IN THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 4D23-452

CELSIUS HOLDINGS, INC.,

Appellant,

v.

STRONG ARM PRODUCTIONS, USA, INC. et al.,

Appellees.

BRIEF OF APPELLANT CELSIUS HOLDINGS, INC.

ON APPEAL FROM A FINAL JUDGMENT ENTERED IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

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INTRODUCTION

Defendant-Appellant Celsius Holdings, Inc. (Celsius) seeks to have the Court enforce the plain and unambiguous language of the parties' contracts. The trial court refused to do so, and instead improperly delegated its role to the jury to ascertain the contracts' meaning, based on extrinsic evidence.

Plaintiff-Appellee Tramar Dillard, a musical artist known as "Flo Rida," engaged Plaintiff-Appellee Strong Arm Productions USA, Inc. (Strong Arm) as his management company to help promote his musical career. Strong Arm, in turn, retained Plaintiff-Appellee D3M Licensing Group (D3M), to seek endorsement opportunities on behalf of Mr. Dillard. In 2014, D3M approached Celsius with a proposed promotional deal for Mr. Dillard to endorse Celsius, a manufacturer of fitness energy drinks. The parties ultimately executed one of the two contracts at issue here—an endorsement deal (the 2014 Agreement).

The 2014 Agreement provided for up-front compensation, in the form of a cash payment and Celsius stock. Beyond the up-front compensation, the 2014 Agreement provided two additional types of compensation, which were tied to the market performance of co-

branded powdered versions of Celsius's products featuring Mr. Dillard on the packaging and marketed as "Celsius Flo Fusion." First, if Celsius achieved $1 million in sales of the Flo Fusion branded products in any 12-month period during the 2014 Agreement's term, D3M would receive 250,000 additional Celsius shares (the Bonus Compensation Clause). Second, if Celsius sold 690,000 units of the Flo Fusion products during the agreement's term, D3M would receive 500,000 Celsius shares (the Incentive Compensation Clause).

No additional shares were transferred to D3M during the 2014 Agreement's two-year term. Approximately one month after the 2014 Agreement expired in March 2016, Celsius and D3M entered a new endorsement contract (the 2016 Agreement), with a different compensation structure. Neither of the mechanisms for the award of additional stock in the 2014 Agreement were included in the 2016 Agreement, which expired after 30 months. After the 2016 Agreement expired in 2018, the parties went their separate ways.

Years later, Celsius became a corporate success story, achieving revenue and financial targets, leading to inking an investment from and distribution deal with Pepsi that greatly broadened its distribution footprint. In 2021, D3M demanded stock under the

Bonus Compensation Clause and the Incentive Compensation Clause, asserting that both sales targets had been achieved.

Celsius declined because the sales targets had not been met. The undisputed evidence showed that the co-branded powder products had not sold well; while Mr. Dillard may have been a "brand ambassador" for Celsius's canned drink products—for which efforts D3M was paid in cash and stock—D3M was not entitled to *additional* compensation under the benchmarks.

D3M, Strong Arm, and Mr. Dillard (collectively, Plaintiffs) sued Celsius, seeking to recover the purported value of the shares to which D3M had asserted entitlement. Although it was undisputed that the Bonus Compensation Clause target had not been reached during the 2014 Agreement's term, Plaintiffs claimed that the 2016 Agreement—which did not refer to the 2014 Agreement and stated that the 2016 Agreement was the sole governing contract between Celsius and D3M—constituted an extension of the earlier agreement. Plaintiffs also claimed that the 690,000-unit target in the Incentive Compensation Clause had been reached because each "stick" of drink mix in the 14-count boxes that Celsius sold to retailers and distributors constituted a "unit" under the clause.

The trial court's cardinal error was its refusal to interpret and apply the two agreements' plain language on summary judgment, instead leaving those quintessential legal questions to the jury to be interpreted based on parol evidence of the parties' purported intent. On its de novo review, this Court will find no ambiguity at all; and, to the extent that there is any ambiguity, it is at best a *patent* ambiguity that should be resolved under contract construction rules.

Either way, the 2014 Agreement was not renewed by the 2016 Agreement, such that D3M had no entitlement to 250,000 Celsius shares under the Bonus Compensation Clause. Even if that were not so, Plaintiffs' claims under the 2014 Agreement are barred by the statute of limitations.

Nor could D3M assert entitlement to 500,000 shares under the Incentive Compensation Clause, because a powder "stick" is not a "unit" of co-branded product. The 2014 Agreement defined the co-branded products as items "priced at retail between $19.95 - 39.95"—and it was undisputed that individual sticks sold at retail for $1.43. And even if the Court accepts that there is latent ambiguity in the clause, the undisputed evidence establishes that a "stick" is not a "unit" that Celsius sold to retailers and distributors.

The trial court further erred in allowing the jury free rein to pick the date for valuing Celsius's stock in awarding damages to Plaintiffs, which allowed Plaintiffs to recover based on the stock value as of the last day of trial, rather than as of the date of any actual breach of either agreement. And finally, the jury verdict is irreconcilably inconsistent: the jury found that the agreements were breached before *May 2016*—but also found that the contractual benchmarks were reached in 2016 and 2018, *and* further found that the breaches occurred in *April 2021*. The trial court erred in overruling Celsius's objection to the inconsistent verdict, and Celsius would be entitled to a new trial, even if the jury's findings could be upheld.

STATEMENT OF THE CASE AND FACTS

I. THE D3M-CELSIUS AGREEMENTS.

A. The 2014 Agreement.

Because Mr. Dillard, a musical artist who performs as "Flo Rida," became interested in "branding opportunities" (T:337-42, 346-47), his management company, Strong Arm, retained D3M to solicit such opportunities. (T:422-23, 434). David Gold, D3M's principal, reached out to Celsius to discuss an endorsement deal. (T:672-73; R:5044; R:5904-12, 6169-73, 5321-28, 6202-05, 6064-68).

On March 9, 2014, Celsius and D3M executed the 2014 Agreement. (R:3938-73). D3M agreed to provide Mr. Dillard's services to Celsius to "advertise" and "promote" Celsius's canned energy drinks and a line of co-branded powdered energy drinks (referred to in the contract as the "Products"). (R:3940, 3945). Celsius repackaged its existing line of powdered drinks to show co-branding with Mr. Dillard, under the name "Flo Fusion":

(R:4507-08, 6183-87; T:861-62). The 2014 Agreement provided that "[t]he Products will be priced at retail between $19.95 - 39.95 or as appropriate for channel of distribution or country and be distributed worldwide through . . . retail/distribution channels." (R:3939).

The 2014 Agreement's expiration date was March 6, 2016, "unless mutually extended by the Parties in writing." (R:3940). Upon execution, D3M received a $100,000 "endorsement fee" and 250,000 Celsius shares. (R:3958). The 2014 Agreement establishes two benchmarks for additional compensation. *Id.*

First, Section 2, the Bonus Compensation Clause, granted D3M another 250,000 shares upon Celsius achieving $1 million in "gross cumulative Co-branded revenues in any twelve-month period during the [contract's] Term." *Id.* Second, Section 3, the Incentive Compensation Clause, granted an additional 500,000 shares once Celsius sold 690,000 "units of Co-branded Product" through its "channels of distribution." *Id.* The 2014 Agreement expired by its own terms in March 2016. (R:3940).

B. The 2016 Agreement.

Celsius and D3M began discussing a new endorsement contract in early 2016. (R:5966-74, 5079-83, 6003-05; R:5309-17, 6078-80,

6099-6104, 6051-63; T:493). The 2016 Agreement, however, was not executed until April 11, 2016, three weeks after the 2014 Agreement expired. (R:3974-4000).

The 2016 Agreement created a different compensation structure:

- 250,000 shares to D3M (27.5%) and Mr. Dillard (72.5%);
- $500,000 in a "Guaranteed Commission Advance/Royalty" staged from execution through two years; and
- an additional royalty, based on sales of two identified Products, which would be deducted from the guaranteed royalty payments.

(R:3983-84).

Unlike the 2014 Agreement, the 2016 Agreement included a strongly worded merger/integration clause:

> This Agreement sets forth the entire agreement between D3M and [Celsius] with regard to the subject matter herein, supersedes all prior agreements and understandings between the parties concerning same, is specifically intended to expand, modify, and/or supersede all written communications and term sheets exchanged between the parties, and may not be modified or amended without a separate writing signed by all parties hereto. D3M and [Celsius] represent that no other agreement, oral

> or written, exists between them. The provisions of this Agreement shall govern the relationship between D3M and [Celsius].

(R:3992-93).

The Celsius-D3M/Dillard relationship ended when the 2016 Agreement's 30-month term expired in 2018. (T:872-73). Shortly thereafter, Mr. Dillard signed an endorsement deal with a Celsius competitor. (T:873).

Following a 2019 restructuring and creation of a "national distribution network," Celsius's drinks are now being sold in more than 160,000 stores around the country; Celsius also signed a distribution deal with Pepsi. (T:877-79). Celsius's shares were selling at around $4.00 in July 2017, when the company qualified for a NASDAQ listing. (T:844-45). By early 2021, the stock price was in the $50-60 range. (R:4946-96).

On February 26, 2021, Plaintiffs demanded stock transfers from Celsius under the 2014 Agreement and payment of other royalties; Celsius, explaining that the benchmarks had not been achieved, declined on April 30, 2021. (T:476-77; R:5294-99).[1] Plaintiffs then

[1] See Argument, Point II, for a discussion of Celsius's limitations defense to Plaintiffs' claims under the 2014 Agreement.

sued Celsius, pleading claims for alleged breaches of both agreements. (R:45-54).

II. THE TRIAL.

A. The Summary Judgment Ruling.

Celsius moved for summary judgment, arguing among other things that unambiguous contractual provisions barred the claims because: (i) the 2014 Agreement expired before either benchmark was achieved; (ii) the 2016 Agreement had foreclosed any claims under the 2014 Agreement; and (iii) the 2016 Agreement did not grant D3M perpetual royalties. (R:632-56). Plaintiffs contended that factual questions were presented on whether: (i) the 2016 Agreement extended the 2014 Agreement's term; and (ii) the 2016 Agreement's royalty provision was perpetual. (R:2825-44).

The trial court ruled that "there are genuine disputes of material fact that preclude summary judgment on the breach of contract claims relating to the revenue and unit benchmarks":

> After considering the agreement as a whole and its terms and provisions, the [c]ourt finds that the agreement can be reasonably interpreted in more than one way, and that material terms, including "co-branded revenues" and "unit" are undefined with conflicting, yet reasonable, interpretations by the parties. Consequently, the agreement is ambiguous and reasonably susceptible to

> different constructions so the trier of fact must interpret the agreement based upon the evidence to be presented by the parties at trial. All of the foregoing must be submitted to the trier of fact for determination at trial.
>
> . . . . The [c]ourt finds that there are genuine disputes of material fact as to whether the 2016 Agreement's royalty obligation expired when the agreement expired or whether it provided for ongoing royalties. . . .

(R:3651-53 (citations omitted)). The summary judgment motion was renewed at trial in Celsius's directed-verdict motions, and in the post-trial motion. (T:650-56, 935-37; R:5539-46, 5554-57; R:5846-50).

B. The Parol Evidence.

Once the court refused to construe the agreements as a matter of law, Plaintiffs tried the question based on parol evidence. (T:657-63, 1123-27, 1129-34). Plaintiffs' theory was that "the contract language . . . was not what was originally intended." (T:1121).

1. Parol evidence on the 2014 Agreement.

a. The Bonus Compensation Clause.

Celsius's former CEO, Gerry David, testified that the co-branded products "just didn't perform." (T:684). "It didn't resonate with the consumers" and "failed miserably." (T:684, 749). John Fieldly, who was promoted from CFO to CEO after Mr. David retired (T:318-19, 836-37), similarly testified that the co-branded products

had not been successful. (T:863-65). Internal documents confirm that Celsius produced approximately 135,000 14-count boxes of Flo Fusion powder sticks and had to throw most of them out due to limited sales. (R:4516-4923; T:858, 860-61). Celsius accordingly "restructured" its relationship with D3M and Mr. Dillard in the 2016 Agreement. (T:870-73).

On January 29, 2016, Celsius's CEO, Gerry David, wrote to Mr. Dillard's counsel, Reggie Mathis: "[Mr. Dillard] has been an outstanding ambassador for our brand over the past 2 years. . . . We would like to continue with [Mr. Dillard] and are requesting a meeting . . . to discuss strategy and deal points." (R:5079-83; T:301). On February 10, 2016, Mr. Gold told Mr. David that he "[w]ould like to see [a] similar contract as is currently in place with increased cash and stock positions." (R:6078-80). The 2014 Agreement expired by its own terms on March 9, 2016.

Following negotiations (R:5309-17, 6099-6104, 6051-63), D3M, Mr. Dillard, and Celsius entered into the 2016 Agreement on April 11, 2016 (R:3974-4000). Mr. David testified that, "in my mind, it was a continuation of the [2014 Agreement], and it just had different . . . numbers in it." (T:305). But while it was a continuation of the

relationship between Celsius and Mr. Dillard, the 2016 Agreement was a "brand-new agreement," with an entirely different compensation formula that included royalties based on canned-drink sales. (T:687-88). It "was not a renewal" or "an extension." (T:755).[2]

Mr. Gold testified that he had been told by Mr. David and Mr. Fieldly that the 2016 Agreement was a "renewal." (T:494, 527-28). He believed that "the bonuses and the benchmarks stayed the same," with "some added deliverables." (T:590, 610). Mr. Gold acknowledged that there is no reference to the 2014 Agreement in the 2016 Agreement, but testified that "[t]here wouldn't be" because "[i]t was a renewal." (T:586-88). Mr. Dillard, who was not involved in the negotiations, testified that he had intended to have the 2014 Agreements' benchmarks "extended." (T:373).

Celsius issued a press release on August 23, 2016, titled "Celsius Renews Partnership with Multi-Platinum Record Artist Flo

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[2] Mr. David explained that an extension of the 2014 Agreement would not have required board approval, but that, "I had to go back to the board for approval because it was a brand-new contract." (T:755-56). The board minutes reflect that "[r]enewal" of the "endorsement agreement" was on the board's March 29, 2016 agenda; Mr. David explained that he had used "renewal," rather than "extension," because "we were going to do a new contract." (T:757).

Rida," announcing "a renewed 30-month partnership agreement with multi-platinum recording artist Flo Rida, whose songs were voted most popular workout tunes in a survey at one of America's top fitness clubs," and a continuation of "Celsius's highly successful worldwide licensing and endorsement agreement with Flo Rida, which began in March of 2014." (R:5975-79; T:371-72).

b. The Incentive Compensation Clause.

Celsius set the 2014 Agreement's 690,000-unit benchmark based on a calculation that it would produce $10 million in revenue. (T:677-78; 855-57; R:6202-05). Mr. David testified that there had never been any discussions with D3M that contemplated a single stick as a unit under the clause, and that Celsius "always went by how we showed it on our pricing sheets," *i.e.*, "[h]ow it was packaged," such that "the sticks were always going to be a 14-count box as a unit." (T:681). Mr. Fieldly explained:

> There is no way I would, as a CFO of the company, would ever enter into any agreement to sell single [sticks]—I mean, you're talking basically generat[ing] $450,000.
>
> That doesn't even pay for anything at least what we paid even D3M and through the contract relationship.
>
> It doesn't make any . . . business sense.

(T:858-59).

Celsius sold the sticks only in those 14-count boxes, and never sold individual sticks to retailers or distributors, as its wholesale pricing lists reflect. (R:4001-03, 5991-94; R:6178-82, 5334-36; T:844-51, 916-17). For example:

Item (Packets)	UPC	Size	Item Dimensions (LxWxH)	Case UPC (Pack Out 12)	Case dimensions (LxWxH)	Case Cube (in³)	Case Pack	Case Weight (lbs)	Pallet (TixHi)	PTD	Dist. Margin	PTR	MSRP	MAP Pricing (30%)	Retailer Margin	Best By (mths)
Celsius **Flo Fusion Orange** Single Packet	889392088014	0.18 oz/5.1g	4.25" x 0.75" x 0.25"										$1.43	$1.00	45%	
Celsius **Flo Fusion Orange** Packet Box (14ct)	889392088021	2.6oz/73.7g	3.5" x 1.625" x 5.0"	889392088038	13.0" x 7.25" x 5.25"	498.81	12	2.36	18 x 9 = 162	$96.75	25%	$129.00	$17.99	$12.59	40%	24
Celsius **Flo Fusion Berry** Single Packet	889392080049	0.22/6.2g	4.25" x 0.75" x 0.25"										$1.43	$1.00	45%	
Celsius **Flo Fusion Berry** Packet Box (14ct)	889392080056	3.08oz/86.8g	3.5" x 1.625" x 5.0"	889392080117	13.0" x 7.25" x 5.25"	498.81	12	2.36	18 x 9 = 162	$96.75	25%	$129.00	$17.99	$12.59	40%	24

Item (Canister)	UPC	Size	Item Dimensions (LxWxH)	Case UPC (Pack Out 6)	Case dimensions (LxWxH)	Case Cube (in³)	Case Pack	Case Weight (lbs)	Pallet (TixHi)	PTD	Dist. Margin	PTR	MSRP	MAP Pricing (30%)	Retailer Margin	Best By (mths)
Celsius **FloFusion Berry Canister** (40ct canister)	889392088090	8.3oz/236g	3.6" x 3.5"	889392088106	11.25" x 7.5" x 4"	337.50	6	3.8	16 x 12 = 192	$134.97	25%	$179.96	$49.99	$34.99	40%	24

THE 14-DIGIT GTIN FOR ISYNC CELSIUS CUSTOMERS HAS 2 ZEROS (00) IN THE BEGINNING OF THE UPC CODE
PTD - Price to Distributor
PTR - Price to Retailer
MSRP - Manufactured Suggested Retail Price

(R:4001-03). Single packets have no price point for sales to distributors or retailers. *Id.*

Celsius knew that some of its customers sold individual sticks of the powdered drinks at retail, and Celsius sales personnel discussed individual-stick retail processing both internally and with customers. (R:4001-03, 4015-19, 5918-21, 5934-36; T:327-28). The pricing sheets accordingly included an "MSRP" number for the individual sticks, *i.e.*, the suggested retail price to consumers — $1.43 per stick. (R:4001-03; T:297, 327-28).

2. The 2016 Agreement.

Mr. Dillard testified to his belief that the royalties under the 2016 Agreement were "never ending." (T:380-81). Mr. Gold, however, acknowledged that there is nothing in the 2016 Agreement indicating that royalties are to be paid in perpetuity. (T:593). He testified: "I never said it was entitled to perpetuity. I didn't see the perpetuity in there." (T:610).

C. Damages.

Plaintiffs' damages expert calculated that the $1 million benchmark in the Bonus Compensation Clause was reached in February 2018. (T:629-31; R:4924-27). The 690,000-unit benchmark in the Incentive Compensation Clause was reached only by treating individual powder sticks as units. (T:633-34, 638; R:4928-32). Celsius's damages expert agreed that the Bonus Compensation Clause benchmark was not achieved during the 2014 Agreement's term (T:784-90), and also testified that, treating the 14-count boxes and not individual sticks as units under the Incentive Compensation Clause, the 690,000-unit benchmark was not achieved until March 2020. (T:797-803).

Plaintiffs' damages expert calculated a total of approximately $650,000 in royalties, as of 2020, under the 2016 Agreement. (R:4938-41, 4942-45). Celsius's expert calculated royalties of $385,000 during the 2016 Agreement's term—less than the $500,000 advance royalties paid to D3M at the outset. (T:803-04).

The trial court overruled Celsius's objections to calculating damages based on a date other than the date of the alleged breach of each agreement (R:874-77), ruling that, "I am going to allow the evidence of whether the plaintiffs would have kept the shares and the stock price for the shares through the date of the verdict." (T:13-15). During closing argument, Plaintiffs' counsel invoked a previously unpleaded theory, telling the jury to choose from: (i) the newly-alleged date of breach (April 30, 2021), when the stock price was $57.30; (ii) the first date on which the stock purportedly could have been sold (November 1, 2021), when the price was $101 per share; and (iii) the last day of trial, when the price was $110 per share. (T:1151; R:4946-96).[3]

[3] See Argument, Point IV.A., *infra*.

D. The Verdict.

The jury found liability on the Bonus Compensation Clause:

1. Did the plaintiffs prove that Celsius breached the 2014 Agreement by establishing that Celsius achieved "One Million Dollars ($1,000,000.00) in gross cumulative Co-branded revenues in any twelve-month period during the Term"?

   YES X NO ___

   If your answer to question 1 is NO, then your verdict is for the defendant on this claim, and you should skip to question 9. If your answer to question 1 is YES, then continue to question 2.

2. On what date did Celsius breach this provision of the 2014 Agreement?

   April 30th, 2021 (this provision was breached on February 2018

3. Did the plaintiffs prove that the Term of the 2014 Agreement was extended by the 2016 Agreement?

   YES X NO ___

* * * *

5. Did the defendant prove that the breach of this provision of the 2014 Agreement occurred before May 4, 2016?

   YES X NO ___

(R:5395-96). The jury awarded $27,545,000 for the breach. (R:5396).

The jury found a breach of the Incentive Compensation Clause:

9. Did the plaintiffs prove that Celsius breached the 2014 Agreement by establishing that Celsius sold "a total of 690,000 units of Co-branded Product through its channels of distribution following the execution of this Agreement"?

YES X NO ___

If your answer to question 9 is NO, then your verdict is for the defendant on this claim, and you should skip to question 17. If your answer to question 9 is YES, then continue to question 10.

10. On what date did Celsius breach this provision of the 2014 Agreement?

April 30th, 2021 (this provision was reached on February 2015)

11. Did the plaintiffs prove that, with respect to units of co-branded product, an individual stick counts as a "unit"?

YES X NO ____

* * * *

13. Did the defendant prove that the breach of the 2014 Agreement occurred before May 4, 2016?

YES X NO ____

(R:5397). The jury awarded $55,090,000 on the claim. (R:5398).

The jury also awarded $5,450.00 in royalties under the 2016 Agreement. (R:5398).

SUMMARY OF ARGUMENT

1. Based on the agreements' plain language, Plaintiffs had no right to recover under the 2014 Agreement's Bonus Compensation Clause (Section 2) or Incentive Compensation Clause (Section 3). The 2014 Agreement terminated, by its own terms, before either benchmark was achieved. The 2016 Agreement was not a renewal of the 2014 Agreement—and was, under an unusually strong merger/integration clause, the parties' only operative contract.

The trial court accordingly erred in denying summary judgment and in allowing Plaintiffs to introduce parol evidence to vary the agreements' plain language. But even if the parol evidence had been correctly admitted, Plaintiffs failed to prove either that the 2016 Agreement renewed the Bonus Compensation Clause or that individual powdered-drink sticks constituted units under the Incentive Compensation Clause.

The 2016 Agreement's plain language also defeats Plaintiffs' claim for recovery of perpetual royalties. There is no provision for continuing royalties upon the agreement's expiration.

2. Plaintiffs' claim for breach of the 2014 Agreement is barred by the statute of limitations. The cause of action accrued when the agreement was purportedly breached. Plaintiffs cannot avoid the statute by asserting equitable estoppel, because Plaintiffs made no showing that they were aware of their purported claims during the limitations period and were induced to forbear bringing an action. Nor can Plaintiffs invoke fraudulent concealment to avoid the statute, because no fiduciary relationship existed between D3M and Celsius.

3. The jury returned an irreconcilably inconsistent verdict, finding that Celsius breached the 2014 Agreement in April 2021, but

that the breach occurred before May 4, 2016—and that one benchmark for additional stock was reached in February 2018. The trial court erred in refusing to order additional deliberations before discharging the jury.

4. The jury's damages award is based on the value of Celsius's stock on the last day of trial. It is black-letter Florida law that contract damages must be determined as of the date of breach. And Plaintiffs indeed pleaded that they were entitled to recover immediately upon the alleged achievement of the contractual benchmarks. The trial court erred in allowing Plaintiffs to try an unpleaded and legally unfounded damages theory.

ARGUMENT

I. THE AGREEMENTS' PLAIN LANGUAGE DEFEATS PLAINTIFFS' CLAIMS.

A. Standards of Review.

"Interpretation of a contract is a question of law." *Waverly 1 & 2, LLC v. Waverly at Las Olas Condo. Ass'n*, 242 So. 3d 425, 428 (Fla. 4th DCA 2018) (citation omitted). This Court accordingly will "review and interpret a contract under the de novo standard of review." *Eclectic Synergy, LLC v. Seredin*, 347 So. 3d 27, 29 (Fla. 4th DCA

2022) (citation and internal quotation marks omitted). A trial court's error in denying summary judgment on unambiguous contractual terms presents this Court with a question of law. *Ioannides v. Romagosa*, 93 So. 3d 431, 433-35 (Fla. 4th DCA 2012).

Whether a contract is ambiguous is a question of law, *E.g.*, *Chopin & Chopin, LP v. Brennan*, 178 So. 3d 509, 510 (Fla. 4th DCA 2015). That question is subject to de novo review on appeal. *Brickell Fin. Servs. - Motor Club, Inc. v. Rd. Transp., LLC*, 298 So. 3d 62, 67 (Fla. 4th DCA 2020).

"Ambiguities can be either patent or latent." *Ehlert v. Castro*, 330 So. 3d 41, 45 (Fla. 4th DCA 2021) (citation omitted). "A patent ambiguity is one that appears on [the contract's] face," *id.* (citation omitted), *i.e.*, patent ambiguity "arises from the defective, obscure, or insensible language used." *Janoura Partners, LLC v. Palm Beach Imports, Inc.*, 264 So. 3d 942, 946 (Fla. 4th DCA 2018) (citation omitted). Latent ambiguity arises if "the language employed is clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among two or more possible meanings." *Id.* (citation omitted). "Patent ambiguities are on the face of the document, while

latent ambiguities do not become clear until extrinsic evidence is introduced and requires parties to interpret the language in two or more possible ways." *Clayton v. Poggendorf*, 237 So. 3d 1041, 1047 (Fla. 4th DCA 2018).

"A significant difference between patent and latent ambiguities is that extrinsic evidence is *normally* not admissible to construe the former because its admittance would allow a trial court to rewrite a contract with respect to a matter the parties clearly contemplated when they drew their agreement," but "[e]xtrinsic evidence . . . is admissible to explain a latent ambiguity . . . because doing so is but to remove the ambiguity by the same kind of evidence as that by which it is created." *Nationstar Mortg. Co. v. Levine*, 216 So. 3d 711, 715 (Fla. 4th DCA 2017) (citations and internal quotation marks omitted; original emphasis); *accord Clayton*, 237 So. 3d at 1047. Thus, while "parol evidence is not admissible to interpret a patent ambiguity," it is admissible, "[i]f there is a latent ambiguity, . . . to interpret the meaning of the ambiguous terms in the contract." *Bd. of Regents, Univ. of S. Fla. Bd. of Trs. v. Rowsey*, 320 So. 3d 954, 962 (Fla. 2d DCA 2021) (citations omitted), *review denied,* No. SC21-957, 2022 WL 413979 (Fla. Feb. 11, 2022).

B. The Agreements' Plain Language Bars Plaintiffs' Claims.

1. The 2014 Agreement terminated before the Bonus Compensation Clause was triggered.

The 2014 Agreement's Bonus Compensation Clause required Celsius immediately to issue 250,000 shares to D3M upon Celsius achieving $1 million in "gross cumulative Co-branded revenues in any twelve-month period during the [contract's] Term." (R:3958). The agreement's "Initial Term" ran from March 9, 2014, to March 6, 2016. (R:3940). It is undisputed—and, indeed, the jury found—that the $1 million revenue trigger did not occur until February *2018* (R:5395-96)—almost two years *after* the 2014 Agreement's Initial Term had expired.

Whether the 2014 Agreement's Bonus Compensation Clause was nonetheless still in effect in February 2018 turns on a construction of the 2016 Agreement. (R:5531-78; R:5596-5626; R:5642-77; R:5846-50). On summary judgment and on post-trial motions, Plaintiffs argued—and prevailed on—the theory that the 2014 Agreement had been renewed by the 2016 Agreement. (R:3298-3317; R:5596-5626; R:5846-50).

a. The 2016 Agreement's plain language.

The 2016 Agreement must first be construed on its plain language. *E.g.*, *Inlet Colony, LLC v. Martindale*, 340 So. 3d 492, 495 (Fla. 4th DCA 2022) ("[i]n construing a contract, the court should consider its plain language and take care not to give the contract any meaning beyond that expressed" (citation omitted)), *review denied,* SC22-865, 2022 WL 4102505 (Fla. Sept. 8, 2022). "[W]hen the language of a contract is clear and unambiguous, courts must give effect to the contract as written and cannot engage in interpretation or construction as the plain language is the best evidence of the parties' intent." *Hallandale Plaza, LLC v. New Tropical Car Wash, LLC*, 335 So. 3d 712, 719 (Fla. 4th DCA 2022) (citation omitted).

By its own terms, the 2014 Agreement expired in March 2016. Celsius and D3M entered into the 2016 Agreement on April 11, 2016—*after* the 2014 Agreement expired. There is not one *word* in the 2016 Agreement about the 2014 Agreement, much less any language that suggests that the 2014 Agreement was being renewed.

"Where a contract is simply silent as to a particular matter, that is, its language neither expressly nor by reasonable implication indicates that the parties intended to contract with respect to the

matter, the court should not, under the guise of construction, impose contractual rights and duties on the parties which they themselves omitted." *Gesten v. Am. Strategic Ins. Corp.*, 339 So. 3d 1008, 1011 (Fla. 4th DCA 2022) (citation omitted). Construing the 2016 Agreement as a silent "renewal" of the 2014 Agreement would constitute impermissible judicial rewriting of an unambiguous contract—and "[c]ourts, without dispute, are not authorized to rewrite clear and unambiguous contracts." *Inlet Colony, LLC v. Martindale*, 340 So. 3d 492, 495 (Fla. 4th DCA 2022) (citation omitted).

b. The merger/integration clause.

Section 13.10 of the 2016 Agreement states:

> This Agreement sets forth the entire agreement between D3M and [Celsius] with regard to the subject matter herein, *supersedes all prior agreements and understandings* between the parties concerning same, is specifically intended to expand, modify, and/or supersede all written communications and term sheets exchanged between the parties, and may not be modified or amended without a separate writing signed by all parties hereto. D3M and [Celsius] represent that *no other agreement, oral or written,* exists between them. *The provisions of this Agreement shall govern the relationship between D3M and [Celsius].*

(R:3992-93 (emphasis added)). This ironclad clause does several different things, all of which ensure that the 2016 Agreement—and *only* the 2016 Agreement—controlled the parties' relationship.

First, it nails down that the 2016 Agreement "sets forth the *entire agreement*" between D3M and Celsius "with regard to the subject matter herein." (R:3992-93 (emphasis added)). "The concept of integration is based on a presumption that the parties to a written contract intended that writing to be the sole expositor of their agreement." *Pops Fam. Ent. Ctr., Ltd. v. Kelly*, 347 So. 3d 509, 512 (Fla. 2d DCA 2022) (citation and internal quotation marks omitted).

In the trial court, Plaintiffs seized on the inclusion of the word "expand" in Section 13.10 to argue that the 2016 Agreement must be read as "expanding"—and *not* superseding—the 2014 Agreement. (R:5607). But "[c]ourts are required to interpret a contract as a whole and give meaning and effect to each part," such that an "interpretation which gives a reasonable meaning to all provisions of a contract is preferred to one which leaves a part useless or inexplicable." *All Year Cooling & Heating, Inc. v. Burkett Props., Inc.*, No. 4D21-3401, 2023 WL 2000991, at *1 (Fla. 4th DCA Feb. 15, 2023) (citations and internal quotation marks omitted). The clause

actually states that it "is specifically intended to expand, modify, and/or *supersede* all written communications and term sheets exchanged between the parties." (R:3992-93 (emphasis added)). When read in its entirety, the clause means that the 2016 Agreement integrates all communications between the parties that led to its execution—and *not* that the 2014 Agreement is somehow revived.

Second, the "entire agreement" clause "make[s] extrinsic agreements unenforceable unless they are contained *within* the written contract." *World-Class Talent Experience, Inc. v. Giordano*, 293 So. 3d 547, 549 (Fla. 4th DCA 2020) (citation omitted; emphasis added). The 2014 Agreement is "not contained within" the 2016 Agreement. *Id.*; *accord Trinchitella v. D.R.F., Inc.*, 584 So. 2d 35, 35-36 (Fla. 4th DCA 1991) ("entire agreement" clause in subsequent agreement that omitted arbitration clause included in initial agreement superseded initial agreement); *see also Harkless v. Laubhan*, 219 So. 3d 900, 905 (Fla. 2d DCA 2016) (in determining whether prior agreement is merged "into a subsequent contract, our guiding principle is the intent of the parties" (citation omitted)).

Third, by agreeing that "no other agreement, oral or written, exists between them," the parties unmistakably disavowed any

inclusion of the 2014 Agreement's terms in the 2016 Agreement. Indeed, to incorporate another agreement, "there must be *some expression* in the incorporating document . . . of an intention to be bound by the collateral document." *Phoenix Motor Co. v. Desert Diamond Players Club, Inc.*, 144 So. 3d 694, 697 (Fla. 4th DCA 2014) (citation omitted; emphasis added). There is not even a *mention* of the 2014 Agreement in the 2016 Agreement, much less an *incorporation* by reference. *See Citizens Prop. Ins. Corp. v. Eur. Woodcraft & Mica Design, Inc.*, 49 So. 3d 774, 778 (Fla. 4th DCA 2010) ("merely suggesting the additional terms of the contract, without sufficiently describing the other document *or* offering the collateral document to the party intending to be bound, precludes application of incorporation by reference doctrine" (original emphasis)); *Affinity Internet, Inc. v. Consol. Credit Counseling Servs., Inc.*, 920 So. 2d 1286, 1288 (Fla. 4th DCA 2006) ("mere reference to another document is not sufficient to incorporate that other document into a contract"). A merger clause is "a highly persuasive statement that the parties intended the agreement to be totally integrated and generally works to prevent a party from introducing

parol evidence to vary or contradict the written terms." *Giordano*, 293 So. 3d at 549 (citation omitted).

c. The 2016 Agreement is not ambiguous regarding the 2014 Agreement.

i. No patent ambiguity.

In the trial court, Plaintiffs sought to flip well-established law on its head, arguing that the 2016 Agreement is ambiguous because it "does not explicitly address its relationship to the terms established in [the] 2014 [Agreement]." (R:5605). Stated otherwise, Plaintiffs would have this Court hold that *silence* creates ambiguity.

Precedent dooms that effort. For one thing, the absence of any reference to the 2014 Agreement in the 2016 Agreement does not create *ambiguity*; rather, as set forth above, it means that the 2014 Agreement *is not incorporated* into the 2016 Agreement. Matters omitted from a contract are deemed to have been purposely left out, and such omissions do *not* create ambiguity. *Advanzeon Sols., Inc. v. State ex rel. Fla. Dep't of Fin. Servs.*, 321 So. 3d 911, 915 (Fla. 1st DCA 2021), *review denied*, No. SC21-1015, 2021 WL 4739368 (Fla. Oct. 12, 2021).

Moreover, the initial question whether a contract is ambiguous is to be made upon examination of the contractual language, *e.g.*, *Sidiq v. Tower Hill Select Ins. Co.*, 276 So. 3d 822, 827 (Fla. 4th DCA 2019) (courts "must first look at the words used on the face of the contract to determine whether the contract is ambiguous" (citation and internal quotation marks omitted)), and "extrinsic evidence . . . should not be used to introduce [a contractual] ambiguity where none exists." *EcoVirux, LLC v. BioPledge, LLC*, 357 So. 3d 182, 187 (Fla. 3d DCA 2022) (citation omitted; brackets in original). "[A] party seeking to introduce parol evidence must *first* establish a contract term is ambiguous." *Fendrich v. Murphy*, 353 So. 3d 1194, 1196 (Fla. 4th DCA 2023) (emphasis added). This, Plaintiffs cannot accomplish.

"An agreement is ambiguous if as a whole or by its terms and conditions it can reasonably be interpreted in more than one way." *Clayton*, 237 So. 3d at 1047. "When a contract's terms are not susceptible to more than one meaning, a court may not indulge in interpretation or resort to extrinsic evidence." *Land Co. of Osceola Cnty., LLC v. Genesis Concepts, Inc.*, 169 So. 3d 243, 248 (Fla. 4th DCA 2015) (citation omitted). On its face, the 2016 Agreement's reference to "this Agreement" cannot possibly be ambiguous.

ii. No latent ambiguity.

Finally, Plaintiffs asserted in the trial court that a latent ambiguity permitted the introduction of extrinsic evidence on whether the 2016 Agreement renews the 2014 Agreement. (R:5610). But "[a] latent ambiguity . . . arises when the language in a contract is clear and intelligible, but some extrinsic fact or extraneous evidence creates a need for interpretation or a choice between two or more possible meanings." *Clayton*, 237 So. 3d at 1047 (citation and internal quotation marks omitted). The "classic example of a latent ambiguity" is "where a contract calls for goods to be delivered to 'the green house on Pecan Street,' but there are in fact two green houses on the street." *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1139 (Fla. 1998). "The fact of the two green houses creates an uncertainty or ambiguity as to which was meant, thus requiring parol inquiry." *Id.* "If a contract fails to specify the rights or duties of the parties under certain conditions or in certain situations, then the occurrence of such condition or situation reveals an insufficiency in the contract not apparent from the face of the document." *Clayton*, 237 So. 3d at 1047 (citation omitted); *accord Fendrich v. Murphy*, 353 So. 3d 1194, 1196-97 (Fla. 4th DCA 2023).

Plaintiffs argued in the trial court that the latent ambiguity in the 2016 Agreement is that the agreement "fails to address . . . whether, when Celsius met the benchmarks in the compensation terms established in 2014, [Celsius] was obligated to compensate [Mr. Dillard]." (R:5610). That is *not* a latent ambiguity.

This is so because: (i) the 2014 Agreement had expired, by its own terms, *before* the 2016 Agreement was executed; (ii) the 2016 Agreement, as set forth above, did *not* incorporate the 2014 Agreement; and (iii) whether Plaintiffs could recover under the Bonus Compensation Clause therefore had to be resolved under the 2014 Agreement's terms, based on events that *preceded* its expiration. *Duval Motors Co. v. Rogers*, 73 So. 3d 261, 263-66 (Fla. 1st DCA 2011) (merger clause in purchase agreement between car dealer and customer prohibited claim of latent ambiguity by dealer that would have incorporated arbitration clause in separate agreement between parties; although merger clause did not "specifically mention prior written agreements . . . it explicitly provides that 'this contract' is the 'entire agreement' between the parties").[4] Absent any latent

[4] *Cf., e.g.*, *Berkowitz v. Delaire Country Club, Inc.*, 126 So. 3d 1215, 1218-19 (Fla. 4th DCA 2012) ("failure of the Articles of Incorporation

ambiguity—indeed, in the absence of *any* ambiguity—the trial court wrongly abdicated its duty to construe the 2014 and 2016 Agreements on summary judgment, and erroneously allowed the jury to decide whether the 2016 Agreement had renewed the 2014 Agreement, based on parol evidence. *Dirico v. Redland Estates, Inc.*, 154 So. 3d 355, 357 (Fla. 3d DCA 2014) (because contract was unambiguous, court erred "[i]n denying . . . summary judgment, and in admitting parol evidence as to the intent of the parties to aid in construing the contract at trial").

2. The Incentive Compensation Clause was not triggered during the 2014 Agreement's term.

a. The contractual language.

The 2014 Agreement's Incentive Compensation Clause entitled D3M to 500,000 shares of Celsius stock "once [Celsius] sells a total of 690,000 units of Co-branded Product" through its "channels of distribution." (R:671-86, 691). The recitals expressly define

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and By-laws to address the scope and format of the materials which a member could submit created a latent ambiguity in the documents" because contracts were silent on materials that could be submitted in support of proposed amendments); *Simpson v. Simpson*, 68 So. 3d 958, 962 (Fla. 4th DCA 2011) (latent ambiguity existed in marital settlement because fixed sum was to be transferred from retirement account, but "parties did not anticipate that this account would fluctuate in value due to market conditions").

"Products" as a powdered version of Celsius's core products that are "*priced at retail*" between "$19.95 - $39.95 or as appropriate for channel of distribution or country." (R:210 (emphasis added)).

It was *undisputed* on summary judgment that *Celsius* does not sell the Products as individual sticks—although Celsius knows that some *retailers* do so and, indeed, has featured the cost per stick in its marketing communications with retailers. (R:4001-03, 5991-94; R:6178-82, 5334-36; T:844-51, 916-17). As Plaintiffs conceded in their opposition to Celsius's summary judgment motion, "product orders are placed by case, cargo container, etc." (R:2837). The contractual definition plainly excludes $1.43 individual sticks.

And the definition must be given controlling weight. While "an operative clause of an agreement prevails over the recital clause when there is a discrepancy between the two," *Johnson v. Johnson*, 725 So. 2d 1209, 1213 (Fla. 3d DCA 1999); *accord Orlando Lake Forest Joint Venture v. Lake Forest Master Cmty.*, 105 So. 3d 646, 648 (Fla. 5th DCA 2013), that rule *does not apply when*, as here, the recital is *definitional*, the defined term "is not limited to the prefatory parts of the contract" but also is used in the contract's "operative part," and there is "no discrepancy" between the recital and operative language.

BPI Sports, LLC v. Fla. Supplement LLC, 338 So. 3d 1016, 1019 (Fla. 3d DCA 2022).

Plaintiffs' attempt in the trial court to avoid the definitional limitation by shoehorning individual sticks into the Incentive Compensation Clause's "as appropriate for channel of distribution" language (R:210) fails under basic construction rules. That language does not *expand* the preamble's definition of Products as items priced between $19.95 and $39.95, but rather addresses the sale *of the defined Products* through Celsius's "channel[s] of distribution." Under established rules of construction, the "channels of distribution" phrase refers only to the items identified in the first part of the sentence. *Ergas v. Universal Prop. & Cas. Ins. Co.*, 114 So. 3d 286, 290 (Fla. 4th DCA 2013) ("when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed" (citation omitted)).

Moreover, if a product priced at $1—or $1,000, for that matter—could be included in the contractual definition of "Products" based on the catch-all "as appropriate" language, the $19.99-39.99 benchmark in the contractual definitions would be rendered completely meaningless. Florida courts abhor contract

interpretations that would render meaningless terms included by the parties in their agreements. *E.g., Residences at Bath Club Condo. Ass'n v. Bath Club Ent., LLC*, 355 So. 3d 990, 996 (Fla. 3d DCA 2023) ("court may not interpret a contract so as to render a portion of its language meaningless or useless" (citation omitted)); *Massey Servs., Inc. v. Sanders*, 312 So. 3d 209, 214 (Fla. 5th DCA 2021) ("a cardinal principle of contract interpretation is that the contract must be interpreted in a manner that does not render any provision of the contract meaningless" (citation omitted)).

Plaintiffs' entire theory of recovery under the Incentive Compensation Clause—that the 690,000-unit trigger was activated when Celsius sold that number of individual "sticks" thus crumbles when the definition of "Products," to which the parties had agreed, is enforced. That being so, the definition of "Products" in the 2014 Agreement cannot be stretched to include individual sticks.

b. Resolving contractual ambiguity.

Moreover, any ambiguity that could arise from the use of the undefined term "unit" in the Incentive Compensation Clause would be *patent*, not latent. Undefined terms do not create ambiguities in the first instance—because courts can use dictionary definitions to

determine an undefined term's plain meaning. *E.g.*, *Parrish v. State Farm Fla. Ins. Co.*, 356 So. 3d 771, 776 (Fla. 2023) ("[d]ictionaries aid us in establishing the publicly understood plain meaning of a word whose relevant definition is contested, and we look to them when a contractual term is undefined within a contract").

Webster's Dictionary defines "unit" to mean "a single quantity regarded as a whole in calculation." *Unit*, Merriam-Webster, https://www.merriam-webster.com/dictionary/unit (last visited Oct. 6, 2023). Thus, "units of Co-branded Product" cannot be individual sticks because a "stick" was never "regarded as a whole" in *Celsius's sales to retailers*. Based on the contractual definition of "Product" and the dictionary definition of "unit," the trial court should have resolved any ambiguity on summary judgment.

Courts should not "turn a blind eye to what common sense dictates" in construing contracts. *Fla. Ins. Guar. Ass'n v. Olympus Ass'n*, 34 So. 3d 791, 795 (Fla. 4th DCA 2010). Rather, "[t]he court should reach a contract interpretation consistent with reason, probability, and the practical aspect of the transaction between the parties." *Michael Anthony Co. v. Palm Springs Townhomes*, 174 So. 3d 428, 432 (Fla. 4th DCA 2015) (citation omitted). Here, the $19.95

- $39.95 price-point definition of "Products" must govern because the 2014 Agreement's compensation provisions can only function reasonably if a "unit of Co-branded Product" is a $19.95 box or a $39.95 tub, not a $1.43 stick.

This is so because the Bonus Compensation Clause's required Celsius to issue 250,000 shares when Celsius achieved $1 million in gross revenue of co-branded product within a 12-month period. *Double* that amount of shares (500,000 shares) would have to be issued under the Incentive Compensation Clause once 690,000 units of co-branded product were sold. As "Product" is defined in the 2014 Agreement—by wholesale price to retailers and distributors—that benchmark would require gross revenues of at least *$13,765,500* ($19.95 multiplied by 690,000). If, however, an individual *stick* constituted a unit, the Incentive Compensation Clause would make no sense.

Requiring Celsius to issue 500,000 shares once Celsius achieved approximately *$986,000* in gross revenue ($1.43 multiplied by 690,000), *before* the Bonus Compensation Clause's benchmark was met, would defy common sense. That interpretation would make

it easier for Plaintiffs to receive *500,000* shares than it would be for them to receive *250,000* shares.

And such an interpretation would ignore the actual structure of the 2014 Agreement's additional compensation terms, which essentially establish a compensation "waterfall." The agreement *first* sets forth the Bonus Compensation Clause, requiring issuance of 250,000 shares at Section (b)(2), and *then* the Incentive Compensation Clause, under which the 500,000 shares would issue upon Celsius's sale of 690,000 units, at Section (b)(3). It would be an absurd construction of the 2014 Agreement to read these clauses as more richly rewarding Plaintiffs for *lesser* benefits to Celsius. "A court must interpret a contract in a manner that accords with reason and probability, endeavoring to avoid an absurd construction." *F.H. Paschen, S.N. Nielsen & Assocs. LLC v. B&B Site Dev., Inc.*, 311 So. 3d 39, 44 (Fla. 4th DCA 2021) (citation and internal quotation marks omitted).

C. The Extrinsic Evidence Defeats Plaintiffs' Purported Interpretation of the Agreements.

1. The alleged renewal of the 2014 Agreement's Bonus Compensation Clause.

Plaintiffs face an all-but insuperable hurdle in seeking to rely

on extrinsic evidence to show that the 2016 Agreement renewed the Bonus Compensation Clause in the 2014 Agreement—the 2016 Agreement's merger/integration clause. "[A] merger clause is a highly persuasive statement that the parties intended the agreement to be totally integrated and generally works *to prevent a party from introducing parol evidence* to vary or contradict the written terms." *Giordano*, 293 So. 3d at 549 (citation omitted; emphasis added).

But even if the Court could look to parol evidence, the 2016 Agreement's merger/integration clause would control. To be sure, Mr. Gold and Mr. Dillard both testified to their subjective belief that the 2014 Agreement's Bonus Compensation Clause benchmarks would be renewed in the 2016 Agreement (T:373, 590, 610), and Mr. Gold testified that he had been told by Mr. David and Mr. Fieldly that the 2016 Agreement was a "renewal" (T:494, 527-28), the parol evidence showed that Celsius was renewing its *relationship* with Mr. Dillard—*not* the 2014 Agreement.

As Mr. David told Mr. Dillard's lawyer at the start of the discussions that resulted in the 2016 Agreement, Celsius "would like to *continue with*" Mr. Dillard as its "ambassador." (R:5079-83; T:301(emphasis added)). Although Mr. David accordingly described

the 2016 Agreement as, "a continuation of the [2014 Agreement], and it just had different . . . numbers in it" (T:305), he explained that it still was a "brand-new agreement," with an entirely different compensation structure. (T:687-88, 695).

The 2016 Agreement "was *not* a renewal" and "was not an extension." (T:755 (emphasis added)). Indeed, a routine extension of the 2014 Agreement would not have required corporate board approval, but Mr. David was required "to go back to the board for approval because it was a brand-new contract." (T:755-56). So it is that Celsius's press release on the 2016 Agreement, which announced "a renewed 30-month partnership" (R:5975-5976), was no more a contract "renewal" than it was the creation of a legal "partnership." Even if parol evidence could contradict the 2016 Agreement's ironclad merger/integration clause, Plaintiffs offered only weak tea that cannot possibly overcome the 2016 Agreement's declaration "that *no other agreement, oral or written,* exists between [Celsius and D3M]"—and that "[t]he provisions *of this Agreement* shall govern [their] relationship." (R:3992-93 (emphasis added)).

2. The definition of units under the Incentive Compensation Clause.

Even if there had been a latent ambiguity in the Incentive Compensation Clause, such that extrinsic evidence should have been considered to construe the clause, the jury's finding that the Incentive Compensation Clause's 690,000-unit requirement was triggered in February 2015—based entirely on its subsidiary finding that an individual stick is a "unit" under the 2014 Agreement—cannot be sustained.

a. Standard of review.

"A latent ambiguity . . . arises when the language in a contract is clear and intelligible, but some extrinsic fact or extraneous evidence creates a need for interpretation or a choice between two or more possible meanings." *Clayton*, 237 So. 3d at 1047 (citations and internal quotation marks omitted); *accord Ehlert*, 330 So. 3d at 45-46. "When a contract contains a latent ambiguity, the trial court must hear parol evidence to interpret the writing properly," and "must also hear parol evidence to explain, clarify or elucidate the ambiguous term." *Taylor v. Taylor*, 183 So. 3d 1121, 1123 (Fla. 5th DCA 2015) (citations and internal quotation marks omitted).

Latent ambiguities must be resolved as fact questions, *e.g.*, *Bd. of Trs. of the Internal Improvement Tr. Fund v. Lost Tree Vill. Corp.*, 805 So. 2d 22, 26 (Fla. 4th DCA 2001), subject to review for support by competent substantial evidence. *Janoura Partners, LLC v. Palm Beach Imports, Inc.*, 264 So. 3d 942, 946-47 (Fla. 4th DCA 2018); *Dinallo v. Gunster, Yoakley, Valdes-Fauli & Stewart, P.A.*, 768 So. 2d 468, 471 (Fla. 4th DCA 2000). "A motion for directed verdict or JNOV should be granted only if *no view of the evidence* could support a verdict for the nonmoving party and the trial court therefore determines that no reasonable jury could render a verdict for that party." *Coba v. Tricam Indus., Inc.*, 164 So. 3d 637, 646 (Fla. 2015) (citation omitted; original emphasis).

b. The extrinsic evidence defeats Plaintiffs' interpretation of the Incentive Compensation Clause.

Celsius's sales records, as introduced at trial, uniformly reflect that Celsius sold sticks to retailers *only* in 14-count boxes, which were sold by the 12-box case. (R:5337-42, 6178-82; R:4001-03, 5991-94, 5334-36). Mr. David, Celsius's former CEO, who negotiated the 2014 Agreement's terms with Mr. Gold, D3M's principal, testified that Celsius had *never* sold individual sticks as "units" to retailers,

but sold the sticks in bulk, in accordance with the wholesale pricing. (T:680-81). He also testified that he, would "never" have agreed that "a unit would be the equivalent of one stick," because "[a]ny agreement that I have done in my 48 years in . . . consumer products . . . you always tie to your wholesale price list." (T:681). As Celsius's expert testified, there is nothing in Celsius's records that reflected sales by Celsius to retailers of individual sticks. (T:797-804).

Mr. Fieldly, Celsius's current CEO, testified that Celsius sells to retailers, not to consumers. (T:848). Celsius tracks its revenue by "SKU," a "stock-keeping unit" (T:239, 847, 916-17), *not* by "UPC," a product's bar code (T:847, 917-18)—and the individual sticks had *only* UPC codes, intended for *retailers' sales*. (T:495-96, 916-17). The *boxes* of 14 sticks, on the other hand, have *both* SKU and UPC codes. (T:496-97, 848). Celsius's sales personnel knew—not surprisingly—that some *retailers* sold individual sticks. (R:5337-42, 4060-88; T:849-51). But *Celsius* never did, and it was *Celsius's sales* that were the measure of D3M's entitlement to receive 500,000 shares under the Incentive Compensation Clause. (R:3958) (500,000 shares to be issued "once [Celsius] sells a total of 690,000 units of Co-branded Product").

Celsius calculated the 690,000-unit target based on expected sales of Flo Fusion tubs and 14-count stick boxes. (T:858) (CEO Fieldly testified that target was "a blend of 690,000 units sold of the 40 serving tub and the 14-count sticks," to produce $10 million in revenue for Celsius).[5] Celsius had sold roughly 143,000 stick boxes (comprising two million sticks) in 2013, the year *before* the 2014 Agreement. (T:858). As Mr. Fieldly explained, it would therefore have been absurd for Celsius to compensate D3M with 500,000 shares if Celsius sold 690,000 *sticks* (approximately 50,000 14-count boxes) over a two-year period—roughly a third of what Celsius had sold the year before—which would have produced only $450,000 in revenue. (T:858-59). "It doesn't make any . . . business sense." (T:859). The only reasonable interpretation is that Celsius intended to generate $10 million in revenue from selling the "blend" of tubs and 14-count boxes before compensating D3M with 500,000 shares.

Moreover, because the co-branded sales effort failed (R:5344-45), Celsius only *produced*—not *sold*—approximately 135,000 14-

[5] Celsius's expert noted that selling 690,000 tubs would have yielded just shy of $14 million in revenue, and 690,000 boxes of sticks would have produced $6.9 million. (T:797-804).

count Flo Fusion stick boxes, and had to throw most of them out due to limited sales. (R:4516-4923, 5314; T:858, 860-61). Indeed, Celsius discontinued sales of co-branded sticks in 2016. (R:5294-99; R:5343-46). And only 151,100 Flo Fusion tubs were produced in the single production run (R:5314; T:862-63), much of which was destroyed because that product did not sell. (T:858-60). Celsius thus did not even produce—much less *sell*—sufficient units of tubs and 14-count stick boxes to satisfy the 690,000-unit benchmark. (T:863-64). Celsius told D3M as much during the 2014 Agreement's term. (T:502-03, 629-31, 867-69; R:4924-27).

It was *only* by treating *individual sticks* as units that Plaintiffs' expert could conclude that the Incentive Compensation Clause target had been reached. (T:632-34, 638; R:5084-5289). Because the unrefuted evidence is that sticks were *never* counted as units in *Celsius's sales*, that unfounded opinion could not be weighed as evidence. "The opinion of [an] expert cannot constitute proof of the existence of the facts necessary to the support of the opinion." *Schindler Elevator Corp. v. Carvalho*, 895 So. 2d 1103, 1106 (Fla. 4th DCA 2005) (citation omitted); *accord Chaudhry v. Adventist Health Sys. Sunbelt, Inc.*, 305 So. 3d 809, 818 (Fla. 5th DCA 2020)*; Mt. Sinai*

Med. Ctr. of Greater Miami, Inc. v. Gonzalez, 98 So.3d 1198, 1202 (Fla. 3d DCA 2012).

Even if the trial court had correctly admitted extrinsic evidence in the first instance, the court was bound to give full effect to that evidence. *See Lincare Holdings Inc. v. Ford*, 307 So. 3d 905, 910-12 (Fla. 2d DCA 2020). Because the uncontradicted extrinsic evidence establishes that powder sticks are not "units" for the purposes of determining D3M's entitlement to receive stock under the Incentive Compensation Clause, the court erred in denying Celsius's motions for directed verdict and for judgment notwithstanding the verdict.

D. Plaintiffs Are Not Entitled to Perpetual Royalties Under the 2016 Agreement.

The 2016 Agreement, which entitled D3M to royalties for Mr. Dillard's promotion of Celsius products, expired in October 2018. (R:3976, 3984). Upon expiration of the 2016 Agreement, Celsius was prohibited from using Mr. Dillard's publicity rights or image to promote its products (or for any other purpose). (R:3986). The 2016 Agreement's royalty clause does not include any provision for continued payments to D3M upon expiration. (R:3984).

Plaintiffs nonetheless prevailed on their purported entitlement to recover *post*-October 2018 royalties. (R:5398). The 2016 Agreement bars that recovery. *See, e.g.*, *Scott v. Simpson*, 774 So. 2d 881, 883 (Fla. 4th DCA 2001) (no right to recover under terminated agreement).

II. PLAINTIFFS' CLAIMS FOR BREACH OF THE 2014 AGREEMENT ARE BARRED BY THE STATUTE OF LIMITATIONS.

Although the jury found that the 2014 Agreement was breached before May 4, 2016, which would render Plaintiffs' claims time-barred, §§ 95.11(2)(b), 95.031 Fla. Stat., the jury *also* found that the date of breach was *April 30, 2021* (R:5395), the date on which Celsius refused to accept Plaintiffs' demand to deliver stock to D3M. (T:1145).[6] Thus, Plaintiffs insisted their 2021 action had been timely instituted. (R:5619). The trial court agreed. (R:5846-50).

[6] See Point III, *infra*, addressing the fatal inconsistencies in the jury's findings.

A. Standard of Review.

The de novo review standard applies. *HSBC Bank USA, Nat'l Ass'n for Registered Holders of Nomura Home Equity Home Loan, Inc. v. Estate of Petercen*, 227 So. 3d 640, 642 (Fla. 4th DCA 2017).[7]

B. Plaintiffs' Cause of Action Accrued When the 2014 Agreement Was Allegedly Breached.

Because "[a] cause of action accrues when the last element constituting the cause of action occurs," § 95.031, Fla. Stat., an action for breach of contract "accrues and the statute of limitations begins to run from the time of the breach of contract." *State Farm Mut. Auto. Ins. Co. v. Lee*, 678 So. 2d 818, 821 (Fla. 1996). This rule "is consistent with the policy behind the statute of limitations, which

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[7] In the trial court, Plaintiffs cited *Cohen v. Cooper*, 20 So. 3d 453, 456 (Fla. 4th DCA 2009), for the proposition that "the determination of timeliness under the statute of limitations is fact-specific and within the province of the jury, not the trial judge." (R:5619-20). That holding does not affect the standard of review here; the Court was addressing whether *summary judgment* should properly have been granted on whether the plaintiff had timely brought suit on a medical malpractice claim within two years "from the time of the incident" or "from the time the incident is discovered, or should have been discovered." 20 So. 3d at 455 (quoting § 95.11(4)(b), Fla. Stat.). The question here is when the cause of action *accrued* under Section 95.11(2)(b), and "[d]etermining when a cause of action accrues *is a question of law, not fact.*" *Kendron v. SCI Funeral Servs. of Fla., LLC*, 230 So. 3d 636, 637 (Fla. 5th DCA 2017) (emphasis added; citation omitted).

is to prevent unreasonable delay in the enforcement of legal rights and to protect against the risk of injustice." *BDI Constr. Co. v. Hartford Fire Ins. Co.*, 995 So. 2d 576, 578 (Fla. 3d DCA 2008) (citation and internal quotation marks omitted).

"[A] cause of action for breach of contract accrues at the time of the breach, not from the time when consequential damages result or become ascertained." *Med. Jet, S.A. v. Signature Flight Support-Palm Beach, Inc.*, 941 So. 2d 576, 578 (Fla. 4th DCA 2006) (citation and internal quotation marks omitted); *accord Schmidt v. Sabow*, 331 So. 3d 781, 787 (Fla. 2d DCA 2021). Where, as here, the right to receive a contract's benefits "automatically vested" upon an identified event, the limitations period commences upon the event's occurrence. *Woodward v. Morell*, 319 So. 3d 47, 53 (Fla. 4th DCA 2021); *cf., Greene v. Bursey*, 733 So. 2d 1111, 1115 (Fla. 4th DCA 1999) ("where the contract requires a demand as a condition to the right to sue, the statute of limitations does not commence until such a demand is made"). The obligation "immediately" to issue stock under the Bonus Compensation Clause (R:3946) was violated, if at all, upon the occurrence of the identified event.

And the jury found the date of that event to be *February 2018* for the Bonus Compensation Clause and *February 2015* for the Incentive Compensation Clause. (R:5395, 5397). The trial court erred in accepting Plaintiff's heretofore-unknown theory that a party entitled to *immediate* performance under a contract may unilaterally extend the limitations period for years—if not for decades—simply by belatedly demanding performance. The jury's finding on the statute of limitations commencement date is legally unsustainable.

C. Plaintiffs Cannot Avoid the Statute of Limitations.

The jury also found that Celsius "fraudulently concealed information relating to the breach" and is "equitably estopped from asserting the statute-of-limitations defense." (R:5396).[8]

1. Equitable estoppel.

"The doctrine of equitable estoppel typically applies to avoid a statute of limitations defense where the injured party recognized the basis for the suit but the party that caused the injury induced the injured party to forbear from filing suit during the limitations period." *W.D. v. Archdiocese of Miami, Inc.*, 197 So. 3d 584, 590 (Fla. 4th DCA

[8] Plaintiffs declined to defend these mutually exclusive findings in their response to Celsius's post-trial motion. (R:5596-5626).

2016) (citation omitted). "To assert equitable estoppel, the defendant must have engaged in *wrongful conduct* which induced another into forbearing suit within the applicable limitations period." *Id.* (citation and internal quotation marks omitted; original emphasis).

"[E]quitable estoppel presupposes that the plaintiff knows of the facts underlying the cause of action but delayed filing suit because of the defendant's conduct." *Iemma v. Heichberger*, 355 So. 3d 415, 417 (Fla. 4th DCA 2022) (citation and internal quotation marks omitted). Equitable estoppel is unavailable to a would-be plaintiff who is *unaware* of a potential cause of action during the limitations period, because there can be no "induce[ment] to forego filing suit within the limitations period" by one who is unaware of the "facts underlying the causes of action." *Ryan v. Lobo De Gonzalez*, 841 So. 2d 510, 518-20 (Fla. 4th DCA 2003). Here, as in *Ryan*, Plaintiffs cannot invoke equitable estoppel: Plaintiffs' position at trial was that they were unaware of their claims because they *never* had access to the sales figures showing that the two clauses' targets had purportedly been reached. (T:475-77; R:48-49, 52; R:76). Plaintiffs accordingly could not invoke equitable estoppel to avoid the statute of limitations.

2. Fraudulent concealment.

Mere failure to disclose is not fraudulent concealment that will avoid the statute of limitations. "[T]o establish fraudulent concealment sufficient to toll the statute, the plaintiff must show both successful concealment of the cause of action *and* fraudulent means to achieve that concealment." *Berisford v. Jack Eckerd Corp.*, 667 So. 2d 809, 811 (Fla. 4th DCA 1995) (citation and internal quotation marks omitted; emphasis added); *accord W. Brook Isles Partner's 1, LLC v. Com. Land Title Ins. Co.*, 163 So. 3d 635, 639 (Fla. 2d DCA 2015).[9] Plaintiffs made no such showing here. *Cf., Fla. Dep't of Health & Rehab. Servs. v. S.A.P*, 835 So. 2d 1091, 1100 (Fla. 2002) (fraudulent concealment shown because, after police "uncovered" acts of "sustained, long-term child abuse," state agency "obstructed the police investigation, falsified reports, altered records, and otherwise actively concealed the abuse" (internal quotation marks omitted)).

[9] As has been set forth, equitable estoppel presupposes that the plaintiff *knew* of the claim during the limitations period, which is irreconcilable with fraudulent concealment, which presupposes that the plaintiff *did not know* of the claim during the limitations period because of defendant's concealment.

To be sure, "[a] *fiduciary's* deliberate withholding of material information the fiduciary has a duty to disclose constitutes fraudulent concealment." *First Union Nat. Bank v. Turney*, 824 So. 2d 172, 190 (Fla. 1st DCA 2001) (emphasis added). But, "[i]n a commercial transaction in which the parties are dealing at arm's length, a fiduciary relationship does not exist because there is no duty imposed on either party to protect or benefit the other." *R.J. Reynolds Tobacco Co. v. Bessent-Dixon*, 313 So. 3d 173, 175 (Fla. 1st DCA 2021) (citations and internal quotation marks omitted). Plaintiffs conceded at trial that there was no fiduciary relationship, and there was thus no special duty to disclose.

Moreover, D3M's principal, Mr. Gold, admitted that he did not request Celsius to produce "sales data to confirm that the product is doing poorly." (T:510). "[A] party seeking to avail itself of the doctrine of fraudulent concealment must have exercised reasonable care and diligence in seeking to learn the facts which would disclose the fraud." *Berisford*, 667 So. 2d at 812. Plaintiffs failed to carry their burden to prove fraudulent concealment.

III. THE JURY'S INCONSISTENT VERDICT ENTITLES CELSIUS TO A NEW TRIAL.

A. Standard of Review.

"An inconsistent verdict[] claim presents a pure question of law and is reviewed de novo." *Brown v. State*, 959 So. 2d 218, 220 (Fla. 2007); *accord Bott v. State*, 307 So. 3d 26, 29 (Fla. 4th DCA 2020); *Morton Roofing, Inc. v. Prather*, 864 So. 2d 64, 66 (Fla. 5th DCA 2003).

B. The Jury's Verdict Is Irreconcilably Inconsistent.

On Plaintiffs' claim that Celsius breached the 2014 Agreement's Bonus Compensation Clause, the jury found:

- Celsius breached the Bonus Compensation Clause *on April 30, 2021*; but
- that the breach "occurred *before May 4, 2016*"; and
- the Bonus Compensation Clause's $1 million target for D3M's receipt of additional Celsius stock was "reached *on February 2018*."

(R:5395-96) (emphasis added). On Plaintiffs' claim that Celsius breached the 2014 Agreement's Incentive Compensation Clause, the jury found:

- Celsius breached the Incentive Compensation Clause *on April 30, 2021*; but
- that the breach "occurred *before May 4, 2016*" and
- the Incentive Compensation Clause's target for D3M's receipt of additional Celsius stock was "reached *on February 2015*."

(R:5397-98) (emphasis added). The jury also found that Plaintiffs' claims are not barred by the statute of limitations, based on equitable estoppel *and* fraudulent concealment. (R:5395-98).

These findings, on their face, are irreconcilably inconsistent.

> [A]n inconsistent verdict is defined as when two definite findings of fact material to the judgment are mutually exclusive. Where the findings of a jury's verdict in two or more respects are findings with respect to a definite fact material to the judgment such that both cannot be true and therefore stand at the same time, they are in fatal conflict.

Coba, 164 So. 3d at 643 (citations and internal quotations omitted); *accord Am. Sales & Mgmt. Org. LLC v. Lopez*, No. 3D20-563, 2023 WL 2589788, at *4 (Fla. 3d DCA Mar. 22, 2023); *Smith v. Fla. Healthy Kids Corp.*, 27 So. 3d 692, 695 (Fla. 4th DCA 2010).

It cannot be that the 2014 Agreement was breached in *April 2021*—although the pertinent targets were reached in February 2015 and February 2018—*and* that the breaches occurred *before* May

2016. The irreconcilable jury findings readily satisfy the standard for legal inconsistency: "for a verdict to be legally inconsistent, it must contain two material findings that legally cannot co-exist." *Am. Sales & Mgmt.*, 2023 WL 2589788, at *4.

C. Celsius Is Entitled to a New Trial.

"The law surrounding inconsistent verdicts is twofold: (1) the objecting party must bring an inconsistent verdict to the trial court's attention before the jury is discharged or the issue is waived; and (2) if the inconsistent verdict is not resolved by the jury, a new trial is required." *Coba*, 164 So. 3d at 645. "[W]here a trial court erroneously denies a timely challenge to an inconsistent verdict, the proper remedy is a new trial." *Id.*

Here, Celsius's counsel brought the inconsistencies to the trial court's attention immediately upon the verdict's return, before the jury was discharged. (T:1273-74). The court responded, "I noticed that," but ruled, "I don't think we need to send them back." (T:1274). Despite acknowledging the inconsistency, the court adhered to that ruling:

> They came back separately. They separately decided what date was the breach, and they also separately decided what date . . . the benchmark was breached. So I think

> it's a very thorough verdict form . . . . [T]he one question seems to be a little bit inconsistent in that they say the breach was prior to a certain date and they put a different date of when the breach occurred, but I think that can all be ironed out because I think on the affirmative defenses, they did check the box for the affirmative defenses.
>
> * * * *
>
> That question wouldn't matter. So I am going to go ahead and discharge the jury unless there is anything else.

(T:1274-75).

In their response to Celsius's post-trial motion, Plaintiffs argued that the inconsistent verdict had not been properly preserved. (R:5623). As the Florida Supreme Court held in *Coba*, "[t]o preserve the issue of an inconsistent verdict, the party claiming inconsistency must raise the issue before the jury is discharged and ask the trial court to reinstruct the jury and send it back for further deliberations." 164 So. 3d at 644 (citations omitted). Here, however, the trial court responded to Celsius's timely objection by announcing its ruling that it would *not* "send [the jury] back," the inconsistencies notwithstanding. (T:1274-75). The reasons for the contemporaneous objection requirement in this context are explained in *Coba*: (i) "by requiring parties to object as soon as they are aware of the verdict, the jury is still available to correct the error"; (ii) "by requiring this

type of objection to be voiced prior to a jury's discharge, it prevents a party from strategically sitting on the objection until after the jury is no longer available to correct its decision"; (iii) "mandating parties to immediately object preserves limited judicial resources, since it permits the error to be rectified during the initial trial and reduces the likelihood that a second trial would become necessary"; and (iv) "requiring an objection at the time the jury can still correct its error maintains the strong deference that the judicial system places on a jury's verdict." *Coba*, 164 So. 3d at 644-45 (citations omitted). All those concerns are satisfied on this record, and any *further* objections—once the court had definitively ruled—would have been futile and therefore unnecessary to preserve the issue for appellate review. *E.g.*, *Gosciminski v. State*, 994 So. 2d 1018, 1024-25 (Fla. 2008); *Ayalavillamizar v. State*, 134 So. 3d 492, 497-98 (Fla. 4th DCA 2014). The trial court "clearly understood [Celsius's] position, and further argument or objection would have been futile." *Wong v. State*, 212 So. 3d 351, 357 (Fla. 2017) (citation omitted).

The trial court's refusal to instruct the jury to attempt a reconciliation of its findings is reversible error:

> Where the findings of a jury's verdict in two or more respects are findings with respect to a definite fact material to the judgment such that both cannot be true and therefore stand at the same time, they are in fatal conflict. In such circumstances, contradictory findings mutually destroy each other and result in no valid verdict, and a trial court's judgment based thereupon is erroneous.

Smith, 27 So. 3d at 695 (quoting *Crawford v. DiMicco*, 216 So. 2d 769, 771 (Fla. 4th DCA 1968)).

IV. THE TRIAL COURT ERRED IN ALLOWING PLAINTIFFS TO PROCEED ON AN UNPLEADED AND LEGALLY BARRED DAMAGES THEORY.

A. The Date of Breach.

Plaintiffs pleaded in their Complaint that Celsius had to issue shares under the Bonus Compensation Clause and the Incentive Compensation Clause "upon achievement of designated sales or revenue benchmarks" set forth in those clauses. (R:48). Plaintiffs also pleaded that, "[a]lthough both benchmarks were achieved, Celsius failed to notify Plaintiffs or issue the additional shares." (R:49). As Plaintiffs argued in opposing Celsius's summary judgment motion, "it was Celsius' failure to issue the required stock *at that point* which constitutes the breach of contract." (R:196 (emphasis added)).

"Citation of authorities is unnecessary to sustain the rule that parties-litigant are bound by the allegations of their pleadings." *Carvell v. Kinsey*, 87 So. 2d 577, 579 (Fla. 1956). "The pleadings frame the issues to be litigated and tried." *Am. Residential Equities LLC v. Saint Catherine Holdings Corp.*, 306 So. 3d 1057, 1059 (Fla. 3d DCA 2020). And "[t]he jurisdiction of the court can be exercised only within the scope of the pleadings in the action." *Mullne v. Sea-Tech Constr. Inc.*, 84 So. 3d 1247, 1249 (Fla. 4th DCA 2012) (citation omitted). "A trial court violates due process and reversibly errs when it awards relief not sought by the pleadings." *Rosaly v. Konecny*, 346 So. 3d 630, 635 (Fla. 4th DCA 2022) (citation omitted). Indeed, "[a] final judgment is void and violates due process where it grants relief that was neither pled nor tried by the parties' consent." *Morales v. Fifth Third Bank*, 275 So. 3d 197, 199 (Fla. 4th DCA 2019).

Here, the trial court inexplicably allowed Plaintiffs to switch their theory of recovery, for the first time—after both sides had rested—at the charge conference, accepting the assertion by Plaintiffs' counsel that Plaintiffs could argue to the jury that Celsius breached the 2014 Agreement on April 30, 2021, when Celsius rejected Plaintiffs' demand letter. (T:1023-27). Over Celsius's

objection, the court ruled that Plaintiffs could make that argument and that the verdict form would allow the jury to identify the date of breach. (T:1027-28). Then, Plaintiffs' counsel made *precisely* that argument (T:1147), and the jury indeed found that April 30, 2021, was the date of breach (R:5395-98).

"[L]itigants are not permitted to take inconsistent positions in judicial proceedings and . . . a party cannot allege one state of facts for one purpose and at the same action or proceeding deny such allegations and set up a new and different state of facts inconsistent thereto for another purpose." *Ash v. Ash*, 332 So. 3d 563, 567–68 (Fla. 3d DCA 2021) (citation omitted). The trial court's allowance of Plaintiffs' tactic denied Celsius fundamental due process.

B. The Valuation Date.

The reason for Plaintiffs' decision to seek recovery based on a 2021 breach date is pellucid: Celsius's stock price was higher on that date than it had been in February 2015 and February 2018. (R:4946-96). On April 30, 2021, the closing stock price was $57.30; while in February 2015, it was between $.74 and $1.13, and in February 2018, the value ranged from $4.99 to $5.81. (R:4946-96).

But then the jury went yet farther—and valued Celsius's stock as of *January 13, 2023*, the last day on which evidence was presented *at trial.* (R:5395-98; R:4946-96). That award is based on a share price of *$110.18*, a figure that far exceeds Celsius's stock value on the actual dates of breach—or, for that matter, on the contrived April 30, 2021 "breach date." (R:4946-96). The jury's January 13, 2023 valuation defies established Florida law.[10]

"Damages for a breach of contract should be measured as of the date of the breach." *Grossman Holdings Ltd. v. Hourihan*, 414 So. 2d 1037, 1040 (Fla. 1982) (citation omitted); *accord Perera v. Diolife LLC*, 274 So. 3d 1119, 1124 (Fla. 4th DCA 2019); *Peach State Roofing, Inc. v. 2224 S. Trail Corp.*, 3 So. 3d 442, 445 (Fla. 2d DCA 2009). In application, this rule means that "[f]luctuations in value *after the breach* do not affect the nonbreaching party's recovery." *Hourihan*, 414 So. 2d at 1040 (emphasis added); *accord CIMA Capital Partners, LLC v. PH Cellular, Inc.*, 69 So. 3d 293, 294 (Fla. 3d DCA 2010); *Lake*

[10] This would be so even if the court had been correct in allowing Plaintiffs to argue for an April 2021 breach date; the court's error is, however, all the worse because of the vast disparity between the January 2023 share price and the price at the time of the actual alleged breaches in February 2015 and February 2018.

Region Paradise Island, Inc. v. Graviss, 335 So. 2d 341, 342 (Fla. 2d DCA 1976).

Thus, in *Lake Region*, the court held that a plaintiff who had sued for recovery of a 10% interest in a trailer park, pursuant to his employment contract, was not entitled to the jury's award of an amount "far in excess" of that interest's value at the time of the breach, because "the object of the rule [is] to place the plaintiff in the same position he would have been in had the contract been performed *on the date fixed therein for performance*." 335 So. 2d at 342 (emphasis added). "Whether [the plaintiff] would not have 'sold off' is too speculative and self-serving to be a viable criterion" of value. *Id.* at 343.

In *CIMA*, the plaintiff was entitled to "a warrant to purchase 5% of [defendant's] shares" as compensation for "successful funding," and the question was whether the plaintiff was entitled to recover "the value of the shares at the time of the breach," rather than when the trial court ordered the transfer, by which time the shares were "worth far less." 69 So. 3d at 294. The court held that the plaintiff was entitled to recover damages "as of the date of the breach,"

because the purpose of damages "is to place the plaintiff in the position he would have been in had the contract been fulfilled." *Id.*

CIMA noted this Court's suggestion, in *Shearson Loeb Rhoades, Inc. v. Medlin*, 468 So. 2d 272 (Fla. 4th DCA 1985), that a plaintiff might be able to argue for damages on a claim for delayed delivery of stock as of the date on which shares would have been sold—if the plaintiff could show a communication of intent to sell on a date certain. *Id.* at 273-74. In *CIMA*, the court declined to allow such a calculation of damages because the defendant "did not delay delivering the shares—it refused delivery outright." 69 So. 3d at 295. The trial court's reliance on *Medlin* was thus misplaced, as was its reliance on *Lindon v. Dalton Hotel Corp.*, 49 So. 3d 299 (Fla. 5th DCA 2010), in which the court held that the plaintiff in an action against a closely held corporation that compelled him to sell back his shares at zero value upon termination of his employment was entitled to discover the stock's subsequent valuation because "it is unlikely that Lindon would have sold his shares . . . for the price of $0." 49 So. 3d at 307. The court concluded that "in determining the applicable measure of damages in this case involving the alleged wrongful redemption of stock in a close corporation, the jury may consider

evidence that (a) if the stock had not been wrongfully redeemed, Lindon would have tendered it for sale . . . on a date certain and the value of the stock on that date; (b) . . . Lindon would have retained the stock until [the defendant] disposed of his shares and the value of the stock on that date, or (c) if the stock no longer exists (or the business has been sold), evidence of the proceeds ultimately received for the stock." *Id.*

Plaintiffs presented *no* such evidence: Mr. Dillard vaguely testified that he had sold some Celsius shares, while Strong Arm's corporate representative testified that Mr. Dillard had sold stock on several occasions (T:393-94, 427-35); but there was *no* evidence about what D3M—the only counter-party to the Celsius contracts—had intended to do with the shares. *CIMA* cuts definitively in favor of overturning the jury's standardless award.

CONCLUSION

Celsius requests this Court to reverse the judgment in its entirety and to remand for entry of judgment in Celsius's favor. Alternatively, Celsius requests the Court to reverse the judgment for a new trial, or for a redetermination of damages by the trial court, based on Celsius's stock price on the date of the alleged breaches.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on October 6, 2023, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using the Florida Courts E-Filing Portal, which will send an electronic copy of the foregoing to counsel listed below:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this initial brief was prepared using Bookman Old Style 14-point font in compliance with Rule 9.045 of the Florida Rules of Appellate Procedure. I also certify that this brief contains 12,658 words, in compliance with Rule 9.210(a)(2)(B) of the Florida Rules of Appellate Procedure.

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