SUMMARY
February 9, 2023

2023COA14

No. 2020CA1998, *Air Solutions v. Spivey* — Contracts — Breach of Contract; Remedies — Damages — Specific Performance — Declaratory Judgments

A division of the court of appeals addresses a number of issues relating to specific performance as a remedy for a breach of contract. In particular, the division addresses adequacy of damages and perceived uncertainties in the parties' agreement as those issues bear on specific performance of a contract to convey an interest in a closely held business.

COLORADO COURT OF APPEALS **2023COA14**

Court of Appeals No. 20CA1998
City and County of Denver District Court No. 19CV30557
Honorable Michael J. Vallejos, Judge

Air Solutions, Inc., d/b/a Airpro Incorporated, a Colorado corporation, and Benjamin Vrbancic, an individual,

Plaintiffs-Appellees

v.

Christopher R. Spivey,

Defendant-Appellant.

JUDGMENT AFFIRMED IN PART, VACATED IN PART,
REVERSED IN PART, AND CASE REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE J. JONES
Welling, J., concurs
Schutz, J., concurs in part and dissents in part

Announced February 9, 2023

Malik Legal Solutions, LLC, Nadia G. Malik, Denver, Colorado for Plaintiff-Appellee Air Solutions, Inc.

Allen & Curry, P.C., Damon M. Semmens, Theodore A. Wells, Denver, Colorado, for Plaintiff-Appellee Benjamin Vrbancic

Burg Simpson Eldredge Hersh & Jardine, P.C., David K. TeSelle, Nelson Boyle, Englewood, Colorado, for Defendant-Appellant

¶ 1 This case arose from a dispute over ownership of a new closely held business, Air Solutions, Inc., that would buy an established closely held business, Air Cleaning Specialists, Inc. Plaintiffs, Air Solutions and Benjamin Vrbancic, brought this case seeking a declaration that defendant, Christopher R. Spivey, isn't an owner of Air Solutions because he never entered into a binding agreement to become an owner. Spivey counterclaimed, alleging primarily that he and Vrbancic had contractually agreed that he would be an owner (on terms discussed below) of the nascent corporation. He also asserted a variety of other legal and equitable counterclaims against Air Solutions and Vrbancic (individually or in tandem) relating to that alleged contract, the negotiations leading up to it, and disputes over terms of Spivey's relationship with Air Solutions (such as entitlement to expense reimbursements).

¶ 2 The district court empaneled a jury to decide Spivey's legal counterclaims and reserved ruling on any remaining declaratory judgment and equitable claims and counterclaims until after the jury decided Spivey's legal counterclaims. Before and during trial, Spivey dismissed some of his counterclaims. As a result, the only legal claims the jury decided were Spivey's counterclaims against

Vrbancic for breach of contract and fraud. The jury found in Vrbancic's favor on the fraud counterclaims but found in Spivey's favor on his breach of contract counterclaim.

¶ 3 After trial, Spivey asked the court for a decree of specific performance on the breach of contract counterclaim and for declaratory relief, arguing, among other things, that the nature of the contract rendered an award of damages inadequate to compensate him for the benefit of his bargain. The court denied Spivey's request for specific performance and his remaining declaratory judgment and equitable counterclaims. (The court denied Air Solutions and Vrbancic's declaratory judgment claim based on the jury's verdict on Spivey's breach of contract counterclaim.)

¶ 4 Spivey appeals. He challenges the district court's denial of his request for a decree of specific performance as well as the court's denial of his declaratory judgment and equitable counterclaims. We conclude that in denying Spivey's request for a decree of specific performance, the court misapplied the law and relied in part on reasons unsupported by the record, thereby abusing its discretion. Spivey is entitled to a decree of specific performance against

Vrbancic on the contract that the jury found. We also conclude that the district court erred by denying Spivey's counterclaims for declaratory judgment against both Air Solutions and Vrbancic, though on remand the district court will need to determine the precise terms of any such declaration, taking into account, among any other relevant considerations, the decree of specific performance, the effect of the jury's verdict on Spivey's requests for declaratory relief not directly related to specific performance of the contract, and the evidence admitted at trial. We affirm the district court's denial of Spivey's equitable counterclaims for promissory estoppel and unjust enrichment.

I. Background

¶ 5 The facts giving rise to this case are relatively complicated, as is the case's procedural history. But a somewhat detailed recitation of both is necessary to fully understand, address, and analyze the legal issues that the parties raise on appeal. We will do our best to clarify rather than obscure.

A. Pre-Litigation Facts

¶ 6 Vrbancic worked for Air Cleaning Specialists (which did business as "Airpro") — a company that manufactured, sold, and

installed industrial-grade air filtration systems — for several years. In 2016, he negotiated with the company's two owners to buy the company. They agreed on a purchase price of $2.5 million.

¶ 7 Vrbancic didn't have the required funds so he explored obtaining a loan. A banker recommended a loan from the Small Business Administration (SBA). Vrbancic applied for such a loan. Because Vrbancic didn't qualify to borrow the full purchase price, the sellers agreed to carry $375,000 of the price as a loan. But to obtain the SBA loan for the remaining sum, Vrbancic needed to come up with $250,000 to put toward the purchase price. He didn't have that kind of money, so initially he looked for someone who could loan him that sum.

¶ 8 In the meantime, in August 2017, Vrbancic filed articles of incorporation for Air Solutions, which would be the entity that would buy Air Cleaning Specialists. The articles indicated that Air Solutions would issue 1,000 shares of stock, but the company didn't issue any shares at that time.

¶ 9 Vrbancic's efforts to find a lender for the $250,000 weren't successful. Eventually, however, a lawyer acquaintance of his steered him to Spivey, an experienced businessman looking for

promising investment opportunities. The two first got together in October 2017. Things went well. Spivey agreed to contribute the $250,000.[1] What he was to receive in return was disputed.[2] Vrbancic testified that he thought Spivey would receive a 33% interest in the company; Spivey, on the other hand, testified that he thought he would receive a 50% interest. The parties also contemplated that Spivey would take on some kind of management role with the company, primarily to look for ways the company could operate more efficiently.

¶ 10 Spivey provided financial information to the banker handling the SBA loan. According to Spivey, that banker told him that so as not to slow the progress of obtaining the SBA loan — which was pretty far along — he would need to take less than 20% of the

---

[1] For reasons that don't matter for purposes of this appeal, Spivey's contribution later increased to $250,100.

[2] The partial dissent, at various points, relies on conflicts in the testimony relating to the negotiations leading to formation of the contract to buttress its view that specific performance wasn't appropriate. But we must, of course, view the facts relevant to the claims submitted to the jury in the light most favorable to the jury's verdicts, including its determination of the terms of the contract. *See Reigel v. SavaSeniorCare L.L.C.*, 292 P.3d 977, 981 (Colo. App. 2011).

company. This was so because (1) an SBA regulation — 13 C.F.R. § 120.160(a) (2017) — requires any person owning 20% or more of a borrowing entity to personally guarantee the loan (the 20% Rule) and (2) having Spivey go through the process of providing the personal guaranty would push the closing beyond the end of the year. Spivey testified that, although he was willing to sign a personal guaranty, he accommodated the banker's request because he didn't want to delay the deal.[3] (Vrbancic testified that Spivey told him much later that he didn't want to personally guarantee the loan because he didn't want to be burdened with the debt.) Spivey agreed with the banker's suggestion that he initially own only 17.5% of Air Solutions, but maintained at trial that he always intended, and the parties understood, that his interest would automatically increase once the company paid the SBA loan in full.

¶ 11 The banker drafted documents showing Vrbancic as an 82.5% owner and Spivey as a 17.5% owner and sent them to Vrbancic. Vrbancic testified that he was surprised to see the reduced share

---

[3] Though plaintiffs argue that the banker "refuted" Spivey's testimony about this conversation at trial, the banker actually testified that he didn't recall talking to Spivey about the 20% Rule.

for Spivey, but he signed and submitted documents to the bank and the SBA showing Spivey as a 17.5% owner (and, in at least one document he submitted to the SBA, did so under penalty of perjury).

¶ 12 And this is where things got messy. The sale didn't close by year-end but was scheduled to close on January 31, 2018. Spivey and Vrbancic met with the lawyer representing Air Solutions (and perhaps also representing Spivey or Vrbancic or both) to discuss whether Air Solutions would be an "S" corporation, a limited liability company, or something else, as well as a written stockholder's agreement. On January 23, the lawyer sent a letter to Spivey and Vrbancic purporting to set forth what they had agreed to: Spivey would contribute $175 to the company for 17.5% of the company's shares, Vrbancic would contribute $825 to the company for 82.5% of the company's shares, and the $250,000 Spivey had put toward the purchase of Air Cleaning Specialists would be treated as a loan to Air Solutions. Depending on the strictures of the SBA loan documents, "the note may be convertible or the parties may negotiate other terms that may include director positions and fees, employment benefits, or other terms."

¶ 13 According to Spivey, this letter didn't reflect the terms to which he believed he and Vrbancic had agreed. He sent an email to Vrbancic on January 29 — two days before the closing. In that email, he said they had originally talked about him owning 33% of the company, and later talked about him owning 50%, but the bank had "talked [him] down" to 17.5% "to avoid having to re-write the loan application, so [he] would not have to sign the Personal Guarantee." He proposed a "50:50" arrangement with neither party having "control" "up until the time I get my $250,100 investment back, subject to the limitations of" the SBA loan. After Spivey got his $250,100 back, the split would remain "50:50" but Vrbancic would have "control for splitting indecision or disagreements." Spivey also proposed that he would have a "first right of refusal" to buy Vrbancic's 50% interest on specified terms.

¶ 14 Vrbancic immediately called Spivey, and they spoke about the proposal and what Vrbancic later claimed to perceive as Spivey's attempt to change their deal. Spivey followed up with another email on January 29 setting forth what he "was seeking in a shareholder agreement." He indicated terms slightly different from those in his earlier email: for instance, while he and Vrbancic would split profits

and losses "50-50," Vrbancic would have decision-making control, and Spivey would also have a "put" option giving him the right to have Vrbancic buy his shares on specified terms, but in no event for less than $1,000,000. (Spivey would also have the previously mentioned right of first refusal.)

¶ 15 That evening, Vrbancic forwarded the email chain to the company's lawyer, along with the following message: "Mr. Steve[,] this is going to be our napkin[.][4] [T]he split will be 51 Vrbancic 49 Spivey[.] Please review and let us know what we are missing in this agreement."

¶ 16 The next morning, Vrbancic again forwarded the email chain to the company's lawyer with the following message: "Please review this draft it will be Ben [Vrbancic] 51 Chris [Spivey] 49[.] [A]lso I want to talk to you about these percentages[.] I think we should be equal[.] [L]et's set up a time to talk."

¶ 17 The sale of Air Cleaning Specialists closed on January 31. Air Solutions used most of the $250,100 contributed by Spivey, about

---

[4] The parties have referred to this email message exchange as the "napkin email."

$1.8 million loaned by the SBA, and a few hundred thousand dollars loaned by the owners of Air Cleaning Specialists to pay the purchase price. A few days later, Spivey began working for Air Solutions in a somewhat amorphous role as chief financial officer focused on making the business more efficient.

¶ 18 Over the next few months, Spivey and Vrbancic had what Spivey later termed "negotiations" to revise the deal he thought he and Vrbancic had agreed on. Air Solutions' lawyer drafted a few "buy-sell" agreements with proposed terms of Spivey's and Vrbancic's respective ownership interests. The parties didn't mutually agree to any of those drafts.

¶ 19 Shortly after Spivey turned down a draft agreement in July 2018, Vrbancic terminated Spivey's employment. Vrbancic claimed that Spivey didn't seem to have the expertise he had advertised, was treating certain staff members poorly, and didn't fit the company's culture. (Air Solutions had continued to operate in the same way as Air Cleaning Specialists had operated, and it retained the prior company's employees.)

¶ 20 Air Solutions never issued any stock to Spivey. It did issue 500 of the company's 1,000 authorized shares to Vrbancic, holding

the remainder in reserve. It appears that Vrbancic remains Air Solutions' sole shareholder.

¶ 21 Following his termination, Spivey demanded his shares. Discussions between Spivey and Vrbancic (and perhaps other Air Solutions representatives) were acrimonious. Air Solutions took the position that Spivey wasn't a shareholder and that his $250,100 contribution had been merely a loan. Rather predictably, this litigation ensued.

B. History of the Case

¶ 22 Air Solutions and Vrbancic filed this case as a declaratory judgment action. They sought declarations that Spivey isn't an owner of Air Solutions, Spivey isn't entitled to reimbursement from the company for $80,000 in expenses Spivey claimed to have incurred while conducting company business, and Air Solutions' return of Spivey's $250,100 contribution (with interest) would "definitively resolve the dispute between the parties."

¶ 23 Spivey counterclaimed. He asserted several counterclaims for declaratory relief against both Air Solutions and Vrbancic pertaining to his alleged ownership interest in the company, his entitlement to an equal split of profits and losses, and his

entitlement to reimbursement for business-related expenses. He also asserted counterclaims for breach of contract relating to his ownership interest, fraud, an accounting, promissory estoppel, and unjust enrichment. (He brought the latter two counterclaims expressly in the alternative — that is, if his claimed contract for an ownership interest in the company isn't enforceable.)[5]

¶ 24 Before or at trial, Spivey withdrew certain aspects of his declaratory judgment counterclaims and his breach of contract and fraud counterclaims against Air Solutions. At a pretrial conference, the parties and the court agreed that a jury would decide the breach of contract and fraud counterclaims against Vrbancic first, and that the court would then decide the remaining counterclaims. With respect to the issue of specific performance as a remedy for breach of contract, the court said it would let the jury decide first whether there was a contract (and, if so, whether there was a

---

[5] Spivey asserted every counterclaim against both Air Solutions and Vrbancic, except for his counterclaim for an accounting, which he asserted only against Air Solutions. It appears that Spivey abandoned his counterclaim for an accounting, so we won't mention it again.

breach) and it would resolve the specific performance issue after the jury trial.

¶ 25 At trial, the parties presented extensive testimony and numerous exhibits concerning their competing views of whether (1) Spivey and Vrbancic had entered into an enforceable contract for Spivey to be an owner of the company and (2) Vrbancic had deliberately misled Spivey about whether Spivey would be entitled to reimbursement of contribution- and owner-related expenses and to a fifty-fifty split of profits and losses. Spivey maintained that the January 29 and 30 emails reflected a "napkin"[6] agreement that, in return for his $250,100, he would immediately be a 17.5% owner of the company and his ownership interest would increase to 49% when the company paid the SBA loan in full. Vrbancic maintained there was no such agreement — indeed, that he had never agreed that Spivey would be a part owner of the company.

¶ 26 Vrbancic called an expert, Matthew Armstrong, to testify as to any damages Spivey might have suffered as a result of any breach

---

[6] The term "napkin" agreement came from Vrbancic's January 29 forwarding email to the company's attorney.

of the alleged contract. Armstrong testified that because, among other things, the company was burdened by substantial debt (mostly the SBA loan), Spivey's claimed 17.5% interest in the company was worth only $82,959 as of July 31, 2018 (the day Vrbancic terminated Spivey's employment).[7] On cross-examination, Armstrong conceded that there is no ready market for shares in Air Solutions and that it is much easier to value an interest in a publicly traded company. As for Spivey's claimed 49% interest (to which Spivey would be entitled upon repayment of the SBA loan), Armstrong said it couldn't be valued: trying to value that interest would be speculative because it wasn't possible to predict what would happen over the next ten years. (The term of the SBA loan is ten years.)

¶ 27 On the morning of the fourth day of the trial, Spivey's attorney sought assurance from the court that Spivey could seek specific

---

[7] Armstrong also testified that he was told by plaintiffs' counsel to assume that $127,600 of Spivey's contribution was a loan. He did so, calculated the amount owed to Spivey on the "loan," with interest, as of July 31, 2018, and added that amount — $133,980 — to the total amount "owed to Mr. Spivey." As discussed below, the jury found that none of Spivey's $250,100 contribution was a loan.

performance as a remedy even if the jury awarded damages for breach of contract. All agreed that Spivey wouldn't waive his right to seek specific performance merely by seeking an award of damages from the jury and that the court would decide the issue of specific performance after the jury reached its verdicts.

¶ 28 Spivey testified that he wasn't an expert in valuing a business and had no experience valuing businesses. He agreed with Armstrong that it would be nothing but speculation to try to value a 49% interest that wouldn't exist, if ever, for ten years, at least from the perspective of "a business valuation specialist." Nonetheless, he testified as "an owner" what the value of his interest in the company was "to [him]." He said that, after looking at some projections, financial statements, and tax returns, the value of the company when he was considering investing in it was between $4 million and $7 million.[8] He didn't say, however, what he thought his interest was worth. In closing argument, his attorney argued, "Is it a million dollars? Two million dollars? I would submit to you that it

---

[8] Spivey said he used a "discounted cash flow analysis" (which he also referred to as the "Warren Buffet approach") to come up with this value, though he also factored in other things.

can't be less than what Mr. Vrbancic agreed in a napkin email that he would pay if he ever wanted to get rid of my client."[9]

¶ 29 While the jury was deliberating, it sent the following question to the court: "If no damages are awarded, will Mr. Spivey receive the $250k?" The court answered, "Yes, the Plaintiff's request is that the court/judge order the return of the $250k to Mr. Spivey with interest."[10]

¶ 30 The jury found in Vrbancic's favor on Spivey's fraud counterclaims. But it found in Spivey's favor on his breach of contract counterclaim. As to that claim, the court instructed the jury as follows:

> In this case, for Mr. Spivey to recover on his claim for breach of contract, which is asserted against Mr. Vrbancic, *you must find all of the following elements* have been proved by a preponderance of the evidence:
>
> 1. Mr. Vrbancic formed a contract with Mr. Spivey to give him a 17.5% ownership interest in Air Solutions with a right to a 49%

---

[9] This was an apparent reference to a term in Spivey's second January 29 email that Vrbancic could buy out Spivey for "in no event less than $1mm."

[10] As noted, Air Solutions and Vrbancic sought a declaration that if Air Solutions returned Spivey's contribution to him, with interest, that would fully resolve the parties' dispute.

> ownership interest at the end of the SBA loan in exchange for his $250,100 contribution.
>
> 2. Mr. Spivey performed his part of the contract by providing the $250,100; [and]
>
> 3. Mr. Vrbancic breached the contract by not providing Mr. Spivey with the ownership interest due under the contract.
>
> If you *find* that any of these three numbered statements has not been proved, then your verdict must be for Mr. Vrbancic. On the other hand, if you *find* that all of these statements have been proved, then your verdict must be for Mr. Spivey.

(Emphasis added.)

¶ 31 As now relevant, the verdict form asked the jury to answer the following question: "Did Christopher R. Spivey and Benjamin D. Vrbancic enter a contract by which Mr. Spivey was granted a 17.5% ownership in Air Solutions with a right to obtain up to 49% ownership at the end of the SBA loan in exchange for a $250,100 payment to Air Solutions, Inc.? (Yes or No)." The jury answered "Yes."

¶ 32 Viewing the verdict form in light of the elemental instruction, the evidence presented at trial, and the parties' arguments, we conclude that the jury found there was a contract that, in return for Spivey's payment of $250,100, he would receive an immediate right

to a 17.5% interest in Air Solutions and a right to a 49% interest if and when Air Solutions repays the SBA loan in full.

¶ 33 Our colleague in partial dissent maintains, however, that — as to the 49% interest — the jury found only that the parties agreed to negotiate: "Spivey could not obtain any additional percentage unless the parties agreed both upon a specific percentage he could obtain, and what he would need to provide to do so." *See infra* ¶ 163. To reach that conclusion, our colleague seizes on the words "up to" in the verdict form. But in so doing, our colleague fails to read the verdict form in light of the elemental instruction, which said, more than once, that for Spivey to prevail on his counterclaim, the jury had to "find" that "Mr. Vrbancic formed a contract with Mr. Spivey to give him a 17.5% ownership interest in Air Solutions with a right to a 49% ownership interest at the end of the SBA loan in exchange for his $250,100 contribution." That is the contract theory that Spivey presented to the jury. Air Solutions and Vrbancic referred to that theory below — and continue to refer to it on appeal — as "the springing interest theory": Spivey's right to 49% would "spring" into being upon Air Solutions' repayment of the SBA loan. *See Moody v. United States*, 958 F.3d 485, 491 (6th Cir.

2020) ("[T]he verdict form didn't stand alone. It came with a user's manual: the jury instructions. So we evaluate the verdict form in the context of the instructions as a whole . . . ."); *Lab'y Corp. of Am. Holdings v. Metabolite Lab'ies, Inc.*, 410 F. App'x 151, 157 (10th Cir. 2011) (reading the verdict form in light of the instructions, evidence, and arguments to determine what the jury found); *Simmons v. Garces*, 763 N.E.2d 720, 735 (Ill. 2002) ("A special interrogatory is to be read in context with the court's other instructions to determine how it was understood . . . ."); *see also People v. Zadra*, 2013 COA 140, ¶ 51 ("We consider alleged errors in verdict forms in the context of all the jury instructions."), *aff'd*, 2017 CO 18; *Tech. Comput. Servs., Inc. v. Buckley*, 844 P.2d 1249, 1253 (Colo. App. 1992) (reading a verdict form in light of the elemental instructions); *Cummins, Inc. v. Nelson*, 115 P.3d 536, 545 (Alaska 2005) (noting that a verdict form may paraphrase the instructions and must be read "in the context in which it was given").

¶ 34 As well, our colleague fails to give effect to the language in both the elemental instruction and the verdict form that Spivey's "right" to the 49% ownership interest was part of the consideration for his payment of $250,100: both said that "right" was "in

exchange for his $250,100 contribution." That language makes it abundantly clear that the contract as agreed to didn't contemplate any further negotiation on percentage of ownership or price.

¶ 35 Indeed, on appeal, Air Solutions and Vrbancic don't argue that, at most, the parties only agreed to negotiate for an additional percentage in the future at some undetermined price. Nor do Air Solutions and Vrbancic argue on appeal that an "agreement to negotiate" is the "agreement" the jury found. Moreover, the district court didn't take the partial dissent's view of the contract — as it relates to the 49% interest — at any point in the post-trial proceedings. Had the district court taken that view, its resolution of Spivey's request for specific performance of a contract for a right to 49% upon repayment of the SBA loan could have started and ended with the observation that an agreement is a prerequisite to specific performance, *see Mestas v. Martini*, 113 Colo. 108, 122, 155 P.2d 161, 167 (1944) (the remedy of specific performance presupposes the existence of a valid contract between the parties), and the jury didn't find the contract asserted by Spivey. But that isn't what the district court did. It declined to order specific performance based on particular perceived uncertainties (which we

discuss below), but the alleged uncertainty posited by the partial dissent wasn't one of them.[11]

¶ 36 In short, the partial dissent's view of the contract the jury found pertaining to the 49% belongs to the partial dissent alone: it wasn't argued by Air Solutions and Vrbancic in the post-trial proceedings in the district court, wasn't taken by the district court in the post-trial proceedings, and isn't argued by Air Solutions and Vrbancic on appeal. The parties at all times have regarded the jury's verdict as finding an agreement that Spivey is entitled to receive a 49% interest in Air Solutions upon repayment of the SBA loan. That view is supported by a commonsense reading of all the court's instructions to the jury and the rest of the record, and we adhere to it.

---

[11] Also, had the district court taken the partial dissent's view that the contract Spivey alleged was indefinite as to ownership interest or price — obviously material terms — it would have granted Air Solutions' and Spivey's attorneys' motion for a directed verdict. But as the partial dissent recognizes, the court denied that motion, concluding that the evidence was sufficient to make the existence of a contract a question for the jury. Air Solutions and Vrbancic don't challenge that ruling on appeal.

¶ 37 On Spivey's breach of contract counterclaim, the jury awarded Spivey damages of $82,959 — the exact amount Armstrong had opined that a 17.5% interest in the company was worth on July 31, 2018. The parties agree that the jury therefore didn't award Spivey any damages for the loss of his potential future 49% interest.

¶ 38 Spivey filed a post-trial motion addressing his request for a declaratory judgment and asking the court to order specific performance of the contract that the jury found. For reasons discussed below (and alluded to earlier), the court denied that motion after concluding that an order of specific performance wasn't appropriate. But in doing so, the court reasoned, in part, that Spivey "will get his $250,100 returned."

¶ 39 This latter conclusion caused Air Solutions and Vrbancic to file a motion for reconsideration under C.R.C.P. 59, in which they argued that Spivey wasn't entitled to the return of his investment *and* damages because the jury's award of damages reflected the value of Spivey's investment.

¶ 40 While plaintiffs' Rule 59 motion was pending, Spivey filed his own Rule 59 motion. He argued that the jury's award of damages didn't make him whole for Vrbancic's breach because no damages

had been awarded for his "contingent future 49% interest." He asked the court to exercise its "equitable powers" to award him "no less than the $1,000,000 referenced as the 'buy out' in the napkin email." In the alternative, he sought judgment against both plaintiffs on his equitable counterclaims for promissory estoppel and unjust enrichment.

¶ 41 The district court granted plaintiffs' Rule 59 motion and denied Spivey's. It concluded that, under the jury's verdict, Spivey was entitled only to the damages awarded — $82,959 — not such damages *and* return of his investment. The court also concluded that the jury's finding of a contract "eliminate[ed] [Spivey's] equitable claims" because those counterclaims concerned "the same subject matter" as the breach of contract counterclaim.

¶ 42 Spivey appeals various aspects of the district court's post-trial rulings, most forcefully its denial of his request for specific performance, and one issue relating to the jury instruction on

contract damages. Plaintiffs haven't cross-appealed the jury's findings of a contract, its terms, or its breach.[12]

II. Discussion

¶ 43 Spivey contends that the district court erred by (1) refusing to order specific performance of his contract with Vrbancic; (2) determining that the jury's verdict on the breach of contract counterclaim rendered moot his counterclaims against Air Solutions and Vrbancic for declaratory relief; (3) determining that the jury's finding of a contract "eliminat[ed]" his equitable counterclaims against Air Solutions for promissory estoppel and unjust enrichment; (4) misinstructing the jury on damages for breach of contract; and (5) if he isn't entitled to specific performance, refusing to exercise its "broad equitable powers" to order Air Solutions to return his $250,100 to him (along with the $82,959 in damages that the jury awarded).

¶ 44 We conclude that Spivey is entitled to specific performance of the contract that the jury found and to declaratory relief as to both

---

[12] Air Solutions and Vrbancic filed a notice of cross-appeal but later voluntarily dismissed their cross-appeal.

Air Solutions and Vrbancic. (This means that we must vacate the jury's damages award, as Spivey can't get both specific performance and damages under these facts.) We remand the case to the district court to order specific performance of the contract and to determine the appropriate declaratory relief to facilitate specific performance. We affirm the district court's dismissal of Spivey's promissory estoppel and unjust enrichment counterclaims against Air Solutions, albeit for somewhat different reasons than those the district court gave. Our resolutions of these issues moot Spivey's remaining contentions.

A. Specific Performance

¶ 45 The district court denied Spivey's request for specific performance for three reasons: (1) damages are an adequate remedy because "the company" can be valued; (2) specific performance would not be "appropriate or workable" because of animosity between Spivey and Vrbancic, and there would be a "host of logistical and practical problems in implementing and enforcing an order of specific performance"; and (3) because the jury awarded Spivey damages and "he will get his $250,100 returned," "further remedy is not warranted." To these three reasons, Air Solutions

and Vrbancic add a fourth — which they raised below but the district court didn't rule on: the contract found by the jury violates public policy because it runs afoul of a federal regulation governing SBA loans (the so-called 20% Rule).

¶ 46 We conclude that the reasons the district court gave for denying specific performance are based on incorrect understandings and applications of the governing law, a fundamental misreading of the contract that the jury found, or, in the case of Spivey's supposed entitlement to return of his $250,100 contribution, a plainly (indeed, admitted) erroneous understanding of the other remedies actually awarded. As for the 20% Rule, we conclude that it isn't an impediment to enforcement of the contract that the jury found.

¶ 47 In the end, we conclude that specific performance of the contract that the jury found is appropriate and that the district court abused its discretion by ruling otherwise.

1. General Law and Standard of Review

¶ 48 "Specific performance is a remedy developed by courts of equity to provide relief when the legal remedies of damages and restitution are inadequate." 12 Joseph M. Perillo, *Corbin on*

Contracts § 63.1, at 215 (rev. ed. 2012); *see Rinderle v. Morse*, 27 Colo. App. 457, 465, 150 P. 245, 248 (1915) ("The origin and ground of equity jurisdiction in cases of specific performance arises [sic] from the fact that a compensation in damages is inadequate . . . ."), *aff'd*, 64 Colo. 32, 169 P. 648 (1917). It is an alternative to an award of damages as a means of enforcing a contract, Restatement (Second) of Conts. ch. 16, intro. note (Am. L. Inst. 1981), "intended to produce as nearly as is practicable the same effect that the performance due under a contract would have produced," *id.* § 357 cmt. a; *see* 25 Richard A. Lord, *Williston on Contracts* § 67:1, at 183 (4th ed. 2002) ("The remedy of specific performance enables a court to compel a party to a contract to perform, if not exactly, at least substantially, what it has undertaken to do."). Put another way, "[a] decree of specific performance remedies a past breach of contract by fulfilling the legitimate expectations of the wronged promisee." *Snyder v. Sullivan*, 705 P.2d 510, 513 (Colo. 1985).

¶ 49 But a nonbreaching party isn't entitled to specific performance as a matter of right. *See Emery v. Medal Bldg. Corp.*, 164 Colo. 515, 527, 436 P.2d 661, 668 (1968); *Schreck v. T & C Sanderson Farms, Inc.*, 37 P.3d 510, 514 (Colo. App. 2001) ("The right to specific

performance is not absolute."). Rather, "[w]hether the remedy should be granted depends upon the equities of the case." *Schreck*, 37 P.3d at 514; *accord Emery*, 164 Colo. at 527, 436 P.2d at 668. Ultimately, the assessment of the equities and the corresponding determination whether ordering specific performance is appropriate rest within the trial court's sound discretion. *De Feo v. Smith*, 119 Colo. 296, 299-300, 203 P.2d 485, 487 (1949); *Schreck*, 37 P.3d at 514; *see also* Restatement (Second) of Conts. § 357 cmt. c.

¶ 50 We therefore review a trial court's decision whether to order specific performance for an abuse of discretion. A court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair, or based on a misapprehension or misapplication of the law. *Sos v. Roaring Fork Transp. Auth.*, 2017 COA 142, ¶ 45. And in the context of specific performance specifically, the court's discretion must be understood as constrained by various working rules and standards. *See Bufton v. Crane*, 143 A. 382, 384 (Vt. 1928) ("[T]his discretion is a judicial discretion, to be exercised in conformity with established principles and rules, and is therefore subject to review."); *Corbin on Contracts* § 63.1, at 219; Restatement (Second) of Conts. § 357 cmt. c; *see also Corbin on Contracts* § 63.1,

at 217 ("Despite the discretionary element, a trial court can commit error in granting or refusing this remedy.").

2. Analysis

¶ 51 We begin by reiterating the terms of the contract that the jury found: in return for his contribution of $250,100, Spivey was immediately entitled to a 17.5% ownership interest in Air Solutions with the right to a 49% ownership interest when the company repays its SBA loan.

a. Adequacy of Damages

¶ 52 The district court ruled that damages were an adequate remedy because it was possible to value "the company." The court found that Air Solutions "is not so unique a company[] that it cannot be valued" and that Spivey himself had testified to a value of "the company" (or "the business"). In so ruling, the court mischaracterized the thing to be valued and misapplied the law.

¶ 53 As far as the adequacy of damages is concerned, the issue wasn't the value of Air Solutions. Rather, the issue was whether it was possible to value (1) a 17.5% interest due Spivey at the outset *and* (2) a 49% interest in 2028, when, if everything went according to plan and Air Solutions paid off the SBA loan in accordance with

the loan documents, Spivey would be entitled to that additional interest. The jury, accepting Armstrong's expert testimony, valued the 17.5% interest to which Spivey was entitled upon making his contribution. That determination was supported by evidence. But the jury, again apparently accepting Armstrong's expert testimony and faced with an absence of evidence of the value of Spivey's contingent future 49% interest, didn't value the 49% to which Spivey would be entitled upon repayment of the SBA loan. Armstrong testified unequivocally that one "couldn't" value that future interest because doing so would be "speculative." Spivey agreed with Armstrong on that point. He testified instead to what he thought the value of the entire company was when he was deciding whether to invest in it. He never opined on the value of the future 49% interest.

¶ 54 True, as the court pointed out, Spivey's attorney asked the jury to consider whether it would be appropriate to award Spivey "$2 million" or "49 percent of whatever the midpoint is of" Spivey's valuation of the company ($4 million to $7 million). But again, Spivey's valuation was as of the time he was considering investing,

not as of 2028 when the SBA loan would be fully repaid, so there was no basis in the evidence for Spivey's attorney's request.[13]

¶ 55 To the extent the court determined that Spivey's mere request for damages bars specific performance — a position Air Solutions and Vrbancic also seem to take (at least on appeal) — that was also a misapplication of the law. Spivey didn't somehow waive his right to ask for specific performance merely because he sought damages, particularly since the court's refusal to decide the specific performance issue before the case went to the jury put him in the position of having to take a stab at establishing damages, and even more particularly since the court and counsel for all parties agreed during the trial that Spivey wouldn't waive his request for specific performance by putting on evidence of damages. *See Corbin on Contracts* § 66.9, at 613-14 ("Merely because one's attorney argued damages to a jury is not an election. The court may still decree specific performance."); *id.* at 621 ("[M]ere pursuing of a suit for

---

[13] The same is true for Spivey's attorney's alternative request that the jury award Spivey $1 million. That was based on the buy-out figure mentioned in one of the January 29 "napkin" emails. It didn't have any correlation to a 49% interest to which Spivey wouldn't be entitled until the SBA loan is fully repaid.

specific performance or for damages should in itself be insufficient to prevent the plaintiff from changing the action and seeking the other remedy."); *cf. Weddingfeld v. Gregersen*, 73 Colo. 582, 583-84, 216 P. 1053, 1054 (1923) (the doctrine of election of remedies doesn't apply to specific performance and damages "because the remedy of specific performance is not inconsistent with the remedy of an action for damages for breach of contract"; allowing an amendment to seek damages rather than specific performance following an earlier remand reversing a judgment on the pleadings).

¶ 56 What matters for determining the availability of specific performance as a remedy is whether there was evidence that the 49% future interest could be valued. There wasn't. There was evidence that one aspect of Spivey's benefit of the bargain — 17.5% right away — could be valued but no evidence that the other aspect of the benefit of his bargain — the 49% future interest — could be. The Restatement covers this situation: "The adequacy of the damage remedy for failure to render one part of the performance due does not preclude specific performance . . . as to the contract as a whole." Restatement (Second) of Conts. § 359(2); *see also id.* at cmt. b ("In such a case, complete relief should be granted in a single

action and that relief may properly be a decree ordering performance of the entire contract if the other requisites for such relief are met."); *Frue v. Houghton*, 6 Colo. 318, 319 (1882) (Specific performance is appropriate if "the party seeking equitable relief cannot be *fully* compensated by an award of damages . . . . When, therefore, an award of damages would not put the plaintiff in a situation as beneficial as if the agreement were specifically performed, or where compensation in damages would fall short of the redress to which he is entitled, a specific performance" as to the contract as a whole "may be decreed.") (emphasis added); *Corbin on Contracts* § 63.21, at 310-12. Indeed, if the injured party "can prove some but not all of his loss, he will not be compensated in full. In [such a] case damages are an inadequate remedy." Restatement (Second) of Conts. § 360 cmt. b.

¶ 57 Along the same lines, the district court erred by finding that damages were an adequate remedy because Air Solutions "is not so unique a company, that it cannot be valued." As discussed, whether one can put a value on Air Solutions today (or, as the parties did, in 2018) is a very different issue from whether the 49%

interest Spivey will acquire in 2028, if at all, can be valued today. There is no evidence that it can; indeed, the evidence is that it can't.

¶ 58 Moreover, the district court's conclusion runs headlong into Colorado case law and decisions from courts in other jurisdictions holding that a contract for shares in a closely held corporation may be specifically enforced. *See, e.g.*, *Johnson v. Johnson*, 87 Colo. 207, 212, 286 P. 109, 111 (1930); *Frue*, 6 Colo. at 321-22; *Bellagio Ins., Ltd. v. Digit. Broad. Corp.*, No. Civ. A. 7:03CV00557, 2005 WL 677223, *4 (W.D. Va. Mar. 23, 2005) (unpublished opinion) (applying Virginia law, specifically enforcing contract that called for periodic issuance of shares in a closely held company to a lender in the event of nonpayment of a loan), *aff'd*, 201 F. App'x 917 (4th Cir. 2006); *Kaneko v. Okuda*, 15 Cal. Rptr. 792, 801-03 (Ct. App. 1961) (affirming specific performance of contract to buy shares in a closely held corporation); *Krukemeier v. Krukemeier Mach. & Tool Co.*, 551 N.E.2d 885, 889-90 (Ind. Ct. App. 1990) (affirming specific performance of right to first refusal to buy shares in a closely held corporation); *Brown v. Knox*, 361 N.W.2d 540, 541-44 (Neb. 1985) (specifically enforcing agreement to transfer 50% of shares in a closely held business purchased pursuant to an agreement between

two individuals); *Dominick v. Vassar*, 367 S.E.2d 487, 488-90 (Va. 1988) (specifically enforcing agreement between the two shareholders of a business that upon the death of one, the other would have an option to buy the deceased shareholder's shares); *see also Williston on Contracts* § 67:79, at 478 ("A contract for the acquisition of the shares of a closely held family corporation, the stock of which is not obtainable in the open market, is a proper subject for specific performance."); *Corbin on Contracts* § 63.8, at 259; *cf. 1629 Joint Venture v. Dahlquist*, 770 P.2d 1352, 1354-55 (Colo. App. 1989) (specifically enforcing an agreement to transfer a 5% interest in a joint venture in return for procurement of a lessee for property owned by the joint venture).

¶ 59 Focusing on the Colorado case law (*Johnson* and *Frue*), Air Solutions and Vrbancic argue that those cases are "outdated." They say more recent authority recognizes that it is possible to value small, closely held businesses.[14] Putting aside Air Solutions and

---

[14] As noted above (and below), there are numerous more modern decisions from other jurisdictions holding that specific performance of a contract to sell shares in a closely held corporation is appropriate.

Vrbancic's focus on the wrong issue — the value of Air Solutions at the time of trial rather than the value of Spivey's future 49% interest — their argument suffers from at least two other flaws.

¶ 60 First, *Johnson* and *Frue* are precedents of the Colorado Supreme Court, which, unless they have been overruled, we must follow. *Town of Monument v. State*, 2018 COA 148, ¶ 18, *aff'd sub nom. Forest View Co. v. Town of Monument*, 2020 CO 52. And the supreme court hasn't overruled *Johnson* or *Frue*. Moreover, the cases Air Solutions and Vrbancic cite for the proposition that closely held businesses can be valued didn't involve requests for specific performance. Nor did they purport to overrule the longstanding and widely applied rule that specific enforcement of an agreement to convey an interest in a closely held business is proper.

¶ 61 Second, Air Solutions and Vrbancic posit an unduly restrictive notion of uniqueness in this context. It is true that one aspect of this uniqueness is the difficulty of valuing an interest for which there is no ready market. *See Johnson*, 87 Colo. at 212, 286 P. at 111; *Frue*, 6 Colo. at 321. But there's more to it than that. Damages may be inadequate "because the subject matter of the contract is unique or rare and cannot easily be duplicated or

because the obtaining of a substantial equivalent involves difficulty, delay, and inconvenience." *Corbin on Contracts* § 63.7, at 245; *see Williston on Contracts* § 67:8, at 212-13; Restatement (Second) of Conts. § 360 cmts. b, c.

¶ 62 As one leading treatise has put it, "each business is unique." *Corbin on Contracts* § 63.8, at 259; *see also* 3 Dan D. Dobbs, *Law of Remedies* § 12.8(2), at 200 (2d ed. 1993) (recognizing businesses as unique for this purpose and saying that "a contract to purchase shares of corporate stock in a small, close corporation" may be specifically enforced because "no market substitutes would be available"). That is, each business has attributes that set it apart from others, and that have an essentially unquantifiable value. *See Frue*, 6 Colo. at 322 (observing that a mining operation "may have a peculiar value to those acquainted with [its] affairs"); *see also Triple-A Baseball Club Assocs. v. Ne. Baseball, Inc.*, 832 F.2d 214, 223-24 (1st Cir. 1987) (specific enforcement of agreement to sell baseball franchise proper because, in part, the franchise was "of special interest" to the buyer; applying Maine law); *see also DeBauge Bros, Inc. v. Whitsitt*, 512 P.2d 487, 489 (Kan. 1973) ("Franchises are by their very nature unique and exclusive, which is the source of their

value to the possessor."); *Ne. Inv. Co. v. Leisure Living Cmtys., Inc.*, 351 A.2d 845, 855-56 (Me. 1976) (affirming specific performance of contract to buy corporate stock, in part because the business was "of special interest" to the buyer); *Madariaga v. Morris*, 639 S.W.2d 709, 711-12 (Tex. Ct. App. 1982) (affirming specific performance of contract to buy business because it had "a special, peculiar, unique value or character" that the buyer could not obtain elsewhere).[15]

¶ 63 Indeed, "[c]ourts have been *increasingly* willing to order specific performance in a wide variety of cases involving . . . contracts for the sale of a business or of an interest in a business represented by shares of stock." Restatement (Second) of Conts. ch. 16, topic 3, intro. note (emphasis added).

¶ 64 In this case, there was ample, undisputed evidence that, according to both Air Solutions and Vrbancic, Air Solutions is a market leader, having little competition in a very specialized

---

[15] Businesses have traditionally been treated like land in this respect. 12 Joseph M. Perillo, *Corbin on Contracts* § 63.8, at 259 (rev. ed. 2012). Colorado law has long held that specific performance is an appropriate remedy for breach of a contract to sell land. *See, e.g.*, *Hill v. Chambers*, 136 Colo. 129, 314 P.2d 707 (1957); *Clark v. Scena*, 83 P.3d 1191 (Colo. App. 2003); *Schreck v. T & C Sanderson Farms, Inc.*, 37 P.3d 510 (Colo. App. 2001).

industry. There is no evidence that Spivey could obtain a comparable substitute for an interest in this company elsewhere.

¶ 65 We therefore conclude that the district court erred in applying the law to determine whether damages are an adequate remedy. Under the circumstances of this case, damages aren't an adequate remedy.[16]

¶ 66 "[T]he primary criterion for the availability of specific performance has been the inadequacy of the legal remedy." *Corbin on Contracts* § 63.1, at 219; *see Allstate Ins. Co. v. Med. Lien Mgmt., Inc.*, 2015 CO 32, ¶ 15 (citing Restatement (Second) of Conts. § 359(1) for the proposition that "the remedy of specific performance is generally unavailable unless the promisee's remedy in damages would be inadequate"). But inadequacy of damages doesn't entitle a nonbreaching party to specific performance; other equitable considerations may justify denying that remedy. We therefore turn

---

[16] The Restatement takes the position that "if the adequacy of the damages remedy is uncertain, . . . [d]oubts should be resolved in favor of the granting of specific performance." Restatement (Second) of Conts. § 359 cmt. a (Am. L. Inst. 1981); *accord Corbin on Contracts* § 63.4, at 237 ("Where there is reasonable doubt as to the adequacy of damages as a remedy, this doubt should be resolved in favor of granting a decree of specific performance.").

to the other reasons given by the district court for denying specific performance and to the additional reason advanced by Air Solutions and Vrbancic.

b. Workability, Including the Degree of Certainty

¶ 67 The district court viewed the contract as "not workable" because of "hostility between the parties[] and employees" and because it fails to address several matters the court deemed critical. These were (1) a lack of "detail regarding how shares would be distributed"; (2) a lack of detail as to when shares would be distributed; and (3) a lack of detail on "what to do in the event of disagreement." To these, Air Solutions and Vrbancic add that the contract doesn't say how Spivey's interests — particularly his contingent, future 49% interest — "will vest." We hold that these concerns fail as a matter of law to justify denying specific performance, either because they are insufficient under governing law or ignore the clear terms of the contract that the jury found, or both.

¶ 68 The district court didn't cite any authority for the notion that specific performance of a contract for the sale of an interest in a business isn't appropriate if the promisee and the promisor don't

get along. Air Solutions and Vrbancic don't cite any such authority either. Nor have we found any. We note that each of the numerous cases approving specific performance of a contract for sale of an interest in a business — some of which are cited above — involve at least some degree of discord: one party sought an interest in a business that the other didn't want him to have. *See, e.g.*, *Brown*, 361 N.W.2d at 542-43 (granting specific performance of an agreement to transfer a 50% interest in a business after "[f]riction developed" between the promisee and one of the promisors after they had been running the business together for two years).

¶ 69 Moreover, the district court's concern about this "hostility" between Spivey and Vrbancic (and between Spivey and Air Solutions employees) appears to have assumed that allowing Spivey to hold an interest in the business would entitle Spivey to some active role in the company's operations. But the contract that the jury found doesn't entitle Spivey to any such role, nor would his stake (even his potentially increased stake) in the company.

¶ 70 The remaining difficulties expressed by the district court, Air Solutions, and Vrbancic relate to the degree of certainty or definiteness expressed by the contract.

¶ 71 "Contracts must be *reasonably certain* to justify a decree of specific performance. Courts cannot make contracts for parties and then order them specifically performed." *Schreck*, 37 P.3d at 514 (emphasis added); *accord Shull v. Sexton*, 154 Colo. 311, 316, 390 P.2d 313, 316 (1964). True, as Air Solutions and Vrbancic point out, the supreme court has said that a greater degree of certainty is required to justify specific performance than would be required to award damages. *Hill v. Chambers*, 136 Colo. 129, 133, 314 P.2d 707, 709 (1957). But this means only that the contract's terms must be "*sufficiently* certain to provide a basis for an appropriate order." Restatement (Second) of Conts. § 362 (emphasis added); *see Hill*, 136 Colo. at 133, 314 P.2d at 709 ("[T]he contract must be free from ambiguity and it must be clearly established that the demanded performance is in accordance with the actual agreement of the parties."); *Howard v. Beavers*, 128 Colo. 541, 547-48, 264 P.2d 858, 861 (1953) (alleged contract as to which party sought specific performance was not sufficiently clear because the court "could not determine by the contract what was to be done to constitute performance"); *Schreck*, 37 P.3d at 514 ("The contract itself must make the precise act to be done clearly ascertainable. It

is fundamental that to enable the court to decree specific performance, the terms of the contract must be clear, definite, certain, and complete."); *Corbin on Contracts* § 64.13, at 411 ("Specific performance will not be decreed unless the terms of the contract are defined sufficiently that the acts to be performed can be ascertained and that the court can determine whether or not the performance rendered is in accord with the contractual duties assumed by the defendant."); *Williston on Contracts* § 67:4, at 193 ("[E]quity will not grant specific performance unless the terms of the contract are sufficiently certain for the court to decree with some exactness what the defendant must do."); Dobbs, § 12.8(1), at 192. It doesn't mean that absolute certainty concerning every aspect of the contract is required. "Although a contract may be uncertain or incomplete in some respects, its specific performance may nevertheless be decreed where the uncertainty or incompleteness relates to matters which the law makes certain or complete by presumption, rule, or custom and usage." *Shull*, 154 Colo. at 316, 390 P.2d at 316; *accord Schreck*, 37 P.3d at 514; *Corbin on Contracts* § 64.13, at 413-14. And, importantly for purposes of this case, "the fact that matters collateral to the primary undertaking or

solely concerned with the performance of the contract are not expressed in the contract is no bar to the remedy." *Williston on Contracts* § 67:4, at 195.[17]

¶ 72 Along these same lines, the fact that the parties may have contemplated preparing a more formal agreement is no bar to specific performance. *See, e.g.*, *Coulter v. Anderson*, 144 Colo. 402, 409-10, 357 P.2d 76, 80-81 (1960) (affirming specific performance of a contract to buy a ranch; recognizing that the fact the parties may have intended to prepare "a written or more formal contract" is no bar to enforcement of the contract).

¶ 73 We conclude that the contract that the jury found is reasonably certain in its terms. Indeed, it's rather simple. It sets forth a purchase price ($250,100), clearly identifies the thing purchased (specific percentages of an interest in Air Solutions), and says when the thing purchased is to be transferred (in the case of

---

[17] Commentators have observed that over the years courts have become less rigid in applying this rule of reasonable certainty. *See, e.g.*, *Corbin on Contracts* § 64.13, at 414; 25 Richard A. Lord, *Williston on Contracts* § 67:4, at 199 (4th ed. 2002); 3 Dan D. Dobbs, *Law of Remedies* § 12.8(3), at 211 (2d ed. 1993); *see also* Restatement (Second) of Conts. § 362 cmt. b.

the initial 17.5% of the company, upon formation of the contract; in the case of the 49% interest, upon repayment of the SBA loan).

¶ 74 As noted, the district court found that the contract was too indefinite to be specifically enforced because "there was no detail regarding how the shares would be distributed, or when that would happen, or what to do in the event of disagreement." Air Solutions and Vrbancic add that the contract doesn't say how the future 49% interest "will vest." Air Solutions and Vrbancic also pose a series of questions that they contend further show the indefiniteness of the contract: "Could a third owner join the company? Can [Air Solutions] issue new shares without diluting Mr. Spivey's interest? Could either party assign or sell his interests? Will the agreement bind either party's successors?"

¶ 75 We aren't persuaded that any of these professed deficiencies preclude specific enforcement of the contract that the jury found, for several reasons.

¶ 76 First, as to issuance of the shares, under the agreement Spivey is plainly entitled to a 17.5% interest now. Recall that Spivey's 17.5% interest arose, or vested, when he performed his obligation under the contract by tendering $250,100 to be put

toward the purchase. (And we observe that Vrbancic told the SBA and the bank in late 2017 that Spivey owned 17.5% of Air Solutions.) As for the potential 49% interest, it plainly vests, if ever, upon Air Solutions' full repayment of the SBA loan. The law implies that Spivey must receive his interest within a "reasonable time" of that event, *Shull*, 154 Colo. at 317, 390 P.2d at 316 (stating that "[c]ourts have applied the doctrine of performance within a reasonable time where the contract fails to specify the time for the discharge of obligations"; affirming a decree of specific performance), and it strains reason beyond the breaking point to suggest that Air Solutions and Vrbancic will not know precisely when that event occurs.

¶ 77 To the extent the court suggested, and plaintiffs suggest, that there is uncertainty as to precisely how the interests should be transferred, we see no fatal uncertainty. Vrbancic is the company's sole shareholder and the holder of all shares thus far issued by the company. But whether Spivey's shares come from Vrbancic directly or from Air Solutions is of no import. Via appropriate declaratory relief ordered against Air Solutions and Vrbancic (discussed below), consistent with the Colorado Business Corporation Act, the means

for Spivey to acquire his shares can be adequately described. It isn't rocket science. *See* Restatement (Second) of Conts. § 362 cmt. b ("Apparent difficulties of enforcement due to uncertainty may disappear in the light of courageous common sense."); *Corbin on Contracts* § 64.13, at 419 (same, and cautioning courts not to make "a mountain out of a molehill" when considering the degree of necessary completeness).

¶ 78 Second, all other concerns raised by the court and plaintiffs — such as how to resolve disagreements between shareholders and whether shareholders may assign their shares — can be alleviated by application of the Colorado Business Corporation Act and related law. *See, e.g.*, § 7-106-202, C.R.S. 2022 (relating to issuance of shares); § 7-106-208, C.R.S. 2022 (relating to restrictions on transfer of shares); § 7-107-202, C.R.S. 2022 (relating to the voting entitlement of shares); §§ 7-108-101 to -501, C.R.S. 2022 (relating to corporate governance). As discussed, a contract isn't rendered unenforceable based on indefiniteness where that indefiniteness concerns matters that the law clarifies. *Shull*, 154 Colo. at 316, 390 P.2d at 316; *Schreck*, 37 P.3d at 514; Restatement (Second) of Conts. § 362 cmt. b.

¶ 79 Third, the matters raised by the court and plaintiffs are collateral to the subject of the contract — a relatively straightforward agreement for the purchase of shares for specific consideration. *See Williston on Contracts* § 67:4, at 195. And there is no indication that the parties intended any of these details to be conditions precedent to the formation of the contract that the jury found. *See Roaring Fork Land & Cattle Co. v. O'Brien*, 476 P.2d 276, 278 (Colo. App. 1970) (not published pursuant to C.A.R. 35(f)) ("[T]he mere fact that certain conditions or terms were omitted does not prevent a mutually binding contract from coming into effect. The omission of details, which were not intended by the parties as being conditions precedent to the formation of a contract, will not prohibit a court from decreeing specific performance in cases where the essential terms of the agreement have been reached, and the parties intend to be bound by these terms." (citing *Coulter*, 144 Colo. 402, 357 P.2d 76)); *see also O'Hara Grp. Denver, Ltd. v. Marcor Hous. Sys., Inc.*, 197 Colo. 530, 536, 595 P.2d 679, 683 (1979) (matter collateral to contract for sale of land wasn't an essential term); *Bell v. McCann*, 535 P.2d 233, 235 (Colo. App. 1975) (not

published pursuant to C.A.R. 35(f)) (same as to multiple collateral matters).[18]

¶ 80 The district court didn't cite any authority, nor do Air Solutions and Vrbancic, supporting the notion that any of the matters they raise as barriers to specific performance are necessary to granting that remedy for a contract to purchase an interest in a business. There is in fact substantial authority supporting the applicability of that remedy for contracts no more detailed than the contract that the jury found in this case. The Restatement itself uses such a contract as an example of a contract that may be specifically enforced:

> A contracts to sell to B 1,000 shares of stock in the X corporation for $10,000. A repudiates the contract and B sues for specific performance. Other shares of X Corporation are not readily obtainable and B will suffer an uncertain loss as a result of diminished voting power. Specific performance may properly be granted.

---

[18] Were any of these matters essential to the formation of the contract, the jury's finding of a contract would be clearly erroneous. But Air Solutions and Vrbancic haven't cross-appealed the jury's verdict, and they and we must therefore accept as settled that the jury rightly found an enforceable contract.

Restatement (Second) of Conts. § 360 cmt. c, illus. 7.

¶ 81 In *Frue*, 6 Colo. at 319-22, the Colorado Supreme Court affirmed a decree of specific performance of a contract to sell shares in a mining company at a specified price. There is no indication in that case that the contract was any more detailed than that.

¶ 82 In *Plains Iron Works Co. v. Haggott*, 72 Colo. 228, 229-32, 210 P. 696, 696-98 (1922), the supreme court affirmed a judgment for specific performance based on a contract to procure purchasers of a company in exchange for $10,000 and a 10% interest in the corporation to be formed for the purpose of buying the company. *See Plains Iron Works Co. v. Haggott*, 68 Colo. 121, 188 P. 735 (1920) (prior opinion in the same case setting forth the terms of the agreement).[19] The contract at issue in that case was no more detailed than the contract that the jury found in this case.

¶ 83 Similarly, in *1629 Joint Venture*, 770 P.2d at 1354-55, a division of this court affirmed a decree of specific performance of an agreement to transfer a 5% interest in a joint venture to a director

---

[19] Interestingly, the court specifically enforced the contract against the newly formed corporation and against an individual to whom shares had been conveyed.

of the joint venture in return for procuring a lease of property owned by the joint venture. Again, there is no indication in the case that the agreement was any more detailed than that.

¶ 84 These decisions are consistent with decisions from other jurisdictions approving of specific performance of similarly bare-bones, but clear, agreements to buy interests in closely held businesses. *See, e.g.*, *Bellagio Ins.*, 2005 WL 677223, at *1-4 (granting specific performance of loan agreements calling for periodic issuance of shares in borrower in the event of nonpayment); *Okun v. Morton*, 250 Cal. Rptr. 220, 223-28 (Ct. App. 1988) (affirming decree of specific performance of contract entitling investor to a proportionate interest in parent corporation's ventures; rejecting argument that contract was too uncertain because it didn't address "the manner in which liabilities are to be shared between the parties and the effect of offering other investors the opportunity to participate in any given deal . . . [or] when and how [the defendant] must offer plaintiff the option to invest"); *Brown*, 361 N.W.2d at 541-44 (directing specific performance of agreement to transfer a 50% interest in a company in return for a loan enabling another investor to purchase a company); *Dominick*, 367 S.E.2d at

488-90 (directing decree of specific performance of option of surviving shareholder to purchase shares of deceased shareholder for "the book value of the stock on the date the option was exercised").

¶ 85 Against all this, Air Solutions and Vrbancic lean on *Howard*, in which the Colorado Supreme Court affirmed a district court's decision denying specific performance of an alleged contract for the exchange of real property. The court held that the district court "could not determine by the contract what was to be done to constitute performance" because the contract was "silent as to the time and terms of payment." 128 Colo. at 547, 264 P.2d at 861.

¶ 86 *Howard* is distinguishable, however. The contract in this case includes the time and terms of payment as well as the time and terms of Vrbancic's performance. No "essential term" is lacking in the contract that the jury found.[20]

---

[20] The partial dissent says we "argu[e] why Colorado's courts should apply the remedy of specific performance in a manner that is more flexible than they have historically." *See infra* ¶ 190. We do no such thing. Nothing in our discussion of the law of specific performance is inconsistent with current Colorado law. The fact is that Colorado appellate courts have addressed some of the specific issues raised in this appeal and courts in other jurisdictions (and

c. Public Policy

¶ 87 Having concluded that damages aren't an adequate remedy and that the contract is sufficiently definite to allow for specific performance, we're left only with Air Solutions and Vrbancic's argument that the contract shouldn't be specifically enforced because it violates public policy — a federal regulation relating to SBA loans referred to by the parties as the 20% Rule.[21] We see no such violation.

¶ 88 We note initially that Air Solutions and Vrbancic frame this issue as one of "public policy": they argue that the agreement violates public policy because it is an attempt to circumvent the 20% Rule. But this framing potentially creates a problem for Air Solutions and Vrbancic; if they are right, under Colorado law, the

---

commentaries) have addressed others. But the underlying principles know no geographic boundary, and those principles, as articulated in the Colorado cases, are broad enough to support our analysis.

[21] To the extent the district court denied specific performance because Spivey was to get back his $250,100 investment, the court erred because, as all parties agree, the district court subsequently determined that Spivey isn't entitled to the return of his $250,100. We therefore don't need to further address that particular justification.

agreement, or at least those portions of the agreement that violate public policy,[22] would be void — that is, unenforceable. *See Fed. Deposit Ins. Corp. v. Am. Cas. Co. of Reading*, 843 P.2d 1285, 1290 (Colo. 1992); *Johnson Fam. L., P.C. v. Bursek*, 2022 COA 48, ¶¶ 10, 28. (Indeed, Air Solutions and Vrbancic argued below that the alleged contract was void for this reason.) But the jury found an enforceable contract, and because Air Solutions and Vrbancic haven't cross-appealed that verdict, they can't now challenge it on appeal. *See Haney v. Pub. Utils. Comm'n*, 194 Colo. 481, 485, 574 P.2d 863, 865 (1978); *City of Delta v. Thompson*, 37 Colo. App. 205, 207, 548 P.2d 1292, 1294 (1975).

¶ 89 Perhaps Air Solutions and Vrbancic can raise this issue on appeal because in doing so they aren't seeking to increase their rights under the judgment. *See Atl. Richfield Co. v. Whiting Oil & Gas Corp.*, 2014 CO 16, ¶ 19 n.6; *Farmers Grp., Inc. v. Williams*, 805 P.2d 419, 428 (Colo. 1991). We will assume they can.

---

[22] Air Solutions and Vrbancic argue that the agreement violates public policy in its entirety.

¶ 90 Air Solutions and Vrbancic invoke the principle that "[s]pecific performance . . . will not be granted if the act or forbearance that would be compelled or the use of compulsion is contrary to public policy." Restatement (Second) of Conts. § 365. But they don't explain how the "act . . . that would be compelled" — transferring an interest in Air Solutions to Spivey — would itself violate public policy. Instead, they posit that the mere intent to circumvent the 20% Rule brings the contract within the ambit of the public policy bar. But we don't see any violation of the 20% Rule or any intent to do so.

¶ 91 13 C.F.R. § 120.160(a) provides that "[h]olders of at least a 20 percent ownership interest generally must guarantee the [SBA] loan." The SBA has adopted policies to carry out Section 7(a) business loan programs, and Air Solutions and Vrbancic rely on one of them. It provides as follows:

> 4. Reducing Ownership Interest:
>
> a) Any person subject to the guaranty requirements six months prior to the date of the loan application would continue to be subject to the requirements even if that Person has changed their ownership interest to less than 20%.

SBA Standard Operating Procedure 50 10 5 (J), subpart B, ch. 4, § II.A.4 (effective Jan. 1, 2018), https://perma.cc/W2H4-BNWG. By its plain terms this reduction provision applies only when an owner *reduces* his interest from at least 20% to less than 20% within the six months before the borrower submits the loan application. In this case, though the parties were negotiating during that six-month period and Spivey clearly wanted more than a 20% interest, there is no evidence that he actually obtained an interest of at least 20% during the six-month period. Vrbancic represented to the SBA during the loan application process that Spivey's interest was 17.5%. The contract that the jury found, which came into being on January 29, 2018, called for Spivey to have only a 17.5% interest during the term of the loan. In short, while there was a reduction in Spivey's *demand*, there was no reduction in the ownership percentage for which he ultimately negotiated and on which he reached agreement.[23] Thus, the

---

[23] Our conclusion that there was a reduction in Spivey's demand but not his actual ownership is also consistent with Air Solutions and Vrbancic's position throughout this litigation that there was *never* an enforceable agreement entitling Spivey to any particular percentage of ownership.

contract that the jury found doesn't violate the 20% Rule. Nor do we see any intent to violate that rule; instead, the parties structured their agreement to avoid violating the 20% Rule.

d. Conclusion

¶ 92 The upshot of all this is that the impediments to specific performance found by the district court and asserted by Air Solutions and Vrbancic are no impediment at all. It follows that the district court abused its discretion by denying Spivey's request for specific performance. On remand, the court must craft a decree of specific performance enabling Spivey to receive the full benefit of his bargain.[24]

B. Declaratory Judgment (Vrbancic)

¶ 93 The district court ruled that the jury's verdict on Spivey's breach of contract counterclaim rendered his counterclaims against

---

[24] Because Spivey isn't entitled to an award of damages in addition to specific performance, the award of damages must be vacated. And because we have determined that Spivey is entitled to his preferred remedy of specific performance, we don't need to address his contention that the district court improperly instructed the jury on damages or his contention that the court erred by refusing to order Air Solutions to return his $250,100 investment.

Vrbancic for declaratory judgment moot. We agree with Spivey that the district court erred by so ruling.[25]

¶ 94 Section 13-51-106, C.R.S. 2022, of the Uniform Declaratory Judgment Law (CUDJL) provides that "[a]ny person interested under . . . other writings constituting a contract or whose rights, status, or other legal relations are affected by a . . . contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status, or other legal relations thereunder." *Accord* C.R.C.P. 57(b); *see also Zab, Inc. v. Berenergy Corp.*, 136 P.3d 252, 256-60 (Colo. 2006) (a court may grant declaratory relief under the CUDJL on an oral contract). Spivey is a "person interested under" a contract and therefore may seek a declaration of rights and legal obligations under that contract.

¶ 95 The only reason the court gave for declining to rule on the merits of Spivey's declaratory judgment counterclaims against Vrbancic was that the jury's verdict finding a contract and a breach

---

[25] Spivey voluntarily dismissed his fourth claim for declaratory judgment before trial.

rendered the claims moot. The court didn't explain why this is so, nor does Vrbancic in defending the court's judgment. That conclusion can't be squared with section 13-51-105, C.R.S. 2022, of the CUDJL, which says that a court has the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." *Accord* C.R.C.P. 57(a). Nor can it be squared with section 13-51-112, C.R.S. 2022, which says that "[f]urther relief based on a declaratory judgment or decree may be granted when necessary or proper." *Accord* C.R.C.P. 57(h), (m); *Troelstrup v. Dist. Ct.*, 712 P.2d 1010, 1012 (Colo. 1986) ("The granting of declaratory relief is a matter resting in the sound discretion of the trial court and is not precluded even when there is another adequate remedy." (citing C.R.C.P. 57(m))); *see also Atchison v. City of Englewood*, 180 Colo. 407, 411-14, 506 P.2d 140, 142-43 (1973) (other remedies need not be sought in the same action but may be sought in a separate action). Thus, as the Colorado Supreme Court said long ago, a judgment under the CUDJL "leaves the parties to pursue the remedies which the law provides." *San Luis Power & Water Co. v. Trujillo*, 93 Colo. 385, 391, 26 P.2d 537, 540 (1933). In other words, the CUDJL provides

for a remedy that may be cumulative of other remedies. *See Clark v. Olsen*, 715 P.2d 993, 996 (Idaho 1986) ("[D]eclaratory relief may be sought in conjunction with other types of relief in the same action."); *Forbes v. Tex. Dep't of Pub. Safety*, 335 S.W.2d 439, 442 (Tex. Civ. App. 1960) (declaratory judgment is an alternative and cumulative remedy); *Berrett v. Stevens*, 690 P.2d 553, 556 (Utah 1984) ("Courts may render declaratory judgments in conjunction with any other appropriate relief."); *cf. Wysowatcky v. Francis*, 483 P.2d 1353, 1354-55 (Colo. App. 1971) (not published pursuant to C.A.R. 35(f)) (party could obtain declaration of validity of option to buy property while simultaneously seeking specific performance of the option in another case).[26]

¶ 96 Particularly in light of our holding that Spivey is entitled to specific performance of the contract, the clear conflict between Spivey and Vrbancic, and the consistently strident tone of the

---

[26] This isn't to say that a court must enter a declaratory judgment whenever one is requested. Though the CUDJL is to be liberally construed and administered, § 13-51-102, C.R.S. 2022; *accord* C.R.C.P. 57(k), the CUDJL and C.R.C.P. 57 include or contemplate limitations on the availability of the remedy. But Vrbancic doesn't argue that any of those limitations apply in this case.

litigation, we believe that a declaratory judgment may be useful in that it can help "terminate the uncertainty or controversy giving rise to the proceeding." § 13-51-110, C.R.S. 2022; C.R.C.P. 57(f); *see Zab, Inc.*, 136 P.3d at 261; *People ex rel. Inter-Church Temperance Movement of Colo. v. Baker*, 133 Colo. 398, 404, 297 P.2d 273, 277 (1956).[27]

¶ 97 We balk, however, at dictating the terms of any declaratory relief. On remand, the district court should rule first on the matter, consistent with this opinion and after considering the parties' respective positions as to appropriate terms.

C. Declaratory Judgment (Air Solutions)

¶ 98 The district court also denied Spivey's declaratory judgment counterclaims against Air Solutions as moot because of the jury's verdict. For the reasons discussed above, the court erred by so

---

[27] To the extent Air Solutions and Vrbancic contend that Spivey waived his claim for declaratory relief, that contention lacks any record support. The parties and the court expressly agreed that the jury would decide contract formation, breach, and damages, along with the fraud claims against Vrbancic, and that the court would subsequently resolve the remaining claims and counterclaims, save for one declaratory judgment counterclaim relating to business expenses and the breach of contract and fraud claims against Air Solutions, which Spivey voluntarily dismissed.

concluding. We therefore direct the court on remand to consider and rule on the merits of Spivey's declaratory judgment counterclaims against Air Solutions.

D. Promissory Estoppel (Air Solutions)

¶ 99 The district court ruled against Spivey on his promissory estoppel counterclaim against Air Solutions because the jury's finding of a contract on the subject of the alleged promise rendered the promissory estoppel counterclaim untenable. *See, e.g.*, *Ward v. McGarry*, 2022 UT App 62, ¶ 15, 511 P.3d 1213, 1218 (a promissory estoppel claim isn't viable if there is an enforceable contract governing the rights and obligations of the parties); *Bennett v. State Farm Fire & Cas. Co.*, 121 N.Y.S.3d 298, 299 (App. Div. 2020) (same).

¶ 100 Spivey argues that the court erred because the contract the jury found is between him and Vrbancic, not him and Air Solutions. He may have a point, but only to a point.

¶ 101 The promise Spivey alleged was the same "promise" alleged to give rise to the contract. Vrbancic made that promise. As Air Solutions points out, it could be held liable for any promise by Vrbancic only if Spivey pleaded and proved some theory of

corporate liability for Vrbancic's actions, and Spivey didn't. It isn't enough for Spivey to argue after the fact that Vrbancic "is the company." He was required to plead, prove, and ask for a ruling on some theory of corporate liability — whether that theory be one of agency or piercing the corporate veil. *See, e.g.*, *Citywide Banks v. Armijo*, 313 P.3d 647, 652-53 (Colo. App. 2011) (discussing principal liability for agent's acts); *Dill v. Rembrandt Grp., Inc.*, 2020 COA 69, ¶¶ 28-31 (discussing the requirements for piercing the corporate veil). Because he didn't do so, Air Solutions was entitled to judgment on this claim. *See Roque v. Allstate Ins. Co.*, 2012 COA 10, ¶ 7 ("We can affirm for any reason supported by the record, even reasons not decided by the trial court.").

E. Unjust Enrichment (Air Solutions)

¶ 102 The district court ruled against Spivey on his counterclaim against Air Solutions for unjust enrichment on the basis that the jury's finding of a contract between Spivey and Vrbancic barred any such claim. The case the court relied on for this proposition — *Interbank Investments, LLC v. Eagle River Water & Sanitation District*, 77 P.3d 814 (Colo. App. 2003) — involved, as Spivey points out, claims for breach of contract and unjust enrichment against

the same party. *See also Pulte Home Corp. v. Countryside Cmty. Ass'n*, 2016 CO 64, ¶ 64. But in this case, the contract was between Spivey and Vrbancic, not Spivey and Air Solutions. It may well be that the existence of a contract with one party doesn't necessarily bar an unjust enrichment claim against another party, even if the unjust enrichment claim involves the same subject matter as the contract.[28] We don't need to enter that thicket, however, because Spivey's claim against Air Solutions fails in any event. *See Roque*, ¶ 7.

¶ 103 Spivey expressly pleaded his unjust enrichment claim in the alternative — that is, he sought recovery for unjust enrichment if, and only if, the contract he alleged "is not enforceable."[29] That contract is enforceable; indeed, it is specifically enforceable.

---

[28] Restatement (First) of Restitution § 110 (Am. L. Inst. 1937) and Restatement (Third) of Restitution & Unjust Enrichment § 25 (Am. L. Inst. 2011) take the position that, at least in some circumstances, a claim for unjust enrichment may be brought against a third party that received a benefit as a result of a contract breached by one of the contracting parties.

[29] Spivey also pleaded his promissory estoppel claim in the alternative.

¶ 104 Because we have concluded that Spivey is entitled to specific performance of the contract, he will receive what he paid for. To allow him to recover against Air Solutions on a theory of unjust enrichment would give him a windfall or double recovery. This is so because the remedy for unjust enrichment is payment of the value of the benefit conferred, otherwise known as restitution, *see Scott v. Scott*, 2018 COA 25, ¶ 47; Restatement (Third) of Restitution & Unjust Enrichment § 1 & cmts. a, b (Am. L. Inst. 2011), and the value of what he paid for is measured by the value of the shares he is entitled to receive. He simply isn't entitled to both the shares and restitution of the value of those shares. *See Lexton-Ancira Real Est. Fund, 1972 v. Heller*, 826 P.2d 819, 823 (Colo. 1992) ("Generally, a plaintiff may not receive a double recovery for the same wrong."); *Taylor Morrison of Colo., Inc. v. Terracon Consultants, Inc.*, 2017 COA 64, ¶ 27. Put differently, and articulated in terms consistent with the elements of a claim for unjust enrichment, under these circumstances, it would not be unjust for Air Solutions to retain the benefit conferred by Spivey without compensating him in addition to issuing him the shares to which he is entitled.

¶ 105 We therefore conclude that the district court didn't err by denying Spivey relief on this claim.

III. Disposition

¶ 106 Those portions of the judgment denying Spivey specific performance of the contract that the jury found and declaratory relief against both Air Solutions and Vrbancic are reversed. The award of damages to Spivey on his breach of contract counterclaim is vacated. The case is remanded to the district court for further proceedings on the specific performance and declaratory relief issues consistent with the views we have expressed in this opinion. The judgment is otherwise affirmed.

JUDGE WELLING concurs.

JUDGE SCHUTZ concurs in part and dissents in part.

JUDGE SCHUTZ, concurring in part and dissenting in part.

¶ 107 The majority concludes the trial court erred by denying the claim of appellant, Christopher Spivey, for specific performance. I respectfully disagree for a number of reasons.

¶ 108 The majority's decision is premised upon a contract inferred from the trial court's elemental instruction defining a claim for breach of contract, rather than the actual verdict that establishes the limited contract the jury found. This erroneous interpretation of the verdict leads the majority to misconstrue the adequacy of the damage remedy the jury granted, and hence the propriety of the trial court's denial of specific performance.

¶ 109 The majority also fails to give appropriate deference to the trial court's factual findings and equitable determinations. The majority's misconstruction also prevents it from appreciating the material contractual terms that were never agreed upon by the parties, the present inability of the parties to fulfill the letter or spirit of the previously contemplated agreements, and the equitable considerations that preclude specific performance as a remedy.

¶ 110 The majority's decision forces two alienated parties into an undefined closely held corporate relationship that is fraught with

uncertainty and conflict. Concluding that such a result is contrary to the operative facts and controlling law, I respectfully dissent.

¶ 111 To provide context for these concerns, I begin with a discussion of the facts that led to this dispute, mindful of our obligation to consider the evidence presented in the light that favors the factual determinations expressly or implicitly made by the jury in reaching its verdict, and by the court in resolving the parties' equitable claims. *See, e.g.*, *Bohrer v. DeHart*, 961 P.2d 472, 476-77 (Colo. 1998) (we review the record to determine if there is sound evidence from which the jury logically could have reached its verdict); *Tyra Summit Condos. II Ass'n v. Clancy*, 2017 COA 73, ¶ 14 ("When reviewing factual findings, we defer to the district court's findings so long as they are supported by the record."). I then address the differences between the contract that the majority assumes the jury found and the actual contract as documented in the jury's verdict. Finally, I apply the jury's and court's findings to the proper contract and conclude the trial court did not err by concluding that (1) the damage award adequately compensated Spivey for breach of contract, and (2) the remedy of specific performance was not warranted.

I. Background

¶ 112 Airpro is the tradename of a Denver-based air filtration business. In 1987, Mel Zeman and Doug Matlock purchased Airpro from their employer. The two of them operated the business through a closely held corporation named Air Cleaning Specialists, Inc. (ACS). Zeman and Matlock were the sole and equal shareholders of ACS. Both played a central role in the day-to-day operation of Airpro. Zeman and Matlock encouraged an inclusive work environment with loyalty and trust among employees. A former employee testified the business environment was that of "a family."

¶ 113 Vrbancic started working for Airpro in 2011. He became a trusted employee. When Zeman and Matlock decided to retire in 2016, Vrbancic was anxious to carry on the Airpro legacy. Vrbancic had significant industry experience, personal relationships, and knowledge of Airpro's business and work culture, but he lacked the initial capital to complete the purchase. Vrbancic formed Air Solutions as a closely held corporation that would purchase all of the outstanding stock of ACS and thereby own the Airpro business.

¶ 114 In December 2016, Zeman and Matlock committed to sell Airpro to Vrbancic for a purchase price of $2,500,000, and Vrbancic arranged for a $1,895,000 small business loan from Chase Bank. Vrbancic also agreed to sign promissory notes payable to Zeman and Matlock totaling $375,000. Thus, the purchase would require Vrbancic to personally guaranty $2,270,000 in debt. But Vrbancic still needed approximately $250,000 in cash to complete the purchase. Vrbancic sought a personal investor to close this gap. Steve Bush, the attorney who had assisted the parties with the initial formation of Air Solutions, arranged for Vrbancic to meet a former client looking for an investment opportunity, Spivey.

A. Spivey's Negotiations with Vrbancic

¶ 115 Spivey had no experience in the air filtration business, but he was an experienced certified public accountant (CPA). He was looking for a passive investment opportunity. Spivey was interested in the opportunity with Vrbancic because Airpro was a successful business in the industrial sector with less than $10,000,000 in annual revenues.

¶ 116 In October 2017, Vrbancic and Spivey met to determine if they could agree upon a deal by which Spivey would provide the

$250,000 in cash necessary to close the purchase. At the completion of this meeting, although no definitive agreement had been reached, Bush understood the parties contemplated that Spivey would provide the company $250,100, which would be used to help fund the purchase of Airpro, and, in exchange, Spivey would receive a one-third interest in the company.

¶ 117 The contemplated one-third interest became problematic, however, because it would have required Spivey, as an owner with an equity interest of 20% or more of Air Solutions, to personally guarantee Air Solutions' SBA loan. *See* 13 C.F.R. § 120.160(a) (2017). The majority notes that Spivey testified he was willing to make the necessary personal guaranty, but that he agreed to reduce his ownership interest at the suggestion of the banker coordinating the SBA loan, rather than delay the closing. Spivey's testimony was contradicted by his later statement to Vrbancic that he was unwilling to guarantee the SBA loan. In addition, the banker testified he had no recollection of encouraging Spivey to reduce his ownership interest to avoid the requisite SBA guaranty. Spivey's unwillingness to sign the SBA guaranty is also consistent

with the fact that he refused to guarantee the loans payable to Zeman and Matlock.

¶ 118 Given these facts and Spivey's sophistication in investment matters, I disagree with the majority's suggestion that the banker somehow caused Spivey to reduce his contemplated ownership interest from 33.3% to 17.5%. Rather, the persuasive evidence supports the conclusion that the parties settled upon an initial 17.5% ownership interest to avoid Spivey having to personally guarantee the SBA loan.

¶ 119 The negotiations between Vrbancic and Spivey continued from October through January 2018. On January 23, 2018, the two of them met with Bush and their CPA. Bush testified that Vrbancic and Spivey informed them that they would utilize an S corporation structure for Air Solutions, and that Spivey's input of $250,100 would be in the form of a loan to be repaid to Spivey over time. After this meeting, Spivey and Vrbancic continued to discuss between themselves their future roles in the company and whether Spivey might have the right to obtain additional equity.

B. The Napkin Email

¶ 120 Because of its central importance to Spivey's claim for specific performance, it is necessary to review in some depth the content of the email exchanges between Spivey, Vrbancic, and Bush during the last three days of January 2018. These emails were introduced into evidence at trial as a combined Exhibit 31, which the parties characterized as the napkin email.

¶ 121 The correspondence began with Spivey's email of January 29, which, after discussions with Vrbancic, was slightly revised before Vrbancic forwarded it to Bush. In the forwarded email, Spivey set forth his perspective of the parties' negotiations to date:

> Originally, I was merely going to be an investor, with limited involvement for 1/3. We discussed and revised the thinking to 50% with control (for me) when it was suggested that I would be required to provide a personal guarantee together with you (joint and several) . . . [the ellipsis is part of the email] Later [the bank providing the SBA loan] talked me down to less than 20% i.e. 17.5% to avoid having to rewrite the loan application so I would not have to sign the Personal Guarantee. I complied with the initiative to grease the skids and enable the loan application to proceed, since it had previously been approved and would be the course of least resistance. Subsequent to the earlier discussion it became apparent that it was your preference that I

> become the "new Doug Matlock" and after thoughtful consideration, I too came around to stepping into Doug Matlock's (the former 50% owner) place and role, taking on a full time role with the daily obligations and presence, being on payroll and fulfilling a role as controller CFO [chief financial officer] as has [Matlock] and the role sort to be determined with [Vrbancic] taking on the role of [Zeman] and [Spivey] taking on the role formerly performed by [Matlock] with slight modifications as suits our skill sets.

¶ 122 After providing this summary of their negotiations to date, Spivey described the type of shareholders' agreement that would be acceptable to him.

> Here is what I am seeking in a shareholder agreement:
>
> To be your 50-50, similar to and inspired by the former ownership of [Zeman and Matlock] who enjoy a 50-50 arrangement, but seemingly without one person identified in control. Notwithstanding the foregoing, we have agreed and acknowledge that while we are 50-50 with respect to profits and losses, Vrbancic will have control in the event of indecision or dispute. But to compensate Spivey he will have a "[p]ut option" [description of the proposed put option terms].
>
> . . . .
>
> I understand the sensitivity with respect to the form vs. substance, and am open to a number of alternatives discussed with Attorney Steve Bush and Dan Gordano.

> I want a first right of refusal to buy your interests or shares [description of the proposed right of first refusal].
>
> However it happens in form or substance, I expect to be 50:50.

¶ 123 The following day Vrbancic jointly forwarded these email exchanges to Bush along with the following notation: "Please review this draft it will be [Vrbancic] 51 [Spivey] 49 also I want to talk to you about these percentages I think we should be equal let's set up a time to talk."

C. The Closing of the Purchase Agreement

¶ 124 Spivey eventually delivered $250,100 to Vrbancic. Vrbancic used these funds to complete the asset purchase agreement with Zeman and Matlock, which closed on January 31, 2018. At the closing, Vrbancic signed and personally guaranteed the SBA loan in the amount of $1,895,000, and the promissory notes payable to Zeman and Matlock in the total amount of $375,000. Spivey did not guarantee any of these debts.

¶ 125 After the closing, Spivey and Vrbancic spent the next six months trying to negotiate the terms of an agreement that would define their respective interests and roles going forward. Bush met

with them on February 8, 2018, to discuss the terms of the contemplated shareholders' agreement. Based upon the discussions to date, Bush understood the initial agreement would document Spivey's initial 17.5% interest, and the $250,100 contributed by Spivey would be treated as a loan. Bush understood the initial ownership interest was agreed upon, and that the parties were working cooperatively to set forth the circumstances under which Spivey may be allowed to acquire additional shares.

¶ 126 At the time of the February 8 meeting, and after appropriate disclosure and agreement from Air Solutions, Vrbancic, and Spivey, Bush represented all three of the parties in the transaction. Bush thought he could do so because he understood the parties were working together cooperatively to negotiate the parameters of the shareholders' agreement, including the circumstances by which Spivey could acquire an additional interest in Air Solutions. But during the February 8 meeting, it became clear that the parties had not yet reached an agreement on these material terms and there may be conflicts among them concerning these issues. At that point, Bush formally withdrew from the joint representation, advised Vrbancic and Spivey that he represented only Air Solutions,

and encouraged each of them to retain separate lawyers to assist with the negotiation process.

¶ 127 During the course of the six-month period, Bush created multiple drafts of possible shareholders' agreements (which Bush also referred to and captioned as a buy-sell agreement). In each of these drafts, the initial starting point was that Vrbancic owned 82.5% and Spivey 17.5% of Air Solutions' outstanding stock. The various drafts were each over twenty pages and addressed various matters, including different possibilities by which Spivey could acquire additional shares. Neither Vrbancic nor Spivey accepted any of these drafts. Indeed, they did not agree on whether Spivey had anything more than a 17.5% interest. In addition, no agreement was reached concerning how Spivey might be able to obtain any additional stock.

¶ 128 Bush testified that during these extended negotiations, Spivey never asserted that the terms of his ownership interest had been established by the napkin email. The last draft of the shareholder agreement that Bush prepared contemplated that Spivey could become a 50% owner if he paid Vrbancic a total of $431,900.

Neither Vrbancic nor Spivey agreed to this proposal, and negotiations ceased.

D. Spivey's Employment with Air Solutions

¶ 129 Spivey had started working as the CFO at Air Solutions in February 2018, shortly after Vrbancic completed the purchase. The relationship did not go well, or last long. Various employees complained that Spivey was not working regularly, did not understand the work culture at Airpro, and did not possess the anticipated expertise as a CFO. Air Solutions' comptroller, who worked most closely with Spivey, complained of a hostile work relationship. She eventually informed Vrbancic of her intent to leave the company based upon her conflicts with Spivey. In August 2018, Vrbancic terminated Spivey's employment.

¶ 130 Vrbancic then attempted to return Spivey's $250,100 investment, with interest. Spivey declined this offer. Air Solutions and Vrbancic then filed a declaratory judgment claim, asking the trial court to declare that no ownership agreement existed between the parties, and, accordingly, that Spivey had no equity interest in Air Solutions. Spivey filed counterclaims against Air Solutions and Vrbancic, alleging they defrauded him and breached their contract.

Spivey also asserted counterclaims for promissory estoppel and unjust enrichment. Spivey sought both equitable and legal remedies.

E. The Trial

¶ 131 On his contract claim, Spivey did not seek rescission. Instead, he elected to affirm the contract and asked the jury to award him the value of the stock that Vrbancic had failed to deliver. Thus, two central issues at trial were the total amount and value of any stock interest Spivey owned in Air Solutions.

¶ 132 On this point, the trial devolved into a battle of experts. Vrbancic and Air Solutions furnished testimony from Matthew Armstrong, an established expert in business valuations. Armstrong evaluated Air Solutions' financials against three industry standard valuation methods — the income, market, and asset approaches — and determined that 17.5% of Air Solutions' value as of July 31, 2018, was $82,959. Armstrong also opined that Vrbancic's potential future interest was too speculative to value.

¶ 133 On cross-examination, Spivey's counsel asked Armstrong "were you told Mr. Spivey is claiming in this lawsuit that part of the agreement includes the right to become a 49% owner once the SBA

loan is paid off?" Armstrong replied that he understood the last draft shareholders' agreement contemplated that Spivey could purchase additional shares once the SBA loan was paid off. Spivey's counsel then inquired, "So, you — you can't value what a future interest in 49% of this company is. Correct?" Armstrong responded, "Yes. Again, I have to value on known ownership interest at a point in time. And that's an unknown ownership interest at a future date. I can't value that."

¶ 134 Spivey offered a competing analysis, testifying himself as his sole expert witness. Rather than focusing on past earnings and current liabilities like Armstrong, Spivey applied a prospective analysis that emphasized the projected profit potential of Air Solutions. Using this metric, Spivey opined that the combined present value of his current 17.5% interest and his future 49% interest was over $1,000,000.

F. The Jury Instruction and Verdict Form

¶ 135 At the completion of the trial, as they had throughout the course of this litigation, Vrbancic and Air Solutions argued that the napkin email was too undefined and devoid of material terms to be an enforceable contract for any ownership interest. They also

repeatedly objected to the ever-evolving terms of Spivey's claimed contract.

¶ 136 Spivey had submitted his proposed jury instructions a day prior to trial. His elemental instruction for breach of contract stated, "Mr. Vrbancic entered into a contract with Mr. Spivey to accept $250,100 from Mr. Spivey in exchange for an ownership interest in Air Solutions, Inc." His proposed verdict form asked the jury to answer whether Spivey and Vrbancic entered into "a contract where Spivey provided $250,100 in exchange for ownership in Air Solutions, Inc." Spivey's proposed elemental instruction and verdict form did not ask the jury to find that the parties had agreed on a particular ownership percentage.

¶ 137 Vrbancic's elemental instruction referred to an alleged contract that provided Spivey with "a 17.5% ownership interest in Air solutions with the right to acquire an additional 31.5% ownership interest" after the SBA loan was repaid. Vrbancic's proposed verdict form asked the jury whether the parties formed a contract "by which Spivey was granted 17.5% ownership in Air Solutions with a right to obtain up to 49% ownership at such time when the SBA loan was retired."

¶ 138 In the final verdict form provided to the jury, the court adopted the identical question that Vrbancic proposed, as quoted in the preceding paragraph. The court drafted an elemental instruction that was identical to the contract described in the verdict form, with the exception that the words "obtain up to" were not included.

¶ 139 At the jury instruction conference, counsel for Vrbancic and Air Solutions expressed their ongoing concern that Spivey had not adequately disclosed the specific terms of the contract that he was arguing existed. Because of this indefiniteness, both counsel moved for a directed verdict. Vrbancic's counsel argued the napkin email was too indefinite to establish a contract: "I mean there is not a price in there. The price needs to be identified. How is the price going to be supplied?" Counsel continued, "The contract itself is not sufficiently definite. It is an agreement to agree down the road, and that is not a binding agreement."

¶ 140 Ultimately, Spivey decided to withdraw his breach of contract claim against Air Solutions. But in support of the remaining breach of contract claims against Vrbancic, Spivey's counsel stated, "[T]he contract that is being proposed to the jury in the instructions, as we're arguing if we prove it, is he has 17.5[%] of the share

ownership now with a right to get to 49% in the future." Spivey's counsel argued that "if there are additional terms or items that need to be addressed that's what the purpose of Rule 57 [is, to give] you the declaratory judgment power of declaring the rights and obligations of the parties."

¶ 141 The trial court decided the question whether a contract had been established was best left to the jury. In doing so, the court characterized Spivey's future potential interest as the ability "to move up to 49%" but acknowledged that "clearly, there were aspects of this, as counsel has argued, there has been continuing negotiation after that that there wasn't an agreement as to price."

¶ 142 In describing to counsel its final instruction on the measure of contract damages, the court explained that it was asking the jury to award a damage amount for any breach, not to declare a specific ownership percentage: "[I]f they find there is a breach, that the damages are that he has ownership. Well that's specific performance. They can't do that. So my thought was that this is a contract. And we're asking the jury to award damages at least at this point."

G. The Jury's Deliberations and Verdict

¶ 143 During its deliberations, the jury asked if Spivey would "receive the $250k" if it awarded no damages, and the court responded affirmatively. The jury subsequently delivered a verdict in favor of Vrbancic on the fraud claim but found in favor of Spivey on the breach of contract claim.

¶ 144 At paragraph 32 of its opinion, the majority states that the jury found there was a contract that, "in return for Spivey's payment of $250,100, he would receive an immediate right to a 17.5% interest in Air Solutions and a right to a 49% interest if and when Air Solutions repays the SBA loan in full." In reaching this conclusion, the majority leans heavily on the elemental instruction. But recall that the elemental instruction refers only to a "right to" a 49% interest.

¶ 145 Most importantly, the majority's analysis fails to give meaning to the actual verdict returned by the jury. What the jury actually found is reflected in the verdict form. In the section entitled "Verdict Regarding Claim of Breach of Contract (Stock Ownership)," the court posed the following specific questions, to which the jury provided the following specific answers:

1. Did Christopher R. Spivey and Benjamin D. Vrbancic enter a contract by which Mr. Spivey was granted 17.5% ownership in Air solutions with a right to obtain up to 49% ownership at the end of the SBA loan in exchange for a $250,100 payment to Air Solutions, Inc.? (Yes or No).

ANSWER Yes

2. Did Christopher R. Spivey, substantially perform his obligations under this contract? (Yes or No).

ANSWER Yes

3. Did Benjamin D. Vrbancic breach this contract? (Yes or No).

ANSWER Yes

4. Did Mr. Spivey experience damages as a result of the breach? (Yes or No).

ANSWER Yes

If you answered “yes” to all four questions above, then you are instructed to award whatever damages have been proved by a preponderance of the evidence related to this claim. If this is the case, insert the amount of damages in the “Damages” line below for this claim.

If you answered "no” to any question above, then you are instructed NOT to award damages related to this claim. If this is the case you should leave the damages line below blank.

DAMAGES $82,959.

¶ 146 The jury's actual verdict is materially different than the majority's characterization of it based upon the majority's assumptions drawn from the elemental instruction. The jury's verdict found the existence of a contract "by which Mr. Spivey was granted 17.5% ownership in Air solutions with a *right to obtain up to 49% ownership* at the end of the SBA loan in exchange for a $250,100 payment to Air Solutions, Inc." (Emphasis added.)

H. The Post-Trial Proceedings

¶ 147 The parties filed several post-trial motions. Spivey first requested that the trial court rule on his alternative remedy of specific performance. More precisely, Spivey requested that the court order Vrbancic to convey to him shares in Air Solutions reflecting a current 17.5% interest and an assurance that Vrbancic would, upon repayment of the SBA loan, convey him additional shares to give him a total equity interest of 49%. Among other arguments, Air Solutions responded by asserting that the contract found by the jury was too indefinite to permit specific performance.

¶ 148 Vrbancic's response assumed, for the sake of argument, that the contract found by the jury was sufficiently definite in terms of

quantity, price and, time but still failed because of the absence of other essential terms. The majority seems to treat this assumption as a concession that the verdict supported Spivey's "springing 49% interest" theory. That conclusion is contradicted, however, by the express terms of the response, in which Vrbancic stated that the concession was made for the sake of argument and with reservation of "his right to challenge the agreement for lack of definiteness consistent with the arguments made [pretrial] and during various times at trial." And as previously recounted in detail, Vrbancic consistently argued in pretrial proceedings and at trial that the claimed contract failed to establish price, quantity, and many other material terms. Indeed, minutes before closing argument, Vrbancic's counsel argued, and the trial court seemed to acknowledge, that there were material contract terms on which the parties had not agreed, including price.

¶ 149 Consistent with the concerns it had expressed at the jury instruction conference, the trial court denied Spivey's request for specific performance because it found the contract was too vague and indefinite to be specifically enforced and because money

damages sufficed to make Spivey whole on the proven contract.

More specifically, the court reasoned,

> This is not akin to a dispute over a contract to purchase real property — a house or a plot of land. This is an operating business with employees, an owner, and a board of directors. The Court noted, from the testimony at trial, that there was a great deal of hostility between the parties, and employees of Air Solutions. Further, Vrbancic and Air Solutions detail a host of logistical and practical problems in implementing and enforcing an order for specific performance. The Court agrees. Potentially, the Court could avoid such a burden by appointing a special master, but that would not resolve the practical problems for the parties, nor answer the personnel conflicts. Additionally, here, this contract was finalized with a "napkin email," which left the details of the organization and operations going forward completely undefined other than ownership percentages. There certainly was no detail regarding how shares would be distributed, or when that would happen, or what to do in the event of disagreement. The Court agrees that the contract, such as it was, did not provide sufficient detail or guidance to warrant an order of specific performance.[1]

---

[1] The majority assumes that, if the jury did not resolve the price and quantity of Spivey's potential future interest, the trial court would have made that finding and stopped. That assumption is speculative. It also fails to recognize the trial court's obligation to make findings and conclusions adequate to address the various arguments the parties presented, as the court actually did in this

¶ 150 The court then entered judgment on the jury verdict awarding Spivey $82,959. As the majority notes, this amount is in accordance with the value Armstrong placed on Spivey's existing 17.5% interest. The court also, sua sponte, awarded Spivey an additional $250,100 based upon the jury's question during deliberations and the court's response thereto.

¶ 151 Next, Spivey moved for the entry of judgment on his claims for promissory estoppel and unjust enrichment. The court rejected this request, finding that these equitable claims were unavailing considering the jury's finding that an express contract existed. Simultaneously, Air Solutions and Vrbancic filed a motion urging the trial court to reconsider its prior order compelling them to refund Spivey's initial $250,100 investment. After briefing, the court concluded that it had erred by awarding Spivey $250,100 in addition to the damage sum the jury awarded. Accordingly, the court entered judgment awarding Spivey damages of $82,959 and rejected Spivey's equitable claims.

---

case, despite also finding that specific performance was not viable due to the absence of essential terms.

II. Discussion

¶ 152 I agree with the majority's conclusion that the trial court correctly dismissed Spivey's claims for unjust enrichment and promissory estoppel. I disagree, however, with the majority's conclusion that the trial court erred by denying Spivey's request for specific performance. Finally, because I conclude the jury's damage award must be affirmed, I address and reject Spivey's argument that his $250,100 investment should be returned to him.

A. Standard of Review and Relevant Law

¶ 153 The heightened deference afforded to a trial court's factual findings on appeal is firmly established. Both our court rules and case law dictate that findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the fact finder to assess the credibility of witnesses; the sufficiency, probative value, and weight of the testimony; and the inferences and conclusions to be drawn from the evidence. C.R.C.P. 52; *People in Interest of A.J.L.*, 243 P.3d 244, 249-50 (Colo. 2010). As the Colorado Supreme Court recently reminded us in *A.J.L.*,

> The sanctity of trial court findings is derived from the recognition that the trial judge's presence during the presentation of

> testimonial evidence provides an unparalleled opportunity to determine the credibility of witnesses and the weight to be afforded the evidence which is before the court. . . . It is impossible to determine from the bare pages of the record whose testimony should be given credit relating to the facts.

243 P.3d at 250 (quoting *Page v. Clark*, 197 Colo. 306, 313, 592 P.2d 792, 796 (1979)).

¶ 154 Deference is particularly important when the testimony of the parties is contradictory. *Page*, 197 Colo. at 313, 592 P.2d at 796. In these cases, the difficult task of factfinding is best left to the jury and the trial court. *M.D.C./Wood, Inc. v. Mortimer*, 866 P.2d 1380, 1383-84 (Colo. 1994) (reversing the court of appeals because the trial court's findings were supported by the record and the court of appeals erred in substituting its findings for those of the trial court). Thus, it is axiomatic that an appellate court cannot substitute itself as a finder of fact. *Gebhardt v. Gebhardt*, 198 Colo. 28, 30, 595 P.2d 1048, 1050 (1979). And the record must be viewed in the light most favorable to the judgment, the presumption being that the determination of the trial court is correct. *Vigil v. Pacheco*, 95 Colo. 405, 408, 36 P.2d 766, 767 (1934).

¶ 155 Thus, we review a jury's and trial court's factual findings for clear error. We are obligated to defer to those factual findings unless they find no support in the record. *See, e.g.*, *Overton v. Chess*, 2022 COA 51, ¶ 30.

¶ 156 Specific performance is designed to remedy a past breach of contract by fulfilling the legitimate expectations of the parties. Whether this equitable remedy is appropriate rests within the sound discretion of the trial court. *Schreck v. T & C Sanderson Farms, Inc.*, 37 P.3d 510, 514 (Colo. App. 2001). A trial court abuses its discretion when its decision is manifestly arbitrary, unreasonable, unfair, or misapplies the law. *Patterson v. BP Am. Prod. Co.*, 2015 COA 28, ¶ 67. Absent such an abuse of discretion, we are obligated to defer to the trial court's factual findings and equitable determinations regarding the propriety of awarding specific performance in a particular case.

¶ 157 The requisite deference given to factual determinations and the court's exercise of its equitable orders is amplified in claims involving closely held corporations. The owners of a closely held corporation are not typically strangers seeking a passive investor relationship. Rather, the shareholders are frequently family

members, trusted friends, or collaborative colleagues who often work shoulder to shoulder to further the business of the collective corporation, and hence their mutual interests. Having presided over the parties' disagreement, seen their interactions, and measured their ability to cooperate as joint owners, the trial court is in a unique position to judge the viability of specific performance involving a closely held identity. An appellate court, in contrast, is ill equipped to meaningfully assess these intangible factors.

¶ 158 In this case, Spivey's request for specific performance triggered all three of these sirens for deference on appeal: (1) the trial court's order was predicated upon highly disputed facts; (2) the trial court's analysis applied to an equitable remedy; and (3) specific performance would have compelled alienated parties to continue in an intimate business environment. In my estimation, adherence to these principles mandates affirmance of the trial court's denial of the request for specific performance.

B. The Jury's Damage Award Adequately Compensated Spivey for the Losses Associated with the Contract that Was Established

¶ 159 In measuring the adequacy of a jury's damage award on a claim for breach of contract, the starting point is the contract that

the jury actually found. As previously noted, the specific contract found by this jury was that Spivey had a 17.5% ownership interest with "a right to obtain up to 49% ownership" at some future date.

¶ 160 But the majority's analysis attempts to assess the adequacy of the jury's damage award based upon a contract that the jury did not find. Relying solely on the elemental instruction and eschewing the express language of the jury's actual verdict, the majority improperly concludes that the jury found a contract by which Spivey had a "an immediate right to a 17.5% interest in Air Solutions and a right to a 49% interest if and when Air Solutions repa[id] the SBA loan in full." *Supra* ¶ 32. From this language, the majority concludes that Spivey, by virtue of the $250,100 investment, has a right not only to his original 17.5% interest, but also to an additional 31.5% interest without providing any further consideration of any kind. I am not persuaded such a conclusion can be reasonably reached, even if we were to ignore the verdict and assume that the jury actually found a contract for "a right to a 49% ownership interest."

¶ 161 But we need not dissect what the parties may have meant by a contract term that the jury did not find. Rather, we must analyze

the evidence and damage award based upon the contract that the jury actually found.

> An appellate court has the onus of reviewing the jury instructions, the jury verdict forms, and the evidence, and determining from the record whether there is competent evidence from which the jury logically could have reached its verdicts. . . . If there is a view of the case that makes the jury's answers consistent, an appellate court has a duty to reconcile the special verdict in that way.

Hock v. N.Y. Life Ins. Co., 876 P.2d 1242, 1259 (Colo. 1994). This jury specifically found that Spivey had "a right to obtain up to 49% ownership."

¶ 162 The first two definitions that Black's Law Dictionary 1297 (11th ed. 2019) provides for the word "obtain" are, "1. To bring into one's own possession; to procure, esp. through effort <to obtain wealth>. 2. To succeed either in accomplishing (something) or in having it be accomplished; to attain by effort <to obtain a loan>." Thus, the "right to obtain up to" describes something one may procure or succeed in accomplishing by future action or effort.

¶ 163 This language amplifies the jury's conclusion that Spivey had no existing ownership interest beyond 17.5%. Rather, he acquired a right to obtain up to a 49% interest. Spivey could not obtain any

additional percentage unless the parties agreed upon both a specific percentage he could obtain and what he would need to provide to do so. The evidence was overwhelming that the parties never reached agreement on these essential terms. Indeed, the contract specifically found by the jury provides "a right to obtain up to 49% ownership," amplifying that there was no present right to any stated percentage beyond the 17.5%.

¶ 164 The majority's analysis of the adequacy of damages requires it to presuppose that Spivey already had an existing contractual right to a full 49% interest after the SBA loan was satisfied. From there, the majority cites Armstrong's testimony in support of its conclusion that any attempt to provide a present value for a vested 49% interest would be speculative. But the majority fails to account for Armstrong's testimony that valuing Spivey's potential interest would be speculative for two reasons: Armstrong testified, "I have to value on known ownership interest at a point in time. And that's an unknown ownership interest at a future date."

¶ 165 Consistent with the overwhelming evidence that the parties were unable to reach an agreement about how Spivey could obtain a future interest, whether that be 33%, 49%, 50%, or somewhere in

between, the jury acted in accordance with Armstrong's expert testimony and common sense. It valued Spivey's known interest of 17.5% consistent with the amount Armstrong attributed to that interest. And consistent with the overwhelming evidence, Armstrong's expert opinion, and the court's instruction not to speculate, the jury declined to award money damages for an unknown and speculative future ownership interest.

¶ 166 Neither Spivey nor the majority contend that the jury's valuation of the existing 17.5% interest was speculative. I agree that it was not. Because the contract that the jury found to exist did not vest Spivey with an existing 49% ownership interest, the jury could not speculate about what value any such interest may have if acquired in the future. Thus, the trial court correctly determined that the damage award for Spivey's 17.5% interest was an adequate remedy at law. And because the damage remedy was adequate for the contract that was proved, the trial court correctly rejected the remedy of specific performance predicated upon a speculative future interest.

C. Spivey's Urged Interpretation of the Contract Was Not Sufficiently Definite to Permit Specific Performance

¶ 167 Specific performance is appropriate only where the contractual terms are reasonably certain, and "the indefiniteness of a contract is an adequate reason to refuse specific performance." *Schreck*, 37 P.3d at 514. To support specific performance, the subject contract must be more definite than a contract that supports an award of monetary damages. *Hill v. Chambers*, 136 Colo. 129, 133, 314 P.2d 707, 709 (1957).

¶ 168 The trial court emphasized the fundamental principle that any contract to be enforced by a specific performance decree must be "clear, definite, certain and complete" in a way that makes the precise act to be done clearly ascertainable. *Schreck*, 37 P.3d at 514. The trial court also relied on the general rule that the rights of the parties in a breach of contract claim are fixed at the time of breach. *See McCoy v. Riley*, 771 P.2d 25, 26 (Colo. App. 1989).

¶ 169 In addition to these firmly established principles, specific performance presupposes a mutuality of the operative promises.

> [A] contract cannot be enforced by specific performance against one of the parties unless the remedy is mutual. . . . It is held as a rule by the weight of authority that an action for

> specific performance of a contract like this cannot be maintained unless plaintiff could be compelled in a court of equity at the suit of the defendant to perform it on his part.

Antero & Lost Park Reservoir Co. v. Lowe, 69 Colo. 409, 436, 194 P. 945, 955-56 (1920). In order to meet the requirement of mutuality, the subject contract must be sufficiently definite to ensure that the parties' contemplated mutual obligations can be fully performed.

¶ 170 "Courts cannot make contracts for parties and then order them specifically performed." *Schreck*, 37 P.3d at 514. As the trial court pointed out, this is particularly relevant in the present dispute because it "is not akin to a dispute over a contract to purchase real property — a house or a plot of land. This is an operating business with employees, an owner, and a board of directors."

¶ 171 The majority concludes that the trial court erred in finding the contract claimed by Spivey lacked sufficient detail to be specifically enforced. The majority minimizes these omission as "several matters [the trial court] deemed critical." *Supra* ¶ 67. But over and above the specific examples listed by the majority, the trial court found the "napkin email . . . left the details of the organization and

operations going forward completely undefined other than ownership percentages." The trial court's finding is supported by the record.

¶ 172 Indeed, Spivey's language in the napkin email illustrates the aspirational nature of his demands, not an existing defined agreement. The first sentence is: "Here is what I am seeking in a shareholder agreement." Later in the same section, Spivey states, "I understand the sensitivity with respect to the form vs. substance, and am open to a number of alternatives . . . ." He closes the email with the following statement: "However it happens in form or substance, I expect to be 50:50." Whatever Spivey's true expectations may have been, these emails do not document an agreement upon a specific ownership interest or how it may be provided for "in form or substance."

¶ 173 The only material term these parties initially agreed upon was that Spivey would deliver $250,100 to Vrbancic in exchange for a 17.5% interest. That is the contract that the jury found. While the jury also found that Spivey proved that the contract contemplated a "right to obtain up to 49% ownership" after the SBA loan was paid

off, the jury did not award damages for that potential interest because it would be speculative.

¶ 174 Spivey's potential interest was speculative in the following ways: (1) it was not possible to quantify Spivey's possible future interest because it was not known whether Spivey and Vrbancic could ever agree upon a particular ownership percentage or the method by which Spivey could "obtain" this future interest, and (2) it is not economically possible to provide a present value for a speculative future interest. The first of these was illustrated by the fact that Spivey and Vrbancic negotiated for at least six months and were not successful in arriving at either the percentage interest Spivey would ultimately acquire or how Spivey would obtain that additional interest. The second was supported by Armstrong's expert opinion on business valuations.

¶ 175 It was simply not possible for the court to enforce a contract by which Spivey could obtain a future interest up to 49%. Indeed, over the course of six months of intense negotiations on these topics, with the aid of legal counsel and a CPA, Vrbancic and Spivey could not reach an agreement. The trial court could not, under the guise of specific performance, dictate how many additional shares

Spivey would eventually acquire, or how much he would be required to pay for such additional shares. The absence of these and many other essential terms precludes specific performance as a remedy. *See Howard v. Beavers*, 128 Colo. 541, 547, 264 P.2d 858, 861 (1953) (specific performance properly rejected by trial court because the contract was "silent as to the time and terms of payment").

¶ 176 And as the trial court also found, there were many other specific terms that had yet to be agreed upon. Holding fast to the notion that specific performance of a contract will not be denied where "the uncertainty or incompleteness relates to matters which the law makes certain or complete by presumption, rule, or custom and usage," *supra* ¶ 71 (quoting *Shull v. Sexton*, 154 Colo. 311, 316, 390 P.2d 313, 316 (1964)), the majority attempts to fill the void by incorporating into the contract the Colorado Business Corporation Act, case law, and Restatement provisions to make complete terms that it deems "collateral" and inessential. But citations to general authorities that speak to broad legal principles do not resolve specific disagreement between actual individuals. Indeed, that is precisely why only sufficiently definitive contracts are deemed enforceable.

¶ 177 Moreover, the case before us is entirely distinct from *Shull*. No less than three drafts of fully integrated contracts were presented by Air Solutions' attorney to Spivey and Vrbancic. They rejected each. Thus, we are left with an email that was never intended to represent a final contract. A shareholders' agreement for the operation of a closely held corporation is not one for which the law can readily provide the omitted material terms, and custom and usage cannot fill these gaps in this context.

¶ 178 As previously noted, the "napkin" agreement contemplates far more than this transaction, so the majority's actions in crafting its own equitable remedy improperly inserts material terms to be specifically performed:

> Whenever it appears that material matters are not clear, certain, and complete, but are left by the parties so obscure or undefined that the court cannot say whether or not the minds of the parties met upon all the essential particulars, or if they did, the court cannot say exactly upon what substantial terms they agreed, the case is not one for specific performance. Equity cannot make a new contract for the parties, but must enforce the contract according to its terms or not at all; the court will not make a contract for the parties or supply any material stipulation thereof.

D. H. Overmyer Co. v. Brown, 439 F.2d 926, 928-29 (10th Cir. 1971) (citation omitted).

¶ 179 The indefinite terms and omissions regarding the amount of stock Spivey would ultimately acquire, the value he would need to give to obtain any additional shares, the scope of Spivey's CFO role, his compensation, share issuance, potential changes in the event of his termination, etc. are material and cannot be supplemented or changed absent mutual assent of the contracting parties:

> Regarding mutual assent, in general, "when parties to a contract ascribe different meanings to a material term of a contract, the parties have not manifested mutual assent, no meeting of the minds has occurred, and there is no valid contract." *Sunshine v. M.R. Mansfield Realty, Inc.*, 195 Colo. 95, 575 P.2d 847, 849 (1978). The requisite meeting of the minds is established by the parties' acts, conduct, and words, along with the attendant circumstances, and not by any subjective, unexpressed intent by either party. *Avemco Ins. Co. v. N. Colo. Air Charter, Inc.*, 38 P.3d 555, 559 (Colo. 2002).

French v. Centura Health Corp., 2022 CO 20, ¶ 27.

¶ 180 The trial court's analysis was also consistent with the principle that a court will only order specific performance when the performance would be both independent and immediate: "Contracts

which by their terms stipulate for a succession of acts, whose performance cannot be consummated by one transaction, but will be continuous, and require protracted supervision and direction, with the exercise of special knowledge, skill, or judgment in such oversight, are not, as a rule, specifically enforced." *Antero*, 89 Colo. at 436, 194 P. at 955-56.

¶ 181 The trial court's decision to deny the remedy of specific performance is well grounded in the evidence, and lack of evidence, produced at the trial court. As a matter of fact and law, the trial court properly concluded that the contract claimed by Spivey did not contain essential terms and therefore could not be specifically enforced. We are duty bound to defer to that exercise of judicial discretion.

D. The Trial Court Did Not Err by Refusing to Award Spivey $250,100 in Addition to the Damages That the Jury Awarded

¶ 182 In its order denying Spivey's request for specific performance, the trial court unilaterally raised and resolved the issue of whether it should add the sum of $250,100 to the jury's contract damage award. But in its response to Vrbancic's motion to reconsider the award, the trial court acknowledged that its prior order was made

without input from the parties and was predicated upon a misremembering of the jury's question.

¶ 183 Recall that the jury inquired, "If no damages are awarded, will Mr. Spivey receive the 250k?" The court answered that question affirmatively. Based upon that response, Spivey argues the jury was misled into undervaluing his damage award. More specifically, he asserts the jury's damage award was based upon an assumption that if it awarded damages to Spivey, the $250,100 would also be awarded to him by the court. But this argument is predicated upon a misreading of the jury's question. The initial clause of the question says, "*If no damages are awarded*." (Emphasis added.) But the jury did award damages, thus rendering the balance of the jury's question and the court's response factually irrelevant.

¶ 184 In addition to the factual error, Spivey's argument is predicated upon legal error, which in turn, causes him to conflate mutually exclusive damage theories. On his claim for breach of contract, Spivey was entitled to pursue the remedy of rescission, in which case the contract would be deemed unenforceable, and he would be entitled to the return of his investment. Alternatively, Spivey was entitled to affirm the contract and pursue the damages

caused by the other parties' breach, which Spivey argued was the value of his promised interest in the stock. But Spivey was not entitled to both the return of his investment and the benefit of the bargain. *See, e.g.*, *Kennedy v. Gillam Dev. Corp.*, 80 P.3d 927, 930 (Colo. App. 2003) ("Colorado courts have consistently . . . [held that the] remedies of rescission of a contract and enforcement of a provision of the same contract are inherently inconsistent."). Spivey was required to elect between these two inconsistent remedies. He chose to affirm the contract.

¶ 185 Spivey argues it is unfair that he was only awarded $82,959 when he invested $250,100. But Vrbancic offered to return the $250,100 to Spivey, with interest, prior to this litigation being initiated. Spivey rejected that offer, opting instead to bank on the assumption that the jury would determine the stock that he purchased for $250,100 had a value in excess of $1,000,000. The fact that the jury rejected this argument is neither surprising nor grounds for him to now insist that Vrbancic should be obligated to accept a remedy that he had previously offered, but which Spivey rejected in order play out his gamble.

¶ 186 Spivey was not legally entitled to both the return of his investment and the value of the shares that his investment purchased. As Vrbancic and Air Solutions point out, "the final judgment in this case cannot confirm the jury's verdict enforcing Mr. Spivey's agreement and simultaneously order a refund that implies the very same agreement never existed." Because the remedy that Spivey elected was to affirm the contract, the court properly limited his damage award to the amount that the jury determined was the value of his 17.5% interest.

¶ 187 For these reasons, the trial court did not err by declining to award Spivey the amount of his initial investment on top of the damage award predicated upon that investment.

E. Other Matters

¶ 188 The majority summarily dismisses the public policy arguments associated with a contract provision that was apparently created with an intent to circumvent the SBA 20% Rule. As noted previously, I am not persuaded that Spivey's decision to reduce his ownership interest can be cast off on the bank that closed the SBA loan. More importantly, the trial court found, with record support, that Spivey simply refused to provide guaranties for either the SBA

loan or the private loans payable to Zeman and Matlock. Finally, the majority's rationale that on January 29, 2018, Spivey had a vested existing right to a future 49% ownership interest for purposes of a damage award but only a 17.5% ownership interest for purposes of the SBA 20% Rule is logically inconsistent. *See supra* ¶ 32, 91.

¶ 189 Like the trial court, however, I ultimately do not pass final judgment on the propriety of Spivey's effort to avoid the 20% Rule and the associated personal guaranty. Because I find the trial court correctly rejected the remedy of specific performance on other grounds, I do not need to reach the question whether granting that remedy would be consistent with public policy.

¶ 190 Finally, I also note that the majority spends a good deal of time arguing why Colorado's courts should apply the remedy of specific performance in a manner that is more flexible than they have historically. It is possible, as the majority suggests, that the decisions of other jurisdictions reflect a more flexible approach, even in cases involving stock ownership of closely held corporations. Perhaps, in time, our appellate courts may find the need to reevaluate the historical boundaries of specific performance

in that context. But for all of the reasons previously explained, this case does not provide such an opportunity.

III. Conclusion

¶ 191 For the stated reasons, I would affirm the judgment entered by the trial court. Accordingly, I dissent from those portions of the majority's opinion that reverse the trial court's orders and that vacate the jury's damage award.