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STATEMENT OF THE CASE

Plaintiff Thomas R. Cross ("Cross") appeals orders of the Circuit Court for Montgomery County (Donohue, J.) granting judgment notwithstanding the verdict on his claim for a sales commission of $2,383,260.50 and granting a conditional new trial. Defendant Automated Systems and Programming, Inc. ("ASPI") cross-appeals the denial of a motion for partial summary judgment and the denial of sanctions.

OUESTIONS PRESENTED ON APPEAL

1. **Did the circuit court err in granting ASPI judgment notwithstanding the verdict?**
2. **Did the circuit court err in granting ASPI's motion for a conditional grant of a new trial?**

OUESTIONS PRESENTED ON CROSSAPPEAL

1. **Did the circuit court err in denying ASPI's motion for partial summary judgment?**
2. **Did the circuit court abuse its discretion in denying ASPI's requests for sanctions?**

STATEMENT OF FACTS

I. FACTS RELATING TO THE APPEAL

A. Introduction

Cross brought this suit to recover, inter alia, a sales commission of three percent of the total price of a computer hardware and software maintenance contract entered into in 1996 between ASPI and the Internal Revenue Service ("IRS"). He based the claim on a letter from ASPI dated January 17, 1992. E. 92-105. The contract with IRS, which had a base year and four option years renewable at the discretion of the IRS (E. 2605(a-b)),[1] had a total evaluated price

[1] **Pages in the Joint Record Extract generally contain four transcript pages. Where appropriate to differentiate the transcript pages herein, they are denoted in parentheses with a, b, c, and d indicating the first through fourth transcript page on**

of $79,375,350. E. 2837 (PX 3). Approximately $69 million of the contract involved computer software maintenance performed by a subcontractor on which ASPI received a handling charge or "markup" of approximately four percent, and the bulk of the remainder involved $9.1 million in hardware maintenance to be performed by ASPI and various subcontractors. E. 2498(a)-99(a), 2981 (PX 24). Cross maintained that upon award of the contract he was entitled to three percent of the total evaluated price because he brought the opportunity to the attention of ASPI. E. 2524(b-d).

ASPI contended that the January 17, 1992 letter did not entitle Cross to a commission on the IRS contract. It also contended that Cross never mentioned the January 17, 1992 letter or any belief that he was entitled to a commission on the IRS contract prior to April 1997, eight months after the contract was awarded and more than two years after ASPI first bid on the contract in March 1995. ASPI maintained that during 1995 and 1996 Cross created numerous documents affirmatively demonstrating that he was claiming no commission. It argued that even if Cross would otherwise be entitled to a commission, under doctrines of waiver, estoppel, and breach of loyalty, the following conduct precludes him from recovering it:

First, as the person in charge of ASPI's pricing strategy, Cross recommended prices to bid on the contract where ASPI's return on the contract would not even cover such a commission. In the same capacity, he provided the principals with profitability estimates that did not reflect the commission, even though the undisclosed commission would have been larger than the estimated profit.

<u>Second,</u> while acting as ASPI's agent, Cross recruited the project manager on the contract, David Slosman, to join ASPI pursuant to an agreement by which

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Slosman would receive a 25 percent share of the profits of the contract and

each Joint Record Extract page. Exhibits of plaintiff and defendants are designated "PX" or "DX."

prepared estimates of that share for Slosman without disclosing that Cross claimed a three percent sales commission that would have entirely eliminated any profit. He thereby made ASPI liable for the fraudulent inducement of Slosman to join ASPI.

Third, Cross testified at a hearing before the Board of Contract Appeals of the General Services Administration concerning the financial capability of ASPI to handle the contract without disclosing to the administrative law judge that he (Cross) maintained that upon the award of the contract ASPI would be obligated to pay him three percent of the total evaluated price of the contract. E. 2419(a)-24(a), 2755(b)-68(a).

Cross acknowledged that he did not disclose the commission to Slosman, maintaining that he purposely concealed the commission from Slosman and that he crafted documents specifically to effect that concealment. E. 2500(c)-01(c), 2536(d)-37(d). He also acknowledged that he failed to disclose the commission to the administrative law judge when testifying about ASPI's financial capability, even though he maintained that he believed at the time that he would be entitled to the three percent commission immediately upon award of the contract. E. 2551(a)-59(b). Cross further acknowledged that he did not inform ASPI's principals of the commission when he was recommending prices to bid on the contract (E. 2597(b)), and when he showed them the profit calculations that did not disclose the commission. agg, in at 6, 9. He maintained, however, that he had mentioned the commission at other times (E. 2490(d)-91(a), 2518, 2597(b)), and that, even if he had not, he was not obligated to do so. E. 2746(a)-55(a).

B. Factual Background

1. The January 17, 1992 Letter

ASPI is an information technology firm. E. 2602(b). During the period at issue, it was certified to bid on government contracts set aside for minority-owned firms under Section 8(a) of the Small Business Act on the basis of ownership by Bevin Prussia. Borah Simon joined ASPI in 1989 and became part owner in 1994.

E. 2425(c)-26(a). In late 1991, Cross approached Prussia and Simon indicating that because of relationships he had with the Department of Energy ("DOE") and firms currently performing certain work there, he could bring ASPI a $10 million DOE contract. Cross was to form a team of subcontractors, prepare a proposal to bid on the contract, and manage the contract as project manager. E. 2602(d)-03(c), 2644(d)-45(d). Following discussions with Simon (id.; E. 2478), Cross came to work for ASPI on or about January 4, 1992. E. 2479(d).

A letter to Cross dated January 17, 1992, and signed by ASPI President Prussia, offered Cross employment as Director, Special Projects, initially on a part time basis, with a salary of $75,000 per year. E. 3193. It also stated:

> **In addition to your salary, you will be eligible to participate in our executive compensation plan. The plan includes a sales commission of three percent of revenue generated solely by you. Also, you will receive 30 percent of the profit on the contracts for which you have direct management supervision.**

A copy countersigned by Cross and dated January 21, 1992, was placed in Cross's personnel file. E. 2646(b-d), 3193-94 (DX 21). Prussia testified that the signature was his but that he did not remember seeing the letter prior to April 1997. E. 2603(d), 2613(d)-14(a). Simon testified that he had never seen the letter until it was brought to his attention in April 1997. E. 2684(a-b).[2]

2 The IRS Contract

ASPI bid on but did not secure the DOE contract. Cross continued to work for ASPI and was involved in efforts to secure additional contracts in the years that followed, becoming officially a full time employee in September 1993. E. 2647(a-b). Whenever it appeared that ASPI might receive a contract with which

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[2] Cross, who produced a letter countersigned on January 18, 1992 (E. 2835 (PX 2)), testified that he had been handed the letter by Simon in Simon's office on January 17, 1992 (E. 2478(a)-81(a)), but had erroneously dated it January 18, 1992. E. 2564(a-b). Simon testified that he did not hand the letter to Cross and was not in the office with Cross on January 17, 1992. E. 2645(c)-46(d), 2690(c-d).

Cross was involved there would be discussions concerning his compensation for the role in securing the contract. la; E. 2509(a).

In late 1994, Washington Data Systems ("WDS") was nearing the end of a five-year computer hardware and software maintenance contract with the IRS that was set-aside for competition among 8(a) firms. WDS, which was no longer eligible to re-bid on the contract, retained Richard Ruiz to search for 8(a) firms to bid on the contract as the prime contractor, with WDS performing the larger part of the work as a subcontractor. After taking into account a number of considerations, including experience with the Treasury Department (where ASPI was performing similar work (E. 2596(d)-97(a)), Ruiz recommended ASPI to WDS President Paul McCoy. E. 2632(b)-35(b).

Meanwhile, in November 1994, Cross was contacted by a friend named Bob Wilson, who informed Cross of the possibility of teaming with WDS. Cross informed Prussia and Simon of the contact by Wilson, then set up a meeting among the principals of the two companies.[3] At the meeting, WDS said it would write the proposal and handle the software portion of the contract as a subcontractor, while ASPI could handle the hardware. WDS President McCoy stated that ASPI stood to earn $500,000 a year on the contract. E. 2604(a-d). A teaming agreement was then executed on December 15, 1994, under which ASPI committed to bidding on the IRS contract, and, if successful, to retain WDS as a subcontractor to handle the software portion of the contract. E. 2489(b-c), 2973-80 (PX 23). Cross acknowledges that at no time prior to ASPI's committing to

[3] Ruiz testified that Wilson had no role in his decision to recommend ASPI. However, Ruiz had informed Robert Davis, the chief operating officer of WDS of his intention to recommend ASPI to WDS president McCoy. E. 2634(d)-35(a). After the call from Wilson, Cross met with-both Wilson and Davis. E. 2487(b-c). Cross also testified about a December 9, 1994 meeting he attended at WDS with various WDS staff prior to a meeting of the principals. E. 2487(c-d). Cross testified that he had not mentioned the meeting in his deposition because he had never been asked about it. E. 2545(d). Ruiz and Simon stated that they did not know of any such meeting. E. 2636(c-d), 2648(a).

this arrangement did he inform Prussia or Simon that he believed he was entitled to a three percent commission on the total price of the contract. E. 2544(a-b), 2546(a-b).

In January 1995, WDS and ASPI began to prepare a proposal for the contract. E. 2490(a-c). Cross, as the principal representative of ASPI, devised ASPI's pricing strategy. He recommended bid prices to Simon, who approved each recommendation, sometimes after consulting with David Slosman, the current project manager. E. 2648(d)-49(a), 2655(a-b), 2683(c-d). Cross acknowledges that at no time during the pricing of the contract did he mention that he believed he was entitled to a commission of three percent of the price of the contract. E. 2597(a-b). Slosman, on whose advice on pricing the contract Simon also relied (E. 2649, 2683), had no knowledge that Cross made any claim for a commission until Cross told him in April 1997. E. 2709(c-d).

3. February 1995-March 1995: Cross's Recruitment Of David Slosman, Cross's Profit Calculations, ASPI's Initial Bid

During February and March 1995, Cross recruited Slosman to join ASPI under an agreement whereby he would receive 25 percent of profits. Cross then persuaded Prussia and Simon to pay him and Slosman each 25 percent of profits. He then drafted, and shared with Slosman, Simon, and Prussia, profit calculations that did not mention any commission, even though a three percent commission would have been larger than the estimated profit. Cross then caused ASPI to submit a $134 million dollar bid under terms whereby, according to his own calculations, ASPI would lose money if it owed him a three percent sales commission. It is undisputed that he did not mention his commission to Slosman, Simon, or Prussia when he did these things.

a. Cross's Recruitment of Slosman

Initially, Slosman had committed to working for ASPI for one year upon award of the IRS contract. E. 2493(b-c). In February 1995, because Cross

understood Slosman to have an attractive offer to thereafter return to WDS, Cross decided to recruit Slosman to join ASPI on a permanent basis. E. 2493, 2549-50. Cross then persuaded Simon and Prussia to agree to give Cross and Slosman each 25 percent of the profit. E. 2656(d)-57(a), 2734(d), 2549(a-b) 2707(d)-08(b).

b. Cross's Profit Calculation

ASPI's first bid, submitted on March 6, 1995, was for $134,096,495, of which approximately 90 percent involved software maintenance performed by WDS. E. 2656(d)-57(a), 3177 (DX 15). Prior to the submission of that bid, with figures supplied by Slosman, Cross created a profit calculation worksheet styled "Derivation of IRS Shares." E. 2546(b)-47(c), 2708(b-d), 3011-13 (DX 2), 3014-16 (DX 2A). On the worksheet he presented a figure of $1,486,306, which he termed "total billings."[4] From "total billings" Cross deducted ASPI's expenses, including an allowance for administrative and credit costs, deriving a profit figure of $534,376. Cross then multiplied that figure by .25 to arrive at $133,594, which he termed "Resulting Value of share for base contract (First year)." E. 3011-13 (DX 2).

On the worksheet and the backup documentation created by Cross, he did not mention, or make allowance for, a sales commission. E. 3008-14 (DX 1-2). Under the pricing scenario reflected in this worksheet, three percent of the total price of the first year of the contract would have been approximately $700,000. Thus, if ASPI owed Cross a three percent commission, it would have incurred a loss rather than the $534,376 profit shown on the worksheet, and there would have

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[4] "Total billings" was a term Cross used to reflect (1) ASPI's markups on hardware subcontractors, (2) revenues to ASPI on hardware maintenance ASPI performed directly, plus (3) the handling charge or "markup" on the software maintenence performed by WDS. In these calculations the handling charge on software maintenance performed by WDS was $515,782, which was based on a 2.5 percent markup on approximately $21 million of software maintenance performed by WDS. E. 2658(a)-60(b), 3008-10 (DX1), 3181 (DX 19).

been no bonuses. E. 2659(b)-62(b).[5]

Cross acknowledged showing these estimates to Prussia, Simon, and Slosman. E. 2549(a-b). In discussing the worksheet with them, Cross did not mention that he believed he was entitled to a three percent commission. E. 2605(d)-07(c), 2661(c)-62(c), 2708(b)-09(c). In his deposition, Cross had testified that he did not remember why he had failed to deduct his commission in determining the profits and bonuses in this worksheet and a similar worksheet. E. 2547(c)-48(b). At trial, he testified that he purposely excluded reference to the commission because he had prepared the worksheet with Slosman and did not want Slosman to know about the commission. E. 2501(b-c).

Cross testified that he concealed the commission from Slosman because disclosing it would have been counterproductive in negotiating an agreement with Slosman and, if disclosed by Slosman to WDS, could have made it difficult to persuade WDS to lower its prices to ASPI. E. 2501(c). He testifed that he hoped to keep that information concealed from Slosman until the final bid was submitted. E. 2548(d). The final bid was submitted in January 1996. E. 2494(c). Cross did not mention the commission to Slosman until April 1997. E. 2508(d).

c ASPI's Initial Bid

After reviewing this profit calculation (E. 2689(a-b), 2694(a)), Simon approved the first bid, which included a three percent markup on software performed by WDS. E. 2692(d)-93(a). A three percent markup would not have been sufficient to cover Cross's claimed three percent commission on the

[5] Cross, Prussia, and Slosman all testified that they considered such worksheets to reflect a "worst case." E. 2499(d)-50(a), 2621(b-c), 2710(d). Slosman testified that he expected to make certain additional savings on the hardware costs, but that he did not believe that these savings would cause the hardware part of the contract to do much better than break even. He testified that, as of the time of trial, the hardware was earning a profit of approximately 2.5 percent. E. 2708-10. Cross testified that he and Slosman contemplated much larger increases in the hardware profits. E. 2499(a)-504(a), 2517(a)-18(b). age infra at note 10.

approximately $120 million of software in the bid, since Cross's commission was based on the price after it was marked up. E. 2663.

Simon and Prussia testified that Cross did not mention a belief that he was entitled to a commission at any time prior to his termination in April 1997. E. 2603(d)-12(a), 2679(a), 2683(d)-84(b). Cross did not dispute that he failed to mention his commission while pricing the contract and when sharing the profit calculations with Slosman, Simon, and Prussia. Cross testified that following a kickoff meeting at WDS on January 5, 1995, he had mentioned his commission to Simon and Simon agreed he would receive it.[6] Cross gave conflicting testimony about whether he actually mentioned the word "commission" during the discussion. He made clear, however, that the conversations following the kickoff meeting was the only occasion in which he maintains he mentioned either his "agreement" or "commission" prior to the submission of ASPI's first bid.[7]

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[6] Cross testified that he asked Simon whether the IRS contract "was covered under our agreement, the commission and bonus arrangement, and he said that it was. And we both agreed that we were going to make a lot of money on this job." E. 2490(d)-91(a). Simon testified: "He said to me, 'You know, this IRS job is going to be very lucrative.' I said that's good, and he said, 'Are you going to give me a deal on this job.' I said absolutely, and I said to him, 'If we make money, you will make money.'" E. 2648(c-d).

[7] During cross-examination, Cross was confronted with deposition testimony where he indicated that he did not mention the commission during that conversation following the kickoff meeting. E. 2544(a)-45(c). On redirect Cross then stated that the statements in his deposition that he had failed to mention the commission in conversations with Simon or Prussia pertained to a specific period of time prior to ASPI's rejection of a short form written agreement David Slosman presented to ASPI. E. 2580(d)-81(c). He testified that it was after that rejection "when [discussions of the commission] all began." E. 2581(c). (While Cross stated he believed that the rejection of Slosman's short form agreement probably occurred in March 1995, documents placed that rejection no earlier than mid-June 1995. E. 2666(c-d), 3195-99 (DX 22, 23)). On re-cross examination, Cross again stated that all discussion concerning a commission on the IRS contract occurred after the rejection of Slosman's short form agreement. E. 2595(c). However, he thereafter reasserted that he mentioned a commission in the January 5, 1995 conversation with Simon. E. 2595(c-d), 2597(c).

4. June 1995-August 1996: Best And Final Offers, Employment Agreements For Slosman And Cross; Cross's Formula For Calculation Of Gross Margin; Meeting With ASPI's Accountant; ALJ Hearing

Between June 1995 and August 1996, ASPI submitted two more bids and there occurred a variety of events related to formalizing the verbal agreement to pay Cross and Slosman each 25 percent of the profit. During this period, according to evidence that is not in dispute, Cross repeatedly failed to disclose his commission in circumstances in which he would be expected to disclose a commission if he believed he was entitled to it. Cross also affirmatively led others to believe there was no commission through documents he created or edited and through sworn testimony before an administrative law judge.

a The July 1995 BAFO Bid

After submission of the initial price proposal (and a corrected proposal in April 1995(E. 2656(a), 3178 (DX 16)), a pricing dispute arose between IRS and IBM that would cause a substantial reduction in the software price of the contract. E. 2663(a). In order to estimate the consequences of the reduction, Cross prepared a worksheet dated June 19, 1995, styled "Derivation of IRS Shares (Removal of IBM Software)." E. 2661(d)-63(b), 3017 (DX 3). The worksheet showed a first-year profit of $349,183 and 25 percent shares of $87,296. Under the pricing scenario reflected in this worksheet, three percent of total revenue would have been approximately $400,000, again larger than the estimated profit. E. 2663(c-d).

While the pricing dispute was being resolved, there also occurred a reduction in the amount of hardware maintenance requested by IRS, which tended to further reduce ASPI's profitability on the hardware. E. 2663(d)-64(c). A document in ASPI's files dated July 10, 1995, which is in Cross's handwriting, reflects Cross's effort to adjust for the reduction in hardware specifications for the

first year of the contract. The document shows a loss on hardware for the first year of the contract of $98,751. E. 3190 (DX 20), E. 2664(c)-65(a).[8]

Pursuant to Cross's recommendation, on July 19, 1995, after IBM software prices were reduced, ASPI submitted a Best and Final Offer ("BAFO") for $83.8 million, of which $9.97 million was hardware. ASPI's markup on the software portion of the contract was 3 percent. E. 2502(d). However, this proposal also contained a $3 million fee that was passed through ASPI to IBM. ASPI received no markup whatever on that amount. E. 3178 (DX 16), 2499(a), 2571(d)-72(c).

b. The Formal Employment Agreements

Beginning in June or July of 1995, an effort was made to formalize the verbal agreements whereby Cross and Slosman were each to receive 25 percent of the profits. ASPI sought to first work out a written agreement with Slosman and then to apply it to Cross as well. E. 2666(d)-67(b). In October 1995, a copy of Slosman's agreement was provided to Cross to adapt to his situation. E. 2668(d)-69(a). Cross replaced Slosman's name with his and otherwise extensively marked the agreement. In doing so, Cross made no reference to a commission. E. 2527(d)-31(c), 3024-62 (DX 8-9). Cross and Simon marked and discussed a number of versions of this agreement over the ensuing months, including discussions about the term "gross margin" on which the 25 percent shares were to be based. E. 2669(a)-71(a), 2675-78(a). In none of the documents resulting from those discussion was there a reference to a commission. E. 3024-117 (DX 8-9A), 3121-56 (DX 11-12).[9]

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[8] Cross testified that he was unfamiliar with the document, could not tell whether the handwriting was his, and that comparing the handwriting with his acknowledged handwriting on Defendant's Exhibit 6 (E. 3023) did not assist him. He also stated that he did not remember ever calculating a loss on hardware. E. 2566(d)-67(c).

[9] In July 1995 a first draft of the agreement was created based on the agreement of another ASPI employee and a copy was provided to Cross. E. 2667(b-d). Among several other markings by Cross, on the fifth page (E. 2995) he wrote the

c Cross's Gross Margin Formula

Cross testified that he was troubled by the narrative definition of "gross margin" in the agreement and attempted to develop an algebraic formula so that he could better understand the terms (E. 2528(d)-29(a)) and so that an accountant could understand it. E. 2533(d)-34(a). Cross created a document entitled "Calculation of Gross Margin of the Division" (E. 3020 (DX 4)) setting out such a formula. E. 2534(a-b). Cross acknowledged at trial that the claimed commission should have been deducted in arriving at gross margin. E. 2525(a-b), 2534(c). However, in the formula Cross created, he did not deduct the category that would have included expenses such as a sales commission ("E1=All Other Divisional Non-Billable Expenses"). Cross stated that this occurred because he "made a mistake" and "forgot" to provide for deducting the commission. E. 2534(b-d).

In a later version of Cross's formula, El is deducted in its entirety. E3023 (DX6). In addition, in parentheses, in Cross's handwriting, the definition of "E1=All Other Divisional Non-Billable Expenses" is amplified. The amplification, however, does not mention commission. Rather, it states: "e.g., consultants, automobile expenses, etc., not covered under contract." Cross first stated that he was not sure whether this handwriting was his, but ultimately testified that he had purposely omitted the word "commissions" in order to conceal from Slosman that Cross was entitled to a commission that would be deducted from profit before any bonus could be paid to Slosman. Cross also stated that the

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word "commission" next to the discussion of Slosman's bonus. E. 2991-3007 (PX 31). Cross testified he had written the word in the course of discussing the document with Simon and had stated that his commission had to be in the agreement. E. 2509(b-d). Simon testified that he had discussions with Cross about this versions of the agreement, which had been adapted from another employee who received a commission rather than a bonus, and there were various inconsistencies between commission and bonus in it. He stated, however, that none of those discussions involved a claim by Cross for a commission or a discussion of any letter agreement. E. 2699(d)-701(b), 2535(a-b).

word "etc." was intentionally chosen to allow for a deduction of the commission, while concealing the commission from Slosman. E. 2536(d)-37(d).

In describing the exclusion of the word "commissions" from the parenthetical in the formula, as well as in the failure to make a deduction for commissions in the profit calculations, Cross repeatedly used the word "we." E. 2501(c), 2537(b-d). However, he later admitted that he had not discussed with either Prussia or Simon the exclusion of references to a commission in the documents he showed to Slosman. E. 2549 (b-c), 2559(d)-60(a).

d. Final Bid And Salary Increase

In January 1996, ASPI submitted a second BAFO bid for $79.4 million, of which approximately $70 million was software. E. 3180. Cross recommended that ASPI include a 4 percent markup on approximately $66 million of the software and no markup on the $3,000,000 pass through. E. 2494(d)-95(a), 2497(b)-99(a), 2571(d)-72(a). Simon approved the recommendation after consulting Slosman. E. 2683(c-d).

Shortly thereafter, when it appeared that ASPI was likely to receive the contract, Cross requested a $15,000 raise and a car allowance, stating that he should be put on par with Slosman. Simon and Prussia granted these requests. E. 2568(a-d), 2608(a-b), 2673(b-c). Cross acknowledges that in making this request he did not mention any alleged commission. E. 2568(a-c).

e. Meeting With ASPI's Accountant To Review Cross's Formula

In April 1996, because of Cross's continuing concern about the definition of gross margin, Simon set up a meeting with ASPI's accountant, Lisa Cines, to discuss Cross's gross margin formula. E. 2640(a)-42(c), E. 2673(d)-74(c), 3023 (DX6), 3082 (PX 10). Present were Cross, Cines, Prussia, and ASPI's in-house counsel, Marc Simon. E. 2641(b), 2551(b). During the meeting, Cines expressed concern that a 25 percent bonus for Cross might create a problem with Section 8(a) requirements that the minority owner (Prussia) be the highest paid person in

the organization. Cross insisted that the concern was not valid, stating that because both he and Prussia would receive a 25 percent bonus they would be in the same place. E. 2641(c-d), 2643(a-b).

If Cross was expecting a commission of three percent of the total price of the contract, there is no question that he would have made far more money than Prussia even if they both received 25 percent bonuses. According to the profit calculations performed by Cross, assuming he was planning to receive a three percent commission, he would have expected a commission of either $700,000 or $400,000 in the first year of the contract, and no one would receive a bonus because ASPI would have lost money. According to the BAFO bid then pending and on which ASPI ultimately won the contract, Cross would have received a commission of approximately $476,000 per year, and he and Prussia would each have received 25 percent shares of any profit that was left.[10] Yet, neither while discussing the relative earnings of himself and Prussia, nor at any other time during the meeting, did Cross mention that he believed he was entitled to receive a commission of three percent of the total price of the contract. E. 2609(a-d), 2641(d)-42(a), 2643(b). Cross testified that he did not mention his commission to

[10] Cross testified concerning plans he maintains he and Slosman had for reducing the expenses underlying his initial profit calculations, while increasing revenues by securing additional contracts and directly performing hardware maintenance originally planned for subcontractors. E. 2495(a)-504(c). He testified that under the contemplated scenario there would be a cash flow to ASPI of approximately
$8 million (E. 2499(c) (mistranscribed as $80 million at E. 2518(a)). He then testified as to profitability where expenses apart from his commission would have been approximately $4 million under a "worst case" and $2.5 million under a "best case" scenario. E. 2517(b)-18(a-b). Accepting those figures, and assuming Cross was expecting the commission, under his worst case scenario, during the contract Cross would have earned approximately $475,000 per year in commissions, and he and Prussia would have each earned approximately $85,000 per year in bonuses. Under Cross's best case scenario, Cross would have earned $475,000 per year in commissions, and he and Prussia would each have earned approximately $200,000 per year in bonuses.

Cines when discussing the relative earnings of himself and Prussia because "I did not feel the need to tell her because we were there to discuss the formula [for calculating gross margin]." E. 2736(a-b).

f The AU Hearing

On May 13, 1997, the IRS awarded the contract to ASPI with a total evaluated price of $79,375.350. E. 2837 (PX 3). Digicon Corp, a losing bidder on the contract, protested the award, contending, inter alia, that ASPI did not have the financial capability to handle the contract. In June 1996, a hearing was held before an administrative law judge for the Board of Contract Appeals of the GSA, in which Cross testified as ASPI's sole witness. E. 2551(a-d). Cross was called back to testify a second time to address a chart created by Digicon to show that ASPI did not have adequate cash flow to handle the contract. E. 2552(b-c). Although Cross maintains that approximately 2.4 million dollars was due and owing to him immediately upon the award of the contract (E. 2424(b), 2535(d), 2553(d)-55a), Cross did not mention any commission obligations ASPI would assume upon the award of the contract. E. 2551(a)-55(c). Cross specifically told the administrative law judge that ASPI had no obligation to pay anything up front. E. 2554(b)-55(a). The protest was rejected.[11]

5 August 1996-April 1997: Commencement Of Contract, Execution Of Slosman Agreement, Cross's Compensation Plan, Related Contracts, Cross's Termination

ASPI began to perform the contract in August 1996, and Slosman executed his agreement that month. E. 2678(a-b). Because Cross and ASPI could not agree

[11] Cross was also deposed in connection with the proceeding. E. 2551(c). However, he at no time mentioned the commission, even to the ASPI's government contracts attorney. E. 2554(a), 2555(b), 2552(c). Cross testified that he had answered all the questions the attorney had asked. E. 2582(b-c).

on final terms of the agreement that had been based on Slosman's agreement,[12] on September 11, 1996, Simon and Prussia provided Cross a one-page Compensation Plan. The plan provided that Cross receive the previously agreed upon 25 percent of gross margin on the IRS contract. The plan also provided that Cross could receive additional bonuses including at management's discretion up to three percent of fully burdened revenue of other contracts he had a role in securing. E. 2678(d)-80(a), 3176 (DX 14).

ASPI secured certain small contracts (Coast Guard and Army at Vint Hill) as a result of securing the IRS contract. Prussia and Simon testified that Cross requested that ASPI give him 25 percent of the gross margin on these contracts, but after Simon consulted with Slosman as to what role Cross had in securing the contracts, ASPI agreed to give Cross a bonus of three percent of the price of the contracts (which was less than the requested 25 percent bonus in the case of these contracts). Simon and Prussia both stated that there was no discussion of a January 17, 1992 letter at the time of the discussions concerning these contracts. E. 2610(b)-27(a), 2680(b)-81(d). During his direct examination Cross mentioned no discussions that led to these payments. On cross-examination, he testified that there had been discussions with Simon about whether the contracts "were new business . . . and I should receive a commission," but denied that he had originally requested 25 percent of the profits. E. 2571(a-b).[13]

[12] Simon testified that Cross would not agree to sign an agreement without a severance package that allowed him to continue to receive the bonus on the IRS contract even if he left ASPI. E. 2677(c)-79(a).

[13] **Prussia** testified that when Cross received his bonus checks he appeared to be pleased and mentioned nothing about a belief that he was entitled to a three percent commission on the IRS contract or a management bonus on the other contracts. E. 2611(a-c). Simon testified that after Cross received the September 1996 compensation plan, on one occasion he complained about not having a severance agreement and stated that if he was ever fired he would sue ASPI, but said nothing to indicate that he believed he was entitled to a three percent commission on the IRS contract and did not mention a January 17, 1992 letter. E.

In April 1997, Cross visited Slosman to request financial information on the contract, advising Slosman that he had a letter stating he was entitled to a three percent commission on the IRS contract and that he had retained an attorney. When Slosman questioned the commission, Cross showed him a letter and pointed to three percent. Slosman called Simon, who told Slosman that Cross did not have a commission. Slosman then told Simon about Cross's letter. E. 2709(b-d).

After the call from Slosman, Simon examined Cross's personnel file and discovered a copy of the January 17, 1992 letter. E. 2683(d)-84(b). Because they felt they had been fair to Cross and he had taken advantage of the company by failing to mention the letter during the course of securing the IRS contract, Simon and Prussia decided to terminate Cross, which ASPI did on April 15, 1997. E. 2611(d)-12(c), 2629(d)-30(d), 2683(d).

C. Post-Trial Proceedings

The case was tried between October 5 and October 13, 1998. At the close of the evidence, ASPI moved for judgment as a matter of law on the claim for a three percent commission, identifying as bases therefor, inter alia, (1) that Cross had failed to satisfy the condition precedent that the revenue be generated solely by him; and (2) that Cross was precluded from recovering under grounds of breach of the duty of loyalty, estoppel, and waiver. E. 1928-34.

On October 13, 1998, the court reserved ruling on the motion. E. 2740(a). The court then instructed the jury and provided it a verdict sheet asking whether Cross had proven by a preponderance of the evidence that there had been a meeting of the minds that there was a contract under which ASPI was to pay Cross three percent of the revenues of the IRS contract, and whether ASPI had proven by a preponderance of the evidence that Cross had committed a breach of his duty of

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2668(a-b). Cross testified that in September he told Simon "I still expect my commission and bonus." E. 2507(d). He also stated that, after receiving his first bonus check in November 1996, he asked Prussia why there was no three percent commission in his check and no management bonus on the Vint Hill and Coast Guard contracts. E. 2507(a-d).

loyalty thereby waiving his right to compensation under the contract. E. 2743-46. The jury returned a verdict of "yes" to the first and "no" to the second question. E. 2774(d). The jury also answered "yes" to a question of whether Cross had proven by a preponderance of the evidence that ASPI was obligated to pay him 128 hours of vacation pay. E. 2746(b), 2774(d).

On October 14, 1998, ASPI argued that there was no evidence of a meeting of the minds as to what constituted "revenue" and that Cross should be precluded from seeking a commission on other than the "total billings" definition or revenue that Cross had used in profit calculation worksheets. E. 2783(c)-84(b). Rejecting these arguments, the court posed to the jury the question of what damages Cross had incurred from the breach of contract as of October 14, 1998. The jury then returned a verdict of $2,381,260.50. E. 2791(d)-92(a).

Counsel for Cross requested that judgment be entered pursuant to Rule 602. The court denied that request, noting that it would be dealt with at a hearing to resolve pending matters, which it set for October 21, 1998. E. 2792(a-b).[14] However, on October 16, 1998, prior to that hearing, the clerk's office entered a judgment for $2,381,260.50. The judgment addressed only the commission and not the vacation pay. E. 42.

Pursuant to Rule 2-532(b), ASPI's pending motion for judgment was converted to a motion for judgment notwithstanding the verdict. E. 2797(d). ASPI submitted a supplement to that motion. It argued that even if Cross's testimony about telling ASPI principals that he believed he was entitled to the three percent sales commission could be believed, ASPI was nevertheless entitled to judgment under doctrines of waiver and estoppel because of Cross's admitted failure to disclose a claimed commission to David Slosman or the administrative law judge of the Board of Contract Appeals. E. 2039-44. ASPI also maintained

[14] The court had reserved to itself, and not ruled on, Cross's claims for management fees. E. 2782(b-c).

that Cross was precluded from recovering because he had failed to make clear to ASPI's principals that he believed he was entitled to the commission. It argued that Cross's testimony to that effect was incredible as a matter of law, in that no rational person could believe it. E. 2044-62.

At a hearing on October 21, 1998, the court granted ASPI's motion for judgment notwithstanding the verdict with respect to Cross's claim for a three percent commission on the IRS contract. E. 2808(a)-2810(d). The court held as a matter of law that the January 17, 1992 letter constituted an unenforceable agreement to agree because it contained various uncertain terms and there was no meeting of the minds. E. 2808(a)-09(b), 2809(d)-10(a)). The court also held that as a matter of law Cross had waived any right to the commission because, by his own admission, he failed to mention it at times when he should have, including in his dealings with the project manager and when testifying before the administrative law judge. E. 2808(d), 2809(c). The court also found that, while there was some evidence that Cross had mentioned his claimed commission, the evidence was not credible and therefore could not support a defense to the claim that he had waived his rights. E. 2808(d). The court also granted judgment notwithstanding the verdict on Cross's claim for vacation pay (E. 2809(c-d)), and directed entry of judgment on all claims including those as to which there had been no jury verdict. E. 2810(a). ,age supra at note 14.

On October 29, 1998, ASPI moved the court for a conditional grant of new trial on grounds that the verdict was against the weight of the evidence, that the damage award was excessive, and that Cross had presented testimony at trial that he had not disclosed in discovery thereby prejudicing ASPI in its ability to show that the testimony was not true. E. 2087-94.[15] On October 29, 1998, Cross

[15] The last contention pertained both to Cross's testimony about intentionally concealing his commission from Slosman and to his testimony that he had attended a meeting at WDS on December 9, 1994, prior to the meetings attended by ASPI principals. Cross had placed great weight on that meeting in arguing that

moved to alter or amend the judgment, inter alia, on grounds that ASPI had not sought judgment at the close of the evidence on the basis that the January 17, 1992 letter was not a contract. E. 2066-86.

At a hearing on January 14, 1999, the court granted ASPI's request for a conditional new trial. It rejected Cross's claim that the motion was untimely and found that the verdict was against the weight of the evidence and that the damage award was excessive. E. 2833(b). The court also rejected Cross's claims that the judgment notwithstanding the verdict had been inappropriate. 1.1

II. FACTS RELATING TO THE CROSS-APPEAL

ASPI cross-appeals from the denial of its motion for partial summary judgment raising the issue that the January 17, 1992 letter was not a contract. ASPI also appeals from the court's denial of sanctions against Cross. The facts relating to these issues are set out below.

Cross brought this suit against ASPI, Bevin Prussia, Borah Simon, and certain other defendants seeking to recover the three percent commission on the IRS contract and certain other relief related to Cross's employment.[16] Cross also brought a fraudulent conveyance claim seeking to set aside a sale of certain assets of ASPI on grounds that the sale rendered ASPI insolvent and had been undertaken to remove assets from Cross's reach. E. 101-02. The sale was finalized in September 1995 (E. 1407-14, 1407-14, 1601), four months before ASPI's final bid on the IRS contract.

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he met the criterion "generated solely by you" with respect to the IRS contract. E. 2748(c-d). ASPI maintained that, as with Cross's testimony about Slosman, the testimony was directly contrary to plaintiff's deposition testimony. ASPI argued that Cross's failure to mention the meeting in his deposition precluded ASPI from showing that the trial testimony was false (E. 2092-94), and presented evidence that it maintained showed that the testimony was false. E. 2092-2232.

[16] Cross also sought $2,345,915.40 reflecting a management fee that was 30 percent of the gross profit margin which was calculated without deduction of the claimed commission. E. 99-100.

On October 29, 1997, before discovery, Cross moved for partial summary judgment on the three percent commission. E. 123-27. The motion was denied without argument on December 17, 1997. E. 159.

During discovery, Cross provided interrogatory answers. E. 2155-92. In the answers, he stated that until September 1996, Simon and Prussia had led him to believe that they would honor their commitment to him. E. 2171. However, he described no occasions during the initial bid process in which he discussed his commission with Simon or Prussia. Cross described his formulas for calculation of gross margin of the division as efforts he had undertaken on behalf of himself and Slosman to ensure that gross margin was "precisely defined" and would not be left deliberately vague by ASPI. E. 2169-70. He stated that he made all final decisions in cost strategy in consultation with Slosman. E. 2179. He described his actions in setting up a meeting of ASPI's principals in terms that would mean that he never attended a December 9, 1994 meeting with the staff of WDS prior to the meeting of the principals of WDS and ASPI. E. 2177-78. His testimony about such a meeting, however, would later be the aspect of his evidence that the contract was "generated solely by" him to which his counsel would give the greatest emphasis in closing argument. E. 2748(c-d).

On the first day of his deposition, Cross testified about the January 1995 discussion with Simon and, in doing so, made clear that he had made no reference to the commission. E. 1050-51. Later in the deposition, he described the same conversation, this time saying that he did mention "commission." E. 1054-55. Confronted with the profit calculations, he testified that he did not remember for whom he had prepared them and why he had failed to mention that his commission would be deducted. E. 1106-10. With respect to his formulas for calculating gross margin he testified that he did not know how the parenthetical material got written below category E-1 in what would become Defendant's Exhibit 6. E. 1961-62. He acknowledged that he had failed to tell Slosman about the commission until April 1997. However, when questioned about the documents

underlying his profit calculations, he stated that they were not discussed in connection with Slosman's agreement and would not respond to questions as to whether they misled Slosman concerning the amount of his bonus. E. 1097-1105. As in the interrogatory answers, Cross's responses to questions concerning the actions he took after being contacted by Wilson precluded the occurrence of the meeting with WDS personnel that he would later testify about in court. E. 2195-2207.

On March 10, 1998, Cross again moved for partial summary judgment on the three percent commission, this time also seeking summary judgment on his claim for treble damages on the commission. E. 176-200. In opposing the motion (E. 950-1019), ASPI pointed out testimony adduced in Cross's deposition concerning his failure to reveal to Slosman and ASPI's principals that he was claiming a three percent commission. E. 972-77, 994-1001. ASPI also noted that in Cross's deposition he had been confronted with, and had been unable to explain, the documents he had created that were inconsistent with his claim for a commission. E. 999-1001. ASPI sought sanctions against Cross for filing the second motion for partial summary judgment without providing additional material support for it and without mentioning evidence concerning his conduct that he knew ASPI would maintain precluded such a claim. E. 953-56.

ASPI also requested that the court grant it summary judgment as the non-moving party, among other reasons, because Cross's failure to disclose the claim for a commission to Simon, Prussia, or Slosman precluded his recovery under doctrines of waiver, estoppel, and breach of loyalty. E. 956-58. In maintaining that there existed no genuine issue of material fact concerning whether Cross disclosed his claim to Simon or Prussia, ASPI cited Cross's inability in deposition to provide a reason for the absence of any reference to his commission in the profit calculations that he had shared with Simon, Prussia, and Slosman. ASPI also maintained that Cross's contradictory testimony concerning his having mentioned

the commission to Simon in January 1995 could not create a genuine issue of material fact. E. 994-1001.

ASPI also sought summary judgment on the grounds that the language "eligible to participate" in the January 17, 1992 letter rendered the letter an unenforceable agreement to agree or made it too vague to enforce. E. 1002-04.

On May 8, 1998, ASPI filed its own motion for partial summary judgment. E. 1442-70. It formally reasserted the grounds for summary judgment on the commission that it had advanced in the opposition to Cross's motion (E. 1446-47), but gave particular emphasis to Cross's acknowledged failure to disclose the commission to Slosman. E. 1448. In addition, ASPI moved for summary judgment on the fraudulent conveyance claim. E. 1209-44. ASPI also sought sanctions for pursuit of that claim because Cross was maintaining in the action that he had secured a contract that was highly profitable for ASPI even after paying his commission, while at the same time maintaining that the sale of unrelated assets had rendered ASPI incapable of paying the commission. E. 1211-12, 1242-43.

On May 22, 1998, Cross submitted oppositions to both motions (E. 1515-43, 1549-56), including extensive affidavits of Cross (E. 1557-1714). Cross maintained that the affidavits established a "plethora of factual disputes" that precluded summary judgment for ASPI on the commission. E. 1520. With respect to the admitted failure to disclose the commission to Slosman until April 1997, Cross relied on an obvious typographical error in Slosman's affidavit—where Slosman stated "April 1995" rather than "April 1997" (E. 1486-87)—to assert that "there can be no breach of loyalty on Mr. Cross's part as Mr. Slosman avers that he knew about the commission in 1995 a year before the contract award..." E. 1532 (footnote omitted), 1648. aee **E. 1785-92.**

In the affidavits, Cross stated that Fe had mentioned his commission to Simon during the January 1995 discussion. E. 1565, 1589, 1616. He said nothing, however, to suggest that he had omitted his commission from any document in

order to conceal the commission from Slosman. Rather, he stated that he had

wanted a formula for the calculation of gross margin in order to avoid any later misunderstanding. E. 1631. Though he would later testify at trial that he had led Slosman wrongly to believe that the first bid had a 2.5 percent software markup in order to mislead WDS (E. 2492(c)-93(b)), in an affidavit Cross stated that Slosman had known at the time that the first bid had a three percent markup. E. 1582, 1645-46.

ASPI filed a response (E. 1782-1813), pointing out that Cross, having no explanation for the failure to inform Slosman as to any claimed commission, had relied on what he and his counsel knew with 100 percent certainty to be a typographical error to claim that Slosman already knew about the commission in 1995. E. 1783-92. ASPI argued that this and other aspects of Cross's opposition, including the changed story about mentioning the commission to Simon in the January 1995 discussion (E. 1803-08), showed that the case had been prosecuted in bad faith and provided additional reason for sanctions. E. 1783-84.

At a hearing on May 28, 1998, the court questioned why Cross had filed a second motion for summary judgment and how it was different from the one that had been denied. E. 2305. After initially maintaining that there was now an admission of a contract, Cross's counsel essentially acknowledged that ASPI clearly could raise issues of fact. E. 2307-09.

The court also denied ASPI's motion for summary judgment on the commission because of factual disputes, but granted ASPI's motion for summary judgment on the fraudulent conveyance claim. E. 2321-28. The court then ruled that all sanctions motions would be determined after trial by the trial judge. E. 2339-41.

At trial, Cross for the first time stated that he had purposely excluded his commission from documents he prepared specifically in order to deceive Slosman, and that he had misled Slosman to believe that the initial software markup was 2.5 percent. When Slosman testified, Cross's counsel sought to elicit from him that he

had filed an affidavit stating that he knew about the commission in 1995. E. 2712(a-c).

Before the end of trial, ASPI moved for dismissal and for sanctions on grounds related to Cross's actions in responding to ASPI's contentions concerning Slosman, including his counsel's effort to deceive the jury concerning Slosman's knowledge by eliciting testimony based on a typographical error in Slosman's affidavit . E. 1943-55. ASPI argued, among other things, that if Cross's trial testimony was true, then his deposition testimony that he did not remember why he had failed to include his commission on the documents he had prepared was false. E. 1949-50.

At trial, Cross had also for the first time testified concerning a December 9, 1994 meeting where he met with various WDS staff before the meeting of the principals. E. 2487(a-b). In closing argument, in support of the contention that Cross's actions in bringing the contract to ASPI qualified him for the commission, Cross's counsel termed this testimony as evidence that Cross was "marketing, marketing, marketing" ASPI to WDS. E. 2748(c-d).

Following the grant of judgment notwithstanding the verdict, the court treated the pending sanctions motions. ASPI argued that in addition to those previously advanced, grounds for sanctions existed in the fact that plaintiff had provided testimony about the December 9, 1994 meeting that was inconsistent with his prior deposition testimony, and that he had demonstrably committed perjury at trial. E. 2816(b)-17(d). The court then denied all pending sanctions motions without opinion. E. 2817(d), 2818(b).

I. APPEAL

A. The Circuit Court Properly Ruled Both That The January 17, 1992 Letter Was Not A Contract And That Cross's Conduct In Any Event Precluded His Recovery Of The Three Percent Commission

Cross argues that the court improperly set aside the jury verdict on the three percent commission. Cross contends that the circuit court improperly ruled that the January 17, 1992 letter was not a contract. He maintains both that the ruling was incorrect on the merits (Br. at 10-19), and that ASPI failed to argue that the letter was not a contract in its motion for judgment at the close of the evidence. Id. at 23-25. Cross also argues that the court erred in finding that his conduct precluded his recovery even if the letter did constitute a contract. He maintains that there was ample evidence to support the jury's verdict and that the court improperly intruded into the consideration of credibility issues. Id. at 19-23. Cross also maintains that the court improperly considered ASPI's breach of loyalty defense. JA. at 21.

ASPI shows below that the court's reasoning in concluding that there was no contract was sound and that the court appropriately considered the issue. ASPI also shows that even if there were a contract, the court correctly held that Cross's admitted failure to mention the commission at times that he should have precluded his recovering. The court's determination is supportable under doctrines of breach of the duty of loyalty, waiver, and estoppel. ASPI also shows that the court correctly determined that Cross's testimony that he mentioned his commission to ASPI's principals was incredible as a matter of law. However, the court's conclusion that Cross's conduct precludes his recovery would stand regardless of correctness of the court's determination as to the incredibility of Cross's testimony.

1. The Circuit Court Correctly Held That The January 17, 1992 Letter Was Not A Contract.

a. The January 17, 1992 Letter Is An Unenforceable Agreement To Agree.

The circuit court concluded that ASPI was entitled to judgment notwithstanding the verdict on the basis that the January 17, 1992 letter did not "constitute a contract." E. 2808(d). The court noted the uncertainty of the terms "revenue" and "generated solely by you," along with the implication in the phrase "eligible to participate" that the commission was not guaranteed. Reasoning that the meaning of "revenue" and "generated solely by you" could only be determined by speculation, which "is not something that the court can do" and "is not something a jury should do," it concluded that the letter "at best is an agreement to agree" and unenforceable. E. 2808(d)-09(b). The court's decision to set aside the jury's verdict on this basis was proper.

Cross does not contest the fundamental legal proposition that "no action will lie upon a contract, whether written or verbal, where such a contract is vague or uncertain in its essential terms." Robinson v. Gardiner, 196 Md. 213, 217, 76 A.2d 354 (1950); see also DeBearn v. DeBearn, 126 Md. 629, 95 A. 476, 477 (1915) ("There is no more settled rule of law, in actions based upon contracts than that, if the contract sued upon . . . is vague or uncertain in its terms, no action will lie upon it."). As the Maryland Court of Appeals explained in Robinson v. Gardiner:

> **The parties [to a contract] must express themselves in such terms that it can be ascertained to a reasonable degree of certainty what they mean. If the agreement be so vague and indefinite that it is not possible to collect from it the intention of the parties, it is void because neither the court nor jury could make a contract for the parties. Such a contract cannot be enforced in equity nor sued upon in law.**

Under this general principle, an "agreement to agree" is not enforceable. *agg* **Horsey v. Horsey, 329 Md. 392, 420, 620 A.2d 305, 319 (1993); Helferstay v.**

Creamer, 58 Md. App. 263, 274, 473 A.2d 47, 52 (1984) ("agreements to agree" are unenforceable because of "vagueness").

The factual setting of this case highlights the uncertainty of the terms cited by the court. The court noted that, while people might initially believe they understand what "revenue" means, the letter leaves many questions about that term unanswered. These include (a) whether Cross would be entitled to $2.3 million (representing 3 percent of the total evaluated price) or a percentage of "billings" (a reference to the "total billings" figure Cross used in his profit calculation that treated only the handling charge on the software part of the contract as revenue actually generated by the contract); (b) whether the payment would be due when the contract was awarded (as Cross claimed), or as revenues were received (as Cross testified was ordinarily done); (c) what would happen if the IRS did not renew its options; and (d) what would happen if Cross were terminated for cause or no cause. E. 2809(a-b). One could add to the list whether Cross would receive a commission on pass through payments such as the $3,000,000 charge on which he recommended that ASPI add no markup.[17]

Comparable issues of interpretation surround the phrase "solely generated by you." At one extreme is Cross's claim that he would meet the criterion if someone called the company and the call was referred to him because Prussia was out. E. 2424(a-b), 2613(d)-14(a). Closer to the other extreme are the circumstances involved with Cross's efforts to secure the DOE contract, where, in addition to forming a team of subcontractors, Cross would prepare the proposal and manage the contract. E. 2602(d)-03(c), 2613(d)-14(a). The letter similarly

[17] The meaning of the word "revenue" was also critical for determining the proper amount of damages. Thus, in order to determine the proper amount of damages, the jury once again was required to engage in impermissible speculation as to the meaning of the word "revenue." age DiLeo v. Nugent, 88 Md. App. 59, 79, 592 A.2d 1126, 1134 (1991), cert. granted, 325 Md. 18, 599 A.2d 90 (Dec. 12, 1991) (holding that a damage award "may not be based on speculative, remote or uncertain damages").

provides no answer to the question of whether Cross would automatically be entitled to a three percent commission on contracts that ASPI secured as a direct or indirect result of securing the IRS contract (such as in the case of Coast Guard and Vint Hill), as well as any rebidding ASPI might later do on IRS maintenance work either as contractor or subcontractor.

The range of potential meanings of these terms illustrates why that letter could only be interpreted as an agreement to agree. Thus, the court's determination was correct.

Citing authority that contracts should not be interpreted to lead to absurd results, Cross argues that the letter could not have left it to ASPI's discretion to pay Cross a commission because it does not make sense for Cross to have entered an agreement whereby ASPI could deny his commission arbitrarily. Br. at 17. But, there is nothing inherently illogical about an arrangement whereby an employee earning a $75,000 base salary shares in discretionary incentive payments under terms determined when the opportunity is identified. The employee could terminate his employment if the employer failed to exercise its discretion fairly. The absurd result is one where the employer would be committed to an arrangement whereby the commission would be paid even if the contract provided insufficient return to the company to cover the commission.

Cross cites Vincent v. Palmer, 179 Md. 365, 19 A.2d 183 (1941), as a "closely analogous case," where the Court of Appeals upheld an employee's claim for 10 percent of net profits. Br. at 11-12. In doing so, the court cited the policy favoring upholding agreements to pay employees shares of profits because that fosters better understanding between employers and employees. Id, at 370-71. Such a consideration does not apply to a sales commission where the employee's interest in ensuring the commission couldTead him to bid a contract in terms that would be disadvantageous to the company.

Cross also cites Born v. Hammond, 218 Md. 184, 188, 146 A.2d 44, 47 (1958), for the proposition that ambiguous terms in an agreement do not render it

void and unenforceable. Br. at 16. However, the quote Cross draws from Born states only that a contract is not rendered unenforceable "merely because the parties do not supply every conceivable detail or anticipate every contingency that may arise." Ld, In this case, the ambiguities in the letter pertained to essential issues: whether Cross was eligible to receive the commission at all and how any such commission would be calculated. The interpretation of these terms could hardly be characterized as "details" or "contingencies." Rather, they constituted the heart of the contract's terms.

Cross argues that, though key terms are ambiguous, extrinsic evidence establishes the intent of the parties. Br. at 13. In making this argument, however, Cross seriously distorts the record. First, with respect to the term "eligible to participate," Cross maintains that Prussia interpreted this language to mean that it was only necessary for the ASPI employee to identify the business and for ASPI to get it. Br. at 14. However, in the portion of the transcript cited by Cross, Prussia was referring to his own agreement with ASPI and Simon's agreement with ASPI. E. 2436(a-b), 2885-97 (PX10). Those agreements do not contain the term "eligible to participate in an executive compensation plan" or the related phrase of "generated solely by you."[18]

On the issue of what "revenue" means, Cross cites his own testimony that as a result of "pre-employment negotiations" he understood that his commission was to be "three percent of the total value of the contract." Br. at 15. But the

[18] Rather they state: "The Employer agrees to pay you, as an additional incentive to develop new business and procure contracts on behalf of the Employer, an amount equal to three percent (3%) of the total value of all contracts that are procured through the efforts of Employee." E. 2886. Moreover, the agreements then go on to state that the percentage will not be paid until after the company receives payment for services, and they make specific provision for deductions of amounts paid to "any other employee, independent contractor, agent or consultant for their assistance in procuring any such contract." E. 2887. Further, they make specific provision concerning payment of the incentive in the event of the death, voluntary retirement, or other termination of the employee. E. 2895.

testimony does not demonstrate a mutual understanding or agreement on the phrase "total value" in general, or with respect to the varied questions that the court observed had been left unanswered. Cross also cites testimony by Prussia that the language of his agreement was "basically the same" as that of Cross's. However, that statement does not make the language in fact the same, which it was not. Nor does it answer the underlying question of what "revenue" meant in Cross's letter or "total value of all contracts" meant in Prussia's contract. Finally, the dictionary definitions Cross cites for "revenue" (Br. at 15) do not establish that its meaning is unambiguous in the context of this agreement. With respect to the phrase "generated solely by you," Cross again relies on statements by Prussia that pertain to Simon's and Prussia's agreements. Br. at 15. As demonstrated above, however, those agreements do not contain the language in dispute.

In sum, while interpreting the evidence in the light most favorable to the Cross, the court correctly determined as a matter law that on its face the letter was too vague to constitute a contract, and that, given the vagueness of certain terms, the letter could constitute no more than an agreement to agree. That was a proper legal conclusion. Robinson, 196 Md. 217, 76 A.2d 356.

b. The Court Properly Considered The Issue Of Enforceability.

Cross argues that the lower court erred in granting judgment in ASPI's favor based on the absence of an enforceable contract because ASPI did not raise the issue in its motion for judgment. However, the court correctly addressed the issue for two reasons.

First, ASPI raised the sufficiency of the terms of the January 17, 1992 letter in its motion for judgment at the close of the evidence. It did so by seeking judgment with respect to the issue of whether Cross had satisfied the conditions precedent specified in the January 17, 1992 letter that the revenue be "generated solely by" Cross. The question of whether the revenue was generated solely by Cross subsumed the issue of whether that phrase in the January 17, 1992 letter

provided sufficient specificity to constitute a contract. Thus, ASPI's renewed motion for judgment raised that issue. Moreover, prior to the submission of the damages question to the jury, ASPI orally moved the Court to rule as a matter of law that the term "revenue" was insufficiently defined to allow the jury to award damages without speculating, arguing that there was no "meeting of the minds with respect to what constitutes revenue." E. 2783(a).

There is no merit to Cross's contention (Br. at 23-24) that he was somehow "sandbagged" with respect to the issue of the contract's enforceability. This was not a situation where any action of ASPI led Cross to fail to present evidence in support of the enforceability of the letter. Cross does not claim, nor could he, that there is any evidence he might have presented if the motion for judgment had explicitly identified the lack of enforceability of the letter as a basis for judgment. Thus, the circuit court did not err in examining the central issue of whether the January 17, 1992 letter was an enforceable contract.

Second, ASPI raised the issue of the absence of an enforceable contract in its motion for summary judgment. E. 956-58, 1002-04, 1446-47. The court denied that motion. E. 2328. It was within the court's discretion to reconsider that decision at any time before a final judgment, Associated Realty Co. v. Kimmelman, 19 Md. App. 368, 374, 311 A.2d 464, 467 (1973), and the court was not bound by the prior ruling of a different trial judge. Gertz v. Anne Arundel County, 339 Md. 261, 661 A.2d 1157 (1995). Hence, even though the court treated the issue in terms of a judgment notwithstanding the verdict, it was within the court's power to reach the same result on the basis of the motion for summary judgment.

2 The Court Correctly Held That Cross's Conduct Precludes Him From Recovering A Commission.

In its renewed motion for judgment at the close of the evidence, ASPI moved the court for judgment as a matter of law on grounds of breach of loyalty, waiver, and estoppel. E. 1929-34. Under the first doctrine, an employee who

breaches a duty of loyalty forfeits compensation that would otherwise be due to him. See Maryland Credit Fin. Corp. v. Hagerty, 216 Md. 83, 139 A.2d 230 (1958).[19] Under the doctrine of waiver, a person may not pursue a claim when he has acted in a manner inconsistent with his intending to pursue a claim, thereby creating an implied waiver. agg Evelyn v. Raven Realty Co., 215 Md. 467, 471-73, 138 A.2d. 898, 900 (1958).[20] Under the doctrine of estoppel, a person is precluded from asserting a claim as a result of the same type of conduct constituting waiver, coupled with the other party's detrimental reliance. ag_Q Benson v. Borders, 174 Md. 202, 219, 198 A. 419, 427 (1938).

The court cited only breach of the duty of loyalty and waiver in determining that Cross's conduct precluded his recovery. Each of the doctrines

[19]Cross argues that the defense was not properly raised because it was not asserted in the answer, and that, though the court allowed it to be asserted on the basis that a breach of loyalty claim was included in the counterclaim, the counterclaim on breach of loyalty involved a different issue. Br. at 21. However, the authority on which Cross relies for the proposition that the defense of breach of loyalty is waived if not specifically asserted in a pleading has recently been overturned with respect to the pertinent holding. See Br. at 21 (citing Liberty Mut. Ins. Co. v. Ben Lewis Plumbing. Heating & Air Conditioning. Inc., 121 Md. App. 467, 710 A.2d 338 (1998)). The Court of Appeals held that a general denial in accordance with Rule 2-323(d) is sufficient to raise any affirmative defense other than those specifically enumerated in Rule 2-323(g). ao Liberty Mut, Ins. Co. v. Ben Lewis Plumbing. Heating & Air Conditioning. Inc., No. 91, 1999 WL 387538, *5-7 (June 15, 1999). ASPI included such a general denial to Cross's breach of contract claim in its answer. E. 112.

[20] Appellant cites Kiley v. First Nat'l Bank of Maryland, 102 Md. App. 317, 331, 649 A.2d 1145, 1151-52 (1994), for the proposition that a waiver involves an "intentional relinquishment of a known right," and argues that there was "no evidence that Cross intentionally relinquished his right to compensation." Br. at 23. However, neither Kiley nor the cases on which it relies suggest that a waiver cannot be implied from the conduct of a party that creates an inference that he does not intend to assert a right. E.g., Gould v. Transamerican Assocs., 224 Md. 285, 294, 167 A.2d 905, 909 (1961). Nor could the absence of knowledge of the January 1992 letter on the part of ASPI preclude a waiver. Cross's actions created the inference that he intended to assert no prior right whatever.

would apply to the course of conduct on which the court based its ruling.[21] As shown below, taking into account the high standard for grant of a judgment notwithstanding the verdict identified by Cross, Br. at 9, the court's decision to overturn the verdict was justified.

a Cross's Acknowledged Conduct Constituted Waiver, Estoppel, And Breach Of Loyalty.

The Court initially stated that Cross waived any contractual right he had to the commission by his actions in dealing with David Slosman and in the hearing before the administrative law judge. E. 2808(d). In explaining its reasoning, the court noted that Cross had failed to mention his commission "time after time when it was not only appropriate that it be mentioned but that it was really necessary that it be mentioned." E. 2809(c). The court then pointed out that Cross admitted that he had not mentioned the commission during times "when there were dealings with Mr. Slosman and when there were other dealings including matters before the administrative law judge." id. The court thus recognized that there were a variety of situations where Cross acknowledged that he had failed to mention the commission when he had a duty to his employer to mention any belief that he was entitled to a commission. The dealings with Slosman and before the administrative law judge were important such dealings. But there were others as

[21] Two differences in the analyses of the doctrines warrant note. First, estoppel requires detrimental reliance on the party asserting it. Here, such detrimental reliance included, at a minimum, bidding on the contract without providing for the commission or securing an alternative arrangement with Cross prior to bidding, and engaging Slosman under terms whereby he would expect his bonus to be undiminished by a substantial commission. Second, waiver and estoppel apply regardless of what Cross might have been thinking because his actions led others to believe that he was making no claim for a commission. Breach of loyalty applies if while Cross was taking these actions, he intended to claim a commission (or believed he might ever otherwise use the letter against ASPI with respect to the IRS contract). Taking Cross at his word as to what his intentions were, breach of loyalty applies here in the same way as the other doctrines.

well, including when he showed ASPI' s principals profit estimates and made recommendations for pricing the contract.

The totality of instances in which Cross admits he did not disclose his claim for a commission is sufficient to establish breach of loyalty, waiver, and estoppel even if one completely accepted Cross's testimony about mentioning the commission. Thus, while we show in the next section that there was overwhelming support for the court's determination that Cross's testimony about mentioning his commission was incredible as a matter of law, the court's ruling stands without regard to Cross's credibility.

With respect to Slosman, Cross admits that while acting as an agent for ASPI, he fraudulently induced Slosman to join ASPI while leading Slosman to believe that there was no commission to be deducted prior to calculation of Slosman's bonus. He argues, however, that Slosman knew that the estimates Cross showed him were "worst case" and that Slosman ultimately earned more than the estimate. Cross maintains that therefore Slosman "suffered no damages on which to base a claim." Br. at 20.

Cross's contention, however, ignores the fact that no commission was deducted before Slosman received his bonus. More important, Slosman's understanding was not that he would receive the bonus indicated, but that he would receive 25 percent of profits. The $135,594 figure shown on the worksheet was simply an estimate of what that profit would be estimate under certain assumptions. Slosman believed that if the contract were made more profitable—which, if it occurred, would largely occur through Slosman's efforts—he would receive a 25 percent share of the additional profit. E. 2714(a). Moreover, Slosman had a reasonable basis for such belief because that is precisely what

Cross acknowledged the profit calculations and gross margin formulas he created were intended to lead Slosman to believe.[22]

Cross next argues that the failure to disclose the commission to Slosman actually served ASPI's interests because it facilitated ASPI's reaching an agreement with Slosman. Br. at 20. Cross does not, however, offer an explanation for how it could possibly have been to ASPI's benefit to reach an agreement with Slosman whereby Slosman would expect a substantial share of a profit calculated without regard to a commission that was larger than the estimated pre-commission profit. The obvious expectation is that upon learning of the deception, Slosman would leave or sue ASPI, or both. Cross also suggests that concealment of a commission served ASPI's interests because it prevented Slosman from communicating information about the commission to WDS when the companies were jockeying for shares of the profits. Br. at 20. He does not explain, however, why an obligation of ASPI to pay three percent of the total price to Cross would reduce, rather than enhance, ASPI's ability to insist on a larger handling charge. Moreover, Cross has no explanation for why it would be in ASPI's interest to continue to secure the services of Slosman without revealing the commission even after ASPI won the IRS contract.

Given the circumstances of his inducement to join ASPI, there is little doubt that ASPI would be liable to Slosman for a bonus undiminished by Cross's claimed commission. Assuming that Cross's testimony about intentionally deceiving Slosman is true, ASPI would likely also be liable for fraudulent inducement. Thus, certainly Cross's actions in inducing Slosman to join ASPI,

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[22] Assuming it were possible to increase the profitability of the scenario underlying Cross's first work sheet, in order to cover Cross's $700,000 commission and still make the $534,376 profit on which Slosman's bonus was based, Slosman would have had reason to expect an additional $175,000. Under the bid that eventually won the contract, Slosman's loss would have been $595,000, assuming the contract revenue was sufficient to cover Cross's commission.

and persuading Simon and Prussia to pay him 25 percent of profits, meet the elements of waiver and estoppel, and, taking Cross at his word concerning his belief that he was entitled to a commission, breach of loyalty as well.

Cross's only defense to his actions before the administrative law judge is to maintain that commissions were not at issue and assert that he was not asked about commissions. Br. at 20. He offers no response for his statement to the administrative law judge that ASPI had no obligations to pay up front. In any event, given the size of the commission relative to ASPI's other expenses, Cross would had to have known that the commission was highly relevant to ASPI's cash flow situation. Thus, assuming Cross intended to claim such a commission, his failure to disclose would likely be deemed the concealing or covering up of a material fact within the jurisdiction of a department or agency of the United States, which is a felony under 18 U.S.C. § 1001. Further, a perception that ASPI's principals were involved in the deception could cause them to be perceived as involved in a conspiracy to violate that statute.

Regardless of Cross's beliefs, however, his actions constituted a waiver of any commission, since they reflected an intention to claim no commission. They also constituted a basis for estoppel, since the failure to disclose a commission to the administrative law judge gave ASPI further reason to proceed with the contract and its negotiations with Slosman while believing Cross sought no commission. Taking Cross at his word about his belief that he was entitled to a commission, however, he also breached his duty of loyalty to ASPI by subjecting it to sanctions from the federal government.

A number of other admitted actions by Cross also support judgment for ASPI under doctrines of waiver, estoppel, and breach of loyalty. He acknowledges that he did not mention the commission prior to the signing of the teaming agreement (E. 2544(a-b), 2546(a-b)), which could have made ASPI liable to WDS if ASPI failed to bid on the contract. He also acknowledges that he did not mention the commission when seeking approval on price proposals (E. 2597(a-

b)), even when his profit estimates indicated that ASPI would lose money if it had to pay him a three percent commission. Even if these were "worst case" estimates, there is no excuse for the failure to point out that, if the worst case happens, ASPI would lose money, and that in any event, ASPI had a very long way to go before the profits shown on the worksheet actually might be realized. Sgg Maryland Credit Finance Corp., 216 Md. at 90, 139 A.2d at 233 (agent had duty to inform principal of all information the principal would reasonably want to know); Avtec Sys,. Inc. v. Peiffer, 21 F.3d 568, 576 (4th Cir. 1994).

Cross acknowledged that, apart from the alleged reference to a commission to Simon on January 5, 1995, there was no mention of a commission until at least June 15. See supra at 9. That admission is important in several respects. First, it establishes that Cross did not mention the commission when showing the initial profit calculations to Simon and Prussia. Second, it establishes that Cross submitted the first bid with an estimate that it would lose money (assuming he was expecting a commission) while only once having previously mentioned the commission. Third, it establishes that he did not mention the commission when requesting the bonus arrangement for Slosman. Just as Cross had the obligation to make sure that Simon knew that Cross was claiming a commission when Simon approved a bid that appeared not even to cover the commission, Cross had the obligation to make sure that Simon and Prussia knew about the commission when they agreed to pay Slosman 25 percent of the profits.

Cross claimed below that he did not need to tell Prussia or Simon at certain times because they knew. E. 2597(b). But, by his own testimony, at least until June 1995, any belief he had that Simon and Prussia knew that he was claiming a commission would have been based on (1) the one passing remark allegedly made to Simon and (2) Cross's beliefs as to Simon's and Prussia's understanding of a letter that had been in his personnel file since 1992 but that had not yet formed the basis for a commission because no contract had yet been secured. Regardless of what might have been Cross's prior belief as to Simon's and Prussia's knowledge

of his claim for a commission, their failure to ask about his commission at the time he showed them the profit calculations put Cross manifestly on notice that they did not know that Cross was claiming a commission of three percent of the total price of the contract. The same holds for Prussia's and Simon's failure to raise an issue about the commission when agreeing to pay Cross and Slosman 25 percent of the profits. It holds as well for Simon's failure to question whether a 2.5 percent or three percent markup on the software that comprised 90 percent of the contract would be sufficient to cover Cross's three percent commission, much less to do so and leave something over for the company.

Despite this notice, repeated actions that Cross, by his own admission, took toward Simon and Prussia between January 6, 1995, and June 1995, not only failed to reveal the commission, but, particularly in the case of the profit calculations and the gross margin formulas, would be expected to affirmatively lead them to believe that there was no such claim. These admitted actions constituted waiver, estoppel, and, assuming Cross had any intention of ever relying on his January 17, 1992 letter, breach of loyalty as well.

For these reasons, as well as the conduct toward Slosman and the administrative law judge, Cross's admitted behavior precludes his recovery under doctrines of waiver, estoppel, and breach of loyalty.

b. The Court Properly Concluded That Cross's Testimony Was Incredible As A Matter of Law.

In a supplement to its motion for judgment notwithstanding the verdict, ASPI detailed the reasons why Cross's testimony that he had told Simon and Prussia about the commission and they had agreed he would receive it was incredible as a matter of law, in that no rational person could believe it. E. 2049-62. While noting that there was some evidence that Cross told ASPI's principals about his commission, the court stated that "that evidence is not credible." E. 2808(d). In context, that finding was a determination that the testimony was

incredible as a matter of law. While the determination was unnecessary to the result reached by the court, the determination was manifestly correct.

ASPI recognizes that in ruling on a motion for judgment notwithstanding the verdict a court must accept all credible testimony that would support the jury's verdict. Bartholomee v. Casey, 103 Md. App. 34, 51, 651 A. 2d. 908, 916 (1994). Yet a verdict cannot be based on testimony that is incredible. Arshack v. Carl M. Freeman Assocs.. Inc., 260 Md. 269, 272, 272 A.2d 30 (1971) (upholding directed verdict for defendant where uncontroverted testimony by defendant made claimed inferences from plaintiffs testimony untenable); Gatling v. Sampson, 242 Md. 173, 182, 218 A.2d 202, 207 (1966) (holding that question of whether to take a case from the jury depends on whether there is credible testimony as to liability, and incredible testimony should be disregarded); Chesapeake & Potomac v. Noblette, 175 Md. 87, 97, 199 A. 832, 836-37 (1938); see also Holland v. Allied Structural Steel Co., 539 F.2d 476, 482-83 (5th Cir. 1976). Here the case for concluding that the testimony was not credible is overwhelming.

In appraising the inherent incredibility of Cross's claim that he told ASPI's principals that he expected to receive his commission, one has to take into account that Cross claims that, from the very start, he was told he would receive it. If that were true, however, it is impossible to understand how Simon and Prussia could have reviewed Cross's profit calculations without questioning him about the fact that the commission would have more than eliminated the profit. It is also impossible to understand how, in pricing the contract, Simon could ask Cross no questions about whether the markup on the software could cover the commissions, much less to agree to take no mark up on the $3,000,000 pass through charge when that charge alone would result in ASPI's having to pay Cross a $90,000 commission.[23]

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[23] One must also assume that, though Simon and Prussia knew about the commission, not only were they unconcerned about agreeing to pay Cross and Slosman 25 percent of any profits that might remain, but they were also

If Cross was expecting the commission, it also impossible to understand how, when he was provided a copy of Slosman's agreement to adapt to his own circumstances, he could have elaborately marked the document to apply to him, while making no reference to the commission that—whether or not it entirely eliminated the gross margin—certainly would have dwarfed Cross's 25 percent share of gross margin. Further, while it is difficult to understand why Cross would even take such pains to ensure a precise formula for calculating gross margin if he were expecting the commission, it is impossible to understand how he could initially forget to make provision for the commission at all or ultimately fail to make it absolutely clear that his commission would have to be deducted before the bonuses could be paid. It also is not possible to understand how Cross could persuade Simon and Prussia to give him a raise and a car allowance to put him on par with Slosman, while neither he nor they saw fit to note that his commission would cause him to earn far more money than Slosman, or, for that matter, Slosman, Prussia, and Simon combined.

Throughout this period, Cross created document after document that was entirely inconsistent with his having informed anyone of his commission. The explanation for those documents--which Cross did not remember until trial-- was that they were to deceive Slosman, "hopefully ... until the final bid went in." E. 2548(d). Yet, after the final bid went in, ASPI's accountant was asked to review the version of Cross's formula that was supposedly designed to deceive Slosman.

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unconcerned about the substantial liability to Slosman that surely would result if it were not made clear to Slosman that the commission would be deducted before he received any bonus. Without noting that Simon maintained that he was unaware of any commission, Cross states that "Simon participated in negotiating with Slosman and discussed with him the potential profitability of the contract," and "Simon did not tell Slosman about Cross's-3"Y° percent commission." Br. at 4. These misleadingly presented facts merely render further unbelievable Cross's claim that he had advised Simon of the commission and Simon agreed he would receive it. If such were the case, Simon would have no interest in bringing Slosman on board while unaware that Cross's commission would be deducted before calculating his bonus.

Then, at a meeting with Cross, Prussia, and ASPI's lawyer, no one mentioned anything about a commission even when a question arose as to whether receipt of 25 percent of gross margin would cause Cross to earn more than Prussia.

In sum, these and other aspects of the conduct of Cross and each of the other involved individuals make it impossible for a reasonable person to believe Cross's claims about mentioning the commission to Simon and Prussia. The court therefore correctly concluded that such testimony was incredible as a matter of law.

B. The Court Properly Granted A Conditional New Trial.

The circuit court granted ASPI's motion for a conditional new trial on the grounds that the verdict was against the weight of the evidence and that the damage award was excessive. E. 2833(b). In maintaining that the motion was improperly granted, Cross argues both that ASPI's October 19, 1998 motion was not timely because it was filed more than ten days after a judgment on the verdict had been entered and that the court abused its discretion in granting the motion. Br. at 26-29. Cross's contentions are without merit.

The jury verdict on October 14, 1998, resolved only the claims for commission and vacation pay. The court had still to rule on issues it had reserved to itself, including claims for a management fee on the IRS contract and claims for treble damages. Recognizing that a final judgment would have been inappropriate until such claims were addressed, counsel for Cross asked the court to enter judgment pursuant to Rule 2-602. E. 2792(a-b).

Rule 2-602(b) allows for a court to direct the entry of a final judgment resolving fewer than all claims "[i]f the court expressly determines in a written order that there is no just reason for delay." However, the court refused Cross's request indicating that it would deal with the matter at a hearing, which the court then scheduled for October 21, 1998. E. 2792(a-b). Thereafter, the court did not issue a written order for a final judgment on less than all claims as required by

Rule 2-602(b), nor did it court treat the jury verdict as a special verdict and provide for immediate entry under Rule 2-601(a).

Nevertheless, the clerk entered a judgment dated October 16, 1998, based on the jury verdict, in the amount of $2,381,260.50 (though not addressing the vacation pay claim on which the jury also had found liability). Meanwhile, pursuant to Rule 2-532(b), as **a result of the verdict, defendant's motion for judgment filed prior to the verdict, and on which the court had reserved ruling, was automatically converted to a motion for judgment notwithstanding the verdict. E. 2794(d).**[24] **At the hearing on October 21, 1998, the court overturned the jury verdicts on the three percent commission and the claim for vacation pay. It also entered judgment for defendants** as **to all matters. E. 2810(a).**

ASPI then moved for the conditional grant of a new trial on October 29, 1998, within ten days of the date on which the court entered judgment on all claims. When plaintiff raised the issue of the timeliness of the motion for a conditional new trial at the hearing on October 21, 1998 (E. 2831(c-d)), counsel for ASPI pointed out that it had been ASPI's understanding that no judgment would be entered until the hearing of October 21, 1998, and that in any event the grant of judgment notwithstanding the verdict voided the earlier judgment. E. 2832 (c-d). The court ruled that the motion was timely. E. 2833(b).

The court was correct that ASPI's motion was timely. Apart from the fact that on October 14, 1998, the court indicated it would not enter judgment until the next hearing, the document entered on October 16, 1998 was insufficient to constitute final judgment as to the three percent commission. aes **Rohrbeck v.**

[24] **Cross is incorrect that ASPI filed its motions for judgment notwithstanding the verdict on October 20, and 21, 1998. Br. at 27. The motion for judgment notwithstanding the verdict on the three percent commission and vacation pay had been pending since the jury verdict. On October 20, 1998, ASPI filed a supplement to the pending motion, containing additional argument. E. 2036-65. ASPI did file on October 21, 1998 a motion for judgment notwithstanding the verdict on damages. E. 2027-35.**

J.ohrbeck, 318 Md. 28, 566 A.2d 767 (1989) (holding that to be a final judgment, a ruling must be intended by the court as an unqualified, final disposition of the matter, and, unless the court properly acts pursuant to Rule 2-602(b), a ruling must complete the adjudication of all claims against all parties); see also Stephenson v. Goins, 99 Md. App. 220, 636 A.2d 481 (1994). The court, which is peculiarly suited for determining such matters as its intent in issuing an order, properly determined the filing to be timely.

With respect to whether the court abused its discretion in granting the motion, Cross claims that the court merely made "conclusory and unexplained statements that the verdict was 'against the weight of the evidence' and `excessive.'" Br. at 29. The court, however, noted that the details were contained in its prior ruling on the motion for judgment notwithstanding the verdict. E. 2833(b).

There the court had not merely found that the verdict may be wrong--which is the standard for grant of a *new* trial where the verdict is against the weight of the evidence (see Thodos v. Bland, 75 Md. App. 700, 542 A.2d 1307, 1309 (1988))--but that it certainly was wrong. E. 2808(c)-10(a). The court also had noted that jury had awarded $2.3 million, even though there were questions as to whether the IRS would exercise its options on the contract. E. 2809(b). In any event, an immediate award of $2.3 million in commissions to be paid not only before the revenues on which the commission is based are received, but also for revenues that may never be received, justifies the court's ruling on excessiveness.

Cross cites an apt passage from Buck's v. Cam's Broadloom, 328 Md. 51, 59, 612 A.2d 1294, 1298 (1992) concerning why the "opportunity of the trial judge to feel the pulse of the trial and to rely on his own impressions in determining questions of fairness and justice" has caused the Court of Appeals to accord a trial judge broad discretion in determining whether to grant or deny a new trial. Br. at 28. That reasoning is precisely why the trial court's exercise of its

discretion should be left undisturbed in this case.

Finally, in light of the trial court's views as to the appropriateness of a new trial, even if the court lacked authority to grant the motion for a conditional new trial due to untimeliness, should this Court overturn the judgment, ASPI submits that the Court should order a new trial pursuant to Rule 2-532(0(1)(C). [25]

II. CROSS-APPEAL

A. The Circuit Court Erroneously Denied Defendants' Motion For Summary Judgment On The Ground That The January 1992 Letter Was Not A Contract.

In its opposition to Cross's second motion for summary judgment, ASPI requested summary judgment as the nonmoving party, inter alia, on the grounds that the language "eligible to participate" in the January 17, 1992 letter indicated that future agreement was contemplated, thus rendering any agreement reflected in the letter unenforceable. E. 956-59, 1002-04. ASPI thereafter incorporated that argument into its own motion for partial summary judgment. E. 1447.

For the reasons discussed in the circuit court's opinion and supra at 27-31, the court erred in denying the motion for summary judgment on the basis that the letter was unenforceable as a contract. Upon the conclusion of this case, the order denying the motion for summary judgment is appealable. ags Johns Hopkins Univ. v. Ritter, 114 Md. App. 77, 91-92, 689 A.2d 91, 98 (1996); Presbyterian Univ. Hosp. v. Wilson, 99 Md. App. 305, 314, 637 A.2d 486, 490 (1994).

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[25] **Though Cross does not address the issue in his Statement of the Case or Statement of Facts, he maintains in passing that the circuit court erred in granting judgment notwithstanding the verdict on his claim for excess vacation pay. Br. at 13. In noting that no one told Cross he could lose his leave by not using it, however, Cross fails to adddress that the written policy of the company stated that an employee could accrue only 160 hours of leave. That fact justified the court's conclusion that, as a matter of law, Cross could not establish a claim for excess vacation pay. E. 2809(d). Cross also suggests that the court should be required to address further the issues the court reserved to itself. Br. at 29-30. However, apart from the fact that such issues are not mentioned in the Statement of the Case, Cross provides no reasons why the court improperly reserved the issues to itself, or why its ruling was incorrect.**

The Johns Hopkins Court noted that courts have been reluctant to overrule a denial of summary judgment where a factual record had been developed at trial to support a judgment for the party against whom summary judgment was sought. Such reservations are not implicated here because the lower court granted judgment notwithstanding the verdict, confirming that any evidence developed during trial did not provide a basis for judgment for Cross. The circuit court's conclusion was purely a legal determination. Hence, the denial of the motion for summary judgment is appealable. Johns Hopkins, 114 Md. App. at 92. For the same reasons that the court correctly determined that the letter was not a contract in its grant of judgment notwithstanding the verdict, the court erred in failing to reach that result in the ruling on the motion for summary judgment.

B. The Circuit Court Abused Its Discretion By Denying Sanctions Against The Plaintiff.

Rule 1-341 provides that when a "court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification, the court may require the offending party or the attorney advising such conduct or both of them to pay to the adverse party the costs of the proceedings and the reasonable expenses, including reasonable attorney's fees incurred by the adverse party in opposing it." A denial of sanctions will be overturned only for an abuse of discretion. Century I Condominium Ass'n. Inc. v. Plaza Condominium Joint Ventures. et al., 64 Md. App. 107, 119, 494 A.2d 713, **720 (1985).**

Nevertheless, this is an exceptional case. Cross had reason to know from the outset of this case that in order to withstand summary judgment or prevail at trial he would have to maintain that he informed ASPI's principals that he believed he was entitled to a commission on the IRS contract. Assuming that he had not informed ASPI's principals, as the court found and as the record demonstrates, Cross knew he would have to support his claim with false testimony.

In his interrogatory answers he explicitly stated that until September 11, 1996, Simon and Prussia had led him to believe that they would "honor their existing commitment to [him]." E. 2171. The statement was clearly intended to mean, not that Simon and Prussia had said they would honor the 25 percent bonus arrangement--which they did honor in the document they provided him on September 11, 1996--but that they would pay him the three percent commission.

In deposition, Cross first stated he had not mentioned the commission in the January 1995 discussion with Simon. E. 1050-51. He then changed his story. E. 1054-55. Confronted with the profit calculations that alone demonstrate that he had not let Simon and Prussia know he was claiming a commission, Cross testified he could not remember for whom he prepared the documents or why the commission was not mentioned. E. 1106-10. Even if one accepts that his testimony at trial was true, the testimony in deposition was false. In fact, however, the evidence compels the conclusion that the testimony in deposition and at trial were both false.

In the case of Cross's formula for calculating gross margin, the testimony in deposition that he had initially forgotten to include a commission in his formula and that he did not know how the parenthetical information was placed on Defendant's Exhibit 6 was certainly false. His testimony at trial that that language had been specifically crafted to deceive Slosman was false as well.

Despite being confronted in his deposition with documentary information entirely inconsistent with his having told Simon and Prussia about the commission, Cross filed a second motion for summary judgment, and with it an affidavit implying that Cross and Simon knew about his commission throughout the bidding process of securing the contract. When forced to respond to ASPI's motion, Cross not only attempted to mislead the court concerning Slosman's knowledge of the commission in 1995, but made further false representations concerning his communications to Simon and Prussia, in order to create "a plethora of factual disputes" that would preclude summary judgment. E. 1520.

Throughout this period Cross was pursuing the fraudulent conveyance claim related to the 1995 sale of ASPI assets, maintaining that the sale was made to render ASPI incapable of paying his commission. Yet, he knew that such claim was false because he knew he that he had failed to inform ASPI about the commission at the time of the sale.[26]

At trial, Cross committed to further false testimony in order to explain the documents that were inconsistent with his claim that he had informed Simon of his claim for the commission at the outset. The record suggests he resorted to further false testimony by fabricating a story about the December 9, 1994 meeting, since, apart from the evidence that the meeting never occurred (see E. 2092, 2095-112), it made no sense for Cross to fail to mention such a meeting earlier when responding to ASPI's claim that for summary judgment on grounds that the IRS contract was not generated solely by him. In any event, either the testimony at trial or the testimony in deposition was false.

As to the January 5, 1995 conversation with Simon, at trial Cross initially maintained that he had mentioned "commission." E. 2490(d)-91(a). He then appeared to recant that claim after being confronted with the deposition testimony where he had merely said "agreement." E. 2544(a)-45(c), E. 2580(d)-81(c). Then--after recognizing that he admitted to never mentioning the word commission prior to June 1995--again testified that he had said "commission" in the January 5 discussion. E. 2597(c). The record, however, leaves little room to

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[26] **After initially indicating an intention to appeal the grant of summary judgment on the fraudulent conveyance claim, Cross failed to address the matter in his brief. However, when ASPI moved to dismiss the appeal of that issue in order that the perceived pendency of the appeal not interfere with the economic arrangements of various defendants, Cross opposed the motion for dismissal claiming that he is continuing to pursue that issue. See Appellant's Opposition to Motion of Appellees for Dismissal of Appellant's Appeal of Order Dismissing Fraudulent Conveyance Claim (June 28, 1999).**

doubt that, in fact, Cross never even mentioned agreement in that conversation, and that every one of his statements in this case about that conversation was false.

Cross's perjury ought in and of itself to constitute a basis for sanctions.[27] However, apart from the abuse reflected in the perjury itself, the perjury demonstrates that Cross's bringing of this suit, and his subsequent actions including the filing of his own motions for summary judgment and the opposition to ASPI's motion, were in bad faith and without substantial justification. For, from the outset, and at each step along the way, Cross knew that central premise of his claim not only was false, but could only be supported by perjury. Indeed, given that a crucial element of his claim is based on a lie, the prosecution of this appeal is further basis for sanctions.

Accordingly, ASPI requests that the Court reverse the order of the circuit court denying sanctions and remand the case for a hearing on the amount of a sanctions award. Alternatively, ASPI requests that the Court remand the case for a hearing on ASPI's requests for sanctions.

CONCLUSION

For the reasons stated above, ASPI submits that the circuit court's grant of judgment notwithstanding the verdict should be affirmed.

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[27] **This case presents a stark contrast to Seney v. Seney, 97 Md. App. 544, 631 A.2d 139 (1993), where the court overturned an award of attorney's fees against a party who had changed his testimony during the course of trial. In that case, a third party defendant had initially stated in interrogatories and deposition that his wife had signed certain documents then later stated that he had signed the document with his wife's authorization. In finding that in the circumstances of that case, perjury alone was an insufficient basis for sanctions, the court pointed out, inter alia, that the party "had been hauled into court as a third party defendant [and] his erroneous or false testimony was not diapositive of the outcome of the case." 97 Md. at 544, 631 A.2d at 144. Here the plaintiff chose to bring a suit that could only be maintained by false testimony, the testimony went to the heart of the case, and, rather than ultimately providing truthful testimony as in Seney, testified falsely through the trial.**

With respect to its cross-appeal, ASPI submits that the Court should reverse the circuit's court's denial of summary judgment on ASPI's claim that the January 17, 1992 letter did not constitute a contract. ASPI also submits that the Court should reverse the circuit court's orders denying sanctions to ASPI and remand the case for a hearing on the amount of a sanctions award.

Respectfully submitted,

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FONT AND TYPE SIZE CERTIFICATION PURSUANT TO RULE 8-504(a)(8)

This brief was prepared using Microsoft Times New Roman font in 13 point size.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing document were served this 19th day of July, 1999, to Stephen Leventhal, Esq., 7315 Wisconsin Avenue, Suite 601-N, Bethesda, Maryland, 20814, and to Roger W. Titus, Esq., Venable, Baetjer and Howard, LLP, One Church Street, Fifth Floor, Rockville, Maryland 20849-1527 via hand delivery.

es P. Scanlan