2011

American Home Systems v. Cambria Homeowners Association : Brief of Appellee

Utah Court of Appeals

Cole Cannon; Cannon Law Group, PLLC; Attorney for Appellee.
Justin D. Heideman; Travis Larsen; Heideman, McKay, Heugly & Olsen, L.L.C; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

AMERICAN HOME SYSTEMS, LLC, dba WHY'RD, a Utah Corporation, Plaintiff, Counterclaim Defendant, and Appellant, v. CAMBRIA HOMEOWNERS ASSOCIATION, INC., a Utah non-profit Corporation, Defendant, Counterclaimant, and Appellee.	Case No. 20111085

APPEAL FROM ORDER OF CONFIRMATION OF ARBITRAL AWARD
THE HONORABLE JUDGE MCVEY
FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

RESPONSE BRIEF OF APPELLEE

JUSTIN D. HEIDEMAN (USB #8897)
TRAVIS LARSEN (USB #11697)
Heideman, McKay, Heugly & Olsen, LLC
2696 North University Avenue, Suite 180
Provo, Utah 84064
Telephone: (801) 812-1000
jheideman@hmho-law.com
tlarsen@hmho-law.com
Attorneys for Appellant
American Home Systems, LLC, dba Why'rd

COLE CANNON (USB #12053)
Cannon Law Group, PLLC
455 East 400 South, #400
Salt Lake City, Utah 84111
Telephone: (801) 363-2999
cole@cannonlife.com
Attorney for Appellee
Cambria Homeowners Association, Inc.

IN THE UTAH COURT OF APPEALS

AMERICAN HOME SYSTEMS, LLC, dba WHY'RD, a Utah Corporation, Plaintiff, Counterclaim Defendant, and Appellant, v. CAMBRIA HOMEOWNERS ASSOCIATION, INC., a Utah non-profit Corporation, Defendant, Counterclaimant, and Appellee.	Case No. 20111085

APPEAL FROM ORDER OF CONFIRMATION OF ARBITRAL AWARD
THE HONORABLE JUDGE MCVEY
FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

RESPONSE BRIEF OF APPELLEE

JUSTIN D. HEIDEMAN (USB #8897)
TRAVIS LARSEN (USB #11697)
Heideman, McKay, Heugly & Olsen, LLC
2696 North University Avenue, Suite 180
Provo, Utah 84064
Telephone: (801) 812-1000
jheideman@hmho-law.com
tlarsen@hmho-law.com
Attorneys for Appellant
American Home Systems, LLC, dba Why'rd

COLE CANNON (USB #12053)
Cannon Law Group, PLLC
455 East 400 South, #400
Salt Lake City, Utah 84111
Telephone: (801) 363-2999
cole@cannonlife.com
Attorney for Appellee
Cambria Homeowners Association, Inc.

LIST OF PARTIES TO THE PROCEEDING

All of the parties to this proceeding are identified in the caption on the cover page.

TABLE OF CONTENTS

LIST OF PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW 1

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS DETERMINATIVE OF THE APPEAL 1

STATEMENT OF THE CASE 1

Statement of Facts 2

SUMMARY OF THE ARGUMENTS 3

ARGUMENTS 5

I. THE ARBITRAL AWARD SHOULD BE UPHELD BECAUSE THE FINDINGS OF FACT HAVE SUFFICIENT EVIDENTIARY SUPPORT AND THE CONCLUSION OF WHY'RD'S BREACH OF THE AGREEMENT IS SUPPORTED BY THE SAME FACTS. 5

A. The Agreement provides that Why'rd will provide functional services and in no way excuses Why'rd from providing programming services that actually work. 10

1. The contract provides for service levels of at least 3mbps and the no guarantee of throughput levels clause does not operate to void the contractually agreed upon speeds. 10

2. Why'rd was required by the Agreement to maintain functional internet service for 20% of 120 consecutive days, or for 24 consecutive days. 15

3. The duty in the Agreement to monitor, control, and keep the system in good working order meant that Why'rd agreed to take reasonable measures to control system abusers. 18

B. Why'rd's problems are its own and are not caused by Cambria or its tenants 21

1. Cambria never agreed to monitor its own tenants' internet uses, and the Agreement only discusses inappropriate "servers" and not mere "uses" alone. 22

2. Cambria's insistence that Why'rd provide quality service to all of its residents did not interfere in anyway with Why'rd's ability to perform its duties under the Agreement. 26

3. An agreement to provide cable TV services is breached when the channels offered are not provided or when the signal is too fuzzy or incomplete to provide any meaningful viewing. 29

C. Cambria is not being unjustly enriched by Why'rd's unwillingness to come and claim its own property. 36

D. In its last section, Why'rd openly tries to trick this Court. 43

CONCLUSION 47

CERTIFICATE OF COMPLIANCE 48

CERTIFICATE OF SERVICE 49

TABLE OF AUTHORITIES

Cases

American Towers Owners Ass'n, Inc. v. CCI Mechanical, Inc., 930 P.2d 1182 (Utah 1996) 41

Bailey-Allen Co. v. Kurzet, 876 P.2d 421 (Utah App. 1994) 40

Davies v. Olson, 746 P.2d 264 (Utah App. 1987) 37

Desert Miriah, Inc. v. B & L Auto, Inc., 12 P.3d 580 (Utah 2000) 1, 6, 36

Equine Assisted Growth and Learning Ass'n v. Carolina Cas. Ins. Co., 266 P.3d 733 (Utah 2011) 10

Haymore v. Levinson, 328 P.2d 307 (Utah 1958) 28, 29

Holbrook v. Master Protection Corp., 883 P.2d 295 (Utah App.1994) 35

Kimball v. Campbell, 699 P.2d 714 (Utah 1985) 1

Lowe v. Rosenlof, 364 P.2d 418 (Utah 1961) 40, 41

Mann v. American Western Life Ins. Co., 586 P.2d 461 (Utah 1978) 36

Peirce v. Peirce, 994 P.2d 193 (Utah 2000) 30, 31, 32

Polyglycoat Corp. v. Holcomb, 591 P.2d 449 (Utah 1979) 35, 39

Ranch Homes, Inc. v. Greater Park City Corp., 592 P.2d 620 (Utah 1979) 38

Selvig v. Blockbuster Enterprises, 266 P.3d 691 (Utah 2011) 36

State v. James, 819 P.2d 781 (Utah 1991) 5, 6

State v. Moore, 802 P.2d 732 (Utah App. 1990) 6

Ted R. Brown and Associates v. Carnes Corp., 753 P.2d 964 (Utah App. 1988) 38

WebBank v. American General Annuity Service Corp., 54 P.3d 1139 (Utah 2002) ... 15, 21

Woodward v. Fazzio, 823 P.2d 474 (Utah App. 1991) 5

Zion's Properties, Inc. v. Holt, 538 P.2d 1319 (Utah 1975) 33, 34

Statutes

Utah Code Ann. § 78A-4-103(2)(j) 1

STATEMENT OF JURISDICTION

Jurisdiction is proper in this Court under Utah Code Ann. § 78A-4-103(2)(j).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the lower court erred in finding Why'rd in breach of its Agreement to provide bulk programming services to Cambria Homeowners Association when the services were far below industry standards and never met the low standards set forth in the Agreement?

Standard of Review: Clearly erroneous on the facts, correctness on the application of the law, and broad discretion to the lower court with unjust enrichment claims. *Desert Miriah, Inc. v. B & L Auto, Inc.*, 12 P.3d 580, 582 (Utah 2000); *Kimball v. Campbell*, 699 P.2d 714, 716 (Utah 1985).

Preservation: All of the proceedings below revolved around issues related to breach of the Agreement.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS DETERMINATIVE OF THE APPEAL

None.

STATEMENT OF THE CASE

This action is based in a dispute over the proper interpretation of a contract that has carried on since 2009. Both parties have spent extensive time before judges and arbitrators to present their arguments. This action started with a series of preliminary injunctions and temporary restraining order requests before a district court judge. In those proceedings, the lower court noted that the findings of fact were not conclusive as the

facts "could change at trial or arbitration" once both sides had time to gather all of their witnesses and go through the discovery process. [R.528, Appellant's Blue Brief Exhibit 1]. After the rushed proceedings in the district court, the parties moved to arbitration to resolve the remainder of the issues. Once there, the Arbitrator first ruled on a Motion In Limine where Why'rd presented arguments claiming that its only duty was to provide services to Cambria Homeowners Association and not to its residents. This argument was soundly rejected by the Arbitrator. Next, the Arbitrator took live testimony in the matter and heard all arguments orally in over 20 hours of trial where both sides finally had the opportunity to present all of the facts relevant to the dispute. After this fact intensive trial, both sides submitted extensive briefs to the Arbitrator to solidify their arguments. After all of this, the Arbitrator issued a decision as to the proper interpretation of the contract and found Why'rd in breach of the contract. Why'rd now appeals the Arbitrator's findings.

Statement of Facts

Cambria Homeowners Association ("Cambria") contracted with Why'rd for basic internet and cable TV services. [R. 1619:24-1618:9, 1613:18-1612:5]. Cambria was not interested in requiring every tenant to purchase a premium package, so it contracted for basic services and for the ability of individual tenants to upgrade their packages. [Agreement Schedule 1 & 2; R. 901:17-21, 895:14-23]. Cambria tenants quickly began experiencing trouble with the internet and cable TV services. [R. 1610:11-1608:4, 1269:14-1267:8]. Why'rd never successfully resolved these issues. [R. 1606:12-1603:9, 1265:7-21]. Cambria tenants were not receiving the service speeds specified in the

contract with Why'rd. [Arbitral Award, Findings of Fact ¶9 (quoting a stipulated fact)]. Cambria tenants also never had reliable internet or cable TV. [R. 1610:11-1603:9].

SUMMARY OF THE ARGUMENTS

Cambria Homeowners Association ("Cambria") contracted with Why'rd for basic internet and cable TV programming services. It is undisputed that the programming services were subpar and not very functional. The dispute below and the essence of the dispute before this Court revolves around who carries the risks under the contract when the services specified in the contract are provided in an extremely poor manner. Why'rd would have this Court believe that it wrote a contract requiring Cambria to pay monthly fees for broken programming services. Why'rd would also have this Court believe that the poor services were caused by tenants at Cambria and that Why'rd had no duty to help resolve any of the problems allegedly caused by the tenants.

Cambria's responses to Why'rd's arguments are quite simple. First, Cambria contracted for basic programming services and not broken programming services. When Cambria contracted for these basic programming services, it reasonably expected to receive a working product. In other words, one who enters into a contract for cable TV could expect that they would be able to access and view cable TV when the TV is turned on.

Second, a provision disclaiming the ability to provide a guaranteed level of throughput cannot be used to eviscerate the rest of the contract. The no guarantee provision found in the contract allows for reasonable drops in the level of throughput at

reasonable intervals, but does not sanction the provision of broken services for the life of the contract.

Third, Cambria is not in the business of regulating internet users, and it specifically contracted with Why'rd so that Why'rd would appropriately regulate the users to "preserve the integrity of the system." [Agreement Schedule 2]. Why'rd refused to add a comparatively inexpensive device to the system to regulate individual users so that one user would not be able to affect the levels of throughput for other users.

Fourth, Cambria is not being unjustly enriched by Why'rd's infrastructure because it is not using it. To the contrary, Cambria is burdened by the remains of Why'rd's infrastructure that pollutes the landscape of the property. Cambria has no use of the pedestals, relay boxes, et cetera that Why'rd left behind. Moreover, Why'rd has been given full opportunity to remove its equipment and has taken what it desires. Exhibit #1 attached hereto is a true and correct of email correspondence between Why'rd's counsel and Cambria's counsel showing that Why'rd was given full opportunity to remove its property and in fact did remove its property without further objection. Why'rd complains that to remove the remaining equipment it would have to tear up sidewalks and gutters to remove the inexpensive conduit pipe that houses the wires. This is plainly not true as the majority of the equipment is above ground, or was stored in the clubhouse, and the majority of the equipment has been removed. Even more, Why'rd continues to use some of the remaining underground conduit on-site for purposes of monitoring a fire alarm system for which they are compensated each month (the fire alarm system is governed by a separate contract not in dispute between the parties). It would not be just to require

Cambria to reimburse Why'rd when Why'rd was the one that failed to perform under the contract. To require such would result in great harm to Cambria, and Why'rd would be transferring the risk of Why'rd's nonperformance to Cambria - a ridiculous proposition to maintain in these circumstances.

Fifth, Why'rd's entire argument flies in the face of what any normal, reasonable being would agree to. Persons signing a contract for internet and cable TV services are not signing in expectation of receiving services that only function occasionally, nor are they signing with the intentions of becoming the technicians who monitor and control the system to make sure it is working and functioning properly. With internet and cable, any reasonable person would expect the service providers to do the behind-the-scenes work to make the programming functional when the TV or computer is turned on.

ARGUMENTS

I. THE ARBITRAL AWARD SHOULD BE UPHELD BECAUSE THE FINDINGS OF FACT HAVE SUFFICIENT EVIDENTIARY SUPPORT AND THE CONCLUSION OF WHY'RD'S BREACH OF THE AGREEMENT IS SUPPORTED BY THE SAME FACTS.

An appellate court does not act as a fact finder in an action. *State v. James*, 819 P.2d 781, 784 (Utah 1991) ("an appellate court does not sit as a second fact finder"). It is commonly known that trials before lower courts, or arbitrators in appropriate situations, serve the purpose of finding the facts in actions brought before the judiciary. These findings of fact must be respected and upheld unless an appellant can satisfy a heavy burden of showing that the findings of fact were clearly erroneous. *Woodward v. Fazzio*, 823 P.2d 474, 477 (Utah App. 1991). The mere existence of conflicting evidence does not

warrant reversal because the fact-finder also sits as a judge of the veracity and strength of the facts presented. *James*, 819 P.2d at 784. If the clearly erroneous burden is not satisfied, the findings of fact must be relied upon on appeal, even if individuals have differing opinions as to how the facts should have been stated. *State v. Moore*, 802 P.2d 732, 738 (Utah App. 1990). The conclusions of law reached below will also be upheld when the facts were correctly applied to the law. *Desert Miriah, Inc. v. B & L Auto, Inc.*, 12 P.3d 580, 582 (Utah 2000).

In this appeal, Why'rd is essentially seeking a second chance at having a judge find facts in its favor. Why'rd wants this Court to hold that Why'rd did not breach its service Agreement by providing extremely poor internet and television services to the residents who are a part of Cambria Homeowners Association ("Cambria"). In essence, all of Why'rd's arguments boil down to one of two positions, 1. that Cambria and Why'rd specifically contracted for extremely poor services, or 2. that Cambria's residents somehow *caused* Why'rd's services to be extremely poor. As was found at arbitration, neither position is well founded in any fact and was properly rejected. This Court should also recognize that Why'rd is seeking to claim these two positions and that neither one is a supportable claim.

Why'rd has tried to make its appeal seem to be more than the two positions above by stating that there are seven issues presented to this Court for review. However, each issue raised by Why'rd is just a factor in determining the true issue here - whether Why'rd breached its agreement. Even the unjust enrichment claims are tied up in which

party breached the agreement because the equitable factors of compensation in this case are directly tied to which party failed to uphold its end of the bargain.

Again, Why'rd is attempting to have this Court find that it did not breach the agreement. Before examining Why'rd's claims on appeal, it is instructive to consider what Why'rd has not appealed. Even if all of Why'rd's contentions on appeal had merit (which they do not), a judge could still find from the facts not appealed that Why'rd still breached the agreement. Below is a non-exhaustive list of findings that Why'rd is not disputing:

1. The decision on the Motion In Limine [Arbitral Award Part II & Findings of Fact ¶4], which states in pertinent part:
    a. "Schedule 2 of the Agreement provides that system capacity within the project is '10mbps to each tenant.' As defined above, tenant is each individual unit at the property. Thus, the Agreement provides that each individual unit at the property shall have a coaxial, fiber optic or hybrid fiber optic, SMATV, MMDS, 5-900MHz or 18 GHZ multi-channel audio, video, data, internet, broadband services distribution system capacity of 10 mbps." [Decision on Motion In Limine ¶8 (emphasis added)].
2. "The Agreement was drafted by Why'rd." [Arbitral Award, Findings of Fact ¶3].
3. "The Agreement provided that 'each tenant to have access to 3 mbps of download throughput, 256 kbps of upload throughput, upon completion of the project.'" [Arbitral Award, Findings of Fact ¶5].
4. "The project was completed." [Arbitral Award, Findings of Fact ¶6].

5. "The parties have stipulated that 'No end user is currently receiving, or has access to, 3 mbps at all times.'" [Arbitral Award, Findings of Fact ¶9].
6. "Bandwidth speeds in the neighbourhood [sic] of 0.27 mbps were measured by at least one tenant. Other witnesses testified that this was roughly the typical speeds that they would expect." [Arbitral Award, Findings of Fact ¶10].
7. "Other tenants found the internet service to be unusable for normal residential internet use. Tenants testified that the internet was frequently out and that basic functions such as email and blogging were not functional. Long periods of disruption were experienced by tenants." [Arbitral Award, Findings of Fact ¶11].
8. "The number one complaint to the Cambria homeowners association was unreliable internet." [Arbitral Award, Findings of Fact ¶12].
9. "Television service provided by Why'rd was frequently poor and included blank channels, fuzzy channels, missing channels, changing channel numbers and the like. Tenants had no ability to upgrade television service. For example, there was no evidence that any tenant was able to upgrade to HD. Certain tenants supplemented their television service by other means, such as installation of a satellite dish." [Arbitral Award, Findings of Fact ¶16].
10. "Cambria tenants logged numerous complaints about poor television service." [Arbitral Award, Findings of Fact ¶17].
11. "The Agreement provided that 'Broadband, internet, and data services will be re-evaluated every two years to ensure that services being offered by American Home Systems (Why'rd) are comparable in price and quality to services being

offered to the majority of the general public.'" [Arbitral Award, Findings of Fact ¶22].

12. "Why'rd never updated or changed the services being offered to Cambria." [Arbitral Award, Findings of Fact ¶23].

13. "Why'rd failed to keep the system competitive within industry standards." [Arbitral Award, Findings of Fact ¶24].

14. "Cambria is not currently using the components of the Why'rd system. Television and internet services are being provided to Cambria tenants through alternative means." [Arbitral Award, Findings of Fact ¶27].

15. "The throughput levels actually provided by Why'rd were substantially below this 3 mbps threshold. The internet service actually provided was at levels which constituted a material breach of the Agreement." [Arbitral Award, Conclusions ¶2] (Why'rd appeals the finding in Conclusion ¶3(b) but does not address ¶2 in its brief).

It is readily apparent from this short list, which is not contested on appeal, that Why'rd provided extremely poor programming services and that the specifications set forth in the "plain language" of the contract were never met. In its brief, Why'rd attempts to paint a picture that it tried to provide good services to Cambria, but that Cambria rejected the "Toyota Land Cruiser" Why'rd was offering to take a "Chevy Geo" instead, even though Why'rd told Cambria the "Chevy Geo" version only provided the basics. [Appellant's Blue Brief p.11]. Why'rd then states that Cambria became dissatisfied when the "Chevy Geo" would not get through the snow. However, as is clear from the

uncontested facts above, Cambria did not become dissatisfied with the "Chevy Geo" version provided by Why'rd when the snow started falling. It became dissatisfied with the "Chevy Geo" when it would not operate even in sunny, clear conditions for more than an hour or two and when it would not even start. In other words, Cambria quickly learned that Why'rd had sold it a lemon[1], and nothing Why'rd has argued in its brief to this court changes that fact.

A. The Agreement provides that Why'rd will provide functional services and in no way excuses Why'rd from providing programming services that actually work.

Cambria agrees that "[t]he primary purpose of contract interpretation is to 'ascertain the intentions of the parties' at the time of contracting." *Equine Assisted Growth and Learning Ass'n v. Carolina Cas. Ins. Co.*, 266 P.3d 733, ¶13 (Utah 2011). In contract disputes, the best source to look to for the intentions of the parties is in the plain language of the contract itself. *Id.* As the intent of this contract was clearly for functional internet and cable TV services provided to Cambria and serviced by Why'rd, Why'rd is in breach of the Agreement. Thus, this Court should uphold the findings below as the findings are in harmony with the plain language and clear intent of the Agreement.

1. The contract provides for service levels of at least 3mbps and the no guarantee of throughput levels clause does not operate to void the contractually agreed upon speeds.

The Agreement is titled "Bulk Programming Services Agreement." Cambria, as an HOA, was interested in providing basic internet and cable options to its residents.

[1] The term "lemon" is often used in automobile sales when a vehicle is sold that appears fine but quickly breaks down after purchase. Utah's "lemon" laws are codified in Title 13, Chapter 20 of the Utah Code.

[R. 905:22-904:9]. While it specifically opted to reduce the residents' monthly fees by going with a basic programming package, [R. 905:22-903:18], Cambria's intent was clearly to provide basic programming services. As is expected by any user of cable or internet, so long as the power is on, they should have access to the programming provided by the internet and cable provider. Cambria's intent was no different and the "Bulk Programming Services Agreement" reflected Cambria's intent to pay $42.20 per month per tenant for the basic programming options offered by Why'rd. [Agreement Schedule 3].

Why'rd contends that the "plain language" of the Agreement provides otherwise and that the contract evinces intent to contract for extremely poor services - services that no rational being would normally agree to. Why'rd points to a provision which states that "[g]uarantee of minimum throughput levels are not available due to the constant fluctuation of utilization throughout the system." Why'rd attempts to use this provision to say that, even though the "plain language" of the contract also says that "Bulk Programming will include the ability for each tenant to have access to 3mbps of download throughput, 256kbps of upload throughput," no certain speed or quality level was ever agreed upon.

For most, a reading of the "plain language" of the contract would show the intent that end users should, normally, have access to 3mpbs of download throughput [Agreement Schedule 2 ("each tenant [will] have access to 3mbps of download throughput")], but that occasional variations or dips in speed should be expected when traffic is extremely high, just like drivers would expect slower commute times during

rush hour. The Arbitrator held this to be the case, [Arbitral Award, Conclusions ¶1], and this Court should as well. Why'rd, however, argues that the language disclaiming a guaranteed speed means that a general speed of 0.27mbps (roughly 10% of the 3mbps stated in the contract) is somehow acceptable, [Arbitral Award, Findings of Fact ¶10] even though the "plain language" of the contract provides for 3mbps as the general speed contracted for by both parties.

On appeal, Why'rd's specific argument is that the Arbitrator did not have enough evidence to make a conclusion, as a matter of law, that the no guarantee provision still requires Why'rd to provide 90% of the service speeds stated in the contract. [Appellant's Blue Brief §1(a)]. Why'rd's argument, though, does not change anything here because of the second conclusion reached by the Arbitrator, that "[t]he throughput levels actually provided by Why'rd were substantially below this 3 mbps threshold. The internet service actually provided was at levels which constituted a material breach of the Agreement." [Arbitral Award, Conclusions ¶2 (emphasis added)].

Assume, for the sake of argument, that Why'rd could provide speeds that were consistently 50%, 40%, or even 30% of the speeds stated in the contract and stay within an acceptable range of the no guarantee provision. If the 90% stated by the Arbitrator was somehow wrong, Why'rd would still be in breach of the Agreement because its services were of such poor quality that they fell entirely beyond the reach of even the *no guarantee* provision. Providing only 10% of the contractually-stated speeds is a material breach of the Agreement, and that was the true essence of the finding below.

Thus, even if the Arbitrator was wrong in writing down 90% as the target speed to provide, it was not wrong in finding Why'rd in breach of the Agreement by providing only 10% of the speeds agreed to in the contract. Accordingly, Why'rd's arguments on the lack of evidence for the 90% conclusion have no merit because Why'rd did not contest the Arbitrator's conclusion that "[t]he throughput levels actually provided by Why'rd were substantially below this 3 mbps threshold. The internet service actually provided was at levels which constituted a material breach of the Agreement." [Arbitral Award, Conclusions ¶2 (emphasis added)]. Additionally, the Arbitrator did have evidence to reach the 90% conclusion, and so this Court should uphold that conclusion.

Why'rd also stipulated in its Motion in Limine, near the outset of arbitration, that "No end user is currently receiving, or has access to, 3 mbps at all times." [Arbitral Award, Findings of Fact ¶9]. Why'rd actually never presented evidence showing that any tenant at any time enjoyed speeds of 3mbps, [*see* Appellant's Blue Brief "Statement of Facts" and Arbitral Award, Findings of Fact ¶9], and the evidence presented all supported the fact that 0.27mbps "was roughly the typical speeds that [the residents] would expect." [Arbitral Award, Findings of Fact ¶10]. Why'rd claims though that it knew its internet was bare-bones and that it specifically contracted for the disclaimer provision because it was afraid customers would be dissatisfied with the slow speeds. [Appellant's Blue Brief p.6]. Cambria recognizes it was purchasing a base level internet, however that base level was 3mbps as stated in the contract; a speed that Why'rd outright, and admittedly, failed to provide [Arbitral Award, Findings of Fact ¶9 ("The parties have stipulated that 'No end user is currently receiving, or has access to, 3 mbps at all times'")]. Cambria

recognized the possibility that *some* residents might be dissatisfied with 3mbps and accordingly contracted with Why'rd for the ability of the residents to upgrade the services if desired. [Agreement Schedule 1 & 2 "Additional Services"; R. 901:17-21, 895:14-23].

Consider the upgrade provisions for a moment. If a tenant wanted to pay $10 extra per month for a 5mbps internet service, Why'rd would still likely disclaim any guarantee of certain speeds due to fluctuations in internet use. Thus, under Why'rd's arguments, a person would be contracting to pay extra money for a service that they may never receive. It is obvious that an internet provider would be shortsighted to guarantee a consistent internet speed at all times, but they would also be foolish to sell 3mbps services and only provide 0.27mbps services at all times. Reading the no guarantee provision as Why'rd would have this Court do would allow internet providers to contract with customers for 3, 5, 10, 20, or 40 mbps internet services and never actually have to provide, even once, what was advertised or agreed upon. Such a reading of the contract would sanction the use of deception in the provision of internet services. Accordingly, Why'rd's reading of the contractual disclaimer must be rejected since the contract specifically states what speeds are to be provided.

While Cambria was contracting for basic programming services, it was not contracting for speeds that functioned only at about 10% of the stated speeds in the contract. Cambria was not contracting for broken services, rather, it was contracting for basic services. Why'rd is attempting to use the disclaimer provision as a means to eviscerate the other language in the contract. The Arbitrator below did not allow Why'rd

to do so, because the "plain language" of a contract must be interpreted in harmony with the other "plain language" provisions in the contract. *WebBank v. American General Annuity Service Corp.*, 54 P.3d 1139, 1144 (Utah 2002) ("[w]e look to the writing itself to ascertain the parties' intentions, and we consider each contract provision ... in relation to all of the others, with a view toward *giving effect to all and ignoring none*" (emphasis added)). As Why'rd's proposed interpretation is not in harmony with the remainder of the contract, it cannot be relied upon or accepted by this Court. The findings by the Arbitrator were correct as they provided a harmonious interpretation of the contract, *see id.*, and they should be upheld by this Court.

2. Why'rd was required by the Agreement to maintain functional internet service for 20% of 120 consecutive days, or for 24 consecutive days.

Why'rd argues to this Court that the contract agreed upon by both parties only required Why'rd to provide internet that operated one out of every five days. [Appellant's Blue Brief p.21]. Why would anyone agree to buy a product that only works one out of every five days? Why'rd does not say, but still attempts to argue straight-faced to this Court that its only obligation was to have internet that worked 20% of the time despite its obligation to have "services revaluated every two year to ensure that services being offered by American Home Systems are comparable in price and quality to services bing offered to the majority of the general public." [Agreement §3.7, Arbitral Award ¶22]. Why'rd states that the internet only has to function for "the required 24 random days of a 120 consecutive day period." [Appellant's Blue Brief p.21]. Note also, that twenty percent of 120 *consecutive* days **is not** 24 *random* days of functional service, as Why'rd

is arguing. Twenty percent of 120 *consecutive* days is 24 *consecutive* days of functional service.

In either case, whether the contract allowed for functional service for an abysmal 24 random days or 24 consecutive days, Why'rd did not provide functional service for *any* day in the course of the contract. Why'rd's own technicians and experts do not contest the fact that typical speeds of internet to the tenants of Cambria was 0.27mbps, which is only 10% of what was required of the contract. Second, by applying *WebBank* and giving full effect to all provisions of the contract, Why'rd had the obligation under Section 3.7 to "re-evaluate every two years to ensure that services being offered by American Home Systems [Why'rd] are comparable in price and quality to services being offered to the majority of the general public." If the 20% service level was somehow acceptable in 2007, it was clearly not acceptable in 2010, 2011, or 2012 where internet and cable TV have become a daily staple of American life. Comparable quality service would need to function nearly all of the time. Thus, even if the Agreement originally contemplated only 24 random days of service, the Agreement clearly stated that such services would improve right along with the services offered to the remainder of the general public.

Why'rd does not contest the finding below that "Why'rd never updated or changed the services being offered to Cambria. Why'rd failed to keep the system competitive within industry standards." [Arbitral Award, Findings of Fact ¶¶23-24]. Because of Why'rd's breach of Section 3.7, the 20% service level is immaterial to the issue of breach of the entire Agreement now as Why'rd was required by Section 3.7 of the Agreement to

keep the quality of the services comparable to those offered to the general public, and Why'rd did not do this.

Third, continuing to apply *WebBank*, Section 3.2.2 of the Agreement provides that Why'rd must use "commercially reasonable efforts to minimize disruption of the Systems' delivery of Bulk Programming to Subscribers" when testing or maintaining the system. Commercially reasonable efforts would not produce 80% downtime, as Why'rd is arguing it is entitled to with the 20% service level provision. Again, when read as a whole, the Agreement contemplates reliable internet service, which Why'rd failed to provide.

The Arbitrator did make findings on the 20% service level point though, and Why'rd did not contest those findings on appeal. The Arbitrator found that: "Other tenants found the internet service to be unusable for normal residential internet use. Tenants testified that the internet was frequently out and that basic functions such as email and blogging were not functional. Long periods of disruption were experienced by tenants." [Arbitral Award, Findings of Fact ¶11 (emphasis added)]. "The number one complaint to the Cambria homeowners association was unreliable internet." [Arbitral Award, Findings of Fact ¶12].

Thus, the Arbitrator had specific grounds to find Why'rd in breach of the Agreement. Again, Why'rd provided a lemon to Cambria, and its arguments to this Court serve as further proof of that fact as evidenced by Why'rd's attempts to creatively construe the contract to be for the sale of broken services, or for the sale of a lemon.

3. The duty in the Agreement to monitor, control, and keep the system in good working order meant that Why'rd agreed to take reasonable measures to control system abusers.

Again, Why'rd makes the attempt to say that the Agreement allows Why'rd to provide poor service to Cambria, and that Cambria is obligated to pay for the poor service. The Agreement specifically provides that Why'rd: "will purchase, install, repair, maintain and operate the System at the Property, including without limitation... distribution of Bulk Programming.... [Why'rd] agrees to keep the System and all related equipment in good working order and repair, and will be responsible to ensure that scrambling/descrambling equipment, firewalls and encryption technology is utilized within its System to prevent piracy of any Bulk Programming, or unauthorized usage of data circuits." [Agreement §3.5 (emphasis added)]. Additionally, Why'rd agreed that it would monitor and control indications of high levels of volume in order to "preserve the integrity of the system for all of its users." [Agreement Schedule 2 (emphasis added)]. Why'rd repeated all of this again in §5.2 of the Agreement, where it stated: "[Why'rd] agrees to keep the System and all related equipment in good working order and repair, and will be responsible to ensure that ... [other equipment and] technology is utilized within the System to prevent piracy of any Bulk Programming."

In spite of these clear commands to ensure the continued functionality of the services provided to Cambria, Why'rd attempts to argue that its duties are limited to a narrow definition of the "System" it provided to Cambria. Put another way, Why'rd argues that while Cambria pays Why'rd for everything related to having internet and television programming show up on a tenant's computer or TV screen, Why'rd only

contracted to maintain limited portions of that distribution system. Why'rd's position would be similar to a burglar alarm company providing alarm services and charging a monthly fee, and then telling its clients "too bad" when the alarm does not work because the physical equipment itself is still functional. Most residents do not contract with a burglar alarm company for services and yet agree to fix their own alarm when it breaks. Similarly, most contracting parties, including Cambria, do not contract to fix their own internet and TV problems that arise. HOA's are not in the business of servicing Bulk Programming Distribution Systems, and they would not contract to service a distribution system installed by another.

In support of its contention, Why'rd turns to the definition of "System" specified in the Agreement. The definition states that "System" means: "a coaxial, fiber optic or hybrid fiber optic, SMATV, MMDS, 5-900MHz or 18 GHZ multi-channel audio, video, data, internet, broadband services distribution system owned and managed by [Why'rd] which serves the property." [Agreement §1]. Why'rd then states that the Agreement obligated Why'rd to keep "...the distribution mechanisms, in good working order, not to keep in good working order the ability of individual tenants to access desired levels of bandwidth." [Appellant's Blue Brief p.23]. This logic is seriously flawed.

If the "broadband services distribution system" (part of the definition of "System" in Section 1 of the Agreement) is functioning correctly, then all users should have access to the levels of bandwidth that were contracted for by Cambria. Cambria contracted for 3mbps. [Agreement Schedule 2]. Why'rd even stipulated that: "No end user is currently receiving, or has access to, 3 mbps at all times." [Arbitral Award, Findings of Fact ¶9

(emphasis added)]. Obviously, Why'rd was not contracting to provide computers for all of the tenants. However, it clearly contracted to provide the infrastructure necessary to give tenants with computers access to an average bandwidth of 3mbps. The definition of "System" clearly states this when it uses the term "broadband services distribution system." [Agreement §1]. Furthermore, the duties Why'rd took upon itself are not limited to maintaining a functional "System" alone. Often, the duties placed on Why'rd in the Agreement do not even use the term "System." Examples include:

1. "[Why'rd] agrees to keep the System and all related equipment in good working order and repair." [Agreement §3.5 (emphasis added)].
2. "[Why'rd] will be responsible to ensure that scrambling/descrambling equipment, firewalls and encryption technology [here Why'rd names three non-"System" pieces] is utilized within its System to prevent piracy of any Bulk Programming, or unauthorized usage of data circuits [Why'rd also agreed to prevent unauthorized usage]." [Agreement §3.5 (commentary added)].
3. Why'rd also states "that high level of volume that indicates server related activity will be monitored and controlled to preserve the integrity of the system for all of its users." [Agreement Schedule 2]. Here, Why'rd agrees (in a section outlining the services it will provide) to **monitor and control** high levels of volume. This is a duty specifically related to **use** of the system by the tenants and not to some limited piece of hardware installed by Why'rd.

Thus, even if the "System" would not normally include a QOS device (as Why'rd argues), Why'rd's duty is not limited to the hardware present in the "System" alone.

Why'rd specifically took on more duties than maintaining hardware in the "System" and should have acted to ensure that the "high volume" it complains of was appropriately controlled, as it clearly agreed to do.

The Arbitrator, in reading the Agreement as a whole, correctly concluded that Why'rd breached the Agreement by failing to monitor and control high levels of volume. *See WebBank*, 54 P.3d at 1144. The QOS device mentioned in the Arbitral Award was Why'rd's duty, and under the Agreement Why'rd has no grounds to argue that Cambria must pay for or install such a device on its own. These findings are correct and should be upheld by this Court.

B. Why'rd's problems are its own and are not caused by Cambria or its tenants.

After Why'rd tries to argue to this Court that the Bulk Programming Services Agreement contemplated and allowed for Why'rd to provide extremely poor and unreliable programming services, it next tries to shift the duties that were not performed to Cambria to argue that Cambria is actually the cause of all the problems. While evaluating Why'rd's arguments in this section, it is wise to keep in mind that HOA's do not contract to regulate and maintain specialized infrastructure in the community. The HOA contracts with a third party who specializes in such matters. Clearly, HOA's do not fix the roads in the community, they do not shovel the sidewalks, they do not maintain the plumbing or sewer pipes, and they certainly do not service the programming distribution systems in the community. Yet, Why'rd would have this Court believe that Cambria HOA is somehow different and that it took upon itself the duty to service the programming distribution systems in the community. Nothing could be farther from the

truth, however, and as the Agreement clearly shows, Why'rd had the duty to service the programming distribution systems.

1. Cambria never agreed to monitor its own tenants' internet uses, and the Agreement only discusses inappropriate "servers" and not mere "uses" alone.

Why'rd attacks Cambria by pointing to a handful of events where Cambria's tenants used the internet in ways that did not follow strict "residential" uses of the internet. Why'rd bases its arguments in the following provision from Schedule 2 of the Agreement: "This system is not designed for the support of high volume or commercial grade servers. The system is designed as a 'residential system,' meaning that high level of volume that indicates server related activity will be monitored and controlled to preserve the integrity of the system for all of its users." (emphasis added). In its arguments, rather than leaving out a word as it did before, Why'rd cleverly substitutes another word to create a very different meaning in the Agreement. Why'rd's argument is based on swapping the word "use" with the word "servers." As stated in its blue brief, "Why'rd challenges the Arbitrator's failure to find that Cambria residents engaged in 'high volume' and 'commercial' use of the internet system in violation of Schedule 2 of the Agreement." [Appellant's Blue Brief p.25 (emphasis added)]. Why'rd makes this claim even though the Agreement does not discuss use.

In the internet world, "use" and "servers" are very different. Consider an average internet user at home. The user opens Internet Explorer to browse the internet. From there the user may go to Netflix to watch a show. As the show is transmitted to the user, the user may have engaged in a "high volume use" of the internet as the show likely takes up

precious bandwidth. However, the user has not in anyway placed a server on the system. Netflix has a server that can send out thousands to millions of requests at a time. Internet users would connect to Netflix's services to view the shows, but the user would not be connecting a server of his own to the residential system back at his house.

Ironically, residential systems are very high use because residents, at home, engage in internet activities that consume large amounts of bandwidth, such as streaming video and online gaming. Usually, at work, individuals' internet activities are far more reduced and focus on transmitting smaller amounts of data back and forth, such as through e-mail. Thus, a "residential system" would be required to contemplate "high use," even if it did not contemplate servicing "high volume servers," such as those Netflix employs to stream movies to thousands of residential systems.

Why'rd understands very well that individuals, at home, can attempt to attach "high volume servers" or "commercial grade servers" to the "residential system." The Agreement sets forth that the "residential system" is mainly designed to receive data and is not supposed to be a means to attach certain servers to send out large amounts of data. In spite of the Agreement's clear focus on "servers" being attached to the system, Why'rd states that "[t]he high volume and commercial use led to slow internet speeds and poor performance." [Appellant's Blue Brief, p.26 (emphasis added)]. Again, "residential systems" have to envision "high volume use" because of the nature of streaming video and online gaming. Schedule 2 of the Agreement is only concerned with servers though, and it is all that this Court should concern itself with as well, and Why'rd offered no evidence of servers being attached to the system. Indeed, the arbitrator appropriately

found, "There was no evidence of commercial grade servers being used on the system." [Arbitral Award, Findings of Fact ¶14]. Thus, the arguments surrounding Montane Hamilton's alleged commercial use of the internet, or the *alleged* hosting of a pornographic website by a Cambria resident, noted in Appellant's Blue Brief, pp.25-26, either did not rise to a level of prohibited conducted under the Agreement as determined by the arbitrator or were not proven to have occurred at all.

Even if Schedule 2 of the Agreement somehow contemplates certain uses not being allowed on the "residential system," the duty to monitor and control such use falls to Why'rd. Schedule 2 clearly sets forth services to be provided by Why'rd. Schedule 2 has three paragraphs. The paragraphs are labeled "Service," "Additional Services," and "Service Level Agreement." The paragraph labeled "Service" states that Why'rd is providing "Bulk Programming" and that such programming will include a number of items which are then listed. The paragraph ends by discussing the "system" that Why'rd is providing to Cambria's tenants, and, in setting forth the specifics of the "system," then states that "activity will be monitored and controlled..." The entire "Service" paragraph discusses what Why'rd agreed to provide to Cambria. Cambria was not contracting to provide a "Service" to itself. Cambria was contracting, among other things, for Why'rd to provide a "Service," and the monitoring and control of the activity on the system was part of that "Service," as evidenced by its inclusion in the "Service" paragraph. [Agreement Schedule 2]. For these reasons, and others, the Arbitrator correctly found "the Agreement requires that Why'rd...keep the System in good working order and repair." [Arbitral Award, Findings of Fact ¶18].

Why'rd, though, argues that "[i]t was clear error to not find that Cambria residents engaged in 'high volume' and 'commercial' use of the internet provided by Why'rd, where they plainly did so. Because Cambria residents violated the provisions of the Agreement, Why'rd should have been excused from its obligations under the Agreement." [Appellant's Blue Brief, p. 27]. This argument seriously misstates the import of Schedule 2 in the Agreement. Consider what the Agreement does not say. The Agreement does not say that "Cambria agrees that none of its residents will ever abuse their privileges under the 'residential system'." Rather, the Agreement says that because Why'rd only contemplates providing a "residential system," that Why'rd then maintains the right to monitor and control users who operate outside the "residential system" specifications, whatever those may be. By signing the Agreement, Cambria agreed to let Why'rd use reasonable means to control users who have attached servers or otherwise violated the terms specified for the "residential system."

Due to the arrangement provided for in the Agreement where Why'rd could use reasonable means to control users, the Arbitrator never specifically ruled on Why'rd's claims that Cambria tenants engaged in "high volume" and "commercial" use of the system because such a finding was immaterial to anything in the action. In other words, even if there was "high volume" and "commercial" use of the system, it would not be a breach because Cambria never agreed to prohibit its residents from such use. As found by the Arbitrator, "There was no evidence of commercial grade servers being used on the system. There was one example of an internet "hogger," namely Shane Campbell. However, the fact that Mr. Campbell could "hog" the bandwidth is an indication that the

system was not in good working order and repair and was not being adequately monitored." [Arbitral Award, Findings of Fact ¶14 (emphasis added)]. Every bit of evidence that Why'rd offered to this Court to support the fact that residents were using the system inappropriately is just additional evidence, as the Arbitrator also found, that Why'rd breached its end of the Agreement to monitor and control the system as it agreed to do. Why'rd clearly had the duty to monitor and control the system and failed to do so.

2. Cambria's insistence that Why'rd provide quality service to all of its residents did not interfere in anyway with Why'rd's ability to perform its duties under the Agreement.

Why'rd next defends its extremely poor services by claiming that Cambria refused to allow Why'rd to fulfill its obligations under the Agreement. First, Why'rd claims that it wanted to completely shut out any users who may have hosted a website at one time or downloaded all of the seasons of Stargate. This is much like a "zero tolerance" policy adopted by schools, and would deny tenants access to the internet for doing something they never knew was in violation of the Agreement, such as downloading a bunch of shows to watch. Cambria, obviously, said "no" to such an approach because the Agreement was to provide service to all tenants. If there were issues with individual users, Cambria gave Why'rd the right to "control" certain "server related activity" performed by its tenants, but "control" is very different from cutting off all access. "Control" would mean to limit or otherwise regulate certain internet functions, but would not extend to denying access altogether. Thus, Cambria did not breach the Agreement by requiring Why'rd to "control" the users by limiting what could go back and forth along the wires instead of completely denying access to the system.

Second, Why'rd tells this Court that it was generous enough to offer to double the bandwidth to Cambria's residents. Of course, this would mean an extra $2/month for each resident. Why'rd infers that Cambria, in refusing this offer, was interfering with Why'rd's ability to provide quality internet. Why'rd seems to forget, though, that it contracted to provide 3mbps, and, as found below and not contested here, the residents could only expect approximately 1/10 of that speed at any given time. [Arbitral Award, Findings of Fact ¶10]. Thus, in offering to "double the bandwidth" available to each tenant for an additional $2/month, Why'rd was offering to provide 2/10 of what it had contracted to provide. What a deal.

Parties to a contract cannot demand more money to perform the obligations that they originally contracted to perform as their obligations are already set by the original agreement. As the $2/month extra demanded by Why'rd to provide quality internet service was clearly an attempt to make more money to meet the obligations under the original contract, Cambria had no duty or reason whatsoever to go along with such demands. Consider the bigger perspective. An extra $2/month for 303 residents over the remaining life of the Agreement (77 months) is an additional $46,662 not contemplated in the original Agreement. Cambria did not interfere with Why'rd's performance by refusing to pay this extra money.

Finally, Why'rd claims that Cambria was required to purchase the QOS device that would "control" users in appropriate ways. The QOS device was not expensive in comparison to all that Why'rd already invested in the system, [R. 1592:5-18], and it would have provided a simple solution to alleviate all of Why'rd's complaints about the

Cambria tenants use of the system. Why'rd refused to invest any more money into the system however, (possibly because it recognized that appropriately "controlling" the users would still not bring the internet speeds up to 3mbps), and demanded that Cambria pay for such a device. Cambria had not been obligated under the Agreement to provide any wires or hardware before, and there was no reason to require it now.

The Agreement clearly states that Why'rd "will purchase, install, repair, maintain and operate the System at the Property." [Agreement §3.5 (emphasis added)]. By definition, the "System" includes an "audio, video, data, internet, broadband services distribution system owned and managed by [Why'rd]." [Agreement §1 (emphasis added)]. This Agreement clearly dictates that Why'rd is the owner of the equipment, and there is no reason it would be any different for a QOS device. Cambria did not hinder Why'rd from performing its duties in anyway. The Arbitrator correctly so held and this Court should as well.

While Why'rd relies on *Haymore v. Levinson*, 328 P.2d 307 (Utah 1958) to justify its claims that Cambria interfered with Why'rd's obligations under the Agreement, this case only serves to go against some of Why'rd's claims. In applying this case, Why'rd confuses which party represents itself in this case. Why'rd assumes that it is the same as the innocent contractor who refused to perform work it was not contractually obligated to do. *Id.* at 309. However, Why'rd is actually the same as the homeowners who demanded more work before they paid the contractor. *Id.* Here, Why'rd had clear contractual duties. It did not fulfill these duties. [Arbitral Award, Findings of Fact ¶¶9-11, 14]. When Cambria raised the issue, Why'rd demanded that Cambria pay $2/month extra, purchase a

QOS device, or cut off access to its tenants, all things outside the scope of the Agreement. Basically, Why'rd was the same as the homeowners who demanded that the non-breaching party provide more than the Agreement called for, and the Utah Supreme Court correctly recognized that the non-breaching party was not at fault for not conceding to the breaching party's demands that were not based in the original agreement. *Haymore*, 328 P.2d at 310.

As correctly found below, Cambria did not breach the Agreement and did not interfere with Why'rd's performance under the Agreement. Cambria had no obligation to concede to Why'rd's demands that were not based in the Agreement. Accordingly, this Court should uphold the findings below that Why'rd breached the Agreement.

> 3. An agreement to provide cable TV services is breached when the channels offered are not provided or when the signal is too fuzzy or incomplete to provide any meaningful viewing.

At this point, it is relevant to point out that even without a breach of the cable TV programming Agreement, Why'rd would still be in breach of the Agreement as a whole by failing in its duty to properly provide internet access for residents. As determined below and not challenged here, "[t]he Agreement provided that Why'rd would provide the agreed services to Cambria for $42.20/month per Tenant. The contract in no way indicated what portion of that amount was allocated for internet and what portion was allocated for television." [Arbitral Award, Findings of Fact ¶15]. In other words, the contract never specified what service was more or less important, and not providing one service is a breach of the entire Agreement. Nevertheless, Why'rd's claims pertaining to

the cable TV will still be addressed to complete the picture of the poor service provided by Why'rd to Cambria and its residents.

Why'rd tries to use its one slightly favorable fact from below to argue that the Arbitrator made conflicting decisions. Why'rd argues that because there was not enough evidence presented to show that Why'rd completely breached its customer service duty to resolve customer issues, then it must mean that the low level of cable TV service it provided was somehow not a complete breach of the Agreement. [Appellant's Blue Brief, p.34]. However, if a person purchases an appliance and the appliance breaks down on a daily basis, whether or not the company selling the appliance sends a serviceman out everyday to fix the appliance is immaterial to determining if the appliance met the terms of the sale agreement. At some point, individuals cannot be obligated to call the repairman yet again before they can determine that the product they purchased was faulty and violated the terms of the original agreement. It is no different here. While Why'rd did respond just enough for the Arbitrator to determine that it did not breach its duty to address customer concerns, the Arbitrator still held that the cable TV service was of too low quality to even satisfy the basic terms of the Agreement. [Arbitral Award, Findings of Fact ¶¶16-17; Conclusions ¶¶3(e), 6].

At some point, low performing cable TV is no longer cable TV. Why'rd contends "[a]ll that the Agreement requires is that Why'rd provide cable television - whether of poor quality or not, Why'rd provided to Cambria the channels set forth in Schedule 1 of the Agreement." [Appellant's Blue Brief, p.35]. Again, Why'rd tries to claim that the Agreement somehow allows them to provide poor quality work, or allows them to

provide Cambria with a lemon. Why'rd ignores the fact that reasonable expectations play into contract formation. *Peirce v. Peirce*, 994 P.2d 193, 198 (Utah 2000) ("we interpret the terms of a contract in light of the reasonable expectations of the parties, looking to the agreement as a whole and to the circumstances, nature, and purpose of the contract.").

When people contract for cable TV, they are contracting for the ability to turn their television on and watch TV programs. People do not purchase ESPN in hopes that it will work on the big game day. [*See* R. 1615:16-1614:2]. Rather, they agree to pay a monthly rate for stable, reliable service. It is of little consolation to a TV viewer to inform them that even though they cannot watch the big game live because their channel is suddenly missing, fuzzy, or blank, that a cable repairman will be along within 24 hours. The game will be over by the time the repairman arrives, and after needing to call a repairman time after time, at some point the TV viewer realizes that the cable company is stealing their money from them.

The Arbitrator correctly concluded after 20+ hours of arbitration testimony, several witnesses, and pictures of TV screens, that: "Television service provided by Why'rd was frequently poor and included blank channels, fuzzy channels, missing channels, changing channel numbers and the like." [Arbitral Award, Findings of Fact ¶16]. Assuredly, this poor television service, along with all of the other problems, constituted a material breach of the Agreement. In arguing that the poor TV service is an immaterial breach of the contract, Why'rd seems to be incredibly out of touch with its true clients, those who watch TV. Nobody wants to sit down for a relaxing or entertaining time in front of the television only to find that the channel options they are paying good

money for are somehow not working that day. Reasonable expectations do play a part in interpreting a breach of a service Agreement. *Id.* Imagine the opposite. Suppose that Cambria's residents missed a payment every now and then, or that some checks went missing in the mail, or that some checks were too fuzzy to deposit in a bank due to water damage that (mysteriously) happened time and time again. Why'rd would be insistent that it received every nickel that it contracted to receive each month. However, when Why'rd fails to provide exactly what (or even remotely close to what) Cambria expected its tenants to receive, it argues that it should be excused from performance because it gave them what they bargained for, which, Why'rd argues, is low quality cable TV that was never guaranteed to consistently work.

Basically, Why'rd is trying to create a new definition for cable TV. Cable TV, as agreed to in the contract, Why'rd argues, includes incredibly poor TV service. Anything better than that, it seems, would be classified by Why'rd as "good cable TV," "better cable TV," or "best cable TV." Car salesmen would love to have such definitions so that they could sell a "lemon" as a "car," while if one wanted anything better than a "car" that is a "lemon," the buyer would specifically have to request to buy a "good car." Obviously, reasonable expectations play into the meanings in a contract. *Pierce*, 994 P.2d at 198. Cable TV means the type of TV that others have, the type that works when the TV is turned on. Basic cable TV would include limited channels. Premium packages of cable TV would include lots more channels with lots of movies and other perks. However, both basic cable packages and premium cable packages would be expected to work when the TV is turned on. [*See* Agreement Schedule 1 (the Agreement includes packages with

more options, but the Agreement never mentions that the premium packages work more consistently than the basic packages offered)]. In other words, basic cable TV is very different than broken cable TV.

Why'rd attempts to disclaim liability for the poor cable TV by pointing to its disclaimer provision in section 3.1 of the Agreement. In actuality, this section only includes a disclaimer for one item: the content of the programming. [Agreement §3.1 "[Why'rd] shall have no responsibility or liability for Bulk Programming content"]. In no way is this a disclaimer for blank, missing, changing, or fuzzy channels. In the same section, Why'rd specifically maintains "the sole right to edit, select, schedule and determine the [Why'rd] programming services contained in the [Why'rd] programming packages." [Agreement §3.1]. At the same time, Why'rd takes on the duty when making changes to "not degrade the quality or mix of programming and shall replace deleted channels with others of similar quality." [Agreement §3.1]. Finally, Why'rd states that it "may add, delete, or modify the Bulk Programming from time to time in its sole discretion and will notify Subscriber of the addition or deletion of available Bulk Programming." [Agreement §3.1].

Clearly, Why'rd's attempt to disclaim all liability for poor cable service is seriously misleading. Why'rd has the ability and power to make changes to programming, and the only item that Why'rd truly disclaimed being responsible for is the content of the programming. In other words, Why'rd contracted to provide Cambria's residents with access to the cable channels, and each cable channel sets its own content. It

is only the actual programs shown on each channel that Why'rd disclaimed liability for in the Agreement.

Still not giving up, Why'rd turns to *Zion's Properties, Inc. v. Holt*, 538 P.2d 1319 (Utah 1975) to claim that its poor television service was not of "sufficient substance and materiality" to justify terminating the Agreement. The first point, not addressed by Why'rd, is that it was not poor television service alone that made Cambria decide to terminate the Agreement. The Arbitrator pointed to a non-exhaustive list of at least six material breaches. Why'rd's arguing that one of the breaches (the poor TV service) is not material does not change the fact that there are five other material breaches listed.

Second, this Agreement was for cable TV and internet services. Cable TV was a significant part of the contract. Why'rd even tried to argue that $36.20/month of the $42.40/month was allocated to cable TV. [Arbitral Award, Findings of Fact ¶15; R. 1424:21-25]. Although this position was rejected by the judge for lack of evidence, [Arbitral Award, Findings of Fact ¶15], Why'rd's position still shows that it recognized the extreme value present in providing cable TV. This is a very different case than that presented in *Zion's Properties*, where a party was not excused from making payments on property it purchased just because the seller of the property left some personal items in storage on the property. *Zion's Properties*, 538 P.2d at 1321-22. To have an analogous case here, Cambria would be trying to back out of paying for the services because Why'rd had left some extra equipment on Cambria's property. That obviously is not the case, and *Zion's Properties* has no application here as cable TV was a central part of the Agreement and was not a mere vestige of a much greater agreement.

Third, these problems were not something that lasted for a day, a week, or even a month. These problems persisted for years. Cambria and the residents did what they could to make the arrangement work as they turned on their TV time after time to find blank, missing, or fuzzy channels. [Arbitral Award, Findings of Fact ¶16]. Some residents, desperate for functional TV service, resorted to purchasing supplemental TV service from third parties, e.g., DirecTV, thus paying two cable bills and only receiving one functional service. *Id.*

In other words, dependable TV was not something insubstantial under the Agreement. It was one of two core purposes for the Agreement. [Arbitral Award, Findings of Fact ¶¶2, 15]. When a core purpose for the Agreement is not fulfilled by a party, the other party is then vindicated in its refusal to continue performing. *Polyglycoat Corp. v. Holcomb*, 591 P.2d 449, 451 (Utah 1979) (stating that a material breach occurs when failure of performance "defeats the very object of the contract"); *Holbrook v. Master Protection Corp.*, 883 P.2d 295, 301 (Utah App.1994) ("The law is well settled that a material breach by one party to a contract excuses further performance by the non-breaching party").

Fourth, Why'rd remains quiet on the fact that it breached the cable TV portion of the Agreement by failing to provide Cambria's residents with the ability to upgrade the cable package. [Agreement Schedule 1 ¶3]. Many residents tried to upgrade, but were unable to do so. [Arbitral Award, Findings of Fact ¶16]. The only option available to residents was to purchase a satellite dish and pay for cable from two subscribers. [Arbitral Award, Findings of Fact ¶16].

To sum up, there were plenty of facts for the Arbitrator to find and conclude that Why'rd failed to provide acceptable levels of cable TV service to Cambria and its residents. Cable TV was a core part of the Agreement, and the failure to provide a workable TV service was a material breach of the Agreement. Thus, the Arbitrator's findings should be upheld as they are not clearly erroneous or incorrect in anyway.

C. Cambria is not being unjustly enriched by Why'rd's unwillingness to come and claim its own property.

Because unjust enrichment claims have their basis in equity, appellate courts "afford broad discretion to the trial court in its application of unjust enrichment law to the facts." *Desert Miriah, Inc. v. B & L Auto, Inc.*, 12 P.3d 580, 582 (Utah 2000). Additionally, Why'rd does recognize that unjust enrichment is not allowed where an express contract covers the subject matter of the litigation. *Selvig v. Blockbuster Enterprises*, 266 P.3d 691, 698 (Utah 2011) (*following Mann v. American Western Life Ins. Co.*, 586 P.2d 461, 465 (Utah 1978)). Here, it is clear that an express contract covers the subject matter of the litigation (breach of the contract), and so no claim for unjust enrichment can follow. *Id.*

Why'rd attempts to claim that the Agreement is faulty and does not provide for the event that the Agreement is terminated early due to Why'rd's breach of the Agreement. This is absolutely not true as the Agreement spells out the remedies available upon Why'rd's breach. Schedule 2 of the Agreement states that when Why'rd "shall be considered to be in default of this agreement [after 30 day notice and opportunity to cure], [the] Subscriber [Cambria] may; (a) terminate the agreement and secure services

from another provider (b) contract with another provider to correct the deficiency and charge these costs back to [Why'rd]." Simply put, Why'rd agreed that if it defaulted under the Agreement, Cambria could terminate the Agreement with no associated termination costs at its end. Why'rd even agreed that extra costs could be charged back to Why'rd. Cambria chose to terminate the Agreement, and did so in the manner required by the Agreement. [Arbitral Award, Conclusions ¶¶4-5]. Accordingly, Why'rd cannot recover for unjust enrichment because there is an express and enforceable contract in place that dictates the results following a breach of the agreement. *Davies v. Olson*, 746 P.2d 264, 268 (Utah App. 1987).

Why'rd drafted this Agreement. [Arbitral Award, Findings of Fact ¶3]. Why'rd knew very well of the costs involved in providing the infrastructure to Cambria, and Why'rd elected, on its own accord, to pay for the infrastructure through the monthly fees charged to Cambria. In other words, Why'rd knew very well that if it wanted to make its money back, it would have to provide the services it contracted to provide. Imagine for a moment what the contract would read like if it were any different. Suppose that Why'rd wanted to ensure that it did not lose any money in case it breached the Agreement at some point in the future. In that case, the contract would require a provision reading something similar to the following: "Cambria agrees that if Why'rd defaults on its obligations to provide Bulk Programming Services that Cambria will reimburse Why'rd's expenses incurred in installing the distribution infrastructure." In simpler terms, the real meaning of such language would be: "Cambria agrees that Why'rd should suffer no monetary loss whatsoever if Why'rd fails to provide the services it contracted to provide.

To that end, if Why'rd defaults, Cambria will pay the hundreds of thousands of dollars necessary to make sure that Why'rd does not suffer any loss for its failure to perform."

Of course, such a provision would be ridiculous. No party would ever agree to such terms, yet Why'rd, in seeking unjust enrichment, is asking this Court to rewrite the contract to provide just those terms. And, as aptly stated by Why'rd, "a court may not make a better contract for the parties than they have made for themselves." *Ted R. Brown and Associates v. Carnes Corp.*, 753 P.2d 964, 970-71 (Utah App. 1988). While claims for unjust enrichment are appropriate at certain times and in certain situations, this is clearly not one of them. Neither justice nor equity would ever require Cambria to pay Why'rd for its loss. When a party breaches a contract, it is the breaching party's duty to pay damages to the non-breaching party to compensate for "natural and probable consequence[s] of the breach." *Ranch Homes, Inc. v. Greater Park City Corp.*, 592 P.2d 620, 624 (Utah 1979). Unjust enrichment does not change this general rule by requiring the non-breaching party to make the breaching party whole for the losses it suffered as a result of its choice to breach the Agreement.

In attempting to appeal to the good graces of this Court, Why'rd makes the plea that Cambria "felt inconvenienced by limited bandwidth and less-than-perfect cable television. The inconveniences experienced by Cambria residents pale in comparison to Why'rd's weighty losses." [Appellant's Blue Brief, p.41]. As has been clear throughout this entire proceeding, non-functional internet and cable TV was the norm, not the exception. [R. 1610:11-1608:4, 1269:14-1267:8]. In this technologically advanced world, people pattern their lives around expectations based on functional internet and cable TV.

It is far more than an inconvenience to not have these basic services working, and functional internet and cable TV were the whole purpose for ever entering into the Agreement.

The sacrifice by Cambria should not be understated here either where each of Cambria's 303 tenants were paying $42.20/month for cable and internet that did not work. [Arbitral Award, Findings of Fact ¶15]. By the termination of the contract Cambria was paying over $13,000 in fees to Why'rd ($42.20/tenant * 303 units). [*Id.*, Conclusions ¶4]. "Mere inconvenience" or not though, functional internet and cable TV were the heart of the Agreement, and Why'rd contracted and agreed to provide these services in exchange for monthly payments. When Why'rd failed to provide what it promised, it cannot expect Cambria to continue paying for something that it is not receiving. *See Polyglycoat Corp.*, 591 P.2d at 451 (stating that a material breach is "certainly a failure of performance which 'defeats the very object of the contract' or '[is] of such prime importance that the contract would not have been made if default in that particular had been contemplated'").

Additionally, Why'rd's weighty losses were part of the risk it undertook in agreeing to the contract. The communications industry operates with heavy, up-front investments in infrastructure that are compensated through contractual arrangements to pay for services for a set length of time. The up-front investments are a significant risk, and the contract clearly puts the risk of that investment on Why'rd. Individual users do not contract to carry that risk. They do not have the money nor the means to provide the infrastructure, nor to pay for the infrastructure.

In demanding that Cambria pay for the infrastructure, Why'rd is really asking this Court to hold that 303 end users pay for Why'rd's failure to perform. When individuals sign up for phone service, they are not agreeing to compensate the phone service provider for losses it experiences at its end. They are simply agreeing to pay their monthly bill. It is the same for internet and cable services. The users sign an agreement to pay the monthly rate, and it is up to the service provider to manage their business in such a way that they maintain cash flow and fulfill their contractual obligations.

If this Court were to hold that Cambria must compensate Why'rd for its losses, this Court would significantly be refiguring the entire communications industry as distinct users would then be required to bear the risk of a service provider failing to perform its obligations. All that users ask for is the service that they contract for, and they are willing to pay service providers significant amounts of money each month to compensate the service provider for the service and for bearing the risks associated with the installation of infrastructure. Cambria should not be required to be a guarantor for Why'rd, especially because the contract in no way even infers such an obligation. The Arbitrator was correct in ruling that Cambria is not being unjustly enriched.

"Cambria is not using any significant portion of the infrastructure installed and owned by Why'rd." [Arbitral Award, Findings of Fact ¶¶27-28]. Why'rd still claims that the infrastructure somehow has value though. Why'rd raises "quasi-contractual dut[ies] to pay for the value of the benefit conferred..." *Bailey-Allen Co. v. Kurzet*, 876 P.2d 421, 425 (Utah App. 1994), and then points to an example of a concrete contractor who abandoned his job but was still able to recover for the portion of the work he had

completed. *Lowe v. Rosenlof*, 364 P.2d 418, 421 (Utah 1961). Why'rd significantly misses the point of these two cases though. The Utah Supreme Court stated that the contractor was "entitled to payment on a quantum meruit basis for the work which he did perform." *Id.* (emphasis added). Thus, the "value of the benefit conferred" is in reference to the period of time where services were actually provided, or performed. *See Id.* Here, Cambria met its monthly payment obligations for each month that it took the extremely poor service from Why'rd. Why'rd received payments each month for the "benefit conferred" upon Cambria. Thus, as Cambria paid Why'rd each month for the limited "value of the benefits" it received, it has satisfied all of its duties under the contract, in law, and in equity.

Why'rd attempts to argue that the infrastructure, even though not used by Cambria, confers value in addition to the limited services it provided. This is a philosophical argument that has no basis in fact. If a satellite TV provider were to go out of business and leave its satellite dish on top of a customer's house, it could not sue the customer for unjust enrichment, even if it cost the company more in gas to drive to the house to retrieve the dish than the dish was worth. The customer did not steal the dish or make use of it in anyway. The customer in no way is enriched by a leftover satellite dish sitting on its roof. If Why'rd wants Cambria to pay for the wires sitting under the ground, Why'rd must show how those wires provide a real, measurable benefit to Cambria. *American Towers Owners Ass'n, Inc. v. CCI Mechanical, Inc.*, 930 P.2d 1182, 1192 (Utah 1996) ("the remedy [of unjust enrichment] is one of restitution designed to restore to a plaintiff a benefit unjustly enjoyed by a defendant") (emphasis added). Cambria has

not benefitted in anyway from Why'rd's failure to remove its infrastructure and cannot be required to pay for useless equipment (or garbage, from Cambria's perspective) buried under the ground that it will never, in the legal sense, enjoy in anyway. *Id.* Why'rd's claim for $400,064 in unjust enrichment damages is highly dubious because the arbitrator neither found the Why'rd actually invested $834,570.88 in infrastructure or that Cambria has been unjustly enriched.[2] Moreover, Why'rd has failed to account for the fact it has removed the vast majority of its equipment already and the remnants of the system have no independent value. [Arbitral Award ¶6, *See also,* Exhibit 1].

Finally, Why'rd claims that it is too cost prohibitive to remove its infrastructure and that "[t]o retrieve the infrastructure, Why'rd would have to tear up sidewalks, streets, curbs, and gutters." [Appellant's Blue Brief, p.42]. This is an incomplete picture of the infrastructure involved. Only the wires are underground. The wires are in a conduit pipe, and so most, if not all, of the wires can be disconnected at both ends and then pulled out of the conduit (that is, if they have not already been removed by Why'rd, see Exhibit #1). Why'rd has of the date of this brief been given every opportunity to recover any part of the wiring, or infrastructure they felt necessary. The only infrastructure that would be left underground is the hollow conduit pipes, and ownership of the pipes was disputed and never resolved at trial because Why'rd did not call its witness who testified in a deposition that Why'rd did not pay for the pipes. [R. 1420:10-1419:13]. The rest of the

---

[2] Expert witness, Spencer Wangsgard testified of Why'rd's installation costs, "I don't know where that number [Why'rd's claimed installation costs] is coming from. In my head, I can't imagine a scenario where it would cost that much to go into an open trench, put some pipes together , and have somebody else come and bury them. It just doesn't—I can't fathom hos it would come to that much money." [R-1164; 8-24].

system involves equipment that is placed indoors or in outdoor boxes that sit by the curb. And, Michael Burnett, Why'rd's principal owner, testified that the HOA and/or the tenants own the wires inside each building. [R. 1456:11-20]. Cambria repeatedly offered to let Why'rd come and remove its remaining property and did not block Why'rd's access to do so in anyway. *See* Exhibit #1.

The Arbitrator was correct in concluding that Cambria has not been unjustly enriched. Cambria has no use for the infrastructure and is not being enriched in anyway by its existence. This Court should not rewrite the contract to redistribute the risks taken on by Why'rd, and should deny Why'rd's attempts to recover for losses it sustained as a result of its failure to perform.

D. In its last section, Why'rd openly tries to trick this Court.

All throughout Why'rd's arguments, it has been readily apparent that this case should never have been appealed. The Arbitrator saw through all of Why'rd's attempts to manipulate the contract and the facts to appear as if Cambria purposely signed up for internet and cable TV that did not work or that Cambria somehow managed to inhibit Why'rd from performing its contractual duties. The Arbitrator saw through Why'rd's attempt to leave out the word "consecutive," Why'rd's swapping of the word "server" with "use" to focus on "high volume use" instead of "high volume servers," Why'rd's attempts to transfer its contractual duties to Cambria, and Why'rd's attempt to rewrite the contract through seeking unjust enrichment. When Why'rd lost in its attempts with the Arbitrator, it repackaged the claims and brought them to this Court.

The last point that Why'rd repackages and makes to this Court is rather appalling because Why'rd definitely knows much more than it professes to know. In section VI of its brief, Why'rd states that:

> [t]he Arbitrator found that Why'rd breached the Agreement by failing 'to supply a system capacity within the project of 10 mbps to each tenant.' During the Arbitration, however, Cambria's attorney acknowledged that the parties stipulated 'that ten megabits was coming into the headend unit'... This finding of breach plainly contradicts the stipulation of the parties and was clearly erroneous. [Appellant's Blue Brief, pp. 43-44].

What Why'rd failed to tell this Court is that this precise issue was argued by Why'rd at a Motion In Limine on December 7th, 2010. There, Why'rd argued that it only had the duty to provide certain speeds to the headend unit, as distinct from the tenants of Cambria (of which there are 303). [Arbitral Award Exhibit A]. Why'rd ran all services into Cambria through the headend unit (as there is only one headend unit located in the club house), and then dispersed the services to the 303 individual units inside Cambria HOA. [*See* Arbitral Award Exhibit A].

The Arbitrator held that the contract required certain capacities to be supplied to each tenant, or individual unit. The parties' stipulation referenced by Why'rd was that the contracted for capacity existed at the headend unit before that capacity was broken up and distributed to each tenant. The Arbitrator clearly found that the capacity, once broken up and distributed to each tenant, was woefully under the capacity specified for each tenant in the contract.

In light of this knowledge, it is wise to read through once more what Why'rd argued in its brief. The entire section VI is quoted below with emphasis and additional points added in brackets [] to show how appalling Why'rd's arguments really are.

> The Arbitrator found that Why'rd breached the Agreement by failing to "supply a system capacity within the project of 10 mbps to each tenant." [Yes, the finding was about the supply to the tenants and not to the headend unit.] During the Arbitration, however, Cambria's attorney acknowledged that the parties stipulated "that ten megabits was coming into the headend unit." [R. 961:25-960:10]. Cambria's attorney further stated as follows:
>
> - "This whole issue has been exhausted when we had the hearing on December 7 [The Motion In Limine]. In fact, it was stipulated to that 10 megs in fact was being received by the headend unit." [R. 868:19-22].
> - "I did not disagree that 10 megs was coming to the headend unit." [R. 664:11-12].
> - "Counsel, if you're trying to establish the 10 megs to the headend unit, it has been stipulated. Go on." [R. 1046:9-11].
>
> This finding of breach [about the supply to each tenant] plainly contradicts the stipulation of the parties [about the supply to the headend unit] and was clearly erroneous [even though the stipulation and the finding are on two very different points]. Certainly, the headend unit could not receive 10 mbps unless it had the capacity to do so. Cambria specifically acknowledged, at least four times, that Why'rd supplied 10 mbps to Cambria [the headend unit].
>
> Because of the stipulation in place between the parties, neither party presented any substantial evidence on this point at the Arbitration. [That is true, because all of the evidence surrounding this issue was presented at the Motion In Limine.] Why'rd is unaware of any evidence to support this finding. [Even though Why'rd was present at the Motion In Limine and argued extensively there]. The basis for the finding of breach on this point is, therefore, difficult to determine. [Even though the Arbitral Award on p.2 says "A 'Decision' on the Motion In Limine was rendered on December 8, 2010, and is incorporated herein by this reference. *See*, Exhibit A."]. Whether the Court analyzes this under a clearly erroneous standard (for the Arbitrator's erroneous factual findings), or a correctness standard (for the Arbitrator's misinterpretation of the stipulation), it should reverse the finding of breach as to this issue.

> In light of Why'rd's uncertainty as to the basis of the Arbitrator's finding of breach [even though it knows very well what the entire Motion In Limine was about], in the very unlikely event that Cambria argues that the Arbitrator was not in error on this point, Why'rd begs some license to more fully address this breach in its reply brief.

Cambria has tried to be civil in this matter but this section of Why'rd's brief is demonstrably false. Why'rd would have this Court reverse the Arbitrator's findings on capacity supplied to 303 individual units when the parties stipulated about capacity received at one headend unit and never once stipulated that the 303 units received 10mbps of throughput speed. Somehow Why'rd ignores another, and more relevant, stipulation made by both parties, that "No end user [or tenant] is currently receiving, or has access to, 3 mbps at all times." [Arbitral Award, Findings of Fact ¶9]. Why'rd understands the difference very well between a tenant (or end user) and a headend unit, yet Why'rd feigns ignorance of these facts and conflates these two distinct facts before this Court. Why'rd knows very well that the Arbitrator's basis for finding breach with respect to the 10mbps capacity was based on the fact that no tenant had 10mbps. The Arbitrator was not making a finding with respect to headend units. It was making findings with respect to tenants.

The Arbitrator saw through all of Why'rd's tricks, and this Court should as well. There is no basis to overturn the findings below. Towards the end of the arbitration, Why'rd completely lost credibility as a main witness made extensive changes to his testimony concerning Why'rd's lost profits. [R. 1419-1331 (Justin Burnett testified to profit/damage figures of $2.8 million one day, $1.15 million the day before, and profits of

only $10,000 at a preliminary injunction hearing on irreparable harm)]. At the end of Why'rd's appellate brief it similarly throws its credibility out the window by arguing something that is patently false. The Arbitrator, acting as fact finder, appropriately judged the veracity of the witnesses and the stretched nature of the claims and found for Cambria. There was no error in doing so, and this Court should uphold the findings below and not fall prey to Why'rd's attempt at claiming Cambria contracted for poor services and that Cambria inhibited Why'rd from performing its obligations under the contract. Why'rd's services were a true lemon and so dysfunctional that it is clear Why'rd materially breached the Agreement.

CONCLUSION

Cambria requests the Court uphold the Arbitral Award entered below, enter judgment in favor of Appellee, and award other such relief as is just and appropriate, including attorney fees in this matter.

Dated and signed this 16th day of April, 2012.

CANNON LAW GROUP, PLLC

COLE CANNON

CERTIFICATE OF COMPLIANCE

I hereby certify that Appellee's principal brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1)(A) because it contains 13,300 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B). This brief was prepared using Microsoft Word, and this brief complies with the typeface requirements of Utah R. App. P. 27(b) because it uses 13-point Times New Roman Font (a proportionally spaced typeface) consistently throughout the entire brief, including the footnotes.

Dated and signed this 16th day of April, 2012.

CANNON LAW GROUP, PLLC

COLE CANNON

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of April, 2012, I hand delivered true and correct copies of the Brief of Appellee to the following

UTAH COURT OF APPEALS
450 South State Street.
Salt Lake City, UT 84114

And First Class Postage to:

JUSTIN D. HEIDEMAN
TRAVIS LARSEN
HEIDEMAN, MCKAY, HEUGLY & OLSEN, L.L.C.
2696 North University Avenue, Suite 180
Provo, UT 84604

Attorneys for Appellant
American Home Systems, LLC, dba Why'rd

CANNON LAW GROUP, PLLC

EXHIBIT 1

These emails are not part of the record as they occurred after arbitration.

Subject: RE: Congratulations
Date: Friday, August 19, 2011 10:43:44 AM MT
From: Justin Heideman
To: Cole S. Cannon, Esq.

Cole:

Sorry if I caused any confusion, I was simply forwarding the data regarding the time. Not asking for your advice. Frankly the response is simple, your guys want my guys out, and my guys don't want to work with your guys any longer so pull the stuff. Mike just indicated that he would be at the property for the removal at 10:00 a.m.

Justin.

From: Cole S. Cannon, Esq. [mailto:cole@cannonlife.com]
Sent: Friday, August 19, 2011 7:55 AM
To: Justin Heideman
Subject: Re: Congratulations

I'll see if next Wednesday works. I suppose at least a board member will be on site to oversee the matter. As for the appeal, I won't think to advise your client, however whatever happens on appeal, Why'rd will not be providing cable/internet to Cambria so the property needs removal either way. Can you pin Mike down to a time for Wednesday?

Thanks!
C

From: Justin Heideman <jheideman@hmho-law.com>
Date: Thu, 18 Aug 2011 20:05:25 -0700 (PDT)
To: Cole Cannon <cole@cannonlife.com>
Subject: Fwd: Congratulations

See below.

Sent from my HTC on the Now Network from Sprint!

----- Forwarded message -----
From: "Mike Burnett" <mike@why-rd.com>
Date: Thu, Aug 18, 2011 7:37 pm
Subject: Congratulations
To: "Justin Heideman" <jheideman@hmho-law.com>

Subject: RE: Call
Date: Wednesday, August 24, 2011 12:57:07 PM MT
From: brian@parker-brown.com
To: 'Cole S. Cannon, Esq.'

Nope we are good.

Brian Evans Brown
Principal Broker, Realtor, CDPE
Parker Brown Real Estate
801-766-9998*212 Phone
801-766-9599 Fax
www.Parker-Brown.com
Brian@Parker-Brown.com

From: Cole S. Cannon, Esq. [mailto:cole@cannonlife.com]
Sent: Wednesday, August 24, 2011 12:00 PM
To: brian@parker-brown.com
Subject: Re: Call

Any problems in removal?

Thanks,
C

Cole S. Cannon Esq., LLM-Tax, MPP, Principal
Cannon Law Group, PLLC
455 E. 400 S. #400
Salt Lake City, UT 84111
Cell. 714.362.1087
Off. 801.363.2999
cole@cannonlife.com
www.cannonlawgroup.com

DEBT COLLECTION NOTICE: This firm collects debts. This communication may be an attempt to collect a debt. Any information obtained as a result of this communication or subsequent communications may be used to collect the debt.

From: <brian@parker-brown.com>
Date: Mon, 22 Aug 2011 15:15:58 -0600
To: Cole Cannon <cole@cannonlife.com>
Subject: RE: Call

Will do thanks.

Brian Evans Brown
Principal Broker, Realtor, CDPE
Parker Brown Real Estate
801-766-9998*212 Phone
801-766-9599 Fax
www.Parker-Brown.com
Brian@Parker-Brown.com

From: Cole S. Cannon, Esq. [mailto:cole@cannonlife.com]
Sent: Monday, August 22, 2011 3:12 PM
To: brian@parker-brown.com
Subject: Re: Call

Hey Brian,

Just to put it in writing. I'm told Michael Burnett is coordinating to remove Why'rd's property on Wedensday at 10 am. Please have someone onsite monitoring the removal. If Why'rd is damaging Cambria's property in any way call my cell (714-362-1087) or my associate Maren Barker at 801.508.2900. If anything gets heated (which I doubt) call the police and have Why'rd escorted from the property.

Best,
Cole

Cole S. Cannon Esq., LLM-Tax, MPP, Principal
Cannon Law Group, PLLC
455 E. 400 S. #400
Salt Lake City, UT 84111
Cell. 714.362.1087
Off. 801.363.2999
cole@cannonlife.com
www.cannonlawgroup.com