Circuit Court for Howard County
Case No. 13-C-16-109978

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2594

September Term, 2018

MERRIWEATHER POST BUSINESS TRUST

v.

IT'S MY AMPHITHEATER, INC.

Fader, C.J.,
Beachley,
Wilner, Alan M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: August 6, 2020

Merriweather Post Business Trust ("Trust"), the appellant/cross-appellee, and It's My Amphitheater, Inc. ("IMA"), the appellee/cross-appellant, each seeks review of a judgment rendered by the Circuit Court for Howard County. The judgment resolved various claims relating to renovation work performed—and, importantly, not performed—at Merriweather Post Pavilion (the "Pavilion"); the effect of that work on IMA's business during the 2016 concert season; and the associated implications for the parties' respective obligations under the Operating Agreement that governed their relationship. The circuit court ultimately ruled in IMA's favor regarding both counts of its complaint and in Trust's favor regarding two of the four counts of its counterclaim. The court ordered Trust to pay $1,160,496.87 to IMA and IMA to pay $309,000 to Trust. Both parties then sought awards of attorneys' fees and costs[1] pursuant to a "prevailing party" fee-shifting provision in the Operating Agreement. The court concluded that IMA was the sole prevailing party; granted its claim for attorneys' fees of $641,859.55; and denied Trust's claim.

Trust contends that it was entitled to judgment as a matter of law on IMA's primary claim against it and also challenges the circuit court's award of attorneys' fees. IMA defends those aspects of the court's judgment and challenges the court's judgment in favor of Trust on one count of its counterclaim. We will affirm.

[1] Except where quoting from other sources, we will adhere to the placement of the apostrophe in "attorneys' fees" as adopted by the Court of Appeals in Subtitle 7 of Title 2 of the Rules, "Claims for Attorneys' Fees and Related Expenses." *See also* Md. Rule 1-341 (providing for award of "reasonable attorneys' fees" for certain litigation conduct). Additionally, for simplicity, rather than referring to "attorneys' fees and costs" throughout the remainder of this opinion, we will refer only to "attorneys' fees," but intend that term to also encompass costs unless specified otherwise.

BACKGROUND

The Operating Agreement

During the relevant time period, Trust owned, and IMA produced music concerts at, the Pavilion, a concert venue in Columbia, Maryland. As part of a "revitalization and redevelopment plan for Downtown Columbia," Trust had agreed to renovate the Pavilion and, upon completing those renovations, to transfer ownership of the Pavilion to the Downtown Columbia Arts and Culture Commission (the "Commission").[2] *See* Howard County, *Downtown Columbia Plan: A General Plan Amendment* iv, 78 (2010), *available at* https://www.howardcountymd.gov/LinkClick.aspx?fileticket=EGk3eRK-xIA%3d&portalid=0 (accessed July 28, 2020).

In May 2014, Trust and IMA entered a ten-year Operating Agreement for the Pavilion. The parties' primary claims center on alleged breaches of provisions of that Operating Agreement. The following provisions are particularly relevant:

- ***Section 2(a)*** defines IMA's "Permitted Use" of the Pavilion, which is its operation of the property from April 1 through October 31 of each year "only for the purpose of producing musical events and any other non-musical events . . . (collectively 'IMA Events') and for food and beverage services and general merchandising in connection therewith." Section 2(a) further requires IMA to "use all commercially reasonable efforts to (i) provide at least thirty (30) IMA Events . . . per Season at the [Pavilion]," including "at least ten (10) having a paid admission of 10,000 or more people."

- ***Section 3(a)*** provides: "In consideration for the right to manage and operate the [Pavilion]," IMA agrees to make specified annual payments to Trust. The only component of those annual payments at issue here is the "Base Annual

[2] The Commission "is a not-for-profit community organization" that "work[s] to expand artistic and cultural activities in and around downtown Columbia and at Merriweather Post Pavilion." Downtown Columbia Arts & Culture Comm'n, *available at* http://www.dcacc.info/ (accessed July 28, 2020).

Payment," which was set at $1 million for 2015 and scheduled to increase by $100,000 each year until it reached $1.5 million. For 2016, the year at issue, the Base Annual Payment was $1.1 million.

- ***Section 4*** makes IMA "responsible, at its sole cost and expense, for managing and operating the [Pavilion] during the Season, including the food and beverage service consistent with the Permitted Use, as a first class major concert amphitheater."

- ***Section 6***—after reciting that Trust had agreed to undertake renovations to the Pavilion and, upon completion, to transfer ownership of the Pavilion to the Commission—sets forth IMA's "acknowledg[ment] that [Trust] and [the Commission] may enter into a joint development agreement . . . with respect to the [Pavilion]" and provides that "IMA is or will become familiar with all the terms and conditions of" any such agreement and "agrees to consult with, cooperate with and take direction from [Trust] and [the Commission] to the extent that [Trust] determines any of the foregoing is necessary to cause the parties to the Joint Development Agreement to comply with the terms and conditions thereof."

- ***Section 12*** addresses more directly the contemplated renovations:

    - ***Section 12(a)*** provides: "IMA acknowledges and agrees that [Trust] intends to cause certain improvements to be made to the [Pavilion] . . . (the 'Required Renovations')." The "principal construction and renovation activities" were to be scheduled and performed in the offseason (i.e., not between April 1 and October 31), and Trust was required to "use commercially reasonabl[e] efforts to cause such principal construction and renovation activities to avoid interfering with IMA Events." However, "[s]hould construction or renovation materially interfere with the Permitted Use, the applicable Base Payment Amount shall be equitably adjusted to reflect such material interference."

    - ***Section 12(b)*** sets the commencement of the fifth season of operation under the Agreement as the deadline for completion of the renovations. IMA has the right to terminate the Agreement if the renovations "are not substantially completed on or before" that date.

- ***Section 15*** addresses the consequences of default events:

    - ***Section 15(a)*** provides that if Trust "is in material default of its performance obligations under this Agreement, . . . IMA's sole and exclusive remedy shall be the right, following notice to [Trust] and a

failure by [Trust] to cure such default within ninety (90) days after such notice, to terminate this Agreement." The sole exception identified in § 15(a) is that if Trust's breach "relates solely to precluding IMA from access to the [Pavilion] as required hereunder, IMA shall be entitled to avail itself of all available remedies at law, in equity or otherwise under the Operating Agreement."

- ***Section 15(b)*** provides that if IMA fails to make any payments owed under the Agreement, Trust has the right to charge interest on all past due amounts and "avail itself of any and all remedies at law, in equity or elsewhere under this Agreement, including, without limitation, the termination of this Agreement." If "IMA fails to perform any other obligation" under the Agreement (and absent a timely cure of such a default), Trust has "the right to avail itself of any and all remedies at law, in equity or elsewhere under this Agreement, including, without limitation, the termination of this Agreement." Finally, if "IMA fails, refuses or neglects to perform any act or fulfill any obligation required of IMA pursuant to this Agreement," and fails to cure such default after written notice, Trust is entitled to "perform or fulfill the same without prior notice to, but at the sole cost and expense of, IMA, together with a management fee of ten percent (10%)."

- ***Section 26*** provides in relevant part: "Attorneys' Fees. If either [Trust] or IMA institutes any action or proceeding against the other relating to the provisions of this Agreement or any default hereunder, the non-prevailing party in such action or proceeding shall reimburse the prevailing party for the reasonable expenses of attorneys' fees and all costs and disbursements incurred therein by the prevailing party, including, without limitation, any such fees, costs or disbursements incurred on any appeal from such action or proceeding."

Renovations and the First Amendment to the Operating Agreement

In June 2014, a month following the effective date of the Operating Agreement, Trust and the Commission entered into a Joint Development Agreement that called for an acceleration of both the contemplated renovations to the Pavilion and the transfer of ownership from Trust to the Commission. Nonetheless, Phase I of the renovations, which was initially slated to begin at the end of the 2014 season, was delayed until March 2015.

The Phase I renovations, which included "a couple of new concession stands, a box office, and new restrooms," were undertaken throughout the 2015 season.

Phase II of the renovations encompassed both a new stage house and new backstage facilities. The backstage facilities included cooking, cleaning, dressing, and production areas. At some point, it was decided both that the Phase II renovations should be enhanced from what was originally planned and that the timetable for those renovations should be accelerated. Thus, in October 2015, Trust proposed splitting Phase II into two sub-phases. Phase IIa, which consisted of constructing a new stage house with "a number of enhanced features incorporated into the design," would now require "complete demolition" of the existing stage house and construction of a new structure "approximately 40' higher than the existing Stage House." Phase IIb would include renovation of the backstage facilities.

Effective November 2015, IMA and Trust entered into a First Amendment to the Operating Agreement. The only substantive amendment was the addition of § 3(c)(ii), which provided, in pertinent part:

> (ii) [Trust] shall undertake certain improvements on behalf of and for the benefit of IMA pursuant to, and as described in [specified contract documents between Trust and a construction company]. . . .
>
> [Trust]'s agreement to undertake the Improvements and [Trust]'s obligation to continue to perform the Improvements is predicated on the understanding that [the Commission] will provide additional funding for the Improvements at such time as [Trust] has spent a total of $9,500,000 on its Required Renovations and the Improvements . . . . In the event such additional funding is not provided as required, [Trust] shall have the right to stop work on the Improvements and shall restore the stage and backstage facilities to a usable, good working condition substantially similar to what previously existed. In such event, [Trust] shall not be deemed to be in default under the Operating Agreement.

> In the event that ownership of the [Pavilion] has not transferred from [Trust] to the [Commission] on or before October 31, 2016, IMA shall pay to [Trust] an additional fee (the "Improvement Fee") of $300,000 on November 1, 2016, regardless of the status of construction, separate and apart from any other amount due under the Operating Agreement, which amount shall compensate [Trust] for a portion of the cost of Improvements undertaken by [Trust].

The remainder of § 3(c)(ii) required additional Improvement Fee payments by IMA to Trust if ownership of the Pavilion had not transferred to the Commission by October 31, 2017 ($300,000), October 31, 2018 ($200,000), and October 31, 2019 ($100,000), all "regardless of the status of construction." Once the property transferred, however, IMA's obligation to pay the Improvement Fees terminated.

The 2016 Concert Season

Trust demolished the stage house and backstage facilities in October and November 2015, and completed the construction of the enhanced stage house before the commencement of the 2016 concert season. However, Trust neither rebuilt the backstage facilities nor returned them to a usable working condition. Other areas of the Pavilion also were not restored, including a VIP area containing private concessions and amenities that had existed next to the stage house. To remedy the lack of a backstage area, IMA constructed temporary backstage facilities at its own expense. Although IMA believed that Trust would reimburse it for the cost of those temporary facilities, Trust ultimately refused to do so.

IMA held 32 events at the Pavilion during the 2016 season. At trial, IMA introduced evidence that the renovations interfered with those events and that it lost significant revenue during the 2016 season as a result of the incomplete work.

On November 28, 2016, ownership of the Pavilion passed from Trust to the Commission. IMA paid Trust the entire $1.1 million Base Annual Payment for the 2016 year, but it did not pay the $300,000 Improvement Fee.

The Litigation

On December 19, 2016, IMA filed a two-count complaint against Trust in the Circuit Court for Howard County. Both counts alleged breach of contract. In Count I, IMA sought an equitable adjustment of the 2016 Base Annual Payment under § 12(a) of the Operating Agreement. IMA alleged that the incomplete renovations, including but not limited to Trust's failure to rebuild the backstage facilities after demolishing them, materially interfered with IMA's ability to operate concerts. In Count II, IMA sought payment of certain utilities bills for which it contended Trust was responsible, also based on the Operating Agreement.

Trust responded with a four-count counterclaim on February 3, 2017. In Count I, Trust sought recovery for the $300,000 "Improvement Fee" it contended IMA owed under § 3(c)(ii) of the Operating Agreement (as added by the First Amendment). In Count II, Trust sought damages for IMA's alleged failure to pay $17,601.00 in security fees owed

under a 2015 Parking License Agreement.[3] In Counts III and IV, Trust sought damages of, respectively, $11,100.00 and $3,000.00, for breaches of two separate Parking License Agreements, one entered for 2015 (Count III) and one for 2016 (Count IV).

At the close of discovery, both parties filed motions for summary judgment, both of which the circuit court denied. After a five-day bench trial, the court issued a written opinion resolving all issues other than the parties' competing claims for attorneys' fees. Regarding IMA's claim for an equitable adjustment of the Base Annual Payment, the court found that "[Trust]'s construction/renovation activities prior to the 2016 concert season caused a material interference with [IMA]'s Permitted Use." The court made the following factual findings:

> In October 2015, [Trust] demolished the stage house and the backstage facilities at [the Pavilion]. A renovated and expanded stage house was erected by [Trust] prior to the 2016 concert season, but the backstage facilities were not replaced.
>
> Brad Canfield, the [Vice] President of [IMA], credibly testified that without the backstage facilities, . . . [IMA] would not be able to operate the venue. . . . [Trust]'s demolition of the backstage facilities . . . resulted in having no permanent, or even temporary backstage facilities, and constituted a "material interference" with the Permitted Use, since concerts could not go forward without replacement of the backstage facilities, and as a direct result, concessions and merchandise could not be sold.
>
> [IMA] took it upon themselves to erect some temporary structures to fill in for the previous structures prior to the start of the 2016 concert season . . . so that the 2016 concert season would not have to be cancelled. [IMA] acted with the belief that [Trust] would reimburse the cost of the construction. . . .

[3] According to the counterclaim, Count II was premised on both the Operating Agreement and the 2015 Parking License Agreement. It ultimately appears that the parties and the circuit court considered the claim as arising under the parking license agreement. Regardless, neither party has raised any issue on appeal concerning this count, which appears to have played a very minor role in the litigation.

> It was not until . . . 16 days before the transfer of the property to [the Commission], that [Trust] sent a letter to [Mr. Canfield] that indicated for the first time that [Trust] would not cover any of the costs.

The court concluded that IMA was entitled to an equitable adjustment of the entire 2016 Base Annual Payment:

> In determining the appropriate "equitable adjustment" to the Base Annual Payment under the Operating Agreement, the Court examined [IMA]'s financial consequences:
>
> 1. The overall operating profit in 2016 was $1,956,211 lower than the average operating profit for the prior 3 years. . . .
>
> 2. The difficulty [IMA] experienced booking artists for the 2016 season: Canfield credibly testified that he had difficulty booking some performers due to the condition of the backstage facilities. . . . Further evidence of the difficulty [IMA] faced was evidenced by the reduction in the profitability per concert, which dropped by $15,000 per show from the three previous years. . . .
>
> 3. Cost of the temporary backstage facilities: [IMA] claims the costs were $479,000. [Trust] argues that the documents submitted would only support $354,000. The audited financial statements show $351,000 in 2016.
>
> The Court finds that the testimony of Canfield and the financial statements confirm that 2016 was not just a "bad season" as suggested by [Trust]. . . . [Trust]'s expert's analysis was not credible to the Court because he failed to isolate the year 2016 and compare it to the prior years. . . . The Court finds Canfield's testimony as to the impact of the construction on [IMA]'s ability to operate the concert venue in 2016 credible and persuasive.
>
> In light of [IMA]'s significant loss of profitability in the 2016 concert season, along with [IMA]'s costs incurred in placing temporary backstage facilities in place to be able to operate at any level, the Court awards [IMA] One Million One Hundred Thousand Dollars ($1,100,000.00) as an equitable adjustment of the 2015/2016 Annual Base Payment of the Operating Agreement.

The court also entered judgment for IMA in the amount of $60,496.87 on the other count of its complaint, the utilities claim, for a total award to IMA of $1,160,496.87.

Turning to Trust's claims, the court granted judgment in favor of Trust on Counts I and III of its counterclaim. On Count I, the court held that IMA was required to pay the $300,000 Improvement Fee for 2016. In support of that ruling, the court made the following factual findings:

> The Court is not persuaded that [IMA] was aware that the backstage would not be rebuilt by [Trust] at the time it entered the First Amendment. [IMA] was on notice of the proposed enhancements to the stage house. . . .
>
> The Court finds that there was consideration to [IMA] for the First Amendment in the improvements to the stage house and in the timing of those improvements. . . .
>
> [IMA] had the option in early 2016, when it became apparent that [Trust] would not be rebuilding the backstage facilities, to give its notice to terminate the Operating Agreement under Section 15A. It did not do so. Instead, [IMA] restored the backstage and sought an equitable adjustment of its Base Annual Payment under Section 12A of the Operating Agreement. After making the temporary backstage facilities, [IMA] went forward with the 2016 concert season and took advantage of the benefit of the enhanced renovation to the stage house. Having opted to proceed in this manner, [IMA] received the benefit of its bargain, through use of the enhanced renovations in the 2016 season, and having been compensated herein for the material interference demolition of the backstage facilities caused in the 2016 season.

The court therefore found IMA responsible to pay the $300,000 Improvement Fee.

The court also found in favor of Trust on Count III of the counterclaim, based on an admission by IMA's general manager, and ordered IMA to pay $9,000 in parking license fees owed under the 2015 Parking License Agreement. The court found in favor of IMA on Counts II and IV of the counterclaim.

After trial, the parties submitted competing motions for attorneys' fees. IMA claimed $641,859.55 in fees and Trust claimed $1,054,593.57.[4] The court held that IMA was the prevailing party in the litigation, awarded it the full amount of its claim, and awarded no fees to Trust. Both parties filed timely appeals.

DISCUSSION

In challenging the circuit court's award to IMA of an equitable adjustment of the Base Annual Payment, Trust argues that the court erred in: (1) denying its motion for summary judgment; (2) its rulings on the parties' respective motions for judgment at the end of trial; and (3) awarding IMA the entire amount of the 2016 Base Annual Payment as its equitable adjustment. Trust also challenges the court's decision to award the entirety of IMA's claim for attorneys' fees and none of Trust's claim. In its cross-appeal, IMA contends that the court erred in holding that it was obligated to pay the Improvement Fee. We begin our analysis by addressing the proper interpretation of key provisions of the Operating Agreement, the resolution of which will guide much of our remaining analysis.

I. THE TRIAL COURT PROPERLY INTERPRETED THE OPERATING AGREEMENT.

Trust's first three claims are all premised in some degree on fundamental disagreements with IMA and the circuit court regarding the proper interpretation of two related provisions of the Operating Agreement. "[T]he interpretation of a contract,

[4] In this commercial dispute involving only monetary damages, not counting fees incurred on appeal or in litigating their respective claims for fees, the parties thus incurred a total of $1,696,453.12 in attorneys' fees to pursue and defend against claims that, in the aggregate, totaled just over $1.6 million.

including the question of whether the language of a contract is ambiguous, is a question of law subject to *de novo* review." *Myers v. Kayhoe*, 391 Md. 188, 198 (2006). As such, we look at the contract anew, and "afford no deference to the circuit court's legal determinations." *Blood v. Columbus US, Inc.*, 237 Md. App. 179, 187 (2018). In doing so, we apply the objective law of contract interpretation. *Credible Behavioral Health v. Johnson*, 466 Md. 380, 393 (2019). "Under this approach, the primary goal of contract interpretation is to ascertain the intent of the parties in entering the agreement and to interpret 'the contract in a manner consistent with [that] intent.'" *Id.* (alteration in *Johnson*) (quoting *Ocean Petroleum, Co. v. Yanek*, 416 Md. 74, 88 (2010)). "We achieve that objective by considering the plain language of the disputed provisions in context, which includes not only the text of the entire contract but also the contract's character, purpose, and 'the facts and circumstances of the parties at the time of execution.'" *Ocean Petroleum*, 416 Md. at 88 (quoting *Pac. Indem. Co. v. Interstate Fire & Cas. Co.*, 302 Md. 383, 388 (1985)). We "strive to interpret contracts in accordance with common sense." *Johnson*, 466 Md. at 397 (quoting *Brethren Mut. Ins. v. Buckley*, 437 Md. 332, 348 (2014)).

A. Material Interference with the Permitted Use.

Trust first contends that the renovation activities could not possibly have "materially interfere[d] with the Permitted Use" of the Pavilion, for purposes of § 12(a), because IMA obtained the full benefit of its bargain. The logical progression of Trust's argument is: (1) under § 2(a), IMA's Permitted Use of the Pavilion is to hold "at least thirty (30) IMA Events" during each concert season; (2) IMA put on 32 events during the 2016 concert

season; thus, (3) IMA realized the benefit of its bargain. Trust's overly simplistic argument both misstates the Operating Agreement's definition of IMA's Permitted Use of the Pavilion and misidentifies what it means to "materially interfere" with that use.

First, § 2(a) does not define Permitted Use as the ability to hold at least 30 concerts. The Permitted Use is "producing musical events and any other non-musical events . . . (collectively, the 'IMA Events') and for food and beverage services and general merchandising in connection therewith." The provision then *requires IMA* to "use all commercially reasonable efforts to . . . provide at least thirty (30) IMA Events." In other words, the Permitted Use is IMA's right to put on events and to sell food, beverages, and merchandise; holding at least 30 events is a minimum use requirement placed on IMA. Moreover, as reflected in § 4 of the Operating Agreement, the intent of the parties was for IMA to operate the Pavilion "as a first class major concert amphitheater," not merely to open the doors 30 times.

Second, § 12(a) does not limit the definition of material interference to activities that prevent IMA from satisfying its minimum use requirements. Section 12(a): (1) requires Trust to schedule renovation activities "to occur during the Off-Season" and to "use commercially reasonabl[e] efforts to cause [the] principal construction and renovation activities to avoid interfering with IMA Events"; and (2) provides that if the renovation activities nonetheless "materially interfere with the Permitted Use, the applicable Base Payment Amount shall be equitably adjusted to reflect such material interference." Section 12(a) thus applies by its own terms to *any* material interference with

the Permitted Use, not only to interference that prevents IMA from meeting its minimum use requirement.

In arguing for a narrower definition of material interference, Trust refers us to *Black's Law Dictionary*, which defines "interference" as "[a]n obstruction or hindrance." "Interference," *Black's Law Dictionary* 971 (11th ed. 2019). Other dictionary definitions are in accord. *See* "Interference," *Merriam-Webster's Collegiate Dictionary* 652 (11th ed. 2014) (defining "interference" as "the act or process of interfering . . . : something that interferes: Obstruction" and defining "interfere" as "to interpose in a way that hinders or impedes"); "Interference," *New Oxford Am. Dictionary* 906 (3d ed. 2010) (defining "interference" as "the action of interfering or the process of being interfered with" and defining "interfere" as "prevent (a process or activity) from continuing or being carried out properly"). These definitions provide Trust no succor, however, because they define interference as something that makes performance of a task more difficult, not impossible.

Black's defines "material," as relevant here, as "[h]aving some logical connection with the consequential facts" or "[o]f such a nature that knowledge of the item would affect a person's decision-making; significant; essential." "Material," *Black's Law Dictionary* 1170 (11th ed. 2019). Again, other dictionaries are in accord. *See* "Material," *Merriam-Webster's Collegiate Dictionary* 765 (11th ed. 2014) ("[H]aving real importance or great consequences."); "Material," *New Oxford Am. Dictionary* 1079 (3d ed. 2010) ("[I]mportant; essential; relevant: . . . (of evidence or a fact) significant, influential, or relevant, esp. to the extent of determining a cause or affecting a judgment"); *see also Tharp*

v. State, 362 Md. 77, 111 (2000) (quoting with approval the definition of "material" in *Black's Law Dictionary*); *Herlson v. RTS Residential Block 5, LLC*, 191 Md. App. 719, 741-42 (2010) (same). We therefore agree with the circuit court that renovation activities need not rise to the level of precluding IMA from fulfilling its minimum use requirement to materially interfere with its Permitted Use of the Pavilion.

In effect, Trust argues that although IMA agreed to pay $1.1 million for the right to operate a "first class major concert amphitheater" during 2016, it could not seek an equitable adjustment to that amount unless renovation activities precluded it from hosting at least 30 events, regardless of the condition of the facilities or the extra expenses those activities required IMA to incur. The plain language of the Operating Agreement is to the contrary.

B. The Respective Roles of §§ 12(a) and 15(a) of the Operating Agreement.

In its second major point of disagreement with the circuit court as to the proper interpretation of the Operating Agreement, Trust contends that § 15(a), rather than § 12(a), applies to IMA's allegations of breach. In resolving that issue, we are guided by two important canons of contract construction. First,

> where two provisions of a contract are seemingly in conflict, they must, if possible, be construed to effectuate the intention of the parties as collected from the whole instrument, the subject matter of the agreement, the circumstances surrounding its execution, and its purpose and design. And, if a reconciliation can be effected by a reasonable interpretation, such interpretation should be given to the apparently repugnant provisions, rather than nullify any.

Heist v. E. Sav. Bank, FSB, 165 Md. App. 144, 151 (2005) (quoting *Chew v. DeVries*, 240 Md. 216, 220-21 (1965)); *see also Nat'l Union Fire Ins. of Pittsburgh v. David A. Bramble, Inc.*, 388 Md. 195, 209, 211 (2005) (restating "the principle that we will not unnecessarily read contractual provisions as meaningless," but rather will interpret provisions, "if possible, so as to give effect to all"). Second, "[w]here two clauses or parts of a written agreement are apparently in conflict, and one is general in character and the other is specific, the specific stipulation will take precedence over the general, and control it." *Heist*, 165 Md. App. at 151 (quoting *Fed. Ins. v. Allstate Ins.*, 275 Md. 460, 472 (1975)).

As noted, § 12(a) allows an equitable adjustment of the Base Annual Payment if renovation activities materially interfere with IMA's Permitted Use of the Pavilion. Section 15(a), on the other hand, provides that in response to a material default of Trust's "performance obligations under this Agreement," "IMA's sole and exclusive remedy shall be the right . . . to terminate this Agreement." Trust contends that its obligations to provide, among other things, a sufficient backstage and adequate access to concessions, merchandising, and other facilities, were "performance obligations," the default of which falls within the scope of § 15(a), not § 12(a). Trust argues further that applying § 12(a) to IMA's claims would render § 15(a) superfluous.

Sections 12(a) and 15(a) are easily reconcilable. For purposes of our analysis, we will assume that Trust is correct that, in the absence of § 12(a), IMA's allegations of breach would be governed by § 15(a), and that IMA therefore could not pursue any remedy for the breach other than termination of the Operating Agreement. That assumption is of no

moment, however, because § 12(a) exists and is addressed specifically to the major renovation project that the parties expressly contemplated might interfere with IMA's operation of the Pavilion. As discussed, § 12(a) addresses that potential interference in two ways: (1) by requiring Trust to take steps to avoid interfering; and (2) by providing for an equitable adjustment to the Base Annual Payment if the activities nonetheless materially interfered.

Section 15(a), by contrast, applies generally to Trust's breach of nearly any performance obligation for any reason. Applying § 15(a) to a material interference with the Permitted Use resulting from the renovation activities would effectively nullify the equitable adjustment remedy provided in § 12(a). The only reasonable interpretation of the Operating Agreement as a whole that gives effect to both of these provisions is that: (1) § 12(a)'s equitable adjustment remedy applies only to the narrow category of claims that are premised on a material interference with IMA's Permitted Use of the Pavilion caused by specified renovation activities; and, conversely, (2) § 15(a) applies to any other alleged breach of Trust's performance obligations, including (a) any breach of those obligations resulting from the renovation activities that does not rise to the level of material interference, and (b) any such breach that does not result from renovation activities. That interpretation gives effect to both provisions and to the objective expectations of a reasonable person interpreting the Agreement in the context in which it was reached.

Having resolved those two fundamental disagreements regarding the interpretation of key provisions of the Operating Agreement, we turn to Trust's specific claims of error.

II. THE CIRCUIT COURT DID NOT ERR IN DENYING TRUST'S MOTION FOR SUMMARY JUDGMENT.

We will first address Trust's contention that the trial court erred in denying its motion for summary judgment. On a motion for summary judgment, "[t]he court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f). "Although a trial court's decision to grant a motion for summary judgment is subject to *de novo* review on appeal, a trial court has discretionary authority to *deny* a motion for summary judgment in favor of a full hearing on the merits, even when the moving party 'has met the technical requirements of summary judgment.'" *Fischbach v. Fischbach*, 187 Md. App. 61, 75 (2009) (internal citation omitted) (quoting *Dashiell v. Meeks*, 396 Md. 149, 165 (2006)). "Thus, on appeal, the standard of review for a denial of a motion for summary judgment is whether the trial [court] abused [its] discretion and in the absence of such a showing, the decision . . . will not be disturbed." *Id.*

Trust's summary judgment argument concerning Count I of the complaint is premised on the two contract interpretation errors discussed above. Trust argues that it was entitled to summary judgment because: (1) "the sole and exclusive remedy for breach of a performance obligation was termination" of the Operating Agreement under § 15(a); and (2) the trial court erred in concluding Trust's actions constituted material interference, as "IMA failed to demonstrate any material facts that showed [Trust] materially interfered with IMA's Permitted Use." Having already demonstrated that § 12(a) governs material

interference with the Permitted Use resulting from the contemplated renovation activities, and that material interference can occur short of preventing IMA from satisfying its minimum use requirement, we conclude that the circuit court correctly denied Trust's motion for summary judgment regarding Count I.

Trust also contends that the circuit court erred in denying its motion for summary judgment regarding Count II of the complaint, although it barely discusses that count in its appellate briefs. Regardless, we find no abuse of discretion in the circuit court's decision to deny summary judgment and allow that count to proceed to trial.

III. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN DENYING TRUST'S MOTIONS FOR JUDGMENT AND GRANTING IMA'S MOTION FOR JUDGMENT ON IMA'S EQUITABLE ADJUSTMENT CLAIM.

We next turn to Trust's contention that the court erred in denying its motions for judgment regarding IMA's equitable adjustment claim, and granting IMA's motion for judgment on the same claim. In a bench trial, "[a] party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party." Md. Rule 2-519(a). "When a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by the court, the court may proceed, as the trier of fact, to determine the facts and to render judgment against the plaintiff or may decline to render judgment until the close of all the evidence." Md. Rule 2-519(b). "Unlike in a jury trial, a trial judge in a bench trial considering a Rule 2-519 motion for judgment 'is not compelled to make any evidentiary inferences in favor of the party against whom the

motion for judgment is made.'" *Saxon Mortg. Servs. v. Harrison*, 186 Md. App. 228, 262 (2009) (quoting *Bricker v. Warch*, 152 Md. App. 119, 135 (2003)).

"Review of the decision of the trial court on the evidence is governed by the 'clearly erroneous' standard set out in Rule 8-131(c) and the trial judge is 'allowed to evaluate the evidence as though he were the jury, and to draw his own conclusions as to the evidence presented, the inferences arising therefrom and the credibility of the witnesses testifying.'" *Bricker*, 152 Md. App. at 135-36 (quoting *Pahanish v. W. Trails, Inc.*, 69 Md. App. 342, 352 (1986)). "A trial court's factual findings are not clearly erroneous as long as they are supported by any competent material evidence in the record." *Saxon Mortg. Servs.*, 186 Md. App. at 262 (citing *Figgins v. Cochrane*, 403 Md. 392, 409 (2008)). The circuit court's conclusions of law, including interpretation of a written contract, are reviewed without deference. *Saxon Mortg. Servs.*, 186 Md. App. at 262-63; *Cattail Assocs. v. Sass*, 170 Md. App. 474, 486-87 (2006).

Trust moved for judgment on IMA's equitable adjustment claim at the close of IMA's case and again at the close of the evidence. Trust contends that the circuit court erred in denying those motions, and in granting IMA's cross-motion, because IMA failed to introduce evidence of material interference with IMA's Permitted Use. That argument, however, is premised largely on the same contract interpretation errors we have already addressed and, therefore, we conclude that the circuit court did not err in its legal conclusions regarding the interpretation of the Operating Agreement.

We also conclude that the circuit court did not clearly err in its factual findings, including its finding that the renovation materially interfered with the Permitted Use. The record supported the circuit court's findings as to the importance of the backstage facilities that Trust demolished and did not rebuild, as well as the additional effects of the renovation on IMA's ability to hold concerts and sell concessions. IMA's Vice President explained the importance of the facilities that were affected by the renovation activities; the difficulties IMA had operating as a result of the loss of those facilities; and additional expenses it incurred. The court credited all of that testimony. IMA also presented evidence that its operating income decreased in 2016 from a three-year average of around $2.4 million to less than $500,000, even though it held a similar number of concerts. Again, the court credited that testimony. Although Trust points to contrary testimony that could have supported a different finding, it is not "our function to weigh conflicting evidence" or to second-guess factual findings that are supported by the record. *See Goss v. C.A.N. Wildlife Tr.*, 157 Md. App. 447, 456 (2004) (citing *Bausch & Lomb, Inc. v. Utica Mut. Ins.*, 355 Md. 566, 586-87 (1999)). We therefore hold that in denying Trust's motions for judgment and granting IMA's motion for judgment, the circuit court neither committed legal error nor relied on any clearly erroneous factual findings.

IV. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN AWARDING IMA AN EQUITABLE ADJUSTMENT OF THE 2016 BASE ANNUAL PAYMENT.

Trust next challenges the circuit court's decision to award an equitable adjustment in the amount of the entire $1.1 million 2016 Base Annual Payment. Trust contends that the circuit court erred by misunderstanding IMA's operations and finances, ignoring

conflicting evidence, and admitting and relying on alleged hearsay evidence. In addition, Trust argues that IMA failed to present credible evidence regarding the cost of IMA's temporary facilities and that the circuit court erred in relying on the evidence IMA did present. We find no merit in any of these contentions, which mostly constitute pleas for us to re-weigh the evidence and come to a different conclusion from the finder of fact. That, of course, is not our role. *See Goss*, 157 Md. App. at 456 ("[U]nder the clearly erroneous standard, this Court does not sit as a second trial court, reviewing all the facts to determine whether an appellant has proven his case." (quoting *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996))).

The remedy available to IMA under § 12(a) is an equitable adjustment to the Base Annual Payment. "[A]s a general rule, . . . the award of equitable relief is discretionary with the court," and "any 'right' to equitable relief is subject to counter equities that may be relevant." *Noor v. Centreville Bank*, 193 Md. App. 160, 175 (2010). The trial court's discretion to award equitable relief is broad, *see Jackson v. 2109 Brandywine, LLC*, 180 Md. App. 535, 576 (2008) ("[T]he fact that restitution is an equitable remedy affords the trial court considerable discretion in calculating the amount of money that should be returned to the owner."), and its "balancing of the equities [is reviewed] for an abuse of discretion," *Serio v. Baystate Props.*, 209 Md. App. 545, 560 (2013) (brackets in *Serio*) (quoting *Royal Inv. Grp. v. Wang*, 183 Md. App. 406, 440 (2008)).

"The trial court is not only the judge of a witness' credibility, but is also the judge of the weight to be attached to the evidence." *Murphy v. 24th St. Cadillac Corp.*, 353 Md.

480, 497 (1999) (quoting *Ryan v. Thurston*, 276 Md. 390, 392 (1975)). "A trial court's factual findings are not clearly erroneous as long as they are supported by any competent material evidence in the record." *Saxon Mortg. Servs.*, 186 Md. App. at 262 (citing *Figgins*, 403 Md. at 409). Where such evidence is present, "the appellate court is bound by the trial court's factual findings and they will not be disturbed on appeal." *Murphy*, 353 Md. at 497. Under this standard, "we must 'consider the evidence produced at trial in a light most favorable to the prevailing party.'" *Id.* at 500 (quoting *Geo. Bert. Cropper v. Wisterco Invs.*, 284 Md. 601, 620 (1979)).

Here, having found that "[Trust]'s construction/renovation activities cause[d] a material interference with [IMA]'s Permitted Use during the 2016 concert season," the trial court proceeded to "determine the 'equitable adjustment' due to [IMA]." In making its determination, the court "examined [IMA]'s financial consequences." The court found that in 2016 IMA's operating profit declined by $1,956,211—a decrease of 82 percent—compared to the average of the prior three years. The court also identified evidence that IMA's profitability per concert had decreased from prior years, that at least one band that had performed consistently (and profitably) at the Pavilion in prior years declined to do so in 2016, and that IMA had spent hundreds of thousands of dollars building temporary backstage facilities. All of these findings of fact are supported by evidence in the record and are not clearly erroneous. Given the substantial deference afforded to the trial court, they also provide more than sufficient support for the court's decision to award an equitable adjustment of the $1.1 million 2016 Base Annual Payment.

Trust makes three arguments to support its contention that the circuit court erred in determining the amount of the equitable adjustment. We address each argument in turn, and conclude that none are meritorious.

A. The Trial Court Did Not Ignore Evidence.

Trust first argues that the circuit court erred as a matter of law by ignoring evidence that (1) IMA booked all 32 of its 2016 concerts during the preceding fall and winter and that none of those acts canceled, (2) IMA had not previously been successful in booking "top rated acts," and (3) IMA admitted that it was unable to determine in advance how successful any individual act would be. Trust contends that because IMA was able to put on 32 concerts during 2016, it "received the benefit of the bargain it entered into . . . when it executed the Agreement," and so is not entitled to any equitable adjustment of the Base Annual Payment.

The record reflects that the circuit court did not ignore the evidence on which Trust relied; instead, the court was unpersuaded by that evidence. As the finder of fact, that was the circuit court's prerogative. *See Yonga v. State*, 221 Md. App. 45, 96-97 (2015) (stating that "[i]t is virtually . . . impossible to find reversible error" when a circuit court is merely unpersuaded of something (emphasis omitted) (quoting *Starke v. Starke*, 134 Md. App. 663, 680-81 (2000))). IMA presented unrefuted evidence of a nearly $2 million reduction in its operating profit in 2016 as compared to the average of the prior three years. As already discussed, IMA also presented evidence that its lower financial performance in 2016 was a consequence of interference caused by the renovation activities, including the

absence of permanent backstage facilities, the need to provide (and pay for) temporary backstage facilities, and the resulting effect on concession and merchandise sales.

To be sure, Trust presented evidence that, if believed, would have undermined at least some of IMA's explanation for the drop in its operating profit. But contrary to Trust's argument on appeal, the circuit court did not ignore that evidence. For example, the circuit court expressly acknowledged that "[Trust]'s expert made numerous suggestions that this [drop in operating profit] was not causally related to the construction interference." The court noted, however, that the expert's testimony did not explain the full "82% drop in operating profit in 2016 compared to the average operating profit in the prior 3 years." Ultimately, the court found IMA's expert testimony more credible than Trust's.[5]

We similarly reject Trust's other contentions that the circuit court erred as a matter of law by ignoring evidence. Of course, the court "need not articulate each item or piece of evidence [it] has considered in reaching a decision." *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 426 (2007) (quoting *John O. v. Jane O.*, 90 Md. App. 406, 429 (1992), *abrogated on other grounds by Wills v. Jones*, 340 Md. 480 (1995)); *see also Wisneski v. State*, 169 Md. App. 527, 556 (2006) ("Nor must a trial court spell out every step in

[5] In presenting his analysis of IMA's financial performance, Trust's expert compared IMA's average concert revenue for the 2015 and 2016 seasons with its average concert revenue for the 2013 and 2014 seasons, and found "a net increase in concert revenues of Three point Five . . . Million Dollars or a sixteen percent change." But IMA did not argue that any renovation activities had a material effect on its use of the Pavilion in 2015, and no evidence was presented that it did. Accordingly, the trial court discounted Trust's evidence and identified the more appropriate comparison as that performed by IMA.

weighing the considerations that culminate in a ruling." (citing *Streater v. State*, 352 Md. 800, 821 (1999))). Thus, that the court did not specifically mention a piece of evidence does not mean the court ignored it. *Cf. Skevofilax*, 396 Md. at 426 ("The fact that the court did not catalog each factor and all the evidence which related to each factor does not require reversal." (quoting *John O.*, 90 Md. App. at 429)). Moreover, the particular pieces of evidence Trust raises on appeal do not have the dispositive effect it claims. For example, Trust argues that the circuit court ignored evidence that none of the 32 acts IMA booked for the 2016 concert season canceled. But the fact that no acts canceled once booked is not inconsistent with evidence that another act chose not to book at all, nor does it mean that the renovation activities did not interfere with the profitability of the acts that performed. Trust also contends that the court erred in measuring the impact of renovation activities based on operating profit and per show profitability, because IMA admitted that (1) it had predicted incorrectly that certain shows would succeed in the past, and (2) the success of its shows sometimes depended on factors outside of its control and predictive abilities, including "[t]he economy, how many people are touring, record cycles, [and] the stars aligning." But the circuit court was free to consider this evidence and come to a different conclusion—as, indeed, it did.

In short, IMA argued that a year in which its operating profit was down by almost $2 million from the prior three-year average was the result of the renovation activities' material interference with its operations, and it provided evidence to support that claim. Trust argued that the drop in operating profit may have been attributable to other things—

including poor decision-making, bad luck, and other external factors—and pointed to evidence that such things can affect the success of concerts and concert seasons. The circuit court was persuaded by IMA's evidence and unpersuaded by Trust's. As a result, the court found it equitable to award an adjustment of $1.1 million. We discern no error or abuse of discretion in that determination.

B. The Circuit Court's Decision Did Not Rely on Inadmissible Hearsay.

Trust next contends that the court's determination to award the entire Base Annual Payment as an equitable adjustment relied inappropriately on inadmissible hearsay. "A trial court's ruling on the admissibility of evidence is generally reviewed for abuse of discretion." *State v. Young*, 462 Md. 159, 169 (2018). "Yet, appellate review of whether a statement is hearsay is conducted without deference to the trial court." *Id.* at 170.

"Hearsay is a 'statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'" *Id.* (quoting Md. Rule 5-801(c)).

> There are two threshold questions when a hearsay objection is raised: "(1) whether the declaration at issue is a 'statement,' and (2) whether it is offered for the truth of the matter asserted. If the declaration is not a statement, or if it is not offered for the truth of the matter asserted, it is not hearsay and it will not be excluded under the hearsay rule."

Young, 462 Md. at 170 (quoting *Stoddard v. State*, 389 Md. 681, 688-89 (2005)). "[O]ut-of-court statements are generally not admissible to prove the truth of the matter asserted. Yet, they can be admitted if the statements are 'relevant and proffered not to establish the truth of the matter asserted therein, but simply to establish that the statement was made.'"

Young, 462 Md. at 170 (brackets omitted) (quoting *Lunsford v. Bd. of Educ.*, 280 Md. 665, 670 (1977)).

Trust contends that the circuit court erroneously allowed IMA to introduce into evidence alleged hearsay statements through Mr. Canfield's testimony. Trust's contention is based on the following passage from Mr. Canfield's direct testimony:

> Q. Was – was Merriweather's operations financially affected?
>
> A. Yes.
>
> Q. Okay how?
>
> . . .
>
> A. Several artists specifically reached out and asked how we were coming with construction, once we realized that it would not be complete we told them that we would be in a temporary situation at best. And they expressed displeasure with that.
>
> [TRUST'S COUNSEL]: I would object to hearsay Your Honor. They're not here, they weren't listed anywhere on the joint pretrial statement or in discovery.
>
> [IMA'S COUNSEL]: It goes to their state of mind Your Honor and that's exception to the hearsay rule.
>
> [TRUST'S COUNSEL]: Their finances were affected, I mean I think we can – can determine that by looking at the numbers Your Honor.
>
> THE COURT: Okay well the question was about financial impact and unhappy artists – no one cancelled correct?
>
> BY [IMA'S COUNSEL]:
>
> Q. Did you – were there artists that you would – in your estimation would have otherwise appeared?

[TRUST'S COUNSEL]: Now it calls for speculation Your Honor in addition to hearsay.

[IMA'S COUNSEL]: It's not –

THE COURT: Well I didn't hear the question.

BY [IMA'S COUNSEL]:

Q. Were there artists that Merriweather lost in 2016 as a result of its physical condition?

A. One of the biggest bands that we have that come every Summer is Phish, I had lengthy discussions with the lead singer of the band Phish.

THE COURT: Well don't tell me what he said. But they come every year?

THE WITNESS: Yes.

THE COURT: But they didn't come in 2016?

THE WITNESS: Once they heard we were not done, they chose to go somewhere else.

BY [IMA'S COUNSEL]:

Q. And they were touring that year?

A. It's a small industry, people know what's going on and when they heard that we weren't going to be done we were marked that year as a place to avoid.

Q. Okay. But – I guess my question was, but Phish was touring in 2016?

A. They were.

Q. They – and they – where – did they appear in the Baltimore-Washington area?

A. No.

The following day, during Trust's cross examination of Mr. Canfield, counsel for Trust returned to the subject and confronted Mr. Canfield with prior deposition testimony in which he had stated that Phish had advised another IMA officer, not Mr. Canfield himself, of the reason it did not return to the Pavilion in 2016. Once Mr. Canfield acknowledged his deposition testimony, Trust moved to strike his testimony from the day before:

> [TRUST'S COUNSEL]: Your Honor, I would move to strike his testimony yesterday about Phish, because the testimony yesterday was that the reason they didn't come back because of a direct conversation.
>
> THE WITNESS: I have direct knowledge from the lead singer specifically what he told me regarding Phish coming back to Merriweather. I spent an hour and half with them. I know exactly why they didn't come back. And though he didn't personally tell me after the fact that they didn't come back, he told me beforehand that would be a cause, us not finishing the renovations. He told me that personally and that's what happened.
>
> BY [TRUST'S COUNSEL]:
>
> Q. Then why did you testify here that –
>
> A. Because you specifically asked the question and I answered it the way you asked it. . . .
>
> But I had direct knowledge from the lead singer that if we didn't finish the renovations correctly, they wouldn't come back. So yes, I had direct knowledge from the band. I just don't have after the fact the way that you asked the question.
>
> [TRUST'S COUNSEL]: Your Honor, again, I believe that the question yesterday was whether he had direct knowledge of why did they not come back. He's talking about the discussion that was had beforehand about the renovations that Phish wanted to have and not the exact question that was asked yesterday.
>
> THE WITNESS: That's not my – that is not my recollection of the question.

> THE COURT: I don't recall with that much specificity how the question was phrased so I'm going to deny the motion.

On appeal, Trust argues that Mr. Canfield's testimony was hearsay and, therefore, the circuit court erred in not sustaining its objection to the testimony when it was first offered and not granting its motion the following day to strike that testimony. For several reasons, we disagree.

First, as the transcript reveals, the only hearsay objection Trust made was to Mr. Canfield's statement that "[s]everal artists specifically reached out and asked how we were coming with construction," and that they "expressed displeasure" when IMA informed them "that we would be in a temporary situation at best." Although the court never expressly sustained the objection, the court led counsel to reformulate the question, which resulted in counsel asking whether "there [were] artists that Merriweather lost in 2016 as a result of its physical condition."

Second, Trust did not raise a hearsay objection from that point forward, including to *any* question specific to the band Phish. "An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." Md. Rule 2-517(a). A party generally is required to object timely to each objectionable question to preserve its argument for appeal. *See, e.g.*, *State v. Robertson*, 463 Md. 342, 366 (2019). Mr. Canfield's direct testimony specific to Phish did not elicit a single objection. Indeed, Mr. Canfield testified, all without objection, that he "had lengthy discussions with the lead singer of the band Phish," and that the band had come to the Pavilion every previous year,

but that "[o]nce they heard we were not done [with the renovation], they chose to go somewhere else." Trust thus failed to preserve for appeal a hearsay objection to this testimony.

Third, although Trust moved to strike Mr. Canfield's testimony related to the band Phish the following day, it did not do so on hearsay grounds. Instead, Trust's motion to strike was based on an alleged inconsistency between Mr. Canfield's trial testimony and his earlier deposition testimony. When an objection is based on specific grounds, "[a]ll other grounds for the objection . . . are deemed waived." *Stevenson v. State*, 222 Md. App. 118, 141 (2015) (emphasis omitted) (quoting *Anderson v. Litzenberg*, 115 Md. App. 549, 569 (1997)). In now arguing that the court should have struck that testimony, Trust relies exclusively on its hearsay argument. *See id.* ("If counsel provides the trial judge with specific grounds for an objection, the litigant may raise on appeal only those grounds actually presented to the trial judge.").

Fourth, it was only during the discussion of the motion to strike that Mr. Canfield testified expressly about the content of statements made by Phish's lead singer. Not only did that testimony come in without objection, but it was actually elicited by Trust.

Finally, we observe that in rendering its ultimate decision on the equitable adjustment, the circuit court did not rely on any testimony about what the representative of any band said to Mr. Canfield or any other IMA personnel. Instead, the court relied only on Mr. Canfield's non-hearsay testimony "that at least one band, Phish, who had played at [the Pavilion] every year it toured, was on tour in 2016 and did not come to [the Pavilion]."

C. The Trial Court Did Not Err in Considering the Evidence of the Cost of Temporary Facilities.

In its final challenge to the circuit court's decision to award an equitable adjustment of the entire 2016 Base Annual Payment, Trust claims that the court erred in "rely[ing] upon the costs IMA allegedly incurred to obtain temporary backstage facilities." Specifically, Trust asserts that IMA gave three separate figures for the cost of obtaining temporary backstage facilities, that none of those figures was reliable, and that the court therefore erred in considering any of them. For two reasons, we disagree.

First, Trust's contention that these different cost figures are proof of a lack of reliability appears to be premised on a misunderstanding of what the numbers represent. IMA claimed at trial that it incurred $479,450.78 in total temporary expenses, itemized to include showers and restrooms, trailers, trailer moving, stone and paving, temporary power, new lights, temporary plumbing and fencing, sod, fire service, and trailer painting. Eleven months before trial, IMA had submitted a response to an interrogatory in which it claimed that it had expended $417,000 "to furnish temporary artist dressing rooms, showers, and restrooms." The answer does not itemize the inputs into that number, but the description suggests that it did not include all of the items IMA included in its damages claim at trial. The third figure Trust identifies, $351,318, is the amount IMA listed in its 2016 audited financials for the line item "[t]emporary structure." Neither of the parties points us to any explication of that figure in the record. The minimal description provided in the financials does not convince us that it was intended to cover the same scope as either

of the other amounts. Trust has thus not persuaded us that any of these figures is inconsistent with the others and, therefore, unreliable.

Second, the circuit court considered those figures as part of its analysis to determine the appropriate amount of the equitable adjustment to the Base Annual Payment. For that purpose, what is most relevant is the general magnitude of the amount IMA spent to remedy Trust's destruction of, and failure to replace, the essential backstage facilities. Trust has not presented us with any cause to question either that IMA was required to spend hundreds of thousands of dollars just to provide those essential facilities or that those expenses were appropriate for the circuit court to consider in determining the amount of the equitable adjustment. We therefore will affirm the circuit court's award to IMA of an equitable adjustment in the amount of the entire 2016 Base Annual Payment.

Trust's final contention on appeal relates to the trial court's award of attorneys' fees. Because our resolution of IMA's cross-appeal necessarily has implications for that analysis, we turn first to that cross-appeal.

IV. THE CIRCUIT COURT CORRECTLY DETERMINED THAT IMA IS REQUIRED TO PAY THE IMPROVEMENT FEE.

In its cross-appeal, IMA contends that the circuit court erred in holding that it was required to pay the $300,000 "Improvement Fee," for two reasons. First, IMA argues that the First Amendment to the Operating Agreement, in which it undertook to pay the Improvement Fee, was not supported by consideration. Second, IMA contends that Trust

breached its obligations under the Operating Agreement, thus relieving IMA of its promise to pay the Improvement Fee. We address each argument in turn.[6]

A. The First Amendment Was Supported by Consideration.

IMA first argues that there was no consideration for its promise to pay the Improvement Fee. In essence, IMA contends that Trust did not make any commitments in the First Amendment that it had not made already by virtue of agreements with other parties, and so Trust's promise to do those same things provided no benefit to IMA. Thus, according to IMA, its promise to pay Trust up to $900,000 in Improvement Fees was essentially gratuitous.[7]

"In Maryland either detriment to the promisor or benefit to the promisee is sufficient valuable consideration to support a contract." *Shimp v. Shimp*, 287 Md. 372, 385 (1980). "[M]utual promises in each of which the promisor undertakes some act or forbearance that will be, or apparently may be detrimental to the promisor or beneficial to the promisee, and neither of which is rendered void by any rule of law other than that relating to consideration, are sufficient consideration for one another." *Id.* at 386 (quoting *Hercules Powder Co. v. Harry T. Campbell Sons Co.*, 156 Md. 346, 365 (1929)); *see also* Md. Law

[6] Trust urges us to dismiss IMA's cross-appeal because IMA's brief fails to set forth the standard of review applicable to that claim. We decline to do so.

[7] As noted, in addition to the $300,000 Improvement Fee required if the transfer of ownership to the Commission was not completed by October 31, 2016, the First Amendment required additional Improvement Fee payments of $300,000, $200,000, and $100,000, respectively, if the transfer was not completed by October 31, 2017, 2018, and 2019. Because the transfer was completed in November 2016, those other fees never came due.

Encyclopedia *Contracts* § 38 ("Mutual promises, whereby the promisor undertakes an act or forbearance detrimental to the promisor or beneficial to the promisee, generally constitute sufficient consideration for one another. Covenants and promises in a bilateral contract are considered mutually dependent, and, the respective promises constitute the consideration for each other.").

Of course, only "a binding promise may serve as consideration for another promise." *Holloman v. Circuit City Stores*, 391 Md. 580, 590 (2006). An illusory promise—one that appears to be binding but does not actually bind or obligate the promisor—cannot serve as consideration. *Id.* at 590-91. "[A] promise to do, or actually doing that which a party to a contract is already under legal obligation to do, is not a valid consideration to support the promise of the other party to the contract to do additional work or to pay additional compensation for such performance." *Berger v. Burkoff*, 200 Md. 561, 567 (1952). Nevertheless, "[t]he undertaking or doing of anything beyond what one is already bound to do, though of the same kind and in the same transaction, is a good consideration." *Shimp*, 287 Md. at 386 (quoting *Hercules Powder Co.*, 156 Md. at 365).

The First Amendment is a straightforward contractual undertaking that purports to add to the Operating Agreement one additional commitment on behalf of each of the parties. First, the First Amendment provides that Trust

> shall undertake certain improvements *on behalf of and for the benefit of IMA* pursuant to, and as described in, [specified contract documents between Trust and a construction company].

(Emphasis added). The Amendment conditions that new obligation on Trust's receipt of sufficient funding from the Commission to complete the renovations, once Trust itself has spent at least $9.5 million. If such funding were not provided, the First Amendment permits Trust to avoid default by "restor[ing] the stage and the backstage facilities to a usable, good working condition substantially similar to what previously existed."

Second, the First Amendment requires IMA to pay the identified Improvement Fees if the transfer of the property from Trust to the Commission has not been completed by the respective deadlines.

On its face, the First Amendment thus includes consideration from both parties: Trust promises to perform certain additional improvements for IMA's benefit and, in return, IMA promises to pay Improvement Fees under certain conditions. The circuit court found expressly that the renovations Trust promised in the First Amendment were "enhanced renovations [that] increase[d] the size of the stage beyond that contemplated in the original plan," and that the First Amendment "also caused the renovation to happen well in advance of the planned time, which was a benefit to [IMA]."

IMA makes a series of interconnected arguments as to why, notwithstanding the mutuality of the contract language and the circuit court's factual finding, Trust's promise in the First Amendment was illusory. First, it contends that Trust was already obligated to undertake the same improvements through commitments it had made to the Commission and to Howard County. However, the evidence on this point was at best mixed, and included testimony that the improvements referenced in the First Amendment were

enhancements that exceeded what Trust had agreed to previously. The circuit court was entitled to credit that evidence.[8]

Second, IMA contends that Trust had already received payment for the enhanced renovations to the stage, and so its agreement to carry out a task for which it had already been paid was not valid consideration. IMA does not explain this argument, nor does it identify any record evidence to support its claim. Moreover, the provision of a benefit to IMA is consideration even in the absence of any corresponding detriment to Trust. *See Shimp*, 287 Md. at 385 ("[E]ither detriment to the promisor or benefit to the promisee is sufficient valuable consideration to support a contract."). IMA does not seriously argue that the planned enhanced renovations were not of benefit to it.

Third, IMA contends that Trust's agreement to transfer ownership of the Pavilion to the Commission more quickly than originally contemplated provided no palpable benefit to IMA. But the timing of the transfer was linked to the timing of the renovations and, in particular, to Trust's commitment to continue work on the enhanced renovations. The circuit court was entitled to credit evidence that the acceleration of the Phase II renovations schedule was of benefit to IMA.

Fourth, IMA contends that it agreed to pay the Improvement Fee only if Trust "built the enhanced stage house and, at least, restored the back of the house to its original

[8] Notably, as the circuit court observed, the parties identified the scope of the improvements called for in the First Amendment by reference to documents that were not included in the record. As a result, the circuit court was unable to consult those documents to determine the scope of work they contemplated.

condition." Because Trust did not restore the backstage area to its original condition, IMA contends, there was a failure of consideration for its obligation to pay the Improvement Fee. The plain language of the contract refutes IMA's argument. The only condition in the First Amendment applicable to IMA's obligation is that the Pavilion "ha[d] not transferred from [Trust] to the [Commission] on or before October 31, 2016 . . . *regardless of the status of construction*." (Emphasis added).

In sum, we are unpersuaded that the trial court erred in finding that there was consideration for the First Amendment. *See* Md. Law Encyclopedia *Contracts* § 36 ("The questions whether a consideration was given for a promise or agreement and its sufficiency to sustain or support the promise or agreement are questions of fact." (citing *Snyder v. Cearfoss*, 187 Md. 635, 644 (1947))).

B. IMA Was Not Excused from Paying the Improvement Fee.

IMA alternatively argues that even if there was consideration for its promise to pay the Improvement Fee, Trust's breach of its corresponding obligation to complete the enhanced renovations—or at least return the backstage area to its previous condition—relieved IMA of the obligation to pay the Improvement Fee. Specifically, IMA contends that because Trust demolished the backstage facilities and then informed IMA that it had no intention of rebuilding them, IMA was not required to pay the Improvement Fee.

In general, where one party has materially breached a contract, the other party is no longer obligated to perform. *See Barufaldi v. Ocean City Chamber of Commerce*, 196 Md. App. 1, 26 (2010) (holding one party could not be liable for his breach where other party

had already materially breached the contract); *see also Sealock v. Hackley*, 186 Md. 49, 53 (1946) ("Repudiation by one party to an executory contract . . . will excuse performance by the other."); *Della Ratta, Inc. v. Am. Better Cmty. Devs.*, 38 Md. App. 119, 137 (1977) (holding that "there was no duty of performance" where "[t]he express condition precedent to [that] performance" had "not . . . been performed or excused"). "A breach is material when it 'is such that further performance of the contract would be different in substance from that which was contracted for.'" *Barufaldi*, 196 Md. App. at 23 (other internal quotation marks omitted) (quoting *Dialist Co. v. Pulford*, 42 Md. App. 173, 178 (1979)).

Importantly, however, "the rights and liabilities of the parties may be governed by an express stipulation in the contract indicating what the effect of a breach will be." Md. Law Encyclopedia *Contracts* § 142 (citing *Cover v. Taliaferro*, 142 Md. 586, 591-92 (1923)). The First Amendment is an amendment to the Operating Agreement, not a stand-alone agreement. As such, the First Amendment provides expressly that, except with respect to the provision it added (and a change of address for Trust), "[a]ll other terms and conditions [of the Operating Agreement] shall remain in full force and effect." Those other terms include the limitations on relief available to IMA: (1) an equitable adjustment of the Base Annual Payment, under the circumstances covered by § 12(a); and (2) optional termination for a default covered by § 15(a). Nowhere in either of those provisions or elsewhere in the agreement is IMA permitted to withhold performance of any of *its* obligations under the Operating Agreement based on a breach by Trust. Nor is IMA's

obligation to pay the Improvement Fee contingent on *anything* other than the passage of October 31, 2016 without transfer of ownership of the Pavilion to the Commission.

Notably, although IMA's remedies under § 15(a) are expressly limited to termination, Trust's remedies for non-performance by IMA, set forth in § 15(b), include the right to "avail itself of any and all remedies at law, in equity or elsewhere under this Agreement." The asymmetric nature of those remedies provisions, which we must presume was intentional, further supports our conclusion that the Operating Agreement does not permit IMA to withhold payment of the Improvement Fee based on a breach by Trust.[9]

In short, we discern no error in the circuit court's determination that IMA breached its obligation to pay the Improvement Fee.

V. THE TRIAL COURT DID NOT ERR BY AWARDING IMA ATTORNEYS' FEES AND DENYING TRUST'S REQUEST FOR ATTORNEYS' FEES.

We turn finally to the trial court's resolution of the parties' dueling requests for attorneys' fees. Trust challenges both the court's decision to award IMA the entire amount of fees it requested and its denial of any fee recovery to Trust. The central question in dispute is whether only IMA was a prevailing party entitled to recover fees, as the trial

[9] IMA argues that even if Trust had not actually breached its obligation to restore the backstage area, it anticipatorily breached that obligation by informing IMA that it would not restore the backstage area. In light of our conclusion that withholding of the Improvement Fee is not a remedy available to IMA, we need not address that alternative contention.

court found, or whether both IMA and Trust were prevailing parties with respect to different aspects of the litigation.

"As concerns the grant of attorney fees, Maryland follows the common law 'American Rule,' which states that, generally, a prevailing party is not awarded attorney's fees." *Nova Research, Inc. v. Penske Truck Leasing Co.*, 405 Md. 435, 445 (2008). One exception to the American Rule is where "the parties to a contract have an agreement to that effect." *Id.* (quoting *Thomas v. Gladstone*, 386 Md. 693, 699 (2005)). A common type of contractual fee-shifting provision mandates an award of attorneys' fees to the "prevailing party" in litigation that relates to or arises out of the contract.[10] *See, e.g.*, *Weichert Co. of Md. v. Faust*, 419 Md. 306 (2011) (applying a "prevailing party" fee-

[10] Many fee-shifting statutes also permit or require an award of attorneys' fees to the "prevailing party" in litigation. *See, e.g.*, 42 U.S.C. § 1988(b) (2018) (providing that "[i]n any action or proceeding to enforce a provision of" certain enumerated civil rights laws, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs"); Md. Code Ann., State Gov't § 20-1202(d) (2014 Repl., 2019 Supp.) ("In a civil action under this section, the court may award the prevailing party reasonable attorney's fees, expert witness fees, and costs."); Md. Code Ann., Real Prop. § 9-303(b)(2), (c) (2015 Repl., 2019 Supp.) (providing that a court may "award to the prevailing party" (i) "[i]nterest from the date the court determines that the amount owed was due"; (ii) "[a]ny reasonable costs incurred"; and, upon a determination of bad faith, (iii) "reasonable attorney's fees").

"The Court of Appeals has drawn a firm line between contractual fee-shifting cases, which arise out of a private agreement, and statutory fee-shifting cases, which involve some overriding public policy." *Ochse v. Henry*, 216 Md. App. 439, 456 (2014). While statutory fee-shifting provisions "serve some greater, legislatively-established social purpose" by "encourag[ing] attorneys to take on cases that might otherwise be financially undesirable," *id.*, "[a] contractual fee-shifting provision . . . is simply an agreement between private parties to pay the attorneys' fees and costs reasonably incurred in the course of litigation," *id.* at 458 (quoting *Cong. Hotel Corp. v. Mervis Diamond Corp.*, 200 Md. App. 489, 505 (2011)).

shifting provision in an employment agreement); *Ochse v. Henry*, 216 Md. App. 439 (2014) (applying a "prevailing party" fee-shifting provision in a contract of sale).

For purposes of a claim for attorneys' fees, "a litigant is a 'prevailing party' if he succeeds 'on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" *Royal Inv. Grp. v. Wang*, 183 Md. App. 406, 457 (2008) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). "A determination of prevailing party status is a question of law," which this Court reviews without deference. *Md. Green Party v. State Bd. of Elections*, 165 Md. App. 113, 128 (2005).

In reviewing an award of attorneys' fees pursuant to contract, we apply the following framework:

> Contractual fee-shifting provisions providing for awards of reasonable attorneys' fees and costs to the prevailing party are generally valid and enforceable. *See Myers*[*v. Kayhoe*], 391 Md. [188,] 207[(2006)]. We interpret contracts under the objective theory of contract interpretation, which provides that "unless a contract's language is ambiguous, we give effect to that language as written without concern for the subjective intent of the parties at the time of formation." *Ocean Petroleum, Co. v. Yanek*, 416 Md. 74, 86 (2010) (citing *Cochran v. Norkunas*, 398 Md. 1, 16 (2007)). "In interpreting a contract provision, we look to the entire language of the agreement, not merely a portion thereof." *Nova Research, Inc. v. Penske Truck Leasing Co.*, 405 Md. 435, 448 (2008) (citing *Jones v. Hubbard*, 356 Md. 513, 534-35 (1999)). We consider the language of the contract in its "customary, ordinary, and accepted meaning[.]" *Fister v. Allstate Life Ins. Co.*, 366 Md. 201, 210 (2001) (citations omitted); *see also Nova Research*, 405 Md. at 448. The language is ambiguous if, "when viewed from [a] reasonable person perspective, that language is susceptible to more than one meaning." *Ocean Petroleum*, 416 Md. at 87 (citing *United Servs. Auto. Ass'n v. Riley*, 393 Md. 55, 80 (2006)).

Plank v. Cherneski, ___ Md. ___, Misc. No. 3, Sept. Term 2019, 2020 WL 3967980, at *30 (July 14, 2020).

Where a "provision in the parties' contract plainly states that the prevailing party '*shall* be entitled to receive reasonable attorney's fees from the other party,'" "the trial court d[oes] not have discretion to refuse to award fees altogether." *Myers*, 391 Md. at 207-08. But "[t]he party requesting fees has the burden of providing the court with the necessary information to determine the reasonableness of its request." *Id.* at 207. "[T]he determination of reasonableness is a factual determination that will not be overturned unless clearly erroneous." *Plank*, 2020 WL 3967980, at *29.

A. The Trial Court Correctly Determined that IMA Was the Sole Prevailing Party with Respect to All Claims in the Litigation Related to the Operating Agreement.

Trust's contentions on appeal require us to resolve two separate questions: (1) How many prevailing parties were there in this litigation? and (2) How do we determine who is the prevailing party? We address each in turn.

1. Section 26 Contemplates a Single Prevailing Party with Respect to All Claims Relating to the Operating Agreement.

We begin with § 26 of the Operating Agreement, which is the primary focus of both parties' arguments. In relevant part, § 26 states:

> Attorneys' Fees. If either [Trust] or IMA institutes any action or proceeding against the other relating to the provisions of this Agreement or any default hereunder, the non-prevailing party in such action or proceeding shall reimburse the prevailing party for the reasonable expenses of attorneys' fees and all costs and disbursements incurred therein by the prevailing party, including without limitation, any such fees, costs or disbursements incurred on any appeal from such action or proceeding.

Section 26 thus contemplates that in "any action or proceeding" that is "institute[d]" by either party, there will be a prevailing party and a non-prevailing party, and the latter will be obligated to pay the reasonable attorneys' fees of the former.

The parties' dispute centers on what constitutes an "action or proceeding" for purposes of § 26. IMA contends that the circuit court correctly determined that § 26 contemplates only a single prevailing party—"*the* prevailing party" (emphasis added)—for the litigation as a whole, and that IMA was that party. Trust argues that § 26 contemplates the possibility of multiple prevailing parties—one for each "action *or* proceeding" (emphasis added)—and that IMA and Trust each prevailed as to different proceedings within the lawsuit. Relying on the definition of "proceeding" in the Maryland Rules as "any part of an action,"[11] Md. Rule 1-202(w), Trust contends that the circuit court should have treated the litigation as a series of individual proceedings, identified a prevailing party as to each, and then calculated an award of attorneys' fees for each proceeding based on the time records submitted by each party. By way of example only, Trust contends that it should have been awarded attorneys' fees for prevailing on, at a minimum, two of the four counts of its counterclaim—one of which was unrelated to the Operating Agreement—a motion to compel discovery, and a motion to strike an amended complaint.

[11] As to a civil matter, the Rules define "action" as "collectively all the steps by which a party seeks to enforce any right in a court." Md. Rule 1-202(a).

We conclude that "action or proceeding," as used in § 26, encompasses all claims in a lawsuit that relate to the Operating Agreement or an alleged default under that agreement. As an initial matter, we observe that Trust's interpretation of "proceeding" to require that fees be allotted separately for every measurable subset of an "action" would render the term "action" superfluous, because fees would always be assessed at the level of the proceedings within the action, rather than the action as a whole. Trust's construction thus "runs afoul of our long-standing tenet of contractual interpretation that provisions of a contract are to be interpreted, if possible, so as to give effect to all." *Nat'l Union Fire Ins. of Pittsburgh v. David A. Bramble, Inc.*, 388 Md. 195, 211 (2005). Instead, the use of the disjunctive "or" between the terms suggests that "proceeding" is intended to cover, in addition to civil actions brought in a court of law, other proceedings, such as arbitrations. *Cf. Plank*, 2020 WL 3967980, at *31 ("Maryland courts generally interpret 'or' in the disjunctive sense when they construe statutes. 'Or' is a conjunction '[u]sed to indicate an alternative, usually only before the last term of a series . . . .'" (quoting *SVF Riva Annapolis, LLC v. Gilroy*, 459 Md. 632, 642 (2018))); *Gannett Fleming, Inc. v. Corman Constr.*, 243 Md. App. 376, 397 (2019) (distinguishing between "arbitration proceedings" and "civil actions at law").

Trust's construction of "proceeding" is also inconsistent with the remainder of § 26, which allows for attorneys' fees only when either party to the Operating Agreement "*institutes* any action or proceeding against the other *relating to the provisions of this Agreement or any default hereunder*." (Emphasis added). Thus, an "action or proceeding"

covered by the provision must be capable of being "institute[d]"; and it must be instituted for the identified purpose, i.e., to resolve a dispute relating to the Operating Agreement. It would be quite unnatural to read that language, in context, as referring to individual skirmishes within a lawsuit. *Accord Mountain Air Enters. v. Sundowner Towers, LLC*, 398 P.3d 556, 563 (Cal. 2017) ("Applying such an interpretation of 'proceeding' . . . could theoretically authorize multiple fee awards in a single case, a result inconsistent with the conventional understanding of how contractual attorney fees are awarded."). Such battles occur within the confines of the lawsuit, rather than being "institute[d]" anew;[12] and they generally relate to the conduct of the lawsuit itself or the prosecution of claims within the lawsuit, not independently to the "Agreement or any default hereunder."[13] Moreover, at least in most cases, it would make little sense to refer to one who wins one or more procedural victories in the life of a lawsuit, but loses on the ultimate merits, as "prevailing" in any real sense.

We further observe that Trust's interpretation of § 26 would be quite burdensome. The Court of Appeals has echoed the Supreme Court's admonition that a "determination of fees 'should not result in a second major litigation.'" *Christian v. Maternal-Fetal Med.*

[12] The *New Oxford American Dictionary* defines "institute" as "to set in motion or establish." "Institute," *New Oxford Am. Dictionary* 901 (3d ed. 2010).

[13] By way of example, the two motions for which Trust says it was the prevailing party were a motion to compel discovery and a motion to strike. In the discovery motion, Trust sought to compel IMA to produce certain documents and other information. And in the motion to strike, Trust sought to strike IMA's amended complaint. Those motions thus related directly to the conduct of the lawsuit, not to the Operating Agreement or a default under it.

Assocs. of Md., 459 Md. 1, 36 (2018) (quoting *Fox v. Vice*, 563 U.S. 826, 838 (2011)). Yet that is precisely what would ensue if the parties were required to litigate dueling claims for attorneys' fees based on who prevailed in every preliminary skirmish throughout the life of a civil action. The problems inherent in such a procedure would be amplified by the difficulty of allocating time and expenses for activities that will necessarily relate both to the ultimate merits as well as to one or more preliminary motions. Disputes also surely would arise over who prevailed on individual motions that were successful only in part. Although the Court's statement in *Christian* was made in the context of a statutory claim for attorneys' fees, we are reluctant to conclude that private parties entering a contractual relationship would intend to impose such an unusual, burdensome, and costly procedure in the absence of language clearly saying so.[14]

In the alternative, Trust argues that we should at least recognize a different prevailing party for each separate claim made in the litigation. But Trust's alternative argument is not grounded in the language of § 26, which mandates an award of attorneys' fees to the prevailing party "in such action or proceeding." The unit of consideration for

[14] Notably, Trust's attorneys appear not to have kept their time, or presented it to the circuit court, in a manner that would allow the entries to be assessed in the way Trust now claims is required. Trust contends that it was the circuit court's job, in the first instance, to sift through all of the billing records submitted by both parties to make allocation decisions among claims. But Trust does not suggest any way in which the court reasonably could have done so based on the information provided. *Cf. Christian*, 459 Md. at 39 (cautioning that in resolving fee disputes, "courts . . . should not become 'green-eyeshade accountants'" (quoting *Fox*, 563 U.S. at 838)). Even if we otherwise agreed with Trust that allocation was required—which we do not—we would reject its argument that the circuit court bore the responsibility to undertake that allocation exercise in the first instance.

the assessment of attorneys' fees under § 26 is thus the entire "action or proceeding," not each individual claim within it. We therefore reject Trust's interpretation of "proceeding," and conclude that this lawsuit constitutes a single "action or proceeding" for purposes of § 26.

Although we rely on the language of § 26 in determining that there must be a single prevailing party as to all claims in the lawsuit that relate to the Operating Agreement, our ruling is consistent with other courts' treatment of claims for attorneys' fees made under similar contractual provisions, statutes, and rules.[15] Indeed, our Court of Appeals recently affirmed a circuit court's determination that the defendants in an action were prevailing

[15] *See, e.g.*, *Stitching Mayflower Recreational Fonds v. Newpark Res., Inc.*, 917 F.2d 1239, 1248 (10th Cir. 1990) (holding that under contract language requiring an award to "the prevailing party" in "any dispute between the parties hereto," "there can generally be only one 'prevailing party,'" and that "the court should consider all of the contract claims together in making a determination of who is the prevailing party"); *Frog Creek Partners v. Vance Brown, Inc.*, 141 Cal. Rptr. 3d 834, 856 (Ct. App. 2012) (under California's governing statute, even "[w]here multiple independent contracts . . . provide[] an independent entitlement to fees, . . . each contract still supports only one fee award in a given lawsuit"); *Wheeler v. T.L. Roofing, Inc.*, 74 P.3d 499, 503 (Colo. App. 2003) (stating that "fee-shifting provisions are . . . not intended to result in each side paying the other's fees. Instead, these provisions generally contemplate that the prevailing party will be entitled to recover its attorney fees and that there will be one winner and one loser regarding payment of those fees."); *Reinhart v. Miller*, 548 So. 2d 1176, 1177 (Fla. Dist. Ct. App. 1989) (holding that "[t]here could not be two prevailing parties" "under one contract"); *Shore v. Peterson*, 204 P.3d 1114, 1125 (Idaho 2009) ("In determining which party prevailed where there are claims and counterclaims between opposing parties, the court determines who prevailed 'in the action'; that is, the prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis."); *R.T. Nielson Co. v. Cook*, 40 P.3d 1119, 1126-27 (Utah 2002) (reiterating that "there can generally be only one prevailing party," and holding that "only one prevailing party was contemplated" under the subject fee-shifting provision because, among other things, "[p]revailing party is singular in form, not plural").

parties, even though some of the plaintiff's claims had succeeded, where the circuit court had decided correctly that the successful claims "were minor and insignificant in comparison" to the unsuccessful claims. *Plank*, 2020 WL 3967980, at *32.

Nevertheless, § 26 does provide an important limitation on the scope of attorneys' fees that may be recovered by the prevailing party. That provision applies to "any action or proceeding . . . relating to the provisions of this [Operating] Agreement or any default hereunder." For efficiency, litigants often combine claims that are either loosely related or even entirely unrelated in a single civil action. Here, for example, Counts II, III, and IV of Trust's counterclaim were based on two separate parking license agreements. We interpret § 26 as applicable generally only to claims that "relat[e] to the provisions of th[e Operating] Agreement or any default hereunder," and not to unrelated claims that may be joined for efficiency in the same lawsuit.[16] Before the circuit court, IMA conceded that point and asserted that it did not include in its request for attorneys' fees any amounts it attributed to its defense of those counts.

[16] Under the common core of facts doctrine, discussed below in footnote 21, a prevailing party may recover attorneys' fees associated with *related* claims that would not independently qualify for fee-shifting under a contractual provision. *See, e.g.*, *Plank* 2020 WL 3967980, at *32-34; *Ocshe*, 216 Md. App. at 459; *Weichert Co. of Md. v. Faust*, 191 Md. App. 1, 18 (2010) ("If the court finds that two claims are factually related, the [common core of facts] doctrine not only awards the costs common to all claims, but also awards costs that arise solely by virtue of the non-fee-shifting claim."), *aff'd*, 419 Md. 306 (2011). Where appropriate, a court applying that doctrine could award attorneys' fees incurred in litigating claims that do not themselves relate to an agreement containing a similar fee-shifting provision, but that share a common core of facts with claims that do. *Id.* Here, however, IMA only sought fees incurred in connection with claims relating to the Operating Agreement.

In arguing that the circuit court erred in not identifying a separate prevailing party for each claim in the litigation, Trust relies on inapposite authority. Trust cites *Mohican Oil & Gas v. Scorpion Exploration & Production*, a decision of Texas's intermediate appellate court, for the proposition that there sometimes can be multiple prevailing parties entitled to an award of attorneys' fees under a single contract, if the claims involve multiple, unrelated disputes.[17] 337 S.W.3d 310, 322 (Tex. App. 2011). We do not disagree, but whether that is so depends on the language of the contract. In *Mohican Oil*, the contract language at issue was: "If this Contract is placed in the hands of an attorney for collection of any sums due hereunder, or suit is brought on same, or sums due hereunder are collected through bankruptcy or arbitration proceedings, then the prevailing party shall be entitled to recover reasonable attorney's fees and costs." *Id.* at 321. That contract language leaves open whether status as a prevailing party should be judged based on the action or proceeding as a whole, as opposed to individual claims. Section 26, by contrast, requires "*the* non-prevailing party *in such action or proceeding*" to pay the attorneys' fees "incurred *therein* [i.e., in such action or proceeding] by *the* prevailing party." (Emphasis added).

In sum, we interpret § 26 of the Operating Agreement to provide for the award of attorneys' fees to a single prevailing party on all the claims in this lawsuit that are related

[17] Trust also relies on *Hoffman v. Gluck*, 20 Md. App. 284, 293 (1974) for the proposition that—in Trust's words—"there can indeed be more than one prevailing party in a contractual dispute." Contrary to Trust's contention, *Hoffman* did not involve an award of attorneys' fees. Instead, *Hoffman* involved the allocation of costs by Rule in the discretion of the court, *id.*, and says nothing about the interpretation of a contractual fee-shifting provision.

to the Operating Agreement and the alleged breaches of that agreement. Those claims include Counts I and II of the complaint and Count I of the counterclaim.

2. IMA Was the Prevailing Party with Respect to the Claims Relating to the Operating Agreement.

In many cases, identifying a prevailing party is easy. When one party succeeds entirely on all claims brought in a lawsuit, it is the prevailing party. In other cases, when victory is less than complete, identifying the prevailing party is more difficult. That may occur when a single party obtains relief, but less than what it sought, or when each party obtains some measure of relief against the other. Things become even more complicated when both monetary and non-monetary relief are involved. Because of the many different permutations in which this issue may arise, Maryland courts have examined each case individually to determine the prevailing party. *See Royal Inv. Grp.*, 183 Md. App. at 457-58 (holding that a counterclaimant, while not securing a complete victory, "clearly was the 'prevailing party' because the trial court ruled in his favor on the core claims that formed the basis of the dispute between the parties"); *cf. Weichert Co.*, 419 Md. at 327-28 (holding, in case involving several claims, that defendant was the "prevailing party" under a fee-shifting provision because she "prevailed on . . . 'the only claim brought pursuant to'" that portion of the contract (quoting *Weichert Co. of Md. v. Faust*, 191 Md. App. 1, 10 (2010), *aff'd*, 419 Md. 306 (2011))).

Other states use similarly flexible approaches to identify the prevailing party in a lawsuit. Some states apply a comparative approach. Utah, for example, "ha[s] developed a 'flexible and reasoned approach' for determining which party has emerged the

'comparative winner.'" *Olsen v. Lund*, 246 P.3d 521, 523 (Utah Ct. App. 2010) (quoting *Mountain States Broad. Co. v. Neale*, 783 P.2d 551, 557-58 (Utah Ct. App. 1989)). That analysis "begins with the 'net judgment rule,' which provides that 'the party in whose favor the "net" judgment is entered must be considered the "prevailing party" and is entitled to an award of its fees.'" *Express Recovery Servs. v. Olson*, 397 P.3d 792, 794 (Utah Ct. App. 2017) (quoting *Mountain States*, 783 P.2d at 557-58)). The "net judgment rule" is only a starting point, however, and courts are also instructed to "look[] at the amounts actually sought and then balanc[e] them proportionally with what was recovered." *Express Recovery Servs.*, 397 P.3d at 794 (quoting *Olsen*, 246 P.3d at 523). "Ultimately, '[t]he focus should be on which party had attained a comparative victory, considering what a total victory would have meant for each party and what a true draw would look like.'" *Id.* (other internal quotation marks omitted) (quoting *Olsen*, 246 P.3d at 523). That approach permits courts to consider not only a party's success on its affirmative claims, but also its success in defending against claims brought by the opposing party.[18]

[18] Other courts have employed a similar comparative analysis. *See, e.g.*, *Eighteen Mile Ranch v. Nord Excavating & Paving*, 117 P.3d 130, 133 (Idaho 2005) ("Viewing its success from an overall standpoint, Nord Excavating was a prevailing party. . . . [W]hile a plaintiff with a large money judgment may be more exalted than a defendant who simply walks out of court no worse for the wear, courts must not ignore the value of a successful defense."); *Riss v. Angel*, 934 P.2d 669, 681 (Wash. Ct. App. 1997) ("If neither [party] wholly prevails, then the determination of who is a prevailing party depends upon who is the substantially prevailing party, and this question depends upon the extent of the relief afforded the parties.").

Some other states determine the prevailing party by assessing which party was "successful on the main issue of the action."[19] *Alaskaland.com, LLC v. Cross*, 357 P.3d 805, 825-26 (Alaska 2015) (quoting *Taylor v. Moutrie-Pelham*, 246 P.3d 927, 929 (Alaska 2011)); *see also, e.g.*, *Deutsche Bank Nat'l Tr. Co. v. Kozma*, 403 P.3d 271, 275 (Haw. 2017); *Ronnisch Constr. Grp. v. Lofts on the Nine*, 886 N.W.2d 113, 123 (Mich. Ct. App. 2016); *Robb v. Bond Purchase*, 580 S.W.3d 70, 84 (Mo. Ct. App. 2019); *Schmidt v. Colonial Terrace Assocs.*, 694 P.2d 1340, 1345 (Mont. 1985); *Hedicke v. Gunville*, 62 P.3d 1217, 1224-25 (N.M. Ct. App. 2002). Under this approach, because "[n]ot all . . . claims [are] equal in terms of emphasis at trial or in terms of the relief sought," the "main issues"

[19] This approach aligns with the definition of "prevailing party" in previous editions of *Black's Law Dictionary*, which reads, in part: "The party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention." *E.g.*, "Prevailing Party," *Black's Law Dictionary* 1188 (6th ed. 1990). The most recent edition of *Black's* defines "prevailing party" to mean "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded." "Prevailing Party," *Black's Law Dictionary* 1351 (11th ed. 2019). This definition first appeared in *Black's* 7th edition, *see* "Prevailing Party," *Black's Law Dictionary* 1145 (7th ed. 1999), and has remained since. Like its predecessor, the more recent definition has influenced in varying degrees the approach that some jurisdictions have taken to "prevailing party" determinations. *See, e.g.*, *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001) (using *Black's* 7th edition in construing "prevailing party" for purposes of attorneys' fees under the Fair Housing Amendments Act and the Americans with Disabilities Act); *see also, e.g.*, *Russell v. Russell*, 882 A.2d 98, 107 (Conn. App. Ct. 2005) (stating that Connecticut's appellate courts "repeatedly" have defined "prevailing party" as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded" (emphasis removed)); *Eagle Jets, LLC v. Atlanta Jet, Inc.*, 740 S.E.2d 439, 452 (Ga. Ct. App. 2013) (citing *Black's* 9th edition); *Boyer Constr. Grp. v. Walker Constr. Co.*, 44 N.E.3d 119, 126 (Ind. Ct. App. 2015) (citing both definitions); *Sheets v. Castle*, 559 S.E.2d 616, 620 (Va. 2002) (quoting *Black's* 7th edition for "common meaning" of "prevailing party").

are the claims that occupied "the clear focus at trial." *Bhatia v. Woodlands N. Houston Heart Ctr.*, 396 S.W.3d 658, 671 (Tex. App. 2013).

We think each of these approaches may be useful depending on the type of claims at issue. The comparative approach offers particular advantages where only monetary relief is sought, whereas the "main issue" approach may be more useful in cases involving significant non-monetary relief. Here, both approaches lead to the same outcome. IMA obtained a net judgment of $860,496.87 on Operating Agreement-related claims that involved exclusively monetary relief. Had IMA prevailed in full as to all four claims that related to the Operating Agreement, it would have received an award of $1,266,250.51.[20] Trust prevailed as to its claim relating to the Operating Agreement, and received an award of $300,000.00 on that claim. The final result was thus an award that was $405,753.64 less than IMA's best-possible result and $1,160,496.87 less than Trust's best-possible result. And IMA prevailed entirely on the "main issue" in the case—its claim for an equitable adjustment of the Base Payment Amount. We agree with the circuit court that IMA was the prevailing party with respect to the claims relating to the Operating Agreement.[21]

[20] IMA sought $1.1 million as an equitable adjustment under Count I and $166,250.51 for the unpaid utility charges under Count II. The Court awarded IMA a judgment of $1.1 million for the equitable adjustment count and $60,496.87 for the utility charges.

[21] In concluding that IMA was the sole prevailing party in the case, the circuit court applied the "common core of facts" doctrine. That doctrine was originally adopted by the United States Supreme Court in *Hensley*, 461 U.S. 424, has been applied by this Court, *see, e.g.*, *Ochse*, 216 Md. App. at 459, and our Court of Appeals recently confirmed that it "comports with Maryland law and may be a reasonable method for apportioning attorneys' fees in certain cases." *Plank*, 2020 WL 3967980, at *33. The doctrine relates to the apportionment of attorneys' fees to a prevailing party, not to the determination of how

3. The Circuit Court's Reasonableness Determination

The circuit court's ruling that IMA was the prevailing party with respect to the claims relating to the Operating Agreement did not end its analysis of whether it was appropriate to award IMA a fully compensatory fee. As the prevailing party, IMA was entitled to a reasonable award of attorneys' fees, but not necessarily a fully compensatory award. The determination of the reasonableness of IMA's claim for attorneys' fees was the proper place to take into account IMA's lack of success on Count I of Trust's counterclaim. *Cf. Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 793 (1989) (Under 42 U.S.C. § 1988, "the degree of the [prevailing party]'s overall success goes to the reasonableness of the award under *Hensley*, not to the availability of a fee award *vel non*").

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many prevailing parties there are or who they are. The doctrine "solves the problem of courts not being able to compensate attorneys for fees that cannot easily be allocated between fee-shifting claims and factually or legally related non-fee-shifting claims." *Ochse*, 216 Md. App. at 459. It does so by "remov[ing] the requirement of allocation and treat[ing] as one claims that are based on a common core of facts or related legal theories." *Id.* When applied, the "doctrine is merely one part of one factor a court should consider (the results obtained) when determining the reasonableness of a fee award, as part of the totality of the circumstances, when a prevailing party prevails on less than all of the asserted claims for relief." *Id.* at 460; *cf. Plank*, 2020 WL 3967980, at *33 ("[I]t is clear that a party prevailing on one but not all claims should receive some compensation, and it is within reason to assign the [] cost to the single claim that merits a fee award." (quoting *Weichert Co. of Md. v. Faust*, 191 Md. App. 1, 18 (2010), *aff'd*, 419 Md. 306 (2011))).

Here, § 26 resolves the prevailing party issue by providing for a single prevailing party on all claims relating to the Operating Agreement. Moreover, because there are no additional claims that do not relate to the Operating Agreement but that share a common core of facts with those that do, there is no need to resort to the common core of facts doctrine. Nonetheless, we agree with the trial court that the flagship claims in the lawsuit (Count I of the complaint and Count I of the counterclaim) arise from the same common core of facts.

A court's overarching "duty in fashioning an award pursuant to a contract is to determine the reasonableness of a party's request." *Ochse*, 216 Md. App. at 458. Rule 2-705(f)(1) provides that, in determining the amount of attorneys' fees to award to a prevailing party under a contract, "the court shall consider the factors set forth in Rule 2-703(f)(3) and the principal amount in dispute in the litigation, and may consider the agreement between party seeking the award and that party's attorneys and any other factor reasonably related to the fairness of an award."[22] The factors listed in Rule 2-703(f)(3) are:

(A) the time and labor required;

(B) the novelty and difficulty of the questions;

(C) the skill required to perform the legal service properly;

(D) whether acceptance of the case precluded other employment by the attorney;

(E) the customary fee for similar legal services;

(F) whether the fee is fixed or contingent;

(G) any time limitations imposed by the client or the circumstances;

(H) the amount involved and the results obtained;

(I) the experience, reputation, and ability of the attorneys;

[22] In prior cases, we stated that the factors to be considered in determining reasonableness are those set forth in what is currently Rule 19-301.5(a) of the Maryland Attorneys' Rules of Professional Conduct. *See Ochse*, 216 Md. App. at 456-58 & n.5; *Reisterstown Plaza Assocs. v. Gen. Nutrition Ctr.*, 89 Md. App. 232, 246-47 (1991). In 2013, however, the Court of Appeals adopted Subtitle 7 of Title 2 of the Maryland Rules to govern claims for attorneys' fees. Rules 2-705(f)(1) and 2-703(f)(3) now set forth the factors courts are to consider in assessing the reasonableness of a claim for attorneys' fees (unless "the claim for an award of attorneys' fees does not exceed the lesser of 15% of the principal amount found to be due or $4,500," in which case the court must consider the factors set forth in Rule 2-705(f)(2)).

(J) the undesirability of the case;

(K) the nature and length of the professional relationship with the client; and

(L) awards in similar cases.

In cases where a party's success was less than total, the eighth factor—"the amount involved and the results obtained"—will often support a reduction in the amount of a fee award to account for the partial or relative degree to which that party prevailed. Of course, that relative degree of success must be balanced against all the other factors in determining the overall reasonableness of the appropriate fee. Here, the circuit court considered the amount in dispute and reviewed all the factors set forth in Rule 2-703(f)(3), including the results obtained and, specifically, the judgment in favor of Trust on its counterclaim.[23] Having reviewed all those factors, the court concluded that IMA was entitled to a fully compensatory fee.

To be sure, in light of Trust's success on its counterclaim, the circuit court *could* have concluded that IMA was entitled to a less-than-fully compensatory fee award, just as trial courts have discretion to award a less-than-fully compensatory fee when a non-prevailing party defeats some but not all of a prevailing party's affirmative claims. *See, e.g.*, *Ochse*, 216 Md. App. at 453-54, 459-60, 469-70 (approving circuit court's decision to grant a "proportionate award" based on litigant's partial success in the litigation). But the court was not required to do so. *See Plank*, 2020 WL 3967980, at *34 (affirming a fully

[23] Our one quibble with the circuit court's assessment of the results obtained is that the court included in that analysis the $9,000 award Trust won on Count III of its counterclaim, which was not related to the Operating Agreement. The inclusion of that amount weighed in favor of Trust, however, not against it.

compensatory award of attorneys' fees in a case where the plaintiff was not entirely successful, and reiterating that while "the circuit court's use of a proportionality theory may be appropriate in certain circumstances . . . , it does not follow that use of a proportionality theory is required of the circuit court when performing its discretionary analysis in every instance"). Such decisions are left "to the discretion of the trial court." *Id.* (quoting *Weichert*, 191 Md. App. at 19-20). In any event, on appeal, Trust does not challenge the court's exercise of its substantial discretion in determining reasonableness. As a result, we have no occasion to review that determination, and will affirm the award of attorneys' fees under the Operating Agreement.

B. The Circuit Court Did Not Abuse Its Discretion in Declining to Award Attorneys' Fees to Trust as the Prevailing Party on Count III of Its Counterclaim.

Counts II, III, and IV of Trust's counterclaim arose not under the Operating Agreement but under two separate parking license agreements. In Count II, Trust sought to recover $17,601.00 in parking security costs under the 2015 Parking License Agreement.[24] The circuit court determined that Trust had not proved that claim and entered judgment in favor of IMA. In Count III, Trust sought to recover $11,100 in parking license fees under the 2015 Parking License Agreement. The circuit court entered judgment in Trust's favor for $9,000 that IMA admitted it owed. In Count IV, Trust sought to recover

[24] As noted in footnote 3, although the counterclaim identified both the Operating Agreement and the 2015 Parking License Agreement as supporting Count II of the counterclaim, the parties and the circuit court ultimately treated that as a claim arising under the parking license agreement.

$3,000 in parking license fees under the 2016 Parking License Agreement. The circuit court entered judgment in IMA's favor.

Both parking license agreements contain identical fee-shifting provisions, which state:

> If either party institutes any action or proceeding against the other arising from or relating to the provisions of this Agreement, the prevailing party in the action or proceeding is entitled to recover all reasonable costs and attorneys' fees from the unsuccessful party.

Although not identical to § 26, this contractual language is very similar in that it contemplates a single prevailing party "in the action or proceeding," who is entitled to an award of attorneys' fees incurred in litigating claims that "aris[e] from or relat[e] to the provisions" of the relevant agreement.

As noted above, IMA did not make any claim for attorneys' fees arising under either of the parking license agreements. And although Trust claimed entitlement to an award of attorneys' fees based, in part, on its success on Count III of its counterclaim, it neither grounded that contention on the fee-shifting provision of the 2015 Parking License Agreement nor presented the circuit court with any breakdown of attorneys' fees wholly or partially attributable to that count. In other words, even if Trust *could* potentially have presented a claim for recovery of attorneys' fees related solely to the 2015 Parking License Agreement, it did not do so. Instead, Trust presented a single claim for attorneys' fees, the vast majority of which were exclusively or primarily attributable to claims related to the Operating Agreement. Although a circuit court should not deny all recovery simply because it might be difficult to segregate fees that are subject to fee-shifting from those

that are not, *cf. Diamond Point Plaza Ltd. P'ship v. Wells Fargo Bank, N.A.*, 400 Md. 718, 760-61 (2007), the party seeking fees bears the burden to provide information from which such a calculation may reasonably be made, *see id.* at 760 ("[T]he lawyer must be prepared to establish how much time is allocable to the claims for which fee-shifting is sought."). Here, Trust failed even to attempt to carry that burden with respect to any fees incurred specific to the 2015 Parking License Agreement. For that reason, even if it were possible to construe Trust's claim for attorneys' fees as seeking an award under the 2015 Parking License Agreement—and even if Trust would have been considered the prevailing party with respect to such claims, in spite of losing the more valuable claim—the circuit court did not err or abuse its discretion in declining to make such an award.

JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID 75% BY APPELLANT/CROSS-APPELLEE AND 25% BY THE APPELLEE/CROSS-APPELLANT.