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Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	
Appeal from: El Paso County District Court District Court Judge: Honorable Tim J. Schutz District Court Case Number: 2019CV32242	
Appellant: BRANDON YOUNG v. **Appellees**: WHOLE HEMP COMPANY LLC d/b/a FOLIUM BIOSCIENCES; and KASHIF SHAN	▲ FOR COURT USE ▲
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APPELLANT'S OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28, C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

- ■ It contains 6,234 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

- ■ **For each issue raised by the appellant**, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

- □ **In response to each issue raised, the appellee** must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

FORTIS LAW PARTNERS LLC

s/ David Olsky
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STATEMENT OF THE ISSUES

1) Whether the trial court erred when it failed to award Appellant Brandon Young ("Young") the stipulated value of a 0.5% membership interest in Appellee Whole Hemp Company LLC d/b/a Folium Biosciences ("Folium") as Folium's Limited Liability Company Operating Agreement granted Young a 0.5% membership interest and it was not issued to him.
2) Whether the trial court erred when it failed to award Young, an independent contractor, the commissions from customer sales that Young had procured on Folium's behalf that were completed after Young's termination.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is an appeal from a judgment issued by the El Paso County District Court, following a trial to the Court. Appellant Brandon Young ("Young") sought damages and/or declaratory relief for, *inter alia*, breach of contract against Defendants Whole Hemp Company LLC d/b/a Folium Biosciences ("Folium") and its Chief Executive Officer and largest member Kashif Shan ("Shan").[1] Young alleged that he was an independent contractor for Folium and had agreed to procure customers on Folium's behalf for salary, commissions and a membership interest in Folium.

The trial court ruled that Folium had breached its contract with Young by failing to pay Young salary and commissions in the amount of $160,465.70, plus prejudgment interest of $45,977.01, for a total judgment of $206,442.76. CF 1416 ¶¶ 16, 17. The trial court, however, did not award damages for (1) the failure to issue Young a 0.5% membership interest in Folium, or (2) the failure to pay Young commissions on sales that he procured for Folium from a large customer (Green Roads) that occurred after his termination.

[1] Young also presented claims at trial for Declaratory Judgment, Promissory Estoppel, Unjust Enrichment, and Misappropriation of Business Value. Young had initially filed a claim for Intentional Interference with Contractual Relations, which he voluntarily dismissed prior to trial.

Young timely appealed and seeks to reverse the latter two rulings, as well as the trial court's determination that Shan was a prevailing party against him.

II. STATEMENT OF FACTS

A. Young's Initial Agreement with Folium

This case concerns the sale of Cannabidiol or "CBD."

Young (an independent sales contractor) developed a significant book of business in the sales of CBD soon after it was legalized in 2014. TR 3/23/21, pp. 48:24-50:13. Green Roads was the largest company with whom he had developed a relationship. TR 3/23/21, pp. 54:21-55:4.

In 2016, Folium (a CBD supplier) was initially coming on-line with its products, and needed customers. TR 3/23/21, pp. 189:22-190:9. That year, Shan hired Ryan Lewis, a friend and colleague of Young, as Folium's Director of Sales. CF 937-939; TR 3/23/21, pp. 50:21-51:5. Shan and Lewis knew that Young had access to one large customer, *i.e.*, Green Roads. CF 950-952.

In the summer of 2016, Lewis and Shan together called Young (who lives in the San Diego area) and invited him to come to Colorado Springs to visit Folium's headquarters, and to consider a business partnership. CF 937-938; TR 3/23/21, pp. 50:21-51:5. Young agreed, and drove out from his home in California to review the facilities and speak with senior management. TR 3/23/21, pp. 50:6-52:3.

At an Italian restaurant, the parties came to an initial agreement about how to conduct business going forward. TR 3/23/21, pp. 52:15-54:10; CF 1413 ¶ 1. Young would procure customers for Folium as a 1099 independent contractor, in exchange for commissions from Folium and an amount of equity to be determined later. *Id.*

With respect to the commissions, the parties agreed that Young would receive a 5% commission on the gross revenue that he procured for Folium. CF 1413 ¶ 1. With respect to equity, the parties discussed that Young would receive a membership interest in Folium and that the amount of the membership interest would be determined after Young began bringing his customers to Folium. TR 3/23/21, pp. 52:21-53:10, 55:17-56:15; TR 3/26/21, p. 73:17-18. Any membership interest granted to Young was to be transferred from Shan's membership interest in Folium. TR 3/23/21, pp. 71:24-72:21; TR 3/26/21, p. 94:6-23.

Shortly after the meeting, Young called Green Roads and informed it of his new agreement with Folium. TR 3/23/21, pp. 54:11-55:4. As Appellees admitted in response to the Requests for Admission (and as the Court found), Young procured Green Roads' business for Folium. TR 3/23/21, p. 74:6-16 (citing to EX 1594-1598 (Plaintiff Ex. 145)); CF 1415 ¶ 10. Young also began procuring sales from other customers for Folium, including companies called Hemp Logica, Kushy Punch, and CBD Living Water, among others. TR 3/23/21, pp. 54:11-55:4.

Green Roads quickly became Folium's largest customer and "was at times the vast majority of [Folium's] monthly revenue." CF 989 (Aug. 30, 2020 Depo. Tr. of R. Lewis ("Lewis Depo.") at 76:9-10). Young obtained on behalf of Folium a marketing and non-circumvent agreement with Green Roads. TR 3/23/21, p. 63:1-17.

Folium began paying monthly commissions to Young. TR 3/23/21, p. 55:17-21. Folium did not provide any accounting to Young; it simply provided him with a lump sum payment purporting to reflect the commissions from all of his accounts. TR 3/23/21, pp. 55:22-56:12.

With respect to the membership interest, Young testified that he spoke with Shan from time to time to inquire about the status of the documentation. TR 3/23/21, pp. 60:24-61:21. Young was repeatedly assured that he did not need to worry because he was "on the cap table." *Id.*

B. Young Starts Folium's Southern California Office

After Young began generating a high volume of sales for Folium, he was asked to move to Folium's office in Colorado Springs and accept a full-time position. TR 3/23/21, p. 21:2-15. Young did not want to move to Colorado and instead the parties agreed that he would open an office for Folium in Southern California. *Id.*

The evidence at trial reflected that two written agreements governed Young's compensation: (1) an offer letter concerning the monetary compensation he would

receive (*i.e.*, salary and commission), and (2) Folium limited liability operating agreements granting Young a 0.5% membership interest in Folium.

1. Young's Monetary Compensation After Starting the California Office

On March 17, 2017, Folium provided Young with an offer letter concerning the commissions that he was to earn on sales from the office. EX 467 (Plaintiff Ex. 35, p. 2). Defendants have admitted that this (non-integrated) document dictated the "salary and commissions" that Young was to earn for the sales that he and his associates procured. EX 1596 (Plaintiff Ex. 145, p. 3) (response to Request for Admission No. 1).

The terms for salary and commission were as follows:

> **Title:** Regional VP of Sales-West Coast
>
> **Start date:** 03/01/2017
>
> **Salary:** S60,000
>
> **Commission:** 1% on all Bulk Sales generated from the Southern California Office
> 2% on all Wholesale Sales generated from the Southern California Office
> 5% on Bulk on Self-Generated
> 10% on Wholesale Self-Generated
> $0.01 (one cent) per gummie, caramel, and candy produced by Paradise Candy
>
> **Employment Classification:** Independent Contractor (1099-Misc)

EX 467 (Plaintiff Ex. 35, p. 2).

Under this agreement, Young was supposed to receive a 5% commission on Green Roads sales. TR 3/23/21, p. 69:18-20.

2. The Grant of a 0.5% Membership Interest to Young.

Beginning in June 2017 and continuing through the following year, Folium executed numerous Limited Liability Company Operating Agreements with investors, that identified Young as a 0.5% member (the "Operating Agreements").

During this period, Quan Nguyen, Folium's Senior Vice President of Business Development and second largest member, was responsible for maintaining the Operating Agreement. CF 1012-1016. Typically, when adding an investor, Nguyen would send an unsigned Operating Agreement to the investor, along with a "Written Consent" that would incorporate the unsigned Operating Agreement. *Id.* The Written Consent would then be executed by Nguyen and Shan as the majority members of Folium, on the one hand, and the investor, on the other hand, which in turn incorporated the referenced unsigned Operating Agreement. *Id.*

Each Operating Agreement that Nguyen sent to an investor became the binding Operating Agreement for Folium. TR 3/24/21, p. 40: 21-24 ("Q. And each time you sent an operating agreement to an investor, those were the operating agreements for Folium, correct? A. That is correct.").

The following nine Operating Agreements and written consents were admitted into evidence at trial:

EX No.	**Name of Investor**	**Date of Signature**
EX 470-503 (Plaintiff Ex. 37)/ EX 104-137 (Defendants Ex. 1015)	Justin Lo	June 13, 2017
EX 572-605 (Plaintiff Ex. 40)	Winnie Liu	June 13, 2017
EX 504-537 (Plaintiff Ex. 38)	Pauline and Alan Tang	June 14, 2017
EX 538-571 (Plaintiff Ex. 39)	Trish Halamandaris	June 15, 2017
EX 1680-1711 (Plaintiff Ex. 157)	Jacqueline Hurd	August 13, 2017
EX 1649-1679 (Plaintiff Ex. 156)	Adam Modzeleski	August 25, 2017
EX 138-168 (Defendants Ex. 1016)	Sam Neutgens	January 2, 2018
EX 1113-1144 (Plaintiff Ex. 98)	Ngo Family Trust	January 16, 2018
EX 1340-1379 (Plaintiff Ex. 114)	Devin Aram (Employment Agreement)	September 28, 2018
EX 69-95 (Defendants Ex. 1011)	Unsigned	Undated

The Liu, Lo, Tang and Halamandaris Operating Agreements identify Young as a 0.5% member "per vesting schedule," but no vesting schedule is included. EX 480 (Plaintiff Ex. 37, p. 11); EX 514 (Plaintiff Ex. 38, p. 11); EX 548 (Plaintiff Ex. 39, p. 11); EX 582 (Plaintiff Ex. 40, p. 11). The remaining Operating Agreements in evidence provide that Young would receive 0.5% in four equal installments of 0.125%

per year (starting in July 2017) but did not require that he work at Folium to receive them. EX 1114, 1119, 1121, 1132 (Plaintiff Ex. 98, pp. 2, 7, 9, 20); EX 1351, 1353, 1364, 1365 (Plaintiff Ex. 114, pp. 12, 14, 25, 26); EX 1650, 1655, 1657, 1668, 1669 (Plaintiff Ex. 156, pp. 2, 7, 9, 20, 21); EX 1681, 1683, 1694, 1695 (Plaintiff Ex. 157, pp. 2, 4, 15, 16); EX 70, 72, 83 (Defendants Ex. 1011, pp. 2, 4, 15); EX 139, 145, 147, 158, 159 (Defendants Ex. 1016, pp. 2, 7, 9, 20, 21); CF 1024, ¶ 22:12-15 (Folium designee: "Q. It doesn't say in this agreement that the vesting will occur only if Mr. Young is employed, correct? A. That is correct.").

Each of the Operating Agreements contains a merger clause as Paragraph 68:

> This Agreement contains the entire agreement between the parties. All negotiations and understandings have been included in this Agreement. Statements or representations that may have been made by any party to this Agreement in the negotiation stages of this Agreement may in some way be inconsistent with this final written Agreement. All such statements have no force or effect in respect to this Agreement. Only written terms of this Agreement will bind the parties.

E.g., EX 1142 (Plaintiff Ex. 98, p. 30).

Further, in or around February 2018, Shan and Nguyen opened a bank account at 5 Star Bank for a newly created entity called "Folium Biosciences LLC," through which they would come to run many of Folium's operations. TR 3/24/21, pp. 53:11-55:19. To open the bank account, Nguyen had to submit to the bank an operating agreement for "Folium Biosciences LLC." He copied and pasted the Whole Hemp

Company LLC operating agreement, changed its name to "Folium Biosciences LLC," and even altered an investor's written consent in Whole Hemp Company LLC to (falsely) reflect this investor had instead invested in "Folium Biosciences LLC". TR 3/24/21, pp. 53:11-56:18, EX 1284-1315 (Plaintiff Ex. 108). In so doing, Nguyen identified Young as a 0.5% member in "Folium Biosciences LLC," as well as "Whole Hemp Company LLC." TR 3/24/21, p. 54:6-9; EX 1286, 1288, 1299 (Plaintiff Ex. 108, pp. 3, 5, 16).

C. Folium Breaches the Agreement.

Soon after the office opened, Shan unilaterally decided to change the terms on which Young was employed. TR 3/23/21, pp. 76:12-77:25. Shan informed Young that Folium would stop paying Young 5% commissions and salary because he was "making too much money." TR 3/23/21, pp. 76:12-77:25. Young did not agree to this change and no consideration was provided, yet Shan did it anyway. TR 3/23/21, p. 77:22-25. Folium also stopped paying Young his salary after two months. TR 3/23/21, p. 124:3-11. Folium never issued the membership interest to Young that was listed in the Operating Agreements, even after Young had brought in the business that he had promised. TR 3/23/21, pp. 88:22-90:9.

Rather than reward him for his outstanding contributions – contributions that had helped Folium obtain a $500+ million valuation in less than two years –

Defendants decided to terminate Young. TR 3/23/21, pp. 91:6-93:9. On April 23, 2018, Nguyen sent a letter to Young purporting to terminate him. EX 1338-1339 (Plaintiff Ex. 113). Defendants ceased paying Young his salary and also commissions on any of his customers – and did not even pay him for his services in April 2018. EX 1714 (Plaintiff Ex. 158). If Folium had kept paying Young commissions on the Green Roads business after April 2018, he would have received $188,493.50.[2]

D. The C.R.C.P. 56(h) Motion on the Operating Agreements

Prior to the Trial, Young filed a Motion for Determination of a Question of Law pursuant to C.R.C.P. 56(h). CF 463-670. Young argued that the Operating Agreements unambiguously granted Young a non-contingent 0.5% membership interest in Folium. CF 465-471. Young argued that as a named party to the Operating Agreements between Shan, Nguyen and the investors, Young had standing to enforce those agreements and to obtain damages for the breach. *Id.* Young argued in the alternative that he was a third-party beneficiary to the Operating Agreements. CF 471-472.

[2] Plaintiff Trial Exhibit 149 is the sales information produced by Folium in lieu of presenting a C.R.C.P. 30(b)(6) designee on the topic for a deposition. EX 1717-1719. From May 2018 to June 2019, Green Roads purchased $3,769,870 in products from Folium. Five percent of this amount is $188,493.50.

Young also argued that the Operating Agreements had a merger clause, and thus the trial court must exclude all parol evidence that would vary or contradict the non-contingent grant of 0.5%. CF 472-474. The parties had stipulated that the value of Folium at the time of Young's termination was $550,938,000; the value of the lost 0.5% was thus stipulated as $2,754,690. CF 427.

On March 15, 2021, the trial court denied the C.R.C.P. 56(h) Motion, concluding that there were "material facts in dispute . . . ." CF 849. Young raised these arguments again in his pretrial brief (CF 875-79) and in counsel's closing argument (TR 3/26/21, pp. 56:13-58:2). The trial court, however, confirmed at trial his ruling on the C.R.C.P. 56(h) Motion that there were "ambiguities" in the agreements. TR 3/23/21, p. 280:20-21.

Given the trial court's pretrial ruling, the parties each presented evidence at trial regarding the oral discussions among the parties about the existence and terms of Shan and Folium's agreement to grant Young equity in the company. Young offered testimony from Lewis and himself that Shan initially promised 1% in membership and then it was revised to 0.5% in March 2017, along with revenue benchmarks that would allow an additional membership interest. Young also presented testimony from his father that Shan and Nguyen had each independently confirmed to him at the time that Young had a membership interest in Folium. Defendants offered conflicting

testimony from Shan and Nguyen, and also email negotiations, asserting that the parties had not reached an agreement on a membership interest.

E. The Trial Court Ruling.

On March 26, 2021, following closing arguments, the trial court entered its ruling into the record, finding in part for Young and in part for Folium and Shan. TR 3/26/21, pp. 62:7-100:24. The trial courts findings of fact and conclusions of law were further memorialized in a judgment dated April 20, 2021. CF 1413-1416 (Joint Submission); CF 1505 (Order adopting the Joint Submission in relevant part).

The trial court ruled in relevant part:

Young and Folium had a written contract for monetary compensation set forth in the letter at Trial Exhibit 35, page 2. CF 1414 ¶ 2.

Folium breached the contract by failing to pay Young salary and commissions through his termination in the amount of $160,465.70. CF 1416 ¶ 16.

Young had procured the Green Roads business for Folium, but the trial court would not award commissions to Young for Folium's sales to Green Roads after Young's termination. CF 1415 ¶ 10.

Based on the parol evidence of negotiations among the parties, the trial court concluded that Young had not proven that the parties had formed a contract with respect to a membership interest grant in Folium. CF 1414-1415 ¶ 6.

The trial court paid short shrift to the 0.5% membership interest grant to Young that was identified in the Operating Agreements. TR 3/26/21 pp. 84:15-86:13. Disregarding the plain language of the Operating Agreements, the trial court concluded that the negotiations among the parties had been inconclusive as to the membership grant, and that the reference to Young's membership interest in the Operating Agreements was merely a disclosure to investors of "potential" members. *Id.*

The trial court ruled that Young was the prevailing party as to Folium, and that Shan was the prevailing party as to Young. CF 1416 ¶ 18.

Young filed a timely notice of appeal on April 14, 2021. CF 1528. Folium and Shan filed a cross-appeal on May 21, 2021. CF 1630.

SUMMARY OF THE ARGUMENT

Young seeks to reverse two aspects of the trial court decision.

First, the trial court erred as a matter of law in ignoring the unambiguous language of the Operating Agreements that granted Young a 0.5% membership interest. Given this unambiguous language and also the Paragraph 68 merger clause, the trial court erred in considering parol evidence contradicting the contractual promise in those Operating Agreements to grant a 0.5% membership interest to Young. The trial court was not permitted to consider evidence beyond the plain language of the Operating Agreements.

Folium and Shan thus breached the Operating Agreements when they failed to issue Young the 0.5% interest required by those agreements. This Court should reverse and order the trial court to enter judgment for Young and against Folium in the amount of $2,754,690 (*i.e.,* the value of the unissued membership interest on the day that Young was terminated), plus prejudgment interest.

Second, the trial court erred as a matter of law when it failed to award damages to Young for Folium's failure to pay him commissions on its sales to Green Roads after Young was terminated. Under the doctrine of procuring cause, Young was entitled to a continuing commission from Folium's sales to Green Roads because Folium was continuing to benefit from Young's efforts. The Court should reverse and

order that the trial court enter judgment for an additional $193,857.50 (*i.e.*, the admitted amount of Folium's post-termination sales to Green Roads), plus prejudgment interest.

ARGUMENT

Issue 1: The trial court erred when it failed to award damages for Folium and Shan's breach of the Operating Agreements, when they failed to issue a 0.5% membership interest to Young.

I. Standard of Review

Whether the Operating Agreements are ambiguous as to Young's 0.5% membership grant, and if not, the meaning of the terms therein, are questions of law that this Court reviews *de novo*. *See Am. Family Mut. Ins. Co. v. Hansen*, 375 P.3d 115, 120 (Colo. 2016) (citation omitted) ("Whether a contract is ambiguous is a question we review de novo."); *Kaiser v. Mkt. Square Discount Liquors, Inc.*, 992 P.2d 636, 640 (Colo. App. 1999) (citation omitted) ("Whether a written contract is ambiguous and, if not, how the unambiguous contractual language should be construed, are questions of law that we review *de novo*. We are not bound by the trial court's construction of unambiguous contractual language, nor by its finding that a contract is unambiguous.").

II. Preservation on Appeal

Young preserved the issue for appeal by raising it with the trial court in his C.R.C.P. 56(h) motion (CF 463-470), raising the issue again in his trial brief (CF 875-879), and then in counsel's closing argument (TR 3/26/21, pp. 56:13-58:2). The trial court ruled on the matter by denying the C.R.C.P. 56(h) motion (CF 849), and then

rejecting the argument in its findings of fact and conclusions of law (TR 3/26/21, pp. 84:15-86:13).

III. Discussion

The trial court erred when it disregarded the unambiguous language of the Operating Agreements with respect to the membership interest grant to Young, and instead considered parol evidence of the parties' intent. It is hornbook law that "[t]he intent of the parties to a contract is to be determined primarily from the language of the instrument itself." *Ad Two, Inc. v. City & County of Denver ex rel. Manager of Aviation,* 9 P.3d 373, 376 (Colo. 2000) (citation omitted). The language of the contract "must be examined and construed in harmony with the plain and generally accepted meaning of the words employed." *Id.* at 376 (citation omitted).

No reasonable reading of the Operating Agreements permitted an interpretation that Young could be denied a 0.5% membership interest. To the contrary, the only reasonable reading is that he was owed a 0.5% interest, and that Folium and Shan's failure to issue him an interest was a breach of the Operating Agreements.

It is particularly important to hold Folium and Shan to the unambiguous terms of the Operating Agreements because the Colorado Limited Liability Company Act requires that a limited liability company (like Folium) be bound by the operating

agreement of its members. C.R.S. § 7-80-108(1)(b).[3] Such agreements are agreements "of all of the members as to the affairs of a limited liability company and the conduct of its business." C.R.S. § 7-80-102(11)(a). By operation of law, the Operating Agreements "govern[] the rights, duties, limitations, qualifications, and relations among the managers, the members, the members' assignees and transferees, and the limited liability company." C.R.S. § 7-80-108(1)(a). *See also* C.R.S. § 7-80-108(1)(b) ("A limited liability company is bound by any operating agreement of its members.").

As a majority of member interests (*i.e.*, Shan and Nguyen) adopted the Operating Agreements as the organizing documents of Folium, those documents set forth the "rights" and "duties" of all identified members within, including the requirement that Young be issued a membership interest. The grant of a membership interest to Young in the Operating Agreements became his "personal property," and thus could not be simply taken away without consequences. C.R.S. § 7-80-702(1). Shan was the master of the documents for the limited liability company that he formed – a company that had a stipulated valuation of over $500 million in April 2018

[3] The Colorado legislature intended to give the maximum effect to the principle of freedom of contract and to the enforceability of operating agreements. C.R.S. § 7-80-108(4). Colorado courts construe a limited liability company's operating agreement according to the general principles of contract law. *Condo v. Conners,* 271 P.3d 524, 527 (Colo. App. 2010).

– and both he and Folium are bound by the organizing documents through which they availed themselves of the privilege of doing business in Colorado.

Since Young is identified as a party in the Operating Agreements, his claims for breach of contract of these agreements is a direct claim for breach of those agreements. Alternatively, Young is a third-party beneficiary who did not receive his benefit. That is, a person who is not a party to an agreement may enforce a contractual obligation if it is apparent from the agreement and surrounding circumstances that the parties to the contract intended to confer a direct benefit. *S K Peightal Eng'rs, Ltd. v. Mid Valley Real Estate Solutions V, LLC,* 342 P.3d 868, 872 (Colo. 2015); *East Meadows Co. v. Greeley Irrigation Co.,* 66 P.3d 214, 217 (Colo. App. 2003). In determining whether a party is a third-party beneficiary:

> The key question is the intent of the parties to the actual contract to confer a benefit on a third party. That intent must appear from the contract itself or be shown by necessary implication. It is a question of fact to be determined by the terms of the contract taken as a whole, construed in the light of the circumstances under which it was made and the apparent purpose the parties were trying to accomplish.

East Meadows Co., 66 P.3d at 217 (citation omitted). "If the language within the four corners of the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as

a matter of law." *J.R. Simplot v. Chevron Pipeline Co.,* 563 F.3d 1102, 1111 (10th Cir. 2009) (*quoting Cent. Fla. Invests. Inc. v. Parkwest Assocs.,* 40 P.3d 599, 605 (Utah 2002)).

The clear intent of the parties to the Operating Agreements (*i.e.*, Shan, Nguyen the investors, and the members identified therein) was to form the organizing documents for Folium, including the identification and grant of *all* members and their membership interests. This was particularly important because Folium was organized as a "member managed" limited liability company, with members having fiduciary duties to each other and the limited liability company. *E.g.*, EX 1134 (Plaintiff Ex. 98 ¶ 18) ("Management of this Company is vested in the Members"); *see also* C.R.S. § 7-80-404 (setting forth duties of members in member-managed limited liability company). By the plain language of the agreement, the parties intended that Young be one of the members; any alternative reading would require that the Court ignore the portions of the Operating Agreements that specifically granted Young such membership. *See Pepcol Mfg. Co. v. Denver Union Corp.*, 687 P.2d 1310, 1313 (Colo. 1984) ("An integrated contract in the first instance is to be interpreted in its entirety with the end in view of seeking to harmonize and to give effect to all provisions so that none will be rendered meaningless.").

The trial court set forth two grounds for ignoring the plain language of the Operating Agreements: (1) that the trial court could consider testimony by Shan and

Nguyen that they did not intend to grant a membership interest to Young; and (2) the Operating Agreements were intended to reflect "prospective" members as well as actual members. Neither ground is sufficient to sustain the ruling, and it should be reversed.

First, the parol evidence rule prohibited the trial court (and prohibits this Court) from considering the self-serving testimony of Shan and Nguyen that they never agreed to grant a membership interest to Young, as that testimony contradicts the plain language of the Operating Agreements about Young's membership grant. "[T]he parol evidence rule excludes extrinsic utterances when their introduction would vary or contradict the terms of a written instrument." *Knuppel v. Moreland,* 366 P.2d 136, 138 (Colo. 1961) (citation omitted). "The parol evidence rule is so firmly entrenched in the law of evidence that we said in the cited case that it is a 'fundamental' rule; that it is 'enforced [as] a universal rule which has our approval.'" *Id.* (citation omitted). More than a rule of evidence, the parol evidence rule is a rule of substantive law. *See id.*; *see also In re Continental Resources Corp.,* 799 F.2d 622, 626 (10th Cir. 1986).

As the Operating Agreements contain an integration clause, the parol evidence rule bars consideration of extrinsic evidence that tends to vary or contradict the terms of the Operating Agreements and Written Consents. *Blue Dolphin Invest., Ltd. v. Kane,* 687 P.2d 533, 534 (Colo. App. 1984); Restatement (Second) of Contracts § 213 (1981)

("A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them."). "Integration [or merger] clauses generally allow contracting parties to limit future contractual disputes to issues relating to the express provisions of the contract." *Nelson v. Elway,* 908 P.2d 102, 107 (Colo. 1995) (citation omitted). "Therefore, the terms of a contract intended to represent a final and complete integration of the agreement between the parties are enforceable, and extrinsic evidence offered to prove the existence of prior agreements is inadmissible." *Id.* (citation omitted).

The trial court was not permitted to go beyond the four corners of the document, yet it did so in error. Contrary to the trial court's assertion, there was no ambiguity in the Operating Agreements that the members intended that Young receive a 0.5% membership interest. For example, in the Written Consent for each agreement, Shan and Nguyen represented to the investor, "The membership interest in [Folium] after [the investor's] admission as a member of [Folium] will be as follows." E.g., EX 1680 (Plaintiff Ex. 157, p. 1). Underneath that statement is a table of members, which included Young's 0.5% membership interest. *E.g.*, EX 1681 (Plaintiff Ex. 157, p. 2). This is not ambiguous.

In the absence of an ambiguity, a written contract cannot be varied by extrinsic evidence, and an unambiguous agreement must be enforced according to its express

terms. *Magnetic Copy Services, Inc. v. Seismic Specialists, Inc.,* 805 P.2d 1161, 1163 (Colo. App. 1990). Absent any ambiguity, a court must not look beyond the four corners of the agreement to determine the meaning intended by the parties. *Vu, Inc. v. Pac. Ocean Marketplace, Inc.,* 36 P.3d 165, 167 (Colo. App. 2001) (*citing Ad Two, Inc.,* 9 P.3d at 373). The trial court's consideration of Shan and Nguyen's testimony – as well as the exhibits referencing the parties' negotiations – was thus an error of law as the terms of Young's membership grant were not ambiguous.

Second, the trial court's interpretation of Young's membership grant as merely a disclosure to investors of a "potential" member contradicts the plain language of the documents as well. As said, the investors were informed that Young was a 0.5% member when they joined the company, not that he was a "potential" member. The Operating Agreements nowhere reflect that Young (or anyone else) is only a "potential" member or that his membership grant was only intended as a disclosure device to investors. By Folium's admission, the plain language was that Young would be an actual member, not a "potential" member. CF 1024, ¶ 22:12-15 (Folium designee: "Q. It doesn't say in this agreement that the vesting will occur only if Mr. Young is employed, correct? A. That is correct.").

Shan and Nguyen's testimony that Young and other employees were identified only as potential members for investor disclosure purposes – the epitome of parol

evidence – is nonsensical in any event and would render the entire table in the written consents and Operating Agreements meaningless. These agreements contain no disclosure to investors that the individuals identified as other members are not actually members, or that their purported membership interest still belongs to Shan and Nguyen. The impression that an investor receives from the Operating Agreements is that Folium is a widely held company, where Shan and Nguyen hold a smaller membership interest in Folium than they actually do. If Young was not actually a member (as Shan and Nguyen testified), they were thus misrepresenting the actual ownership, not providing disclosure to investors. Indeed, it is telling that Nguyen admitted under oath that he had deceived these same investors by creating a new entity "Folium Biosciences LLC" in which Folium's investors were members, did not disclose to these investors that they were now also members of Folium Biosciences LLC, failed to issue those members a K-1 so they could properly report income on their taxes, and forged a document purporting to show an investor's consent. TR 3/24/21, pp. 53:11-56:18, EX 1284-1315 (Plaintiff Ex. 108).

The Court should thus reverse the trial court ruling, and hold that Folium and Shan breached the Operating Agreements when they failed to issue the 0.5% membership interest to Young. The Court should further direct that judgment be entered against Folium and Shan in the amount of $2,754,690, which is the stipulated

value of the 0.5% membership interest when Young was terminated. *See Scully v. US WATS, Inc.*, 238 F.3d 497, 512-513 (3d Cir. 2001) (affirming damages award for failure to issue stock option that calculated damages from value of equity on date of the breach).

As the trial court noted and the record reflected, Shan is a proper Defendant because Young's membership interest was supposed to be taken from Shan's membership interest. TR 3/23/21, pp. 71:24-72:21; TR 3/26/21, p. 94:6-23. Indeed, Shan is the largest member and signatory to the Operating Agreements. Judgment should therefore enter against Shan as well, and the ruling that he was a "prevailing party" be reversed.

Issue 2: The trial court erred when it failed to award damages for the post-termination commissions on Folium's sales to Green Roads.

I. Standard of Review

Young takes as true the trial court's factual finding that he was the procuring cause of Folium's sales to Green Roads. Whether Young is owed commissions on post-termination sales under the doctrine of procuring cause is a question of law that is reviewed *de novo*. *See E-470 Pub. Highway Auth. v. 455 Co.*, 3 P.3d 18, 22 (Colo. 2000) ("[C]onclusions of law are generally reviewed under a de novo standard.").

II. Preservation on Appeal

Young raised the issue in his trial brief (CF 884-885), in his opening arguments (TR 3/23/21, p. 21:15-19), and in his closing arguments (TR 3/26/21, pp. 26:23-29:17). The trial court acknowledged the doctrine of procuring cause, but rejected its application to Young's right to post-termination commissions on sales to Green Roads. CF 1415 ¶ 10.

III. Discussion

The trial court erred as a matter of law when it found that Young was the procuring cause of Folium's sales to Green Roads, yet denied him the commissions on those sales that occurred after his termination. Under the doctrine of procuring

cause, Young is owed all commissions on business that he procured for Folium, including those that concluded after his termination.

"The doctrine of procuring cause has long been a part of the common law in Colorado." *See Telluride Real Estate Co. v. Penthouse Affiliates, LLC,* 996 P.2d 151, 153 (Colo. App. 1999). Under this doctrine, an agent who procures a purchaser for a principal is owed his commission whenever he or she sets in motion a chain of events that resulted in a sale. *See id.* This agent is entitled "to commission on sales made after termination of a contract if that party procured the sales through its activities prior to termination." *Houben v. Telular Corp.*, 231 F.3d 1066, 1073 (7th Cir. 2000) (citation omitted). That is, the very purpose of the doctrine of procuring cause is to ensure that a principal pays its agent for the services it received, even if the contract with the agent is terminated. *Id.*

Although Colorado courts have not specifically addressed the matter, courts in every other state and jurisdiction have applied the procuring cause doctrine to post-termination sales commissions, such as those procured by Young on behalf of Folium. *See Chuck Latham Assocs., Inc. v. Ace Bayou Corp.,* No. 15-0287, 2015 WL 9268573, *2 (E.D. La. December 21, 2015) (applying Colorado law, court holds that the doctrine of procuring cause applies in favor of a sales representative); *Houben,* 231 F.3d at 1073 (citation omitted) (finding sales employee entitled to commission on

"sales made after termination of a contract if that party procured the sales through its activities prior to termination"); *Aerotronics, Inc. v. Pneumo Abex Corp.,* 62 F.3d 1053, 1064-65 (8th Cir. 1995) (applying procuring cause doctrine in case involving sales representative); *Leach Corp. v. Turner,* 390 P.2d 515, 517-518 (Okla. 1964) (applied to post-termination commissions of sales representative).

The doctrine of procuring cause is a "gap filler" when (as here) such contracts are otherwise silent. *Miller v. Paul M. Wolff Co.*, 316 P.3d 1113, 1117 (Wash. App. 2014). That is, unless the parties agree otherwise, the default is that post-termination commissions are owed to sales agents for the customers that they procure for their principal. *Id.* at 1116-17 (citations and internal punctuation omitted) ("[The doctrine] is based upon the equitable maxim that the principal shall not be permitted to enrich himself at the expense of the agent or broker, whose services have inured to his benefit.").

Here, per the trial court's finding and Folium and Shan's admission, Young was the procuring cause for Folium obtaining sales from Green Roads. CF 1415 ¶ 10; EX 1596 (Plaintiff Ex. 145, p. 3) (response to Request for Admission No. 2). The record evidence further showed that Young obtained a marketing agreement and non-circumvent agreement with Green Roads on Folium's behalf. TR 3/23/21, p. 63:1-17.

Long after he was terminated, Folium continued to receive a benefit from Young's work on its behalf.

The trial court thus erred in its application of the procuring cause doctrine when it failed to award Young commissions on Folium's post-termination sales to Green Roads. The very point of the doctrine is to ensure that Folium pays its agent for the benefit it received. Otherwise, Folium would be incentivized to terminate Young as early as possible and retain the reward from his work without having to pay the promised amount. Here, having been found as the procuring cause for Green Roads sales, the Court should direct the trial court to enter judgment in Young's favor in the amount of an additional $188,493.50. (*i.e.*, 5% of Folium's sales to Green Roads between May 2018 and June 2019 of $3,769,870).

CONCLUSION

For the reasons stated herein, the Court should reverse the trial court and direct it to (a) enter judgment against Folium and Shan in the amount of $2,754,690 for failing to issue 0.5% membership interest to Young, (b) increase the judgment against Folium by $188,493.50 for Young's commissions on post-termination sales to Green Roads, and (c) deem Young a prevailing party against Shan.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2021, the foregoing **APPELLANT'S OPENING BRIEF** was filed and served via CCE on the following:

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