In the United States Court of Appeals for the Ninth Circuit

Nos. 12–35307 & 12–35325

JOHN M. FLOYD & ASSOCIATES, INC.,
a Texas corporation,
Plaintiff/Appellant/Cross–Appellee,

v.

TAPCO CREDIT UNION,
Defendant/Appellee/Cross–Appellant.

On Appeal from the U.S. District Court for the
Western District of Washington, No. 10–cv–5946
(Honorable Benjamin H. Settle, U.S. District Judge)

BRIEF FOR APPELLANT

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CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1, plaintiff/appellant/cross–appellee John M. Floyd & Associates, Inc. (JMFA) hereby states that it has no parent corporations, and no publicly held corporations own 10% or more of JMFA's stock.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court possessed subject matter jurisdiction pursuant to 28 U.S.C. §1332(a) because the parties are citizens of different States and the amount in controversy exceeds $75,000, exclusive of interest and costs. Record Excerpts (R.E.) 229–30.

In mid–November of 2011, defendant TAPCO Credit Union filed a motion for summary judgment seeking the dismissal of all four claims contained in the civil action complaint that plaintiff John M. Floyd & Associates, Inc. had filed against TAPCO. R.E.103. The opposing parties fully briefed the summary judgment motion by the end of December 2011. R.E.239–40. On February 8, 2012, the district court granted summary judgment in favor of TAPCO against all of JMFA's claims. R.E.7–17.

JMFA then filed a timely motion to alter or amend the judgment, pursuant to Federal Rule of Civil Procedure 59(e). R.E.23. On March 21, 2012, the district court issued an order denying JMFA's motion to alter or amend. R.E.1–5. Thereafter, on April 18, 2012, JMFA filed its timely notice of appeal. R.E.20.

This Court possesses appellate jurisdiction pursuant to 28 U.S.C. §1291.

ISSUES ON APPEAL

1. Did the district court err as a matter of law in ruling that no genuine issues of material fact existed to preclude the entry of summary judgment on JMFA's claims for breach of contract and unjust enrichment arising from TAPCO's continued use of the Overdraft Privilege program's software and know–how, which JMFA had supplied at the outset of the contractual relationship, even after the expiration of the written contract between JMFA and TAPCO?

2. Did the district court err as a matter of law in holding that TAPCO was not liable to JMFA for breach of contract despite admissible evidence establishing that TAPCO had implemented JMFA's Overdraft Privilege program's recommendations as to TAPCO's e–channels once the computer operating system running TAPCO's core processor became capable of doing so?

STANDARD OF REVIEW

This Court exercises plenary review over a district court's decision granting summary judgment. *Stilwell* v. *Smith & Nephew, Inc.*, 482 F.3d 1187, 1193 (9th Cir. 2007) ("Our review of the grant of summary judgment is plenary, and we view the facts in the light most favorable to * * * the non-moving party.").

STATEMENT OF THE CASE

Plaintiff John M. Floyd & Associates, Inc. (JMFA) initiated this suit in the U.S. District Court for the Western District of Washington by means of a complaint filed in December 2010. R.E.229–37. The complaint asserted four claims for relief against defendant TAPCO Credit Union: (i) breach of contract; (ii) an accounting; (iii) unjust enrichment; and (iv) breach of duty of good faith and fair dealing. *Id.* The parties briefed the legal issues in this case at the district court level on the assumption that Washington State law governed the contract giving rise to this lawsuit and the claims at issue, and the district court did not disagree with that assumption. R.E.111–12, 78–79. JMFA

continues to proceed on that assumption in briefing the merits of this appeal.

Following discovery, TAPCO in November 2011 filed a motion for summary judgment as to all of JMFA's claims. R.E.103. On February 8, 2012, after the parties had fully briefed the summary judgment motion, the district court issued an opinion and order granting TAPCO's motion for summary judgment. R.E.7–17.

With respect to JMFA's breach of contract claim, the district court explained that "Floyd has not provided any probative evidence to support its underlying claim that TAPCO used its recommendations, products, and/or services post–December 31, 2007," the date on which the contract between the parties was due to expire. R.E.14. The district court relied on essentially the same rationale in entering summary judgment against JMFA's quantum meruit/unjust enrichment claim. R.E.15–16. Next, the district court ruled that JMFA was not entitled to an accounting in the absence of any viable claim for damages based on TAPCO's increased profits. R.E.16. Finally, the district court once again relied on its conclusion that "nothing in the record indicates that TAPCO used Floyd's recommendations post–December 31, 2007" as the

basis for granting summary judgment against JMFA's claim for breach of the implied covenant of good faith and fair dealing. R.E.17.

On February 9, 2012, the district court formally entered judgment in favor of TAPCO and against JMFA. R.E.6.

Thereafter, on March 8, 2012, JMFA filed a timely motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e) in which JMFA contended that the district court should vacate its entry of summary judgment and allow the case to proceed to trial. R.E.23. By means of an order entered March 21, 2012, the district court denied JMFA's motion to alter or amend on two separate grounds. R.E.1–5.

First, the district court ruled that the motion "should be treated as one for reconsideration pursuant to Local Civil Rule 7(h)," which should have been filed within 14 days of the district court's summary judgment order. R.E.2. By contrast, under Federal Rule of Civil Procedure 59(e), JMFA's motion to alter or amend was timely because it was filed within 28 days of the district court's entry of judgment. Based on its view that JMFA's motion was untimely under Local Civil Rule 7(h), "[f]or this reason alone the Court denie[d] the motion." R.E.2.

Second, the district court ruled that JMFA "has failed to show 'manifest error' in the Court's order granting summary judgment" because "Floyd had still not provided any probative evidence to support its claim that TAPCO in fact *used* its recommendations, products, and/or services after December 31, 2007." R.E.2–3.

JMFA filed its timely notice of appeal to this Court on April 18, 2012. R.E.20–21.

STATEMENT OF FACTS

In May 2004, John M. Floyd & Associates, Inc. (JMFA) entered into a written contract with TAPCO Credit Union with the goal of implementing JMFA's Overdraft Privilege program at the credit union. R.E.125–32. An overdraft privilege program enables a bank or credit union to choose to honor its customers' checks or electronic payment orders even when the checks or electronic payment orders exceed the amount of collected funds in the customers' accounts, thereby allowing such customers to avoid the embarrassment, expense, and annoyance of bouncing a check or having an electronic payment order rejected. R.E.85–88. In exchange, the bank or credit union assesses and collects

fees from its customers whose overdrafts the bank or credit union has covered, enabling the bank or credit union to profit from the arrangement. R.E.125, 127–28.

The written agreement between the parties to this lawsuit provides that JMFA, in exchange for providing its recommendations, advice, and know–how to TAPCO, would be entitled to receive the compensation specified in the agreement, expressed as a percentage of TAPCO's increased income from its use of JMFA's Overdraft Privilege program. R.E.127–28. TAPCO selected a three–year contractual compensation period, which formally began on January 1, 2005 and ended on December 31, 2007. R.E.127.

In accordance with the contract between the parties, at the outset of the relationship, JMFA presented TAPCO with a series of recommendations for the proposed Overdraft Privilege program. JMFA's recommendations included implementing the Overdraft Privilege program for both payments made by checks and payments made by electronic means, such as through ATM machines, debit cards, and other forms of authorized electronic payments. R.E.87–88, 96–97. In response to JMFA's recommendations, TAPCO informed JMFA that

TAPCO wished to install JMFA's Overdraft Privilege program for payments made by checks and electronic means (the latter of which is referred to in the industry as "e–channel" payments). R.E. 87–88, 96–97.

Unfortunately, the computer software that existed at TAPCO to run TAPCO's core processing system was not sufficiently robust to enable the immediate implementation of JMFA's Overdraft Privilege program as to so–called "e–channels." R.E.88, 97. As a result, at the outset, TAPCO was unable to implement JMFA's Overdraft Privilege program as to payments that TAPCO's customers were making via electronic means. R.E.88, 97.

At or around the time that the contract between the parties was due to expire at the end of December 2007, TAPCO updated the software operating its core processor so that, as a consequence, TAPCO was then able to implement the so–called "e–channel" aspects of JMFA's Overdraft Privilege program. R.E.88, 97. In this lawsuit, JMFA asserted, among other things, that TAPCO had implemented JMFA's e–channel recommendations at or around the end of 2007, thereby entitling JMFA to recover three years' worth of compensation for the

profits that TAPCO experienced as the result of installing those recommendations.R.E.231–33.

TAPCO, by contrast, relied on the following provision of the contract between the parties to contend that no compensation was due to JMFA:

> If a recommendation is not approved it will not be included in the fee calculation. However, if any recommendation, within 24 months of the initial engagement, is installed or approved or approved as modified, or initially declined and later approved as recommended or as subsequently modified, it will be included in the fee calculation.

R.E.128. JMFA, in response, asserted that the above–quoted provision was not applicable, because here TAPCO had approved JMFA's e–channel recommendation, but TAPCO was initially unable to implement that recommendation due to no fault of JMFA. R.E.87–88, 96–97. Thus, it was JMFA's contention in this lawsuit that TAPCO was liable to JMFA for JMFA's contractual share of 36 months of TAPCO's e–channel profits under the terms of the parties' contract. R.E.231–33.

The other major component of JMFA's breach of contract claim is even more easily explained. Simply put, the other aspect of JMFA's breach of contract claim asserts that TAPCO continued to use JMFA's Overdraft Privilege program even after the contract between the parties expired on December 31, 2007. R.E.89, 98. Consequently, TAPCO's

continued use of JMFA's Overdraft Privilege program either gave rise to a contract implied–in–fact or caused TAPCO to be liable to JMFA under an unjust enrichment theory in the absence of any actual continuing contractual relationship. R.E.233–35.

On this second aspect of JMFA's breach of contract claim, the evidence in the record is as follows. TAPCO did not have any overdraft program in effect before entering into the contract with JMFA. R.E.91, 100. When the contract was about to expire, an attorney for TAPCO in correspondence to counsel for JMFA pledged to return JMFA's software and other materials after the contract ended on December 31, 2007. R.E.155. Thereafter, however, counsel for TAPCO sent another letter to JMFA's counsel stating that TAPCO would not be returning any software or other materials to JMFA as TAPCO had previously promised. R.E.159.

After the contract expired on December 31, 2007, TAPCO continued to offer its banking customers an overdraft privilege program without any interruption. R.E.90–91, 100. Although TAPCO denied that it was continuing to use JMFA's overdraft privilege program, TAPCO's motion for summary judgment did not contain any actual evidence (such as

contracts, invoices, or proof of payments) to establish that TAPCO had replaced JMFA's Overdraft Privilege program with the program of another overdraft services vendor. R.E.103–220. Thus, in the absence of any actual proof that TAPCO had replaced JMFA's Overdraft Privilege program, and given TAPCO's acknowledgement that TAPCO continued to offer an overdraft privilege program, JMFA argued to the district court that a genuine issue of material fact existed for trial.

The district court, however, concluded that the evidence of record was insufficient to allow a reasonable jury to conclude that TAPCO was in fact using JMFA's Overdraft Privilege program. It was the district court's view that JMFA should have inspected TAPCO's core processor computer to determine whether TAPCO was in fact using JMFA's Overdraft Privilege program after December 31, 2007. R.E.14–15. But what the district court overlooked was that inspecting TAPCO's core processor — even if the parties could have reached agreement to allow JMFA to do so, notwithstanding that no such agreement ever was reached — was unlikely to conclusively establish or rebut JMFA's claims, because JMFA's Overdraft Privilege program is not primarily a computer program. Rather, JMFA's Overdraft Privilege program

consists of a comprehensive set of "best practices" business methods for offering an overdraft privilege system (R.E.86–87), such that a jury reasonably could have concluded that TAPCO was continuing to use JMFA's system in the absence of any evidence that TAPCO had instead contracted with one of JMFA's competitors to utilize that competitor's overdraft privilege system.

Because JMFA believes that none of the bases for the district court's entry of summary judgment against JMFA's claims can withstand further scrutiny, JMFA has chosen to pursue this appeal.

SUMMARY OF THE ARGUMENT

The district court's grant of summary judgment in favor of TAPCO and against JMFA should be reversed due to the existence of genuine issues of material fact necessitating a jury trial in this matter.

In accordance with the express terms of the written contract between the parties, if TAPCO approves a recommendation that JMFA made during the initial engagement period, then TAPCO owes a contingent fee commission over the 36–month period following TAPCO's implementation of the recommendation representing a percentage of

the increased profits that TAPCO has earned as a result of having implemented the recommendation.

In this case, JMFA has introduced evidence that would allow a reasonable finder of fact to conclude by a preponderance of the evidence that TAPCO originally approved JMFA's Overdraft Privilege program as to TAPCO's e–channels, but that TAPCO's then–existing outdated computer system did not enable TAPCO to immediately implement that recommendation. Later, after TAPCO updated its computer system and thereby became able to implement JMFA's recommendations as to TAPCO's e–channels, the 36–month contingent fee commission period came into effect at the time when TAPCO implemented JMFA's e–channel recommendations. As a result, when TAPCO refused to pay any contingent fee on e–channel profits to JMFA, TAPCO breached the contract between the parties and became liable to JMFA in damages.

To the extent that TAPCO's defense consists of an assertion that TAPCO initially disapproved of JMFA's e–channel recommendations because TAPCO was unable to immediately implement those recommendations, a genuine issue of material fact exists over whether TAPCO initially approved or disapproved those recommendations. And

to the extent that TAPCO is contending that it did not owe any commission to JMFA because TAPCO waited three years to implement JMFA's e–channel recommendations — even if TAPCO had initially approved those recommendations — the language of the contract between the parties does not excuse TAPCO from its payment obligation to JMFA.

Likewise, the district court's entry of summary judgment in favor of TAPCO on the other aspect of JMFA's breach of contract and unjust enrichment claims should be reversed due to the existence of a genuine issue of material fact. A jury reasonably could conclude, despite TAPCO's unsubstantiated denials to the contrary, that TAPCO continued to use JMFA's Overdraft Privilege program after the original contract between the parties had expired, which would cause TAPCO to be liable under Washington State law to JMFA under either a contract implied–in–fact theory or under an unjust enrichment theory.

The evidence in the record before the district court at the summary judgment stage that would allow a reasonable jury to rule in JMFA's favor consists of proof that TAPCO was continuing to utilize some form of overdraft privilege program after December 31, 2007, but TAPCO

failed to come forward with any evidence (which would necessarily be within TAPCO's possession) to establish that the provider of TAPCO's overdraft privilege program was anyone other than JMFA. Moreover, TAPCO's attorney had originally promised to return JMFA's Overdraft Privilege software and other related materials to JMFA, but thereafter TAPCO's attorney communicated that no software or other materials would be returned. This evidence, by itself and combined with other evidence in support of JMFA's claims detailed elsewhere within this appellate brief, would allow a reasonable jury to find in favor of JMFA on JMFA's claims for breach of contract or unjust enrichment.

Lastly, as explained below, the district court erred in holding that JMFA's motion to alter or amend the judgment had to be denied because it was not filed within the 14–day period specified in Western District of Washington Local Civil Rule 7(h)(2), when that motion was timely filed within the 28–day period provided in Federal Rule of Civil Procedure 59(e).

For all of these reasons, the district court's entry of summary judgment in favor of TAPCO and against JMFA should be reversed in its entirety.

ARGUMENT

A. The District Court Erred In Entering Summary Judgment As To JMFA's "E–Channel" Claim, When JMFA Introduced Evidence Establishing That TAPCO Originally Approved JMFA's "E–Channel" Overdraft Recommendation

The existence of genuine issues of material fact concerning whether TAPCO did or did not originally approve JMFA's recommendation to install the "e–channel" aspect of JMFA's Overdraft Privilege program necessitates reversal of the district court's entry of summary judgment as to that aspect of JMFA's breach of contract claim.

JMFA has averred through its witnesses' affidavits that TAPCO originally approved JMFA's recommendation to install the e–channel component of JMFA's Overdraft Privilege program, but the outdated software running TAPCO's core processing computer precluded the immediate installation of that component. R.E.87–88, 96–97. Toward the time that the written contract between JMFA and TAPCO was originally scheduled to expire in December 2007, however, TAPCO updated the software running its core processor, which then allowed TAPCO to implement the e–channel component of JMFA's Overdraft Privilege program. R.E.88, 97. Thus, under the terms of the parties' written agreement, beginning in December 2007 TAPCO had a 36–

month obligation to provide JMFA with JMFA's contractually specified portion of TAPCO's resulting profits from installation of the e–channel component of JMFA's Overdraft Privilege program. R.E.127–28.

In arguing in support of its motion for summary judgment that JMFA was not entitled to any compensation, TAPCO did not deny any of the most important facts at the heart of JMFA's claim. Specifically, TAPCO did not deny that it had updated the software controlling its core processing system. TAPCO further did not deny that due to the updated core processing software, TAPCO was now able to implement the e–channel component of JMFA's Overdraft Privilege program. Finally, TAPCO did not deny that it did implement an e–channel component of its overdraft privilege program around the end of 2007.

Rather, TAPCO in moving for summary judgment relied on the following provision of the written contract between the parties:

> If a recommendation is not approved it will not be included in the fee calculation. However, if any recommendation, within 24 months of the initial engagement, is installed or approved or approved as modified, or initially declined and later approved as recommended or as subsequently modified, it will be included in the fee calculation.

R.E.128. TAPCO's reliance on that contractual provision implicates a key disputed issue of material fact concerning whether or not TAPCO

originally "approved" or rejected JMFA's recommendation at the outset of the contractual relationship to install the e–channel component of JMFA's Overdraft Privilege program.

JMFA, in opposing TAPCO's summary judgment motion, pointed to affidavits establishing that TAPCO approved the e–channel recommendation but, due to no fault of JMFA, was initially unable to implement that recommendation due to the out–of–date software running TAPCO's core processing system. R.E.87–88, 96–97. Thus, later, when TAPCO was finally able to implement JMFA's recommendation as to the e–channel component of the Overdraft Privilege program, TAPCO's 36–month obligation to pay to JMFA a contingent share of profits generated from the e–channel component sprung into effect.

Under Washington State law, a court applies the objective manifestation theory of contracts, giving the words of a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. *See Hearst Commc'ns, Inc.* v. *Seattle Times Co.*, 115 P.3d 262, 267 (Wash. 2005). Where, as here, interpretation does not depend on the use of extrinsic

evidence, interpretation of a contract provision is a question of law reviewed *de novo*. *See State* v. *R.J. Reynolds Tobacco Co.*, 211 P.3d 448, 452 (Wash. Ct. App. 2009).

If, as JMFA's evidence shows, TAPCO originally approved JMFA's e–channel recommendation, TAPCO can point to nothing in the language of the contract that would excuse TAPCO from compensating JMFA for the full, contractually specified 36–month period after finally installing that recommendation once TAPCO became capable of doing so. Rather, the only way that TAPCO could avoid compensating JMFA was if TAPCO had originally disapproved JMFA's e–channel recommendation, and with regard to that point a genuine issue of material fact unquestionably exists.

The only remaining ground for the district court's entry of summary judgment was the district court's view that JMFA had failed to produce sufficiently persuasive evidence that TAPCO was in fact continuing to use some or all of JMFA's Overdraft Privilege program following the contract's expiration on December 31, 2007. JMFA demonstrates the reversible error in that aspect of the district court's ruling in the following section of this brief.

B. The District Court Erred In Holding That JMFA Did Not Produce Sufficient Evidence To Persuade A Rational Jury That TAPCO Continued To Use JMFA's Overdraft Privilege Program After The Contract Between The Parties Expired

In holding that JMFA had failed to introduce sufficient evidence to establish that TAPCO had continued to use JMFA's Overdraft Privilege program after the contract between the parties expired on December 31, 2007, the district court seized on an argument that TAPCO advanced in its reply brief asserting that TAPCO had offered to give JMFA access to TAPCO's computer system in discovery, but JMFA never took advantage of that offer. R.E.4, 14–15, 39.

TAPCO's argument and the district court's reliance on it improperly overlook that JMFA's Overdraft Privilege program is not exclusively or even predominantly a form of computer software that inspection of TAPCO's computer system would have revealed the presence or absence of. Rather, JMFA's Overdraft Privilege program is a comprehensive "best practices" set of business methods consisting of, among other things, various types of internal recordkeeping at the bank or credit union and various types of recommended communications to the customers of a bank or credit union. R.E.86–87. Accordingly, the most persuasive evidence that TAPCO was continuing to operate JMFA's

Overdraft Privilege program after the written contract's expiration consisted of TAPCO's acknowledgement that it was continuing to operate an overdraft privilege program after that date, coupled with TAPCO's failure to place before the district court any evidence either that TAPCO had contracted with any other vendor to provide an overdraft privilege program or that TAPCO's overdraft program differed in any way from JMFA's Overdraft Privilege program.

The actual question before the district court was not whether JMFA might have uncovered a "smoking gun" indisputably establishing the validity of JMFA's claims if JMFA had inspected TAPCO's computer system. Rather, the question before the district court was whether the evidence actually before the district court sufficed to allow a rational jury to find in JMFA's favor on JMFA's claim for breach of contract or unjust enrichment. Thus, it is important to review the evidence that was actually before the district court.

JMFA introduced evidence establishing that TAPCO did not have an overdraft privilege program in effect before entering into the contract with JMFA giving rise to this lawsuit. R.E.91, 100. It is undisputed, however, that TAPCO continued to have an overdraft privilege program

in operation after December 31, 2007, when TAPCO's contract with JMFA expired. R.E.91, 100. Moreover, TAPCO never introduced in support of its summary judgment motion any contract with any competitor of JMFA, nor any invoices from such a competitor, nor any evidence of payments made to any such competitor, to attempt to show that TAPCO had installed some other overdraft program after December 31, 2007.

Thus, the district court was not faced merely with a "he said, she said" swearing contest whereby one party was asserting the other party's liability, while the other party was denying liability, although in that scenario a jury question would be presented. Rather, here the district court confronted a record wherein it was undisputed that TAPCO was continuing to utilize some form of overdraft privilege program after December 31, 2007, but TAPCO failed to come forward with any evidence (which would necessarily be within TAPCO's possession) to establish that the provider of TAPCO's overdraft privilege program was anyone other than JMFA. Moreover, TAPCO's attorney had originally promised to return JMFA's Overdraft Privilege software and other related materials to JMFA (R.E.155), but thereafter

TAPCO's attorney communicated that no software or other materials would be returned (R.E.159).

Faced with these facts, a reasonable jury certainly could conclude that TAPCO was continuing to use JFMA's overdraft privilege program after the contract between the parties expired on December 31, 2007. The district court, meanwhile, invented some sort of "best evidence" requirement whereby, in the district court's view, TAPCO's computer system would presumably reveal whether TAPCO was or was not continuing to use JMFA's Overdraft Privilege program. R.E.4, 14–15. But, in fact, neither the district court nor this Court knows what TAPCO's computer system would reveal, as TAPCO did not present the contents of its computer system to the district court in seeking summary judgment, and TAPCO never in fact allowed anyone from JMFA to touch TAPCO's computer in the absence of any protective order, which never existed in this case.

Perhaps a hypothetical would even more clearly illustrate the central flaw in the district court's ruling. Assume that two rare book collectors — one named Allen, the other named Benjamin — are neighbors. Allen is about to embark on a two week trip to Europe in search of additional

rare books, so he asks Benjamin to periodically check in on Allen's rare book collection located at Allen's home library while Allen is overseas. When Allen returns, he notices that one of the most valuable rare books from his personal home collection is missing, and there is no sign of any break–in at the house. Allen thus sues Benjamin, alleging that Benjamin stole the book, seeking either its return or its monetary value.

Assume further that Benjamin were to offer in discovery, in an attempt to disprove the accusation of theft, that Allen could search through the contents of Benjamin's home in an attempt to find the missing book. Surely, if Allen were to decline Benjamin's offer, a court could not reasonably use Allen's failure to search through the contents of Benjamin's home as the central basis for granting summary judgment against Allen on Allen's claim of theft against Benjamin. Rather, the trial court under these circumstances would realize the offer to search lacked any evidentiary value, for no one who has actually stolen a rare book from his neighbor would leave the book out in plain view in his own home after inviting the neighbor over to search the premises. Here, TAPCO's offer to allow JMFA to search TAPCO's

computer for evidence that TAPCO was continuing to use JMFA's Overdraft Privilege program was likewise bereft of evidentiary value.

The district court correctly did not question that TAPCO could be held liable as a matter of law if TAPCO had continued to use JMFA's Overdraft Privilege program after expiration of the parties' contract on December 31, 2007. R.E.13–14. The written contract was for a 36–month duration, but the contract did not entitle TAPCO to continue using JMFA's overdraft privilege program free of charge once the 36–month period expired. R.E.125–32.

Under Washington state law, TAPCO's continued use of JMFA's Overdraft Privilege program gave rise either to a contract implied–in–fact or a claim for unjust enrichment, whereby TAPCO received the benefit of JMFA's know–how, and thus equity required TAPCO to compensate JMFA for providing that benefit. As the Supreme Court of Washington explained in *Young* v. *Young*, 191 P.3d 1258, 1263 (Wash. 2008), "the elements of a contract implied in fact are: (1) the defendant requests work, (2) the plaintiff expects payment for the work, and (3) the defendant knows or should know the plaintiff expects payment for the work." Washington State's highest court further explained in

Young that "[u]njust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it." *Id.* at 1262.

Here, whether TAPCO's continued use of JMFA's Overdraft Privilege program gave rise to a contract implied–in–fact or a claim for unjust enrichment because the contract had expired is something for the finder of fact to determine at trial. What is clear, however, is that as a matter of Washington state law, TAPCO cannot avoid paying additional compensation to JMFA for using JMFA's Overdraft Privilege program merely because TAPCO's continued use of that program occurred after the original contract between the parties had expired.

* * * * *

Above, JMFA has established that the district court erred as a matter of law when that court entered summary judgment in favor of TAPCO on JMFA's claims for breach of contract and unjust enrichment. The reinstatement of those claims should also lead this Court to reinstate JMFA's claims for an accounting (which was predicated on TAPCO's continuing liability to JMFA) and for breach of the covenants of good faith and fair dealing.

C. To The Extent That The District Court Rejected JMFA's Motion For Reconsideration As Untimely Based On Local Civil Rule 7(h), The District Court Erred And Abused Its Discretion

In 2009, Federal Rule of Civil Procedure 59(e) was amended to allow a timely motion to alter or amend the judgment to be filed within 28 days of the entry of judgment. Before the 2009 amendment, the deadline for filing a Rule 59(e) motion was ten business days, a period that ordinarily translated into 14 calendar days.

Unfortunately, federal district courts all too often fail to update the timing provisions contained in their local rules of procedure in a prompt manner following amendments to the corresponding timing provisions contained in the Federal Rules of Civil Procedure. As a result, when JMFA filed its Federal Rule of Civil Procedure 59(e) motion to alter or amend the judgment in this case in a timely manner within the 28 days provided in Rule 59(e), local Civil Rule 7(h)(2) of the U.S. District Court for the Western District of Washington continued to state that motions for reconsideration must be filed within 14 days of the entry of an order from which reconsideration is being sought.

The district court's denial of JMFA's timely Rule 59(e) motion to alter or amend the judgment on the ground that the motion was not

filed within the 14–day period specified in local Civil Rule 7(h)(2) was both legally erroneous and an abuse of discretion for one very simple reason. As Federal Rule of Civil Procedure 83(a)(1) makes clear, local rules of procedure "must be consistent with" the Federal Rules of Procedure. *See* Fed. R. Civ. P. 83(a)(1); *see also Marshall* v. *Gates*, 44 F.3d 722, 724–25 (9th Cir. 1994) (recognizing that the Federal Rules of Procedure take precedence over conflicting local rules).

Here, as noted above, JMFA's Rule 59(e) motion to alter or amend the judgment was filed within the 28–day period for timely filing such a motion. R.E.240. Moreover, the district court proceeded to address the merits of JMFA's motion as an alternate basis for denying relief, and thus no remand is required to have the district court address the merits of that motion in the first instance. R.E.2–5. Nevertheless, JMFA, out of an abundance of caution, could not simply ignore the district court's holding that JMFA's Rule 59(e) motion was untimely under local Civil Rule 7(h)(2), because the timeliness of JMFA's Rule 59(e) motion is a necessary prerequisite to the timeliness of JMFA's appeal.

Because JMFA's Rule 59(e) motion was unquestionably timely, this Court should reverse the district court's holding that JMFA's post–

judgment motion was being denied as untimely under local Civil Rule 7(h)(2) because the motion was not filed within 14 days of the entry of judgment.

CONCLUSION

For the reasons set forth above, the district court's grant of summary judgment on John M. Floyd & Associates, Inc.'s claims against TAPCO should be reversed in its entirety, and this case should be remanded for trial.

Respectfully submitted,

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STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Rule 28–2.6, counsel for JMFA hereby certifies that he is not aware of the existence of any related cases.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH TYPE–VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type–volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief does not exceed 30 pages in length.

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Dated: July 27, 2011

/s/ Howard J. Bashman
Howard J. Bashman

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 27, 2012.

I certify that all participants in the case (as listed below) are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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