ash (as defined in the Agreement) to property owned or to be acquired by CPM-Virginia in Chesapeake, Virginia to be developed as a golf course (the "Property").

S. Gray Folkes, Jr. ("Folkes") with the consent of the parties hereto has or will acquire the Property. The developer of the Property will now be CPM rather than CPM-Virginia pursuant to a lease between CPM, as tenant, and Folkes, as landlord dated as of March 15, 2002 (the "Lease").

The parties desire to amend the Agreement to substiute CPM for CPM-Virginia and to make certain other modifications to the terms of the Agreement.

NOW, THEREFORE, in consideration of the above recitals and other good and valuable consideration, the receipt and sufficiency are hereby acknowledged, the parties hereto agree that the Agreement is hereby amended as follows:

1. CPM-Virginia hereby assigns all its rights, duties and obligations under the Agreement to CPM, and CPM hereby assumes all such rights, duties and obligations as if CPM were the original party to the Agreement instead of and in the place of CPM-Virginia.

2. VFL hereby agrees to the assignment, assumption and substitution set forth in paragraph 1 above.

3. In the fourth WHEREAS clause, insert the word "amended" between "supply" and "Ash".

4. The last sentence on page 2 of the Agreement is hereby amended and restated in its entirety to read as follows:

   "Establishment of an easement agreement with Company, which is satisfactory to Company, to allow for access by Company, without additional compensation, to perimeter monitoring wells or other reasonable environmental monitoring equipment associated with the Project, which wells or other equipment shall be installed by Company at its sole cost and expense."

5. In the first paragraph under the heading PRICING SCHEDULE on page 5, add to the end of the paragraph the following new sentence :

   "In the event that VFL is no longer supplying the services identified in the scope of work, then VFL shall compensate CPM $5.59 for each ton of amended ash delivered to the Project by VFL. "

6. In the second paragraph under the heading PRICING SCHEDULE on page 5 of the Agreement,

   a) delete from the beginning of the first sentence :

   "CPM Virginia shall provide"

   b) add to the beginning of the first sentence

   "The Parties agree that"

   c) add to the end of the first sentence:

   "shall be provided, meeting the requirements of the Project agreement between CPM and Company, unless an acceptable alternative is agreed to by CPM and Company"

   d) insert a new third sentence as follows:

   "The initial bond shall be posted on or before June 15, 2002.", and

   e) add at the end of such paragraph the following new sentence:

   "At any time when the required performance bond has not been posted, the Company shall be entitled to retain from its payments due VFL an amount equal to One Dollar ($1.00) per ton of amended Ash delivered to the Project up to a maximum amount equal to the amount of the delinquent performance bond (the "Retainage"). In such event, VFL's obligation to CPM shall be reduced by the amount of the Retainage. The Retainage shall be paid by the Company to VFL within 30 days after the first to occur of (a) the posting of such required performance bond and (b) satisfactory completion of the Project. Upon such release of the Retainage by the Company to VFL, VFL will make payment to CPM in accordance with the provisions of this Agreement."

7. In the third paragraph under the heading PRICING SCHEDULE on page 6 of the Agreement, insert the following new sentence:

"The compensation to CPM shall be paid as follows: (a) VFL shall pay to Folkes the then amount due for rental under the terms of the Lease; (b) any amounts remaining shall then be paid to CPM as provided above. For the first ninety (90) days of this Project, Company shall make best efforts possible to make payment to VFL on a net fifteen (15) day basis upon receipt of approved weekly invoices and in turn, for the same ninety (90) day project period, VFL shall make best efforts possible to make payment to CPM on a net fifteen (15) day basis. "

8. In the section entitled "TERM" on page 6 of the Agreement, delete the words "March 1, 2002 until February 28, 2007" and substitute "April 1, 2002 until March 31, 2007."

9. Revise the first sentence of the section entitled "DEFAULT" in its entirety to read as follows:

   "In the event that CPM defaults on it obligations under this Agreement, CPM grants VFL the right to purchase the property at a value not to exceed the original price of the unimproved property and CPM agrees to execute such documents as are necessary to effect this purchase option."

10. At the end of the section entitled "DEFAULT" on page 6 of the Agreement, insert the following new sentence:

    "It shall also be an immediate default hereunder if CPM becomes (a) unable to pay its debts as they come due, (b) insolvent, or (c) bankrupt (including voluntarily or involuntarily filing or engaging in a reorganization or other arrangement under applicable bankruptcy laws)."

11. In the section entitled "GENERAL", add the following to the end of the first paragraph :

"This agreement is based upon Dominion Generation's warranty that the CEC Ash is (1) non-hazardous based upon all federal, state and local regulations and as measured by semi-annual representative samples taken for TCLP metals analysis, (2) shall be amended by VFL with approximately 1.5% reagent binder and Dominion shall take reasonable efforts to deliver the amended Ash to VFL with suffient moisture content so that it can be compacted to a minimum of 95% of the maximum dry density achievable at its optimum moisture content in accordance with the Standard Proctor Method, ASTM test designation D 698 under normal operating conditions, and (3) has been analyzed by URS, an independent third party engineering firm contrated to perform an environmental assessment of the Project relating to the use of amended Ash, and that the use of CEC Ash amended with a minimum of 1.5% cement kiln dust or lime kiln dust as proposed in the project specification is an environmentally acceptable application. "

12. In the section entitled "GENERAL", delete the entire paragraph and insert the following new sentence :

"This Agreement shall be subject to the mutually agreed upon general terms and conditions provided as Attachment "A" to this amendment."

13. CPM shall provide evidence of insurance coverage, which shall remain in effect for the duration of the Project, satisfactory to VFL, in the following amounts:

a). Workers Compensation as required by the statutory benefit laws of the state where the services are to be performed or as required by any other state where the employees performing the services is normally employed;

b). Employers liability insurance with a total limit of at least $2,000,000 each accident for bodily injury by accident and $2,000,000 each employee for bodily injury by disease;

c). Commercial general liability insurance with a total limit of at least $2,000,000 per occurrence (occurrence form policy). Such insurance shall include, but not be limited to, specific coverage for: i) contractual liability encompassing the Article entitled Indemnity, ii) personal injury and property damage insurance, iii) products/completed operations liability, and iv) where applicable, explosion, structure and ground collapse, and underground hazards coverage;

d). Automobile liability insurance covering bodily injury and property damage with a total limit of at least $2,000,000 per accident. Such insurance shall cover liability arising out of any auto (including owned, hired and non-owned autos).

Before beginning work, CPM shall provide certificates of insurance to VFL and to Company evidencing CPM's coverage and limits required by this Agreement. The amount of insurance required above may be satisfied, at CPM's option, through the purchase by CPM of a separate excess umbrella liability policy together with lower limit primary underlying insurance. The coverage required in above shall provide for claims by one insured against another such that, except for the limits of insurance, the coverage shall apply separately to each insured against whom a claim is made or suit is brought.

CPM waives and will require its insurers to waive all rights of recovery against VFL and Company, its directors, officers and employees, whether in contract, tort (including negligence and strict liability) or otherwise.

CPM and its authorized subcontractors and assignees shall cause their insurers to name VFL and Company, its affiliates and subsidiaries, and the officers, directors, employees and agents of each of them, as additional insureds to the extent required hereunder, but only for liability arising out of CPM's work.

CPM and CPM's insurer agree that each of these policies is primary with respect to any other similar insurance maintained by VFL or Company. These policies may not be canceled, non-renewed or materially changed without giving 30 days prior written notice to VFL or Company.

14. VFL shall, for the duration that ash placement and other services are provided by VFL at the Project site, provided evidence of insurance coverage, which shall remain in effect for the duration of the Project, satisfactory to CPM, in the following amounts:

a). Workers Compensation as required by the statutory benefit laws of the state where the services are to be performed or as required by any other state where the employees performing the services is normally employed;

b). Employers liability insurance with a total limit of at least $2,000,000 each accident for bodily injury by accident and $2,000,000 each employee for bodily injury by disease;

c). Commercial general liability insurance with a total limit of at least $2,000,000 per occurrence (occurrence form policy). Such insurance shall include, but not be limited to, specific coverage for: i) contractual liability encompassing the Article entitled Indemnity, ii) personal injury and property damage insurance, iii) products/completed operations liability, and iv) where applicable, explosion, structure and ground collapse, and underground hazards coverage;

d). Automobile liability insurance covering bodily injury and property damage with a total limit of at least $2,000,000 per accident. Such insurance shall cover liability arising out of any auto (including owned, hired and non-owned autos).

Before beginning work, VFL shall provide certificates of insurance to CPM evidencing VFL's coverage and limits required by this Agreement. The amount of insurance required above may be satisfied, at VFL's option, through the purchase by VFL of a separate excess umbrella liability policy together with lower limit primary underlying insurance. The coverage required in above shall provide for claims by one insured against another such that, except for the limits of insurance, the coverage shall apply separately to each insured against whom a claim is made or suit is brought.

VFL waives and will require its insurers to waive all rights of recovery against CPM, its directors, officers and employees, whether in contract, tort (including negligence and strict liability) or otherwise.

VFL and its authorized subcontractors and assignees shall cause their insurers to name CPM, its affiliates and subsidiaries, and the officers, directors, employees and agents of each of them, as additional insured to the extent required hereunder, but only for liability arising out of VFL's work.

VFL and VFL's insurer agree that each of these policies is primary with respect to any other similar insurance maintained by CPM. These policies may not be canceled, non-renewed or materially changed without giving 30 days prior written notice to CPM.

IN WITNESS WHEREOF, the parties hereto, by their duly authorized representatives, execute this Agreement as of the date first set forth above.

VFL TECHNOLOGY CORPORATION

By: _____

Title: Vice President

CPM VIRGINIA LLC

BY: Combustion Products Management, Inc.,
Managing Member

By: Neil Walker

Title: Pres.

COMBUSTION PRODUCTS MANAGEMENT, INC.

By: Neil Walker

Title: Pres.

COMMONWEALTH OF PENNSYLVANIA:

CITY/COUNTY OF Chester:

The foregoing instrument was acknowledged before me this 7th day of May, 2002, by Louis M Puggiano, as Vice President, of VFL Technology Corporation, a Pennsylvania corporation, on behalf of the corporation.

Carol L. Mellen
Notary Public

My Commission Expires: Feb 27, 2003

NOTARIAL SEAL
CAROL L. MELLEN, NOTARY PUBLIC
WEST GOSHEN TWP, CHESTER COUNTY
MY COMMISSION EXPIRES FEB. 27, 2003

COMMONWEALTH OF ~~VIRGINIA~~ New York:

CITY/COUNTY OF Tompkins:

The foregoing instrument was acknowledged before me this 1st day of May, 2002, by Neil Walker, as President of CPM Virginia LLC, as Managing Member of CPM Virginia LLC, a Virginia limited liability company, on behalf of the Company.

Connie R Clark
Notary Public

My Commission Expires: 6/12/03

CONNIE R. CLARK
Notary Public, State of New York
No. 01CL5045149
Qualified in Tompkins County
Commission Expires June 12, 2003

STATE OF NEW YORK:

CITY/COUNTY OF Tompkins:

The foregoing instrument was acknowledged before me this 1st day of May, 2002, by Neil Walker, as Pres. Dir of Combustion Products Management, Inc., a New York corporation, on behalf of the corporation.

Connie R Clark
Notary Public

My Commission Expires: 6/12/03

CONNIE R. CLARK
Notary Public, State of New York
No. 01CL5045149
Qualified in Tompkins County
Commission Expires June 12, 2003

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