In The

Supreme Court of Virginia

RECORD NO. 170617

CGI FEDERAL INC.,

Appellant,

v.

FCi FEDERAL, INC.,

Appellee.

BRIEF OF APPELLANT

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INTRODUCTION

Following a 7-day trial, a jury unanimously concluded that Defendant-Appellee FCi Federal, Inc. ("FCi") perpetrated a fraud, and awarded Plaintiff-Appellant CGI Federal Inc. ("CGI") a $12 million verdict. However, based on several misapplications of Virginia law, the Circuit Court let FCi off the hook and allowed it to profit handsomely from its fraudulent conduct. The Circuit Court (1) struck jury verdicts in favor of CGI on claims for fraudulent inducement and breach of contract, and then (2) granted FCi summary judgment on CGI's unjust enrichment claim, without any explanation. In throwing out the work of a properly instructed jury and summarily dispensing with CGI's equitable claim, the Circuit Court left CGI without any remedy whatsoever—in contract, tort, or equity—for FCi's wrongful conduct. The Circuit Court's rulings were incorrect under Virginia law, and this Court should reverse.

CGI's claims relate to an Amended Teaming Agreement ("ATA") that the parties executed to pursue and perform a federal government contract. Under the ATA, CGI agreed to help FCi prepare its competitive proposal for the prime contract and FCi promised in return that CGI would work as a subcontractor if the proposal was successful. CGI demonstrated at trial that, prior to executing the ATA, FCi's President expressly promised CGI a 41% work share and 10 management positions if FCi won the prime contract. FCi's President made these

promises knowing that FCi had already finalized and boxed up for delivery its proposal for the federal contract containing contrary terms. The jury found by clear and convincing evidence that FCi's conduct constituted fraud, and awarded CGI damages for that fraud based on the profits that CGI would have earned had FCi's representations been true. On CGI's breach of contract claim, the jury found that FCi breached the ATA by not meeting its commitments to CGI under the ATA.

Notwithstanding the jury's factual findings, the Circuit Court set aside the jury's verdict on both of the counts presented at trial. On CGI's fraudulent inducement claim, the Circuit Court *upheld* the jury's finding that FCi fraudulently induced CGI into the ATA. The Circuit Court held, however, that a contractual provision limited CGI's damages for the fraud. Specifically, the Circuit Court held that a provision in the ATA permitting termination of the agreement within 90 days after the prime contract award if the parties had not finalized an implementing subcontract limited CGI's fraud damages to 90 days. That holding badly conflated the fraudulent inducement and breach of contract causes of actions. On CGI's breach of contract claim, the Circuit Court held that the post-award work share promised to CGI under the ATA was unenforceable because it required the parties to execute a separate subcontract. The breach of contract holding was equally in error under settled Virginia law.

To make matters worse, the Circuit Court then entered summary judgment against CGI on its remaining unjust enrichment claim without providing any reasoning whatsoever. The Circuit Court apparently accepted FCi's argument that the ATA was an *enforceable* contract that precluded an equitable unjust enrichment claim, even though (1) FCi had just successfully argued that CGI's breach of contract claim could not proceed because the ATA was *unenforceable*, and (2) the Circuit Court had essentially acknowledged FCi's unjust enrichment by upholding the jury's finding that FCi committed a fraud from which it benefited.

The Circuit Court's rulings on each of CGI's three claims were incorrect. Together, the errors become even more clear. The Circuit Court held that CGI had no enforceable contractual rights under the ATA, and yet it allowed FCi to use the ATA to shield itself from liability on both the fraudulent inducement and unjust enrichment claims. The net result was to permit FCi to escape all liability for a brazen fraud. Virginia law does not and cannot countenance such a perverse result.

ASSIGNMENTS OF ERROR

1. The Circuit Court erred in holding that the damages CGI could recover for fraudulent inducement into an agreement were limited to those recoverable as a matter of contract law under the agreement. JA 3088-3100, 3172-76, 3288-3306.

2. The Circuit Court erred in holding that the parties' teaming agreement was unenforceable, even if it set forth specific terms for the parties' intended performance, just because the agreement required execution of a later subcontract. JA 3065-88, 3167-72, 3247-88.

3. The Circuit Court erred in granting summary judgment on CGI's unjust enrichment claim after holding that the parties' teaming agreement was unenforceable for purposes of CGI's breach of contract claim. JA 3420-37, 3482-53.

STATEMENT OF THE CASE

I. Statement of Facts.

A. The Initial Teaming Agreement.

In September 2012, the State Department issued a solicitation seeking proposals from small businesses for a prime contract to provide visa processing services (the "Solicitation"). JA 2783. FCi, a small business, sought to submit a proposal, but lacked the experience and technical expertise necessary to win the award by itself. JA 494-96. CGI also was interested in participating in the project, but was not a small business eligible to serve as the prime contractor. JA 492. The parties, recognizing that "neither . . . possesse[d] the capability on its own to compete successfully for the contract," decided to join together. JA 2631.

In September 2012, the parties executed a Teaming Agreement ("TA") "to define their mutual rights and obligations in connection with the efforts to be undertaken in response to the Solicitation." JA 2631. The TA identified CGI as the "subcontractor" throughout. In Section 1 of the TA, CGI committed to work exclusively with FCi on the Solicitation and not to team with other potential prime contractors. JA 2631-32. In return, FCi agreed that it would not enter into

arrangements with other potential subcontractors without CGI's consent if those arrangements would diminish the scope of work promised to CGI. JA 2632.

In that regard, Section 1 of the TA provided that "the specific scope of work to be performed by [CGI]" if FCi won the Solicitation was "set[] forth" in Exhibit A to the TA. JA 2631. The parties agreed in Exhibit A that, if FCi won the prime contract, then "[s]ubject to final solicitation requirements, [CGI] will receive forty-five percent (45%) work share of the total contract value." JA 2640. Exhibit A also outlined CGI's obligations to help prepare FCi's proposal. Those obligations included providing "expertise and support" in areas including "technical proposal inputs, personnel resumes, project profiles, cost and pricing information, [and] bid strategies." *Id.*

Section 2 of the TA expanded upon CGI's obligations to assist with proposal preparation. Specifically, it required CGI to provide, "in a timely manner," "all technical, management, schedule data, information, resumes, and materials as FCi [] may reasonably request to facilitate the successful completion of the procurement process." JA 2632. Section 2 also gave FCi exclusive control over the proposal process, but nonetheless required FCi to "consult with [CGI] on proposal decisions affecting data and materials submitted by [CGI]." *Id.*

Section 3 of the TA outlined the procedures that the parties agreed to follow to enter into a subcontract if FCi's proposal was successful. The parties agreed that

they would enter into good faith negotiations for a subcontract "as soon as practicable" if FCi were awarded a prime contract that included the scope of work outlined for CGI in Exhibit A. JA 2633. Section 3 also made the resultant subcontract subject to several conditions, including CGI's furnishing information required by law, the Government's specific approval of CGI as a subcontractor, and mutual agreement by the parties to a statement of work, financial terms, and reasonable subcontract provisions. *Id.*

Section 5 of the TA stated that the TA would terminate under a number of conditions, including if the parties failed to execute a subcontract for the work contemplated in Exhibit A within 90 days of the prime contract award. JA 2634-35. Section 9 limited each side's liability in the event of breach, stating that the breaching party would be liable for direct damages, but not lost profits. JA 2636-37. Finally, Section 15 contained both a merger clause and a covenant that the "Teaming Agreement shall become a mutually binding agreement by and between" the parties. JA 2638.

B. FCi's Initial Proposal.

The parties spent the next few months collaboratively preparing the prime contract proposal. Based on its expertise and experience, CGI helped draft and revise technical sections of the proposal, explained to FCi how the visa centers would need to operate, and provided background materials and insight on existing

State Department systems. JA 515-18. CGI also permitted FCi to name CGI in the proposal as an expected subcontractor and use CGI's previous contracts as references, allowing FCi to benefit competitively from CGI's experience and strong reputation. *See* JA 3679, 3689, 3713-14; *see also* JA 2679.

FCi submitted its initial proposal to the State Department in December 2012. FCi refused to provide CGI a copy of the proposal—or even to confirm that FCI had honored the work share commitment in the TA. JA 521-31. CGI later learned that FCi's proposal gave CGI a work share of only 38%, 7% lower than the 45% work share promised in the TA. JA 549, 2929-30.

C. The Amended Teaming Agreement and FCi's Revised Proposal.

In March 2013, the State Department provided notice that FCi's initial proposal was in the competitive range, discussed with FCi the strengths and weaknesses of the initial proposal, and requested a revised proposal by April 18 and an oral presentation on April 23. JA 2651-60. As the deadline for the revised proposal approached, FCi informed CGI that FCi could no longer offer CGI a 45% work share, purportedly because, to meet the Solicitation's small business requirements, FCi needed to retain 51% of the work for itself and provide another 8% to other small business subcontractors. JA 2929.

In light of this news, the parties attempted to negotiate a mutually-acceptable amended TA. As part of these negotiations, on April 17, 2013, CGI's Senior Vice

President Toni Townes-Whitley informed FCi's President Scott Miller that CGI would only move forward with an amended TA if FCi committed to CGI that, if FCi were awarded a prime contract, CGI would receive both: (1) a 41% work share and (2) at least 10 management positions to compensate CGI for the reduced work share. JA 3027-28; *see also* JA 551-54. Miller responded via email that same day, April 17, 2013, making the following commitments:

> I will ensure that our revised teaming agreement with CGI affirms our commitment to CGI providing 10 management/supervisory positions. These positions will include seven (7) Team Lead-Document Review positions, including the Team Lead-Scheduling Unit, and three (3) Team Lead-Cases Processing Positions. In addition, the agreement will reflect CGI's 41% total contract value work share.

JA 3027.

FCi, however, never intended to honor these promises. Miller admitted at trial that FCi already had finalized (and boxed up) its revised proposal by the time he sent this email to Ms. Townes-Whitley, and that FCi's revised proposal contained neither commitment. JA 1712, 1771-72, 1780-83; *see also* JA 2161. The revised proposal—which FCi submitted to the State Department on April 18, the day after Miller's email—allocated CGI a work share of roughly 35% and stated that FCi would staff "all management positions." JA 1740, 2673, 2716, 2721. FCi again did not provide CGI a copy of the proposal and further refused to allow CGI to attend the April 23 oral presentation to the State Department. JA 557. At that presentation, FCi reiterated that it would hold *all* management positions under the revised proposal, contrary to what FCi promised CGI just days earlier. JA 2673-74.

CGI signed the Amended Teaming Agreement ("ATA") on April 23, 2013, the same day as the oral presentation, unaware that FCi already had reneged on its promises. FCi signed the ATA three days later, on April 26, 2013, knowing that it already had breached its obligations. The ATA left the main section of the original TA unchanged, but made the parties' agreed-upon changes in Exhibit A, which now provided that CGI would "receive forty-one 41% work share" and added the commitment that CGI would receive at least 10 management positions. JA 2642-43. FCi did not disclose to CGI that the already-submitted revised proposal, as well as FCi's oral presentation, contradicted these key ATA terms.

D. FCi's Third Proposal and the Prime Contract Award.

The State Department notified FCi in August 2013 that it had won the prime contract. JA 2717. However, the State Department subsequently rescinded the award when an unsuccessful offeror, Ikun, filed a bid protest and size challenge protest. JA 2729-35. When the protest was resolved, the State Department invited FCi to submit a revised proposal, JA 2718-28, which FCi did in September 2013, JA 3613-3882. Unbeknownst to CGI, FCi's revised proposal further dramatically cut CGI's work share to roughly 18%. JA 1740-41, 2710.

The State Department again awarded FCi the prime contract in February 2014. JA 2738. The total prime contract value as awarded was over $145 million. *Id.* Ikun again protested, but this protest was denied. When Ikun threated to appeal

the protest decision, FCi settled the matter by hiring Ikun as a new subcontractor. In so doing, FCi reallocated to Ikun 100 positions that should have gone to CGI under the ATA, making it impossible for FCi to honor its 41% work share commitment to CGI. FCi's President Scott Miller directed one of his employees not to tell CGI or the State Department about FCi's arrangement with Ikun until after FCi signed the prime contract with DOS. ROA 2524 (Pl.'s Trial Ex. 20) (Miller stating in an email that "we need a signed contract before we talk to the govt about Ikun and CGI about the changes"). FCi signed the prime contract on March 27, 2014. JA 3884. Thereafter, FCi finally notified CGI that FCi had unilaterally reduced CGI's work share and eliminated the 10 management positions promised to CGI. JA 2740.

E. Post-Award Events.

On April 4, 2014, CGI notified FCi that FCi had breached the ATA, and CGI invoked the ATA's dispute resolution clause. JA 2740-41. Concurrently, the parties attempted to negotiate a subcontract, but FCi pressed CGI to accept terms that did not remotely approach those promised in the ATA. FCi offered CGI just a 22% work share and no management positions, and insisted on new, commercially-unreasonable terms. JA 2743-44. In June 2014, with the prime contract set to begin and no subcontract in place, the parties agreed to a stopgap Letter Subcontract that enabled CGI to assist FCi with the project in the short-term while the parties made

further attempts to negotiate a subcontract that would cover the full duration of the prime contract. JA 2759-69. FCi terminated the Letter Subcontract in November 2014, before a definitive subcontract could be finalized. JA 2781-82.

II. Material Proceedings Below.

A. The Trial.

1. Fact Testimony.

The Circuit Court presided over a 7-day jury trial commencing on April 11, 2016. The first witness to testify was CGI's Senior Vice-President Kenyon Wells. Wells testified that the most important aspect of the parties' teaming agreement from CGI's perspective was the post-award work share promised to CGI, noting: "that is how [CGI] valued the agreement." JA 506-07. Wells explained that the assurance of a specific work share if FCi won a prime contract under the Solicitation was essential, "[b]ecause by joining this team, [CGI] had decided not to join any other team and that [it was] going to be exclusive to FCi." *Id.*

Wells testified that, when FCi indicated that it needed to reduce the 45% work share promised to CGI in the initial TA, CGI insisted on a 41% work share for the ATA because CGI "had made an internal decision that if it was really less than 40 percent . . . , it probably would not be worthy of [CGI's] investment or the risks associated with pursuing it." JA 555. In other words, CGI decided that it would not go forward with FCi on the procurement unless CGI received at least a 40% work share under the ATA, and FCi's Miller promised that CGI would

receive that in his April 17, 2013 email. *See supra* 8. Miller's April 17 email also assured CGI that it would receive 10 management positions, which, Wells testified, CGI had requested to compensate it for reducing its work share from 45% to 41%. JA 554. CGI's agreement to continue teaming with FCi pursuant to these terms was critical to FCi's winning the prime contract; the Circuit Court recognized in its opinion that CGI's withdrawal "likely would have destroyed FCi's chance to be awarded the prime contract." JA 3358.

Wells also testified regarding the material assistance CGI had provided to help FCi win the prime contract. CGI spent "a lot of time and money . . . to help" FCi with its proposal to the State Department, including providing significant assistance with the proposal's technical sections. JA 523; *see also* JA 515.

The State Department's Contracting Officer for the Solicitation, Kathleen Mejia, also testified at trial, and she confirmed the value that CGI brought to the proposal. Mejia testified that the State Department viewed CGI's inclusion as a subcontractor on FCi's team as a major "strength" in FCi's proposal, especially given "CGI's corporate experience with the Department of State and with consular affairs contracts in the past." JA 1048, 1070.

FCi's Scott Miller testified for the defense. Miller admitted under cross-examination that, at the time he sent his April 17, 2013 email to CGI promising a 41% work share and 10 management positions, FCi already had "completed" its

proposal to the State Department, which did not contain those terms. JA 1780-81. Rather, that proposal, which FCi submitted the next day, allotted CGI just a 35% work share and no management positions. JA 1740, 2673, 2716, 2721. Miller also admitted that, at FCi's oral presentation to the State Department several days later, FCi stated it would hold *all* management positions on the project, even though Miller had promised CGI in the April 17, 2013 email that CGI would receive 10 management positions. JA 1784.

FCi's CEO and founder Sharon Virts admitted much of the same in her trial testimony. Virts testified that, when Miller sent his April 17 email to CGI's Townes-Whitley making the 41% work share commitment, FCi's proposal containing contrary terms was already "printed," "in the box," and "taped" up. JA 2161. Virts claimed that FCi made the commitment to Townes-Whitley, and took these actions, out of fear of Townes-Whitley's "connections." JA 2162. Virts purportedly feared Townes-Whitley because she was "a sorority sister with Michelle Obama" and therefore had "power way beyond the State Department." *Id.*

Based on Miller's and Virts' testimony, CGI's trial counsel summarized CGI's fraudulent inducement claim as follows during closing argument:

> If you want to know where the fraud occurred in this case, it was on April 17, 2013. That's the best evidence that we have right there. It's . . . Defendant's Exhibit 114, you saw Mr. Miller's email where on the evening of . . . April 17—and this is after, everyone on FCi's side, after these proposals were boxed up, I think the term was, Mr. Miller said, "We promised to give you 41 percent and ten

> management positions." No teaming agreement had been signed, but they knew at the time they hadn't. They knew on April 17, at 5:00 p.m. they had not given CGI 41 percent, and they had not given CGI ten management positions.

JA 2304.

2. Damages Theories and Jury Instructions.

At trial, CGI did not seek damages for lost profits on its breach of contract claim. CGI recognized that Section 9 of the ATA, which prevented either party from recovering lost profits, precluded CGI from seeking such damages for breach of contract. JA 2295. Rather, CGI's expert Gregory Bingham explained that CGI sought to recover under the contract claim only for the portion of the revenue CGI would have earned as a subcontractor that it would have used to pay certain corporate expenses that CGI incurred irrespective of the ATA. These expenses were overhead and general and administrative ("G&A") expenses such as building rent, utilities, and salaries of certain corporate employees. JA 1274, 1280.

CGI did seek lost profits for its fraudulent inducement claim, however. JA 2317. FCi contended that such damages were legally barred, arguing that ATA Section 9's damages limitation should apply to the fraudulent inducement claim, in addition to the breach of contract claim. The Circuit Court rejected this argument, holding that such a contractual limitation did not limit recovery on a fraudulent inducement claim in tort, and, therefore, CGI could seek lost profits on this claim. JA 2263. Accordingly, the Circuit Court instructed the jury that, if it found FCi

liable for fraudulent inducement, then CGI was entitled to recover "all of the losses it sustained, including gains prevented that are a natural and ordinary result of the fraud." JA 2295; *see also* ROA Add. III 14.

FCi never argued at trial, whether in the context of this jury instruction or otherwise, that the ATA's provision permitting termination of the ATA 90 days after the prime contract award if the parties had not finalized a subcontract limited CGI's damages for fraudulent inducement. In fact, it was not FCi who raised the idea of the 90-day provision limiting damages at all. The Circuit Court *sua sponte* raised the 90-day provision during an argument on FCi's motion to strike (after the jury already had begun deliberations), and in the context of CGI's breach of contract claim, not its fraudulent inducement claim. JA 2490-95. The Circuit Court said that it was "just kind of throwing" out the idea of limiting CGI's breach of contract damages to this 90-day period. JA 2495.

The jury ultimately returned a verdict in CGI's favor on both the fraudulent inducement and breach of contract counts. It awarded CGI $8,533,000 on the fraudulent inducement claim and $3,465,000 on the breach of contract claim, for a total award of roughly $12 million. JA 3056-59.

B. Post-Trial Proceedings

The parties submitted post-trial briefs addressing a number of legal issues. FCi argued, for example, that the ATA was an unenforceable agreement-to-agree,

which precluded CGI from recovering under either the breach of contract or fraudulent inducement claims, and that CGI's damages were overly speculative. JA 3120-39. FCi did not argue, however, that the ATA's 90-day termination provision limited CGI's damages on the fraudulent inducement claim. *Id.* Nonetheless, the Circuit Court raised this possibility for the first time at the oral argument on the post-trial briefs. JA 3199.

On August 16, 2016, the Circuit Court issued an opinion setting aside the verdict on both counts. JA 3354-71. Significantly, the Circuit Court agreed that the evidence supported the jury finding that FCi committed fraud. JA 3369-70. The Circuit Court held, however, that CGI's damages on the fraudulent inducement claim were limited by the ATA's 90-day provision, and CGI had failed to present evidence on damages limited to the 90-day window after the prime contract award. JA 3370-71. The Circuit Court also held that the ATA's post-award promises were unenforceable as a matter of contract law because they required the parties to execute a later subcontract, rendering the ATA an unenforceable agreement-to-agree that precluded recovery on the breach of contract claim. JA 3362-67.

FCi subsequently moved for summary judgment on CGI's remaining count for unjust enrichment. Despite having just found the ATA unenforceable for purposes of the breach of contract claim, and despite having *upheld* the jury's finding that FCi committed fraud, the Circuit Court granted summary judgment on

CGI's unjust enrichment claim. JA 3607. The Circuit Court provided no reasoning for its decision. *Id.* The Circuit Court entered final judgment for FCi that same day, February 8, 2017, and this appeal followed. JA 3607-10.

SUMMARY OF ARGUMENT

The Circuit Court erred as a matter of law by setting aside the jury's verdict on CGI's fraudulent inducement and breach of contract claims, and by granting summary judgment on CGI's unjust enrichment claim.

Fraudulent Inducement. The Circuit Court correctly recognized that CGI could bring a fraudulent inducement claim in addition to its breach of contract claim, regardless of whether or not the promise underlying the fraud was enforceable in contract. The Circuit Court's holding was correct because a fraudulent inducement cause of action lies in tort, not in contract. It is a settled rule in Virginia that a party holds an independent claim for fraudulent inducement where the other party makes a false representation prior to the entry of a contract, and "with[out] a present intention . . . to perform" that promise at the time it was made. *Abi-Najm v. Concord Condo., LLC*, 280 Va. 350, 362-63, 699 S.E.2d 483, 490 (2010) (quotations omitted).

The Circuit Court also correctly instructed the jury on damages for fraudulent inducement. Specifically, the Circuit Court instructed the jury that, if it found FCi committed fraud, then FCi was liable for all of CGI's "gains prevented"

as a "result of the fraud." JA 2295. The jury found by clear and convincing evidence that FCi committed fraud, and it found that the damages attributable to the fraud amounted to $8,533,000. Those factual findings are entitled to great deference, and they are entirely consistent with the evidence. CGI demonstrated at trial that the fraud occurred when FCi's President Miller sent his April 17, 2013 email to CGI promising a 41% work share if FCi won the prime contract, while simultaneously taking contrary action confirming that there was no present intent to perform that promise. The jury calculated the fraud damages based on the profits that CGI would have earned had Miller's representation been truthful.

The Circuit Court upheld the jury's finding of fraud, but then erroneously set aside the jury's award by holding that CGI's fraud damages were limited by the ATA's 90-day termination provision. In so doing, the Circuit Court conflated breach of contract and fraudulent inducement recovery: the fraudulent promise in this case was that CGI would receive a 41% work share over the life of the prime contract—not just for the first 90 days—and CGI was entitled to recover all of the money it would have earned had that fraudulent promise been true. CGI's fraudulent inducement claim is premised not on the breach of a contractual duty under the ATA, but rather on an independent duty that arises in tort. The ATA's limitations provision thus is irrelevant to the fraud claim. The Circuit Court correctly recognized as much earlier in the case when it held that the ATA's

provision preventing recovery of lost profits did not apply to the fraud claim, but the Circuit Court erroneously held to the contrary post-trial when it limited CGI's fraud recovery based on a different contractual provision.

The Circuit Court independently erred in restricting the fraud damages based on the ATA's provisions because a party that fraudulently induces a contract cannot rely on a provision in that contract to limit its own liability. *See Devine v. Buki*, 289 Va. 162, 175-76, 767 S.E.2d 459, 466 (2015). CGI never would have agreed to the 90-day window to execute a subcontract had it known that FCi never intended to live up to its promises, and FCi cannot use that ATA provision now to avoid damages for its fraud.

Breach of Contract. The Circuit Court erred in finding the ATA to be unenforceable. In *Navar, Inc. v. Federal Business Council*, 291 Va. 338, 347, 784 S.E.2d 296, 300 (2016), this Court held that a teaming agreement is enforceable where it: (1) contains "reasonably certain" terms regarding the work promised the subcontractor and (2) demonstrates the parties' intent for the plaintiff to be the "actual subcontractor[]" hired by the defendant. The ATA met both criteria. The ATA's Exhibit A contained highly specific terms, providing that, if FCi received the prime contract, then CGI would receive a 41% work share (with specified responsibilities) and 10 defined management positions. The ATA also contained clear indicia that the parties intended for CGI to be the actual subcontractor hired

by FCi if awarded the prime contract. The ATA not only identified CGI as a "subcontractor," but also stated unequivocally in Section 1 that "Exhibit A . . . sets forth the specific scope of work *to be performed by [CGI]*" if FCi won the prime contract. JA 2631 (emphasis added). Even if the text were ambiguous as to the parties' intent, such intent is clear from the full context of the ATA and the absurd outcome that would result otherwise. If FCi were not obligated to award CGI a subcontract with the terms set forth in Exhibit A, then the ATA would be entirely one sided: CGI would be required to provide substantial assistance in preparing the proposal and pledge its exclusivity to FCi (allowing FCi to use CGI's brand name and references to win the prime contract), but FCi would not be required to provide anything of value in return. Virginia courts must avoid interpreting contracts in a manner that would render their terms "unreasonable or unequal." *Reid v. Boyle*, 259 Va. 356, 367, 527 S.E.2d 137, 143 (2000).

The Circuit Court failed to apply *Navar*'s framework in holding the ATA unenforceable. The Circuit Court instead held that the ATA was unenforceable, "even if . . . sufficiently certain in all materials terms," because it required the execution of a future subcontract. This holding is inconsistent with *Navar*, which focused on the specificity of the post-award terms and the parties' intent when they agreed to them, not on whether those terms had to be memorialized in a later instrument. The Circuit Court's analysis also failed to properly distinguish teaming

agreements like the ATA from unenforceable "agreements to agree." In a teaming agreement like the ATA, the prime contractor's promise to execute a *future* subcontract is consideration for the subcontractor's *present* obligations to work exclusively with the prime contractor and provide assistance with the proposal. The Circuit Court's holding effectively invalidates all teaming agreements, which are vital instruments for the federal government contracting industry.

Unjust Enrichment. Finally, assuming *arguendo* that the Circuit Court's ruling on the breach of contract claim were correct, the Circuit Court erred in granting summary judgment on CGI's unjust enrichment claim. CGI could have established the three elements of an unjust enrichment claim: (1) CGI conferred benefits on FCi by helping it win the prime contract; (2) FCi knew CGI was conferring those benefits; and (3) the circumstances make it inequitable for FCi to retain those benefits, especially since they were fraudulently procured. The Circuit Court provided no reasoning for granting summary judgment, but FCi argued below that CGI could not assert an unjust enrichment claim because the ATA was an "enforceable contract" governing the same subject matter. FCi's argument is unavailing for at least two reasons. First, as with the fraudulent inducement claim, FCi cannot shield itself from liability by relying on a contract it fraudulently procured. Second, fraud aside, the ATA would lack mutuality if only the ATA's post-award terms are unenforceable, because those post-award commitments were

the principal consideration that CGI received in exchange for its pre-award exclusivity and its work in helping FCi win the prime contract.

This Court should restore the jury's unanimous verdict and correct the Circuit Court's multiple legal errors, which produced an extraordinarily unjust result in this case. This result, which allows FCi to escape all liability even though a seven-member jury found (and the Circuit Court upheld) that FCi perpetrated a brazen fraud from which it earned millions of dollars in profits, should not be permitted to stand.

ARGUMENT

I. The Circuit Court Erred in Holding that the Damages CGI Could Recover for FCi's Fraudulent Inducement into the ATA Were Limited to Those Recoverable As a Matter of Contract Law Under the ATA.

A. Standard of Review.

"[W]here the trial court has set aside a jury verdict for the plaintiff," "the jury verdict must be reinstated and judgment entered on the verdict if there is any credible evidence in the record to support the jury verdict." *Wooldridge v. Echelon Serv. Co.*, 243 Va. 458, 461, 416 S.E.2d 441, 443 (1992). The plaintiff in such cases must receive "the benefit of all substantial conflicts in the evidence and all reasonable inferences which may be drawn from the facts in evidence." *Id.* This Court reviews *de novo* the Circuit Court's determinations on questions of law relevant to the decision to set aside the verdict. *Transcon. Ins. Co. v. RBMW, Inc.*, 262 Va. 502, 510, 551 S.E.2d 313, 317 (2001).

B. Fraudulent Inducement Is a Separate Cause of Action from a Breach of Contract Claim and Is Based on an Independent Duty.

The Circuit Court improperly imported contract principles and limitations into CGI's fraudulent inducement claim, overlooking established Virginia law that recognizes the tort of fraudulent inducement to enter into a contract. Accordingly, this Court should reverse the Circuit Court's erroneous ruling.

1. It is well-settled that "Virginia law recognizes the separate tort" of fraudulent inducement "even where the parties have agreed to a contract." *City of Richmond v. Madison Mgmt. Grp., Inc*., 918 F.2d 438, 446-47 (4th Cir. 1990). A party may bring a tort claim for fraudulent inducement where, before entering into a contract, the other party makes "promises . . . with a present intention not to perform them." *Abi-Najm*, 280 Va. at 362, 699 S.E.2d at 490 (quotations omitted). These two requirements—(1) that the promise be made before the formation of the contract, and (2) that the party making the promise had no present intent to perform *at the time* the promise was made—distinguish instances of fraudulent inducement from mere "unfulfilled promises or statements as to future event features." *Id.* at 362, 490 (quotations omitted). These requirements prevent parties from being able to recast "every breach of contract . . . [as] an action in tort for fraud." *Id.* (quotations omitted).

Because fraudulent inducement claims require that the fraud be "perpetrated . . . before a contract between the two parties came into existence," the "duty" underlying the fraud claim is not "one that finds its source in the [c]ontract[]," but

rather is an independent duty in tort. *Abi-Najm*, 280 Va. at 363, 699 S.E.2d at 363-64, 490 (distinguishing, among other cases, *Dunn Construction Co., Inc. v. Cloney*, 278 Va. 260, 266-67, 682 S.E.2d 943, 946 (2009), where "a contract . . . was the source of the duty allegedly breached"). Thus, Virginia courts routinely recognize that "[p]laintiffs may properly bring" fraudulent inducement claims "separate from," or in addition to, "their contract claims." *XL Specialty Ins. Co. v. Truland*, No. 1:14CV1058 JCC/JFA, 2015 WL 925582, at *3 (E.D. Va. Mar. 3, 2015); *see also, e.g.*, *Abi-Najm*, 280 Va. at 362-63, 699 S.E.2d at 363-64, 490; *Cty. of Grayson v. RA-Tech Servs., Inc.*, No. 7:13CV00384, 2013 WL 6002348, at *4 (W.D. Va. Nov. 12, 2013); *Whalen v. Rutherford*, No. 3:12CV00032, 2012 WL 6473151, at *6 (W.D. Va. Dec. 13, 2012); *Marcano v. Fox Motors, Inc.*, No. 1:11cv16 (JCC–IDD), 2011 WL 1326999, at *3 (E.D. Va. Apr. 7, 2011).

Consistent with these principles, a party may sue for fraudulent inducement "whether or not the promise is enforceable as a contract." Restatement (Second) of Torts § 530 cmt. (c) (1977). It is irrelevant whether or not the fraudulent promise is enforceable in contract because, as explained above, "the duty breached" with a fraudulent inducement claim "is not contractual in nature." *McKesson Med.-Surgical, Inc. v. Kearney*, 271 F. Supp. 2d 827, 829 (E.D. Va. 2003); *accord Abi-Najm*, 280 Va. at 362, 699 S.E.2d at 490.

2. These principles are controlling in this case. CGI's fraudulent inducement claim rests on FCi President Scott Miller's promises in the April 17

email to CGI that FCi would give CGI a 41% work share and 10 management positions if FCi won the prime contract. Virginia law allows CGI to recover for Miller's fraudulent promises, regardless of whether they are enforceable as a matter of contract law under the ATA, because (1) Miller made those promises before signing the ATA, (2) as the jury found, FCi had no present intention of performing those promises at the time Miller made them, and (3) as the jury found, CGI relied upon those promises, as they induced CGI to enter into the ATA.

The Circuit Court correctly recognized these principles as a matter of liability. The Circuit Court correctly concluded that CGI's fraudulent inducement claim was separate from its breach of contract claim, and that CGI could pursue its fraudulent inducement claim regardless of whether the underlying fraudulent promise was enforceable in contract. JA 3369. The Circuit Court explained that "[a] misrepresentation of one's present intent to perform an unenforceable promise is a false statement that is just as false as a misrepresentation concerning a promise that is enforceable." *Id.* "All of the other elements of fraud—the intent to make the statement, the intent to mislead, reliance and resulting damages—can exist regardless of the enforceability of the fraudulently made promise." *Id.*[1] Yet, after

[1] The Circuit Court assumed without deciding that a party can sue for fraudulent inducement where the underlying contract is unenforceable, but it explained that "[t]here are good reasons to believe this assumption is correct," and it then provided the reasons set forth above. JA 3369.

correctly holding that CGI had a fraudulent inducement claim independent of its contract claim, the Circuit Court then improperly conflated the two claims together when it came to damages. *See infra*.

C. The Circuit Court Correctly Upheld the Jury's Finding of Fraud.

The jury found by clear and convincing evidence that FCi fraudulently induced CGI into the ATA, and the Circuit Court correctly upheld that finding. JA 2292, 3369-70. The evidence of fraud was overwhelming—the fraud was even in writing. On April 17, 2013, CGI's Townes-Whitley emailed FCi's Miller that CGI would agree to the ATA (and thus continue to team with FCi on the Solicitation) only if FCi promised that CGI would receive a 41% work share and 10 management positions. JA 3027-28; *see also* JA 551-54. Miller responded via email that same day providing a "commitment" that CGI would receive the "41% total contract value work share" and 10 management positions if FCi won the prime contract. JA 3027-28.

FCi had no "present intent[] . . . to perform" these commitments at the time Miller made them, which was before the parties signed the ATA. *Abi-Najm*, 280 Va. at 363, 699 S.E.2d at 490 (quotations omitted). Miller knew at the time of his email that FCi's revised proposal already was completed and boxed for delivery, and, contrary to his promises, included a lower work share for CGI and no CGI management positions. JA 1712, 1771-72, 1780-83. FCi left no doubt that it never

intended to honor its commitments when: (1) FCi reiterated to the State Department at an oral presentation five days later that FCi would hold *all* management positions on the project (JA 2673-74); (2) FCi allowed CGI to execute the ATA the same day as the oral presentation, April 23, without disclosing to CGI that FCi's proposal contradicted the ATA's terms; and (3) FCi signed the ATA several days later knowing that its proposal contradicted the ATA's terms. The Circuit Court thus had ample basis to hold that "[t]he evidence . . . supports the [jury's] finding" that FCi committed fraud. JA 3370.

D. The Jury Awarded Fraudulent Inducement Damages Under a Correct Jury Instruction.

The Circuit Court also correctly instructed the jury on the damages available for FCi's fraud. A party may recover for fraudulent inducement the value it would have received "if the facts had been as represented" less the value actually received. *White Sewing Mach. Co. v. Gilmore Furniture Co.*, 128 Va. 630, 105 S.E. 134, 141 (1920); *accord Prospect Dev. Co. v. Bershader*, 258 Va. 75, 91, 515 S.E.2d 291, 300 (1999). The Circuit Court's jury instruction followed this rule. The instruction stated that, as damages for fraudulent inducement, CGI was entitled to recover "all of the losses it sustained, including gains prevented that [were] a natural and ordinary result of the fraud." JA 2295; *see also* ROA Add. III 14.

Given this instruction, the jury necessarily found that CGI sustained losses as a "result of the fraud" equal to $8,533,000. JA 3058-59. These jury findings—

that FCi's fraud *caused* CGI to suffer losses and that the *size* of those losses were in this amount—must receive "all reasonable inferences that may be drawn from the evidence" and can be set aside only if "plainly wrong or without credible evidence to support it." *Doherty v. Aleck*, 273 Va. 421, 424, 641 S.E.2d 93, 94 (2007) (quotations omitted).

The evidence more than supported these findings. The jury calculated its fraud damages based on the profits CGI would have earned had it received 41% of the prime contract value—*i.e.*, had Miller's April 17, 2013 promise been true that CGI would receive a 41% work share if FCi won the prime contract. JA 3015-19; JA 3058-59. Accordingly, there was no basis to set aside this damages award.

E. The Circuit Court Incorrectly Held that CGI's Damages Were Limited By the ATA's 90-Day Termination Provision.

The Circuit Court, however, did set aside the award. It did so on a theory that the Circuit Court raised *sua sponte*, after the jury had already rendered its verdict, that CGI could recover fraud damages only for the first 90 days of the prime contract. The Circuit Court reasoned that CGI's damages were limited to that "which it was due under the ATA," and, because Section 5 of the ATA provided that the agreement would expire within 90 days of the prime contract award if the parties had not entered into a subcontract, CGI's damages were limited to this 90-day period. JA 3370-71.

This reasoning conflated the breach of contract and fraudulent inducement claims. A fraudulent inducement claim does not derive from contractual duties, *see supra* 23-24; it comes from an independent duty that lies in tort. *Abi-Najm*, 280 Va. at 363, 699 S.E.2d at 490. Accordingly, a plaintiff's damages for fraudulent inducement "may not necessarily be confined to those available under" the relevant contract. *In re Myrtle*, 500 B.R. 441, 455 (Bankr. W.D. Va. 2013). Such is the case here. FCi fraudulently promised that it would give CGI 41% of the prime contract value over the life of that contract, if FCi won the prime contract under the Solicitation. The promise was *not* that CGI would receive a 41% work share for just the first 90 days of the prime contract. Such a promise hardly would induce CGI into entering the ATA. Even if there were ambiguity regarding the nature of FCi's fraudulent promise, the jury's verdict resolves it; given its award, the jury necessarily found that the fraudulent promise was that FCi would give CGI a 41% work share over the life of the prime contract. CGI, therefore, is entitled to what the jury found as CGI's damages—*i.e.*, all of the gains CGI would have earned had FCI intended to keep this promise, regardless of whether or not CGI had a contractual right to that amount under the ATA.

The Circuit Court's error in conflating the fraudulent inducement and breach of contract claims also is apparent from its inconsistent rulings on whether or not the ATA's limitation provisions applied to the fraud claim. At trial, the Circuit

Court correctly ruled that the ATA's limitation of liability provision, which precluded either party from recovering lost profits, did not prevent CGI from recovering lost profits on its fraudulent inducement claim. JA 2263. Yet, after the trial ended and the jury rendered its verdict, the Circuit Court changed course and decided that the ATA's 90-day termination provision limited CGI's recovery on its fraudulent inducement claim. JA 3370-71. There is no reason to treat the two contractual provisions differently. Neither is relevant to the damages that CGI suffered in tort, which the jury found as a factual matter amounted to $8,533,000.

The Circuit Court's rulings likewise were inconsistent regarding whether or not CGI could recover on the fraudulent promise even if it were unenforceable as a matter of contract law. Again, the Circuit Court correctly found in the liability portion of its opinion that a party *can* recover for fraudulent inducement predicated on an unenforceable promise, because the "elements of fraud—the intent to make the statement, the intent to mislead, reliance and *resulting damages*—can exist regardless of the enforceability of the fraudulently made promise." JA 3370 (emphasis added). This was a correct statement of the law. *See* Restatement (Second) of Torts § 530 cmt. (c) (explaining that in fraudulent inducement cases, "it is immaterial to the tort liability that the damages recoverable are identical with, or substantially the same as, those which could have been recovered" under a contract "if the promise were enforceable").

The Circuit Court abandoned this liability analysis, even though it was correct, when it came to damages. The Circuit Court held that CGI's damages for fraudulent inducement were limited to that "which it was due under the ATA," JA 3370, but only after stripping out from the ATA the promise in Exhibit A of a 41% work share over the life of the prime contract. In other words, the Circuit Court calculated that "which [CGI] was due under the ATA" by excluding the very promise that formed the basis of the fraudulent inducement claim, because the Circuit Court found that promise unenforceable in contract (*see infra*). This faulty approach conflated the two claims and, if left to stand, would effectively mean that a party could never recover on a fraudulent inducement claim for a promise that is unenforceable in contract, leading to perverse results such as the one here.

Finally, and critically, the Circuit Court's reliance on the ATA's 90-day provision was in error because a party that fraudulently induces a contract "cannot use the language of the contract as a shield from liability." *Thomlyn, LLC v. Holladay Prop. Servs. Midwest, Inc.*, 90 Va. Cir. 272, 2015 WL 10765159, at *2 (Va. Cir. Ct. 2015). This Court's decision in *White Sewing Machine*, 128 Va. 630, 105 S.E. 134, is instructive. In that case, the plaintiff alleged that the defendant's agent made fraudulent promises regarding the quality of the product and the defendant's support staff in order to induce the contract. 105 S.E. at 136-37. This Court rejected the defendant's argument that the plaintiff could not recover

fraudulent inducement damages based on these promises because the contract contained an integration clause. The Court held that "a principal cannot by any such [contract] clause or other device relieve himself of the consequences of the fraud of his own agent, while claiming the benefit of such a contract." *Id.* at 137. The Court held that the plaintiff could recover fraud damages equal to the value of the machines "if the facts had been as represented by [the defendant's] agent," minus the value actually received. *Id.* at 141. Similarly in *George Robberecht Seafood, Inc. v. Maitland Bros. Co.*, 220 Va. 109, 111, 255 S.E.2d 682, 683 (1979), this Court rejected the defendant's effort to rely on an "as is" clause in a contract to preclude damages for fraudulent inducement. The Court held that "even [where] the written contract contains covenants waiving warranties or disclaiming or limiting liabilities," those disclaimers do "not render the seller immune from fraud that induced the contract." *Id.* at 112, 683; *see also Devine*, 289 Va. at 175-76, 767 S.E.2d at 466 (party may not invoke a contract it fraudulently induced to "relieve [itself] of the consequences of [its] fraud" (quoting *Packard Norfolk, Inc. v. Miller*, 198 Va. 557, 564-65, 95 S.E.2d 207, 212-13 (1956)).

Here, FCi cannot rely on the 90-day termination provision in Section 5 of the ATA to limit CGI's recovery for fraud. That provision is no different from the "as is" clause in *George Robberecht Seafood* or the integration clause in *White Sewing Machine*, and FCi cannot use this limitations provision to "render [itself]

immune from [the] fraud that induced the conduct." *George Robberecht Seafood*, 220 Va. at 112, 255 S.E.2d at 683. It is particularly unjust for FCi to be able to rely upon this provision because CGI never would have agreed to that provision had CGI known that FCi had no intention of agreeing to a subcontract with the terms that Miller promised in his April 17, 2013 email. FCi cannot now use this fraudulently procured, 90-day termination provision to shield itself from liability.

In holding otherwise, the Circuit Court allowed FCi to escape scot-free—reaping millions of dollars in the process—for a fraud that the jury unanimously found FCi perpetrated. This Court always strives to "uphold the sanctity of [a] jury verdict . . . that has been fairly rendered." *Smithey v. Sinclair Ref. Co.*, 203 Va. 142, 145, 122 S.E.2d 872, 875 (1961). It is imperative that the Court do so here.

II. The Circuit Court Erred in Holding that the ATA Was Unenforceable, Even If It Set Forth Specific Terms for the Parties' Intended Performance, Just Because It Required Execution of a Later Subcontract.

A. Standard of Review.

Where a contract is unambiguous, the question of whether or not the ATA is enforceable is a legal one that this Court reviews *de novo*. *W.J. Schafer Assocs., Inc. v. Cordant, Inc.*, 254 Va. 514, 519, 493 S.E.2d 512, 515 (1997).

B. The ATA Is Enforceable Because It Contains Reasonably Certain Terms and Demonstrates the Parties' Intent for CGI to be FCi's Subcontractor.

The Circuit Court independently erred in setting aside the verdict on CGI's breach of contract claim. The ATA satisfies the requirements for an enforceable teaming agreement under Virginia law. This Court provided guidance on the enforceability of teaming agreements in *Navar*, holding that a subcontractor cannot claim a contractual right to post-award work where the teaming agreement: (1) does not "contain a sum, or any reasonably certain method for determining a sum," for the post-award work promised the subcontractor; or (2) does not demonstrate that the parties "mutually agreed that [the plaintiff] would be the actual subcontractor[] hired by [the defendant]." 291 Va. at 347, 784 S.E.2d at 300.

Courts applying Virginia law have applied this same two-part test in enforcing teaming or partnership agreements. In *EG&G, Inc. v. Cube Corp.*, 63 Va. Cir. 634, 2002 WL 31950215 (Va. Cir. Ct. 2002), the circuit court found that a teaming agreement was enforceable because: (1) it contained "sufficient criteria" regarding the work promised the subcontractor, and (2) demonstrated "the requisite intent" that the plaintiff would in fact be hired as the subcontractor. *Id.* at *9. More recently, in *Blevins v. Booker*, No. 1:17CV00012, 2017 WL 2389720 (W.D. Va. June 1, 2017), a federal district court applying Virginia law held that an initial partnership agreement was enforceable, even though it required execution of a

subsequent agreement to flesh out its terms, because the initial agreement contained "sufficient objective criteria to enforce" and "it [was] clear that the parties intended to enter into a binding contractual relationship." *Id.* at *4 (quotations omitted); *see also id.* (explaining that "[i]n considering whether an agreement is an enforceable contract or merely an agreement to agree, courts consider whether the document at issue includes the requisite essential terms and also whether the conduct of the parties and the surrounding circumstances evince the parties' intent to enter a contract." (quotations omitted)). Because the ATA satisfies these criteria, it is enforceable under Virginia law.

1. The ATA Contained Reasonably Certain Terms.

In assessing the first element of the *Navar* test—whether or not the ATA contained reasonably certain terms—this Court is guided by the principle that "[t]he law does not favor declaring contracts void for indefiniteness and uncertainty, and leans against a construction which has that tendency." *Reid*, 259 Va. at 367, 527 S.E.2d at 143 (quotations omitted). A contract must not be found unenforceable due to "indefiniteness" unless it "reach[es] the point where construction becomes futile." *LongView Int'l Tech. Solutions, Inc. v. Lin*, No. 160228, 2017 WL 1396062, at *3 (Va. Apr. 13, 2017) (quoting *Heyman Cohen & Sons, Inc. v. M Lurie Woolen Co.*, 133 N.E. 370, 371 (N.Y. 1921) (Cardozo, J.)). "Invalidating a contract on the ground that it is indefinite should be a last resort." *Id.* (quotations omitted).

Here, constructing the ATA's post-award terms is far from "futile." *Id.* The post-award work promised to CGI was more than "reasonably certain," as the ATA contained precise work load and specific positional promises. Exhibit A of the ATA specified that, if FCi won the prime contract, CGI would receive a 41% work share and 10 management positions, including "Seven (7) Team Lead Document Review positions" and "Three (3) Team Lead Case Processing positions." JA 2642-43. These clear requirements stand in contrast to the teaming agreement in *Navar*, which stated only that the *prime* contractor would receive "at a minimum" 51% work share, the minimum threshold required by regulation, but was silent as to any specific work share or positions the subcontractor would receive. 291 Va. at 347, 784 S.E.2d at 300. The *Navar* agreement thus left it open for the subcontractor to receive a work share of anywhere between 1% and 49%. The ATA, in contrast, is perfectly clear—it promised CGI a 41% work share.

The ATA also included all of the remaining requirements for an enforceable contract: (1) the nature of the work to be performed by CGI; (2) the place of performance; (3) the "duration" of the work; and (4) the compensation to be paid. *Mullins v. Mingo Lime & Lumber Co.*, 176 Va. 44, 50, 10 S.E.2d 492, 494 (1940). Exhibit A stated that CGI would perform specific functions detailed in the Solicitation at a New Hampshire facility (*e.g.*, visa processing and file storage) and would perform quality control work at a Kentucky facility. JA 2642. The ATA

made clear that CGI would perform these functions for the duration of FCi's work under the prime contract, and, as the jury found, the ATA set the compensation to be paid as 41% of the total contract value, or $59.5 million. *Id.* Although FCi complained below that the ATA did not specify whether this price would be paid on a flat fee basis or an hourly rate, the "method for fixing a price . . . is not a required material term" for an agreement to be sufficiently definite, especially where the agreement is not a "contract of sale" but rather "provides the basis for a partnership." *Blevins*, 2017 WL 2389720, at *3. Thus, the ATA properly defined the compensation to be paid.

Like in *EG&G*, even though the ATA did not contain certain "functional details of the subcontract," it did contain the "essential terms" of the post-award work promised to CGI. *EG&G*, 2002 WL 31950215, at *13. Those terms were sufficiently certain to avoid declaring Exhibit A and the work share commitment therein unenforceable due to indefiniteness.

2. The Parties Intended for CGI to Be the Actual Subcontractor Hired By FCi.

The second *Navar* element—whether or not the parties mutually intended that the proposed subcontractor would be "the actual subcontractor," *Navar*, 291 Va. at 347, 784 S.E.2d at 300—also is satisfied in this case. The ATA referred to CGI as the "subcontractor" throughout, and the ATA's preamble stated that "FCi intends to . . . include [CGI] in its proposal as a subcontractor." JA 2631. Then in

its very first section, the ATA provided that "Exhibit A . . . sets forth the specific scope of work *to be performed by [CGI]* on the . . . Solicitation." *Id.* (emphasis added). This provision was unconditional: FCi agreed that CGI would "perform[]" work on the prime contract under Exhibit A's terms if FCi won the prime contract.

The use of mandatory language in Exhibit A is dispositive of the parties' intent. Exhibit A plainly states that CGI "will receive" 41% of the contract's work share and "will be provided" 10 management positions. JA 2642. Such language "indicates an intent to perform and be bound." *Blevins*, 2017 WL 2389720, at *5. The parties further demonstrated their intent for CGI to be the actual subcontractor hired on the project through the ATA provision that barred FCi from entering into arrangements with other subcontractors without CGI's consent if those arrangements would reduce CGI's work share. JA 2632. Moreover, the ATA provided that the agreement "shall become a mutually binding agreement by and between" the parties," JA 2638, leaving no doubt that the parties intended for this to be a "binding contractual relationship," *ATACS Corp. v. Trans World Commc'ns*, 155 F.3d 659, 666 (3d Cir. 1998); *cf. Schafer*, 254 Va. at 520, 493 S.E.2d at 515 (finding a teaming agreement unenforceable where there was "no mutual commitment by the parties" and no agreed-upon terms).

Ordinary principles of contract interpretation resolve any possible ambiguities about whether or not the ATA obligated FCi to provide CGI the post-

award terms in Exhibit A. Virginia law adheres to the canon that "[a] construction should be avoided . . . which would be unreasonable or unequal," "if it can be done consistently with the tenor of the agreement," *Reid*, 259 Va. at 367, 527 S.E.2d at 143 (quotations omitted). "[T]hat construction which is most obviously just is to be favored as most in accordance with the presumed intention of the parties." *Id.* (quotations omitted). Likewise, Virginia courts interpret contracts to avoid constructions that would produce "absurd results." *Transit Cas. Co. v. Hartman's, Inc.*, 218 Va. 703, 708, 239 S.E.2d 894, 896 (1978).

Interpreting the ATA *not* to require FCi to give CGI the post-award terms outlined in Exhibit A would produce results that are "unreasonable," "unequal," and outright absurd. *Reid*, 259 Va. at 367, 527 S.E.2d at 143. The ATA obligated CGI to make significant pre-award commitments to FCi. It required CGI to provide material assistance in preparing the State Department proposal and to pledge exclusivity to FCi and not team with any other prime contractor. JA 2631-32. These pre-award obligations "served as . . . consideration" for FCi's promise to provide CGI the work share and management positions outlined in Exhibit A. *EG&G* 2002 WL 31950215, at *7. If FCi was not obligated to provide CGI that post-award work, then the agreement would be entirely one-sided and fail for lack of mutuality: it would require CGI to outlay significant time and money, which it did, for nothing of value in return. This Court should avoid any such interpretation.

In short, the ATA contained sufficiently certain post-award terms and demonstrated the parties' intent for FCi to hire CGI as a subcontractor if the parties' bid were successful. *Navar* requires nothing more.

C. The Circuit Court Incorrectly Held that a Teaming Agreement Is Unenforceable If It Requires Execution of a Later Subcontract.

1. The Circuit Court dispensed with *Navar's* two-part framework and effectively adopted a rule of *per se* invalidity for teaming agreements. The Court held that "even if the ATA is sufficiently certain in all material terms, it is not enforceable" because it requires "the negotiation and execution of a future subcontract." JA 3365-66. The Circuit Court thus held that, even if the ATA satisfied both parts of the *Navar* test by demonstrating the parties' intent that CGI would be awarded a subcontract and setting forth in crystal clear detail the terms of CGI's post-award work, those promises were unenforceable if they had to be memorialized in a subsequent agreement.[2] The net result is to render nearly all

[2] The Circuit Court also found that the promised 41% work share was "aspirational and not binding," because the parties recognized that "the work share commitment may not be exactly 41% each year," although that percentage remained "the end goal" for "the contract term." JA 3365. These provisions, however, merely afforded flexibility in recognition that CGI's work could vary slightly from year-to-year based on the project's demands. They do not show a lack of intent for CGI to be the subcontractor hired by FCi, nor do they change the fact that FCi promised with "reasonabl[e] certain[ty]" that CGI's work share would be 41% *over the full contract period*. The significance the Circuit Court attributed to these provisions is inconsistent with the Circuit Court's later analysis that the ATA would be unenforceable even if "sufficiently certain on all materials terms," because it would still require a later subcontract to effectuate those terms.

teaming agreements—which by definition contemplate that the parties will enter a subsequent, post-award agreement—unenforceable.

The Circuit Court's reasoning is inconsistent with Virginia law. As this Court recently explained in *LongView*, "the mere fact that a later formal writing is contemplated will not vitiate [an] agreement." 2017 WL 1396062, at *2 (quotations omitted). In *LongView*, this Court found a term sheet enforceable even though "by its express terms [it] contemplate[d] that the parties would draft a more comprehensive agreement." *Id.*; *accord Blevins*, 2017 WL 2389720, at *5. *LongView's* holding was consistent with *Navar*, which turned on the lack of *specificity* regarding the post-award work promised the subcontractor, not the mere fact that the parties had to enter into a later agreement to implement those promises. The Circuit Court erred as a matter of law in holding that the need to execute a subsequent agreement alone renders the ATA unenforceable.

The error in the Circuit Court's approach is particularly pronounced in the context of teaming agreements. Putative prime contractors and subcontractors wishing to team on a procurement invariably will need to enter a post-award subcontract should the proposal succeed, because many of the nonessential subcontract details depend on the details of the prime contract as eventually awarded. Such is the case here, where the ATA set forth the essential terms of the future subcontract, but the parties recognized that additional "subcontract terms

and conditions" would "flow[] down from the prime contract." JA 2633. Rarely, if ever, will parties be able to memorialize the full terms and conditions of a subcontract in an initial teaming agreement. *See* Ralph C. Nash & Richard N. Kuyath, *Teaming Agreements: Are They Binding?*, 27 Nash & Cibinic Rep. NL ¶ 36 (Aug. 2013) (explaining that *Cyberlock* did not "recognize how difficult it is to spell out the precise arrangement before [the parties] have won the contract"). That is what the decision below erroneously requires—a particularly poor precedent in Virginia, the hub of federal government contracting.

2. The Circuit Court relied extensively on the federal district court's opinion in *Cyberlock Consulting, Inc. v. Information Experts, Inc.*, 939 F. Supp. 2d 572 (E.D. Va. 2013), to support its conclusion, but *Cyberlock* is not binding on this Court. To the extent *Cyberlock* stands for the proposition that a teaming agreement is unenforceable solely because it requires the execution of a later subcontract, it is incorrect as a matter of Virginia law.[3]

Cyberlock relied on Virginia precedent regarding so-called "agreements to agree," but *Cyberlock* overlooked an important distinction between such agreements and teaming agreements. In the "agreement to agree" cases, the *entire*

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[3] *Cyberlock* also is distinguishable on its facts. For instance, the teaming agreement in *Cyberlock* did not have the same indicia of intent to enter into a binding relationship because it did not have a provision like the ATA's that the agreement represented a "mutually binding agreement by and between" the parties. JA 2638; *see Cyberlock*, 12-cv-00396-JCC-TRJ (E.D. Va.), Dkt. no. 8-1.

current agreement between the parties is to enter into a future agreement. Neither side receives present consideration in such cases; there are only mutual promises with respect to the future arrangement. *See*, *e.g.*, *Boisseau v. Fuller*, 96 Va. 45, 30 S.E. 457, 458 (1898) (agreement to enter into future lease); *Beazer Homes Corp. v. VMIF/Anden Southbridge Venture*, 235 F. Supp. 2d 485, 487-88 (E.D. Va. 2002) (letter of intent detailing potential terms for future contract). In contrast, with teaming agreements like the ATA, a subcontractor provides *present* consideration to the prime contractor pre-award, agreeing both to exclusivity (in some cases) and the provision of material assistance with the prime contract proposal. The contemplated future subcontract is the consideration for the subcontractor's present obligations—obligations that the subcontractor already will have performed when the time comes to execute that subcontract and fulfill the prime contractor's post-award obligations to the subcontractor. *See EG&G*, 2002 WL 31950215, at *7. Teaming agreements therefore are wholly different from and must be distinguished from mere "agreements to agree."

3. The Circuit Court's ruling is not only wrong as a matter of Virginia law, it also would transform Virginia into an outlier in its treatment of teaming agreements. *See ATACS*, 155 F.3d at 666 (citing cases from other jurisdictions on teaming agreements). By making teaming agreements *per se* unenforceable, parties will not enter into such agreements in Virginia. This result will be detrimental to

Virginia contractors given that teaming agreements are an essential tool for the federal government contracting community and the federal government expressly encourages teaming agreements in contract proposals. 48 C.F.R. 9.602. This Court should reaffirm *Navar's* guidance that teaming agreements are enforceable in Virginia so long as they are sufficiently certain regarding the work promised the subcontractor and demonstrate an intent for the putative subcontractor to be the actual subcontractor hired on the contract. Both of those elements are met here.

This Court's reversal of the Circuit Court's breach of contract holding also is important given the unjust result that it produced in conjunction with the fraudulent inducement holding. The Circuit Court allowed FCi to use the ATA as both a sword and a shield, permitting FCi to escape its obligations under the ATA for purposes of the contract claim by arguing that the ATA was unenforceable, while simultaneously allowing FCi to use the ATA to limit its liability under the fraud claim. Both holdings were wrong and, together, produced an inequitable outcome.

III. The Circuit Court Erred in Granting Summary Judgment on CGI's Unjust Enrichment Claim After Holding that the ATA Was Unenforceable for Purposes of CGI's Breach of Contract Claim.

A. Standard of Review.

This Court reviews the Circuit Court's grant of summary judgment *de novo*. *Mount Aldie, LLC v. Land Trust of Va., Inc.*, 796 S.E.2d 549, 553 (Va. 2017). Summary judgment is proper only if "no material fact is genuinely in dispute on a

controlling issue or issues and the moving party is entitled to such judgment as a matter of law." *Id.* (quotations omitted).

B. CGI Could Have Established the Elements of an Unjust Enrichment Claim.

Assuming *arguendo* that the Circuit Court's ruling on the breach of contract claim was correct, the Circuit Court erred in granting summary judgment on CGI's unjust enrichment claim. The elements of an unjust enrichment claim are: "(1) the Plaintiff conferred a benefit on the Defendant; [] (2) the Defendant knew that the Plaintiff was conferring the benefit; and (3) the Defendant accepted or retained the benefit under circumstances which would make it inequitable for the Defendant to retain the benefit." *Online Res. Corp. v. Lawlor*, 285 Va. 40, 51, 736 S.E.2d 886, 892 (2013). Here, given the evidence admitted at trial, CGI had more than enough evidence to establish that: (1) CGI conferred significant benefits on FCi by providing FCi with assistance in proposal preparation, and allowing FCi to use CGI's brand name and contract references to secure the award; (2) FCi knew CGI was conferring those benefits; and (3) it would be inequitable for FCi to retain those benefits given that FCi fraudulently procured them and then benefited handsomely as a result.

C. The ATA Does Not Preclude the Unjust Enrichment Claim.

The Circuit Court provided no explanation for granting summary judgment, *see* JA 3607, but FCi's principal argument in support of summary judgment is

unsustainable under Virginia law. Specifically, FCi maintained that, even though the Circuit Court found the ATA unenforceable for purposes of the breach of contract claim, the unjust enrichment claim nonetheless failed because the ATA and/or the Letter Subcontract was "an enforceable contract" governing the same subject matter as that claim. JA 3380. For several reasons, FCi's argument fails.

First, and most importantly, FCi's argument rests on a flawed premise that it can use the ATA, which it fraudulently procured, to shield itself from liability for unjust enrichment. The rule that prohibits parties from relying on a fraudulently procured contract to limit or avoid liability applies with equal force to unjust enrichment. *See supra* 31-32 (citing *White Sewing Machine*, 105 S.E. at 136-37; *George Robberecht Seafood*, 220 Va. at 111, 255 S.E.2d at 683).

This case perfectly illustrates that principle. Allowing FCi to rely on the ATA to defeat CGI's unjust enrichment claim meant that: (1) FCi could fraudulently induce CGI into a contract; (2) CGI could have no enforceable rights under that contract; and yet (3) FCi could still rely on that contract to defeat a claim of unjust enrichment. Equity cannot permit such a result.

Second, the ATA independently cannot serve as an enforceable agreement that precludes CGI's unjust enrichment claim because, if the post-award promises to CGI in Exhibit A are unenforceable, as the Circuit Court held, then the ATA must be invalid in its entirety for lack of mutuality of obligation. *See Town of*

Vinton v. City of Roanoke, 195 Va. 881, 896, 80 S.E.2d 608, 617 (1954). CGI offered significant consideration under the ATA, pledging to work exclusively with FCi and dedicating substantial time and effort to FCi's proposal. FCi's promises to give CGI a post-award 41% work share and 10 management positions were the consideration that CGI received (or at least thought it was receiving) in exchange for its pre-award performance. If those post-award obligations are stripped away, then the ATA lacks mutual consideration, cannot be enforceable, and cannot bar CGI's unjust enrichment claim as a matter of law.

FCi attempted to avoid this outcome by invoking the ATA's severability clause, arguing that it preserved the ATA's pre-award obligations even if the post-award terms were unenforceable. JA 3467. This is not how severability clauses work. Even where a contract contains a severability clause, courts must inquire whether or not an unenforceable provision is "integral to the parties' agreement." *Schuiling v. Harris*, 286 Va. 187, 193, 747 S.E.2d 833, 836 (2013). If it is, then the provision "cannot be severed" and the entire agreement must fall. *Id.*[4] Because the

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[4] *See also Miller v. GGNSC Atlanta, LLC*, 746 S.E.2d 680, 688 (Ga. App. 2013) ("[T]he severance of an essential contract term is not allowed, even where the contract contains a severance clause." (quotations omitted)); *Stewart v. GGNSC-Canonsburg, L.P.*, 9 A.3d 215, 220-21 (Pa. Super. 2010) ("[T]he severability clause cannot save the Agreement" where the relevant provisions "were an integral part of the Agreement."); *John R. Ray & Sons, Inc. v. Stroman*, 923 S.W.2d 80, 87 (Tex. App. 1996) (similar).

ATA's post-award terms were the consideration that CGI received for entering into the ATA, the terms necessarily were "integral to the parties' agreement." *Id*. The ATA is not enforceable absent the consideration provided by those terms.

Finally, there is no merit to FCi's argument that the Letter Subcontract precludes CGI's unjust enrichment claim. Simply put, the Letter Subcontract does not cover the same subject matter as the unjust enrichment claim, a prerequisite for it to bar the claim. The parties signed the Letter Subcontract *after* FCi won the prime contract to enable CGI to begin short-term work on the project. CGI does not seek compensation for this short-term work. Rather, CGI's unjust enrichment claim seeks redress for the fraudulently procured benefits that CGI conferred on FCi to help win the prime contract. The Letter Subcontract did not address or seek to compensate CGI for the benefits CGI conferred in helping FCi win the prime contract, and therefore did not cover the same "subject matter" for which CGI now seeks equitable relief. *Trident Prod. & Servs., LLC v. Canadian Soiless Wholesale, Ltd.*, No. 3:10CV877-HEH, 2011 WL 2938483, at *5 (E.D. Va. July 19, 2011).

D. This Court Should Remand On the Unjust Enrichment Claim If It Affirms the Circuit Court on the Breach of Contract Claim.

The Court should remand the unjust enrichment claim to the Circuit Court for a determination of liability and remedies if the Court affirms the Circuit Court's judgment on the breach of contract claim, regardless of whether the Court reinstates the jury's award on the fraudulent inducement claim.

This Court should remand even if it reinstates the fraudulent inducement award because damages for fraudulent inducement and unjust enrichment claims can serve different purposes. The jury's award on the fraudulent inducement claim reflected expectancy damages designed to compensate CGI for the profits it would have earned had FCi's representations been true. An award for unjust enrichment, on the other hand, can be "measured by the *defendant's* profits, where the object of restitution is to strip the defendant of a wrongful gain." Restatement (Third) of Restitution and Unjust Enrichment § 51 (2011) (emphasis added); *see id.* § 51(4). In other words, CGI may seek disgorgement of FCi's profits that are attributable to FCi's wrongful conduct, in addition to CGI's lost profits that resulted from the fraud. *Id.* Illustration 10 (providing example where a defendant is liable for its "profit realized in the wrongful transaction," in an amount greater than the plaintiff's lost profits). CGI should be able to pursue this claim below, because "[t]o permit [FCi] to retain the profits . . . would run counter to the principle[] that one should not be permitted to profit from his own wrongdoing." *Frank Shop, Inc. v. Crown Cent. Petroleum Corp.*, 264 Va. 1, 11, 564 S.E.2d 134, 139 (2002) (allowing disgorgement as a remedy); *see also Pender v. Bank of Am. Corp.*, 788 F.3d 354, 366 (4th Cir. 2015) ("It is blackletter law" that a plaintiff can seek disgorgement, irrespective of the plaintiff's own losses, to "ensure that wrongdoers [cannot] profit from their unlawful acts.").

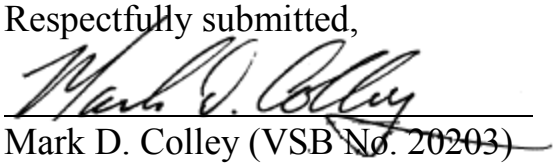
In all events, if this Court were to affirm the Circuit Court's decision to set aside the jury award on both the fraudulent inducement claim and breach of contract claim, then reversal and remand on the unjust enrichment claim clearly would be necessary. "Equity will not suffer a wrong to be without a remedy," *Price v. Hawkins*, 247 Va. 32, 37, 439 S.E.2d 382, 385 (1994), but that is what the combined effect of the Circuit Court's holdings allowed here. This Court should make clear that businesses in Virginia do not, and cannot, get away with fraud.

CONCLUSION

For the reasons stated above, CGI requests that this Court: (1) reverse the Circuit Court's judgment on CGI's fraudulent inducement claim and enter final judgment on the jury's verdict on that claim; (2) reverse the Circuit Court's judgment on CGI's breach of contract claim and enter final judgment on the jury's verdict on that claim; and (3) if the Court does not reinstate the breach of contract award, reverse the Circuit Court's grant of summary judgment on the unjust enrichment claim and remand for further proceedings.

Dated: October 23, 2017

Respectfully submitted,



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CERTIFICATE REQUIRED PURSUANT TO RULE 5:26

(a) I hereby certify that the names of the Appellant and the Appellee and the names, addresses and contact information of counsel for each party are as follows:

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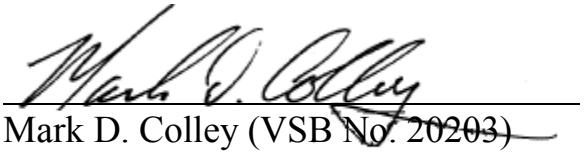
(b) I further certify that a true and accurate electronic copy of this Appellant's Opening Brief was served, via email, and electronic copies of the Brief and Appendix were served on CD, via UPS Ground Transportation, this 23rd day of October 2017 to counsel for Appellee listed above.

(c) I further certify that exclusive of the cover, Table of Contents, Table of Authorities, and Certificate, this Appellant's Opening Brief does not exceed 50 pages and is produced in Times New Roman size 14 font.

(d) I further certify that three copies of the foregoing Appellant's Opening Brief and Appendix were hand-filed with the Clerk of the Supreme Court and electronic copies were filed, via VACES, this 23rd day of October 2017.



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