No. 4D2023-0452

In the Fourth District Court of Appeal State of Florida

CELSIUS HOLDINGS, INC.,
Appellant,

v.

STRONG ARM PRODUCTIONS, USA, INC., D3M LICENSING GROUP, LLC, AND TRAMAR DILLARD P/K/A FLO RIDA,
Appellees.

On Appeal from the Circuit Court of the Seventeenth Judicial Court in and for Broward County, Florida (No. CACE-21-008997)

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INTRODUCTION

In 2014, celebrity musician Tramar Dillard—better known by his stage name Flo Rida—agreed to act as "brand ambassador" for Celsius Holdings, a struggling energy-drink company. Celsius, in return, promised to issue Mr. Dillard shares of the company's private stock once designated sales benchmarks were reached.

The deal was a success: After making Flo Rida the "face behind Celsius," the company's stock price skyrocketed as it grew to become one of the largest players in the highly competitive and lucrative energy-drink market. Even as it profited off Mr. Dillard's efforts, however, Celsius refused to pay him what it promised. Instead, the company hid that the contract's benchmarks had been met and refused to transfer the shares it owed.

After discovering Celsius's deceit, Mr. Dillard and two of his representatives sued the company for breach of contract, alleging that it violated the terms of two contractual benchmark provisions. *First*, Mr. Dillard alleged that Celsius ignored the contract's requirement that it issue 250,000 shares of restricted stock upon reaching $1 million in "Co-branded revenues." *Second*, he alleged

that the company had failed to issue an additional 500,000 required shares upon selling "690,000 units of Co-branded Product."

A jury trial was necessary to resolve these claims: Whether Celsius met the benchmarks and thus breached the contract was a question of fact that could be answered only by reference to extrinsic evidence of sales. *See Access Ins. Planners, Inc. v. Gee*, 175 So. 3d 921, 924 (Fla. 4th DCA 2015). After a five-day trial, the jury sided with Mr. Dillard, holding that Celsius had breached its payment obligations under both the $1 million and 690,000-unit benchmarks.

Celsius's lead pitch for reversal is that any sales made after the end of the contract's initial two-year term should not count toward the benchmarks because the parties—in the company's view—never agreed to extend the contract. Even if true, that misses the point. Because the jury found that Celsius met both the $1 million and 690,000-unit benchmarks *before* the first term ended, this Court can and should affirm the jury's verdict without reaching Celsius's arguments about the effect of second-term sales.

This Court must affirm the jury's verdict unless the record is "devoid of probative evidence" on which the jury could have relied. *Heyman v. Weka, Inc.*, 333 So. 2d 550, 551 (Fla. 3d DCA 1976). In

two ways, the evidence here supported the jury's finding that Celsius breached the contract during the initial term. First, although the phrase "Co-branded revenues" is undefined and ambiguous, the jury heard evidence that, because Mr. Dillard's responsibility as brand ambassador was to promote the company as a whole, the parties intended the phrase to include revenues from its whole range of products—which, it is undisputed, surpassed the $1 million benchmark during the first term. Second, even under Celsius's much narrower definition (limited to revenue from Flo Fusion powdered drinks) the evidence was still sufficient for the jury to find that the company would have recorded revenue over $1 million if it had tracked sales as the contract required.

The evidence likewise supported the jury's finding that Celsius met the 690,000-unit benchmark during the first contract term. Because the term "unit"—like "Co-branded revenues"—is undefined and ambiguous, the jury properly considered extrinsic evidence of its meaning. Although Celsius disputes the jury's verdict on this point, its argument just rehashes its own view of the trial evidence—a view that the jury was justified in rejecting. At the very least, the contract does not *unambiguously* rule out the jury's finding as a matter of law.

Indeed, even Celsius relies on extrinsic evidence for its reading of the contract language. The trial court was thus correct to submit the issue to the jury and to honor its resolution of the disputed evidence.

Even if this Court were to set aside the jury's verdict that the benchmarks were satisfied in the initial term, Celsius's *own evidence* shows that they were met—at a minimum—after the term ended. The agreement defines "Term" to include both an "Initial Term" of two years and, if "mutually extended by the Parties in writing," an "Extended Term." (R:3940). The meaning of "Term" is thus a latent ambiguity in the 2014 contract: It can't be determined solely by looking to the contract's text. Again, it is a fact question that requires extrinsic evidence of whether the parties later agreed to an extension. The jury heard overwhelming evidence that both Celsius and Mr. Dillard intended a separate agreement signed in 2016—right at the end of the initial contract term—to be a "renewal" or "continuation of the other agreement." (T:305, 590, 610). Based on that evidence, the jury found that the "plaintiffs prove[d] that the Term of the 2014 Agreement was extended by the 2016 Agreement." (R:5395).

It is only at this point that Celsius's lead argument even potentially comes into play. Celsius argues that the trial court erred

in letting the issue go to the jury in the first place because a merger clause in the 2016 agreement prohibited looking to extrinsic evidence of the contract's meaning. But there was no choice but to look to extrinsic evidence. The 2016 agreement, on its face, is silent as to whether the parties intended it to trigger the 2014 agreement's renewal provision. It was the jury's province to resolve that ambiguity, as well as the fact question of whether the parties ever "mutually extended" the initial term.

Finally, Celsius challenges the jury's award of damages based on the price of Celsius stock at the close of evidence. Celsius argues that its stock value should instead be determined based on the date of breach. But the well-established rule is that the damages awarded should "place the injured party in the position it would have been in had the other party not breached the contract." *Katz Deli of Aventura, Inc. v. Waterways Plaza, LLC*, 183 So. 3d 374, 379 (Fla. 3d DCA 2013). The undisputed evidence shows that the plaintiffs did not intend to sell their Celsius shares as soon as they acquired them but to hold the shares as a long-term investment.

To prevail, Celsius must persuade this Court that "*no view of the evidence*" could support the jury's verdict. *Coba v. Tricam Indus.,*

Inc., 164 So. 3d 637, 646 (Fla. 2015) (emphasis in original). The evidence before the jury here supports the verdict in multiple ways. The jury could reasonably have relied on the plaintiffs' evidence of the meaning of the ambiguous terms "Co-branded revenue," "Unit," and "Term," or on the inaccuracy of Celsius's data—any one of which alone would be sufficient to uphold the jury's finding of breach. The evidence supporting the jury's verdict on damages is equally overwhelming. This Court should "preserve[] the sanctity of the verdict" by "resolving all doubts in [its] favor" and affirming the jury's determination. *Id.*

RELEVANT CONTRACT PROVISIONS

> **Term:** This Agreement shall have an initial term of two years (the "Initial Term"). The Term shall commence on the Effective Date, and shall expire on March 6, 2016, unless mutually extended by the Parties in writing (the "Extended Term" and together with the Initial Term, the "Term") or otherwise terminated earlier in accordance with Section 8 hereof.
>
> . . .
>
> **Company Shares:** Company shall issue up to 1,000,000 shares of restricted shares of its common stock, as directed by D3M (the **"Shares"**) in exchange for services performed hereunder and as performance incentives, which Shares shall be cumulative and shall be issued as follows:
>
> 1. **250,000** Shares shall issue as of the date hereof;

2. An additional **250,000** Shares, as bonus compensation, shall immediately be issued once the Company achieves One Million Dollars ($1,000,000.00) in gross cumulative Co-branded revenues in any twelve-month period during the Term; and

3. An additional **500,000** Shares, as incentive compensation, shall immediately be issued once the Company sells a total of 690,000 units of Co-branded Product through its channels of distribution following the execution of this Agreement.

STATEMENT OF THE CASE AND FACTS

A. Factual background

1. Hoping to save the company from financial disaster, Celsius hires superstar Flo Rida as its celebrity "brand ambassador."

Celsius is a Florida-based maker of energy drinks that over the last decade has risen to become one of the biggest players in a highly competitive industry. When the parties signed their contract in 2014, however, Celsius was still "a very, very small company with very few employees." (T:281). Its stock, which had recently been delisted from the NASDAQ, had last sold for only about 50 cents per share. (T:842–43). The company was "losing money" fast and "needed to be turned around." (T:277, 670). Otherwise, "Celsius was really in serious trouble." (T:670).

A few years earlier, Celsius had hired Gerry David as its new CEO, with the goal of increasing the company's stock price enough to get it back on the NASDAQ. (T:842). In 2014, Mr. David settled on a strategy for accomplishing that. He proposed that Celsius hire Tramar Dillard—better known as Flo Rida—an international "rapping sensation" with more than 100 million record sales worldwide. (T:334). Mr. Dillard grew up in Carol City, not far from Celsius's Boca Raton headquarters. (T:339). He released his debut album in 2008, and by 2014 was an international icon with "multiple top 10 hits," including world-record sales of a single song. (T:340). Mr. David believed that harnessing Flo Rida's "strong global presence" would "open[] up a new era for Celsius" by introducing the brand "to millions of people globally." (T:280). He also hoped that an endorsement deal would give the company access to Flo Rida's "major following" on social media. (T:351).

In addition to his music career, Mr. Dillard is "a guy who loves fitness." (T:350). His "songs top the charts at gyms across the country," and he has been "well-known for [his] fitness since day one of [his] career." (T:334, 338, 350; R:5977). After meeting him in 2014, Mr. David recognized Mr. Dillard as "a person that was really in tune

with his body," as well as a "devout Christian" with a "great moral compass." (T:281). Because Celsius also "represented [a] healthy lifestyle," the partnership was "a perfect match." (T:350). Mr. Dillard agreed: The Celsius brand, he testified, was "right in line with [his] passion for living and inspiring a healthy lifestyle." (T:280).

In 2014, the parties signed a contract that "engaged" Mr. Dillard as the company's "brand ambassador." (T:750). In the parties' written contract, Mr. Dillard agreed to "promote [the] Company" and to endorse its whole "range of products." (R:5873–74, 5888). Celsius planned a "whole campaign around Flo Rida and his image and workout." (T:334). By adopting the superstar as the "face behind Celsius," the company would "align" itself "with his clean lifestyle . . . and his personality" that "puts a premium on health and fitness." (T:281, 334). In short, Flo Rida would "personif[y] the brand." (T:334).

In addition, Mr. Dillard agreed to "advertise" and "promote" a new line of co-branded powdered drinks, referred to in the contract only as the "Products," but later named "Flo Fusion." (R:3940, 3945, 4508, 6184–87; T:861–62). The company anticipated that increased brand awareness from these sales would flow over to sales of other Celsius products—a common marketing tactic called the "single-use

strategy." (T:749–52). "[W]hen you're in the very early stage of a company," Mr. David explained, "people don't know your brand" and "don't want to reach in their pocket and spend $8 on something they don't know if they're going to like." (T:278). Single-use powder sticks and cans give consumers a less-expensive "opportunity for trial of [the] product." *Id.* If "they like it, then they may be more inclined to spend more and buy it again"—possibly in larger packages. *Id.* The strategy also opens up "different channels of distribution" like convenience stores, vending machines, and gyms that "only handle singles." *Id.*

2. The parties dispense with Flo Rida's usual fee in exchange for a long-term ownership stake in the company.

Mr. Dillard would normally receive millions of dollars for an endorsement deal like this one. (T:748–49). But Celsius—deep in debt—did not have that kind of money. (T:277). Mr. Dillard thus proposed an arrangement "inspired" by hip-hop artist 50 Cent's long-term deal with Vitamin Water to endorse its product in exchange for an ownership interest. (T:346). Under the contract's terms, Mr. Dillard would receive "performance incentives," (R:3958), in the form of restricted shares of Celsius stock "in lieu of" the "seven-figure

upfront money [he] typically gets." (T:748). The contract required that the company issue 250,000 shares immediately, with the promise of additional payments of 250,000 and 500,000 shares, "as directed by" Mr. Dillard's representatives, when either of two sales benchmarks were met—for a maximum of a million shares. (R:3958).

$1 million revenue. Celsius agreed to issue 250,000 shares to Mr. Dillard when it reached $1 million in "Co-branded revenues in any twelve-month period during the Term." *Id.* In full, the provision reads:

> An additional **250,000** Shares, as bonus compensation, shall immediately be issued once the Company achieves One Million Dollars ($1,000,000.00) in gross cumulative Co-branded revenues in any twelve-month period during the Term.

The agreement defines "Term" to include both an "Initial Term" of two years, ending on March 6, 2016, and—if the agreement is "mutually extended by the Parties in writing"—an "Extended Term." (R:3940). It does not, however, define the "Co-branded revenues" that count toward the benchmark.

690,000 units. Celsius also agreed to issue 500,000 shares to Mr. Dillard when it sold 690,000 "units of Co-branded Product." It reads:

> An additional **500,000** Shares, as incentive compensation, shall immediately be issued once the Company sells a total of 690,000 units of Co-branded Product through its channels of distribution following the execution of this Agreement.

(R:3958).

The number 690,000 comes from Celsius's single-use strategy: The company expected that 1% of Flo Rida's 23 million online followers would buy at least three Celsius products each, thus establishing themselves as returning customers. (T:855–56). Unlike the $1 million revenue benchmark, this benchmark was not limited to sales "during the Term," but included all sales "following the execution of this Agreement." (R:3958). It failed, however, to define the term "units."

At 2014 prices, the maximum one million shares of Celsius's "penny stock" would still have been worth far less than Mr. Dillard's usual fee. The stock had recently sold for only about 50 cents per share, and even that overestimated its real-world value. (T:225). The shares were restricted, requiring Mr. Dillard to hold them for at least six months. (T:323, 427). Because Celsius was not listed on any stock exchange, the stock was virtually impossible to sell. (T:546–47). It

was also risky, given that Celsius's mounting debt threatened to drive its value to zero.

Mr. Dillard, however, was willing to accept these risks in exchange for receiving "ongoing revenue" from "long-term shares in equity in the growth of the company." (T:347, 349). He knew that his strong brand and large following were likely to turn Celsius from an unknown company into a "very successful" one—increasing the value of its stock to the benefit of both parties. (T:348). He therefore "didn't intend to sell any" Celsius stock, but to hold it over the long term as a form of "[g]enerational wealth." (T:347, 383–84).

3. While Flo Rida's enthusiastic endorsement catapults Celsius to success, the company reneges on its promises.

Mr. Dillard did what he promised to do. From the start, he began prominently featuring Celsius cans in a variety of media, including live performances and music videos of his top songs. (T:343–44). Just one of these, "My House," is frequently played in gyms and sports venues, has been viewed online hundreds of millions of times, and remains online even today. (T:299, 366–67, 380; R:5977). And within six months of signing the contract, his posts about Celsius had reached 27 million consumers across all social-media platforms

(including Facebook, Instagram, and Twitter). (T:351–52). Celsius paid nothing extra for any of this; the only benefit Mr. Dillard received was the anticipated increase in the company's stock price. (T:299).

Flo Rida in his music video, "My House"

Mr. Dillard also leveraged his industry contacts to help the company grow. Right off the bat, his introduction of record executive Russell Simmons to Celsius led to a critical investment that relieved its looming financial troubles. (T:333). Soon after, his performance at the largest convenience-store trade event "led to new distribution agreements with national chains," including 7-Eleven. (T:300, 741). Mr. Dillard also brought Celsius with him to "every one" of his shows,

mentioned it in press interviews, gave it away at Miami Heat games, and introduced it to his celebrity friends and connections. (T:310, 350-51, 361). Again, he received no separate compensation for any of this beyond the hope that it would help Celsius grow its sales and stock value.

The strategy paid off. In the twelve months before its contract with Mr. Dillard, Celsius brought in about $12.1 million in annual revenue and its stock traded for about 50 cents per share. (T:225, 620). By the end of the contract's first two-year term in 2016, its revenue had risen to $16.2 million and its stock price was at $1.95. (T:625, 1169). "Over the past two years," Celsius announced, Flo Rida had "helped broaden the brand recognition of Celsius through co-branding products, social media support, and numerous appearances, including his participation in the exhibition race with Celsius-sponsored NASCAR driver Blake Koch, the Gold's Gym annual convention, [and] the Vitamin Shop Managers' National Conference." (T:300).

Even while enjoying the benefit of increased sales, however, Celsius had no intention of holding up its end of the bargain. Nobody within the company ever asked whether the benchmarks had been

satisfied. (T:647–48). The company generated no reports or calculations that could have answered that question. *Id.* Rather than trying to figure out what it owed, the company kept its product sales secret and hid its success, telling Mr. Dillard that Flo Fusion "didn't resonate with the consumers." (T:684). In "several conversations" with the plaintiffs, Mr. David "consistently represented" that sales were below expectations and that the products were "fail[ing] miserably" in terms of revenues. (T:296, 749, 761). Celsius produced no evidence to back up that claim when asked, and the plaintiffs had no way to verify it. (T:647). But Mr. Dillard had no reason to distrust the company, which thus far had treated him like "family." (T:348).

4. The parties extend the 2014 contract for another thirty months.

About a month before the March 6, 2016, end of the agreement's "Initial" two-year term, Mr. David wrote to Mr. Dillard's lawyer that Celsius "would like to continue with Flo." (R:5079–83; T:301). Flo Rida, Mr. David wrote, had "been an outstanding ambassador for [the] brand over the past 2 years." *Id.* After a discussion of "strategy and deal points," Mr. David proposed a draft agreement to "retain" Mr. Dillard as spokesperson. (R:443). In exchange for extending the

term of the agreement, Celsius agreed to a new incentive: It would pay at least $500,000 in royalties upon its sale of Flo Fusion powdered sticks and "Flo Rida Orange" cans. (R:3983–84; R:423). Mr. David described the agreement as a "continuation of the other agreement," with "the same structure . . . as the other one" but with "different numbers." (T:305). So did the plaintiffs. David Gold of D3M, who represented Mr. Dillard in negotiations, testified that both Mr. David and John Fieldly (the company's chief financial officer) described the agreement as a "renewal" of the original agreement with added "deliverables." (T:590, 610). Likewise, Mr. Dillard testified that the new agreement was intended to "extend[]" the old one. (T:373, 494; R:527–28).

On March 29, 2016, the company's board of directors approved a "[r]enewal" of the endorsement agreement. (T:303). Formal execution of the agreement was briefly delayed while Mr. David was "out of the office." (T:303, 606). During that period, Mr. Dillard continued promoting Celsius products and Celsius continued featuring him in its ads. (T:373–77). The parties signed the agreement a few weeks later, on April 11, 2016. (R:3974–4000). In a press release, Celsius announced "a renewed 30-month partnership

agreement with [the] multi-platinum recording artist" and a continuation of "Celsius' highly successful worldwide licensing and endorsement agreement," "which began in March of 2014." (R:5975–79; T:371–72). Flo Rida, it wrote, would be the "face behind" the ad campaign for its new product, "Celsius Heat." (T:311, 334).

Over the course of the extended term, Celsius's growth became exponential. In 2017, the company announced "an unprecedented year [of] growth." (T:335). Sales had doubled from 2016, "thanks in part to . . . astounding" sales from Mr. Dillard's Celsius Heat campaign. (T:316–17, 335). That same year, with its stock selling at around $4 per share, Celsius made it back on the NASDAQ. (T:844–45). By the final twelve months of the renewal period in 2018, the company's revenues had reached $42.2 million. (T:625). Even today, Celsius continues to capitalize on that success. The company's board recently approved a 3-1 stock split. *See Celsius Holdings Announces Three-for-One Stock Split*, https://www.celsiusholdingsinc.com/2023/11/celsius-holdings-announces-three-for-one-stock-split. And the company—virtually unknown before its Flo Rida deal—announced last year that it had overtaken Red Bull to become the second-largest distributor of energy drinks in the nation. *See* Tracy

Alloway and Joe Weisenthal, *Celsius and What It Takes to Make It in the Crowded Market for Energy Drinks*, Bloomberg (Oct. 26, 2023), https://perma.cc/95N4-FSWG.

B. Procedural history

In 2020 the plaintiffs discovered that, despite Celsius's claim to the contrary, the company continued to sell Flo Fusion powder at some retail locations. The plaintiffs demanded that the company provide a full accounting of its sales and transfer any stock or royalties due. (T:476–77; R:5294–99). In April 2021, Celsius refused the plaintiffs' demand, contending that neither benchmark had been reached and that no royalties were owed. *Id.* But the company provided no evidence to back up its claim.

Mr. Dillard and two companies representing him—Strong Arm Productions USA, Inc. and D3M Licensing Group, LLC—sued Celsius for breach of contract. (R:45–54). Celsius moved for summary judgment, arguing among other things that the agreement's initial two-year term ended before either benchmark was achieved. (R:632–56). The trial court denied the motion, holding that disputes of material fact precluded summary judgment on the benchmark claims. The court found that summary judgment was improper

because material contract terms, including "co-branded revenues" and "unit," were "undefined" by the contract and given "conflicting, yet reasonable, interpretations by the parties." (R:3651–53). It also found a dispute of material fact on the question whether the parties intended the 2016 agreement to extend the 2014 one—a question not addressed in the contract's text. *Id.* Because the agreement's terms were thus "ambiguous and reasonably susceptible to different constructions," it was for "the trier of fact [to] interpret the agreement based upon the evidence." *Id.*

At trial, Celsius's witnesses told the jury that, because the company never sold powder sticks individually, a "unit" under the contract could only mean a box of fourteen sticks. (T:681). The plaintiffs, however, introduced compelling evidence that this was false. Celsius included a UPC code on individual sticks, provided retailers with a suggested price for a single stick, tracked cost of goods on a per-stick basis, and regularly ran "single-use promotions." (T:296–97, 308, 327, 496–97). On cross-examination, Celsius's CFO was forced to admit the truth of these facts. (R:326–29).

At closing argument, plaintiffs' counsel asked the jury to find that Celsius met both the revenue and unit benchmarks before the end of the contract's initial two-year term on March 6, 2016. (T:1103–12). Even Celsius's flawed and incomplete records showed the $1 million benchmark nearly satisfied in 2016, and the missing data—had Celsius recorded it—could easily have gotten it the rest of the way there. *Id.* Likewise, Celsius had sold 738,773 individual sticks by February 2015—well over the 690,000-unit benchmark. (T:634).

At a minimum, however, the plaintiffs argued that, because "the contract was extended," "the benchmarks were satisfied during the second contract term." (T:1122). Celsius's own records showed the revenue benchmark satisfied by February 2018, when revenues exceeded $1 million over the previous 12 months. (T:629–31, 797–803; R:4924–27). And even under Celsius's definition of "unit," the company met the 690,000-unit benchmark in September 2019. (T:634). By then, the company had sold at least 728,000 boxes of individual powder sticks—a total of 9.5 million sticks. *Id.*

Plaintiffs' counsel explained to the jury that, although the 2014 contract limited the $1 million benchmark to revenue earned during the "Term," it expressly allowed that term to be extended by

agreement of the parties. (T:1153). And the plaintiffs' evidence unequivocally showed that everyone involved—including Celsius's board, CEO, and other top officers—intended the 2016 agreement as a "renewal" or "continuation of the other agreement." (T:305, 370-73, 493–94). Again, Celsius's response to these undisputed facts lacked credibility: Mr. David claimed that he thought "renewal . . . meant that it was a new contract" because "within the word 'renewal' is the word 'new.'" (T:757).

Based on this overwhelming and largely uncontested evidence, the jury found after a five-day trial that Celsius breached its payment obligations under both benchmark provisions. (R:5395–98). The trial court overruled Celsius's objection to calculating damages based on a date other than the date of the alleged breach. (R:874–77). Mr. Dillard testified that he "didn't intend to sell any" Celsius stock and did not in fact sell any of the shares he was issued until 2020, when the pandemic halted his live performances. (T:383–84). He continues to hold the remainder of shares today. *Id.*

The jury concluded that Celsius owed the plaintiffs 750,000 shares, which it valued based on Celsius's stock price on the last day of trial ($110.18 per share). (R:5395–98). Multiplying that price by

the number of shares owed, the jury awarded $27.5 million for breach of the $1 million benchmark and $55 million for breach of the 690,000-unit benchmark. (R:5396, 5398). The jury also awarded about $5,000 in unpaid royalties under the 2016 agreement. (R:5398).

Following trial, Celsius filed motions for a judgment notwithstanding the verdict, for a new trial, and for remittitur. (R:5764, 5769, 5803, 5846). After a hearing on the motions, the trial court denied all three in open court. *Id.*

SUMMARY OF ARGUMENT

I. Overwhelming evidence supported the jury's finding that Celsius reached both the contract's $1 million benchmark and its 690,000-unit benchmark before the end of the contract's initial two-year term in March 2016. The jury found that Celsius reached $1 million in "Co-branded revenues" at least twice: once before May 4, 2016, and again in February 2018. Because the contract did not define "Co-branded revenues," the jury properly considered extrinsic evidence in concluding that the phrase includes revenues from sale of all Celsius products during Mr. Dillard's term as brand ambassador. But assuming the term is limited to sales of Flo Fusion,

as Celsius contends, the evidence was still sufficient for the jury to find that the company would have documented first-term revenue of more than $1 million if it had accurately tracked Flo Fusion sales (as the contract required it to do).

Overwhelming evidence also supported the jury's finding that Celsius achieved the 690,000-unit benchmark before the end of the contract's first term. The evidence showed that a "unit" under the contract is a single Flo Fusion powdered stick. The company priced powder sticks for individual resale and ran promotions on single sticks. Even its executive vice president admitted that a box containing fourteen sticks is fourteen "units." Celsius easily sold more than 690,000 sticks during the first contract term.

The jury's verdict thus establishes that Celsius breached the benchmark provisions even if—as it contends—the parties never extended the contract. This Court can overturn that verdict only if "*no view of the evidence* could support" it. *Coba*, 164 So. 3d at 646. Because the evidence here is more than sufficient to support the jury's findings, the Court should affirm.

II. This Court need go no further to affirm the jury's finding that Celsius reached both benchmark provisions and therefore breached

the contract's terms. At a minimum, however, Celsius reached the benchmarks after the end of the initial contract term. The jury heard overwhelming evidence that the parties intended their 2016 agreement to extend the initial term. The 2016 agreement's merger clause doesn't change that conclusion, because the agreement says nothing about whether it is intended to extend the initial two-year term. Relying on the merger clause to foreclose extrinsic evidence of the contract's meaning would thus leave the court without evidence on which to resolve the issue either way. In these circumstances, it is well established that parties can introduce evidence to clarify a latent ambiguity.

The 690,000-unit benchmark, unlike the $1 million benchmark, is not limited to sales made "during the Term." Instead, it includes all sales "following execution of this Agreement." To respect the parties' intent, this difference in contract language must be given effect. The 690,000-unit benchmark, by its plain language, thus has no deadline, and the plaintiffs are entitled to compensation regardless of whether the contract was extended or when the benchmark was satisfied.

III. Finally, Celsius challenges the jury's award of damages based on the price of Celsius stock at the close of evidence. Celsius argues that its stock value should instead be determined based on the date of breach, but the well-established rule is that damages should place the injured party in the position it would have been in had the other party not breached the contract. The undisputed evidence shows that the plaintiffs did not intend to sell their Celsius shares as soon as they acquired them but to hold them as long-term investments. Any remaining uncertainty is attributable to Celsius, which prevented a more precise valuation by failing to report its sales as the contract required. Fundamental justice requires that this uncertainty be weighed against Celsius and in favor of the jury's verdict.

ARGUMENT

The "importance of the right to trial by jury implicates a strong deference to a jury's decision, requiring that its verdict be sustained if at all possible." *Coba*, 164 So. 3d at 644–45. Thus, this Court "will not disturb a final judgment if there is competent, substantial evidence to support the verdict." *Berges v. Infinity Ins. Co.,* 896 So. 2d 665, 675–76 (Fla. 2004). In "the face of evidence which is at odds or

contradictory, all conflicts must be resolved in favor of the" jury's decision. *Irven v. Dep't of Health & Rehab. Servs.*, 790 So. 2d 403, 406 n.2 (Fla. 2001). And "every reasonable conclusion which may be drawn from the evidence must also be construed favorably" to the verdict. *Id.*

At the foundation of these rules is the principle that an "appellate court is not authorized to substitute its judgment for that of the jury." *Coba*, 164 So. 3d at 643. "Only where there is *no evidence* upon which a jury could properly rely[] in finding for the plaintiff" can a verdict be set aside. *Irven*, 790 So. 2d at 406 n.2 (emphasis added). Because overwhelming evidence supports the jury's verdict here on multiple grounds, this Court should affirm.

I. The jury properly found that Celsius reached the contract's benchmark provisions during the initial contract term.

The jury found that Celsius breached the terms of both the contract's $1 million benchmark provision (requiring issuance of 250,000 shares) and its 690,000-unit benchmark provision (requiring issuance of an additional 500,000 shares). (R:5395–98). Celsius's lead argument (at 24) is that the plaintiffs should not have been allowed to count sales toward either benchmark after the end

of the contract's initial two-year term. That is because—the company claims—the parties never renewed the contract for a second term.

Given the jury's verdict, however, that question is beside the point. As explained below, the jury found that Celsius reached the 2014 contract's $1 million and 690,000-unit benchmarks *before* the end of the contract's initial two-year term in March 2016. The verdict thus establishes that Celsius reached both benchmark provisions—regardless of whether the parties renewed the contract.

A. The jury properly found that the $1 million revenue benchmark was reached before the end of the initial term.

1. The first benchmark required Celsius to issue 250,000 restricted shares of its stock "as directed" by plaintiffs when it achieved $1 million in "Co-branded revenues" over "any twelve-month period during the Term." (R:3958). The plaintiffs argued several ways in which Celsius's revenues met the $1 million benchmark, "depending on how the jury viewed the evidence." (T:1034).

First, under the relevant statute of limitations, claims for breach of contract before May 4, 2016, would have been time barred if the plaintiffs did not show that the period was tolled. So, at closing argument, plaintiffs' counsel asked the jury to find that Celsius breached the provision after that date. (T:1147–49). The jury agreed that it had. Based on expert evidence, the jury concluded (and specifically noted on the jury form) that Celsius "reached" the $1 million benchmark in "February 2018." (R:5395). And since the benchmark had been satisfied, the jury further agreed with the plaintiffs that Celsius "breach[ed]" the contract on April 30, 2021, when it failed to honor Mr. Dillard's demand for payment:

COUNT I - BREACH OF 2014 AGREEMENT

(BONUS COMPENSATION PROVISION - 250,000 SHARES)

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 reached on February 2018

Id.[1]

Second, because the plaintiffs also presented a tolling theory, they asked the jury to find the benchmark satisfied *before* May 4, 2016, too. The jury form required the jury to address this alternative theory. So long as the plaintiffs had not "waived their right to compensation" under the benchmark—and the jury found they had not—then it was told to "continue to" the question of an earlier breach. (R:5396). The jury did so, finding that a "breach of this provision" had "occurred before May 4, 2016" and that this claim was timely because Celsius "fraudulently concealed information relating to the breach" and was "equitably estopped from asserting the statute-of-limitations defense." (R:5397).[2]

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[1] As explained in Part I.C below, the April 30, 2021, breach date is relevant as an alternative basis to establish that the plaintiffs' claims were timely. It does not, however, bear on the question of whether Celsius reached the benchmarks during the first contract term.

[2] Although the contract's initial two-year term ended on March 6, 2016—about two months before the May 4 date that the jury was asked about—the jury couldn't have concluded that the breach occurred between March 6 and May 4. The evidence on which the plaintiffs relied was for the twelve-month period immediately before the end of the first term on March 6. (R:5294–99). The jury thus found the benchmark satisfied *during* that term—not immediately after it.

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

YES _X_ NO ___

If your answer to question 5 is YES, answer questions 6 and 7. If your answer to question 5 is NO, then skip to question 8.

6. Did the plaintiffs prove that Celsius fraudulently concealed information relating to the breach of this provision?

YES _X_ NO ___

7. Did the plaintiffs prove that Celsius is equitably estopped from asserting the statute-of-limitations defense to the breach of this provision?

YES _X_ NO ___

Id.

Given the first jury question, the phrase "breach of this provision" in question 5 means that Celsius "achieved" the required revenue "in any twelve-month period during the Term." (R:5395). The verdict's plain language thus found that Celsius "achieved" (or "reached") the $1 million benchmark provision at least twice: Once during the initial contract term, and once after.

2. Celsius's proposed alternative reading is untenable. The jury's finding that the $1 million benchmark "was reached in February 2018," it contends (at 56), is facially inconsistent with the jury's finding on the next page of the jury form that the breach "occurred before May 4, 2016." As the company sees it, the jury found that it reached the benchmark *just one time* but assigned two

different dates to that event—one before May 2016 and the other in February 2018. The problem with that reading is that it is nonsensical: Both dates "cannot be true and therefore stand at the same time." *Coba*, 164 So. 3d at 643–44. And that is precisely the point of Celsius's reading: The breach dates, it argues (at 57), are "irreconcilably inconsistent" and require this Court to throw the verdict out entirely.

Celsius misreads the verdict form. The form asked the jury to find that Celsius "breached" the 2014 Agreement if it found that the company "achieved" the $1 million benchmark "in *any* twelve-month period during the Term." (R:5395 (emphasis added)). The jury thus could have found the $1 million benchmark met more than once during separate twelve-month periods. And that is precisely what happened here: The plain meaning of the jury's verdict, and the only way to read it consistently with itself, is that Celsius "achieved" the $1 million benchmark at least twice during two separate twelve-month periods. And because this reasonable and consistent interpretation is available, this Court is not free to reject it in favor of an illogical and inconsistent one. The jury's verdict is "clothed with a presumption of regularity." *Coba*, 164 So. 3d at 643. When, as here,

a better reading is available, the Court must "preserve[] the sanctity of the verdict . . . by resolving all doubts in [its] favor." *Id.* at 646.

In any event, Celsius cannot raise its inconsistency argument for the first time on appeal. "To 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." *Id.* at 643–45 (emphasis added). "[R]equiring 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." *Id.*

Celsius argues (at 58) that it "brought the inconsistenc[y] to the trial court's attention." But the company did not object when the Court proposed to release the jury. (T:1273-75). Nor did it ask the Court to re-instruct the jury, return it for further deliberations, or grant any other relief. *Id.* Regardless, as the trial court recognized, and Celsius did not dispute, (T:1273–74), this supposed inconsistency does not involve any "fact material to the judgment," *Coba*, 164 So. 3d at 643–44. It just establishes that the jury agreed with the plaintiffs on both theories of breach. To read the verdict in

a way that instead *releases* Celsius from liability under both theories would accomplish the opposite of the jury's intended result.

3. The trial evidence supported the jury's finding that the benchmark was satisfied in the initial contract term in two independent ways. First, the trial court held that the phrase "Co-branded revenues" is ambiguous. For purposes of the 690,000-unit benchmark, the contract defines sales of "Co-branded Product" to mean sales of new Flo Fusion powdered drinks. (R:3939). That the $1 million benchmark instead uses the phrase "Co-branded revenues" thus "strongly implies that a different meaning was intended." *Hillcrest Country Club Ltd. P'ship v. Zyscovich, Inc.,* 288 So. 3d 1265, 1270 (Fla. 4th DCA 2020). The contract, however, never defines the phrase. The jury thus properly considered extrinsic evidence that Celsius hired Mr. Dillard to promote the brand *generally*: As "brand ambassador" he would "personif[y] the brand," serving as the "face behind Celsius," and promoting the company's whole "range of products." (T:334, 389, 750; R:5873–74, 5888). The evidence further showed that the company's single-use strategy was designed to "generate additional sales for all of [Celsius's] products." (T: 749–52). These facts, considered in light of the difference in

contract language, are enough to support the jury's finding that the parties intended Mr. Dillard to get credit for any increase in the company's revenue during the brand ambassadorship's limited term—a number that easily surpasses the $1 million benchmark in the first term alone. (T:620–25).

Second, even under Celsius's much narrower reading of "Co-branded revenues"—which the company interprets as limited to revenue from sales of Flo Fusion powdered drinks—the evidence was still sufficient for the jury to find the $1 million benchmark met in the initial term. Although Celsius failed to keep accurate records of sales counting toward the benchmark, the plaintiffs showed that—if the company had tracked sales as the contract required—it would have found first-term revenue above the benchmark's $1 million minimum. Even the company's flawed data showed that Celsius achieved at least $827,000 of benchmark revenue during the first term. (T:820, 1107; R: 5294–99). But that number was just a "guess" based on the company's incomplete records. (T:1109–10). Celsius made no reports during the contract term calculating whether the benchmark was satisfied. (T:303–04, 615–17, 647–48). The company did not even bother to track how much Flo Fusion it sold—its data

failed to distinguish sales of Flo Fusion from sales of other powdered products. (T:618–19). There was thus “no way from the data to say what’s Flo Fusion and what’s not.” (T:632).

Even the data that Celsius did keep was not accurate, but was filled with “mistakes,” “missing” data, and other problems. (T:617, 630). The jury heard that correcting just one of Celsius’s errors—like its failure to track sales of 50-count boxes—would have pushed benchmark revenue over $1 million by the end of the contract’s first term. (T:821–22). The jury was entitled to weigh this and other errors in Celsius’s data against the credibility of the company’s revenue estimate. *See Duclos v. Richardson*, 113 So. 3d 1001, 1004 (Fla. 1st DCA 2013). The jury’s finding that Celsius engaged in fraudulent concealment is strong evidence that the jury did exactly that. (R:5397). Because it was Celsius that “prevented a more precise computation” of the benchmark, “[f]undamental justice” requires that “the perils of such uncertainty . . . should be laid at [its] door.” *Lindon v. Dalton Hotel Corp.*, 49 So. 3d 299, 307 (Fla. 5th DCA 2010).

B. The jury properly found that the 690,000-unit benchmark was reached before the end of the initial term.

1. The jury also found that Celsius met the second benchmark by selling "690,000 units of Co-branded Product" before the end of the contract's first two-year term. (R:3957). "[W]ith respect to units of co-branded product," the jury found, "an individual stick counts as a 'unit.'" *Id.* Based on that finding, Celsius easily met the 690,000-unit benchmark no later than February 2015—well before the term ended in March 2016. *Id.*

Celsius asks this Court to throw out the jury's finding, arguing—as a matter of law—that the word "units" does not refer to single Flo Fusion sticks, but to larger boxes of 14 individual sticks that the company distributes to retailers. On this reading, Celsius claims that the 690,000-unit benchmark was not reached until 2019, when the company achieved cumulative sales of 9.5 million Flo Fusion sticks. (*See* R:4930).

To overcome the jury's verdict, Celsius must show that the meaning of a "unit" in the 2014 agreement *unambiguously* means a box of 14 powder sticks. *Nationstar Mortg. Co. v. Levine*, 216 So. 3d 711, 714 (Fla. 4th DCA 2017). But the agreement never defines the

word, and its plain meaning cuts against Celsius's position. In ordinary use, "unit" means "a single thing or a separate part of something larger." *Unit*, Cambridge Online Dictionary, https://perma.cc/X3KE-8ZN6. It follows that a "unit" of "Product" means a "single" powder stick. It is the individual sticks in the boxes shipped to retailers that are the "single things" or "separate parts" of "something larger."

Other contract language supports that reading. The contract defines "Core Products" as the "range of . . . beverages" sold by Celsius. And it defines "Products" as a "modified version" of those beverages "in powder form and co-brand[ed]." (R:5873). The phrase "unit of Co-branded Product" thus can only mean a single Celsius *beverage*. That's also the sense in which the rest of the contract uses the word: It requires Mr. Dillard to "promote the Products"; to "use and evaluate the Products according to the recommended use"; to post "viral videos . . . using the Products"; and to "help launch the Products." (R: 5873, 5889–90, 6025). These provisions require promotion of individual Celsius drinks—not *boxes* of those drinks.

2. In contrast, the word "box" never appears in the contract. The only textual evidence on which Celsius relies (at 34–36) is a

fragment of the contract's prefatory recital listing prices that Celsius says are too high to represent individual sticks. But the contract is more flexible on pricing than Celsius admits. Because the company had yet to develop or price Flo Fusion, the contract left the pricing question open: It provided that the product would either "be priced at retail between $19.95–39.95" (the price of powder tubs that Celsius sold at that time) or at another price "appropriate for channel of distribution or country." (R:5873). Those "channel[s]" include "convenience" stores, "fitness clubs," and other venues that, the evidence shows "only handle singles." (T:278). The contract's language thus does not support Celsius's position at all, much less support it unambiguously.

Indeed, Celsius itself is forced to turn to extrinsic evidence of real-world sales to support its argument. For example, Celsius claims (at 35) that it never directly sold powder sticks individually, so the incentive-compensation provision *must* refer to boxes. But the way that Celsius chose to sell its products isn't in the contract. It is thus not a legal issue of contract interpretation—it is a fact question

requiring extrinsic evidence on which the jury has already rejected Celsius's position.[3]

3. Because "unit" is at least ambiguous, the question of its meaning is "one of fact" for the jury. *Nationstar*, 216 So. 3d at 714. And overwhelming evidence supported the jury's determination that "unit" means a single Flo Fusion stick. Testimony by Celsius officers, for example, showed that the company intended for powder sticks to be sold individually at retail. Celsius included a UPC code on sticks, (T:297), for the purpose of allowing individual sale, (496–97). It provided retailers with a suggested price for a single stick. (T:327). It regularly ran single-use promotions, such as one advertising "10 cents off sticks." (T:309–310, 328–29). And it calculated the profits derived from the sales of single sticks. (T:326). Retailers like GNC, for example, paid Celsius by the stick. (T:700). Even Celsius's CEO

[3] Celsius is also wrong that "unit" is patently ambiguous. The contract's language "is clear and intelligible, but some extrinsic fact or extraneous evidence"—here, the way Celsius packages products—"creates a need for interpretation or a choice between two or more possible meanings." *Nationstar*, 216 So. 3d at 715. In any event, though, Celsius failed to preserve this objection and so this Court need not consider it. *See Curcio v. Cessna Fin. Corp.*, 424 So. 2d 868, 871 (Fla. 4th DCA 1982).

admitted that a box with fourteen sticks contains “fourteen units.” (T:307).

Further, the jury considered evidence that a single-stick understanding of “unit” is more consistent with industry practices. (T:894–906). Numerous trial exhibits supported this conclusion. (R:4001–03, 4373–88, 4471–76, 5918–21, 5934–36 6229–33). An email from a Celsius employee, for example, talks about the “Unit” cost of individual powder sticks:

From: Randy Smith
Sent: Wednesday, June 3, 2015 2:58 PM
To: ray@plspecialties.com
Subject: Flo Fusion Sticks Pricing

Ray -

Per my voice mail I wanted to get you some pricing for the sticks you received Monday.

Case Cost is $96.00/cs

Unit cost is $.57/stick

Suggested Price to Customer is $129.00/case

Unit cost is $.76/Stick

Above works out to a 25% margin for Private Label Specialties

There are several ways to merchandise and sell at retail based on my experience. We deal with both health clubs and specialty stores so the sale is different. Meaning in Specialty stores they will sell both the 14 count box or singles and of course in health clubs they are selling singles but will BUNDLE with a water!

- 14 count SRP - $17.99
- Single Stick SRP - $1.49
- Bundled with water SRP - $2.50 - $2.79 Now remember this is a functinoal stick and it would be like purchasing an energy drink or thermogenic beverage at the health club for $2.79- $2.99

It was nice speaking with you and I will send you some dates asap!

Thank you,

Randy Smith

Director of Sales

Celsius

(R:5915).

Finally, Celsius argues (at 39) that the plaintiffs' reading would "defy common sense" by allowing the 690,000-unit benchmark to be reached first. But nothing in the contract even hints that the benchmarks must be satisfied in the order it lists them. On the contrary, it says that benchmark revenues "shall accrue concurrently with the calculation of unit sales." (R:391).

The jury considered all this and found for the plaintiffs—a determination that "necessarily involved the weighing of evidence and assessing of credibility." *N. Fla. Mango, LP v. LLS Holdings, LLC*, 2023 WL 7365591, at *5 (Fla. 4th DCA Nov. 8, 2023). Celsius already had its chance to persuade a jury of its position, and it lost. It is not the role of this Court to "retry a case or reweigh conflicting evidence submitted to a jury." *Hastie v. Ekholm*, 199 So. 3d 461, 465 (Fla. 4th DCA 2016).

C. The plaintiffs' claims were not barred by the statute of limitations.

1. Celsius argues that any claims arising during the first contract term would be barred by the statute of limitations. The jury's verdict, however, renders this point irrelevant. The jury found that

Celsius breached the contract in April 2021—just a month before the plaintiffs filed their complaint and well within the five-year limitations period. That finding was within the jury's province. "The occurrence of a breach, or breaches, is a question of fact." *Access Ins. Planners,* 175 So. 3d at 924. "Courts throughout the state" have thus "held that the determination of timeliness under the statute of limitations is fact-specific and within the province of the jury, not the trial judge." *Cohen v. Cooper*, 20 So. 3d 453, 456 (Fla. 4th DCA 2009).

Again, the jury's finding is amply supported by the evidence. "Florida case law consistently holds that a cause of action for breach of contract accrues and the limitations period commences at the time of the breach." *Lexon Ins. Co. v. City of Cape Coral*, 238 So. 3d 356, 358 (Fla. 2d DCA 2017); *see, e.g.*, *Access Ins. Planners*, 175 So. 3d at 924 ("For purposes of the statute of limitations, a cause of action for breach of contract accrues at the time of the breach."). Celsius breached the contract in April 2021, when Celsius failed to honor the plaintiffs' demand for payment. That was the proper time for the plaintiffs to sue for breach of contract. It would make no sense to say that they should have sued earlier, before they had even asked for, and been denied, the compensation that Celsius owed them.

Celsius argues that the plaintiffs cannot rely on an April 2021 breach date because they did not allege it in their complaint. But the date of breach is not a pleading requirement. *See, e.g.*, *Goodwin v. Sphatt*, 114 So. 3d 1092, 1094 (Fla. 2d DCA 2013) (reversing dismissal of complaint that did "not set forth any specific dates" for the breach of contract). "Only the ultimate facts are required to be pleaded." *Reinert v. Carver*, 41 So. 2d 449, 449 (Fla. 1949); *see also* Fla. R. Civ. P. 1.110(b). The plaintiffs thus are not required to plead which acts constituted a breach. *Reinert*, 41 So. 2d at 449. Regardless, Celsius did not timely object to admission of the plaintiffs' evidence of an April 2021 breach, and it cannot now complain that the jury relied on that evidence. *See S. Fla. Coastal Elec., Inc. v. Treasures on Bay II Condo Ass'n*, 89 So. 3d 264, 266 (Fla. 3d DCA 2012) ("A judgment must be based upon a claim or defense that was either properly pled or tried by consent of the parties.").

2. Even if the breach occurred in 2015, as Celsius argues, the plaintiffs' claims would still have been timely because the jury found that the limitations period was tolled under the doctrines of fraudulent concealment and equitable estoppel. The question of "whether the statute of limitations is tolled" by a defendant's conduct

is another "question of fact for a jury to decide." *Kleiman v. Wright*, 2020 WL 5632654, at *24 (S.D. Fla. Sept. 21, 2020); *see, e.g.*, *Walker v. Dunne*, 368 So. 2d 640, 641 (Fla. 2d DCA 1979) (holding that the trial court "should have left the question to the trier of fact"). Here, Celsius "consistently represented" to the plaintiffs that Flo Fusion was underperforming and that the benchmarks had not yet been met. (T:296, 684, 749, 761). But the reality was that the company did not even keep internal records about benchmarks and royalties because it never intended to notify the plaintiffs that payments were due. (T:303–04, 615–17, 647–48). The facts on which Celsius relies for its contrary argument (at 55) were considered and rejected by the jury.[4]

Celsius argues (at 54–55) that fraudulent concealment requires a fiduciary relationship, which it says is absent here. But the cases on which Celsuis relies are about the *tort* of fraudulent concealment, not the tolling doctrine that the plaintiffs raised below. *See R.J. Reynolds Tobacco Co. v. Whitmire*, 260 So. 3d 536, 538–39 (Fla. 1st DCA 2018); *Chino Elec., Inc. v. U.S. Fid. & Guar. Co.*, 578 So. 2d 320,

[4] Celsius claims (at 54–55), without citation, that the plaintiffs "conceded at trial that there was no fiduciary relationship" or "special duty to disclose." There was no such concession.

323 (Fla. 3d DCA 1991). In the context of tolling, fraudulent concealment is not rooted in fiduciary duties, but "embodies an estoppel concept" that a defendant should not benefit from its own misrepresentations. *Cohen*, 20 So. 3d at 456. It is, in other words, "a doctrine to prevent the court from participating in the fraud of the defendant." *Vargas ex rel. Vargas v. Glades Gen. Hosp.*, 566 So. 2d 282, 285 (Fla. 4th DCA 1990). That is precisely what is going on here. The jury found that Celsius made false statements about benchmarks to avoid payment. The company should not now benefit from the delay it created.

Like fraudulent concealment, "[e]quitable estoppel presupposes a legal shortcoming in a party's case that is directly attributable to the opposing party's misconduct." *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1077 (Fla. 2001). Equitable estoppel is supported by evidence showing that the defendant willfully "lulled" the plaintiff into delaying the filing of the lawsuit and is grounded in basic notions of "fair play and essential justice." *Kleiman*, 2020 WL 5632654, at *24–*25; *see, e.g.*, *Acoustic Innovations, Inc. v. Schafer*, 976 So. 2d 1139, 1144 (Fla. 4th DCA 2008) (defendant through its "words and actions repeatedly assured [plaintiff] that [defendant] would honor

their agreement" to transfer shares of the company and was thus equitably estopped from relying upon its statute-of-limitations defense). For this independent reason, the jury found the plaintiffs' claims timely.

Celsius argues (at 52-53) that equitable estoppel applies only to plaintiffs who *know* they have a cause of action but are nevertheless lulled into not filing suit. The jury's finding of both, it argues (at 57), is thus inconsistent. But Celsius never asked the Court to instruct the jury on a knowledge requirement. Indeed, the Court used Celsius's *own* proposed instruction on the elements of equitable estoppel, which included no such requirement. Moreover, Celsius did not flag this supposed inconsistency to the court or ask for further deliberations before the jury was discharged. Like the company's other inconsistency argument, this issue is therefore waived. *See Coba*, 164 So. 3d at 643–45.

II. At a minimum, Celsius reached the benchmark provisions after expiration of the contract's initial term.

This Court need go no further to affirm the jury's verdict that Celsius breached the benchmark provisions. The question of when the benchmarks were met cannot be answered solely by reading the

contract. Rather, the "occurrence of a breach, or breaches, is a question of fact," requiring reference to extrinsic evidence and suitable for resolution only by a jury verdict. *Access Ins. Planners,* 175 So. 3d at 924. Because the evidence here is more than sufficient to support the jury's conclusion that Celsius reached the benchmarks before expiration of the initial contract term, this Court should affirm the verdict on that basis without considering second-term sales.

But even if this Court were prepared to set aside the jury's verdict on that point, it would not get Celsius far. This Court can overturn the verdict only if "*no view of the evidence* could support" it. *Coba*, 164 So. 3d at 646. Although it may have taken Celsius longer to reach the benchmarks on the company's view, there is no dispute that the company did eventually reach them. Celsius's own records showed the $1 million benchmark satisfied by February 2018. (T:629–31, 797–803; R:4924–27). And the company also admits that it met the 690,000-unit benchmark in September 2019 even under its restrictive definition of "unit." (T:634). These alternative bases for liability are independently sufficient to support the jury's finding of breach.

A. The $1 million revenue benchmark provision was separately reached in the extended contract term.

1. Celsius argues that its sales after expiration of the contract's first two-year term should not have counted toward satisfying the $1 million benchmark because, it claims, the parties never agreed to renew the contract for a second term. The jury, however, concluded precisely the opposite, finding "that the Term of the 2014 Agreement was extended by the 2016 Agreement." (R:5395). To justify disregarding the jury's factual finding, Celsius must again prove that the contract unambiguously supports its position and never should have reached the jury in the first place. Celsius cannot meet that burden.

Celsius begins by arguing (at 25) that the 2016 agreement's "plain language" forecloses reading it as a renewal. That is wrong: The 2016 agreement never mentions the 2014 agreement, much less makes clear whether it constitutes an extension under the terms of that contract. This Court has repeatedly held that an agreement's "failure . . . to address" a particular situation or issue creates a latent ambiguity "for which extrinsic evidence [is] properly required to clarify." *Berkowitz v. Delaire Country Club, Inc.*, 126 So. 3d 1215,

1219 (Fla. 4th DCA 2012) (listing cases); *see Bayco Dev. Co. v. Bay Med. Ctr.*, 832 So. 2d 921, 922 (Fla. 1st DCA 2002) (holding that, when a contract fails to explicitly address the relationship to a "material existing contract[]. . . there is a latent ambiguity"); *Henn v. Broward Cnty.*, 524 So. 2d 696, 697 (Fla. 4th DCA 1988); *Hunt v. First Nat'l Bank of Tampa,* 381 So. 2d 1194, 1197 (Fla. 2d DCA 1980).

The only textual indication of the parties' intent is the contract's statement of purpose to "retain" Mr. Dillard as its brand ambassador—rather than, as in the 2014 agreement, to "engage" him for the first time. (R:443). As the trial court explained, the word "retain" is at least ambiguous. Unlike the 2014 agreement's provision to "engage" Mr. Dillard, it can easily be read as "extending" the company's prior engagement. (T:373, 494; R:527–28); *see Retain*, *Merriam-Webster's Collegiate Dictionary* 1063 (11th ed. 2003) (defining "retain" as "to keep in possession or use" and "to keep in one's pay or service").

2. Absent express contract language, the question whether the 2016 agreement is an "extension" is a question of fact for resolution by a jury. *See, e.g.*, *Lake Sue Dev. Co. v. Keewin Real Prop. Co.*, 950 So. 2d 1280, 1284 (Fla. 5th DCA 2007); *see Romo v. Amedex Ins. Co.*,

930 So. 2d 643, 649 n.3 (Fla. 3d DCA 2006) (explaining that whether a contract is a "renewal . . . is a key issue of fact, which will directly affect the legal issue presented in this case," because renewals indicate that parts of an original agreement remain operative). Only the jury could determine whether the parties contemplated "one continuous contract[ual]" term by extending the contract. *Bell Care Nurses Registry, Inc. v. Cont'l Cas. Co.*, 25 So. 3d 13, 16–17 (Fla. 3d DCA 2009); *Broward Bank v. Se. X-Ray Corp.*, 463 So. 2d 440, 443 (Fla. 4th DCA 1985) (explaining that the "[e]xtensions of time for repayment given the payor by the payee, also expressly contemplated by the agreement, are similarly ineffectual to absolve [] liability" established by the original repayment contract).

Celsius cites no authority holding that a contract can't be renewed after it expires. The case law holds otherwise. *See, e.g.*, *Lake Sue,* 950 So. 2d at 1284 (calling renewal a question of fact). In any event, Celsius failed to raise this argument on directed verdict and cannot raise it for the first time on appeal. *TLO S. Farms, Inc. v. Heartland Farms, Inc.,* 282 So. 3d 145, 148 (Fla. 2d DCA 2019).

Celsius responds with competing testimony that it claims shows that the 2016 agreement "was not a renewal" but a "brand-new

agreement" with a different compensation formula. (T:687–88, 755). But the jury already considered and rejected Celsius's evidence. And the rest of the trial evidence supports the jury's decision. *See supra* I.B.1 (describing trial evidence); (R:193) (describing similar evidence in opposing summary judgment); *cf. Landin, Ltd. v. Loxahatchee River Env't Control Dist.*, 416 So. 2d 482, 483 (Fla. 4th DCA 1982) ("Our review of the pleadings, depositions and affidavits filed in the cause convinces us that the contract between the parties contains latent ambiguities which preclude the entry of a summary judgment.").

In addition to the contracts themselves, the jury considered a company press release that announced: "Celsius renews partnership with multi-platinum recording artist, Flo Rida." (T:299–300). Top executives at Celsius described the 2016 document as a "renewal" of the 2014 agreement with "some additional . . . 'deliverables.'" (T:493–94). Indeed, Celsius's CEO testified that he viewed the 2016 renewal as "a continuation of the other agreement." (T:302–05). The jury also considered the board of directors' meeting minutes, which referred to the 2016 document as the "Renewal of Flo Rida Endorsement Agreement." (R:303). Because the contract's own language—plus a slew of extrinsic evidence—suggests that an extension occurred, "it

was proper to submit the issue to the jury for resolution as a matter of fact." *Hoffman v. Terry*, 397 So. 2d 1184, 1184 (Fla. 3d DCA 1981).

3. Celsius's invocation of the 2016 agreement's merger clause adds nothing to the analysis. (*See* R:460–61). The company argues that the clause forecloses the use of parol evidence to determine whether the agreement extended the initial term. But Celsius's reliance on the provision is misplaced. The question whether revenue counts toward the $1 million benchmark turns on the meaning of the word "Term"—a word defined and used in the original 2014 agreement, not the 2016 one. And that question cannot be answered within the four corners of that agreement because, at the time of contract formation, no renewal could yet have occurred. Thus, there is no way to determine whether sales after March 2016 fell within the "Term" without looking to extrinsic evidence.

Likewise, the 2016 agreement says nothing about whether it extended the initial contract term. "[E]ven in cases where a contract contains an integration clause," reliance on parol evidence is proper when necessary "to explain an ambiguity in the contract." *Centennial Mortg., Inc. v. SG/SC, Ltd.*, 772 So. 2d 564, 565–66 (Fla. 1st DCA 2000); *see also, e.g.*, *Enns-Halbe Co. v. Templeton*, 135 So. 135 (Fla.

1931) (considering parol evidence despite an apparently integrated writing). "Whenever a party presents an arguable claim that a document contains a latent ambiguity, the court is obliged to consider the extrinsic evidence, at least to the extent necessary to determine whether [it] actually exists." *Bd. of Trs. of the Internal Improvement Tr. Fund v. Lost Tree Vill. Corp.*, 805 So. 2d 22, 26 (Fla. 4th DCA 2001). Indeed, the "prevailing view" is that "whether a writing is a final and complete expression of an agreement can never be determined by the words of the contract alone" because "the existence of an 'integration' depends on the intention of the parties when they executed the contract." *Bird Lakes Dev. Corp. v. Meruelo*, 626 So. 2d 234, 238 (Fla. 3d DCA 1993); *see also Outlaw v. McMichael*, 397 So. 2d 1009, 1011 (Fla. 1st DCA 1981).[5]

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[5] Celsius's cases on incorporation by reference (at 29) miss the mark because Mr. Dillard is not contending that the 2016 document *incorporated* the 2014 agreement by reference, but that it *extended* the term of the agreement. There is no rule that an agreement to extend a prior agreement must formally incorporate a prior agreement by reference. Nor is there any rule that a merger clause precludes the enforcement of any other agreement without incorporation by reference. Celsius's cases (at 28) say nothing of the sort. These cases additionally miss the mark because they involve neither latent ambiguities, nor clauses envisioning the expansion upon past terms, as the one here does.

B. The 690,000-unit benchmark provision was also reached at least in the extended term.

Unlike the $1 million benchmark, the 690,000-unit benchmark had no deadline, so the jury was free to count sales after the end of the first term. This benchmark includes not just sales made "during the Term," but all sales "following execution of this Agreement." (R:3958). Again, this different language "strongly implies that a different meaning was intended." *Hillcrest Country Club,* 288 So. 3d at 1270. Because the 690,000 benchmark is thus not tied to any contract term, the plaintiffs are entitled to compensation even if the contract was never extended and even if they satisfied the benchmark after expiration of the initial term.[6]

C. The jury's award of royalties was proper.

Celsius also challenges the jury's award of $5,000 for royalties accrued after the end of the contract's second term. But, like the

[6] Celsius does not argue that the 2016 agreement terminated the original contract and replaced it. Nor could it. That argument is the same as the affirmative defense of novation: "To establish the defense of novation, (defendant) must prove that all parties agreed, by words or conduct, to cancel the original contract and to substitute a new contract in its place." (*Fla. Standard Jury Instruction* § 416.31). Because Celsius never pleaded that affirmative defense, it is waived. *See* Fla. R. Civ. P. 1.110(d).

690,000-unit benchmark, the contract's royalty provision has no temporal limitation. (R:452). Other provisions of the renewal agreement, by contrast, do. For example, the contract licenses Celsius to use Flo Rida's name and image in advertising only "during the Term of this Agreement." (R:444–45). Numerous other provisions include the same express temporal limit. (*See* R: 446–50, 453, 457–58). Again, this difference in contract language "strongly implies . . . a different meaning." *Hillcrest,* 288 So. 3d at 1270.

The only case that Celsius cites for support, *Scott v. Simpson*, actually supports the plaintiffs' position. 774 So. 2d 881 (Fla. 4th DCA 2001). In *Scott*, the court held that contractual obligations terminated because of "clear and unambiguous language in the contract" stating: "SALESMAN forfeits all entitlement to any pending commissions upon the termination of this Agreement." *Id.* at 883. Because that language is absent from the royalties provision here, but present elsewhere in the contract, it would be improper to impose a temporal limit. *See City of Homestead v. Beard,* 600 So. 2d 450, 453 (Fla. 1992) ("When a contract does not contain an express statement as to duration, the court should determine the intent of the parties by examining the surrounding circumstances and by

reasonably construing the agreement as a whole."); *cf. Excelsior Ins. Co. v. Pomona Park Bar & Package Store*, 369 So. 2d 938, 942 (Fla. 1979) (explaining that courts may not "rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties").

III. The evidence also supports the jury's award of damages.

Celsius next attacks the jury's award of damages of $110.18 per share—the price of Celsius stock on the last day of trial. (R:4946, 5396, 5398). Once again, Celsius's argument flies in the face of the jury's verdict. As the trial court observed, the date on which the plaintiffs would have sold stock is a "factual question for the jury to decide." (T:996–99). Here, the uncontested evidence shows that Mr. Dillard "didn't intend to sell any" Celsius stock after it was issued. (T:383–84). Rather, he testified that he intended to hold the stock as a "generational" asset. (T:347). Indeed, the benchmarks could not have served their purpose as "performance incentives," (R:3958), if Mr. Dillard did not benefit from an increase in Celsius's stock price. The jury credited this evidence, and it "is not this court's province to substitute its judgment for that of the trier of facts." *J.C. Penney Co. v. Dahlan*, 356 So. 2d 64, 65 (Fla. 3d DCA 1978).

A. Celsius again argues (at 21) that the question should not have been left to the jury at all because, it claims, Florida law requires "that contract damages must be determined as of the date of breach." But there is no such rule of Florida law. Rather, the well-established rule is that the damages awarded should "place the injured party in the position it would have been in had the other party not breached the contract." *Katz Deli*, 183 So. 3d at 379; *see also, e.g.*, *Lindon*, 49 So. 3d at 305.[7]

That is not just the law in Florida—it is black-letter contract law. *See* Restatement (Second) of Contracts § 347 cmt. a (1981) ("Contract damages are . . . intended to give him the benefit of his bargain by awarding him a sum of money that will . . . put him in as good a position as he would have been in had the contract been performed."). Although the "general rule" under common law is to "assess [damages] as at the date of the breach," the rule is not meant to be applied "mechanistically." Andrew Dyson & Adam Kramer, *There Is No "Breach Date Rule": Mitigation, Difference in Value and Date of Assessment*, 130 L. Quarterly Rev. 259, 259 (2014). Courts

[7] Even if Celsius's stock price were based on the date of breach, the jury found that date to be April 2021—not 2014. (R:5395).

are free to depart from it "where necessary to reflect the overriding compensatory principle." *Id.*

Application of the rule thus depends on the facts of each case. Because "damages reasonably flowing from a breach can vary greatly depending on the factual circumstances surrounding the breach," "different methods of calculation may be employed to properly compensate a successful plaintiff." *Katz Deli*, 183 So. 3d at 380. For example, where a plaintiff's damages are based on the wrongful withholding of stock, "[a] showing of entitlement to damages under the general rule is accomplished by the plaintiff demonstrating that, had he possessed the shares, he would have sold them during the interim between the date of breach and the actual date of delivery." *Shearson Loeb Rhoades, Inc. v. Medlin*, 468 So. 2d 272, 273 (Fla. 4th DCA 1985). The Fourth District in *Shearson* thus held that the measure of damages for delay in delivery of stock certificates was the difference between the value when the certificates should have been delivered and the value when they were actually delivered—well after the date of breach. *See id.* Likewise, the Fifth District in *Lindon* based damages for the wrongful sale of stock on the stock's value at the time the plaintiff would instead have sold it. 49 So. 3d at 306. The

court found it "unlikely" that the plaintiffs "would have sold his shares back" at the time of breach "for the price of $0." *Id.* at 306–07.[8]

The same principle applies here. The undisputed evidence shows that the plaintiffs did not intend to—and in fact did not—sell their Celsius shares as soon as they acquired them. That is not surprising. At the time of the agreement, Celsius was a penny stock worth only about 50 cents per share. (T:225, 478, 517–18, 536, 842–44). At that price, the 750,000 shares awarded by the jury would have been worth only $375,000—far below the up-front fee that Mr. Dillard would typically collect on a contract like this one. (T:478, 481, 536). And because the stock was not listed on any exchange, it was very difficult to sell—rendering it largely valueless. As Mr. Dillard's

[8] The rule in *Lindon* is not, as Celsius suggests, limited to the narrow circumstances of stock in a closely held corporation. Rather, *Lindon* just applied the "general rule" of contract damages to the facts of that case. 49 So. 3d at 306. In any event, Celsius stock was not listed on any exchange and sold only in private sales. (T:478, 517–18, 536, 842–44). For purposes of stock valuation, it is much more like the closely held corporation in *Lindon* than a publicly traded company. *See Kaplan v. First Hartford Corp.*, 603 F. Supp. 2d 195, 197 (D. Me. 2009).

representative explained, "you couldn't do anything with the shares." (T:546).

Mr. Dillard did not agree to accept Celsius stock because it was valuable (it wasn't), but as a bet on the future value of the company given "good marketing and Flo." (T:536). To put the plaintiffs "in the position [they] would have been in" absent the breach, the damages thus must be sufficient to allow them to buy the stock at its current price. *Katz Deli*, 183 So. 3d at 379. That is precisely what the jury did here. Alternatively, Celsius could make the plaintiffs whole simply by delivering the shares that it owes—a remedy that the plaintiffs have consistently said they are willing to accept and that they remain willing to accept today. (T:580–81, 599).

As other courts have recognized, this measure of damages is consistent with the Florida Supreme Court's holding in *Grossman Holdings Ltd. v. Hourihan* that "[d]amages for a breach of contract should be measured as of the date of the breach." 414 So. 2d 1037, 1040 (Fla. 1982); *see Shearson*, 468 So. 2d at 273; *Lindon*, 49 So. 3d at 306. *Hourihan* held only that, in a construction-defect case, a plaintiff's recovery cannot be *reduced* by a subsequent increase in the property's market value. But it neither establishes "an inflexible

principle" nor purports to govern facts "not implicated" in that case. *Lindon*, 49 So. 3d at 306. Rather, the "object of the rule," as in all contract cases, is to ensure that the plaintiff is put "in the same position he would have been in had the contract been performed on the date fixed therein for performance." *Lake Region Paradise Island Inc., v. Gravis*, 335 So. 2d 341, 342–43 (Fla. 2d DCA 1976).[9]

If it were otherwise, a defendant could manipulate damages by complying with a contract's requirement that it grant stock only when it would benefit from doing so. If the stock price has gone down since the contract was signed, a defendant would have an incentive to issue the stock at the reduced price. If, on the other hand, the stock price has gone up, the defendant could minimize damages by paying the lower stock price as of the breach date. This "heads I win, tails you lose" approach to damages would always benefit defendants while depriving plaintiffs of full recovery.

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[9] As in *Hourihan*, the court in *CIMA Capital Partners, LLC v. PH Cellular, Inc.* required that damages be measured from the date of breach because the stock had subsequently declined in value. 69 So. 3d 293, 295 (Fla. 3d DCA 2010). Awarding the price at the time of breach was therefore necessary "to place the plaintiff in the position he would have been in had the contract been fulfilled." *Id.* at 294.

B. Celsius argues (at 65) that the trial court should have excluded the plaintiffs' testimony of intent as "speculative" and "self-serving." But Celsius did not object when this evidence was introduced at trial. "It is well-settled that the failure to object" to the admission of evidence "waives the objection." *Polaco v. Smith*, 376 So. 2d 409, 409 (Fla. 1st DCA 1979). Nor did it object to introduction of the stock's price at the end of trial. (R:4946–96). Regardless, it is the unique role of the jury—not of this Court—to "assess a witness's credibility." *Duclos*, 113 So. 3d at 1004; *see also Bearden v. State*, 161 So. 3d 1257, 1264 (Fla. 2015). Courts have thus held that a jury may properly consider plaintiffs' testimony about when they "would have tendered [stock] for sale." *Lindon*, 49 So. 3d at 307; *see also Shearson*, 468 So. 2d at 273.

The jury here was presented with more than just uncorroborated testimony of the plaintiffs' intent. Mr. Dillard testified that he in fact *did not* sell any of the Celsius shares until the pandemic began to slow live performances in 2020 and that he continues to hold the remainder of shares today. (T:383–84). The jury thus had ample evidence on which to conclude that the plaintiffs would not have sold additional shares after they were issued. Indeed,

the plaintiffs *could not* have sold the shares even if they had wanted to. Because the shares were restricted, the plaintiffs were required to hold them for at least six months. (T:323, R:5051–53).

To the extent any uncertainty remains, it is attributable solely to Celsius. It was Celsius's decision to wrongfully withhold stock that "prevented a more precise computation" of damages. *Lindon*, 49 So. 3d at 307. "Fundamental justice" thus requires that, "if the calculation of damages is less than precise, the perils of such uncertainty . . . should be laid at the [defendant's] door." *Id.*

CONCLUSION

This Court should affirm the jury's verdict in its entirety.

February 3, 2024

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This brief complies with the page limitation of Rule 9.210(a)(5) because this brief contains 12,822 words excluding the parts of the brief exempted by Rule 9.210(a)(5). This brief complies with the typeface requirements of Rule 9.100(l) because this brief has been prepared using Microsoft Word in 14-point Bookman Old Style font.

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