FILED
United States Court of Appeals
Tenth Circuit

June 23, 2026

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CATALYST STRATEGIC ADVISORS, LLC, a Colorado limited liability company; KONDRUP ENTERPRISES, INC., a Colorado corporation,

Plaintiffs Counterclaim Defendants - Appellees,

v.

DV CONSULTING, INC., a Connecticut corporation,

Defendant Counterclaimant - Appellant

and

DANIEL VAN DER AUE,

Defendant Counterclaimant Third-Party Plaintiff - Appellant,

v.

JOSEPH KONDRUP, JR.,

Third-Party Defendant - Appellee.

No. 25-1373
(D.C. No. 1:23-CV-00396-RM-MDB)
(D. Colo.)

ORDER AND JUDGMENT*

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Before **HARTZ**, **MATHESON**, and **MORITZ**, Circuit Judges.

Joseph Kondrup, Jr. ended his 13-year business relationship with Daniel Van Der Aue. Litigation ensued. The district court granted summary judgment to Mr. Kondrup and two business entities he owned. It entered final judgment against Mr. Van Der Aue on his partnership and breach of contract claims. This appeal followed. Exercising jurisdiction under 28 U.S.C. § 1291, we reverse.

I. BACKGROUND

A. *Factual History*[1]

Mr. Kondrup owns KEI, a Colorado corporation. KEI in turn owns and controls Catalyst LLC, a Colorado limited liability company. Catalyst provides mergers and acquisitions ("M&A") advisory services.

Mr. Van Der Aue is the owner and president of DV Consulting, Inc., a Connecticut S corporation.[2] It provides financial consulting services and serves as a conduit for payments to Mr. Van Der Aue.

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[1] "Because this case arises from an appeal of summary judgment, we present the following factual background in the light most favorable to [Mr. Van Der Aue] as the non-moving party, unless contradicted by the record." *Litzsinger v. Adams Cnty. Coroner's Off.*, 25 F.4th 1280, 1284 (10th Cir. 2022).

[2] A "Subchapter S corporation []is a pass-through entity for income-tax purposes—that is, the Corporation does not itself pay income taxes, but its taxable income, deductions, and losses are passed through to its shareholders." *See Petersen v. Comm'r of Internal Revenue*, 924 F.3d 1111, 1113 (10th Cir. 2019) (citing 26 U.S.C. § 1366).

Mr. Kondrup and Mr. Van Der Aue started working together in 2009. In March 2013, they exchanged three emails (the "framework emails") regarding their business relationship.

First, Mr. Kondrup sent Mr. Van Der Aue the following email with the subject line "Framework???":

> Framework:
> 1. Total fees paid to Catalyst (excluding expense reimbursements)
> 2. Minus 10% of total fees to cover overhead costs up to direct out-of-pocket costs (Estimated $200-$250K reviewed-annually for Scott, Janice, Shonn, offices, soft costs; client cultivations, web-sites, trade shows, etc).
> 3. Remaining 90% distributed on a discretionary basis, 1/3 to DV, the remaining 2/3 to JK and/or participating team members (Scott, Jim, etc, based on value creation and involvement)--- or should the DV/JK splits be on a net basis after the discretionary awards as we go forward.....
> Let's discuss and refine as needed.

Catalyst Strategic Advisors, LLC v. DV Consulting, Inc., No. 23-CV-00396, 2025 WL 2816885, at *2 (D. Colo. Sept. 3, 2025).

Mr. Van Der Aue responded:

> Joe,
> I think this all makes sense and memorializes what we have been doing all along. As discussed, after eventually "covering the nut" on a cumulative basis (annual fixed costs of $250 – 300K (reviewed annually) with Scott on board, and initial start-up costs of $400 – 500K) we can lift the 10% base cut for expenses and split the entire gross fees earned by Catalyst (excluding expense reimbursements). I also agree as you suggest below that it's most fair for you and I to do the split 1/3 to DV and 2/3 to JK after taking care of discretionary awards going forward (Scott, Janice, Shonn, Jim, Paul, etc.), provided that we discuss those amounts in advance (as we have already been doing).

> Goes without saying that I am proud to be your partner and truly enjoy doing what we do together. I also recognize and appreciate that we are enjoying a rare situation where great friends can do great business together!
>
> Sincerely,
>
> Dan.

Id.

Mr. Kondrup replied:

> Agreed, we can adjust and refine as we move forward.....
>
> Ditto on the proud to be partners and excited about our future!

Id.

The two men worked together for many years without formalizing their business relationship. *Id.* At the end of 2022, Mr. Kondrup and Catalyst LLC ended their relationship with Mr. Van Der Aue and DV Consulting. *Id.*

B. *Procedural History*

1. Complaint and Counterclaims

Plaintiffs Catalyst LLC and KEI[3] filed a Complaint for Declaratory Judgment seeking a judicial declaration that Defendants Mr. Van Der Aue and DV Consulting have no ownership interest in Catalyst LLC. Defendants filed counterclaims against Catalyst LLC and KEI and third-party claims against Mr. Kondrup seeking a declaratory judgment that Mr. Van Der Aue and Mr. Kondrup were partners in the "Catalyst Business,"

[3] Mr. Kondrup was named as a third-party defendant. Because Catalyst, KEI, and Mr. Kondrup moved together for summary judgment, we refer to them collectively as "Plaintiffs."

damages for breach of fiduciary duty and civil theft, and an accounting of the partnership profits. App., Vol. I at 54-57. Defendants brought an alternative claim alleging that if there was not a partnership between Mr. Van Der Aue and Mr. Kondrup, then there was a contract that Plaintiffs breached by failing to pay Mr. Van Der Aue. The parties invoked the district court's diversity jurisdiction. *See* 28 U.S.C. § 1332.

Plaintiffs moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) as to the counterclaims and third-party claims, asserting (1) the alleged "Catalyst Business" could not be a partnership because KEI was a corporation and Catalyst was an LLC,[4] (2) the March 2013 emails did not constitute an enforceable partnership agreement, and (3) there was no partnership because Mr. Van Der Aue did not share in the risk of loss of the business.

The district court denied the motion and allowed the case to proceed. *Catalyst Strategic Advisors, LLC v. DV Consulting, Inc.*, No. 23-CV-00396, 2024 WL 2273406, at *4 (D. Colo. Apr. 24, 2024).

2. Summary Judgment

Plaintiffs then filed a motion for summary judgment on all claims—Defendants' claims and their own—arguing the summary judgment record could not support the existence of a partnership between Mr. Kondrup and Mr. Van Der Aue. *Catalyst*, 2025 WL 2816885, at *1-2.

[4] The Colorado Uniform Partnership Act says that an association is not a partnership if it is formed under a different statute. Colo. Rev. Stat. § 7-64-202(2).

The district court, applying Colorado law, granted Plaintiffs' motion. *Id.* at *5. It concluded that Defendants' evidence could not establish a genuine dispute of fact "as to whether [Mr.] Van Der Aue and [Mr.] Kondrup (1) carried on as co-owners, and (2) shared profits in their business together." *Id.* at *3. Absent such evidence, the court said there could be no partnership. *Id.* at *2. The district court also concluded that "the absence of a profit-sharing agreement is fatal to Defendants' breach of contract claim" because they "rely on no other grounds to establish that Plaintiffs breached any contractual obligations." *Id.* at *4.

Defendants timely appealed.

II. DISCUSSION

On appeal, Defendants argue that the district court erred when it granted summary judgment to Plaintiffs on both the partnership and contract claims.

The district court's summary judgment decision suffers from factual and legal deficiencies. First, it failed to consider Mr. Van Der Aue's declaration and deposition, and it overlooked much of the documentary evidence. Second, at several points it said the evidence was "not necessarily inconsistent" with either parties' position, *Catalyst*, 2025 WL 2816885, at *3, which misstated the summary judgment standard.

Based on our review of the record, we conclude there are genuine issues of material fact as to whether Mr. Kondrup and Mr. Van Der Aue had a partnership or an agreement to share profits. We therefore reverse the grant of summary judgment to Plaintiffs.

A. *Standard of Review and Summary Judgment Standard*

"We review the district court's summary judgment decision de novo," applying the same standards as a district court should apply. *Iweha v. Kansas*, 121 F.4th 1208, 1220 (10th Cir. 2024) (quoting *Klein v. Roe*, 76 F.4th 1020, 1028 (10th Cir. 2023)). "We review the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." *Id.* (quotations omitted).

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "An issue is genuine if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." *Becker v. Bateman,* 709 F.3d 1019, 1022 (10th Cir. 2013) (quotations omitted); *see Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). "An issue of fact is material if under the substantive law it is essential to the proper disposition of the claim." *Becker,* 709 F.3d at 1022 (quotations omitted); *see Anderson,* 477 U.S. at 248. "If a reasonable jury could return a verdict for the nonmoving party, summary judgment is inappropriate." *Riser v. QEP Energy*, 776 F.3d 1191, 1195 (10th Cir. 2015) (quotations omitted).

The party moving for summary judgment bears the initial burden of showing an absence of any issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where, as here, the burden of persuasion at trial would be on the nonmoving

party,[5] the movant may carry its initial burden by providing "affirmative evidence that negates an essential element of the nonmoving party's claim" or by "demonstrat[ing] to the Court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." *Id.* at 331 (Brennan, J., dissenting); *see Hamric v. Wilderness Expeditions*, 6 F.4th 1108, 1122 (10th Cir. 2021); *Tesone v. Empire Marketing Strategies*, 942 F.3d 979, 994 (10th Cir. 2019).

If the movant makes this showing, the burden then shifts to the nonmovant to "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 250 (quotations omitted). If the nonmovant "fails to make a showing sufficient to establish the existence of an element," the Federal Rules of Civil Procedure "mandate[] the entry of summary judgment." *Celotex*, 477 U.S. at 322. The movant bears the ultimate burden to show that no genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Farmer v. Perrill*, 288 F.3d 1254, 1259 (10th Cir. 2002).

As the following discussion shows, whether or not Plaintiffs, as the summary judgment movants, met their initial burden of production, nonmovant Defendants pointed to ample evidence showing there is a genuine issue for trial, evidence the district court mostly ignored.

[5] Here, because the Defendants claim there was a partnership, at trial they have "the burden of proving its existence." *Reid v. Pyle*, 51 P.3d 1064, 1066 (Colo. App. 2002).

B. *Partnership-Based Claims*[6]

1. Legal Background[7]

In 1997, drawing from the Uniform Law Commission model provision, the Colorado legislature enacted the Colorado Uniform Partnership Act ("CUPA").[8] The CUPA provides that "[a] partnership is an entity distinct from its partners." Colo. Rev. Stat. § 7-64-201. On partnership formation, it states that "the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership." *Id*. § 7-64-202(1). The CUPA further provides that "[a] partner may maintain an action against . . . another partner . . . to [e]nforce the partner's rights under this article." *Id.* § 7-64-405(2)(b).

"If the parties have placed themselves in a relation which constitutes a partnership, it is not determinative that they call, or do not call, themselves a partnership, or that they expressly deny that a partnership exists." *Johnson v. Chilcott*, 599 F. Supp. 224, 227 (D.

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[6] The parties agree that four of Defendants' counterclaims were predicated on the existence of a partnership, (1) the declaratory judgment claim and the claims for (2) breach of fiduciary duty, (3) civil theft, and (4) an accounting of the partnership. Aplt. Br. at 14-15; Aplee. Br. at 19.

[7] The *Erie* doctrine requires federal courts sitting in diversity to "apply state substantive law when resolving disputes not directly implicating a federal question." *Iron Bar Holdings, LLC v. Cape*, 131 F.4th 1153, 1166 n.23 (10th Cir. 2025) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)). The parties agree that Colorado law governs this case. *See* Aplt. Br. at 19; Aplee. Br. at 1.

[8] Corporations—Uniform Partnership Act—Adoption, 1997 Colo. Legis. Serv. H.B. 97-1237 (West); *see also* Colo. Rev. Stat. § 7-64-1201 ("This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among states enacting it.").

Colo. 1984) (citing *Richardson v. Keely*, 142 P. 167 (Colo. 1914))[9]; *see also Leoff v. S & J Land Co.*, 503 F. App'x 630, 636 (10th Cir. 2012) (unpublished)[10] ("[A] partnership can be created [under Colorado law] without any formalities and regardless of the parties' intentions."). "The person asserting the partnership has the burden of proving its existence." *Reid v. Pyle*, 51 P.3d 1064, 1066 (Colo. App. 2002).

"The elements of co-ownership" under the partnership-formation provision of the Revised Uniform Partnership Act ("RUPA") "include profit sharing, control over the business, loss sharing, contributions to equity capital, and property co-ownership." J. William Callison & Maureen A. Sullivan, Partnership Law & Practice: General & Limited Partnerships § 5.11 (2025). "Profit sharing is probably the most important element in the case law and has been singled out for a special statutory presumption," but "[c]ontrol is also important" albeit "somewhat more elusive because of the many gradations of control and because partners often delegate decision-making power." 1 Christine Hurt, et al., Bromberg & Ribstein on Partnership § 2.06[A] (3d ed. 2020).

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[9] Colorado adopted the original version of the Uniform Partnership Act in 1931. *See LaFond v. Sweeney*, 343 P.3d 939, 949 (Colo. 2015); *E & A Assocs. v. First Nat'l Bank of Denv.*, 899 P.2d 243, 245 (Colo. App. 1994). Its provision defining a partnership contained the same language as the revised version adopted in 1997: "[an] association of two or more persons to carry on, as co-owners, a business for profit." *Thompson v. McCormick*, 370 P.2d 442, 471 (Colo. 1962) (en banc) (quoting Colo. Rev. Stat. § 104-1-6 (1953)). In the absence of contrary statutory authority, cases pre-dating adoption of the 1997 CUPA are instructive in interpreting Colorado partnership law. Colo. Rev. Stat. § 7-64-104(1) ("Unless displaced by particular provisions of this article, the principles of law and equity supplement this article.").

[10] We cite unpublished cases for their persuasive value. *See* Fed. R. App. 32.1(a); 10th Cir. R. 32.1.

The parties' appellate arguments focus on whether Mr. Kondrup and Mr. Van Der Aue (1) shared in the profits of a business and (2) exercised joint control over the business.

a. Profit Sharing

The CUPA provides that, "[i]n determining whether a partnership is formed," "[a] person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment" for one of several purposes, including "services as an independent contractor." Colo. Rev. Stat. § 7-64-202(3)(c).

"The sharing of gross receipts, as opposed to the sharing of profits (i.e., receipts less expenses), does not establish a partnership." Callison & Sullivan, *supra* at § 5.12. "However, sharing gross receipts coupled with sharing expenses is, in substance, sharing profits, and can create a partnership." *Id.*

b. Control

The Uniform Law Commission's official comments to the RUPA state, "Ownership involves the power of ultimate control." Unif. P'ship Act § 202 cmt. (Unif. L. Comm'n 1997). Because "partners' management rights . . . are subject to contrary agreement, partners may agree that one or more members of the firm shall act as managing partners and that the others will not participate in control." 1 Hurt, et al., *supra* at § 2.06[C]. And under the CUPA, although "[a]ll partners have equal rights in the management and conduct of the partnership business," Colo. Rev. Stat. § 7-60-118(1)(e), "partners may agree that one or more of them shall have exclusive control over the management of the partnership business." *Tucker v. Ellbogen*, 793 P.2d 592, 597 (Colo.

App. 1989). "Even minor participation in business management" therefore "constitutes control sufficient to establish co-ownership." Callison & Sullivan, *supra* at § 5.13.

2. Analysis

Defendants have established a triable issue of fact as to whether Mr. Kondrup and Mr. Van Der Aue (a) shared in the profits of a business and (b) exercised joint control over the business.

a. Profit Sharing

Defendants argue the record supports an inference that Mr. Van Der Aue shared in the profits of a business with Mr. Kondrup and thus a partnership should be presumed. *See* Colo. Rev. Stat. § 7-64-202(3)(c); Callison & Sullivan, *supra* at § 5.17. Plaintiffs argue Mr. Van Der Aue (i) cannot show that he shared in the profits of any business with Mr. Kondrup, (ii) did not share a risk of loss from the alleged business, and (iii) was paid instead as an independent contractor. After considering these three points, we agree with Defendants that the evidence supports a reasonable inference of profit sharing.

i. Profit-sharing evidence

The profit-sharing evidence falls into two categories: (1) the framework emails and (2) Mr. Van Der Aue's declaration and supporting documentation.

First, the March 2013 framework emails show that Mr. Van Der Aue and Mr. Kondrup shared in the profits of a business. They provide for a calculation of "fees" less "expense[s]" and set aside a percentage of that total for "overhead costs." *Catalyst*, 2025 WL 2816885, at *2. The two men agreed to "tak[e] care of discretionary awards" before splitting the remainder "1/3 to DV and 2/3 to JK." *Id.*; *see also Profit*, Black's

Law Dictionary (12th ed. 2024) (defining "profit" as "[t]he excess of revenues over expenditures in a business transaction."); Callison & Sullivan, *supra* § 5.12 ("[S]haring gross receipts coupled with sharing expenses is, in substance, sharing profits, and can create a partnership.").

Second, the record contains substantial documentary and other evidence—evidence the district court largely ignored—that Mr. Kondrup and Mr. Van Der Aue shared profits. In his sworn declaration, Mr. Van Der Aue described his dealings with Mr. Kondrup from 2013 until 2022. He maintained that they calculated the profits of their joint business and split them according to the agreed one-third/two-thirds ratio. His declaration included excerpts from emails and spreadsheets reinforcing his statements.

For example, Mr. Van Der Aue declared that in a 2014 email "Mr. Kondrup calculated the full-year 2014 revenues for our business, and the full-year 2014 expenses for our business." R. App., Vol. I at 125. Based on the revenues and expenses, "Mr. Kondrup then calculated that the full-year 2014 profits of our business—which he called 'our net distributable amount'—would be 'about $1.85m +/-.'" *Id.* (quoting R. App., Vol. I at 142). The email confirms the same:

From: Joe Kondrup [joe@catalyststrategicadvisors.com]
Sent: 11/6/2014 6:57:59 AM
To: Dan VanDerAue [dan@catalyststrategicadvisors.com]
Subject: Economics-Let's Discuss
Attachments: CSA P&L Jan-Sep 2014.xlsx; CSA Flow Thorugh Analysis 10.11.14 jkv.xlsx; Copy of CSA Revenue Estimates 10-24-2014.xlsx

Dan

Let's discuss when we have some time today so I can get a check out to you.

1. Attached is the 1/1-9/30 CSA P&L imported from quick books. It doesn't include labor/bonus cost for Janice, Scott or Shonn, nor does it include rent or other miscellaneous expense that runs through KEI...
2. The rough math that summarizes a CSA P&L after we provide for the expense (I created this excel file and Janice has not seen it).
3. YTD and estimated FY 2014 revenue forecast

At up to about $2.0m in revenues our fixed cost is about $650k (the $650k does not include what I pay myself nor does it include any 2014 cost for Kenley, Hensley or Paul...) and at $3.0m I estimate it goes up incrementally to about $750k...

Revenues for CSA including the $750,600 we got for GWG (and the retainers on the spreadsheet through December) should put us at about $2.50m +/- for FY 2014. Assuming we have revenues of $2.50m and our fixed cost is about $650k (could be a bit more depending if what bonuses we decide for Janice and Scott), our net distributable amount will be about $1.85m +/-.

Jk

Id. at 142.

Mr. Van Der Aue declared that after the November 6, 2014 email, "Mr. Kondrup and I discussed the overall performance of our business, and also discussed and refined Mr. Kondrup's . . . estimate of its 2014 profits. We calculated and agreed upon the amount of my one-third share of those 2014 profits of our business." *Id.* at 126.

As another example, Mr. Van Der Aue declared that the "2016 Compensation" spreadsheet reflects payment for the business' personnel, which was calculated to ensure that Mr. Kondrup and Mr. Van Der Aue were paid according to the two-thirds/one-third profit-sharing ratio. The "2016 Compensation" spreadsheet supports his statement:

Undistributed CSA Revenue	1,651,050
Less: Office, O/H, Ins, Unreimb Travel etc.	350,000 ?
Net Remaining Distributable to Kondrup	1,301,050
Kondrup Wages & SEP included above	260,000
Total Kondrup Gross Comp	1,561,050
Ratio to VDA Gross Comp	2.01

C. App., Vol. I at 91-12.

Plaintiffs offer no alternative explanation for why the spreadsheet calculated the ratio of Mr. Kondrup's compensation to Mr. Van Der Aue's compensation.

As a final example, Mr. Van Der Aue declared that the "2021 Profit & Loss Statement" contained a detailed calculation of the full-year 2021 profits for his and Mr. Kondrup's business. He claims the spreadsheet calculated profits before he and Mr. Kondrup were paid. It then calculated their two-thirds/one-third distribution. Again, the 2021 spreadsheet supports his statement:

Catalyst Strategic Advisors LLC
Profit & Loss
January 1 through December 23, 2021

5,771,062	Net Income per Adjusted CSA P&L
3,456,000	Addback Outside Consulting Payments (Dan & Michael)
(360,000)	Put Michael back into the P&L
8,867,062	Adjusted CSA Net Income prior to Dan and Joe getting paid
2,955,687	DVC at 1/3
1,089,000	DVC Consulting Fees Paid to Date (Excl SOE Equity, and prior to Temp Power & Mersino)
1,866,687	DVC True Up for Temp Power & Mersino (Assuming Mersino at $4.25m as of 12/28 - $4.35 - $100k retainer)
(600,000)	Check sent for Temp Power
1,266,687	Final True Up to DVC (if Mersino closes at $4.25m in net fees)

C. App., Vol. I at 91-14.

Plaintiffs argue that the spreadsheet's reference to "Consulting Fees" negates any inference of profit sharing. Aplee. Br. at 44-45. But they do not explain why they

calculated the Catalyst LLC "Net Income prior to Dan and Joe getting paid" or why Mr. Van Der Aue was paid one third of the net income of Catalyst LLC.

* * * *

Although Plaintiffs point to competing evidence to show that Mr. Van Der Aue did not share in the profits, the framework emails, Mr. Van Der Aue's declaration, and the supporting documentation establish a genuine factual issue as to profit sharing.

ii. Risk of loss

Plaintiffs argue that the lack of an explicit agreement to share the losses of the business shows there was no partnership, citing Colorado law purporting to hold that a partnership requires both shared profits and shared loss. Aplee. Br. at 28-30 (citing *Kaneco Oil & Gas, Ltd., II v. Univ. Nat. Bank*, 732 P.2d 247, 250 (Colo. App. 1986); *L. Baldwin & Co. v. Patrick*, 91 P. 828, 829 (Colo. 1907)). But Plaintiffs' argument fails both legally and factually.

It fails legally because Plaintiffs' cases do not hold that an explicit agreement to share losses is required for partnership formation. Instead, consistent with Colo Rev. Stat § 7-60-118, which provides that "each partner shall . . . contribute to the losses . . . according to such partner's share in the profits," the cases recognize that shared losses are an incident of profit sharing in a partnership that has already been formed. *See Kaneco Oil*, 732 P.2d at 250 ("The partners in a partnership are jointly and severally liable for the debts and obligations of the partnership."); *L. Baldwin & Co.*, 91 P. at 829 ("Another incident of a partnership is the sharing of losses by the partners." (quoting *Lee v. Cravens*, 48 P. 159, 164 (Colo. App. 1897))). Thus, "[i]n the absence of evidence to the

contrary, a right to participate in profits implies a corresponding liability for losses, and simply because losses are not specifically mentioned does not mean there has been no agreement establishing a joint venture." *McNeill v. Allen*, 534 P.2d 813, 817 (Colo. App. 1975) (citing *Quier v. Rickly*, 177 P.2d 549, 552 (Colo. 1947)); *see also L. Baldwin & Co.*, 91 P. at 828 ("The partnership contract may say nothing about losses, but the right to participate in profits implies a corresponding liability for losses; and it has accordingly been held that an agreement for the division of profits is admissible in evidence as tending to show a partnership.")

Plaintiffs' argument also fails factually at this summary judgment stage of the proceedings. Mr. Van Der Aue's declaration states that he and Mr. Kondrup shared the risk of loss. Because the record lacks evidence of actual losses, let alone how any may have been shared, the declaration satisfied the nonmovant's burden to show a genuine issue for trial. The Plaintiffs may be able to rebut the declaration's statement with evidence at trial, but they did not do so as the moving parties at summary judgment.

iii. Independent contractor status

Plaintiffs argue there was no partnership because all payments to Mr. Van Der Aue were made through DV Consulting "for compensation as an independent contractor." Aplee. Br. at 34 (citing Colo. Rev. Stat. § 7-64-202(3)(c)(II)). They point to the CUPA's provision that a presumption of partnership does not apply when profits were received in "'payment' for 'services as an independent contractor.'" *Id.* (quoting Colo. Rev. Stat. § 7-64-202(3)(c)(II)).

To support this argument, Plaintiffs assert that (1) "DV Consulting performed services to support Catalyst LLC transactions" and was "paid on a per-project basis, from a portion of the success fee Catalyst LLC earned from its clients on certain deals"; (2) "uncontradicted business records confirm Catalyst LLC did not pay DV Consulting on some deals"; and (3) "payments to DV Consulting were always reported via IRS Form 1099" so they could not have been "partnership distributions." *Id.* at 35-36.

Plaintiffs' assertions fail to account for the full summary judgment record, which establishes a genuine dispute of material fact as to whether Mr. Van Der Aue shared in the profits of the business as a partner or was paid as an independent contractor.

First, Defendants offered ample evidence that Mr. Van Der Aue shared in the profits of an enterprise rather than on a per-deal basis. In addition to the profit-sharing calculations described above, they pointed to Mr. Van Der Aue's deposition testimony that he was paid his one-third share whether or not he worked on a deal. He said: "Whatever we do in the partnership, I would be entitled to one-third of the results, the overall results. . . . I didn't need to work on the deal or not. Cary Rosoff needed to work on the deal if he's going to get paid. Michael Lauterbach needed to work on the deal if he was going to get paid. I would get paid on all deals." *See* App., Vol. III at 685. Also, Defendants' expert, CPA Matthew Wester, reviewed the financial information for the

alleged partnership and identified only 1% of all M&A activity on which Mr. Van Der Aue was paid only a nominal amount or no amount.[11]

Second, Plaintiffs argue there was no partnership because Catalyst LLC reported payments to DV Consulting on IRS Form 1099s. But their reliance on *Grubb v. DXP Enterprises, Inc.*, 85 F.4th 959 (10th Cir. 2023), is misplaced. In *Grubb*, we found no partnership under Oklahoma law "where the plaintiff did not receive any Form K-1s from the defendant and presented no evidence that he declared any partnership income or losses on his tax returns." *Catalyst*, 2025 WL 2816885, at *3 (citing *Grubb*, 85 F.4th at 971). *Grubb* is distinguishable because the party asserting a partnership in that case had a formal employment agreement with his alleged "partner" and had no evidence of profit sharing. 85 F.4th at 971.[12] We said, "The best Mr. Grubb could do to show that he was a partner was to testify at his deposition that after signing the employment agreement, he probably said something to Mr. Little that 'We're partners no[w]. Let's

[11] In its Rule 12(c) order, the district court said Defendants' allegation that "Mr. Van Der Aue received one third of the profits regardless of whether or not he worked on any particular project significantly undermin[ed] the inference that the payments were made as compensation for services, such as those provided by an independent contractor." *Catalyst*, 2024 WL 2273406, at *3 (citations omitted) (quotations omitted). Defendants have supported that allegation on summary judgment with Mr. Van Der Aue's deposition.

[12] Catalyst LLC had an independent contractor agreement with Mr. Lauterbach of Lauterco. But there is no evidence in the record of such agreement between Catalyst LLC and Mr. Van Der Aue. *Parks v. Miller*, No. 18-CV-3244, 2020 WL 12813967, at *9 (C.D. Ill. June 1, 2020) (unpublished) (determining that in the absence of either a partnership agreement or an independent contractor agreement "the fact that Plaintiff's share of the profits have been *characterized* as pay to an independent contractor is not dispositive" and should be weighed by a jury).

move forward.'" *Id.* (quotations omitted). Nothing in the opinion indicated that the lack of "Form K-1 partner-income statements" was dispositive under Oklahoma law. *Id.* We agree with Defendants that, under *Grubb*, "[t]ax reporting and payment mechanics may support a *competing* inference that payments were for services as an independent contractor, but they do not foreclose partnership formation." Aplt. Br. at 44.[13]

* * * *

Drawing inferences in Defendants' favor, a reasonable jury could find that Mr. Kondrup and Mr. Van Der Aue shared profits in a partnership business.

b. Control

The summary judgment evidence also would permit a reasonable jury to find that Mr. Kondrup and Mr. Van Der Aue "carr[ied] on as co-owners" of a business. Colo. Rev. Stat. § 7-64-202(1).

In analyzing shared control, the district court considered only a single email in which Mr. Kondrup asked Mr. Van Der Aue about how to compensate team members in the business. *Catalyst*, 2025 WL 2816885, at *4. But there was more evidence of shared control. For example, Mr. Van Der Aue's declaration stated that he and Mr. Kondrup made key decisions together, such as the timing and amount of distributions between them, hiring and firing of employees, and compensation for the business's team

[13] *See also Swan v. Tanjuakio*, No. CV 21-00052, 2021 WL 1794756, at *5 (D. Haw. May 5, 2021) (unpublished) (applying Hawai'i UPA) ("The evidence . . . clearly establishes that there was an 'association of two or more persons to carry on as co-owners a business for profit' . . . . regardless of whether Plaintiffs were paid with IRS Forms 1099." (citations omitted)).

members. Email evidence supports Mr. Van Der Aue's declaration. For example, Mr. Van Der Aue points to a series of emails in the summary judgment record showing he made decisions on behalf of the business in salary negotiations for a prospective hire:

From: Mark Smith <marksmith@brewermorris.com>
Sent: Monday, February 28, 2022 3:19 PM
To: Dan Van Der Aue <dan@catalyststrategicadvisors.com>; Joe Kondrup <joe@catalyststrategicadvisors.com>
Subject: Michael Denny Follow Up

Hi Joe and Dan,

Michael is very excited about the opportunity and thinks it will be a great fit. Michael is specifically asking for 160,000. I did not discuss total compensation bonus. He is expecting a counteroffer.

From: Dan Van Der Aue [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=7D6AC101A40941E0AFC73AF6D7839FB3-DAN]
Sent: 2/28/2022 2:15:18 PM
To: Mark Smith [marksmith@brewermorris.com]; Joe Kondrup [joe@catalyststrategicadvisors.com]
Subject: RE: Michael Denny Follow Up

Mark,

Joe and I haven't discussed yet but one thing for sure, he needs to commit to a start date so it's not open ended. I would say no later than Monday 3/28, preferably 3/21 or 3/23...

So are you saying $160k base plus our 20-50% bonus arrangement seals the deal, and by meeting his base salary ask we don't need to address whatever bonus he's leaving behind?

If so, let's go ahead and make it happen so he can give notice and start the clock can start ticking.

We'll need his address to put into the offer documents...

Regards, Dan

Daniel Van Der Aue
Principal
CATALYST
STRATEGIC ADVISORS

R. App., Vol. I at 146.

On the one email the district court did consider, the court said it demonstrated Mr. Van Der Aue "merely having a say in compensation matters." *Catalyst*, 2025 WL

2816885, at *3. But the email supports Mr. Van Der Aue's contention that he and Mr. Kondrup jointly made compensation decisions:

From: Joe Kondrup <joe@catalyststrategicadvisors.com>
Sent: Thursday, November 17, 2022 1:32 PM
To: Dan Van Der Aue <dan@catalyststrategicadvisors.com>
Subject: FYI

Dan,

I was working on this yesterday and it raises a few questions noted in the attached:

1. Sarah and Bryan got some spiff money earlier this year. Do we want to deduct this from the bonus calculation or let them know that we are leaving this with them and it is above and beyond their bonus calculation because they were carrying a big load before we expanded the Team.
2. Also, for Cody, she got a signing bonus of $15k and I don't recall if that nets from her bonus or not. We can check, but same question, even if it does do we want to let her know it's an incremental gift... if its not tied to anything we can just reflect that as part of her total comp for the year
3. I think we decided $175k for Srah, Bryan and Denny, and $200 or $205 for Cody? I want to put together a comp summary as well as a 2023 bonus program document that lays out the bonus framework for them when we present the raises.

I think a good timeline would be to put this in place after Thanksgiving and as we draw near to the PA and CCIS closings. Depending on how things play out, we'll have Sarah and Bryan in Scottsdale so we could preview for them there.

Let's chat when we have some quiet time.

Joe Kondrup, Jr.

Id. at 151.

Plaintiffs argue that Mr. Van Der Aue could not have been a co-owner because "Catalyst LLC performed all of the alleged partnership's business activities," such as "leas[ing] the alleged partnership's office space, pa[ying] its employees, execut[ing] client engagement letters, and fil[ing] the alleged partnership's lawsuits in Catalyst LLC's name." Aplee. Br. at 23. But under Colorado law, partners retain control over their business venture even when they delegate the day-to-day management responsibilities to others. *See Chan v. HEI Res., Inc.*, 512 P.3d 120, 128 (Colo. 2022).

c. Catalyst LLC

Plaintiffs mount an additional argument: Mr. Van Der Aue "cannot establish that he had ownership over the business enterprise he alleges" because "the M&A advisory business he claims to co-own is Catalyst LLC—which cannot be a partnership." Aplee. Br. at 22-23. They invoke the CUPA provision stating that an association is not a partnership if it is formed under a different statute. Colo. Rev. Stat. § 7-64-202(2).

But as the district court said in its Rule 12(c) order, "this argument misses the mark because Defendants allege that the partnership is between Mr. Van Der Aue and Mr. Kondrup, as individuals," and "there are no allegations" that Mr. Van Der Aue and Mr. Kondrup's relationship already constituted an "established form of business entity or association when the purported partnership was formed." *Catalyst*, 2024 WL 2273406, at *2. The issue is whether the two men created a partnership under Colorado law by "carry[ing] on as co-owners a business for profit." Colo. Rev. Stat. § 7-64-202(1). And starting with the framework emails splitting profits between "JK" and "DV," the record contains abundant emails and spreadsheets documenting the business relationship between Mr. Van Der Aue and Mr. Kondrup as individuals, not between their respective companies.[14]

[14] *See, e.g.*, R. App., Vol. I at 139 ("Framework" emails dividing the remainder of revenues less expenses "1/3 to DV and 2/3 to JK," which presumably refers to Daniel Van Der Aue and Joseph Kondrup); C. App., Vol. I at 91-12 (calculating ratio of "[Joseph] Kondrup Gross Comp" to "VDA Gross Comp," presumably Daniel Van Der Aue); C. App., Vol. I at 91-14 (calculating "CSA Net Income prior to Dan [Van Der Aue] and Joe [Kondrup] getting paid").

* * * *

Drawing inferences in Defendants' favor, a reasonable jury could find that Mr. Van Der Aue and Mr. Kondrup carried on as co-owners in the business, allocating management responsibilities commensurate with their share of the profits of the business.[15]

C. *Alternate Contract Claim*

The district court granted Plaintiffs summary judgment on Defendants' contract claim, concluding there was no profit-sharing agreement between Mr. Kondrup and Mr. Van Der Aue. Because we conclude that there is a genuine dispute of material fact as to whether there was an enforceable agreement to share the profits of the business, we also reverse the grant of summary judgment on this claim.

III. CONCLUSION

We reverse the district court's judgment and remand for further proceedings.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

[15] *See* Colo. Rev. Stat. § 7-64-406(2) ("If the partners . . . continue the business without any settlement or liquidation of the partnership, they are presumed to have agreed that the partnership will continue.").