Circuit Court for Howard County
Case No. C-13-CV-21-000193

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

Nos. 683 & 2307

September Term, 2023

MARYLAND INDOOR PLAY, LLC, et al.

v.

SNOWDEN INVESTMENT LLC, et al.

Reed,
Beachley,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: July 12, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

In March of 2021, appellee Snowden Investment, LLC ("Snowden") filed suit in the Circuit Court for Howard County against Maryland Indoor Play, LLC ("MIP"), Bynia Reed, Chinnababu Gudapati, and Sangeetha Gudapati (collectively referred to as "appellants"), and David Clark.[1] Snowden alleged multiple claims relating to breach of a loan agreement and note. The court ruled in favor of Snowden on all counts. Appellants present six questions for our review, which we have rephrased and consolidated[2]:

[1] Although Mr. Clark was a defendant before the trial court, he has not participated in this appeal.

[2] Appellants presented the following questions:

1. Did the trial court err by denying MIP's Motion for Partial Summary Judgment and ordering specific performance of a ROFR [Right of First Refusal] for Boomerang?

2. Did the trial court err by denying MIP's Motion for Judgment where Snowden's case lacked legally sufficient evidence of its damages from AIP under the required measure of contract damages and at the time of a breach of the ROFR?

3. Did the trial court err by denying MIP's Motion for Judgment where Snowden's case lacked legally sufficient and credible evidence of its amount [of] damages from AIP?

4. Did the trial court err by denying MIP's Motion for Judgment where Snowden's case lacked legally sufficient evidence that it was ready, willing and able to perform it[s] obligations under the ROFR on the same terms as the other equity holders in Boomerang?

5. Did the trial court abuse[] its discretion and commit error of law by awarding Snowden damages based on claimed accounting errors in MIP's calculation of [Net Profit Payments] where there was no credible or legally sufficient evidence in the record of errors?

6. Did the trial court abuse its discretion and commit error by awarding Snowden attorney's fees after allowing Snowden's attorney to testify

1. Did the circuit court err by ordering specific performance of a right of first refusal relating to Boomerang Franchise, LLC ("Boomerang")?

2. Did the circuit court err in its calculation of damages related to the Ashburn Indoor Play, LLC ("AIP") right of first refusal?

3. Did the circuit court err in its calculation of damages related to the net profit payments MIP made to Snowden?

4. Did the circuit court err in its award of attorney's fees to Snowden?

We conclude that the court erred in its damages calculation regarding the net profit payments, and we shall direct the Clerk of the Circuit Court for Howard County to amend the judgment to correct that error. We shall otherwise affirm the circuit court's judgment.

BACKGROUND

MIP was formed on November 4, 2016. The original members of MIP were two LLCs that each owned fifty percent of MIP: Reed/Clark Enterprises, LLC (whose members were Ms. Reed and Mr. Clark)[3]; and Srinergy 2 Educare, LLC (whose members are the Gudapatis) ("Srinergy"). In 2018, MIP opened a children's indoor play facility in Columbia, Maryland called Hyper Kidz. Before opening, MIP obtained a small business loan from the Howard County Economic Development Authority ("HCEDA").

Snowden was formed in January 2018 by Ashish Parikh and three other individuals for the purpose of lending money to MIP and, according to Mr. Parikh, "to be a partner equally in the future locations and future endeavors" of MIP. In January 2018, Snowden

where it failed to identify the attorney as a witness in violation of discovery and the court's scheduling orders?

[3] In late 2019, Ms. Reed and Mr. Clark began divorce proceedings and dissolved Reed/Clark Enterprises. Ms. Reed then assumed 50% ownership of MIP.

loaned MIP $350,000 to open the Columbia Hyper Kidz location. Ms. Reed testified that MIP fully repaid this loan in May of 2022. Three documents were signed as part of the loan transaction: a Loan and Security Agreement ("Agreement"), a Term Note ("Note"), and a personal guaranty signed by Mr. Clark, Ms. Reed, and the Gudapatis in their individual capacities ("Guaranty").

The following provisions from the contract documents are relevant to this appeal. First, the Agreement contained a Right of First Refusal, which provided:

> If at any time while the LOAN and NOTE are outstanding or thirty-six months thereafter, the BORROWER [MIP] and/or the GUARANTORS [Mr. Clark, Ms. Reed, and the Gudapatis] seek to open additional locations of an organization related to operating or owning an indoor play entertainment facility for children, including, but not limited to Hyper Kidz, prior to issuing any equity interests or taking any loans in connection with the creation, construction, operation or financing of the venture, whether it be through the BORROWER, any of the GUARANTORS or any other entity (collectively, the "NEW VENTURE"), the LENDER [Snowden] shall be provided at least sixty (60) days prior written notice of the NEW VENTURE and an opportunity to elect to obtain equity interests in the NEW VENTURE or loan the NEW VENTURE working capital funds on the same terms as the other equity holders and/or lenders of the NEW VENTURE, as the case may be. The LENDER shall have sixty (60) days upon recei[pt] of notice of the NEW VENTURE to elect to participate by providing the BORROWER and/or GUARANTORS notice, as the case may be.

In addition to the right of first refusal, the Note included a provision requiring MIP to pay Snowden a percentage of its net profits; the percentage decreased during the term of the loan from 35% in April 2018 to 7% in January 2023. The Note included a definition of "net profits":

> As used in this Note, the term "net profits" shall mean the gross profits of the company after operating expenses, including payments to [HCEDA] and Lender and trade payables, and taxes are deducted.

Finally, the Agreement and the Guaranty included attorney's fees provisions. The Agreement provided:

> BORROWER [MIP] shall reimburse and pay to LENDER [Snowden] upon demand all LENDER EXPENSES, including without limitation attorneys' fees and expenses (including fees and expenses incurred to collect LENDER EXPENSES), advanced, incurred by, or on behalf of LENDER in collecting and enforcing the OBLIGATIONS and the LOAN DOCUMENTS.

The Guaranty contained a similar provision:

> IN THE EVENT of any legal action or proceeding brought by Lender against Guarantor arising out of this Guaranty, Lender shall be entitled to recover its reasonable and actual attorneys' fees and costs incurred in such action (in addition to any fees or expenses incurred to collect fees or expenses). Such amount shall be included in any judgment rendered in any action or proceeding.

Having established the relevant contractual provisions, we turn to the events that spawned this litigation. In May 2018, Ms. Reed and Srinergy formed Boomerang Franchise, LLC ("Boomerang") for the purpose of selling Hyper Kidz franchises. Ms. Reed testified that a Hyper Kids franchise location opened in Owings Mills in December 2020. Appellants did not provide Snowden an opportunity to become an equity member of Boomerang.

In October of 2018, Ms. Reed and Srinergy formed Ashburn Indoor Play, LLC ("AIP") for the purpose of opening a Hyper Kidz location in Ashburn, Virginia. Ms. Reed testified that although AIP entered into a lease in January 2019, the Ashburn facility did not open until 2021. As with Boomerang, appellants did not provide Snowden an opportunity to become an equity member of AIP.

On March 5, 2021, Snowden filed a complaint against appellants[4] seeking specific performance of the right of first refusal as to both Boomerang and AIP, damages for breach of contract, and attorney's fees as provided in the Agreement and Guaranty. The complaint alleged that on multiple occasions in 2018 through 2020, Snowden made demands for the opportunity to exercise its right of first refusal. Snowden alleged that appellants did not provide information concerning the terms of ownership in Boomerang or AIP. We note that, at trial, Snowden sought specific performance of its right of first refusal as to Boomerang, but only requested monetary damages for any breach related to AIP.

Both sides filed motions for partial summary judgment, which the court considered at a hearing in June 2022. Appellants argued that Snowden was not entitled to a right of first refusal as to Boomerang because Boomerang "is a franchisor." In appellants' view, because Boomerang does not open any Hyper Kidz facilities, it is not "an organization related to operating or owning" an indoor play facility. Appellants further argued that Snowden's right of first refusal is triggered only when a third party is involved. Snowden countered that, by "enabling the opening and operating of a Hyper Kidz" location, Boomerang's business is "related to" the owning and operating of indoor play facilities as described in the Agreement. Snowden further argued that nothing in the Agreement requires participation by a third party to trigger its right of first refusal. Finding that the terms of the Agreement were not "ambiguous in any way," the court concluded that the

[4] Snowden included Mr. Clark as a defendant in its complaint. The court ultimately determined that Ms. Reed is legally obligated to indemnify Mr. Clark for liability arising out of this litigation.

right of first refusal applied to both AIP and Boomerang irrespective of third-party involvement. The court granted Snowden's motion for partial summary judgment and denied Boomerang's motion, ruling that Snowden was entitled to a right of first refusal for Boomerang and AIP and that Snowden was entitled to attorney's fees. The issues of Snowden's entitlement to specific performance, the amount of damages, and the amount and reasonableness of attorney's fees were left for trial.

The trial spanned four days in late July 2022, with a final day scheduled in September 2022. Ms. Reed testified for appellants concerning the formation and business practices of MIP, AIP, and Boomerang. She testified that, before forming AIP, appellants knew there was less demand for an indoor play facility in Ashburn than there was in Columbia, and they expected fewer walk-ins and fewer birthday bookings, revenue streams that comprise the bulk of MIP's profits. Appellants also anticipated that AIP would have "significant debt for at least three to five years upon opening." Ms. Reed testified that, at the time of trial, AIP owed unpaid rent and was indebted to third-party lenders. However, the third-party loans were consolidated into a loan in MIP's name. AIP makes payments to MIP for that loan.

R. Christopher Rosenthal provided expert testimony for Snowden on forensic valuations and general accounting matters. His testimony related to two issues in this appeal—calculation of damages caused by appellants' failure to extend a right of first refusal for AIP, and calculation of damages for net profit payments. Mr. Rosenthal testified that he used a "discounted cashflow method" for determining the value of AIP as of March

31, 2021. This method involves projecting cashflows for AIP for three years in the future, estimating the value of AIP at the end of the three-year period, and then discounting its value back to "present value." Appellants' expert, James Kern, used the same methodology. Both experts formulated their opinions using MIP's data from 2018 through 2020 because of the similarity between MIP and AIP. The differences in the experts' testimony lay primarily in their use of AIP's data and their treatment of certain expenses, such as debt payments. Mr. Rosenthal did not use financial data from AIP and did not include debt in his determination that the "fair value" of AIP was $1,470,000. Mr. Kern used AIP data to determine the effect of COVID-19 and the demographic differences between Columbia and Ashburn, and reduced his valuation of AIP by the total actual debt owed by AIP in 2021. Mr. Kern calculated the "fair market value" of AIP to be zero because he determined the business had a negative value of $277,259. Both experts explained that the primary difference between a "fair value" calculation and a "fair market value" calculation is that "fair market value" includes discounts for lack of marketability and lack of control. Because the interest at issue is a minority ownership (lack of control) of a privately owned LLC (limited marketability), these discounts could be substantial.

On the final day of trial, Snowden's attorney, Indira Sharma, testified regarding the amount and reasonableness of her fees. Appellants objected to her testimony concerning the reasonableness of the fees on the ground that she was not designated as an expert witness in discovery. After Snowden explained that it was not asking Ms. Sharma to provide expert testimony, the court allowed Ms. Sharma to testify.

After trial, Ms. Sharma submitted an affidavit describing her fees and costs for the final day of trial and the post-trial briefing requested by the court. These fees totaled $31,904.55. The affidavit stated that the fees were reasonable based on the time and effort needed to perform the claimed services and that the hourly rate was within the market rate for similarly experienced attorneys. Appellants moved to strike the affidavit based on their inability to cross-examine Ms. Sharma or rebut the evidence, and argued that Rule 2-704 requires evidence of attorney's fees to be presented in a party's case-in-chief.

On May 8, 2023, the court issued its memorandum opinion and order. The court ordered, relevant to this appeal, that (1) Appellants "shall grant to [Snowden] its Right of First Refusal with respect to Boomerang Franchise LLC"; (2) Appellants "shall pay to [Snowden] the sum of $453,333.00 for breach of the Right of First Refusal with regards to Ashburn Indoor Play, LLC;" (3) Appellants "shall pay to [Snowden] the sum of $142,568 for damages caused by various accounting errors in Maryland Indoor Play's books;" and (4) Appellants "shall pay to [Snowden] its reasonable attorneys' fees and costs and interest totaling $438,245.86."

Appellants noted this timely appeal.

DISCUSSION

I. Specific Performance of Boomerang Right of First Refusal

Appellants argue that the court erred in ordering specific performance of the Boomerang right of first refusal for three reasons. First, they argue that the right of first refusal is only triggered when a third party becomes an equity member of the LLC. Second,

they assert that because Boomerang is merely a franchisor, and not an owner or operator of an indoor play facility, the right of first refusal does not apply to Boomerang. Third, they claim that Snowden did not prove that it was ready, willing, and able to exercise its right of first refusal.

Snowden responds that the plain language of the Agreement does not require third-party involvement as a predicate to assert its right of first refusal. Snowden next argues that, as a franchisor, Boomerang's business is necessarily "related to" owning and operating indoor play facilities, which is all that is required under the terms of the Agreement. Finally, Snowden avers that its complaint satisfied the requirement that it was ready, willing, and able to perform the first right of refusal, but in any event, it provided adequate financial evidence to verify that it was ready, willing, and able to pay any required capital contributions.

"[T]he interpretation of a written contract is a question of law for the court subject to *de novo* review." *Plank v. Cherneski*, 469 Md. 548, 569 (2020) (quoting *Nova Research, Inc. v. Penske Truck Leasing Co.*, 405 Md. 435, 448 (2008)). We review a court's findings of fact for clear error. "A trial court's findings are not clearly erroneous if 'any competent material evidence exists in support of the trial court's factual findings[.]'" *Id.* at 568 (alteration in original) (quoting *Webb v. Nowak*, 433 Md. 666, 678 (2013)).

"[T]he primary goal of contract interpretation is to ascertain the intent of the parties in entering the agreement[.]" *Credible Behav. Health, Inc. v. Johnson*, 466 Md. 380, 393 (2019) (citing *Ocean Petroleum Co., Inc. v. Yanek*, 416 Md. 74, 88 (2010)). The language

of the contract "is ambiguous where a reasonably prudent person could ascribe more than one reasonable meaning to it." *Id.* at 394 (citing *Calomiris v. Woods*, 353 Md. 425, 436 (1999)). If the language is ambiguous, a court may use extrinsic evidence to determine the parties' intent. *Id.* (citing *Sullins v. Allstate Ins. Co.*, 340 Md. 503, 508 (1995)). "[W]here contractual language is unambiguous, [a determination of the intent of the parties] is based on what a reasonable person in the position of the parties would have understood the language to mean and not 'the subjective intent of the parties at the time of formation.'" *Id.* at 393 (quoting *Ocean Petroleum*, 416 Md. at 86). We "interpret a contract's plain language in accord with its 'ordinary and accepted meaning[.]'" *Id.* at 394 (alteration in original) (quoting *Ocean Petroleum*, 416 Md. at 88).

The relevant portion of the parties' Agreement reads as follows:

> If at any time while the LOAN and NOTE are outstanding or thirty-six months thereafter, the BORROWER and/or the GUARANTORS seek to open additional locations of an organization related to operating or owning an indoor play entertainment facility for children, including, but not limited to Hyper Kidz, prior to issuing any equity interests or taking any loans in connection with the creation, construction, operation or financing of the venture, whether it be through the BORROWER, any of the GUARANTORS or any other entity (collectively, the "NEW VENTURE"), the LENDER shall be provided at least sixty (60) days prior written notice of the NEW VENTURE and an opportunity to elect to obtain equity interests in the NEW VENTURE or loan the NEW VENTURE working capital funds on the same terms as the other equity holders and/or lenders of the NEW VENTURE, as the case may be. The LENDER shall have sixty (60) days upon recei[pt] of notice of the NEW VENTURE to elect to participate by providing the BORROWER and/or GUARANTORS notice, as the case may be.

We turn to appellants' three arguments concerning this provision.[5]

[5] At oral argument, both parties confirmed their views that the contractual terms are not ambiguous.

a. *Third-Party Involvement Is Not Required to Trigger the Right of First Refusal*

Appellants argue that the word "other" in the Agreement ("the LENDER shall be provided . . . an opportunity to elect to obtain equity interests in the NEW VENTURE . . . on the same terms as the *other* equity holders . . . of the NEW VENTURE" (emphasis added)) indicates that the right of first refusal is only triggered where an entity other than the parties to the Agreement becomes involved in the "NEW VENTURE." Thus, in appellants' view, because they never sought "other investor/owners," Snowden had no right of first refusal under the contract. We disagree with appellants' interpretation.

The plain language of the Agreement supports Snowden's (and the circuit court's) interpretation of the right of first refusal. The key term in this provision of the contract is "NEW VENTURE." The contract plainly provides Snowden two rights in the context of a "NEW VENTURE": 1) "the LENDER [Snowden] shall be provided at least sixty (60) days prior written notice of the NEW VENTURE"; and 2) Snowden shall have "an opportunity to elect to obtain equity interests in the NEW VENTURE or loan the NEW VENTURE working capital funds on the same terms as the other equity holders and/or lenders of the NEW VENTURE, as the case may be." The contract expressly defines "NEW VENTURE" as a formative event or process where the "BORROWER [MIP] and/or the GUARANTORS [Mr. Clark, Ms. Reed, and the Gudapatis] seek to open additional locations of an organization related to operating or owning an indoor play entertainment facility for children, including, but not limited to Hyper Kidz[.]" Equally significant, the Agreement expressly recognizes that the "NEW VENTURE" may be

comprised of "BORROWER, any of the GUARANTORS *or any other entity* (collectively, the 'NEW VENTURE')." (Emphasis added). We fail to see any ambiguity—Snowden's contractual rights are directly tied to the creation of a "NEW VENTURE," and contrary to appellants' view, the provision is not limited to situations where the "NEW VENTURE" includes third-party equity partners and/or lenders. The word "or" generally has a disjunctive meaning, and is used to indicate "an alternative between unlike things, states, or actions[.]" *Gilroy v. SVF Riva Annapolis, LLC*, 234 Md. App. 104, 111 (2017) (alteration in original) (quoting *Or*, Webster's Third New Int'l Dictionary Unabridged (1986)); *see also Burnett v. Spencer*, 230 Md. App. 24, 33 (2016) ("Rule 2-631 states that '[j]udgments may be enforced only as authorized by these rules *or* by statute.' . . . Because the rule employs the disjunctive term 'or,' it is obvious, as a matter of logic and grammar, that a person may enforce a judgment by a method that is authorized by the rules alone: the method need not also be expressly authorized by statute." (first alteration in original)). In short, the plain language of the contract gives Snowden the right to obtain equity interests in or make loans to the "NEW VENTURE" on "the same terms as the other equity holders and/or lenders" without regard to whether appellants or third parties are the other equity holders in the "NEW VENTURE."

b. *Boomerang is "an Organization Related to Operating or Owning" an Indoor Play Facility*

Because appellants created Boomerang as an entity to franchise Hyper Kidz stores, they claim that Boomerang is not "an organization related to operating or owning" an indoor play facility as contemplated by the Agreement. We again look to the plain

language of the contract, which provides that the right of first refusal applies when appellants "seek to open additional locations of an organization related to operating or owning an indoor play entertainment facility for children, including, but not limited to Hyper Kidz[.]" By its terms, the Agreement does not require that the new or additional organization itself operate or own an indoor play facility. Black's Law Dictionary defines "related" as "Connected in some way; having relationship to or with something else." *Related*, Black's Law Dictionary (11th ed. 2019). "[T]he ordinary meaning of 'relate' is the existence of a connection between two subjects, not that the two subjects need be the same." *Friedman v. Hannan*, 412 Md. 328, 338 (2010).[6]

Boomerang was formed for the purpose of selling Hyper Kidz franchises, an activity reasonably "related to operating or owning" Hyper Kidz locations. Maryland's Business Regulation Article defines "franchise" as:

> an expressed or implied, oral or written agreement in which:
>
> (i) a purchaser is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by the franchisor;
>
> (ii) the operation of the business under the marketing plan or system is associated substantially with the trademark, service mark, trade name, logotype, advertising, or other commercial symbol that designates the franchisor or its affiliate; and

[6] The Supreme Court of the United States has also interpreted the phrase "relating to" as encompassing a broad scope. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-86 (1992)) (explaining that statute prohibiting states from enacting laws "relating to rates, routes, or services of any air carrier" is not limited to only those laws "actually prescribing rates, routes, or services").

(iii) the purchaser must pay, directly or indirectly, a franchise fee.

Md. Code (1992, 2015 Repl. Vol.), § 14-201(e)(1) of the Business Regulation Article.

Returning to the Agreement's plain language, Snowden's right of first refusal applies when "the BORROWER and/or the GUARANTORS seek to open additional locations of an organization related to operating or owning an indoor play entertainment facility for children, including . . . Hyper Kidz." It is pellucid that Boomerang's activities fall squarely within the Agreement's plain text. Ms. Reed (after dissolution of Reed/Clark Enterprises) and Srinergy, the members of MIP ("BORROWER"), also formed Boomerang. In addition, Ms. Reed and the Gudapatis are "GUARANTORS" as defined in the Agreement. Accordingly, Ms. Reed and Srinergy qualify as "the BORROWER and/or the GUARANTORS" under the terms of the Agreement, and they sought, through Boomerang, to open additional locations of Hyper Kidz, an "indoor play entertainment facility for children" that is expressly referenced in the Agreement. Not only was Boomerang formed for the purpose of securing franchisees to open new Hyper Kidz facilities, but Ms. Reed confirmed the opening of a Hyper Kidz franchise in December 2020. We have no difficulty concluding that Boomerang is "an organization related to operating or owning an indoor play entertainment facility for children" as contemplated by the Agreement. The circuit court correctly determined that Snowden's right of first refusal applied to Boomerang.

c. *The Court Did Not Err in Determining That Snowden Was Ready, Willing, and Able to Perform*

Appellants argue that there was a "lack of legally sufficient evidence that Snowden

and its individual members were ready, willing and able to perform their reciprocal obligations" under the Agreement. Although appellants allege numerous terms that Snowden would have to satisfy as an equity member of Boomerang, all of their record citations refer to terms of membership in AIP or MIP. No evidence was submitted indicating the terms of membership in Boomerang.

In any event, appellants' arguments miss the mark. Here, Snowden sought an order requiring appellants to

> (1) immediately provide Snowden Investment LLC with the exact same terms of their interest, or the interest of any entity owned by them, in any Hyper Kidz or indoor play location or franchise opportunity[; and] (2) allow Snowden Investment LLC sixty (60) days to exercise its right to participate in the venture on equal terms as [appellants.]

The court granted Snowden's request for relief: "Defendants shall grant to Plaintiff its Right of First Refusal with respect to Boomerang Franchise LLC as set forth in § 6.5 of the parties' Agreement[.]"[7] Thus, the court ordered only that appellants specifically perform the contract by extending an offer to Snowden for equity membership in Boomerang on the same terms as Boomerang's other members, and giving Snowden sixty days to respond to that offer. The only "performance" required of Snowden under this order, if any, is to

[7] Additionally, Snowden's closing argument made clear that it was seeking only to have appellants extend an offer and afford it time to respond under the terms of the Agreement:

> [W]e're not asking for the [c]ourt to force [Snowden] to buy into Boomerang right away. . . . We're asking the [c]ourt to give [Snowden] the right of first refusal. Essentially the notice and the sixty days [it] should have gotten in the beginning to elect whether [it] would like to participate or not. We're not forcing anybody into Boomerang. We're asking for [it] to have the right to choose.

be available to receive the notice and offer. There is no indication in the record that Snowden would not be "ready, willing, and able" to receive the notice and offer contemplated by the Agreement. Moreover, because appellants successfully convinced the court to exclude financial evidence related to Boomerang, they deprived Snowden the opportunity to demonstrate that it could comply with the terms of membership. The incongruity of appellants' argument on this point is not lost upon us.

For the foregoing reasons, we hold that the court did not err in ordering specific performance of the right of first refusal with regard to Boomerang.

II. Damages from AIP Right of First Refusal

Appellants next challenge the court's damages award in the amount of $453,333 representing a one-third interest in AIP. Appellants argue that Mr. Rosenthal's assessment of damages was flawed in three respects: first, that he failed to measure damages at the time of the breach; second, that he should have calculated damages based on "fair market value" rather than "fair value"; and third, that he used "incorrect and erroneous data" in his calculations. Resolution of these issues requires careful consideration of both experts' analysis and testimony.

Mr. Rosenthal explained that there are three accepted approaches to calculate "lost value" damages in this type of scenario: (1) Cost (basically an assets/liabilities analysis); (2) Income (using a discounted cashflow analysis or a capitalization method); and (3) Market (discerning value from comparable sales using data from public and private corporate transactions). On this point, both Mr. Rosenthal and Mr. Kern utilized the

"discounted cashflow" method of the "Income" approach, agreeing that this was the most appropriate methodology to value the right of first refusal for a business that had not yet started. The "discounted cashflow method," as applied to this case, involves (1) estimating projected cashflows from AIP for three years in the future, (2) calculating AIP's "terminal value" at the end of that three-year period, (3) discounting the projected cashflows and terminal value back to the value in 2021 (the "present value") to calculate the "present value of interim cashflows" and "terminal enterprise value," and (4) adding the present value of the projected cashflows to the terminal enterprise value. Significantly, both experts calculated the value of AIP as of 2021—Mr. Rosenthal used March 31, 2021, and Mr. Kern used December 31, 2021. Moreover, both experts used MIP data from 2018 through 2020 in their respective "discounted cashflow" analyses.

We begin with Mr. Rosenthal's analysis. For the first step, Mr. Rosenthal assumed that AIP would perform as well in its first two years as MIP did in 2018 and 2019, resulting in projected cashflows of -$290,448 and $177,776 respectively. MIP's revenues in 2020 were significantly lower than the previous two years due to COVID-19. Because of this, Mr. Rosenthal projected AIP's revenues for its third year using AIP's long-term growth rate rather than using MIP's actual 2020 revenues. To calculate the long-term growth rate, he looked to "an industry data source" for the long-term growth rate of the specific industry type that includes indoor children's play facilities (5.5%), and added to that the inflation rate as of March of 2021 (2.2%). After applying the 7.7% long-term growth rate, Mr. Rosenthal projected AIP's "terminal revenue" at the end of three years to be $2,056,716.

From this, he determined that AIP's projected cashflows for its third year would be $221,205 after subtracting various expenses.

In the second step, Mr. Rosenthal estimated the "terminal value" of AIP after the first three years by multiplying the terminal revenue of $2,056,716 by a "revenue multiplier" of 1.2. The revenue multiplier is derived from a "discount rate" of 20%. Mr. Rosenthal testified that he derived the discount rate by adding a standard "risk-free rate," an "equity risk premium" related to investor demand, a "size premium" to account for AIP being a small company, an "industry premium" based on industry standards, and the "specific company risk," which accounts for the experience of the management team and differences between AIP and other businesses in the same industry, among other factors. He testified that, other than the specific company risk, the elements of the discount rate are "from empirical sources," and not subject to the appraiser's judgment. Thus, Mr. Rosenthal calculated AIP's "terminal value" as follows:

Terminal Revenue	2,056,716
Revenue Multiple	× 1.20
Terminal Value	$2,468,059

For the third step, Mr. Rosenthal multiplied the terminal value by the "present value factor of .592" to arrive at AIP's "terminal enterprise value" in 2021. His report states that the present value factor is based on AIP's "estimated weighted average costs of equity and debt." He then applied the .592 present value discount to the $2,468,059 "terminal value," yielding a "terminal enterprise value" of $1,460,899. He also multiplied the projected cashflows for the first three years by discount factors of .916, .769, and .646, yielding a

total "present value of interim cashflows" of $13,528.

Finally, Mr. Rosenthal added the $13,528 to the $1,460,899 terminal enterprise value, and then rounded down to $1,470,000. Mr. Rosenthal's report expressed the calculation as follows:

PV of Interim Cash Flows	$	13,528
PV of Terminal [Value]		1,460,899
Enterprise Value		1,474,427
Indicated Enterprise Value [rounded down]	$	1,470,000

Mr. Rosenthal concluded that $1,470,000 represented the "fair value" of AIP as of March 2021. He explained that a "fair value" calculation, unlike a "fair market value" calculation, does not include discounts for lack of marketability and lack of control.

As noted, Mr. Kern used the same "discounted cashflow" method to value AIP, but his analysis differed in certain key aspects from Mr. Rosenthal's analysis. First, Mr. Kern did not assume that AIP would perform as well in its first two years as MIP did. He compared the revenues MIP generated in its first three months of operation in 2018 to AIP's revenues in its first three months after opening in 2021 and determined that "AIP's revenues averaged 41.3% of MIP's revenue." He applied this percentage reduction to MIP's revenues for its first three years of operation to estimate AIP's projected revenue, adjusting his 41.3% baseline to account for projected increases in revenue as the impact of COVID-19 subsided. For expenses, Mr. Kern used AIP's known expenses and, for those expenses not known for AIP, he used MIP's expenses. He subtracted AIP's debt payments and payments on deferred unpaid rent as expenses. He also subtracted management fees

paid to Ms. Reed and the Gudapatis, which the court later determined were contrary to the terms of the loan Agreement, a ruling which has not been appealed. After making these adjustments, Mr. Kern determined that the projected cashflows for the three-year projected period would be -$523,713, -$155,696, and $75,259.

For the second step, Mr. Kern estimated the "terminal value" of AIP after three years based on the "terminal year cash flow to equity" amount by applying expenses to the terminal revenue. Mr. Kern did not use industry data to calculate the long-term growth rate as Mr. Rosenthal did, but instead chose a long-term growth rate of 3% because, while AIP was expected to "do better than inflation," he relied on information Mr. Gudapati and Ms. Reed gave him indicating that indoor play businesses "can get off to a good start, but then revenue starts to actually contract." As for the discount rate, Mr. Kern used the same method as Mr. Rosenthal to determine the rate. Because of minor differences in calculation, Mr. Kern's discount rate (22.02%) was slightly higher than Mr. Rosenthal's (20%). Rather than using the discount rate directly, however, Mr. Kern first subtracted from it the long-term growth rate to arrive at a capitalization rate of 19.02%. He calculated the terminal value by increasing the "terminal year cash flow to equity" amount using the long-term growth rate of 3% and the capitalization rate of 19.02%. Applying these rates, he concluded that AIP's terminal value is $606,525, expressed as follows:

Terminal year cash flow to equity	112,001
Multiplied by: (1 + long-term growth rate)	1.03
Terminal year cash flow to equity grown one year	115,361
Divide by: capitalization rate	19.02%
Terminal value	606,525

For the third step, Mr. Kern first added to the terminal value the present value of the "tax benefit of initial capital expenditures" ($65,357), then subtracted the present value of "after-tax interest-bearing debt payments" ($233,410), resulting in an "adjusted terminal value" of $438,472. Applying a present value factor of .608 to the adjusted terminal value yielded $266,603 as the terminal enterprise value. He also applied present value factors of .905, .742, and .608 to the projected cashflows from step one, yielding a total present value of interim cashflows of -$543,862.

Finally, Mr. Kern deducted the -$543,862 present value of interim cashflows from the terminal enterprise value of $266,603, which yielded an "equity value" of -$277,259. He then rounded this number and determined that the "indicated equity value" of AIP was -$277,000.[8] Thus, Mr. Kern opined that the value of a one-third interest in AIP is zero.

a. *Time of Breach*

Appellants argue that Snowden was seeking "general damages," which must be measured at the time of breach. Because equity interests in AIP were issued when it was formed in October 2018, appellants assert that October 2018 establishes the time of breach for calculation of damages.[9]

Although many Maryland cases mention the "time of breach" rule, very few discuss its application in any detail. The most in-depth discussion of the "time of breach" rule is

[8] Mr. Kern's "indicated equity value" of AIP correlates to Mr. Rosenthal's "enterprise value" as reflected on page 19 above.

[9] Appellants contend that the latest possible "time of breach" would be January 2019 when AIP executed a lease.

found in *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 429 Md. 387 (2012) [hereinafter *CR-RSC*], where the Supreme Court of Maryland discussed the application of the "time of breach" rule to different types of "lost profits" cases. The Court explained that

> a party injured by a breach of contract has a right to damages based on his expectation interest as measured by
>
> (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
>
> (b) any other loss, including incidental or consequential loss, caused by the breach, less
>
> (c) any cost or other loss that he has avoided by not having to perform.

Id. at 407 (block quote omitted) (quoting *David Sloane, Inc. v. Stanley G. House & Assocs., Inc.*, 311 Md. 36, 42 (1987)). A claim based on the loss of the value of the other party's performance "is a 'general damages' claim, calculated as 'the difference between the contract price and the fair market value at the time of breach.'" *Id.* (quoting *Burson v. Simard*, 424 Md. 318, 327-28 (2012)). A claim based in consequential damages is "calculated as losses that 'may reasonably be supposed to have been in the contemplation of both parties at the time of making the contract.'" *Id.* at 408 (quoting *Burson*, 424 Md. at 327). The Court quoted two examples from Dobbs's *Law of Remedies* to differentiate general damages from consequential damages in different types of cases that may be described as concerning "lost profits." First, regarding general damages, Dobbs explains,

> [Suppose] the defendant breaches a contract to sell land or a business to the plaintiff. A parcel of land or a business which can produce $100,000 in annual profits will have a greater market value than a parcel or a business which can produce only $10,000 in annual profits. So the plaintiff might attempt to prove the value of the land or the business by proving the profits it could earn. Coupled with evidence about the ratio between value and

> profits for the particular kind of enterprise, it would be possible to back-construct the value of the defendant's promised performance. Once value is determined the ordinary contract-market value measure could be used to figure general damages. The damages are general damages in such a case because they are based on the value of the very performance promised by the defendant (land or business) and not on some secondary good derived from that performance.

Id. at 412 (alteration in original) (quoting 3 Dan B. Dobbs, *Law of Remedies* § 12.4(3) (2d ed. 1993)). Next, Dobbs provides an example of consequential damages:

> [Suppose] the defendant breaches a contract to supply paint to a painting contractor. The contractor cannot find substitute paint quickly and he suffers two losses: (a) he loses a contract job on which he would have made profits; and (b) his reputation suffers so that he loses future profits on customers he would have enlisted but for his reputation as a painter who falls behind schedule. Although the second kind of claim may be identified as a loss of good will, both kinds of claims are for lost profits and both represent consequential damages[.] The damages are consequential because they are not based on the market value of the very thing promised (the paint).

Id. at 412-13 (alterations in original) (quoting Dobbs, § 12.4(3)).

We initially note that both parties acknowledge these generally accepted principles of contract law. As discussed above, appellants argue on appeal that AIP's date of formation—October 2018—represented the "time of breach" for calculation of damages rather than the March 31, 2021 valuation date used by Mr. Rosenthal. However, appellants' own expert, Mr. Kern, valued AIP as of December 31, 2021, a date nine months after Mr. Rosenthal's valuation date and three years after the October 2018 date they argue on appeal. It cannot be disputed that a focal point of this trial was the competing experts' opinions, and both experts provided values for AIP as of 2021.

In their brief and at oral argument, appellants maintained that the court erred in denying their motion for judgment at the close of Snowden's evidence. However, when

appellants presented evidence of damages related to AIP, they withdrew their motion for judgment. *See* Rule 2-519(c) ("A party who moves for judgment at the close of the evidence offered by an opposing party may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. *In so doing, the party withdraws the motion*." (emphasis added)). Therefore, denial of appellants' motion for judgment at the close of Snowden's case-in-chief is not subject to appellate review. *Driggs Corp. v. Md. Aviation Admin.*, 348 Md. 389, 403 (1998). During closing arguments at trial, appellants again raised the "time of breach" issue. Because appellants had proceeded to put on evidence in their case, the court was no longer limited to determining the sufficiency of Snowden's evidence, but instead could make its decision based on all the evidence which had been presented, including Mr. Kern's 2021 valuation. *See Driggs Corp.*, 348 Md. at 403 n.5 ("The presentation of additional evidence in [the defendant's] case, whether by [the defendant] or [the plaintiff], produces a different record for consideration (1) by the court, on any motion for judgment at the end of the entire case, or (2) by the trier of fact.").

The short answer to appellants' argument that October 2018 represented the proper date to determine damages is that appellants' own expert used December 31, 2021, as the appropriate date to measure damages. What we stated in *Am. Laundry Mach. Indus. v. Horan*, 45 Md. App. 97, 110 (1980), applies equally here: "Appellant[s] it seems to us, [are] hard-pressed to complain that the court concurred in the [valuation date] expressed by its own (and only) expert witness." *See also Skrabak v. Skrabak*, 108 Md. App. 633,

651 (1996) (holding that husband could not argue that the trial court erred in using accounts receivable to determine the value of his company when husband's expert witness "used the accounts receivable himself to form the basis of his opinion of the value" of the company). Furthermore, appellants argued in response to Snowden's motion *in limine* prior to trial that the date of breach could be sometime after the COVID-19 pandemic began in March of 2020, inferentially explaining their substantial failure to object to Mr. Rosenthal's testimony concerning the value of AIP. The court therefore did not err in assessing damages based on a 2021 valuation of AIP.[10]

b. *"Fair Value" versus "Fair Market Value"*

Appellants' argument that the court should have considered the "fair market value" of AIP rather than its "fair value" ultimately concerns whether discounts should be applied for lack of marketability and lack of control. "The application of discounts is appropriate only under a fair market value analysis, that is, in determining what price a willing buyer would offer, and a willing seller would accept, on the open market." *E. Park Ltd. P'ship v. Larkin*, 167 Md. App. 599, 621 (2006). Informing our analysis of this issue is the principle that "[t]he amount of damages recoverable for breach of contract is that which will place the injured party in the monetary position he would have occupied if the contract had been

[10] We also reject appellants' assertion that Mr. Rosenthal improperly relied on "evidence of post-breach historical revenues." We first note that appellants' expert, Mr. Kern, also used data related to revenues and expenses occurring after October 2018. Secondly, Mr. Rosenthal's use of post-breach revenue and other data merely informed his assessment of AIP's value as of March 31, 2021, a date that we have determined the court could properly rely on under the circumstances of this case.

properly performed." *Hall v. Lovell Regency Homes Ltd. P'ship*, 121 Md. App. 1, 12 (1998).

Normally, when a claim "is based on the value of the item promised, . . . the damages are 'the difference between the contract price and the fair market value at the time of breach.'" *CR-RSC*, 429 Md. at 408 (quoting *Burson*, 424 Md. at 327-28). However, there are situations in which "fair market value" is not an accurate valuation for purposes of establishing damages. As Snowden points out, several statutes provide for a "fair value" determination "when a member of an LLC, corporation, or limited partnership is removed from their corresponding business entity[.]" *See* Md. Code (1975, 2014 Repl. Vol.), § 3-202 of the Corporations and Associations Article ("CA"); CA § 4A-606.1; CA § 10-604.

In *East Park Ltd. P'ship*, we discussed a statute providing that a limited partnership must pay a withdrawing partner "the fair value of the partner's partnership interest . . . as of the date of withdrawal," CA § 10-604, essentially allowing the withdrawing partner "to 'cash out' his or her equity in the partnership[,]" 167 Md. App. at 618. We concluded that discounts for lack of marketability and lack of control over the business are "appropriate only under a fair market value analysis[.]" *Id.* at 621. In reaching that conclusion, we first looked at out-of-state cases involving dissenting shareholders. *Id.* at 619-20. Those cases agreed that, where a shareholder is selling shares to the corporation or to a majority shareholder, discounts for minority interest and lack of marketability should not be applied. *Id.* This is because "a sale to a majority shareholder or to the corporation simply

consolidates or increases the interests of those already in control[,]" whereas, when selling to a third party, "the third party gains no right to control or manage the corporation." *Id.* at 619 (quoting *Hansen v. 75 Ranch Co.*, 957 P.2d 32, 41 (Mont. 1998)). Applying a discount for lack of control "'deprives minority shareholders of their proportionate interest in a going concern'" because the shareholders "are not receiving what they would have received had the entire entity been sold on the open market. Instead, they are receiving what they would have received had only *their* interests been sold, which is not what actually occurs." *Id.* at 619-20 (quoting *Pueblo Bancorporation v. Lindoe, Inc.*, 37 P.3d 492, 496 (Colo. Ct. App. 2001)).

We found the dissenting shareholder cases to be analogous to a withdrawing limited partner because "[i]n both situations, the individuals are exercising a statutory right to withdraw from an entity, and the entity is absorbing the interests of those individuals. . . . The [w]ithdrawing [p]artners should not be penalized for exercising their statutory rights." *Id.* at 620. We held that, "[b]ecause no open market transaction takes place when a partner withdraws from a limited partnership, . . . ordinarily, discounts should not be applied." *Id.* at 621.

Although based in breach of contract rather than a claim asserting a statutory right, the scenario presented in this case is comparable to dissenting shareholder and withdrawing limited partner cases. In effect, Snowden was "forced out" of ownership of a portion of AIP, with Snowden's interests in the company retained by appellants. "[N]o open market transaction [took] place," rather, appellants' breach of contract "'simply consolidate[d] or

increase[d] the interests of those already in control.'" *See id.* at 619, 621 (quoting *Hansen*, 957 P.2d at 41). Applying the discounts for lack of marketability and lack of control would "deprive[Snowden] of their proportionate interest in a going concern." *Id.* at 619 (quoting *Pueblo Bancorporation*, 37 P.3d at 496).

We see no reason why "fair market value" must be applied to a breach of contract case where another valuation method will more accurately "place the injured party in the monetary position [it] would have occupied if the contract had been properly performed." *Hall*, 121 Md. App. at 12.

c. *Erroneous Data*

Finally, appellants argue that Mr. Rosenthal used two factually incorrect numbers in his calculations: (1) $101,312 for depreciation/amortization for the first three months of 2021; and (2) $110,000 in capital contributions to AIP. Snowden responds that the court did not abuse its discretion in finding Mr. Rosenthal credible.

i. Depreciation/Amortization

Appellants argue that the "factually correct" amount of depreciation for the first three months of 2021 is found on MIP's profit and loss statement used for determining net profit payments. The first quarter 2021 profit and loss statement indicates depreciation of $6,397.71. Mr. Rosenthal's report indicates that the depreciation for MIP in the first three months of 2021 was $101,312. This number was added to the 2020 depreciation of $98,735 to project AIP's depreciation for its third year of operations ("T3"), and was only used to estimate the income tax AIP would pay in T3. On cross-examination, Mr. Rosenthal could

not remember what source he used to calculate $101,312 of depreciation, but suspected it might have been the total depreciation for 2021, rather than only the first three months of the year. He indicated that he did not believe the profit and loss statement was his source for the depreciation amount. Mr. Kern testified that $101,312 is "the total depreciation number from April 1st, 2020, through March 31st of 2021." We note that this issue would affect only the $13,528 present value of interim cash flows, which formed a small part of Mr. Rosenthal's overall damages calculation. If Mr. Rosenthal had applied appellants' proposed depreciation of $6,397.71, the present value of interim cash flows would instead be -$3,342.84, the enterprise value of AIP would be $1,457,556.16 (instead of $1,474,427), and Snowden's damages would be $449,185.39 (instead of $453,333).

"Generally, an expert's opinion has no probative force unless there is a legally sufficient factual basis upon which to support the conclusions." *Zilichikhis v. Montgomery County*, 223 Md. App. 158, 185 (2015). However, an expert's inability to recall certain details in the formation of his or her opinion goes to the weight of the evidence. *See Sangster v. State*, 70 Md. App. 456, 466 n.4 (1987) (citing *Delaware v. Fensterer*, 474 U.S. 15, 19 (1985)); *Oken v. State*, 343 Md. 256, 291 (1996) ("the proponent of expert testimony is not required to elicit *all* the facts upon which the opinion is based; nevertheless, the factual basis for the expert's opinion is admissible to enable the jury to properly weigh the testimony.").

Notably, Mr. Rosenthal's "Depreciation/Amortization" amounts for 2018 and 2019 also do not match MIP's profit and loss statements, discrepancies which appellants do not

challenge. The profit and loss statements for 2018 indicate $211,373 in depreciation, while Mr. Rosenthal's depreciation/amortization amount for that year is $302,905. Similarly, the profit and loss statements for 2019 show $119,000 of depreciation, and Mr. Rosenthal's report shows $46,427. Only the 2020 amount ($98,735) matches between the two documents. It therefore is apparent that Mr. Rosenthal was not relying on the profit and loss statements as his source for the depreciation/amortization numbers. Additionally, the depreciation/amortization amounts projected by Mr. Kern for the second and third years of operation were over $100,000 more than the amounts projected by Mr. Rosenthal, and were also significantly higher than the amounts reflected in MIP's profit and loss statements.[11] Had Mr. Rosenthal used the same depreciation/amortization amounts as Mr. Kern, his damages calculation would be approximately $21,000 *higher*.

Appellants do not argue that Mr. Rosenthal's expert opinion was inadmissible based on lack of a factual basis, but only argue that the court should not have found his testimony and report to be credible. In our view, the court did not err in accepting Mr. Rosenthal's analysis on this point, which as noted, only comprised a small component of the overall damages award.

ii. Capital Contributions

Appellants' second "factual error" argument is that Mr. Rosenthal should not have used the capital contribution data from MIP ($110,000) because the capital contributions

[11] Mr. Kern's depreciation/amortization amount for AIP's first year of operation was approximately $30,000 lower than Mr. Rosenthal's projection, but $60,000 higher than MIP's profit and loss statements.

to AIP were known ($228,896). The capital contribution amount used by Mr. Kern derives from AIP's 2019 and 2020 tax returns. Mr. Rosenthal explained that $110,000 did not only reflect "the buy-in amount to acquire the interest" in MIP, but instead showed "the amount over a period of three years that they contributed, the withdrawals, and the distributions. It's the net number that they put in." He explained his decision to use MIP's capital contribution amounts:

> Because that's what had been done in the past. And when we used Maryland Indoor Play as, again, a proxy for the revenue projections and expense projections I felt it was appropriate to use what they had invested as capital in Maryland Indoor Play as part of that analysis.

The use of MIP data to project the net future contributions into AIP was a judgment call based on Mr. Rosenthal's expertise as an accountant. Whether to use AIP's actual capital contributions or MIP's net capital contributions over three years to project AIP's future value amounts to a quintessential "battle of the experts." *See Moseman v. Cnty. Council of Prince George's Cnty.*, 99 Md. App. 258, 267 (1994) ("It is not for this Court to re-weigh expert testimony as long as there is adequate foundation for the opinions. Even if this Court were to have concluded differently than the [fact-finder] from the same testimony, we would not engage in relitigating a battle of the experts."). Mr. Rosenthal's method of projection in this regard was not clearly erroneous, and the court did not err in finding his method reliable. *See Grimm v. State*, 232 Md. App. 382, 403-04 (2017).

III. Damages from Net Profit Payments

Appellants' next argument relates to the calculation of "net profit payments" as provided in the Note. The relevant provision states:

> In consideration of the non-compete provision set forth in the Loan and Security Agreement . . . , the Borrower shall also make the payments of the percentage of net profits set forth in the table below . . . . As used in this Note, *the term "net profits" shall mean the gross profits of the company after operating expenses, including payments to [HCEDA] and Lender and trade payables, and taxes are deducted.*

(Emphasis added).

In substance, the contract required MIP to pay Snowden a percentage of its net profits with the percentage decreasing from 35% in April 2018 to 7% in January 2023. Appellants argue that the court erred by accepting Mr. Rosenthal's calculation of the amount of net profit payments MIP was obligated to pay to Snowden. Specifically, appellants challenge three items in Mr. Rosenthal's net profit calculation: (1) net profit payments to Snowden from the prior quarter; (2) sales tax and payroll withholdings categorized as "trade payables"; and (3) cash withdrawals categorized as "other operating expenses." Snowden responds that the court did not abuse its discretion in crediting Mr. Rosenthal on these issues.

Mr. Rosenthal identified a total of seven "accounting errors" in MIP's net profit payments related to items appellants deducted from gross profits to determine net profit. Appellants only challenge the three "errors" identified above. The court's written opinion does not provide a breakdown of the amount of damages it found for each "accounting error" related to the net profit payments, instead stating broadly:

> The Agreement provides that MIP is to repay the loan, interest payments, and net profits to Plaintiff according to the terms. Mr. Rosenthal's report evidences various accounting errors in MIP's books and records which reduced Plaintiff's net profits by a total of $142,568. This was bolstered by Mr. Kern's own admission that Defendants' books contained multiple

> accounting errors. By Mr. Kern's calculations, MIP's books contained errors totaling $22,089.
>
> The Court finds Defendant[s'] arguments regarding overpayments to be unpersuasive. The Court, having previously found Mr. Rosenthal's report to be more persuasive, finds that Defendants' books contained accounting errors in the amount of $142,568.

(Citations omitted). It is not immediately clear from the record how the court arrived at a total of $142,568 in damages related to net profit payments. Mr. Rosenthal's report set forth $145,100 in net profit payment damages. During his testimony, he amended his opinion to $141,762 due to an error in his calculations. However, Mr. Rosenthal also testified that for one of the categories of accounting errors, Mr. Kern's damages calculation was $806 higher than his own. It appears that the court accepted Mr. Rosenthal's amended totals for six of the categories of alleged errors, but used Mr. Kern's higher total for the seventh category.

Although we provide our interpretation of the court's damages calculation for context, we shall limit our appellate focus to the three categories of net profit errors alleged by appellants. In both his report and supporting testimony, Mr. Rosenthal assessed damages for these three categories in the amount of $95,062.

a. *Deduction of Prior Quarter's Net Profit Payments*

When appellants calculated quarterly net profit payments to Snowden, they deducted the amount of net profit payments made during the previous quarter. For example, the payment to Snowden for the second quarter of 2018 was deducted when calculating the net profits for the third quarter of 2018. According to Mr. Rosenthal, these deductions resulted in Snowden being underpaid a total of $45,507. Notably, during cross-

examination, Mr. Rosenthal agreed that the net profit payments were "payments to . . . Lender" under the express terms of the Note, and conceded that they were properly deductible.

Whether net profit payments for the previous quarter are deductible under the Note's definition of "net profits" is a matter of contract interpretation, which we review *de novo*. *See Plank*, 469 Md. at 569. The Note states that "the term 'net profits' shall mean the gross profits of the company after operating expenses, including payments to . . . Lender . . . are deducted." Snowden is expressly referenced in the contract documents as "Lender." Although the phrase "payments to . . . Lender" is not defined, nothing in the Note indicates an intention that the term "payments" would be limited to loan principal and interest payments. We therefore conclude that, under the plain language of the Note, "payments to . . . Lender" includes any of the types of payments to Snowden provided for in the Note, including net profit payments. Moreover, our interpretation is consistent with Mr. Rosenthal's acknowledgment "that payments made to the lender which are for net profit payments are . . . deductible as a defined operating expense in the term note[.]" The court therefore erred in assessing damages of $45,507 by disallowing the deduction of the previous quarter's net profit payments as an operating expense.

b. *Deduction of Sales Tax and Payroll Withholdings*

In MIP's net profit payment reports to Snowden, it listed "Sales & Use Tax Payable" and "Payroll Liabilities" (which included Federal and State withholdings and garnishments) as "Trade payables" when it deducted those amounts from gross profits.

According to Mr. Rosenthal, sales tax and payroll liabilities are not properly categorized as "trade payables," and therefore should not have been deducted in the "net profits" calculation. Mr. Rosenthal concluded that Snowden suffered $30,765 in damages from these deductions, which the court accepted.

"Trade payables" is not defined in any of the parties' contract documents. Mr. Rosenthal defined "trade payables" as "expenses related to operating the company," and Mr. Kern defined the term as "a payable that's being incurred in conducting the trade or business." We have no quarrel with the experts' definitions of "trade payables." Regardless of the definition of "trade payables," however, both sales tax and payroll liabilities are deductible from net profits under the terms of the Note. The Note provides that "the term 'net profits' shall mean the gross profits of the company after operating expenses, including . . . taxes are deducted." The term "taxes" is not limited in the Note to any particular types of taxes, and sales tax is self-evidently a "tax." Additionally, the term "operating expenses" is not limited by the listed examples, *see Tribbitt v. State*, 403 Md. 638, 648-49 (2008) ("[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle[.]" (quoting *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941))), and payroll liabilities including Federal and State withholdings are regular expenses involved in running a business with employees. Thus, regardless of whether either sales taxes or payroll liabilities were properly classified as "trade payables," they are nonetheless "operating expenses" and therefore deductible from net profits under the plain language of the Note.

In short, under both the plain language of the Note and the expert accountants' interpretation of the term "trade payables" as operating expenses of a company, the sales taxes and payroll liabilities were properly deducted. The court erred in accepting Mr. Rosenthal's conclusion that Snowden suffered $30,765 in damages as a result of sales tax and payroll liabilities being deducted from net profits.

c. *Deducting Cash Withdrawals*

In calculating net profits for each quarter, MIP deducted various cash withdrawals made from its bank account as "other operating expenses." According to Mr. Rosenthal, there was "no accounting support that shows what these [withdrawals] were for." He concluded that the withdrawals were not appropriate deductions and that Snowden suffered $18,790 in damages as a result of the deductions.

Ms. Reed testified that all of the cash withdrawals were to make change for the registers. She testified that appellants regularly withdrew cash for the registers at MIP's Hyper Kidz location, which was documented as an expense, and when cash from the registers was deposited into the bank account, the entire amount was documented as revenue. Although she claimed that there was "a well-documented chain of exactly what was needed, where it went, the deposit bags, and the deposits back into the account[,]" no such documentation was entered into evidence. The only documentary support in evidence indicating how the cash withdrawals were used is MIP's general ledger, which lists numerous checks, ATM withdrawals, and counter withdrawals. The overwhelming majority of the listed expenses provide no indication what the payment or withdrawal was

for. Of the $70,301.45 in expenses listed as "other operating expenses" for April 17, 2018, through July 19, 2021, only $3,579.25 of expenses have any indication of what the expense was for. Of those, five withdrawals totaling $2,300 were labeled "cash for coins" or something similar, and one $675 withdrawal was for "petty cash."

The court did not err in accepting Mr. Rosenthal's testimony that the unlabeled expenses were not adequately documented as "operating expenses." The court did not make explicit findings on this issue, but found Mr. Rosenthal generally "more persuasive." The court did not clearly err in implicitly rejecting Ms. Reed's explanation of MIP's accounting practices.

Because we hold that the court erred with regard to damages arising from deductions of prior net profit payments, sales tax, and payroll liabilities, totaling $76,272, we shall reduce the judgment in favor of Snowden for "accounting errors" from $142,568 to $66,296.

IV. Attorney's Fees

Appellants argue that the court erred in awarding Snowden attorney's fees for two reasons: (1) Ms. Sharma was not named as a witness in discovery, and the court should therefore have excluded her testimony; and (2) the post-trial affidavit certifying fees incurred during the last day of trial and post-trial briefing should not have been considered because it was not presented in Snowden's case-in-chief.

Snowden responds, first, that appellants did not preserve their argument that Ms. Sharma's lay opinion testimony should have been excluded because their objection at trial

was premised on Ms. Sharma being called as an expert witness. As to the attorney's fees affidavit, Snowden asserts that Rule 2-704 allows for attorney's fees to be proven after the case-in-chief if the court so orders, and, in this case, the court ordered that the attorney's fees issue could be presented after the case-in-chief.

a. *Appellants Failed to Object to Ms. Sharma Testifying as a Lay Witness*

We agree with Snowden that appellants only preserved their objection to Ms. Sharma's testimony on the basis that she was not named as an expert witness in discovery. Ms. Sharma testified that the attorney's fees incurred through August 2022 amounted to $271,297.33 and that the expert witness fees totaled $101,795.50. Appellants did not object to Ms. Sharma being called as a witness, nor did they object to her testimony regarding attorney's fees and costs referenced above. Moreover, appellants expressed "no objection" when the invoice for attorney's fees and expert costs was proffered for admission through Ms. Sharma. Appellants first raised an objection to Ms. Sharma's testimony when she was asked about the reasonableness of the fees. The following colloquy demonstrates that appellants' objection was clearly limited to Ms. Sharma not having been named as an expert prior to trial:

> [SNOWDEN'S COUNSEL]: Based on your experience, are the legal fees, costs, and interest reasonable for a case like this one?
>
> [APPELLANTS' COUNSEL]: Objection.
>
> THE COURT: Basis?
>
> [APPELLANTS' COUNSEL]: *The objection is that Ms. Sharma has not been designated as an expert witness to testify about these matters.* If you look at the discovery in this case, *we ask in interrogatory as to naming all the experts with regard to any topic, then there was no*

> *answer with regard to that interrogatory that identified her nor any supplement. There was then a deadline in the [c]ourt's Scheduling Order by which one had to identify experts who were going to testify. There was no identification of Ms. Sharma as being an expert* to testify about the fairness, reasonableness, or render an[y] opinions about attorney's fees.
>
> Then in addition to which . . . there was a Pre-Trial Statement and an Amended Pre-Trial Statement. And in that Pre-Trial Statement according to the [c]ourt's [o]rder, *you had to identify your expert witnesses. Ms. Sharma was not identified as an expert witness to testify about attorney's fees in either of the original or the Amended Pre-Trial Statement. So there were four opportunities for the Plaintiff to identify this witness as an expert* and on none of those occasions during discovery, prior to the close of discovery, during the [c]ourt's designation of the date, you have to identify experts and then the two Pre-Trial Statements was Ms. Sharma ever identified as a witness to testify about attorney's fees.

THE COURT: Counsel, do you want to respond?

[SNOWDEN'S COUNSEL]: *Your Honor, we're not seeking to admit Ms. Sharma as an expert.* We're simply seeking for her to reflect on her billing in this matter in her personal capacity and provide that information to the [c]ourt to weigh in its determination of whether or not these fees are reasonable.

. . .

THE COURT: I'll hear from you.

[APPELLANTS' COUNSEL]: Ms. Sharma's personal views about whether she thinks that the billings that she did, and her associates did, and her firm did, as to whether they're fair and reasonable, is not either relevant or is an expert opinion about the fairness and the reasonableness of the attorney's fees. In the first instance, it's not probative of anything that she feels that what she billed as you would expect, is fair and reasonable and *to the extent that it's an opinion that she was not identified as an expert, it[']s simply we never had the opportunity to know that she would be the expert who would be identified to testify about attorney's fees.*

> That's a requirement because it requires an opinion and Counsel knew that from the very beginning, but they never bothered to identify anybody, so we'd have the opportunity to -- *we didn't depose her, we didn't name our own experts because none was named to testify on this topic.* And so we are prejudiced by this, and she didn't comply, she, the Plaintiff didn't comply with the Rules and the Orders of Court, and that's the basis of our objection to her testimony in that regard.

(Emphasis added).

In *Zachair, Ltd. v. Driggs*, 135 Md. App. 403 (2000), this Court considered a similar scenario. Zachair failed to name one of its attorneys, Nelson Deckelbaum, as an expert witness prior to trial. *Id.* at 435, 438. The trial court limited the scope of his expert testimony, but did not exclude his testimony altogether. *Id.* at 438. Deckelbaum testified concerning the reasonableness of his fees, and the defendants argued that he should not have been permitted to do so. *Id.* We first held that the defendants were not prejudiced by the discovery violation because "they were aware from the start of Zachair's suit that Zachair was seeking to recover its attorney fees, and there is no reason to believe that they did not have sufficient opportunity to prepare a defense." *Id.* Secondly, we noted:

> [Defendants] direct us to no authority that would suggest that expert testimony is necessary to establish that attorney fees are reasonable, and we are aware of no such authority. . . . Even a lay witness may offer an opinion on an ultimate issue of fact, such as the reasonableness of fees, if the opinion is rationally based on the perception of the witness and helpful to the determination of the trier of fact.

Id.

Thus, not only was Ms. Sharma not called as an expert witness, but the caselaw establishes that expert testimony is not necessary to prove reasonableness of attorney's

fees. Because appellants did not object to Ms. Sharma testifying as a lay witness, we need not consider whether the court abused its discretion by permitting her to testify.[12]

b. *Post-Trial Affidavit for Attorney's Fees*

Appellants finally assert that the post-trial affidavit for attorney's fees was improperly admitted. Appellants argue that, because Snowden's attorney's fees claim is based on a provision in a contract, Snowden was required to prove the amount and reasonableness of the attorney's fees in its case-in-chief. Appellants rely on Rule 2-704, which provides, in pertinent part: "Evidence in support of or in opposition to a claim for attorneys' fees under this Rule shall be presented in the party's case-in-chief unless the court orders otherwise[.]" Rule 2-704(d)(1).

Snowden responds that the court properly exercised its discretion when it ordered that evidence related to attorney's fees be presented after its case-in-chief, as Rule 2-704(d)(1) expressly authorizes an exception to the general rule where "the court orders otherwise."

Before trial started, the court ordered that "the issue of attorney fees and costs will be addressed on the last day of the trial." On the last day of trial, Ms. Sharma mentioned

[12] At trial, appellants' counsel stated that Ms. Sharma's testimony "is not either relevant or is an expert opinion about the fairness and the reasonableness of the attorney's fees." Appellants have not argued on appeal that Ms. Sharma's testimony was not relevant. In addition, to the extent appellants assert error as a result of Snowden's failure to name Ms. Sharma as a witness at all, we reject their claim because they did not object when she was called as a witness, testified to the attorney's fees and costs, and authenticated the invoices that were admitted. Appellants' argument on this point is further undermined by the fact that they actually named Ms. Sharma as a fact witness in discovery.

on two occasions that she intended to file post-trial affidavits to support the amount of fees charged for the last day of trial and the post-trial briefing ordered by the court. Appellants did not raise any objections to these statements, nor did the court provide any indication that a post-trial affidavit would be outside the scope of its prior order.[13] Ms. Sharma submitted an affidavit describing the fees charged for the final day of trial and the post-trial briefing. Appellants' motion to strike the affidavit constituted their first objection on this subject.

To the extent that this issue was preserved, the court did not err in considering Ms. Sharma's post-trial affidavit. The court had already ordered that it would accept evidence of attorney's fees after Snowden's case-in-chief. Therefore, the Rule 2-704 requirement that the evidence be presented during the case-in-chief had been superseded by an order of the court, as contemplated in the Rule. *See* Rule 2-704(d)(1) ("Evidence in support of or in opposition to a claim for attorneys' fees under this Rule shall be presented in the party's case-in-chief *unless the court orders otherwise*[.]" (emphasis added)).[14] We therefore affirm the circuit court attorney's fees award.

[13] Later, while discussing whether a different witness's testimony on attorney's fees would be admitted, appellants briefly stated that "affidavits . . . are not even admissible either" because they are not part of "an evidentiary hearing." The court ultimately excluded that witness's testimony.

[14] We note that in their motion to strike the affidavit, appellants stated that the affidavit should be excluded in part "because Defendants have no opportunity to rebut such evidence and are unable to cross-examine the witness and the evidence." To the extent that appellants make this argument on appeal, it has not been adequately briefed. Appellants' questions presented make no mention of the post-trial affidavit, and we see only two potential references related to this issue: (1) a description of the affidavit as "untimely and prejudicial," and (2) a sentence stating that Rule 2-704 precludes consideration of the

V. Conclusion

For the foregoing reasons, we:

1. Affirm the trial court's order requiring appellants to extend a right of first refusal to Snowden as to Boomerang;

2. Affirm the court's damages award arising from appellant's failure to extend a right of first refusal to Snowden as to AIP;

3. Remand to the circuit court for the purpose of directing the Clerk of Court to amend the damages award for "accounting errors" in MIP's net profit payments to Snowden from $142,568 to $66,296; and

4. Affirm the court's attorney's fees award.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED IN PART, VACATED IN PART. CLERK OF THE CIRCUIT COURT FOR HOWARD COUNTY SHALL AMEND JUDGMENT AGAINST APPELLANTS AS TO COUNT 5 FROM $142,568 TO $66,296. JUDGMENTS ON ALL OTHER COUNTS ARE AFFIRMED. COSTS ALLOCATED AS FOLLOWS: 75% TO BE PAID BY APPELLANTS AND 25% TO BE PAID BY SNOWDEN.

affidavit "notwithstanding the mistaken assertion of Snowden's counsel about affidavits and necessity of evidentiary hearings under Rule 2-704." The first reference apparently relates to the affidavit being "untimely" because the court considered it after the close of Snowden's case-in-chief. As to the second reference, appellants' record citations refer to a portion of the transcript containing comments by Snowden's counsel concerning a different expert witness; there is no discussion of post-trial affidavits. Because this issue has not been adequately argued on appeal, we decline to exercise our discretion to consider it. *See Oak Crest Village, Inc. v. Murphy*, 379 Md. 229, 241 (2004) ("[I]f a point germane to the appeal is not adequately raised in a party's brief, the court may, and ordinarily should, decline to address it."); *Peterson v. Evapco, Inc.*, 238 Md. App. 1, 62 (2018) ("Appellants can waive issues for appellate review by failing to mention them in their 'Questions Presented' section of their brief." (quoting *Green v. N. Arundel Hosp. Ass'n, Inc.*, 126 Md. App. 394, 426 (1999))).