In The

Supreme Court of Virginia

RECORD NO. 170617

CGI FEDERAL INC.,

Appellant,

v.

FCi FEDERAL, INC.,

Appellee.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

FCi's response boils down to the simple, but legally flawed, argument that it can use a fraudulently procured and purportedly unenforceable contract to prevent CGI from obtaining any remedy in tort, contract, or equity. Virginia law, however, plainly permits a party fraudulently induced into a contract to recover in tort and, if contract obligations are broken, in contract. If the underlying contract is deemed unenforceable, Virginia law also allows the defrauded party to recover for unjust enrichment. Because FCi offers no reason to depart from settled Virginia law, this Court should reverse the Circuit Court's legally erroneous and unjust decisions.

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. The Circuit Court Correctly Upheld the Jury's Finding of Liability for Fraudulent Inducement.

1. CGI Established the Elements of Fraudulent Inducement.

FCi barely disputes that it committed fraud. Significantly, FCi does not deny that when FCi's President Scott Miller sent an April 17, 2013 email promising CGI a 41% work share and 10 management positions, FCi had *no present intent* to honor that commitment. FCi does not dispute this fact for good reason—at the time Miller sent this email to CGI, FCi already had finalized and boxed up its proposal

to the State Department allotting CGI a much lower work share and no management positions. Br. of Appellant ("Br.") 26.

FCi's entire rebuttal for its fraud is buried in a footnote. Br. of Appellee ("Opp.") 41 n.18. FCi claims that Miller's email "promised only to amend the teaming agreement to give CGI a 41% work share and 10 management positions," and "FCi kept that promise . . . when it executed the amendment to the teaming agreement." *Id.* This claim is nonsense. Had Miller written: "FCi will commit to write into the ATA a 41% work share and 10 management positions, but will not actually give you those things if FCi wins the prime contract," CGI assuredly would not have relied on that promise. The evidence is incontrovertible: when CGI's Toni Townes-Whitley demanded that FCi commit that it would provide CGI a 41% work share and 10 management positions, Miller responded stating that the ATA would "reflect" and "affirm" those "commitment[s]." JA 3027-28. Miller thus made those "commitments" and confirmed that the ATA would memorialize them. It is unsurprising that FCi did not raise this specious defense at trial.

FCi also argues that CGI cannot recover for fraudulent inducement because Miller's email post-dated the *original* teaming agreement. Opp. 42-43. But the amended teaming agreement, the ATA, was a new contract: CGI agreed to reduce its work share in exchange for the promise of ten management positions. Miller's April 17 email preceded, and induced CGI into executing, this new contract. Even

where there is a "contract existing between the parties," a party can be liable for fraudulently inducing the other into "a new contractual relationship." *XL Specialty Ins. Co. v. Truland*, No. 1:14CV1058 JCC/JFA, 2015 WL 925582, at *3 (E.D. Va. Mar. 3, 2015); *see also Whalen v. Rutherford*, No. 3:12CV00032, 2012 WL 6473151, at *6 (W.D. Va. Dec. 13, 2012).[1]

The distinction between the original and amended teaming agreement also is relevant to reliance. FCi argues that CGI did not rely on the 41% work-share promise in signing the ATA, Opp. 47 & n.20, but the jury was instructed on and necessarily found reliance, JA 2292-93. Ample trial evidence supports the jury's reliance finding. In April 2013, FCi informed CGI that FCi's bid purportedly could not succeed with the original teaming agreement's terms. JA 2929-30. CGI then had two choices: (1) continue to team with FCi under a new agreement; or (2) seek to team instead with another potential prime contractor. CGI's Kenyon Wells testified that CGI had decided that it would not pursue the first option unless FCi promised at least a 40% work share, JA 555, and CGI's Toni Townes-Whitley's April 17 email to Miller corroborates that testimony.[2]

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[1] As the Circuit Court held, FCi alternatively is liable for "fraud in the inducement to perform in accordance with the pre-existing agreement." JA 3369.

[2] FCi argues that Wells' testimony that CGI would not agree to less than 40% work share "did not square" with CGI's willingness to agree to a 22% work share in October 2014 when negotiating a subcontract. Opp. 47. By then, however, FCi had won the prime contract and CGI had no option to team with another prime contractor. CGI should not be penalized for trying to salvage anything it could.

2. FCi Breached an Independent Duty in Tort for which CGI Can Recover Economic Losses.

FCi argues that, despite the jury's factual findings, CGI cannot recover in tort because "the source of the duty was one assumed only by contract." Opp. 41. FCi fundamentally misstates Virginia law on fraudulent inducement.

This Court has long recognized that a party violates an *independent duty* in tort where it makes a promise prior to the entry of a contract "with a present intention not to perform" that promise. *Lloyd v. Smith*, 150 Va. 132, 145, 142 S.E. 363, 365 (1928); *see Abi-Najm v. Concord Condo., LLC*, 280 Va. 350, 362-63, 699 S.E.2d 483, 490 (2010). The duty breached is "the duty not to commit fraud," a "duty imposed by tort law." *City of Richmond v. Madison Mgmt. Grp., Inc.*, 918 F.2d 438, 447 (4th Cir. 1990). This duty necessarily does not "find[] its source in the [c]ontract[]," since the fraud is "perpetrated . . . before [the] contract between the two parties came into existence." *Abi-Najm*, 280 Va. at 363, 699 S.E.2d at 490.

The fact that the fraudulent promise relates to contractual duties does not alter this analysis; it is unsurprising, since the tort's name is "fraudulent inducement *to contract*." *Devine v. Buki*, 289 Va. 162, 175, 767 S.E.2d 459, 466 (2015) (emphasis added). Even where the fraudulent promise relates to a subsequent contractual provision, the duty not to lie about a present fact before entering a contract remains separate from the duty not to breach the contract. Accordingly, "a single act or occurrence can . . . support causes of action both for

breach of contract and for breach of a duty arising in tort." *Abi-Najm*, 280 Va. at 361, 699 S.E.2d at 489 (quotations omitted).[3]

B. The Jury's Damages Award for Fraud Should Be Restored

The damages to which CGI is entitled for FCi's fraud are straightforward. CGI may recover the value that it would have received "if the facts had been as represented" by FCi, less the value that CGI actually received. *White Sewing Mach. Co. v. Gilmore Furniture Co.*, 128 Va. 630, 649, 105 S.E. 134, 141 (1920). In accord with this rule, the Circuit Court properly instructed the jury that CGI was entitled to "all 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.

On appeal, FCi does not dispute that this instruction was correct, and that is dispositive. *Cf.* Opp. 45 (noting only that FCi objected to the instruction *at trial*). The jury calculated CGI's fraud damages consistent with the correct instruction, awarding CGI the "gains prevented," JA 2295, based on the profits that CGI would have earned had "the facts been as [FCi's Miller] represented;" *i.e.*, had CGI received a 41% work share and 10 management positions after FCi won the prime contract. *White Sewing Mach.*, 128 Va. at 649,105 S.E. at 141.

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[3] FCi argues that CGI cannot recover for fraudulent inducement because CGI does not "seek redress . . . for personal injury or property damage." Opp. 42. Under Virginia law, the economic loss rule does *not* apply to fraudulent inducement. *Abi-Najm*, 280 Va. at 363, 699 S.E.2d at 490; *Cty. of Grayson v. RA-Tech Servs., Inc.*, No. 7:13CV00384, 2013 WL 6002348, at *4 (W.D. Va. Nov. 12, 2013).

The Circuit Court improperly set aside the jury's award on the theory that the ATA's 90-day termination provision limited CGI's fraud damages. JA 3370. Rather than meaningfully argue why this ruling was correct as a matter of law, FCi makes a series of scattershot arguments in an attempt to escape liability for a fraud that it now effectively concedes. Opp. 43-50.

First, FCi argues that CGI "invited" the Circuit Court's "error." Opp. 44. Cherry-picking from a CGI post-trial brief describing the fraud damages in the context of the ATA, FCi asserts that "CGI cannot now complain that the trial court" erroneously relied on the 90-day provision. Opp. 43-44. However, the jury instruction, which did not tie fraud damages to the amount CGI could recover under the ATA, is dispositive. CGI requested (and the Circuit Court gave) a correct instruction to award as damages all gains prevented as "a natural and ordinary result of the fraud." JA 2295; *see also* ROA Add. III 14.

FCi's "invited error" argument also is factually incorrect. CGI's post-trial brief included a section titled "Limitations to Contract Damages Do Not Bar The Full Recovery of Damages Under CGI's Tort Claim for Fraud in the Inducement." JA 3094. That section explained that tort and contract duties are independent, and that "the wrong for which CGI seeks recompense under [the fraud claim] occurred *before* the parties executed the ATA." JA 3096. And at oral argument, CGI disputed the applicability of the 90-day provision to the fraud claim, explaining

that the Circuit Court should not conflate "contract expectancy damages" with "what [CGI was] promised." JA 3303.

FCi also cannot refute the black-letter principle that a party who fraudulently procures a contract cannot then use that contract to limit its liability. Br. 31-33. Instead, FCi resorts to semantics, asserting that "[t]he court did not apply any damages[] limitation or contractual disclaimer in the ATA to restrict the fraud claim." Op. 44. Whether one calls the 90-day provision a "damages limitation," a "contractual disclaimer," or something else, the fact remains that it is indisputably part of a fraudulently procured contract and cannot be used as a shield.

FCi's remaining arguments mostly proceed on the erroneous assumption that CGI's only remedy was for rescission. FCi argues that the remedy for fraud is "to restore the defrauded party to the position he held prior to the fraud," and therefore the "proper measures of CGI's damages . . . was the delta" between the original and amended teaming agreements. Opp. 45-46 (quotations omitted). FCi also argues that CGI cannot recover for the fraud because CGI purportedly "ratif[ied]" the ATA. Opp. 48. But as FCi itself has recognized, *see* Opp. to Pet. for Appeal 17, a party suing for fraudulent inducement can seek rescission *or* it can pursue "an action for damages." *Abi-Najm*, 280 Va. at 362, 699 S.E.2d at 489-90 (quotations omitted). CGI appropriately sought damages equal to the value that CGI would have received had it been given the 41% work share and 10 management positions

that FCi's Miller promised. *Id.*; *see White Sewing Machine*, 128 Va. at 649, 105 S.E. at 141. FCi's rescission cases, therefore, are inapposite. Opp. 45, 48.

FCi's damages arguments are nonsense even on their face. FCi's argument that CGI should receive the "delta" between the original and amended teaming agreements implies that the parties could somehow have gone back to the original teaming agreement that promised CGI a 45% work share. Opp. 46. Yet, FCi told CGI that the original agreement was no longer viable, JA 2929, and, even if it were, FCi's position surely is that the post-award work share in the original agreement was not enforceable (just like in the ATA). As for FCi's argument that CGI ratified and "perform[ed]" under the ATA, Opp. 48, FCi conflates the ATA with the Letter Subcontract. As FCi recognizes earlier in its brief, the ATA and Letter Subcontract were two entirely separate agreements. Opp. 28-29. CGI performed under the latter on a short-term basis, but not the former. Indeed, FCi's position is that the ATA contained solely "pre-award" obligations. Opp. 29-31. CGI could not have "performed" under the ATA after FCi won the prime contract in February 2014 if, according to FCi, there was nothing left to perform.

Finally, there is no merit to FCi's argument that, as a matter of law, CGI could not prove lost profits for Option Years 3, 4, and 5 because they had not yet been awarded to FCi. Opp. 49. A future contingency related to damages—such as unexercised Options Years—presents a fact issue for the jury and does not

preclude recovery. *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp.*, 65 F.3d 1113, 1125-26 (4th Cir. 1995) (upholding damages award that included prospective profits for five years of anticipated but as-yet unexercised renewals of franchise agreement). In fact, this Court has held that, even where "no future contract was guaranteed" by the federal government, a prime contractor can still recover from its subcontractor for work expected in the future. *Preferred Sys. Solutions, Inc. v. GP Consulting, LLC*, 284 Va. 382, 398-99, 732 S.E.2d 676, 685 (2012); *see also* ROA 1661-62. "The standard of proof . . . is not that of a 'guarantee.'" *Preferred Sys.*, 284 Va. at 398, 732 S.E.2d at 685. Damages can be awarded based on evidence that government contract work is expected. *Id*.[4]

In fact, FCi does not even argue that the evidence at trial was insufficient to support the jury's decision to include Option Years 3, 4, and 5 in the damages award, likely because there was overwhelming trial evidence that work was expected to be performed by FCi. The State Department's Kathleen Mejia testified that the need for visa services had not changed since the initial solicitation and was not expected to change, and, therefore, the State Department likely would exercise

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[4] FCi's reliance on *Mktg. & Mgmt. Info., Inc. v. United States*, 62 Fed. Cl. 126 (2004), is misplaced. Opp. 49. There, the court held that a contractor's damages from two unexercised option years were "inherently speculative" because the Government had "no contractual obligation to extend performance." *Mkt. & Mgmt. Inc.*, 62 Fed. Cl. at 130-31. Here, however, FCi agreed to award CGI a 41% workshare over the entire contract term. In other words, CGI was entitled to receive this workshare for any additional option years the Government exercised.

the remaining Option Years. JA 1083-87, 1123-25. In addition, CGI's damages expert explained to the jury that his calculations accounted for both the risk that the Government might not award the future Option Years and the time value of money. JA 1421-43. Taken together, the evidence was more than sufficient to support the jury's factual decision to include Option Years 3, 4 and 5 in the award.

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

A. The *Navar* Two-Part Test Governs.

FCi contends that the ATA's "subject to" language automatically renders the post-award terms unenforceable "[i]rrespective of whether CGI can satisfy the standards articulated in *Navar*." Opp. 18. That is incorrect. The "subject to" language is relevant to the second *Navar* factor—whether the parties *intended* a binding relationship under which CGI would be "the actual subcontractor." *Navar Inc. v. Fed. Bus. Council*, 291 Va. 338, 347, 784 S.E.2d 296, 300 (2016). For instance, in *Golding v. Floyd*, 261 Va. 190, 539 S.E.2d 735 (2001), this Court "concluded that [a] 'subject to' clause *evinced an intent* by the parties to avoid being bound until a formal contract had been prepared." *LongView Int'l Tech. Sols., Inc. v. Lin*, No. 160228, 2017 WL 1396062, at *3 (Va. Apr. 13, 2017) (summarizing *Golding*) (emphasis added). Similarly, in *Boisseau v. Fuller*, 96 Va. 45, 46-47, 30 S.E. 457, 457 (1898), this Court described a "subject to" clause as

"evidence" that the parties "did not intend the previous negotiations to amount to an agreement." A "subject to" clause thus does not have talismanic significance; it is simply probative of intent and must be weighed with other evidence.

B. The ATA Demonstrates the Parties' Intent for CGI to be the Actual Subcontractor under the ATA's Post-Award Terms.

FCi ignores the key distinction between this case and *Golding* and *Boisseau*—here, one party (CGI) provided *present consideration* in exchange for promises by the other party (FCi) that would be effectuated through a later agreement (the subcontract). Br 43. Outside the ATA's post-award terms, which FCi maintains are unenforceable, FCi points to no valuable consideration CGI received in exchange for helping FCi win the prime contract. In a footnote, FCi vaguely asserts that "the pre-award provisions were supported by the mutual promises to collaborate on pre-award efforts." Opp. 37 n.16. Suffice to say, CGI is not a nonprofit; it does not exchange "mutual promises to collaborate" that provide no financial benefit. The only consideration for CGI under the ATA was the promised post-award work share and management positions.

FCi nevertheless asserts that the parties *intended* to enter a contract that obligated CGI to provide substantial pre-award consideration, but did not obligate FCi to provide anything of value in return. This Court "presume[s]" that contracting parties do not intend to produce such "unreasonable or unequal"

results. *Reid v. Boyle*, 259 Va. 356, 367, 527 S.E.2d 137, 143 (2000) (quotations omitted). The parties did not intend such a result here.[5]

C. The ATA Contained Reasonably Certain Terms.

With regard to the first *Navar* factor, FCi does not meaningfully dispute that the ATA contained reasonably certain terms. FCi argues only that the ATA "did not identify how many employees CGI would provide . . . or how payments would be calculated." Opp. 19. A contract need not contain such granular details for its terms to be "reasonably certain." Exhibit A of the ATA sets forth CGI's specific work share and positions, the total compensation to be paid, and the nature, place, and duration of the work. Br. 36. The post-award terms were "reasonably certain."

D. The Jury's Damages Award on the Contract Claim was Proper.

FCi's contract damages arguments (Opp. 23) are just repackaged versions of its arguments about why the post-award terms are unenforceable—they all rest on the mistaken premise that FCi was *not* obligated to give CGI a 41% work share if FCi won the prime contract. Opp. 23-27. If FCi had that obligation, then it is undisputed that the jury properly awarded contract damages as a portion of the revenue CGI would have earned under the prime contract with a 41% work share.

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[5] FCi also ignores the other evidence of the parties' intent, *see* Br. 37-38, including the mandatory language in the ATA's Exhibit A, which provided that CGI "will receive" 41% of the contract's work share and "will be provided" 10 management positions. JA 2642. FCi's silence on these provisions speaks volumes.

E. CGI's Assignment of Error was Not Deficient.

Finally, FCi argues the second assignment of error does not challenge the Circuit Court's holding that "the 41% work share was too indefinite to be enforceable," which FCi claims is an independent basis for the finding that the ATA was unenforceable. Opp. 13-14. FCi waived this argument by not raising it in opposition to the Petition for Appeal. In any event, FCi misreads the Circuit Court's opinion. The Circuit Court stated its holding clearly: "Thus, even if the ATA is sufficiently certain in all material terms, it is not enforceable." JA 3365. The Circuit Court then offered several bases for *this holding*, the "[f]irst" of which was that the 41% work share was "aspirational." *Id.* This was not an alternative ground for its decision. Even on appeal, FCi does not argue that the ATA was unenforceable because the 41% work share was uncertain, which is evidence enough that this was not an independent basis for the Court's decision.

III. The Circuit Court Erred in Granting Summary Judgment on Unjust Enrichment After Holding the ATA Unenforceable.

FCi argues that, even if the ATA's post-award terms are *unenforceable* for purposes of CGI's contract claim, the ATA is "an enforceable, express contract[]" that precludes CGI's unjust enrichment claim. Opp. 29. FCi asserts that the Circuit Court "left intact the pre-award provisions of the ATA," *id.*, and that severing the post-award terms while keeping the rest of the ATA in place "gives effect to the central purpose of the ATA—for the parties to partner to win the VSS contract,"

id. at 36. Severing FCi's post-award obligations is not possible, however, because that would remove the sole consideration CGI received in exchange for its pre-award performance. Winning the prime contract may have been FCi's "central purpose," but the ATA represented a certain financial loss to CGI unless it received the post-award work that FCi promised. If the ATA's post-award terms were unenforceable, the agreement lacks any semblance of mutuality. Br. 46-47.

The ATA also cannot block CGI's unjust enrichment claim because FCi cannot use a fraudulently procured contract to shield itself from liability. Br. 45-46. FCi argues that CGI somehow waived this issue because CGI "was seeking to enforce" the ATA. Opp. 37. What CGI was "seeking to enforce" were the ATA's post-award provisions, which the Circuit Court held unenforceable. Virginia law does not permit FCi to bar CGI's equitable claim based on a fraudulently procured contract, let alone one that is entirely one-sided. Br. 46-47.

FCi's argument that the Letter Subcontract precludes the unjust enrichment claim also fails. Opp. 31. CGI seeks redress for the benefits it conferred in helping FCi win the prime contract, whereas the Letter Subcontract compensated CGI only for short-term work *after* FCi won the prime contract. Br. 48. FCi does not dispute this point, but argues that together the Letter Subcontract *and* the ATA cover the "entire subject matter of the parties' relationship." Opp. 31-32. This argument

collapses, however, if the ATA is unenforceable for lack of mutuality (which it must be if the post-award terms are unenforceable, as explained above).[6]

FCi argues, implausibly, there is no evidence it knew CGI was conferring a benefit for which CGI expected compensation. Opp. 32. As FCi well-knew, CGI did not help FCi win the prime contract out of the goodness of CGI's heart; CGI expected to be compensated with a 41% work share and 10 management positions.

Finally, FCi incorrectly asserts that this Court should not remand on the unjust enrichment claim if it reinstates the verdict on either the contract claim *or* the fraud claim. Opp. 38 n.17. Remand would be unnecessary if this Court reinstates the contract award (since the ATA would then be an enforceable contract), but not if this Court reinstates only the fraud award. Br. 48-49.

CONCLUSION

CGI requests that this Court: (1) reverse the Circuit Court's judgment on CGI's fraudulent inducement and breach of contract claims and enter final judgment on the jury's verdicts; and (2) 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.

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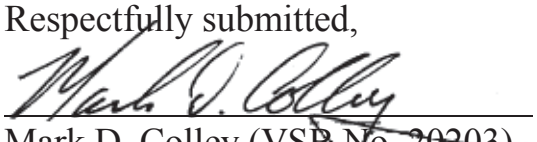
[6] Moreover, the Letter Subcontract states the parties' intent that it would be superseded by the definitive subcontract, which was never agreed upon. JA 2759.

Dated: December 1, 2017

Respectfully submitted,



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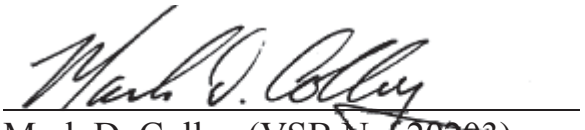
(b) On this 1st day of December, 2017, an electronic copy of the Appellant's Reply Brief has filed, via VACES, and three paper copies of the same were hand-filed with the Clerk of the Supreme Court of Virginia. On this same day, an electronic copy of the Appellant's Reply Brief was served, via email, to the above address. I further certify that exclusive of the cover, Table of Contents, Table of

Authorities, and Certificate, this Appellant's Reply Brief does not exceed 15 pages and is produced in Times New Roman size 14 font.



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