IN THE CIRCUIT COURT FOR CHARLES COUNTY, MARYLAND

TURBOHAUL INC.	:	
	:	
Plaintiff	:	
	:	
vs.	:	**Case No. C-11-2541**
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AB CONSTRUCTION INC., et al.	:	
	:	
Defendant	:	

FILED
NOV 21 2014
CIRCUIT COURT
FOR CHARLES CO., MD.

MEMORANDUM

The genesis of this case can be found in Brandywine, Prince George's County, where millions of tires had been illegally dumped in several ravines. The Maryland Environmental Service, thanks to federal "superfund" grants, solicited bids for the removal of the tires. The plaintiff, as its name implies, is in the business of hauling waste materials and wanted a piece of the Brandywine action. Unable to secure a bidding partner for the next phase of the tire removal project, the plaintiff reached out to the defendant, AB Construction ("AB"), just prior to the deadline to bid. Although AB was initially willing to award a subcontract to the plaintiff, by the time the tires were being removed from the ravines the plaintiff had been cut out. Aggrieved, the plaintiff filed suit.

The plaintiff submitted a Second Amended Complaint on February 21, 2013, and that is ultimately the complaint that went to trial. Before trial began, several of the counts were disposed of, either by way of summary judgment or voluntary dismissal. A list of the claims in the Second Amended Complaint follows:

Count One:	Breach of Contract	Summary Judgment for AB Granted
Count Two:	Detrimental Reliance	Pending

Count Three:	Unjust Enrichment	Pending
Count Four:	Fraud	Pending
Count Five:	Interference with Contract	Pending
Count Six:	Conversion	Pending
Count Eleven:	Conspiracy	Dismissed

Counts Seven through Ten were alleged against Tomar Trucking, Inc. Those counts were all dismissed by the plaintiff on April 17, 2013.

After extensive pre-trial litigation, the trial finally commenced on October 15, 2013. The trial consumed the better part of 6 days, ultimately concluding on September 3, 2014.[1] The court took the case under advisement, directing the parties to submit written closing arguments. The court now issues this Memorandum explaining the reasons for its decision and the basis of determining any damages. Md. Rule 2-522(a).[2]

Summary of the Testimony

Kevin Daly

[1] Specifically, the trial took place on October 15, 16, 17, and 18, and resumed on November 12, 2013. The trial was originally to conclude on January 3, 2014, but inclement weather caused the courthouse to close. The next available date was July 16, 2014. This court became unavailable for that day. The evidentiary portion of the trial was finally concluded on September 3, but eleven month gap between the beginning and end of trial prompted the court to request counsel to prepare written closing arguments, the last of which was due on October 31, 2014.

[2] Maryland Rule 2-522(a) contemplates a "*brief* statement of the reasons for the decision."

Mr. Daly is the president and founder of TurboHaul, Inc. He founded the company shortly after graduating from the University of Maryland in 1995 with a degree in logistics and transportation. Mr. Daly's salary is roughly $3400 per week.

Turbo Haul specializes in bulk trash removal. As of the time of the trial, the company had 35 full-time employees and 10 part-time employees. The company has a scrap tire hauler's license issued by the Maryland Department of the Environment.

Mr. Daly describes his current role with Turbo Haul as one of "business development." He is the primary person who negotiates contracts with customers. Prior to October, 2010, Mr. Daly had looked at several projects sponsored by the Maryland Environmental Service ("MES") but had never bid on one. In October, 2010, though, he heard of what was colloquially called "the Garner scrap tire stockpile," an enormous collection of tires illegally dumped in ravines in Brandywine.[3] Initially, Mr. Daly was hopeful that Turbo Haul could apply to be the prime contractor for Phase I of the tire removal. He reviewed the MES Request for Bids paperwork and toured the ravines. Ultimately, Mr. Daly concluded his company could satisfy MES's bonding requirement as a prime. He teamed up with another company and together they submitted numbers for the bid. They were unsuccessful.[4] MES informed Mr. Daly that there would be another Request for Bids forthcoming.

In January, 2011, Mr. Daly began to prepare for a bid on the next phase of the Garner project. He knew that Turbo Haul could not bid as the prime contractor as MES was requiring

[3] MES estimated there were 1.2 million tires in the ravines that needed to be removed for Phase II. Mr. Daly, recollecting his tour of the ravines, testified, "You'd believe every tire was there if you toured the site. It was breathtaking." Tomar Trucking had hauled away over 84,000 tires during a prior phase. Plaintiff's Exhibit 14.
[4] Mr. Daly testified that he subsequently learned that his partner company had "doubled my numbers" on the bid.

the prime contractor to have 100% performance and payment bonds.[5] He and Jeff Schwartz of a landscaping company called Greenskeeper agreed to seek out a company that could qualify as a prime contractor. The deadline for bids was March 11, 2011.

In addition to the bond requirement, before a company could bid as a prime contractor it had to attend a meeting hosted by MES. Mr. Daly received the attendance lists from MES on February 17, 2011, and saw that AB was on the list. Over the next three weeks, he reached out to many of the companies on the list, including AB.

Mr. Daly proceeded to research disposal facilities. The MES proposal required multiple disposal sites. Mr. Daly described his research as involving four steps: 1) finding a facility; 2) confirming that it was licensed to receive scrap tires; 3) determining the facilities requirements for tires; and 4) negotiating with the facility about prices.

On or about March 9, 2011, Mr. Daly was contacted by Donna Coberly of AB. After their conversation, Mr. Daly sent Ms. Coberly an e-mail (Plaintiff's Exhibit 3). The e-mail included various attachments: a copy of Turbo Haul's scrap tire license; lists of Turbo Haul's equipment; and a "company profile." In his e-mail message, Mr. Daly represented, "We have the required 11% MBE and 11% WBE covered in our numbers for our portion of the work." Neither the e-mail nor the attachments mentioned any other companies.

Donna Coberly was not called as a witness by either side. Mr. Daly testified to his recollection of the conversation. As he remembers it, he specifically asked Ms. Coberly about

[5] Del Carden, an agent with Tischer Surety, explained in his testimony that a "performance bond" acts as insurance that the contractor will perform under the contract. A "payment bond" is insurance that the prime contractor will pay its subcontractors and suppliers. Mr. Carden also explained that a "bid bond" acts as a guarantee that a company bids for a contract will actually enter into the contract if it wins the bid. In this case, MES required a bid bond of 5%.

bonding – could AB satisfy the MES bonding requirements? Mr. Daly told Ms. Coberly that Turbo Haul had the best numbers, AB was sure to win the bid with Turbo Haul's numbers, but that he was not going to give them his numbers unless he had assurances that he would be awarded the subcontract for hauling the tires away from the site.[6]

On March 10, Mr. Daly sent an e-mail to Ms. Coberly telling her he could reduce his price for tire disposal. Ms. Coberly responded by sending Mr. Daly a "DBE Subcontractor Performance Form" to fill out.[7] Plaintiffs Exhibit 4. That same afternoon, Mr. Daly sent (at Ms. Coberly's request) a list of disposal facilities and prices. He also reported that he had an MBE/WBE that would perform 62% of the hauling. He promised to send the remaining information once he received a signed letter of intent. Plaintiff's Exhibit 5.

Mr. Daly sent his proposed Letter of Intent to Ms. Coberly at 3:35 p.m. on the afternoon of March 10. Plaintiff's Exhibit 6. The Letter of Intent was signed by Greg Staley on behalf of AB and sent back to Mr. Daly that same day.[8] Also that afternoon, Mr. Daly sent to Ms. Coberly the signed DBE form, which was executed by Mary Proctor on behalf of Tomar Trucking, Inc.

The bidding took place on Friday, March 11. Mr. Daly was not present, but had a representative there. His representative informed him that AB had won the prime contract. Mr. Daly, who was in Utah at the time, celebrated because it was "the best job we ever got." Mr. Daly also received a call from Tomar, and Tomar sent him a "letter of acceptance"

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[6] It is not clear who else Mr. Daly would have given the numbers to.

[7] "DBE" stands for "Disadvantaged Business Enterprise." The term "DBE" can refer to any of several types of business, including "Minority Business Enterprise" ("MBE") and "Women's Business Enterprise" ("WBE"). See "Attachment B-2" to Plaintiff's Exhibit 14.

[8] Following arguments at the summary judgment hearing, this court concluded that the Letter of Intent was not a contract, based on this court's interpretation of Cochran v. Norkunas, 398 Md. 1 (2007).

memorializing the agreement between Tomar and Turbo Haul. Mr. Daly received a final letter from Tomar on March 17. Plaintiff's Exhibit 10.[9]

Mr. Daly spoke with Mr. Staley for the first time on Monday, March 14. Mr. Daly remembers the conversation as being brief and that Mr. Staley seemed "subdued." As Mr. Daly recalls it, there was no mention of any bonding requirements during this conversation. Mr. Staley confirmed that AB would use Turbo Haul as its hauling and disposal subcontractor.

On March 15, Mr. Daly received an e-mail from Mr. Staley in which AB raised an issue about bonding for the first time. Specifically, Mr. Staley wrote, "With talking with our bonding company is there anyway [sic] you can provide a bond for you [sic] work. I understand this is an extra, I did put some money in my price for a bond for you at the last minute do [sic] to bonding company." Mr. Daly responded that he had already discussed bonds with his bonding company but had been told a bond was not possible "given the dollar value of our portion and the period of time the bond needs to be held." He added that if the bond was a "deal breaker" he had a friend who may be able to use his company to help with a bond.[10] Mr. Staley responded, "It is looking like it will be a big deal so you may want to get the ball rolling." Mr. Daly replied, "Will do. I'm sure we'll be able to get it done." Plaintiff's Exhibit 11.

The next day, Mr. Staley asked for a breakdown of MBE and WBE figures. Mr. Daly responded that Tomar was both MBE and WBE.[11] Mr. Daly estimated that Tomar will perform 63% of the hauling at a cost of $265,038. He surmised that the "total estimated value of our

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[9] The chronology and details of Turbo Haul's negotiations with Tomar is unclear. According to the various complaints, Turbo Haul had contacted Tomar to address any MBE/WBE requirement for the bid. Mr. Daly's e-mail to Ms. Coberly, Plaintiff's Exhibit 5, indicates that Tomar was to do 62% of the hauling. However, both Mr. Daly and Ms. Proctor testified at trial that the plan from the beginning had been for Tomar to do *all* of the hauling.

[10] The friend was Mr. Schwartz of Greenskeeper.

[11] The owner of Tomar is Ms. Mary Proctor, an African-American female.

work" would be $1,430,873, and that Tomar's share of that would be 19%. Plaintiff's Exhibit 11.

On March 17, Mr. Staley asked for information about "sub and the dump sites." Mr. Daly responded with several documents including copies of licenses for Tomar and some disposal facilities. Plaintiff's Exhibit 12.

Over the next three months, Mr. Daly attempted to secure a bond. He was told by Mr. Staley that AB's bonding company was requiring that each subcontractor performing over $250,000 had to be bonded. Mr. Daly testified that every time he would present Mr. Staley with an alternative to bonding, the response would be, "We need a bond." Mr. Staley presented it as "hard and fast, these are the rules."

On May 16, 2011, Mr. Daly sent to Mr. Staley a summary of his efforts to date. Mr. Daly reported that Greenskeeper Environmental had been approved "by two different surety companies for the necessary bonding. The bond is only contingent upon our receipt of AB's award notification, an acceptable subcontractor agreement and proof of AB's bonding for the project." Mr. Daly also suggested a kick-back proposal, where Turbo Haul would pay to AB the $50,000 it would have to pay to a bonding company. The e-mail also confirms that Mr. Staley had represented that AB's bonding company was requiring the bond for subcontractors "doing over $250K of work," and that "AB may not have any choice in this bonding matter." Plaintiff's Exhibit 16.

The next day, Mr. Staley sent to Mr. Daly a proposed subcontract agreement which included Greenskeeper as a party. Plaintiff's Exhibit 17. Mr. Daly forwarded the agreement to

Greenskeeper. Greenskeeper, however, told Mr. Daly that it wanted 50% of Turbo Haul's profit. Mr. Daly thought that was "absurd."

On May 19, Mr. Daly advised Mr. Staley that he thought the subcontract was fine, but he wanted new versions with Tomar or Montgomery Scrap Corporation instead of Greenskeeper.[12] Mr. Daly also represented, "Since all parties have their bond approval, I will make a decision as to which party we will work with." With the contract in hand, Tomar or Montgomery Scrap could get "final approval for their bonding." Mr. Staley sent the requested contract proposals less than half an hour later. Plaintiff's Exhibit 18 -20. Despite the representation that Tomar had bond approval, Mr. Daly testified that he considered the Tomar bond "a long shot." He was hopeful that Tomar or its surety could find a minority bonding program.

On May 20, Mr. Daly asked Mr. Staley, "Are we at a place yet where we can ask MES the questions about disposal facility selection and per mile ton x mile calculation? . . . . The answers to these questions have bearing on our bonding acquisition." Mr. Staley responded that the MES contract was not finalized yet. Mr. Daly replied, "For now, I'll try to work around the issue as it relates to my bonding." Plaintiff's Exhibit 21.

On May 24, Mr. Daly asked for a fourth contract draft, this time only listing Turbo Haul, writing, "Our bonding agent has requested this as well." Plaintiff's Exhibit 22. Mr. Staley supplied it soon thereafter, probably the next morning.

On June 3, Mr. Daly asked Mr. Staley, "Any update on your official award and 'notice to proceed' for Garner?" The response was, "any day now, got the contract back Signed [sic] we

[12] Mr. Daly explained that Montgomery Scrap was a "longtime business associate" of Turbo Haul. He negotiated with them for a period of time but ultimately Montgomery Scrap declined to become involved in the project.

need ur [sic] bond ASAP[.]" Mr. Daly then asked for "a copy of your signed contract so that I can proceed with finalizing our bonding? I am being told I will also need a copy of your bond before I can finalize." That afternoon, Frank McQuade, the project manager for AB, sent Mr. Daly "the signed contract for the Tire job." Plaintiff's Exhibit 24. Mr. Daly also asked about how flexible MES would be on how many tires could go to which disposal sites and how MES was going to calculate mile/ton payment.

On June 6, Mr. McQuade informed Mr. Daly, "I got a couple answers for you. I hope this will help let me know." Mr. McQuade included an e-mail message from James Woods, who was the project manager for MES. In response, Mr. Daly confirmed he had received the "signed contract you sent along, which also contained your bonding. That is all that I need right now to move forward with everything on my end." Plaintiff's Exhibit 25.

On June 8, Mr. Daly reported to Mr. Staley, "I should have everything wrapped up for you and your surety by the end of this week, or early next week at the very latest." Mr. Staley replied that he was no longer involved with the Garner tire project, but that he would forward the e-mail to Mr. McQuade. Plaintiff's Exhibit 26.

Five days later, on June 13, Mr. Daly sent an e-mail to Mr. McQuade. In his introductory paragraph, Mr. Daly says he would like to touch base with Mr. McQuade soon to go over the project. "In the meantime," he continued, "I have figured out the way we need to structure the subcontracting agreements for Turbo Haul's portion of work on this portion of work on this project to achieve compliance with your bonding company's requirements."

Mr. Daly suggested that AB contract directly with Tomar for the hauling of tires, that AB also contract directly with each disposal site, and that AB contract with Turbo Haul "for logistics

and disposal management, including support for all scrap tire and non-tire material." Mr. Daly estimated Turbo Haul's share of this proposal to be $204,813. The net result would be that since neither Tomar nor Turbo Haul's share of the work would be more than $250,000, AB's bonding company would not require Turbo Haul to be bonded. Mr. Daly concluded the e-mail, "We are continuing to prepare our equipment and personnel for a first week in July start date."[13]

Mr. McQuade's response on June 14 was abrupt and to the point: "Hey Kevin, I do not like how you are cutting and slicing this all up. I only want to deal with one subcontractor and only one. If you are the one than [sic] we will write you the one contract and cut you the checks and you carry the bond. Than [sic] however you want to divide your deals up is how ever you want to. We may have to talk more if your company can not handle this job or do not want to carry the bond?"[14]

Mr. Daly testified that he took Mr. McQuade's response as an indication that AB was not interested in "working it out." He viewed as "a threat to cut us out." He telephoned Mr. McQuade and told him that Turbo Haul had been ready to go since "day one," that the only hold-up was AB's insistence on a bond, and that he had been working his butt off for the bond. Mr. Daly told Mr. McQuade that he was not accepting bond as a contingency for their contract and that AB and Turbo Haul had an agreement. Mr. McQuade told him to "settle down, it'll be okay, you're still our man."[15]

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[13] This sentence is a non-sequitur. Mr. Daly had just outlined a scenario whereby Turbo Haul would only be responsible for "logistics and disposal management" and support. As previously noted, both Mr. Daly and Ms. Proctor testified that they anticipated Tomar to do all of the hauling. There was no need for Turbo Haul to prepare any equipment or personnel.

[14] Mr. Daly's June 13 e-mail and Mr. McQuade's June 14 reply are both contained in Plaintiff's Exhibit 27.

[15] Neither side called Mr. McQuade to testify.

On June 15, Mr. McQuade asked Mr. Daly for information on non-tire disposal sites. Mr. McQuade apologized for the request, "I know you been up [sic] all night working on the bonds and everything. LOL[.]"[16] Mr. Daly responded an hour later with a spreadsheet describing four facilities. Plaintiff's Exhibit 28.[17]

The next day, June 16, Mr. McQuade asked Mr. Daly, "I was wondering how we are doing on the bond issue. Can you get me the one bonded for $247,,,,,, at least please. I would like to final everything this week." That afternoon, Mr. Daly responded in a lengthy e-mail. He reported, "Since we spoke on Tuesday, I've been continuing to pursue every option for obtaining some level of bonding." Tomar was applying for a bond through the State, and Mr. Daly was working with two different companies. "I feel confident that we will be able to obtain bonding for at least $250K, but the issue may be 'time.'" Mr. Daly estimated it would be another 2 weeks before Turbo Haul or Tomar received an answer about bond.

Mr. Daly then returned to his earlier proposal about restructuring the subcontracts. He assured Mr. McQuade, "My consultant says that these measures would affectively [sic] provide the same protection to your bonding company as Turbo Haul bonding back. And most importantly should allow your bonding company to release your bonding capacity for Turbo Haul's portion of work, or at least a good chunk of it." Mr. Daly concluded the e-mail with, "All this being said, it is still my intent to get you an actual bond." Plaintiff's Exhibit 29.

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[16] "LOL" is, of course, a common e-mail/text acronym for "laugh out loud."

[17] Also included with Plaintiff's Exhibit 28 is a blank form page titled "Scrap Tire Acceptance Facility." That was probably sent by Mr. McQuade as he asked, "Can you give me the info I need on this form." Also included with the exhibit are 36 single pages providing information on different facilities. Mr. Daly's reply said, "Please find the attached data sheet for all of our non-tire, disposal sites for the project." It is unclear, therefore, where the other 36 pages came from or what their significance is.

On June 21, Mr. McQuade asked for an update on the bond. Mr. Daly responded on June 22. He reported that the two companies he had been working with had declined. He reported that one of the disposal facilities might offer a $250,000 bond. He also reported that Tomar was still attempting to get a bond; he estimated their chance of success as being 50/50. He also said he was still in contact with a friend who owned a landscaping business (i.e., Mr. Schwartz and Greenskeeper) and that although they had had difficulty coming to terms he was going to try again.

Mr. McQuade replied on June 23, asking, "What is the amount of the contract just for you (Turbo Haul). Than [sic] what would be the amount for the others and the names of the company's [sic]. Let me see what I can do for you." Mr. Daly then copied and pasted portions of his earlier e-mails describing his idea to subdivide the subcontracts. Mr. McQuade forwarded the e-mails to Mr. Paul Dolan of AB who was not moved. Specifically, Mr. Dolan e-mailed Mr. McQuade, "Please pass on to Mr. Daly that we have already provided his original proposal to our bonding company. They don't want us to break this down into a bunch of little pieces. We told them that per Mr. Daly we would be forwarding a bond for the entire amount. Mr. Daly told Greg [Staley] that he would be able to get us a bond for his contract and we proceeded on that basis."[18]

By this time, having received a copy of the signed MES contract, Mr. Daly knew that AB had already posted its required bonds with MES. He initially believed that those bonds could be revoked. When he learned that the bonds were irrevocable, he began to question why AB was

[18] Mr. Dolan did not testify at trial.

continuing to press him on *his* bond. Angry, he drove to AB on June 24 and waited in the parking lot so he could "collar" either Mr. McQuade or Mr. Dolan and demand an explanation.

The three men met and Mr. Daly explained to them his position: AB's bonds had been posted, the bonds could not be revoked, and "I'm tired of these games." The bonding, Mr. Daly continued, was not his problem. Mr. Dolan responded that although the bonds could not be revoked, AB did not want to tick off their surety company and jeopardize future projects. Mr. Dolan told Mr. Daly, "You told us you could get a bond, we need you to get a bond." Mr. Daly recalls asking if he could reach out to the surety company directly, but Mr. Dolan was unwilling.

On July 1, Mr. Daly sent Mr. McQuade an e-mail summarizing his contacts with various bonding companies to date. Plaintiff's Exhibit 31. Mr. Daly was still, or once again, engaged in negotiations with Greenskeeper and, on July 6, requested some more paperwork to facilitate the discussions. Mr. Dolan responded by the next morning and Mr. Daly responded back the morning of July 7. Plaintiff's Exhibit 32. Mr. Daly's representations to Mr. Dolan were to the effect that he had already worked out the important details with Greenskeeper and that "we are now just distilling it into an agreement."

On July 12, Mr. Dolan sent to Mr. Daly another revised subcontractor agreement, which basically listed Greenskeeper as AB's subcontractor, and TurboHaul as a sub to Greenskeeper and covered a third of the proposed work. Plaintiff's Exhibit 33. Mr. Daly had requested such a contract in his July 6 e-mail. Mr. Daly testified that it was Mr. Dolan who suggested breaking the agreement down into thirds to make the deal more palatable to surety companies. On July 8, Mr. Daly had asked that the new version of the subcontract include a provision about renewal,

and Mr. Dolan agreed. Plaintiff's Exhibit 34. The renewal provision appears in paragraph 26 of the addendum "General Requirements Exhibit B" in Plaintiff's Exhibit 33.

At 7:57 a.m. on July 14, Mr. Daly sent an e-mail to Mr. Dolan explaining that he was having on-going issues with Greenskeeper. Mr. Daly also succinctly reported, "As it has turned out, we cannot bond right now." Mr. Daly promised, "In a year from now, TurboHaul will be prepared with the proper financials to acquire the bonding ourselves. There has got to be a way to get through this first period of the contract without dealing with the mess of bringing in another party. . . . That said, we can absolutely get this done with Greenskeeper. But we've got a lot of work still ahead of us going down this road." Defendant's Exhibit 62 (underline in original).[19]

By this point, it was understood by Mr. Daly that AB would contract at least some portion of the work directly with Tomar. On July 14, Mr. McQuade asked Mr. Dolan for a contact person at Tomar and Mr. Daly referred him to either Ms. Proctor or her assistant Caryne King. Plaintiff's Exhibit 35. Mr. Daly testified that he was still expecting that TurboHaul would get the hauling/disposal contract minus Tomar's share. Either later on July 14 or on July 15, however, Mr. Daly got a phone call from Ms. Proctor who, as he recalled it, was upset that AB had asked her about contracting for the entire project.[20] On July 15, Ms. King forwarded to Mr. Daly a proposed contract between AB and Tomar. Plaintiff's Exhibit 36. On July 16, Mr. Dolan sent to the Proctors a lengthy e-mail attempting to persuade them to sign the proposed contract.

[19] Mr. Daly did not testify to this e-mail on direct examination. It was first discussed during cross examination.
[20] Mr. Dolan testified that he received the call from Ms. Proctor the day before he received the e-mail in Plaintiff's Exhibit 36, which is dated Friday, July 15, 2011. However, his own e-mail of Saturday, July 16, references phone conversations with Ms. Proctor and Shawn Proctor the night before, i.e., on July 15.

Plaintiff's Exhibt 38. He assured them that AB was acting appropriately and that if they all kept their heads both Tomar and TurboHaul would profit.

Despite his assurances to Tomar, Mr. Daly called Mr. McQuade the next Monday. "I was hot, I was angry," Mr. Daly testified. He demanded to know why AB was offering the entire contract to Tomar. Mr. McQuade assured Mr. Daly that he was still their guy and that they would work it out. Mr. Dolan, however, was on vacation. Mr. McQuade promised they would meet once Mr. Dolan returned.

Several days went by without any further communication from either AB or Tomar. Finally, on July 27, Mr. Daly went to the Garner project site. He saw that thousands of tires had already been extracted. He also saw a walking floor trailer sitting next to the pile of tires. He knew that Tomar owned such a trailer and suspected it was theirs. He did not see anyone from either AB or Tomar on the site. He left the site and left a message for Shawn Proctor, Mary Proctor, and Mr. McQuade, demanding to know if it was Tomar's trailer on the site. He drove to AB's office in Lanham and was told Mr. Dolan was not available. He went back to his office and again tried to reach Ms. Proctor. No one from AB or Tomar returned his calls.

On August 23, 2011, Mr. Daly received a letter from AB dated August 22, and signed by Mr. McQuade. "Thank you for your proposal on the above referenced project; however, at this time, we have decided to work with a different subcontractor." Plaintiff's Exhibit 40. On September 1, 2011, Mr. Daly received an e-mail from Mr. Dolan explaining that AB was rescinding "the proposed contract" because of TurboHaul's inability to secure a bond. Plaintiff's Exhibit 41.

Mr. Daly estimated that he had spent 42 days researching information prior to the MES bid, and had spent 73 days working on the AB issues after the bid. No other Turbo Haul employee was substantially involved.[21]

On cross examination, Mr. Daly admitted that he had given substantially the same bid information to another company, Pleasants Excavating, who ended up being the only other bidder (with AB) on the prime contract. In fact, he sent an e-mail to Pleasants containing pricing information within half an hour of sending the same e-mail to Ms. Coberly. Defendant's Exhibit 19; Plaintiff's Exhibit 5. Mr. Daly also acknowledged that he spent hundreds of hours (as he represented in several e-mails to potential prime bidders) working on the Garner project before his first contact with AB took place.

Mr. Daly also acknowledged that as part of his efforts to get involved in the Garner project he had spoken with representatives of a company called Penn Environmental. Penn was not likely to bid on the project because of MES's bonding requirement. In addition, Penn's bonding company would require that all subs be bonded as well. In an e-mail to Mr. Schwartz on February 25, 2011, Mr. Daly recognized, "I won't be able to pull that off." Defendant's Exhibit 7.

Mr. Daly also admitted that some of the information he supplied to AB on his company profile was the result of some liberties taken. Defendant's Exhibit 14 For example, he had represented that TurboHaul's annual sales were $4,000,000; in fact, that figure could only be

[21] Indeed, other than a TurboHaul representative at the bid to report the result, there was, as best as the court can recall, no testimony about any other TurboHaul employee doing anything at all.

reached by including revenues from three sister companies. The total number of employees and equipment list was also an amalgamation of different companies.

James Woods

Mr. Woods was the State of Maryland's project manager for the Garner tire project. Most of his testimony was spent describing many of the hundreds of documents associated with the project, all of which were admitted as Plaintiff's Exhibit 45. Of relevance, Mr. Woods testified that AB was awarded the prime contract because, in part, of the qualifications of its proposed sub-contractors, including TurboHaul. Mr. Woods also testified that if a sub-contractor needed to be replaced, MES would need to know that the replacement sub was qualified to do the job.

Among the documents in Plaintiff's Exhibit 45, at page 363, is a letter from MES to AB dated March 15, 2011, asking about the relationship between Tomar and TurboHaul. The document also asks for the licenses for the proposed disposal facilities as well as for Tomar and another hauling company called Dirt Express. AB, through Mr. Staley, responded on March 18 in a letter found on page 365. AB represented that Tomar was a sub to TurboHaul.

Also among the MES documents is a letter from Ms. Coberly of AB to Tomar dated July 11, 2011, stating that AB "will be contracting your services to haul scarp [sic] tires for this project. The contract amount will be $265,038." Plaintiff's Exhibit 45 at 434. On September 6, AB, through Mr. McQuade, sent MES a letter informing them that TurboHaul "will not be used on the above referenced project. We have decided that Tomar Trucking, Inc., will be sufficient with regards to hauling services for this project." Plaintiff's Exhibit 45 at 442. MES responded on September 9 asking, among other things, for the reasons behind the removal of TurboHaul.

Plaintiff's Exhibit 45 at 445-46. On September 19, AB, through Mr. McQuade, responded, "The first issue was that Turbohaul could not produce a bond to do the project as was stated they could when we first contacted them to bid the project. We had been working with Turbohaul for several months waiting for them to provide us with the proper paperwork and the bond. It was at this time that AB Construction, in order to keep in compliance with our contract with MES and keep a good working relationship, had to contract directly with Tomar Trucking." Plaintiff's Exhibit 45 at 450.

There were then, presumably, some discussions between AB and MES about TurboHaul because on October 5, 2011, Mr. Dolan sent an e-mail to MES which, basically, asked why it mattered to MES who the subcontractors were. Plaintiff's Exhibit 45 at 451. The answer is contained in a letter from MES to AB dated October 12, Plaintiff's Exhibit 45 at 452-3,and was also testified to by Mr. Woods: MES awarded the job to AB in part because of representations made about the sub-contactors' ability to do the job. In its October 12 letter, MES stated it "is currently unable to approve AB Construction, Incorporated's (AB) request to remove TurboHaul from subject contract," because, "To date, AB has failed to provide sufficient grounds to remove TurboHaul. AB has not provided sufficient evidence to support an MES determination that the new proposed team, including subcontractors, is responsible and capable of fully completing the requirements of the contract without TurboHaul." The concern of MES, therefore, was not over the justice or injustice of removing TurboHaul, but over whether the job could be accomplished without TurboHaul.[22]

[22] Of course, what MES did not know was that TurboHaul never intended to perform the hauling work but only supervise it.

Also of concern to MES was their view that changing a subcontractor meant changing the contract AB had with MES. "Therefore, any proposed change of subcontractors would be a change to our Contract which must be reviewed and approved by the Service Our interest is not therefore in Turbohaul specifically, but that changes to our

On October 18, AB, through Mr. Staley, responded, "We submitted with our bid a list of proposed sub-contractors. AB can not [sic] contract with any sub-contractors prior to our contract with MES. AB notified Turbo Haul to provide a bond for their portion of the work that was going to be contracted to them. This notification was done verbal [sic] as well as in writing as early as March 15, 2011. Turbo Haul, as of July 2011, could not full fill [sic] AB Construction, Inc[.] bonding requirement. AB Construction, Inc[.] notified Turbo Haul in July 2011 that AB would not be contracting with them since they were unable to provide a bond for their work." Mr. Staley went on to explain that the project was currently four months ahead of schedule with Tomar handling the hauling. Accordingly, Mr. Staley concluded, TurboHaul was not necessary. Mr. Staley did not mention that Tomar was not being required to get a bond. Plaintiff's Exhibit 45 at 456-57.

Mr. Staley's representations appear to have assuaged any concerns MES had. On March 15, 2012, Mr. Woods issued an open letter declaring that Tomar Trucking "is an approved subcontract hauler for AB Construction, Inc. for the Garner/Brandywine Tire Cleanup Site in Prince George's County Maryland." Plaintiff's Exhibit 45 at 462. Mr. Woods testified that ultimately MES basically did not do anything about the removal of TurboHaul.[23] Indeed, MES had issued a letter to Waste Management Inc. as early as August 2, 2011, identifying Tomar as an approved subcontract hauler. Plaintiff's Exhibit 45 at 551.

On October 5, 2011, Mr. Woods prepared a chronology reflecting the issues surrounding TurboHaul, Plaintiff's Exhibit 45 at 424. MES issued its "Notice to Proceed" ("NTP") to AB on

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contract are made properly and with our review and approval. Let me remind you that this project is federally funded, and will be subject to federal audit of invoices, payments, contract changes, etc." E-mail from Woods to Dolan, Oct. 6, 2011, Plaintiff's Exhibit 45 at 611.

[23] Mr. Woods added that if TurboHaul had been an MBE/WBE their removal would have subjected to greater scrutiny.

June 15, 2011. On July 11, MES was informed that AB intended to use Tomar for $265K of the project, and use TurboHaul for the rest.[24] On July 18, MES was told much the same thing "in conversations with AB Project Manager and Woods," and that TurboHaul "is trying to obtain bonding required by AB." On July 19, however, "AB Project Manager informs Woods that AB will use Tomar for ALL of the tire hauling and not use Turbohaul." In fact, MES had at least constructive knowledge that there was a bonding issue as early as June 3, 2011. Mr. McQuade had forwarded Mr. Daly's June 3, 2011, e-mail (Plaintiff's Exhibit 24) to Mr. Woods asking about disposal facilities and billing. Plaintiff's Exhibit 45 at 502.

On July 5, Mr. McQuade sent an e-mail to Mr. Woods clarifying that "Tomar is part of TurboHaul" when calculating the subcontractor total. Plaintiff's Exhibit 45 at 506. Mr. Woods responded that in order for AB to use Tomar for MBE credit AB had to contract with Tomar directly. Plaintiff's Exhibit 45 at 507. On July 11, Mr. McQuade sent an e-mail to Mr. Woods attaching the explanation of the TurboHaul/Tomar relationship that had been sent to MES back in March and advising that Tomar would now sub directly from AB. Part of the plaintiff's complaint was that Mr. Daly had encouraged AB to contract with Tomar directly in order to achieve the required MBE percentage. Second Amended Complaint, ¶74-75. However, at trial both Mr. Daly and Mr. Staley denied that the MBE requirement played a role in these discussions, notwithstanding the e-mail from Mr. Woods.

Del Carden

Mr. Carden works for Tischer Surety as a "bonding agent." His role is similar to that of an insurance agent; his clients are the companies who need bonds and he makes the

[24] There is a clear typo in Mr. Woods' chronology. "AB Letter (Doc #3) to Tomar stating they will contract with Tomar for $265,038 to haul tires with revised EPA form 6100-4 for Turbohaul in amount of $,165,835."

arrangements with the bonding companies. For the Garner project, Mr. Carden's client was AB and on the surety side he dealt primarily with John Hollister of "The Hartford."

Mr. Carden's testimony, supported by e-mail correspondence involving himself, Mr. Hollister, and various AB personnel, is unequivocal. The Hartford was, in fact, requiring that all of AB's subcontractors performing $250,000 or more of work must be bonded. Mr. Carden also testified that he never received copies of any of AB's contracts with its subs.

Mary Elaine Proctor

Ms. Proctor is the owner of Tomar. She came to court with a large white box of documents which admitted as Plaintiff's Exhibit 64.[25] Ms. Proctor testified that Tomar ultimately entered into a contract with AB to handle all of the hauling and disposal of the tires at the Garner site. She also testified that Tomar was never asked by AB to post a bond. Tomar was first contacted directly by AB in mid-July. Up to that point, Ms. Proctor thought that TurboHaul and AB were working together and that Tomar would be a sub-contractor to both of them.

Referring to the letter she sent to Mr. Daly back in March, Plaintiff's Exhibit 10, Ms. Proctor testified that the information about disposal facilities and prices was information Tomar possessed from its prior work on the Garner project; the information did not come from TurboHaul. Ms. Proctor also testified that, based on her conversations with Mr. Daly, she expected that Tomar would be doing *all* of the hauling of the tires.

[25] Ms. Proctor had also prepared a summary of the documents, Plaintiff's Exhibit 43. A defense objection to the summary was sustained, which prompted the plaintiff to move for the admission of the box itself. Neither party has directed the court's attention to any document in the box and the box has remained unopened since its receipt into evidence.

Tomar began the job in August, 2011, and did not complete their portion of the work until April, 2012. Ms. Proctor estimates the transported between one and one and a half million tires, and were paid around $1.4 million. Tomar had various expenses, including equipment and subcontractors of their own, and they were also lent $20,000 by AB buy some other needed equipment.

Discovery Witnesses

Kim Chan, the current owner of AB, and attorneys John Frederickson and Christopher Young all testified regarding the plaintiff's complaints about discovery violations and desire for sanctions. Their testimony, to the extent it has any significance, will be discussed *infra*.

Greg Staley

Mr. Staly has worked for AB for over ten years. With AB, he has worked on projects involving stream restoration, bridge repair and replacement, road construction and improvement, and sewer repairs. The majority of the projects have been public contracts with the State, various counties, and the federal government.

Mr. Staley has been a project "estimator" since 1996. An estimator's role is to figure out how much a job will cost in order to prepare bids, and such was his task in the time leading up to the MES bid in March, 2011. Mr. Staley explained that in just about every bid process the vast majority of the action takes place in the few days just before the bid deadline, with potential subcontractors revising their information up to the last minute.

For the Garner project, AB had not received prices from any potential sub until two days before the deadline. Mr. Staley had received proposals from multiple hauling companies, but

TurboHaul's numbers impressed him because they were laid out in exactly the manner MES required. He also liked the company profile and the numbers they provide. Had he not heard from TurboHaul, it had been his intention to put in a bid regardless.

Mr. Staley recalls speaking to Mr. Daly on the phone before the bid to discuss Mr. Daly's Letter of Intent. According to Mr. Staley, he explicitly told Mr. Daly that all subs doing more than $250,000 would have to be bonded.[26] Mr. Staley had been told by Mr. Carden the Monday or Tuesday before the bid that the subcontractors would have to be bonded. Mr. Staley, in his bid proposal, included an estimated cost for TurboHaul's bond. Plaintiff's Exhibit 75.[27]

As of July 18, Mr. Staley and AB were still expecting TurboHaul to acquire a bond and still expected to contract with it. July 18 was the day Mr. Daly confronted Mr. Dolan and Mr. McQuade. Despite that, however, AB did not decide to terminate its relationship with TurboHaul until August. According to Mr. Staley, the contract signed with Tomar in July was consistent with that belief as the amount of that contract was for only $265,000, the same figure Mr. Daly had estimated would be Tomar's share under his agreement with them.

Mr. Staley acknowledged that neither Tomar nor any other subs were ultimately required to get a bond. "We did not require it. We should have. Why it didn't happen was a mistake." In response to the court's questions, Mr. Staley added, "I understand the whole time we were going down the road, TurboHaul was going to be the sub, Tomar was their sub, we ended up, per TurboHaul, contracting directly with Tomar. The intent was always still to negotiate a contract

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[26] As previously noted, in Plaintiff's Exhibit 11, Mr. Staley wrote to Mr. Daly on March 15 "With talking to our bonding company is there anyway you can provide a bond for you [sic] work, I understand this is an extra. . . ." Mr. Staley's explanation for this is, "We talked about bonding. It wasn't an extra because it wasn't part of his prices."

[27] For example, the bid proposal included $85,688 for "mobilization." Plaintiff's Exhibit 74. Plaintiff's 75 is AB's breakdown of the mobilization costs, including an amount for "TurboHaul bond." AB did not submit Exhibit 75 to MES.

with TurboHaul The work began, again through not getting a bond, stories changing, the comfortability dropped we ended up dropping it by, we ended up terminating the relationship. At that point, Tomar is working on the job. The intent was for them only, like I said in the beginning, was just doing a portion. They ended up doing it all, and you're right, no bond was ever required of them."

Putting It All Together

When all is said and done, there is very little factual dispute between the parties as to what happened when. What is in dispute is the motivation behind each party's actions.

The only significant dispute is whether Mr. Daly and Mr. Staley spoke before the bid. Ultimately, the court concludes that Mr. Staley's recollection is more likely to be accurate than Mr. Daly's. Mr. Staley included multiple entries for a bond for TurboHaul in his calculations before submitting the bid. Plaintiff's Exhibit 75. The only reason to do that would have been because he had had a discussion with Mr. Daly about bonds. The court, as it applies the facts to the law, will nevertheless assume Mr. Daly's recollection is the more accurate as, either way, the final result does not change.

In short, Mr. Daly, on behalf of TurboHaul, invested time and energy in preparing for the March, 2011, bid for the Garner project. He voluntarily submitted the same information to the only two companies who ended up bidding on the job. His expectation was that if *either* company won the bid, TurboHaul would be awarded the subcontract job. He received an explicit

promise from AB to that effect. When told that AB's surety company was requiring a bond of its subcontractors, Mr. Daly made repeated assurances that, although difficult, he would be able to accomplish it. AB worked with Mr. Daly throughout, sending him revised proposed subcontracts as he asked for them. AB's surety was, in fact, making such a demand. When MES issued its notice to proceed and tires began piling up something had to give. Following a suggestion of Mr. Daly, AB contracted with Tomar directly; the initial contract was for a portion of the project. Mr. Daly continued to be unable to deliver on his bond promises and his continued failure combined with his loss of temper in July led AB to give up on TurbHaul. However, AB violated its own promises to its surety by not requiring Tomar (or any other subcontractor) to get a bond.

With that background, it is time to consider each remaining cause of action.

Detrimental Reliance

The elements of a claim for detrimental reliance were succinctly laid out by the Court of Appeals in Pavel Enterprises Inc. v. A.S. Johnson Co., 342 Md. 143 (1996):

> 1. a clear and definite promise;
>
> 2. where the promisor has a reasonable expectation that the offer will induce action or forbearance on the part of the promisee;
>
> 3. which does induce actual and reasonable action or forbearance by the promisee; and
>
> 4. causes a detriment which can only be avoided by the enforcement of the promise.

Although not a contract, the letter of intent signed by Mr. Staley on behalf of AB is clearly a "promise," a promise to enter into a binding agreement with TurboHaul if AB is

awarded the MES contract. That terms and details still needed to be negotiated does not make it any less of a promise. The plaintiff has met the first element.[28]

The only "action or forbearance" testified to by Mr. Daly undertaken in response to the promise was the delivery of information to AB for AB to use in its bid.[29] There is no evidence at all to support TurboHaul's contention in its closing argument, "AB induced TurboHaul to work with AB and not any other general contractor considering a bid on the Project." To the contrary, TurboHaul shared the same information with the only other general contractor to submit a bid. Nor is there any evidence that TurboHaul declined other jobs or was prevented from performing other jobs because of AB's promise.[30] True, Mr. Daly expended some time and effort to meet the bonding requirement. However, again, there was no evidence that the time Mr. Daly spent on the bond issue prevented TurboHaul from acquiring other jobs, and this action was induced by subsequent conversations, not the promise itself. In addition, no reasonable person in AB's position would have expected any particular action or forbearance to be taken in response to the promise. Finally, TurboHaul suffered no detriment whatsoever, let alone a detriment "which can only be avoided by enforcement of the promise."

The plaintiff's claim for recovery under a theory of detrimental reliance fails.

Unjust Enrichment

There are three elements to a claim for unjust enrichment:

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[28] In its closing argument, AB characterizes the letter of intent as merely "an implied understanding." Even under AB's argument, the letter of intent was a promise to negotiate.

[29] In fact, as AB observes in its closing argument, TurboHaul provided the same post-promise information to Pleasants, and that information was more the property of Tomar than of TurboHaul.

[30] Nor could it. It was Mr. Daly's intention that TurboHaul only manage the project. TurboHaul would have to use its personnel or equipment only as a back-up to Tomar.

1. A benefit conferred upon the defendant by the plaintiff;
2. An appreciation or knowledge by the defendant of the benefit;
3. The acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value. Hill v. Cross Country, 402 Md. 281, 295 (2007).

TurboHaul's contention is that AB received the benefit of its total profits from the project "due to its inducement of an unfulfilled promise to TurboHaul." AB, on the other hand, contends that TurboHaul conferred no benefit at all. In fact, TurboHaul did confer *some* benefit TurboHaul's numbers and the manner they were presented were appealing to Mr. Staley and, if nothing else, saved him the task of doing additional number crunching and researching himself.[31] While TurboHaul's information was no doubt helpful, it does not necessarily follow that AB won the bid *because* of TurboHaul. Pleasant, after all, received the same information and did *not* win the project.[32] Mr. Staley acknowledged the receipt of that benefit both in his testimony and by signing the letter of intent. The first two elements of the claim are, arguably, satisfied.

However, an unjust enrichment claimant must prove more than just "enrichment." He must prove *unjust* enrichment – that it would be *inequitable* to allow the recipient to keep the benefit. Mr. Daly engaged in his information-gathering activities for weeks, if not months, before ever speaking with AB. Had he declined to share it with AB, TurboHaul would be exactly where it is now – without a contract to remove tires from the Garner project. Indeed, his efforts would have been completely wasted had he not shared it with the companies bidding on

[31] For example, the other proposals Mr. Staley received did not include disposal costs, while TurboHaul's did.
[32] Admittedly, there is no direct evidence that Pleasants used TurboHaul's information in its bid. However, both Mr. Staley and Mr. Daly testified that TurboHaul's numbers and formatting were the best. Mr. Daly was confident, and told AB, that if they went with his figures they would get the job. It strains credulity to think he did not make the same pitch to Pleasants.

the project. As will be discussed below, there were no false promises or representations made to him by AB.

The plaintiff's claim for recovery under a theory of unjust enrichment also fails.

Fraud

There are five elements to a fraud claim in Maryland:

1. That the defendant made a false representation to the plaintiff;
2. That its falsity was either known to the defendant or that the representation was made with reckless disregard for the truth;
3. That the misrepresentation was made for the purpose of defrauding the plaintiff;
4. That the plaintiff relied on the misrepresentation and had the right to rely on it; and
5. That the plaintiff suffered compensable injury as a result of the misrepresentation. Alleco Inc. v. Weinberg, 340 Md. 176 (1995).

The plaintiff contends, "AB's alleged bonding requirement was total fiction." The evidence directly contradicts this statement. The testimony of Mr. Carden and the correspondence from Mr. Hollister demonstrate, beyond any reasonable doubt, that AB's surety was, in truth, demanding that each of AB's subcontractors doing $250,000 or more in work have a bond. When AB communicated the requirement to TurboHaul, AB was being truthful.

The fact that, when all is said and done, Tomar did the job without a bond does not convert statements that were true at the time they were made into falsehoods. In fact, it remained true that even Tomar should have had a bond. AB acted in clear violation of its instructions from its surety when it contracted with Tomar without requiring a bond. At most, this means that AB

was willing to cheat in order to work with Tomar, but not willing to cheat in order to make the deal with TurboHaul happen. If that is fraud, it is fraud perpetrated on the surety, not on TurboHaul.

Nor was the letter of intent itself a misrepresentation. At the time of the letter of intent, and at least as far as July 18 (if not into August), AB was willing to contract with TurboHaul. Their willingness is confirmed by the multiple drafts of proposed subcontracts sent to Mr. Daly at his request. Had AB never intended to contract with TurboHaul they would not have worked with him to the extent they did.

Nor did Ms. Coberly make any knowing misrepresentation to TurboHaul, assuming Mr. Daly's recollection is accurate. According to Mr. Daly, he asked if AB can handle the bond requirements. Ms. Coberly answered in the affirmative. Nothing about that conversation as Mr. Daly recalls it would have put Ms. Coberly on notice he was asking about any *subcontractor* bonding requirement. Mr. Daly had shared with her his observation that no company had been able to meet the bond requirement of $5,000,000 for three years, i.e., the bond that would be required of the general contractor. Ms. Coberly's response was neither false nor intended to deceive.[33]

The plaintiff having failed to establish the first element of fraud, there is no need to consider the remaining elements.

Interference with Contract

[33] TurboHaul's hands are far from clean when it comes to fraud. TurboHaul created the impression with AB, and through them, with ME, that it would be performing at least 36%, if not more, of the hauling work. That was not going to be the case.

The gravamen of this complaint is that AB unlawfully interfered with TurboHaul's relationship with Tomar. The tort has been recognized as "wrongful interference with contractual or business relationships in two general forms: 'inducing the breach of an existing contract and, more broadly, maliciously or wrongfully interfering with economic relationships.'" Alexander & Alexander v Evander & Associates, 336 Md. 635, 650 (1994)(quoting Natural Design v Rouse Co., 302 Md. 47, 69 (1984)). It is necessary that any interference undertaken by the defendant must done "through improper or wrongful means." Id. at 656 (citing Macklin v. Logan, 334 Md. 287, 302 (1994)).

Here, assuming the existence of a contract or other relationship between TurboHaul and Tomar, it is beyond any dispute that AB's "interference" with that relationship occurred at the express invitation of TurboHaul. It was Mr. Daly himself who first suggested that AB contract with Tomar directly. His thought was that breaking the subcontract down into smaller chunks would make it more palatable to possible sureties. When Mr. Daly provided Tomar's contact information to Mr. McQuade, he did so knowing that AB was going to talk to Tomar about writing a contract. Plaintiffs Exhibit 35. Mr. Daly also went to great lengths to convince Tomar they should enter into the contract with AB. Plaintiff's Exhibit 38. There was, in short, nothing improper or wrongful about AB's ultimate contracting with Tomar.

The plaintiff's claim for unlawful interference with a contract, therefore, fails.

Conversion

"Conversion" generally refers to the acquisition of another person's property without lawful authority to do so. "A conversion may consist of a wrongful, tortious or unlawful taking

of property of another by theft, trespass, duress, or fraud and without his consent or approbation, either express or implied." Saunders v. Mullinex, 195 Md. 235 (1950).

"Property" is at the heart of a conversion claim. Ordinarily, to be the subject of a conversion claim, the property must be tangible. The only exception would be for "intangible property rights that are merged or incorporated into a transferable document." Allied Inv. Corp. v. Jasen, 354 Md. 547, 562 (1999).

During the summary judgment argument, the court discussed with plaintiff's counsel the issue of just what was "converted." Information, as such, cannot be "converted." It is neither tangible nor the embodiment of some other property, such as a deed or a stock certificate. The response was that when TurboHaul turned over its equipment list to AB, it effectively transferred control of those assets to AB. TurboHaul was prevented from using that equipment as it had to commit it to the Garner project. Nothing in the evidence presented supported this proffer. To the contrary, as has been mentioned repeatedly, TurboHaul committed nothing to the project whatsoever.

In short, AB acquired no property of TurboHaul. Accordingly, the claim for conversion must also fail.

Discovery Sanctions

Trial was originally scheduled to begin in April, 2013. The week before trial, defense counsel learned from Mr. Carden that he had correspondence, e-mails, between his office, The Hartford, and AB about the Garner project. These e-mails had not been produced in discovery to the plaintiff. The explanation provided by AB, through its current owner, Mr. Kim Chan, is that there had been an issue with AB's e-mail archiving system from 2009 through 2011, and

therefore "certain e-mail communications were not archived as part of normal business processes, and therefore were not able to be produced in response to discovery requests." Plaintiff's Exhibit 67. Mr. Staley testified that AB is a paperless company. Documents are scanned and then recycled. Nevertheless, many documents, including documents that MES had and not just limited to e-mails, were not recovered and disclosed.

Never in the court's career has it encountered a greater epitome of the cliché "the tail that wagged the dog." Perhaps half of the trial was spent on the plaintiff's complaints about discovery and its effort to persuade the court to impose sanctions. Over half of the plaintiff's closing argument memorandum is consumed with this issue. Never has the court ever more regretted saying it would reserve on an issue.

The bottom line is this. The court accepts AB's explanations for the failure to turn over documents not so much because the explanations are themselves credible but because to intentionally withhold them makes no sense at all. The most critical documents not disclosed are the e-mails involving Mr. Carden and Mr. Hollister. These e-mails are central to AB's defense. They demonstrate, as discussed, beyond any reasonable doubt that AB did *not* engage in fraud or any other improper conduct when it told TurboHaul a bond was needed.[34]

If anything, the most remarkable development is not that AB failed to discover and disclose the information, but that TurboHaul persisted in the litigation after receiving it. Once it was clear that The Hartford was, in fact, demanding bonds of the sub-contractors there was no

[34] True, defense counsel could have reached out to Mr. Carden sooner and discovered the e-mails sooner. But, for that matter, so could have plaintiff. It is rather surprising that such skilled trial attorneys - as all the attorneys involved in the case are – would not have, as part of their respective investigations, contacted Mr. Carden much earlier in the litigation. The bond requirement, or lack thereof, was and is the central issue in the case and Mr. Carden was clearly the best person to get information about it.

longer any viability to the fraud complaint at all and the remaining counts of the complaint were fundamentally undermined. The plaintiff had from April through October to digest the new information and reconsider its position. It did not and the result was a multi-day trial where more time was spent on this collateral issue than on the merits.

The court, therefore, declines to order any sanctions against the defendant.

Summary

There is no question that Mr. Daly and TurboHaul feel aggrieved. However, the evidence is clear that AB extended courtesy after courtesy to the plaintiff. AB was not required to breach its promise to its surety to accommodate TurboHaul. TurboHaul is correct to complain that AB never required Tomar to have a bond. However, it would not be consistent with a fair system of justice to punish a company because it was willing to break rules for others but not the plaintiff. That, in essence, is what TurboHaul wishes this court to do. The court declines to do so.

JUDGE

CERTIFIED COPY
ATTEST: SHARON L. HANCOCK, CLERK