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)

REPLY BRIEF FOR APPELLANT/BRIEF FOR CROSS–APPELLEE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Other Authorities

REPLY BRIEF FOR APPELLANT

INTRODUCTION

Defendant TAPCO Credit Union, in its Brief for Appellee/Cross–Appellant, seeks to falsely portray plaintiff John M. Floyd & Associates, Inc. (JMFA) as a software provider, when in fact JMFA is a business consultant to the banking industry whose line of work involves improving the profitability of banks and credit unions such as TAPCO. R.E.85–86.

The written contract between JMFA and TAPCO repeatedly makes clear that what JMFA is agreeing to deliver are "recommendations" aimed at improving TAPCO's profitability. R.E.126–28. The district court's own description of the facts of this case, contained in that court's summary judgment opinion, likewise recognized that Floyd had agreed in the contract to provide "recommendations, products, and/or services." R.E.10 (district court's summary judgment opinion at 4).

Both the district court's summary judgment opinion (R.E.11, opinion at page 4) and TAPCO's Brief for Appellee/Cross–Appellant (at page 3) acknowledge that TAPCO paid to JMFA a total of $147,583.05 in compensation due under the parties' contract during the original 36–

month period specified in the contract. Because those fees represented 12% of the profits that TAPCO realized as the result of implementing JMFA's recommendations, the evidence in this case thus further reveals that TAPCO generated more than $1.2 million in non–interest income (or on average more than $400,000 in non–interest income per year) during the original 36–month contractually specified payment period. R.E.89.

Regardless of whether TAPCO had no — or "virtually no" (R.E.91, 100) — overdraft privilege program in place before entering into the contract with JMFA, the record before this Court is clear that TAPCO experienced significant additional income as the result of implementing JMFA's recommendations. If TAPCO had ceased using JMFA's recommendations when the contract between the parties was scheduled to terminate as of December 31, 2007, the increased profitability that TAPCO experienced as the result of implementing JMFA's recommendations should have begun to disappear as TAPCO's levels of non–interest income returned to the levels experienced before the contract between the parties came into effect. R.E.90–91.

But here, exactly the opposite happened. TAPCO's non–interest income not only stayed the same as when TAPCO was using JMFA's recommendations (demonstrating that TAPCO was improperly continuing to use those recommendations without continuing to compensate JMFA for them), but TAPCO's non–interest income continued to substantially increase (as the result of TAPCO's decision to finally implement JMFA's e–channel recommendations, which TAPCO had approved at the outset of the contract between the parties but TAPCO was unable to install earlier due to outdated software that TAPCO was then using). R.E.88, 91–92.

Thus, contrary to TAPCO's arguments on appeal, the district court's summary judgment ruling cannot be upheld based on JMFA's failure to have caught TAPCO's hand in the cookie jar, nor can the entry of summary judgment be affirmed on a supposed lack of evidence that would have allowed a reasonable jury to hold that TAPCO is liable for breach of contract. Rather, JMFA's Chief Executive Officer and JMFA's engagement manager were both competent to testify, and have testified under oath, based on their own first–hand knowledge of this particular engagement and their review of TAPCO's publicly available earnings

filings, not only that TAPCO was continuing to use JMFA's overdraft recommendations after December 31, 2007, but that TAPCO had also installed JMFA's recommendations regarding e–channels and was continuing to use those recommendations as well after December 31, 2007. R.E.90–92, 99–101.

Viewing the facts in the light most favorable to JMFA, as this Court is required to do on appeal from the district court's grant of summary judgment against JMFA, this Court should hold that JMFA is entitled to proceed to trial on JMFA's claims sounding in contract implied–in–fact and unjust enrichment. In addition, this Court should further hold that JMFA has a valid claim for breach of contract arising from TAPCO's installation of JMFA's e–channel recommendations, because those recommendations had been approved at the outset of the engagement, and it was not due to any fault of JMFA that TAPCO was unable to implement those recommendations until some three years later. R.E.88, 97. Under the contract, it is the date of TAPCO's approval of JMFA's e–channel recommendations, rather than the date of implementation of those recommendations, that determines TAPCO's liability for breach of contract. R.E.127–28.

The remaining disputed factual issues — whether TAPCO was continuing to use JMFA's recommendations after December 31, 2007, and whether TAPCO approved or did not approve JMFA's e–channel recommendation at the outset of the contract between the parties — are all disputed issues of material fact for the jury to decide.

For these reasons, as further explained below, this Court should reverse the district court's entry of summary judgment and remand this case for trial.

ARGUMENT IN REPLY

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

TAPCO's Brief for Appellee confirms that a critical disputed genuine issue of material fact exists which necessitates reversal of the district court's entry of summary judgment in favor of TAPCO on JMFA's e–channel claim: did TAPCO, as JMFA contends, originally approve JMFA's recommendation that TAPCO install the e–channel aspect of JMFA's overdraft privilege program; or, as TAPCO contends, did TAPCO not originally approve that recommendation.

In its Brief for Appellee, TAPCO does not dispute that the outdated nature of TAPCO's operating system in place when JMFA made its recommendations prevented TAPCO from installing the e–channel recommendations immediately. TAPCO further does not dispute that in late 2007, TAPCO updated its own internal software, at which time TAPCO became able to install JMFA's e–channel recommendations. Perhaps most importantly, TAPCO's Brief for Appellee does not deny that TAPCO added the e–channel aspect to its overdraft program once TAPCO's software allowed for such implementation in late 2007.

Under the written contract between the parties, JMFA is responsible for "[i]dentify[ing] those recommendations that are approved [by TAPCO]." R.E.128 (letter agreement at page 4). Here, both JMFA's Chief Executive Officer and JMFA's engagement manager have testified under oath in their affidavits that TAPCO did approve JMFA's e–channel recommendation at the outset of the contract between the parties, giving rise at a minimum to a genuine issue of material fact on that factual question. R.E.88, 97. Thus, under JMFA's version of the facts, TAPCO became obligated to pay to JMFA the profits that the e–channel component generated over the 36–month period following that

component's implementation in accordance with the written contract between the parties. R.E.127–28.

In arguing that TAPCO does not have to pay JMFA on account of TAPCO's later installation of JMFA's e–channel recommendation, TAPCO apparently relies on language from the written contract between the parties that provides:

> 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. In order for that provision to apply, however, the jury must agree with TAPCO (despite persuasive evidence to the contrary) that TAPCO did not originally approve JMFA's e–channel recommendation.

As JMFA explained in its opening Brief for Appellant filed in this Court, JMFA's opposition to TAPCO's motion for summary judgment filed in the district court contained affidavits establishing that TAPCO approved the e–channel recommendation but, due to no fault of JMFA, TAPCO was initially unable to implement that recommendation because of 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 came into effect. R.E.89, 98.

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).

Despite the evidence relied on in JMFA's Brief for Appellant demonstrating that TAPCO originally approved JMFA's e–channel recommendation, TAPCO's Brief for Appellee has failed to point to anything in the language of the contract that would excuse TAPCO from compensating JMFA for the full, contractually specified 36–month period once TAPCO installed JMFA's e–channel recommendation after

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.

TAPCO's Brief for Appellee simply fails to grapple with the genuine issues of material fact that exist concerning TAPCO's approval and the timing of its approval of JMFA's e–channel recommendation. Consequently, TAPCO fails to confront the fact that the language of the contract allows for JMFA's recovery under JMFA's view of the disputed facts. Ignoring the evidence and the relevant contractual language should not be the recipe for success on appeal, but that is the approach that TAPCO has opted to pursue.

For these reasons, and for the reasons set forth in JMFA's Brief for Appellant, this Court should reverse the district court's entry of summary judgment in favor of TAPCO on JMFA's claim for breach of contract pertaining to TAPCO's use of JMFA's e–channel recommendation.

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 arguing that the evidence that JMFA placed before the district court was not sufficient to create a jury question on the issue of TAPCO's continued use of JMFA's original recommendations after the original 36–month contractually specified payment period expired, TAPCO in its Brief for Appellee relies on nothing more than boilerplate language from this Court's ruling in *Intel Corp.* v. *Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991), for the proposition that the opponent of a properly supported summary judgment motion "must present significant probative evidence to support its claim or defense."

But, as this Court's ruling in *Intel Corp.* proceeds to note, quoting *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), summary judgment is *not* appropriate where the evidence, when viewed in the light most favorable to the non–moving party, would allow a rational trier of fact to find for the non–moving party. The evidence of record in this case would easily allow a rational trier of fact to find in favor of JMFA on both aspects of JMFA's breach of contract claim.

As both the district court's summary judgment opinion (R.E.11) and TAPCO's Brief for Appellee (at page 3) acknowledge, TAPCO paid to JMFA $147,583.05, representing the contingent commission due to JMFA during the original 36–month period in which the contract was in effect. JMFA's contingent compensation represented 12% of TAPCO's increased non–interest income resulting from TAPCO's utilization of JMFA's recommendations, meaning that JMFA's recommendation produced more than $1.2 million in increased non–interest income to TAPCO during that three–year period, or greater than an average of $400,000 in non–interest income per year. R.E.89.

TAPCO and other banks and credit unions are required to make public filings with governmental agencies each year disclosing their income and expenses, and thus JMFA was able to confirm that TAPCO's own financial filings reflected not only that TAPCO continued to experience the same high level of non–interest income that TAPCO enjoyed while TAPCO was entitled to use JMFA's recommendations, but that TAPCO's non–interest income even increased further as the result of implementing JMFA's e–channel recommendation. R.E.90–91, 99–100. That is the evidentiary basis on which JMFA has alleged not

only that TAPCO has continued to use JMFA's recommendations even after the contract was scheduled to expire, but that TAPCO also installed JMFA's recommendation as to the e–channel component around the time that the contract was scheduled to expire.

If TAPCO had not continued to use JMFA's original overdraft recommendations after the contract had expired, but rather had returned to the pre–contractual circumstances where TAPCO had either no or "virtually" no overdraft program, the approximately $400,000 per year in additional non–interest income that TAPCO was earning as the result of implementing JMFA's recommendations should have disappeared. R.E.91, 100. Instead of disappearing, TAPCO's non–interest income continued to increase, as TAPCO not only continued to use JMFA's original recommendations, but TAPCO also installed JMFA's e–channel recommendations. R.E.90–92, 99–101.

This persuasive circumstantial evidence of TAPCO's continued use of JMFA's recommendations, and of TAPCO's installation of JMFA's e–channel recommendations, more than suffices to allow a rational finder of fact to conclude that TAPCO continued to use JMFA's recommendations after the original 36–month payment period had

expired. It is an integral part of JMFA's business for JMFA to be able to identify when a bank or credit union customer's implementation of JMFA's recommendations has caused that bank or credit union's non–interest income to grow. R.E.90, 99. In moving for summary judgment, TAPCO has never once attempted to offer even one alternative explanation other than TAPCO's continued use of JMFA's recommendations for why TAPCO's non–interest income has not only remained high, but increased even more.

Here, the district court erred as a matter of law when that court accepted TAPCO's argument that unless JMFA had caught TAPCO's hand in the cookie jar by showing that JMFA's software remained on TAPCO's computer system after the original 36–month billing period had expired, JMFA could not recover. Not only does the district court's rationale improperly overlook that JMFA's recommendations do not primarily consist of software (but rather represent a comprehensive set of "best practices" business methods for offering an overdraft privilege system (R.E.85–87)), but the district court's summary judgment ruling improperly devalues or altogether ignores the significance of the persuasive circumstantial evidence on which JMFA relies.

This Court has repeatedly and emphatically recognized that "circumstantial evidence is not inherently less probative than direct evidence." *Costa* v. *Desert Palace, Inc.*, 299 F.3d 838, 853 n.4 (9th Cir. 2002) (en banc) (internal quotations omitted), *aff'd*, 539 U.S. 90 (2003); *see also DirecTV, Inc.* v. *Webb*, 545 F.3d 837, 844 (9th Cir. 2008) ("The law does not require direct evidence to support a factual finding. Circumstantial evidence may be sufficiently persuasive."); *United States* v. *Ramirez–Rodriquez*, 552 F.2d 883, 884 (9th Cir. 1977) ("Circumstantial and testimonial evidence are indistinguishable insofar as the jury fact–finding function is concerned, and circumstantial evidence can be used to prove any fact.").

Indeed, in this Court's own Model Civil Jury Instructions, instruction 1.9 — titled "Direct and Circumstantial Evidence" — instructs a jury as follows:

> Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence.

9th Cir. Model Civil Jury Instructions #1.9.

Consequently, the district court's insistence that JMFA could only survive TAPCO's summary judgment motion if JMFA came forward with direct evidence that TAPCO was continuing to use JMFA's recommendations (or software, based on the district court's mistaken view that JMFA is merely, or even primarily, a software provider) was erroneous as a matter of law.

As the U.S. Court of Appeals for the Third Circuit recognized in an analogous case, JMFA's analysis of a bank's financial statements suffices to support a conclusion "that the Bank's increase in revenues was attributable to its adoption of recommendations proposed by JMFA" *John M. Floyd & Assocs., Inc.* v. *Ocean City Home Sav. Bank*, 206 Fed. Appx. 129, 133 (3d Cir. 2006).

Although the contract between JMFA and TAPCO permitted TAPCO to use JMFA's original recommendations for a 36–month period in exchange for TAPCO's payment of the specified contingent fee on increased income earned during that period, the contract did not further entitle TAPCO to continue using JMFA's recommendations after that 36–month period concluded without any further financial obligation owing to JMFA. Rather, 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. *See Young* v. *Young*, 191 P.3d 1258, 1262–63 (Wash. 2008).

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.

For these reasons, this Court should reverse the district court's entry of summary judgment against JMFA on the second component of JMFA's breach of contract claim.

C. TAPCO's Contention That JMFA Is Overly Litigious Is False And Only Serves To Further Undermine TAPCO's Arguments For Affirmance

Unwilling to confine itself to the facts and legal arguments pertaining to this case, TAPCO in its Brief for Appellee at 29 takes an unnecessary swipe at JMFA, writing that "TAPCO believes that Floyd's modus operandi * * * is to do everything in its power to get its unsubstantiated claims to a jury in the hope of obtaining a favorable settlement before trial."

In the sentence quoted above, TAPCO cites to two federal appellate court rulings (*John M. Floyd & Assocs., Inc.* v. *First Florida Credit Union*, 443 Fed. Appx. 396 (11th Cir. 2011), and *John M. Floyd & Assocs., Inc.* v. *Star Financial Bank*, 489 F.3d 852 (7th Cir. 2007)), but conveniently omits a third federal appellate court ruling — in the case most analogous to this one — wherein JMFA prevailed in obtaining the reversal of the entry of summary judgment on its contractual claims (*John M. Floyd & Assocs., Inc.* v. *Ocean City Home Sav. Bank*, 206 Fed. Appx. 129 (3d Cir. 2006)).

In the *Ocean City* case, JMFA made various recommendations to a savings bank located in Ocean City, New Jersey. After receiving JMFA's

advice and recommendations, that savings bank terminated JMFA, opting instead to install the recommendations itself or with the assistance of one of JMFA's competitors. JMFA sued for breach of contract, claiming that it was entitled to recover the contractually specified commissions regardless of whether the bank or a competitor eventually installed JMFA's recommendations. The district court, however, granted summary judgment in favor of the savings bank, holding that JMFA could only recover if its recommendations constituted trade secrets or were somehow uniquely tailored to the Ocean City bank.

On appeal, the Third Circuit reversed the district court's entry of summary judgment and allowed JMFA's breach of contract claims to proceed to trial. *See Ocean City*, 206 Fed. Appx. at 133. At the trial that followed, JMFA received a jury verdict in its favor against the savings bank for the full amount of breach of contract damages that JMFA had claimed.

Similarly, in the *Star Financial Bank* case, as the Seventh Circuit's opinion in that case notes, "[t]here were other claims between the parties that eventually went to trial, but those are not before us on this

appeal." *Star Financial Bank*, 489 F.3d at 854. Importantly, the claims that went to trial produced a jury verdict in favor of JMFA in the amount of more than $426,000. As the Seventh Circuit's opinion further notes, the version of JMFA's contract at issue in *Star Financial Bank* had yet to be revised to provide that JMFA is entitled to recover its contractually specified compensation regardless of whether the bank on its own or using another overdraft protection vendor proceeds to implement or install the recommendations that JMFA made. *Id.* at 856. It is that revised version of JMFA's contract, which was at issue in the *Ocean City* case and in this case, that allows JMFA to recover here.

Thus, in two of the three breach of contract cases involving JMFA to have reached appeal, JMFA won one and lost a part of the other. In the one that JMFA won, JMFA ended up recovering a jury verdict awarding the full amount of its damages claimed, while in the other case (the *Star Financial Bank* case) JMFA also recovered substantial damages on its claims that did reach the jury.

The third and final case, the *First Florida Credit Union* case, JMFA admittedly did not win. But that case is entirely distinguishable. At issue in *First Florida* was whether the merger of two credit unions, one

of which was under contract with JMFA at the time of the merger, gave rise to a new contract between JMFA and the credit union that resulted from the merger lasting for an additional two years from the effective date of the merger. *See First Florida*, 443 Fed. App. at 398. The Eleventh Circuit instead ruled that the resulting credit union's contract with JMFA expired on the date that the predecessor credit union's contract with JMFA was originally scheduled to expire. *See id.* at 399.

To summarize, in two of these three cases, JMFA achieved either a total or sizeable recovery, and in none of these three cases did JMFA use unsubstantiated claims to obtain a pretrial settlement, because none of the three cases settled. Thus, TAPCO's effort to impugn JMFA as improperly litigious falls flat. As a consultant, JMFA's stock–in–trade are its advice, know–how, and recommendations. When a client or former client proceeds or continues to use JMFA's advice, know–how, and recommendations without paying the compensation to which JMFA is entitled, JMFA has no alternative other than to seek to enforce its legal rights available through our nation's judicial system.

RESPONSE BRIEF FOR CROSS–APPELLEE

SUMMARY OF THE ARGUMENT

In its cross–appeal, TAPCO argues that the district court should have held that the contract between JMFA and TAPCO was either fully or partially integrated and should have rejected JMFA's breach of contract claims on that basis.

Before addressing TAPCO's cross–appeal on the merits, this Court should dismiss the cross–appeal as improper. TAPCO in its cross–appeal merely seeks to offer an alternate basis for upholding the district court's entry of summary judgment against JMFA. A cross–appeal is proper and necessary only when the party taking the cross–appeal is seeking to expand or increase its rights in the judgment being appealed.

Here, by contrast, TAPCO obtained the dismissal of all of JMFA's claims in the district court, and TAPCO is not seeking to expand or increase TAPCO's rights in the judgment in any manner whatsoever. Rather, TAPCO's cross–appeal merely seeks to offer an alternate basis for affirmance. Because a cross–appeal is neither a necessary nor an appropriate means for offering arguments that merely provide an

alternate basis for affirmance, this Court should dismiss TAPCO's cross–appeal.

With regard to the substance of TAPCO's argument, whether in connection with TAPCO's cross–appeal or considered merely as an alternate basis for affirmance, TAPCO's contention that the district court erred in failing to dismiss JMFA's breach of contract claims due to the fully or partially integrated nature of the written contract lacks merit.

To begin with, JMFA agrees that the written contract was intended to contain the complete agreement between the parties. However, the written contract does not address whether or what TAPCO's responsibilities will be toward JMFA if TAPCO continues to use JMFA's recommendations after the original 36–month billing period expires. Thus, JMFA's reliance on the remedies of contract implied–in–fact and unjust enrichment is proper under these circumstances, which the written contract does not address. Accordingly, JMFA's claims sounding in contract implied–in–fact and unjust enrichment cannot be precluded by TAPCO's contention that the contract is either fully or partially integrated.

Similarly, JMFA's argument that TAPCO owes JMFA compensation for having installed JMFA's e–channel recommendation is based directly on the express language of the contract. JMFA asserts that TAPCO initially approved the e–channel recommendation but was unable to implement that recommendation until later due to no fault of JMFA. The express language of the contract thus entitles JMFA to recover its contingent commission on the increased income that TAPCO realized during the 36–month period after TAPCO implemented JMFA's e–channel recommendation.

For these reasons, this Court should dismiss TAPCO's cross–appeal as unnecessary and should reject the alternate basis for affirmance that TAPCO seeks to raise.

ARGUMENT ON THE CROSS–APPEAL

A. This Court Should Dismiss TAPCO's Cross–Appeal As Unnecessary And Improper

Although TAPCO has filed a cross–appeal to raise an argument intended to provide an alternate basis for affirming the district court's entry of summary judgment against JMFA, TAPCO's cross–appeal does not seek in any manner to increase or expand TAPCO's rights in the

judgment. Accordingly, this Court should dismiss TAPCO's cross–appeal as unnecessary.

As this Court has recognized, "A prevailing party need not cross–[appeal] to defend a judgment on any ground properly raised below, so long as that party seeks to preserve, and not to change, the judgment." *Lee* v. *Burlington Northern Santa Fe Ry. Co.*, 245 F.3d 1102, 1107 (9th Cir. 2001) (citing *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364 (1994)); *see also Engleson* v. *Burlington Northern Ry. Co.*, 972 F.2d 1038, 1041 (9th Cir. 1992) ("Generally, a cross–appeal is required to support modification of the judgment, but * * * arguments that support the judgment as entered can be made without a cross–appeal.").

Here, TAPCO's cross–appeal does not seek to change or modify the judgment or to enlarge TAPCO's rights under the judgment. Rather, TAPCO by means of its cross–appeal merely seeks to offer what TAPCO maintains is an alternate basis for affirmance of the district court's entry of summary judgment against JMFA's breach of contract claims. Under these circumstances, a cross–appeal was unnecessary and improper. Accordingly, this Court should dismiss TAPCO's cross–appeal.

B. TAPCO's Arguments About The Fully Or Partially Integrated Nature Of The Contract Between The Parties Fail To Provide An Alternate Basis For Affirmance

Turning now to the substance of TAPCO's arguments in support of its unnecessary cross–appeal, the fully or partially integrated nature of the contract between the parties does not provide an alternate basis for affirming the district court's entry of summary judgment against JMFA.

As the district court correctly recognized, the contract between the parties is either silent or ambiguous concerning JMFA's right to recover compensation if TAPCO continues to use JMFA's recommendations after the original term of the contract has expired. R.E.14. TAPCO argues, in essence, that whenever a contract has a specified durational term, one of the parties can continue to enjoy the fruits of the contract after expiration of that term without any continuing payment obligation owing to the other party to the contract. A simple hypothetical demonstrates the absurdity of TAPCO's position.

Assume that JMFA owns land on which valuable minerals are located. Assume further that JMFA entered into a contract with TAPCO pursuant to which TAPCO was entitled to mine the minerals from the land and sell them to third–parties, in exchange for which

JMFA would receive a specified percentage of TAPCO's income on the sales. Finally, assume that the contract had a 36–month term. Apparently it is TAPCO's argument that once the mining contract had expired, TAPCO could continue to extract valuable minerals from JMFA's land and sell those minerals to third–parties, but TAPCO would no longer have any obligation to pay additional compensation to JMFA because the original contract had expired. Unfortunately, TAPCO's illegitimate view of contract law would transform contracts containing express durational terms into licenses to steal once the specified term had expired.

Contrary to TAPCO's arguments in support of its cross–appeal, Washington law recognizes claims for contracts implied–in–fact and claims for unjust enrichment where one party seeks to continue to obtain the benefit of a contract at the expense of the other party after the contract has expired. *See Young* v. *Young*, 191 P.3d 1258, 1262–63 (Wash. 2008). Whether the contract between JMFA and TAPCO was fully or partially integrated is simply immaterial with respect to this aspect of JMFA's breach of contract claim.

With respect to the other aspect of JMFA's breach of contract claim, involving TAPCO's implementation of JMFA's e–channel recommendations, JMFA is simply seeking to have the provisions of the written contract enforced as written. The written contract states that if TAPCO approves one or more of JMFA's recommendations at the outset of the contractual engagement, TAPCO must pay to JMFA a contingent fee on the income TAPCO realizes from implementing that recommendation for the first 36 months following implementation. R.E.127–28.

Unlike the other recommendations that TAPCO was able to implement immediately, TAPCO was not able to implement JMFA's e–channel recommendations until nearly three years after TAPCO had approved that recommendation. R.E.88. But since the recommendation was approved at the outset of the contractual period (viewing the evidence in the light most favorable to JMFA), TAPCO's duty to pay to JMFA a share of the income that implementing the recommendation generated remained in effect for the entire 36–month period beginning once TAPCO implemented that recommendation. R.E.88, 127–28.

The preceding paragraph sets forth JMFA's understanding of the written agreement between the parties concerning JMFA's claim for its share of TAPCO's e–channel revenues. JMFA is not attempting to rewrite the contract or to offer oral testimony or other evidence to vary the plain language of the contract between the parties. Accordingly, TAPCO's argument that the contract should be viewed as fully or partially integrated does nothing to defeat the aspect of JMFA's breach of contract claim pertaining to TAPCO's belated installation of JMFA's e–channel recommendations.

* * * * *

In sum, as to TAPCO's cross–appeal, this Court should dismiss the cross–appeal as unnecessary and should reject TAPCO's argument that the fully or partially integrated nature of the contract between the parties provides an alternate basis for affirming the district court's entry of summary judgment against JMFA's breach of contract claims.

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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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. 28.1(e)(1) pertaining to the appellant's response and reply brief because this brief does not exceed 30 pages in length.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14–point Century Schoolbook font.

Dated: September 26, 2012

/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 September 26, 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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