

**DISTRICT COURT, DENVER COUNTY,  
COLORADO**

1437 Bannock Street  
Denver, Colorado 80202  
(720) 865-8301

DATE FILED: March 10, 2022 4:53 PM  
CASE NUMBER: 2020CV33183

Plaintiffs: SHAE WHITNEY, BRADLEY  
BECKER, and HEYSEED LLC d/b/a DRAM  
APOTHECARY,

v.

Defendants: ANDREW FULTON, CHRISTOPHER  
KOONS, AND GOLDEN GLOBAL GOODS  
D/B/A ROCKY MOUNTAIN SODA COMPANY,  
AND COLORADO’S BEST DRINKS, LLC.

▲ COURT USE ONLY ▲

Counterclaim-Plaintiffs: ANDREW FULTON,  
CHRISTOPHER KOONS, individually and  
derivatively on  
behalf of DRAM DRINKS, LLC,

v.

Counterclaim-Defendants: SHAE WHITNEY,  
BRADLEY BECKER, and HEYSEED LLC d/b/a  
DRAM APOTHECARY.

Case Number:  
2020CV033183

Courtroom: 466

**FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE  
REMAINING EQUITABLE CLAIMS, COUNTERCLAIMS AND  
DEFENSES AND ORDER FOR ENTRY JUDGMENT**

This matter is before the Court on the jury’s verdict reached on December 15, 2021 in this matter and on the remaining equitable claims, counterclaims and

defenses in this action. Plaintiffs also filed a motion for entry of judgment on December 31, 2021.

All claims, counterclaims and defenses asserted in this action were tried to a jury and the Court in a trial that proceeded from December 6 – 14, 2021. On December 15, 2021 the jury returned a special verdict form answering questions and entering a verdict on all legal claims, counterclaims and defenses. On January 5, 2022 the Court held a status conference with counsel for the parties and established a briefing schedule to resolve the remaining equitable claims, counterclaims and defenses in this matter.

The Court has reviewed the briefing and exhibits submitted by the parties on these matters, the entire file, the exhibits and the testimony and argument presented at trial. Upon consideration of all of this briefing, exhibits, testimony, argument, the entire file and the applicable authorities the Court enters the following findings of fact, conclusions of law and order for the entry of judgment on all legal and equitable claims, counterclaims and defenses presented in this action.

### **THE JURY'S VERDICT**

On Plaintiff's claim for breach of fiduciary duty the jury was required to answer questions asking whether the parties had formed a partnership or limited liability company (LLC). The jury responded to these questions finding that no partnership or LLC existed between or among the parties. *See* special verdict form entered 12/15/21, responses to questions nos. 1A(i) and (ii).

The special verdict form informed the jury that if they found no partnership or LLC then they shall not answer the verdict questions related to the parties' claims and counterclaims for breach of fiduciary duty or Defendants' counterclaim for civil theft. Therefore, the jury skipped the verdict questions related to these claims and counterclaims.

On the parties' claims and counterclaims for breach of contract the jury responded to verdict questions finding that the parties had entered into a contract. *Id.*, response to question no. 2A. However, the jury found that no party breached any contractual obligations to any other parties. *Id.*, responses to questions nos. 2B & 2C. Nevertheless the jury answered the questions related to contract damages and found that nominal damages of \$1 should be awarded to each party. *Id.*

Finally, the jury determined that Plaintiffs had trade secrets, but that Defendants did not misappropriate and use the trade secrets. *Id.*, responses to questions nos. 4A & 4B.

### **DEFENDANTS' COUNTERCLAIM FOR JUDICIAL DISSOLUTION**

Defendants seek an order judicially dissolving Dram Drinks, LLC pursuant to C.R.S. § 7-80-810. Defendants contend that Dram Drinks, LLC was formed on October 18, 2019 when Mr. Fulton filed the articles of organization and operating agreement with the Secretary of State. Defendants argue that the operating agreement supports a finding that the parties formed Dram Drinks, LLC. Defendants also point to Mr. Callison's testimony in which he states that an LLC was formed on October 18, 2019 when Mr. Fulton filed the articles of organization and operating agreement. Defendants also cite to Mr. Fulton's testimony and the testimony of their own expert, Professor Lowenstein, to support a finding that an LLC was formed.

Defendants contend that because this LLC was formed they may seek judicial dissolution of Dram Drinks, LLC. This dissolution would include a winding up of its affairs and distribution of assets or proceeds after all of Dram Drinks LLC's creditors are paid.

The Court finds that this claim fails because the jury found that no LLC existed. The existence of this LLC was fully litigated at trial. The jury received conflicting evidence and testimony as to the formation of this LLC. The jury

determined that no partnership or LLC existed between or among the parties. This finding is supported by competent evidence and testimony presented at trial.

The Court adopts the jury's findings that no LLC existed between the parties. When deciding an equitable claim that was tried along with legal claims the Court is "bound both by a jury's explicit findings of fact and those findings that are necessarily implicit in the jury's verdict." *Churchill v. Univ. of Colo. at Boulder*, 285 P.3d 986, 1008 (Colo. 2012).

Here, the jury explicitly found that no partnership or LLC existed between or among the parties. The same evidence relied upon by Defendants to argue that the Court should find an LLC was presented to the jury. The jury received evidence about the operating agreement and whether the parties had a meeting of the minds regarding all material terms of the operating agreement. Plaintiffs argued that there was not a meeting of the minds because Mr. Fulton inserted wording granting exclusive rights to the Dram brand. *See ex. 15*, final operating agreement, § 10.10. Plaintiffs testified that they never agreed to this language.

Plaintiffs also presented evidence that none of the traditional hallmarks of a co-owned business existed in this case, including: capital accounts reflecting the parties' capital contributions; sharing of losses and profits; profit sharing; common ownership of property; a shared bank account; or a separate federal tax identification number.

Plaintiffs also testified that they never intended to enter into a partnership, LLC or other co-owned business with Defendants. They maintained that they had a contractual relationship with Defendants to co-pack the Dram beverages. Also the expert witnesses for both sides presented competing conclusions as to the formation of a partnership or LLC.

The jury heard all of this evidence and determined that no partnership or LLC was formed. The Court is bound by this explicit finding. *Churchill*, 285 P.3d at 1008. This finding is dispositive of Defendants' claim for judicial dissolution of

Dram Drinks, LLC. Because the jury found that no LLC existed the Court is unable to enter an order for judicial dissolution of Dram Drinks, LLC. Defendants' counterclaim for judicial dissolution of Dram Drinks, LLC, therefore, fails.

### **UNJUST ENRICHMENT**

Defendants further argue that if the Court declines to grant judicial dissolution of Dram Drinks, LLC, then these circumstances presents an appropriate case for allowing Defendants to recover on an unjust enrichment claim. Defendants argue that Plaintiffs would be unjustly enriched if they are allowed to retain the right to own and control the Dram brand without compensating Defendants.

Defendants presented evidence that they incurred costs that allowed for the development and production of the Dram beverages at a significant cost-savings to Plaintiffs. Defendants point out that hard costs such as overhead, insurance, rent and utilities were not factored into the true-up spreadsheet. Other significant costs such as the cost for acquisition of special equipment and depreciation were also not accounted for in true-up spreadsheet.

Defendants maintain that these are costs that they had to bear which went into the development, production and distribution of the Dram beverages. Defendants also presented evidence that their distribution network placed the Dram beverages in numerous retail outlets which allowed it to gain market share. Defendants contend that all of these costs added to the development, production and value of the Dram brand. They point out that Plaintiffs did not have to bear any of these costs.

Defendants also presented evidence that it passed on a business opportunity with another beverage company, Koios, so that it could devote more line time to producing the Dram beverages. Defendants argue that the Dram brand has benefitted from all of Defendants' contributions. Defendants argue that it would be unjust for Plaintiffs to own and control the entire Dram brand without fairly compensating Defendants for these contributions.

“[A] party claiming unjust enrichment must prove that (1) the [Plaintiffs] received a benefit, (2) at the [Defendants’] expense, (3) under circumstances that would make it unjust for the [Plaintiffs] to retain the benefit without commensurate compensation.” *Lewis v. Lewis*, 189 P.3d 1134, 1141 (Colo. 2008). Unjust enrichment “does not depend on any contract, oral or written,” and “does not require any promise or privity between the parties.” *Salzman v. Bachrach*, 996 P.2d 1263, 1265 (Colo. 2000).

“In a contractual context, ‘a party cannot recover for unjust enrichment by asserting a quasi-contract when an express contract covers the same subject matter because the express contract precludes any implied-in-law contract.’” *Harris Group, Inc. v. Robinson*, 209 P.3d 1188, 1205 (Colo. App. 2009), quoting *Interbank Invs., LLC v. Eagle River Water & Sanitation Dist.*, 77 P.3d 814, 816 (Colo. App. 2003).

However, there are two exceptions to this general rule. Under the first exception “a party can recover on quasi-contract when the implied-in-law contract covers conduct outside the express contract or matters arising subsequent to the express contract.” *Interbank*, 77 P.3d at 816. “Second, a party can recover on a quasi-contract when the party ‘will have no right under an enforceable contract.’ ... For example, quasi-contractual recovery may be allowed when an express contract failed or was rescinded.” *Id.* (citations omitted).

Defendants’ unjust enrichment claim is precluded by the jury’s finding that a contract existed between the parties. The issue in this case was whether the parties were partners in a co-owned business or whether they had a contractual relationship. Conflicting testimony and evidence were presented on this issue. After considering all of this testimony and evidence the jury found that the parties had a contractual relationship. This finding is binding on the Court when considering Defendants’ counterclaim for unjust enrichment. Because there is an express contract between the parties, Defendants cannot invoke the equitable claim of unjust enrichment to recover from Plaintiffs. *See Harris Group*, 209 P.3d at 1205; *Interbank Invs.*, 77 P.3d at 816.

Defendants argue, though, that the first exception stated above permits recovery on an unjust enrichment claim. They argue that they are seeking to recover the contributions that they made to develop, produce and distribute the Dram beverages for which they have not been compensated. Defendants argue that these costs are different than the co-packing agreement that Plaintiffs claim they had with Defendants.

The Court disagrees. Throughout the trial the jury was presented with competing positions as to the parties' legal relationship. Plaintiffs maintained that they had nothing more than a contractual relationship. Defendants, on the other hand, argued that this was a co-owned business operating as either an LLC or a partnership.

The jury found that the parties had a contractual relationship. There was no room for the jury to find an express agreement, while still leaving room for the finding of an implied quasi-contract to do something else. The development, production and distribution of the Dram beverages were the focus of all of the parties efforts in this case. It was also the focus of all of the testimony and evidence presented. The full scope of the parties' relationship was a choice between a co-owned business or a contractual relationship. The jury found that the parties had a contractual relationship. The jury also found that no party breached any contractual obligations owed to the other parties.

The Court rejects Defendants' argument that their unjust enrichment claim is based on grounds outside of the express contract found by the jury to exist between and among the parties. Therefore, the Court finds that Defendants' unjust enrichment claim is barred by the jury's finding of an express contract between the parties.

To the extent that Plaintiffs seek to recover on their unjust enrichment claim the Court finds that this claim fails for the same reasons set forth above.

## ORDER FOR ENTRY OF JUDGMENT

In accordance with the jury's answers set forth in the special verdict form returned on December 15, 2021 and the Court's findings of fact and conclusions of law entered above, **IT IS ORDERED, ADJUDGED, AND DECREED** that pursuant to Rules 58 and 79(d) of the Colorado Rules of Civil Procedure, the Clerk of the Court shall enter judgment upon the register of actions as follows:

1. On Plaintiffs' and Defendants' request for declaratory judgment the Court **ENTERS A DECLARATORY JUDGMENT** that:

There was no partnership, LLC or company ("Dram Drinks, LLC") co-owned by any of the Plaintiffs and any of the Defendants together. The Court further declares that there are no corresponding rights or obligations of any type that exist or arise out of the purported existence of such a partnership, LLC or company.

2. On Plaintiffs' remaining claims for judicial dissolution under C.R.S. § 7-80-810 and C.R.S. § 7-6-132, breach of contract, misappropriation of trade secrets, breach of fiduciary duty, request for an accounting and unjust enrichment, the Court enters judgment in favor of Defendants and against Plaintiffs;
3. On Defendants' remaining counterclaims for breach of contract, breach of fiduciary duty (direct and derivative claims), civil theft (direct and derivative claims), unjust enrichment and for judicial dissolution pursuant to C.R.S. § 7-80-810 the Court enters judgment in favor of Plaintiffs and against Defendants.

**IT IS FURTHER ORDERED** that any post-judgment motions, including any bill of costs and/or motion for attorney fees shall be filed fourteen (14) days from the date of this order. The Court makes no determination at this time as to which party is a prevailing party, or whether there is a prevailing party. This

determination shall be made in connection with the Court's consideration and resolution of any motion for attorney fees and/or bill of cost. Such motion and/or bill of costs shall state the grounds supporting the filing parties' claim that they are the prevailing parties and/or otherwise entitled to recovery costs and/or attorney fees.

**IT IS FURTHER ORDERED** that judgment shall not be delayed for the determination of attorney fees, (if any), and taxing of costs, (if any).

**SO ORDERED AND DATED** this Thursday, March 10, 2022.

BY THE COURT:



---

Andrew P. McCallin  
District Court Judge