Nos. 12-35307, 12-35325

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

TAPCO CREDIT UNION,
Appellee/Cross-Appellant.

Appeal from the United States District Court
for the Western District of Washington
The Honorable Benjamin H. Settle
District Court Docket Number: 3:10-cv-05946-BHS

APPELLEE'S REPLY BRIEF

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I. ARGUMENT

A. Cause Arguably Exists To Dismiss Floyd's Appeal And Floyd's Opposition To TAPCO's Cross Appeal Due To Floyd's Repeated Failure To Comply With The Rules Of Appellate Procedure.

It is improper to include in an appellate brief matter which is outside the record. Fed. R. App. P. 28.1; *e.g.*, *Johnson v. U.S.*, 426 F.2d 651 (D.C. Cir. 1970), *certiorari granted* 400 U.S. 864, *certiorari dismissed* 401 U.S. 846. The violation of this rule in preparation of an appellant's brief subjects the appeal to dismissal. *E.g., U.S. v. 339.77 Acres of Land, More or Less, in Johnson and Logan Counties, Ark.*, 420 F.3d 324 (8th Cir. 1970). Thus, where a brief for an appellant exhibits a gross disregard of the requirements of court rules, a dismissal of the appeal is warranted. *Thys Co. v. Anglo California Nat. Bank*, 219 F.2d 131 (9th Cir. 1955), *certiorari denied* 349 U.S. 946, *rehearing denied* 350 U.S. 855.

Here, Floyd erroneously stated in its opening brief that "TAPCO did not have *any* overdraft program in effect before entering into the contract with [Floyd]." [1] As seen from TAPCO's opening brief, the record abundantly reflects the fact that TAPCO did in fact have an overdraft protection program in place well before Floyd came along, and that Floyd did not give TAPCO the idea to offer overdraft protection to its members. [2] R.E.45, 47, 49, 91, 100. The excerpts from the record that Floyd cited to in support of the erroneous proposition that TAPCO

[1] Opening Brief for Appellant at 10 (emphasis added).
[2] TAPCO's Opening Brief at 6.

did not have "any" overdraft protection program in place before Floyd came along came from Floyd's declarations that it put forward in response to TAPCO's motion for summary judgment, which state in relevant part that "TAPCO had *virtually no* overdraft privilege programs to speak of before contracting with FLOYD." [3]

The troubling thing is that Floyd has offered no explanation whatsoever in its Reply Brief for Appellant / Brief for Cross-Appellee regarding its misstatement of the record concerning TAPCO's overdraft protection program. Nowhere in this twenty-nine (29) page brief does Floyd even try to explain how and why it misstated the record with respect to the existence and nature of TAPCO's overdraft protection program. Instead, Floyd seemingly argues that its misstatement of the record in this regard is inconsequential ("Regardless of whether TAPCO had no — or "virtually no" (R.E.91, 100) — overdraft privilege program in place … TAPCO experienced significant additional income as the result of implementing [Floyd's] recommendations.") [4]

In all likelihood, TAPCO probably would not have bothered mentioning Floyd's unexplained mischaracterization of the record concerning TAPCO's overdraft protection program if this was Floyd's only transgression of the Rules of Appellate Procedure in this case. But the fact is Floyd also ran afoul of the court rules when it repeatedly made reference in its Reply Brief for Appellant / Brief for

[3] R.E.91, 100 (emphasis added).
[4] Reply Brief for Appellant / Brief for Cross-Appellee at 2.

Cross-Appellee to alleged facts and circumstances concerning several other lawsuits that Floyd has filed against financial institutions. As seen from the following, these references to alleged facts and circumstances concerning these lawsuits are wholly unsupported by the record and are irrelevant to the merits (or lack thereof) of Floyd's appeal.

For example, Floyd states in its Reply Brief for Appellant / Brief for Cross-Appellee that "[a]t the trial that followed [in *John M. Floyd & Assocs., Inc. v. Ocean City Home Sav. Bank*, 206 Fed. Appx. 129 (3d Cir. 2006)], 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." [5] As seen from Floyd's brief and the excerpts of the record, this assertion is wholly unsupported by the record in this case.

But Floyd does not stop there. In its discussion of the *John M. Floyd & Assocs., Inc. v. Star Financial Bank* case, 489 F.3d 1102 (7th Cir. 2007), Floyd states "Importantly, the claims that went to trial produced a jury verdict in favor of JMFA in the amount of more than $426,000." [6] Once again, these assertions are wholly unsupported by the record.

Similarly, Floyd's claim that "[i]t 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

[5] Reply Brief for Appellant / Brief for Cross-Appellee at 18.
[6] *Id.* at 19.

recover here" [7] is also unsupported by the record, as neither the record nor the Seventh Circuit's *Ocean City* opinion contain a copy of the contract between Floyd and Ocean City Home Savings Bank.

Floyd then concludes its recitation of its claimed victories in certain other lawsuits that it has filed by stating that "in none of these three cases did JMFA use unsubstantiated claims to obtain a pretrial settlement, because none of the three cases settled." [8] Once again, this claim is wholly unsupported by the record. There is no evidence in the record as to how exactly Floyd's lawsuits against Ocean City Savings Bank and Star Financial Bank were resolved.

Taken together, Floyd's mischaracterization of the record concerning the existence (or lack thereof) of TAPCO's overdraft protection program, combined with Floyd's failure to explain how and why it made such a mischaracterization, and its repeated reference to the alleged and unsubstantiated results of certain other lawsuits that it has filed arguably amount to violations of Fed. R. App. P. 28.1 and the applicable case law set forth above. As such, the Court may determine that Floyd's appeal and Floyd's objection to TAPCO's cross appeal should be dismissed. *Thys Co. v. Anglo California Nat. Bank*, 219 F.2d 131 (9th Cir. 1955), *certiorari denied* 349 U.S. 946, *rehearing denied* 350 U.S. 855 (where a brief for an appellant exhibits a gross disregard of the requirements of court rules, a

[7] *Id.*
[8] Reply Brief for Appellant / Brief for Cross-Appellee at 20.

dismissal of the appeal is warranted).

B. Floyd's Contention That TAPCO's Cross Appeal Is "Unnecessary And Improper" Is Meritless.

Floyd cites to this Court's holdings in *Lee v. Burlington Northern Santa Fe Ry. Co.*, 245 F.3d 1102, 1109 (9th Cir. 2001) and *Engleson v. Burlington Northern Ry. Co.*, 972 F.2d 1038, 1041 (9th Cir. 1992) to support its claim that TAPCO's cross appeal is "unnecessary and improper." [9] *Lee* determined "[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." 245 F.3d at 1107 (emphasis added). However, *Lee* did not hold that a party *cannot* cross-appeal to defend a judgment when that party seeks to preserve, and not change, the judgment. *See id.* Similarly, *Engleson* did not hold that a party *cannot* cross-appeal to defend a judgment when that party seeks to preserve and not change the judgment. 972 F.2d at 1041-42 (emphasis added).

"As one thoughtful commentator has put it, 'a prudent appellate lawyer will always follow one simple rule: When in doubt, file a cross-appeal' — and make sure that your notice of appeal encompasses everything that you wish to challenge on appeal." C. Wright and A. Miller, *16A Fed. Prac. & Procedure, Jurisdiction and Related Matters* § 3950.7 (4th ed.) (updated September 2012) (internal citations omitted).

[9] Reply Brief for Appellant / Brief for Cross-Appellee at 24.

The reality is Floyd's claim that TAPCO's cross appeal is "unnecessary and improper" is not supported by *Lee*, *Engleson*, or respected commentators like the ones named above. As such, there is no legitimate reason for dismissing TAPCO's cross appeal.

C. If TAPCO Prevails On Its Cross Appeal, This Ruling Will, In Fact, Provide An Alternate Basis For Affirming The District Court's Dismissal Of Floyd's Claims On Summary Judgment.

1. Floyd's Claims For Unjust Enrichment And Breach Of Contract Implied-In-Fact Fail As A Matter Of Law.

Floyd "agrees that the written Contract was intended to contain the complete agreement between the parties." [10] Integrated contracts are contracts that are intended to be a final expression of the parties' agreement. *Berg v. Hudesman*, 801 P.2d 222 (Wash. 1990). In Washington, neither parol nor extrinsic evidence that contradicts or varies the terms of an integrated written contract is admissible. *E.g.*, *Berg*, 801 P.2d 222.

Nevertheless, Floyd argues its "claims sounding in contract implied-in-fact and unjust enrichment cannot be precluded by TAPCO's contention that the [C]ontract is either fully or partially integrated." [11] As seen from the following, this claim is flat-out wrong and is directly contrary to applicable Washington law. The reality is that both Floyd's unjust enrichment claim and its claim for breach of

[10] Reply Brief for Appellant / Brief for Cross-Appellee at 22.
[11] *Id.*

contract implied-in-fact fail as a matter of law.

Regarding Floyd's unjust enrichment claim, as seen from TAPCO's opening brief, under Washington law, a party to a valid express contract is bound by the provisions of that contract, and they may not disregard the same and bring an action for *quantum meruit* (*i.e.*, unjust enrichment) relating to the same matter in contravention of the express contract. *U.S. for Use and Benefit of Walton Technology, Inc. v. Weststar Engineering, Inc.*, 290 F.3d 1199, 1204 (9th Cir. 2002) (affirming trial court's dismissal of unjust enrichment claim on summary judgment based on Washington law); *see also Chandler v. Wash. Toll Bridge Auth.*, 137 P.2d 97 (Wash. 1943) (affirming trial court's order sustaining defendant's demurrer that dismissed the case and noting a party to a valid express contract may not disregard the contract and bring an action on an implied contract relating to the same matter, in contravention of the express contract).

Tellingly, Floyd has failed to explain how its unjust enrichment claim can survive summary judgment under *Weststar Engineering* and *Chandler* in light of the express Contract, its "Three Year Engagement" and 36 billing months that both Floyd and TAPCO initialed (R.E.127), and its provision to the effect that TAPCO only needs to pay Floyd for any recommendation that is installed or approved within 24 months of the initial engagement. R.E.128. It is undisputed that the initial engagement ended no later than August 31, 2004. R.E.121.

Not surprisingly, Floyd has failed to even *cite* to either *Weststar* or *Chandler* in either of its two (2) appellate briefs. The reality is that Floyd's unjust enrichment claim cannot stand under either of these cases because this claim unquestionably relates "to the same matter in contravention of the express contract" given the Contract's three-year term and its requirement that TAPCO need not pay Floyd for any recommendation that is installed or approved beyond 24 months of the initial engagement, not to mention the fact that Floyd failed to put forward significant and probative evidence to the effect that TAPCO used or approved any of Floyd's products, recommendations, and/or services after December 31, 2007. R.E.13.

In addition, contrary to Floyd's assertions, Washington law does *not* recognize contracts "implied-in-fact … 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." [12] Floyd's reliance on *Young v. Young* in support of this assertion, 191 P.3d 1258, 1262-63 (Wash. 2008) is completely misguided, as seen from the following.

There was no express, written contract at issue in *Young*; that case involved a property owner's quiet title and ejectment action against occupants of the property, who counterclaimed for unjust enrichment based on improvements they

[12] Reply Brief for Appellant / Brief for Cross-Appellee at 26.

made to the property. 164 Wn.2d 477, 191 P.3d 1258. *Young* cites *Chandler* and other Washington cases and notes 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 (emphasis added) (internal citations omitted). *Young* does not overrule *Chandler*. *See id.*

Young also notes that *quantum meruit* "is the method of recovering the reasonable value of services provided under a contract implied in fact." *Id.* at 1262 (citing *A.F.A.B., Inc. v. Town of Old Orchard Beach*, 639 A.2d 103, 105 n. 3 (Me. 1994) ("*Quantum meruit* denotes recovery for the value of services or materials provided under an actual, implied-in-fact contract.")). 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." *Id.* at 1263.

Floyd's claim for breach of contract implied-in-fact fails right out of the gate because there is no evidence in the record to the effect that TAPCO requested any work or anything else from Floyd before or after the Contract terminated on December 31, 2007. Nor is there any evidence in the record to the effect that Floyd actually provided "work" to TAPCO after December 31, 2007. Further, there is no competent evidence in the record to the effect that TAPCO "knows or should know" that Floyd expected payment for any alleged "work" Floyd did for

TAPCO after December 31, 2007. Again, the district court rightly held that Floyd failed to produce significant and probative evidence in support of its claims as required in the Ninth Circuit under *Intel Corp.* R.E.15.

Further, importantly, nowhere in the record has Floyd identified a single specific product, recommendation, or service of Floyd's that TAPCO used or implemented after December 31, 2007. R.E.85-102.

Moreover, in a case involving Floyd that is factually similar to the case at bar, the Eleventh Circuit Court of Appeals held the district court did not err in dismissing Floyd's breach of contract claim against a credit union on summary judgment where the interpretation of the contract sought by Floyd would require the insertion of words into the parties' agreement. *John M. Floyd & Associates, Inc. v. First Florida Credit Union*, 443 Fed.Appx. 396, 399 (11th Cir. 2011). The Eleventh Circuit noted Floyd's interpretation of the contract "would rewrite the provision to state that First Florida [Credit Union] was required to 'compensate [JMFA] for an additional 24 months on the same terms.' *Id.* "But that language is not there." *Id.* "An interpretation is not reasonable if it requires rewriting the contract to add language that a party omitted and in order to impose an obligation on the other party that was not in the original bargain." *Id.* (internal citations omitted).

Thus, in sum, contrary to Floyd's assertions, the question of "[w]hether the

[C]ontract … was fully or partially integrated" is not "simply immaterial" with respect to this aspect of Floyd's breach of contract claim." [13] *Floyd has essentially admitted the Contract was integrated, as there is no disputing the fact that it was meant to be the final expression between and among the parties.* As such, Washington case law bars Floyd from introducing any evidence to the effect that the Contract lasted more than three years, or that TAPCO had to pay Floyd for any products used or recommendations approved after 24 months after the parties' initial engagement, which ended on August 31, 2004. *E.g., Berg*, 801 P.2d 222.

Further, as seen above, Washington case law prevents Floyd from maintaining an unjust enrichment claim or a claim for breach of contract implied-in-fact given the subject matter and nature of the express, written Contract. *Young*, 191 P.3d 1258; *Chandler*, 137 P.2d 97. Floyd has failed to produce significant and probative evidence in support of its claims, while Floyd has failed to produce *any* evidence in support of all three (3) elements of Floyd's claim for breach of contract implied-in-fact, as again, there is no evidence in the record to the effect that TAPCO requested any work or anything else from Floyd to be done or performed after the Contract terminated on December 31, 2007. Nor is there any evidence in the record to the effect that Floyd actually provided "work" to TAPCO after December 31, 2007, and the record is completely devoid of any competent

[13] Reply Brief for Appellant / Brief for Cross-Appellee at 26.

evidence to the effect that TAPCO "knows or should know" that Floyd expected payment for any alleged "work" that Floyd did for TAPCO after December 31, 2007.

2. *Floyd's Claims Also Fail Insofar As They Are Based On The Notion That TAPCO Approved Floyd's E-Channels And Derived Money From Them After The Contract Ended.*

Floyd's second argument on cross appeal is that TAPCO owes Floyd money under the parties' Contract because TAPCO [allegedly] installed Floyd's e-channel recommendation after TAPCO updated its core processor but prior to December 31, 2007, and that TAPCO is therefore obligated to pay Floyd for the implementation of this recommendation per the parties' Contract "for the first 36 months following implementation." [14] This argument fails for at least two obvious reasons.

First, the record abundantly reflects the fact that TAPCO never implemented Floyd's e-channels, nor did TAPCO ever utilize any of Floyd's programs, products, recommendations, or services after the parties' Contract ended on December 31, 2007. R.E.122-23; R.E.47-48. The district court rightly determined such when it held 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." R.E.14. Floyd is therefore mistaken from a

[14] Reply Brief for Appellant / Brief for Cross-Appellee at 27.

factual and evidentiary standpoint when it asserts that TAPCO implemented Floyd's e-channel recommendations "nearly three years after TAPCO had approved that recommendation." [15]

TAPCO further submits there is no competent, admissible evidence in the record to support Floyd's claim that TAPCO "approved" the "e-channel recommendation" at the outset of the Contract and implemented this recommendation "nearly three years after TAPCO had approved that recommendation." [16] Floyd's argument to this effect is entirely premised on the two declarations it submitted in response to TAPCO's motion for summary judgment. R.E.88, 97. One of these declarations came from John M. Floyd, Floyd's Chairman and Chief Executive Officer, while the other declaration came from Eric Hudgins, one of Floyd's employees or former employees. R.E.85, 94. The district court rightly held that these declarations "warrant scrutiny for containing statements that arguably lack foundation" and the district court rightly "weigh[ed] these declarations accordingly."

As seen from TAPCO's reply in support of its motion for summary judgment and its motion to strike Floyd's declarations (R.E.40-41), an affidavit or declaration used to oppose a motion for summary judgment must be made on personal knowledge, set out facts that would be admissible in evidence, and show

[15] Reply Brief of Appellant / Brief for Cross-Appellee at 27.
[16] *Id.*

that the affiant or declarant is competent to testify on the matters stated. Fed. R. Civ. P. 56(c)(4). A witness may not testify as to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Fed. R. Evid. 602. This rule excludes testimony concerning matters the witness did not observe or had no opportunity to observe. *E.g., U.S. v. Lyon*, 567 F.2d 777 (8th Cir. 1977).

Under this rule, the witness only has personal knowledge when testifying about events perceived through physical senses or when testifying about opinions rationally based on personal observation and experience. *De la Torre v. Merck Enterprises, Inc.*, 540 F.Supp.2d 1066 (D.Ariz. 2008); *see also Elizarras v. Bank of El Paso*, 631 F.2d 366 (5th Cir. 1980); *U.S. ex rel. El-Amin v. George Washington University*, 533 F.Supp.2d 12 (D.D.C. 2008); *U.S. ex rel. Laymon v. Bombardier Transp. (Holdings) USA, Inc.*, 656 F.Supp.2d 540 (W.D.Pa. 2009).

Under the "personal knowledge" standard, an affidavit is inadmissible if the witness could not have actually perceived or observed that which he testifies to. *Argo v. Blue Cross and Blue Shield of Kansas, Inc.*, 452 F.3d 1193 (10th Cir. 2006). A weak factual foundation in an affidavit that is not sufficient to establish the affiant's personal knowledge of the facts alleged renders the affidavit inadmissible for lack of personal knowledge. *See, e.g., Medina v. Multaler, Inc.*, 547 F.Supp.2d 1099 (C.D.Cal. 2007) (former employee's statements in her

declaration about supervisor lacked a factual foundation, and thus were inadmissible in opposition to employer's motion for summary judgment in employee's wrongful discharge action); *Filtration Solutions Worldwide, Inc. v. Gulf Coast Filters, Inc.*, 2010 WL 148442 * 4 (W.D. Mo. 2010) (granting plaintiff's motion to strike opinion testimony in declarations based on lack of foundation); *Kesey, LLC v. Francis*, 2009 WL 909530 * 15 (D.Or. 2009) (striking testimony from record based on lack of foundation).

Here, the Floyd and Hudgins declarations (R.E.85-102) that Floyd filed in opposition to TAPCO's motion for summary judgment noticeably fail to identify a single specific product, recommendation, or service of Floyd's used after December 31, 2007 let alone explain *how exactly* Messrs. Floyd and Hudgins came to believe "TAPCO approved FLOYD's recommendations, products, and/or services for FLOYD's e-channel overdraft programs" as asserted in paragraph 15 therein. For instance, these declarations say *nothing* about conversations the declarants may have had with TAPCO employees concerning TAPCO's alleged approval of these recommendations, products, and/or services; nor do these declarations say anything at all about correspondence or communications that the declarants may have had with TAPCO representatives. Tellingly, the declarants have failed to specifically identify *any* TAPCO agents or employees that they may have communicated with concerning TAPCO's alleged approval of Floyd's

recommendations. Further, Floyd's declarants provide no specifics, context, background, or circumstances that explain what they personally observed and how exactly they came to believe that TAPCO approved Floyd's recommendations, products, and/or services for Floyd's e-channel overdraft programs.

In sum, the Floyd and Hudgins declarations provide *no support whatsoever* for Floyd's position because these declarations fail to explain how Messrs. Floyd and Hudgins came to have personal knowledge of the allegations they made concerning TAPCO's alleged approval of Floyd's recommendations, products, and/or services concerning Floyd's e-channel overdraft programs. A weak factual foundation in an affidavit that is not sufficient to establish the affiant's personal knowledge of the facts alleged renders the affidavit inadmissible for lack of personal knowledge. *See*, *e.g.*, *Medina*, 547 F.Supp.2d 1099.

That is exactly the situation here — Floyd has put forward declarations with a weak factual foundation that are insufficient to establish the declarants' personal knowledge of the facts alleged. Considering the Floyd and Hudgins declarations provide no explanation whatsoever as to how the declarants allegedly came to have personal knowledge of TAPCO's alleged approval of Floyd's e-channels, these declarations fail to provide any evidentiary support for Floyd's claims. Thus, the "other aspect" [17] of Floyd's breach of contract claim fails as a matter of law.

[17] Reply Brief of Appellant / Brief for Cross-Appellee at 27.

II. CONCLUSION

Given Floyd's repeated departure from the Rules of Appellate Procedure, the Court may dismiss Floyd's appeal and its opposition to TAPCO's cross appeal. Regardless, TAPCO's cross appeal is strong enough to prevail on the merits. If the Court grants TAPCO's cross appeal and determines the Contract was integrated, this ruling would provide an alternate basis for affirming the district court's dismissal of Floyd's claims on summary judgment.

RESPECTFULLY SUBMITTED this 10th day of October, 2012.

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(B)

The undersigned certifies that pursuant to Fed. R. App. P. 32(a)(7)(B), the attached Appellee's Reply Brief complies with the type-volume limitation, and the attached Brief is proportionately spaced, has a typeface of 14 points, and contains 4,626 words.

Dated this 10th day of October, 2012.

/s/ Alexander S. Kleinberg
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CERTIFICATE OF SERVICE

I hereby certify that my office electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 10, 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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