Circuit Court for Baltimore County
Case No.: 03-C-15-004685 CN

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2530

September Term, 2016

SUBWAY DEVELOPMENT CORPORATION OF WASHINGTON

v.

ALBERT'S FOOD STORES, INC.

Meredith,
Friedman,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: April 22, 2019

This case concerns the expansion of a restaurant chain known as Subway. The corporation at the top of the organizational chart is Doctor's Associates, Inc. ("Doctor's Associates), incorporated in 1966. In 1985, that corporation entered into a Development Agent Agreement with a corporation named Subway Development Corporation of Washington ("Subway Development Washington"), the appellant in this case, authorizing that entity to expand Subway locations in Delaware and most of Maryland. In turn, in 1990, Subway Development Washington entered into an arrangement with Albert's Food Stores, Inc. ("Albert's"), the appellee in this case, engaging Albert's to handle Subway's expansion in Delaware and the Eastern Shore of Maryland. The arrangement appears to have worked well, without major disputes, for over 20 years. But, in 2015, Subway Development Washington threatened to terminate its agreement with Albert's, alleging a material breach of contractual duties. Albert's initiated litigation against Subway Development Washington in the Circuit Court for Baltimore County, and was successful in obtaining declaratory and injunctive relief that precluded Subway Development Washington from terminating its contracts with Albert's. This appeal followed.

Subway Development Washington presented three questions for this Court's review, which we have consolidated: Did the circuit court err in granting judgment in favor of Albert's?[1]

[1] Subway Development Corporation of Washington framed the issues in its Brief as:

continued…

Because we perceive no reversible error, we will affirm the judgment of the Circuit Court for Baltimore County.

FACTS AND PROCEDURAL HISTORY

In 1965, Fred DeLuca and Dr. Peter Buck opened a submarine sandwich shop in Bridgeport, Connecticut, called "Pete's Super Submarines." The next year, the pair formed a corporation named Doctor's Associates, Inc. ("Doctor's Associates") for the operation of their new venture. In 1968, the "Subway" name was used for the first time. In 1974, Doctor's Associates began franchising its concept in New England.[2] The evidence in this case showed that, generally, Doctor's Associates operated Subway via a nationwide network of franchisees, and expanded its network by entering into development agent agreements that covered specific geographic areas.

I. The Development Agent Agreement

On June 4, 1985, Doctor's Associates entered into a Development Agent Agreement (the "Development Agent Agreement" or "Contract 517") with Subway Development Washington. The Development Agent Agreement granted Subway

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1. Did the circuit court err in allowing Albert's to invoke the "savings clause" of the Development Agreement between [Subway Development Washington] and [Doctor's Associates]?
2. Did the circuit court err in finding that Albert's breach of the IR Agreements' gross sales requirements was immaterial?
3. Did Albert's breaches entitle [Subway Development Washington] to terminate the IR Agreements?

[2] Source: https://www.subway.com/en-us/aboutus/timeline (last visited April 15, 2019).

Development Washington "the right to develop and service Subway sandwich shops within the Territory," which covered all of Delaware, and all of Maryland except for the area within the Baltimore Beltway and Allegany and Garrett Counties. As the Development Agent, Subway Development Washington took on certain responsibilities, including assisting franchisees with selecting locations for new stores, making sure the equipment in the stores was up to company standards, and "developing prospective franchisees into Subway operators," at the Development Agent's cost. The contract provided that the Development Agent would be an independent contractor, not a Doctor's Associates employee.

Subway Development Washington was required to meet certain development-density and productivity standards, which were a principal focus of the case before us. The Development Agent Agreement provided, at ¶ 2(c), that Subway Development Washington agreed to:

> c) establish new franchised units with average sales volumes of $3,200 per week per unit.[3] This volume will be adjusted for inflation based upon the change in the Consumer Price Index for January 1, 1985 which was 316.1. The Development Agent will be responsible for the establishment of one store for every 30,000 people in his Territory. The population of the Territory is presently estimated to be 2,136,360, thereby calling for 71 units to be established. There are currently 8 units in the territory leaving 63 to be developed at the rate of 8 per year over 8 years based upon a formula

[3] The productivity metric was referred to as "Average Unit Volume," or "AUV." Subway Development Washington's counsel described AUVs as "the weekly sales on a trailing average of 12 months. So you look back 12 months in time. You take the total sale, you divide it by 52, voila, AUVs." As stated in ¶ 2(c) of the Development Agent Agreement, the minimum AUV number was adjusted upward every year from the baseline of $3,200 per week based on the change in CPI since January 1, 1985.

wherein the number of years to develop the territory shall be the square root of the number of stores to be developed. The parties adopt the following schedule for development, subject to modification up or down as hereinafter provided:

Total Required Number of Units To Be Operating Including Units Now Existing	**Date Required By**	**Total Required Number of Units To Be Operating Including Units Now Existing**	**Date Required By**
12	1/1/86	**48**	7/1/90
16	7/1/86	**52**	1/1/91
20	1/1/87	**56**	7/1/91
24	7/1/87	**60**	1/1/92
28	1/1/88	**64**	7/1/92
32	7/1/88	**68**	1/1/93
36	1/1/89	**71**	7/1/93
40	7/1/89		
44	1/1/90		

Provided, however, that the Development Agent shall not be deemed to be behind in the development schedule at any time where the number of SUBWAY units established in his Territory equals or exceeds the total number of units established in the Territory by the fast food chain with the most units in the Territory.

It is further agreed that if the population in the Territory increases or decreases subsequent to the execution of this Agreement, the number of

units required will increase or decrease in accordance with the formula of one store for every 30,000 people. The number of years allotted for development will then become the square root of the adjusted number of units to be developed.

If the Development Agent is ahead in the performance of his schedule, the Company [Doctor's Associates] shall pay him an extra $100 per month for each store that he is ahead. If he is behind schedule, he shall pay the Company $100 per month for each store that he is behind. ["The Bonus Schedule"]

After development is complete, the Development Agent shall be required to maintain the required number of operating units at the maximum level provided for under this Agreement and the same average weekly volume provided for at that time.

The units currently in existence in the territory are:

1. #203 – 2108 Pulaski Hwy., Edgewood

2. #772 – Long Reach Village Ct., Columbia

3. #901 – 5485 Harpers Farm Rd., Columbia

4. #862 – 7428 Ritchie Hwy., Glen Burnie

5. #654 – 201 Main St., Reisterstown

6. #306 – 110 S. Philadelphia Blvd., Aberdeen

7. #643 – RD 3 Box 43K, Dover, Delaware

8. #906 – 534 Benfield Rd., Severna Park

The Development Agent shall be in default of this Agreement if he falls twelve (12) months behind the above-mentioned time schedule as to number of operating units. He shall also be in default if the average unit volume for any twelve (12) month period is below the required volume for that period.

> For the purpose of this Agreement, an operating unit shall be only a Franchised SUBWAY unit within the Territory that is in substantial compliance with the terms of its License or Franchise Agreement.

The Development Agent Agreement was executed on behalf of Subway Development Washington by its then-President, Lawrence Feldman, and provided that it was to run for "40 years from the date of this Agreement," *i.e.*, until June 4, 2025. In return for Subway Development Washington's work as Development Agent for the Territory covered by Contract 517, Doctor's Associates agreed to pay Subway Development Washington: (a) "50% of all income from initial Franchise Fees received from franchisees," specifically, 25% upon the sale of a franchise, and 25% upon the opening of the franchisee's unit, provided the unit had been constructed in accordance with Subway's specifications, and (b) "33 1/3% of all royalties and transfer fees received from any franchised units located in the Territory for services rendered by him to said units." ¶ 3.

The Development Agent Agreement also contained eight grounds for which Doctor's Associates could terminate the Development Agent Agreement without prior notice; the eight specified grounds were listed "without prejudice to any other rights or remedies provided for hereunder or by law or equity[.]" ¶ 5(a) – (h). The agreement also provided that, if Subway Development Washington was "otherwise in default of this Agreement," Doctor's Associates could terminate with 30 days' notice if the default was not cured within 30 days. But there was no evidence introduced in this case that Doctor's Associates had ever given notice that Subway Development Washington was in default or

subject to termination. Mr. Alan Warmund, the President of Subway Development Washington, testified that Doctor's Associates had never notified Subway Development Washington of any breach.

II. The 1990 Income Rights Agreements

Pursuant to ¶ 6, Subway Development Washington could assign the Development Agent Agreement with Doctor's Associates' written consent. On August 1, 1990, Subway Development Washington carved out a portion of its Territory and, in return for $600,000, assigned its rights as to that subterritory under the Development Agent Agreement to two entities that later became Albert's Food Stores, Inc. ("Albert's"), the appellee in this case.[4] The assignment was achieved through the execution of two substantially-identical Income Rights Agreements.[5]

The Income Rights Agreements provided, in relevant part, that Lawrence Feldman and Albert Aaron, Subway Development Washington's principals, personally guaranteed Subway Development Washington's performance thereunder; that the Development Agent Agreement was "attached hereto as Exhibit A and made a part hereof"; and that

[4] The two entities were Mid-Atlantic Subway Development Company of Maryland and Mid-Atlantic Subway Development Company of Delaware. According to ¶ 19 of Albert's Complaint, these entities merged and re-incorporated as Albert's Food Stores, Inc., on February 22, 1992. All further references to the party that contracted with Subway Development Washington pursuant to the Income Rights Agreements will be to Albert's.

[5] The only difference between the two Income Rights Agreements is that one covered Delaware and the other covered the Eastern Shore of Maryland, at fees paid by Albert's of $500,000 and $100,000 respectively.

Albert's was purchasing "the exclusive right to develop any and all future franchises in the Territory" pursuant to the Development Agent Agreement, and "the exclusive right to receive" from Subway Development Washington "any and all sums due to and received by" Subway Development Washington under the Development Agent Agreement and, specifically, the Bonus Schedule provided for in the Development Agent Agreement and referred to above.

Further, the Income Rights Agreements provided, at ¶ D:

> [Albert's] shall have all of the benefits of the [Development Agent Agreement] as stated herein and all of the burdens of the [Development Agent Agreement], except as hereinafter provided. [Albert's] agrees to abide by all of the terms and conditions of the Development Agreement **except** (i) such obligations and liabilities as existed or arose prior to the Closing hereunder, and (ii) **the obligation of the Development Agent to develop and service one (1) store for every thirty thousand (30,000) people living in the Territory (as defined in the Development Agreement) for the duration of the Development Agreement. In lieu of said provision, [Albert's] shall be obligated to develop and service four (4) units per year** for both the Territory defined in this Agreement (hereinafter referred to as the "Maryland Territory") and the territory as defined in a second agreement between the parties hereto, a copy of which is attached hereto as Exhibit D and made a part hereof, for the State of Delaware (the territory being hereinafter referred to as the "Delaware Territory" and the second agreement being hereinafter referred to as the "Delaware Agreement"). The obligation to develop and service four (4) units may be satisfied by developing all four (4) in the Maryland Territory or all four (4) units in the Delaware territory or any combination of the four (4) units in both territories.

(Emphasis added.)

Paragraph 8 of the Income Rights Agreements dealt with default. It provided Albert's with many remedies for a default by Subway Development Washington: [6]

> Upon any default by [Subway Development Washington] hereunder prior to or following Closing, [Albert's] shall be entitled to any and all remedies at law or in equity including injunctive relief and/or specific performance. In the event of any default by [Subway Development Washington] under the [Development Agent Agreement], pursuant to which default [Albert's] is denied receipt of the Income Rights conveyed hereunder, at the option of [Albert's], [Albert's] shall be entitled to:
>
> A. Take such steps as [Albert's] may determine, in [Albert's] sole discretion, to cure [Subway Development Washington's] default under the [Development Agent Agreement]; or
>
> B. Demand a refund of the Purchase Price provided in Section 3 hereof as follows:
>
> 1.) If the number of units at the time of default is the same as on the date of this Agreement, then [Albert's] shall be entitled to a refund of One Hundred Thousand Dollars ($100,000.00) of the Purchase Price.
>
> 2.) If the number of units at the time of default exceeds the number of units in existence on the date of this Agreement, then [Albert's] shall be entitled to a refund of One Hundred Thousand Dollars ($100,000.00) plus Forty Thousand Dollars ($40,000.00) for each unit exceeding the number of units in existence on the date of this Agreement, provided however, that for each such unit, the unit's gross business (averaged over the preceding twelve (12) months, or so much thereof if

[6] The Income Rights Agreements provided that the Income Rights Agreements themselves "shall be construed as and shall constitute a Security Agreement under the Maryland Uniform Commercial Code. [Subway Development Washington] hereby grants, conveys and transfers to [Albert's] a security interest in and to the Income Rights now owned or hereafter acquired for the Territory pursuant to this Agreement. [Subway Development Washington] agrees to execute, as may be necessary, such further documentation, including Financing Statements to perfect, secure, maintain and evidence [Albert's] right, interest and entitlement in and to the Income Rights."

twelve (12) months has not expired from the date of this Agreement) exceeds Five Thousand Dollars ($5,000.00) per week.

Feldman and Aaron hereby agree, jointly and severally, to personally guarantee each and every obligation of [Subway Development Washington] hereunder. In the event of default by [Subway Development Washington], [Albert's] agrees to provide Feldman and Aaron with notice of default. Feldman and/or Aaron may take any and all steps to cure any default by [Subway Development Washington], and shall cure any default by [Subway Development Washington] within fifteen (15) days, provided, however, that any steps to cure the default of [Subway Development Washington] by Feldman and/or Aaron shall not waive any rights of [Albert's] to declare such a default and pursue remedies and damages against [Subway Development Washington] available to [Albert's] therefor. In the event that Aaron and/or Feldman fail to cure any default by [Subway Development Washington] after notice by [Albert's], Aaron and Feldman shall be in default under this Agreement and [Albert's] shall be entitled to pursue remedies and damages against [Subway Development Washington], Aaron and Feldman, all or any one of them jointly and severally as [Albert's] may elect; provided, however that damages Aaron and Feldman, jointly and severally, shall be limited to the refund set forth in Subsection B.1 and B.2 above. [Albert's] shall be entitled, in the pursuit of any remedies and damages upon [Subway Development Washington]'s, Aaron's, or Feldman's default hereunder, to recover all reasonable attorneys' fees, court costs and reasonable expenses related thereto.

In contrast, Subway Development Washington's remedies that were specified for Albert's defaults were far more limited:

Upon any default by [Albert's] hereunder prior to closing, the parties agree that [Albert's] Deposit may be retained by [Subway Development Washington] as liquidated damages (actual damages hereunder being difficult to ascertain) and such liquidated damages shall be [Subway Development Washington's] sole remedy.

In the event of any act or omission by [Albert's], which act or omission **causes a default by [Subway Development Washington] under the [Development Agent Agreement] and causes [Subway Development Washington] to lose its rights under the [Development Agent Agreement]**, [Subway Development Washington] shall give [Albert's] prompt written notice thereof. In the event that [Albert's] fails to cure any

> such act or omission within thirty (30) days following receipt of such notice by [Subway Development Washington], **[Subway Development Washington] shall be entitled**, as its sole remedy, **to declare an event of default by [Albert's] and terminate this Agreement** and [Albert's] right to the Income Rights hereunder and the parties shall have no further liability to each other except any payment obligations existing prior to termination and the indemnification obligations.

(Emphasis added.)

The Income Rights Agreements also granted Albert's, in ¶ 11, "Rights of First Refusal and Option" in the event Subway Development Washington desired to sell "its rights as Development Agent":

> In the event that [Subway Development Washington] should desire to offer for sale or should receive a bona fide written offer from a third party to purchase its right, title and interest to the [Development Agent Agreement], [Subway Development Washington] hereby grants to [Albert's] a right of first refusal and option to purchase the right, title and interest in and to the [Development Agent Agreement]. Before offering for sale or accepting a bona fide offer to purchase, [Subway Development Washington] shall notify [Albert's] in writing and any such notice shall include a copy of the proposed offer by [Subway Development Washington] to sell (including the terms and conditions thereof) or a copy of any bona fide written offer. [Albert's] shall have thirty (30) days from receipt of the notice from [Subway Development Washington] within which to exercise its option to purchase. If [Albert's] fails to exercise its option to purchase within said thirty (30) days, then [Subway Development Washington] shall be entitled to sell its rights and interests hereunder pursuant to its offer to sell or a bona fide offer to purchase free and clear of this right of first refusal provided, however, that any such transaction shall be (a) subject to the terms and conditions of this Agreement, (b) consummated within ninety (90) days from the expiration of the thirty (30) day notice, and (c) if the transaction is not consummated, any subsequent offer to sell or offer to purchase shall be subject to this right of first refusal. In the event that [Albert's] exercises its option to purchase, the transaction shall be on the same terms and conditions provided in the notice by [Subway Development Washington] to [Albert's], provided, however, that Closing on any such purchase should occur no sooner than sixty (60) days

> from the date [Albert's] exercises its option to purchase pursuant to this right of first refusal.

The Income Rights Agreements provided that they were "the entire agreement between the parties hereto and [are] intended to be an integration of all prior agreements, conditions or undertakings between the parties thereto," and that "[n]o change or modification of this Agreement shall be valid unless the same is in writing and signed by all parties hereto."

III. The 1994 Addendum

On February 3, 1994, Doctor's Associates and Subway Development Washington entered into an Addendum to the Development Agent Agreement that made several alterations. First, the Addendum altered the Bonus Structure by eliminating the first sentence of the fourth paragraph of ¶ 2(c) of the Development Agent Agreement --- which had stated: "If the Development Agent is ahead in the performance of his [development] schedule, the Company shall pay him $100 for each store that he is ahead." --- and adding the following paragraph to the end of ¶ 2(c):

> If the Development Agent is ahead of a modified development schedule based upon the establishment of one store for every 25,000 people in the Territory, instead of every 30,000 people in the Territory, in any month, the Company shall pay the Development Agent a bonus, equal to $100, multiplied by the difference between (a) the number of stores which were operating that entire month, but only up to (i) the number of stores required to be established based upon a rate of one store for every 25,000 people at the time of the calculation, or (ii) the number of stores operated by the largest chain (not including SUBWAY), whichever is less, minus (b) the number of stores required by the modified development schedule, for such month. The population of the Territory is estimated to be 2,548,000 at February 3, 1994, thereby calling for 102 units to be developed to provide for one store for every 25,000 people. Sole[l]y for purposes of calculating

any bonus payable to the Development Agent, the Development Agent shall develop additional Subway sandwich shops in the Territory according to the following schedule:

CUMULATIVE NUMBER OF STORES TO BE OPERATING (INCLUDING EXISTING STORES)	**DATE REQUIRED BY**
71	2/3/94
74	8/3/94
78	2/3/95
82	8/3/95
86	2/3/96
90	8/3/96
94	2/3/97
98	8/3/97
102	2/3/98

No bonus shall be payable for development after February 3, 1998. Nothing contained in this Paragraph 2.c with respect to the utilization of a modified development schedule for purposes of calculation of any bonus to be paid to the Development Agent shall in any way increase the number of units required to be established by the Development Agent, or the schedule of such development, during the original term of the Agreement (including any extensions provided in the original Agreement).

The Addendum also recited in its preamble that the Development Agent had agreed to share in litigation costs incurred by Doctor's Associates:

WHEREAS, [Doctor's Associates] has requested [Subway Development Washington] to enter into a modification of the [Development Agent

> Agreement] with respect to [Subway Development Washington]'s responsibility to contribute to the costs of litigation and other action in the Territory and [Subway Development Washington] has agreed to enter into a modification provided that [Doctor's Associates] grants to [Subway Development Washington] the right to receive incentives from accelerated development over those incentives provided under the terms of the [Development Agent Agreement] and to provide [Subway Development Washington] with the right to additional extensions of the term set forth in the [Development Agent Agreement] and for such other considerations as set forth in this Addendum; and
>
> WHEREAS, [Doctor's Associates] and [Subway Development Washington] have agreed to the modifications contained herein, with the clear understanding between the parties that except as otherwise specifically stated, the modifications shall in no way affect [Subway Development Washington's] obligations set forth in the [Development Agent Agreement] during the original term of the [Development Agent Agreement] (including any extensions thereof provided therein) set forth in the [Development Agent Agreement]; and
>
> WHEREAS, [Doctor's Associates] and [Subway Development Washington] agree that this Addendum is to be incorporated in its entirety as a part of the [Development Agent Agreement] to be read as an integral part thereof as of the effective date of the Addendum.

Paragraph 4 of the Development Agent Agreement, which provided that the Development Agent Agreement would remain in effect for a 40-year term, was amended to provide that Subway Development Washington would also be eligible for up to four additional five-year extensions of the original 40-year term, provided that it met "all the terms and conditions of [the Development Agent Agreement] at least ninety days prior to the end of the original term or the end of the prior extension, as the case may be," with "[p]articular emphasis" to be given "to strict satisfaction [of] the AUV requirements and the Development Schedule requirements." Should Subway Development Washington

earn the initial 5-year extension, then to remain eligible for future extensions, Subway Development Washington had to comply with productivity requirements.

Because the Development Agent Agreement's initial term will not expire until 2025, the extension provisions of the Addendum were not directly at issue in this litigation. Paragraph 4 of the Addendum provided: "Except as amended by this Addendum, all other provisions of the [Development Agent Agreement] remain in full force and effect."

Albert's was not a party to the Addendum; Albert's asserted that Subway Development Washington did not even reveal the existence of the Addendum to Albert's until 1996, two years after it was signed.

IV. Expansion of Units

Over the years, Subway grew and prospered. Subway Development Washington and Albert's had great success in their respective territories. Maurice Wyatt, Albert's principal, testified that, on the day the Income Rights Agreements were signed, August 1, 1990, there were only ten Subway locations in all of what became Albert's territory. Subsequent to 1990, Albert's opened 124 Subway locations.[7]

More recently, however, Subway's sales declined, nationally and locally, owing to a variety of factors, including various public relations problems.

On April 16, 2015, counsel for Subway Development Washington sent Albert's a purported "Notice of Termination," which stated, in pertinent part:

[7] At the time of trial, 85 Subway locations were operating in Albert's territory.

> Dear [Counsel]:
>
> As you know, [this firm] represents Subway Development Corporation of Washington ("SDCW"). This letter is a notice that Albert's materially breached two contracts between Albert's and SDCW, which were executed on August 1, 1990 and amended from time to time thereafter (the contracts and amendments are herein referred to collectively as the "Contracts") and that therefore SDCW is terminating the Contracts effective immediately.
>
> Specifically and without limitation, Albert's has defaulted on the obligation to develop four (4) units per year set forth in Section 1.D. of the Contracts. For example, in 2014, Albert's failed to open four Subway® units, which is a material default of Albert's obligations under the Contracts.

No other alleged default was set forth in the letter. The Notice of Termination made no mention of any underperformance in sales volume or AUVs.

Following communication with counsel for Albert's, Subway Development Washington agreed to withdraw the April 2015 termination notice, and Albert's agreed not to proceed with the Motion for Temporary Restraining Order that it had filed.

But, on April 29, 2015, Albert's filed a two-count Complaint and Election of Jury Trial in the Circuit Court for Baltimore County against Subway Development Washington, asserting breach of contract and tortious interference with Albert's economic or business relationship with the franchisees in its territory. Albert's asserted that the Income Rights Agreements clearly provided that the only basis upon which Subway Development Washington could declare a default by Albert's would be if Albert's had done something that had [1] caused Doctor's Associates to declare Subway Development Washington in default of the Development Agent Agreements, *and* [2]

caused Subway Development Washington to have lost its rights under that Agreement. Because neither of those events had occurred, Albert's contended that Subway Development Washington's attempt to terminate Albert's was wrongful.

On June 25, 2015, Subway Development Washington filed an answer and counterclaim, seeking a declaratory judgment regarding the rights and liabilities of the parties pursuant to the Income Rights Agreements, a judicial determination that Albert's had materially breached the Income Rights Agreements, and a declaration that Subway Development Washington was entitled to immediately terminate the Income Rights Agreements.

On July 16, 2015, Albert's filed its First Amended Complaint. The first two counts remained the same, but the First Amended Complaint added Count 3 (tortious interference with prospective advantage), and Count 4 (seeking a declaratory judgment "that determines and adjudicates the rights of the parties with respect to their obligations under the IR Agreements," and a declaration that Subway Development Washington was not entitled to terminate the Income Rights Agreements).

Discovery ensued. On January 22, 2016, Subway Development Washington sent Albert's a second termination notice, which revised the alleged breach of contract that had been identified in the first notice of termination, and now claimed that "Albert's has defaulted on the obligation to develop four (4) units per year with AUVs at the default threshold established in the Development Agent Agreement dated June 4, 1985 [as] set forth in Section 1D of the Contracts."

In response, Albert's filed a Second Amended Complaint on February 10, 2016. The Second Amended Complaint contained the same four counts, but now alleged that Subway Development Washington had, in fact, moved to terminate the Income Rights Agreements.

Subway Development Washington filed an amended answer to the First Amended Complaint on February 11, 2016, along with an election of jury trial. On February 24, 2016, it also filed a motion to dismiss Counts 2 and 3 and to "strike allegations contained in the Second Amended Complaint."

On March 1, 2016, Albert's filed a motion for temporary restraining order, which was granted on March 3, 2016.[8]

In the meantime, on February 25, 2016, the parties had filed cross-motions for summary judgment. Subway Development Washington sought summary judgment on all counts in the second amended complaint, and on its counterclaim. Albert's sought summary judgment in its favor on Counts 1 and 4 of the second amended complaint, and on Subway Development Washington's counterclaim. Both parties requested a hearing. The cross-motions for summary judgment were later denied, but Subway Development

[8] The March 3 order granting Albert's requested TRO extended only through March 14, 2016. On that date, there was a preliminary injunction hearing at which all parties appeared. On April 7, 2016, the court signed an order granting a preliminary injunction preventing Subway Development Washington from "terminating any and all agreements or contracts" between the parties "until this case is decided on its merits."

Washington's motion to dismiss Counts 2 and 3 was granted, without leave to amend, after a hearing on September 7, 2016.[9]

Therefore, what remained to be tried was Counts 1 and 4 of Albert's Second Amended Complaint, which sought injunctive and declaratory relief, and Subway Development Washington's counterclaim for declaratory judgment. A bench trial in the Circuit Court for Baltimore County was held on December 12, 13, and 14, 2016. On January 23, 2017, the court issued a memorandum opinion, declaratory judgment, and order, resolving the case as follows.

First, the court found that the Development Agent Agreement and the Income Rights Agreements were "ambiguous on material points and do not lend themselves to easy interpretation." Accordingly, the court considered parol evidence, and specifically the trial testimony of Maurice Wyatt (Albert's owner), Raymond Burrows (Albert's vice president), and Alan Warmund (Subway Development Washington's President and minority owner), all of whom the court found "credible and forthright."[10]

[9] Albert's filed a Third Amended Complaint on October 3, 2016, adding allegations in its breach of contract count asserting that Subway Development Washington had repeatedly flouted Albert's right of first refusal by refusing to disclose, and/or actively concealing, various offers to purchase the territory covered by Contract 517 that had been received by Subway Development Washington. The court granted Subway Development Washington's motion to strike the Third Amended Complaint as time-barred on December 8, 2016.

[10] Although Subway Development Washington argues in its Brief that the Development Agent Agreement's "savings clause unambiguously does not apply to Albert's development obligation" and "[t]he IR Agreements are unambiguous," it does not argue that we should find reversible error in the court's admission of parol evidence.

Next, the court found that the four-store-per-year requirement in ¶ 1.D. of the Income Rights Agreements --- which, in lieu of the requirement in ¶ 2(c) of the Development Agent Agreement (that the development agent establish one store for every 30,000 people in its territory) required Albert's to "develop and service four (4) units per year" --- was intended to last for the life of the contract. In other words, Albert's had an obligation to establish four stores per year through June 2025. "Against this requirement," the court found that Albert's had "failed to establish an adequate number of units at least during the period 2014 through and including 2016." The court rejected Subway Development Washington's argument that the re-opening of a closed or abandoned store did not count as the establishment of a new unit: "In replacing a closed or abandoned store, the court finds Albert's has 'established a new unit' within the meaning of ¶ 2(c)" of the Development Agent Agreement.

But, despite its finding that Albert's had failed to establish the required four units per year in 2014, 2015, and 2016, the court found that Albert's failure was excused by a provision in the Development Agent Agreement which the parties sometimes referred to as the "McDonald's savings clause." The court found:

> In exchanging the numerical development schedule in ¶ 2(c) of the [Development Agent Agreement] for the four store per year requirement, the court finds that it was not intended to eliminate all of the other provisions in that paragraph. Nothing in ¶ 1.D. [of the Income Rights Agreements] suggests an intent to do anything more than to replace the numerical calculation of the minimum number of stores to be developed. Significantly, the court finds that the following paragraph in ¶ 2(c) is unaffected by the [Income Rights] Agreement:

> Provided, however, that **the Development Agent shall not be deemed to be behind in the development schedule at any time where the number of SUBWAY units established in his Territory equals or exceeds the total number of units established in the Territory by the fast food chain with the most units in the Territory**.
>
> Put plainly, "at any time" (including at the time of trial) [Subway Development Washington] "shall not be deemed behind" in completion of the development schedule if [Subway Development Washington] had established at least as many Subway stores as the number of stores of its nearest competitor in the territory. **It was a stipulated fact that, at all times pertinent, [Subway Development Washington] and Albert's had established more Subway stores in the Albert's territory than there were McDonald's restaurants. This "savings clause" relieves Albert's of any failure to maintain four stores per year so long as it has established and maintained more stores than does its nearest competitor within the Albert's territory, in this case, McDonald's**.

(Footnote omitted; emphasis added.)

Subway Development Washington disputes this conclusion, and contends that the McDonald's savings clause does not apply to Albert's because the provision was integrally tied to the population-based development requirement which had been negotiated out of Albert's Income Rights Agreements. Subway Development Washington contends that, when the population-based development schedule was replaced with a four-store-per-year schedule with respect to Albert's territory, the savings clause was no longer applicable.

The court also found that Albert's was in breach of its minimum AUV requirements: "The court finds Albert's in breach of this ongoing requirement to maintain a minimum sales volume in each of the stores in the Albert's territory." However, the court expressly found that Albert's breach in this regard was not a *material* breach that

permitted Subway Development Washington to terminate the Income Rights Agreements --- another conclusion Subway Development Washington disputes on appeal.

STANDARD OF REVIEW

Rule 8-131(c) provides:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

As we said in *Hillsmere Shores Improvement Ass'n, Inc. v. Singleton*, 182 Md. App. 667, 690 (2008):

> "A factual finding is clearly erroneous if there is no competent and material evidence in the record to support it." *Hoang v. Hewitt Ave. Assocs., LLC*, 177 Md. App. 562, 576, 936 A.2d 915 (2007); *see YIVO Inst. for Jewish Research v. Zaleski*, 386 Md. 654, 663, 874 A.2d 411 (2005). The "clearly erroneous" standard does not apply, however, to questions of law. "'When the trial court's [decision] "involves an interpretation and application of Maryland statutory and case law, [the appellate court] must determine whether the lower court's conclusions are legally correct . . . ." '" *White v. Pines Cmty. Improvement Ass'n*, 403 Md. 13, 31, 939 A.2d 165 (2008) (citations omitted). We make this determination *de novo*, without deference to the legal conclusions of the lower court. *Hoang*, 177 Md. App. at 576, 936 A.2d 915 (citing *L.W. Wolfe Enters., Inc. v. Maryland Nat'l Golf, L.P.*, 165 Md. App. 339, 344, 885 A.2d 826 (2005)). *See also Yourik v. Mallonee*, 174 Md. App. 415, 423 n.2, 921 A.2d 869 (2007) (standard of appellate review of judgment concerning adverse possession); *Porter v. Schaffer*, 126 Md. App. 237, 259, 728 A.2d 755, *cert. denied*, 355 Md. 613, 735 A.2d 1107 (1999) (same).

We are tasked here with reviewing the circuit court's various factual and legal findings regarding the relevant contracts, namely, the Development Agent Agreement and the Income Rights Agreements. "The interpretation of a written contract is a legal

question subject to *de novo* review by the appellate courts." *Calomiris v. Woods*, 353 Md. 425, 447 (1999). Whether a breach of contract is material is ordinarily a question of fact, and we will affirm the trial court's finding on that question unless it is clearly erroneous.

DISCUSSION

A. Number of Stores Opened

Subway Development Washington's first claim of material breach is that Albert's did not meet its contractual commitment to open four new stores each year. Albert's does not dispute that, in some years, it has not opened four new stores. But Albert's asserts that it is protected against retribution from Subway Development Washington because of the McDonald's savings clause. That provision, set forth in ¶ 2(c), expressly provides that "the Development Agent shall not be deemed to be behind in the development schedule at any time where the number of SUBWAY units established in the Territory equals or exceeds the total number of units" of the fast food chain competitor with the largest number of units in the territory, namely, McDonald's. It was stipulated at trial that the number of Subway units in the Albert's territory exceeded the number of McDonald's units in the territory.

Subway Development Washington contends, however, that the McDonald's savings clause was not expressly incorporated into the Income Rights Agreements, and therefore, the provision does not relieve Albert's of its contractual obligation to persist in opening four stores each year, even if the franchise has reached a point of over-saturation

in the territory. We agree with Albert's that this argument is not supported by the plain language of the agreements and would require the Court to adopt an absurd construction of the Income Rights Agreements.

The evidence demonstrated that the number of Subway units in Albert's territory is already far in excess of the target ratio required in the Development Agent Agreement of 1 for every 30,000 people in the territory (and also in excess of the 1 for every 25,000 people target as referenced in the 1994 Addendum). We agree with the circuit court's conclusion that the "'savings clause' relieves Albert's of any failure to maintain four stores per year so long as it has established and maintained more stores than does its nearest competitor within the Albert's territory, in this case, McDonald's."

Consequently, the failure of Albert's to open four stores every year did not provide a basis for Subway Development Washington to terminate the Income Rights Agreements.

B. Materiality of AUV Shortfall

"The materiality of a breach of contract is a factual inquiry." *Weichert Co. of Maryland v. Faust*, 419 Md. 306, 316 n.1 (2011). As we said in *Barufaldi* v. *Ocean City Chamber of Commerce, Inc.*, 196 Md. App. 1, 23 (2010):

> 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.'" *Dialist, supra*, 42 Md. App. at 178, 399 A.2d 1374 (1979) (quoting *Traylor v. Grafton*, 273 Md. 649, 687, 332 A.2d 651 (1975), in turn quoting *Speed [v. Bailey], supra*, 153 Md. [655] at 661, 139 A. 534 [(1927)]). **Ordinarily, this is a question of fact.** *See Speed, supra*, 153 Md. at 661–62, 139 A. 534 ("'Whether a given breach is material or essential, or not, is a question of fact'" (quoting *Williston on Contracts*, sec. 866)). There are

> instances, however, when the issue is so clear that it may be decided as a matter of law. *Id.* at 662, 139 A. 534.

(Emphasis added; footnote omitted.)

In this appeal, Subway Development Washington contends that the circuit court "misapplied the binding precedents on materiality," pointing specifically to *Barufaldi*. It argues that the court's "factual finding of immateriality was clearly erroneous," where that conclusion was based in part on the court's finding that Subway Development Washington had "continuously accepted a considerable underperformance in AUVs over a long period of time." Subway Development Washington denies that it tolerated, for years, non-compliant AUVs from Albert's stores. "There is no evidence of tolerance," argued Subway Development Washington, "and the circuit court ignored the undisputed documentary evidence of [Subway Development Washington]'s assertiveness."[11]

[11] Appellant specifically charges that the trial court "overlooked Plaintiff's Exhibit 13, [Subway Development Washington]'s letter of June 13, 2013." This letter was written by counsel for Subway Development Washington to counsel for Albert's after the latter learned of "numerous offers to sell" that had been received by Subway Development Washington and not revealed to Albert's, in violation, Albert's contended, of its right of first refusal. The letter acknowledged that Subway Development Washington was considering an offer to purchase all three of its Development Agent Agreements for $75,000,000, and the letter offered Albert's the opportunity to buy out the Development Agent's rights applicable to Albert's territory "for $11,600,000." The "assertiveness" that Subway Development Washington contends was present in this letter appears to be in a single sentence framing the offer to come: "[Subway Development Washington] maintains that it has lived up to the terms and conditions of the [Income Rights Agreements], while [Albert's has] defaulted on the obligation to develop and service four units per year set forth in Section 1.D. of the Agreement." We see no basis to conclude that this letter, which was admitted into evidence, was "overlooked" by the trial court. As noted above, when Subway Development Washington sent its first Notice of Termination on April 16, 2015, it made no mention of non-compliant AUVs.

Subway Development Washington also argues that "Albert's inability to satisfy the minimum AUV requirement is material because it puts [Subway Development Washington] at risk to default vis-à-vis" Doctor's Associates. Subway Development Washington contends that, "with each passing year, the risk increases that Albert's underperformance" will cause Doctor's Associates to declare a default by Subway Development Washington under the Development Agent Agreement, which would cause Subway Development Washington to lose its rights under that contract.

First, in *Barufaldi*, we found that the employer's total failure to pay Barufaldi *any* incentive compensation --- in a case in which the jury found that Barufaldi had earned $60,000 in incentive compensation --- was a material breach that transformed the employment contract into "something different in substance than that which was contracted for." 196 Md. App. at 26. Because the Chamber of Commerce had agreed to pay Barufaldi two forms of compensation, and then flatly refused to pay him a significant portion of the earned compensation, the employer's partial performance was not the bargain Barufaldi entered into with the Chamber.[12]

[12] The breach in *Barufaldi* was so egregious that this Court was able to decide its materiality as a matter of law (the *Barufaldi* jury had not been instructed on materiality). We noted that the materiality of a breach is ordinarily "a question of fact," but "[t]here are instances . . . when the issue is so clear that it may be decided as a matter of law." Because the evidence in *Barufaldi's* case led the jury to conclude that he had been paid less than half the amount he was owed, we concluded his case was such that "no reasonable juror could have found that the Chamber's breach of the incentive pay provisions was immaterial." *Barufaldi*, 196 Md. App. at 23–24.

The facts of this case are clearly different. There was not a total failure by Albert's to produce any AUVs. And, there was ample evidence that the decline in AUVs was attributable in large part to factors that were beyond the control of Albert's. AUVs were down nationwide, and in Subway Development Washington's remaining territory as well, and had been declining for several years. Subway Development Washington's President, Alan Warmund, testified that Subway sales nationwide had "dropped significantly over the last three to four years," which he admitted had nothing to do with any conduct or performance on the part of Albert's:

> [BY COUNSEL FOR ALBERT'S]: What are the reasons in your mind as to why Subway Doctor's Associates condition has so significantly deteriorated?
>
> [BY MR. WARMUND]: There are lots of different reasons, but, you know, one is the, the, the --- we got some very bad publicity with the Jared situation. Short foot long. We had a number of milestone events that you could see where the sales started dropping, actually started dropping in October of 2012, the third week, and it really accelerated. That year was positive, because there was a part year that it started falling, it was not falling fast, but then suddenly you accumulate that and you start getting into the next summer and starts, you know, get into the year 2014, it starts going down and down, and it's about 20 some odd percent down from where it was four and a half years ago.
>
> Q. **So Subway nationwide is down 20 percent?**
>
> A. **Over a four-year period** ---
>
> Q. Over four years?
>
> A. **---down 20 percent, yes**.
>
> Q. **And [Subway Development Washington] over the last four years is also down; is it not?**

A. **Yes, we're down too.**

Q. How much are you down?

A. **We're down around the same as national.**

Q. **And that's 20 percent?**

A. **I'm using round numbers.**

Q. So this reduction necessarily causes a reduction in the average AUV throughout [Territory] 517; isn't that correct?

A. It causes a reduction in the sum total average of the AUVs, yes.

* * *

Q. **You would agree with me, would you not, that Albert's AUV reduction is in line with [Subway Development Washington]'s reduction in AUVs?**

A. **Yeah, [they're] about the same level of reduction.**

Q. It's also in line with Doctor's Associates[']s reduction nationwide?

A. Yeah, they're within a few points, within a couple of points, yes.

Q. So you would agree with me that that reduction of [Subway Development Washington]'s AUVs and Albert's AUVs have nothing to do with how you operate your territory and how Albert's operates the territory; isn't that correct?

A. I, I don't believe, I don't believe that any one thing is responsible for the --- any one organization or one thing is responsible for the lower AUVs over the years. I personally think everyone, all our franchisees, could do better in an individual store basis, because I have some stores that are up 40 percent, 30 percent, 25 percent. I have some that are down 15, 20 percent. So some are up, some are down, a lot of different reasons, but I'm not going to say that it's one office performing better than the other. **I have no knowledge of how they perform.**

(Emphasis added.)

Warmund agreed that Subway Development Washington's reserved portion of the territory covered by Contract 517 was far more lucrative than Albert's portion, and that, despite its geographic disadvantage, Albert's had exceeded the one-in-30,000 density-driven development metric in the Development Agent Agreement, because Albert's saturation rate is actually "at about one for every 12,000 people, 13,000 people," *i.e.*, approximately twice as many stores as the target rate for density set forth in the 1985 Development Agent Agreement.[13] Warmund also conceded that Albert's had *not* caused Subway Development Washington to lose its rights under the Development Agent Agreement, and Doctor's Associates had made no claim that it was in breach.

At oral argument, when asked to point to what facts the trial court should have considered that made its finding that the breach was not material clearly erroneous, Subway Development Washington argued that the mere fact that AUVs were written into the contract made AUVs a material contract term. As noted above, however, materiality is largely a factual question dependent upon the circumstances, and here, the evidence supported the court's conclusion that the declining AUVs were caused by company-wide issues that were unrelated to any conduct of Albert's. It would have been unreasonable for the court to conclude that Albert's declining AUVs provided a justification for

[13] At oral argument, counsel for Albert's stated that Albert's has one store for every 15,500 people; that is still a much higher density than the ratios mentioned in either the 1985 Development Agent Agreement or the 1994 Addendum.

terminating Albert's Income Rights Agreements. *See also Speed v. Bailey*, 153 Md. 655, 660 (1927) ("It is not every partial failure to comply with the terms of a contract by one party which will entitle the other party to abandon the contract at once."); *Maslow v. Vanguri*, 168 Md. App. 298, 323–24 (2006) ("rescission will not be granted for casual or unimportant breaches, but only for a substantial breach tending to defeat the object of the contract." (internal quotation marks omitted)).

The evidence demonstrated that Subway Development Washington itself, like Subway stores nationally, was suffering from reduced sales volume. But Subway Development Washington also conceded that Albert's had not done anything that caused Subway Development Washington to lose its rights under the Development Agent Agreement. Under the circumstances, the circuit court's finding that Albert's failure to meet minimum AUVs was not a material breach justifying forfeiture of Albert's rights under the Income Rights Agreements was not clearly erroneous.

Because we conclude that the trial court correctly entered judgment in favor of Albert's, we will affirm.[14]

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[14] At oral argument, counsel for Subway Development Washington stated that we would not need to address its arguments regarding exclusive remedy if we found in favor of Albert's regarding the savings clause and materiality. We agree that it is not necessary for us to address the argument relative to exclusive remedy.