2004

Alpha Partners INC., a Utah corporation v. Transamerica Investment Management, LLC, a limited liability company: Reply Brief

Utah Court of Appeals

[redacted]

IN THE UTAH COURT OF APPEALS

ALPHA PARTNERS INC., a Utah corporation, Appellant/Cross-Appellee, vs. TRANSAMERICA INVESTMENT MANAGEMENT, LLC, a limited liability company, Appellee/Cross-Appellant.	No. 20040605-CA

APPELLANT'S REPLY BRIEF/CROSS-APPELLEE'S RESPONSE BRIEF

On Appeal from the Third Judicial District Court, Summit County
Case No. 010500566, Honorable Bruce Lubeck

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

In this brief, Alpha Partners first replies in support of its own appeal, demonstrating it is entitled to reversal and a remand on its contract claim. Alpha Partners then responds to Transamerica's (or "TIM's") cross-appeal, demonstrating the denial of TIM's counterclaims is properly affirmed on this record.

REPLY IN SUPPORT OF ALPHA PARTNERS' APPEAL

The grounds on which TIM opposes Alpha Partners' appeal fail under any proper analysis. TIM's response is heavy on scattered facts, but light on analysis and supporting authorities. Significantly, it fails to counter Alpha Partners' dispositive legal points. TIM's multiple concessions are case-determinative. This Court should reverse.

I. TIM'S BRIEF INSUFFICIENTLY RESPONDS TO ALPHA PARTNERS' APPEAL.

Two significant procedural points are noteworthy regarding TIM's briefing. First, TIM's Statement of Facts confuses rather than clarifies the issues for this Court. Second, TIM has made numerous important concessions. Alpha Partners will discuss each point as context for the later legal discussion.

A. TIM's Statement of Facts Is Calculated to Confuse.

The ultimate questions presented by Alpha Partners are not difficult. They query whether this Court will enforce a carefully crafted contract that a small Utah business presented to a large multinational establishment, which it accepted and executed but then undermined and ignored. This case asks whether this Court will allow parties in Utah to freely contract and obtain the benefit of their bargain or whether the Court will fall prey to

the tendency expressed in so many other jurisdictions to substitute the judgment of the judiciary for the deal the parties actually struck. Nothing less is at stake here.

TIM's Statement of Facts is an obvious attempt to try to "factualize" this appeal – i.e., cast the case as so factually intense that no appellate court would dare to wade in. (Aplee. Br. at 4-19.) But this case is not the hopeless factual morass TIM presents it to be. At bottom, the legal principles are relatively straightforward. The parties have the affirmative obligation to frame and discuss the facts in light of the relevant standards of review and substantive law. Alpha Partners has done this; TIM has not. (*Compare* Aplt. Br. at 5-23 *with* Aplee. Br. at 4-19.) Moreover, Alpha Partners is well aware this Court is not a second-shot forum for trying its case. If Alpha Partners' claims had been denied simply because the district court made a choice between competing factual points of view, this case would not be on appeal. But there is more to it than that.

There are solid, foundational legal principles established in Utah's common law jurisprudence that render the decision below incorrect. As catalogued in Alpha Partners' opening brief, these can be analyzed at both the correction-of-error and clearly-erroneous level. (Aplt. Br. at 1-3, 25-50.) This Court is equipped by experience and training to cut to the heart of a matter despite complexity in facts or confusion by the parties.

There are no significant facts presented by TIM that were not identified or marshaled in Alpha Partners' opening brief. Alpha Partners has conceded what may fairly be conceded and has dropped claims made below to narrow its appeal. Alpha Partners further clarifies its position in response to questions raised by TIM. There is no valid reason presented in TIM's response sufficient to counter Alpha Partners' carefully supported appeal

B. TIM Makes a Series of Dispositive Concessions.

Throughout its briefing, TIM makes a series of revealing concessions and omissions that seal its fate. As shown in the remainder of the Argument section, these concessions prove fatal to TIM in Alpha Partners' appeal.[1]

II. REVERSAL IS REQUIRED BECAUSE THE RECORD AND THE BRIEFING CONFIRM THAT TIM BREACHED THE CONTRACT.

TIM breached the contract in two independent but related ways. First, TIM materially delayed performance by its repeated inaction and failure to cooperate. Second, TIM failed to pay Alpha Partners' invoices that came within the contractual estimate-plus-20% range. These two dispositive facts are not disputed. The breaches, independently and collectively, deprived Alpha Partners of the benefit of its bargain. Alpha Partners demonstrated both of these points as a matter of law in its opening brief. (Aplt. Br. at 25-34.) TIM's response fails to call either into question. (Aplee. Br. at 21-27.)

A. It Is Established for Purposes of this Appeal that TIM Materially Delayed Performance of the Contract.

TIM does not appeal the district court's findings or conclusions holding that TIM materially delayed performance of the contract. (Findings Nos. 13, 18, 23-24, 31, Addend. Ex. 1, at 5, 7-11; Conclusion of Law Nos. 1, 5, 8, Addend. Ex. 1, at 14-18.) These findings and conclusions are therefore binding on this Court. *See Grossen v. DeWitt*, 1999 UT App 167, ¶ 10, 982 P.2d 581, 585.

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[1] There may be some temptation for TIM to try to plug the holes in its briefing by responding further to these points when TIM files its own reply on its cross-appeal. The Court should reject any such attempt. *See* Utah R. App. P. 24(g).

1. The district court erred in failing to attach the proper legal conclusion to the effect of TIM's material nonperformance.

A material delay in contract performance is a breach. *See Bradford v. Alvey & Sons*, 621 P.2d 1240, 1242 (Utah 1980). TIM itself makes a telling concession. TIM notes that the district court excused Alpha Partners from further performance because of TIM's delays. (Aplee. Br. at 29; R. 1032.) TIM then argues: "A party to a contract can only be relieved from performing its contractual duties if the other party materially breached the contract." (Aplee. Br. at 29.) Alpha Partners agrees. *See Lowe v. Rosenlof*, 364 P.2d 418, 420-21 (Utah 1961) (party in breach may not enforce contract); *Fischer v. Johnson*, 525 P.2d 45, 46-47 (Utah 1974) (same). As TIM concedes, material nonperformance is the very definition of a breach. *See Jones v. Gaskins*, 284 S.E.2d 398, 400 (Ga. 1981) (equating material nonperformance with breach). The district court erred as a matter of law on this record in holding that TIM's undisputed material delays did not constitute a breach.

2. TIM presents arguments that are wholly irrelevant and fail to call into question the points established by Alpha Partners.

TIM has no answer for Alpha Partners' close analysis of the contract's plain language. (Aplt. Br. at 31-32.) That language unequivocally establishes Alpha Partners' contractual right to bill an additional 20% for material changes in the "extent or complexity of any elements of the project." (Addend. Ex. 2, at 12-13.)

TIM also ignores the effect of the district court's unchallenged rulings regarding the materiality of TIM's inaction. (Aplt. Br. at 29-30.) TIM has waived any argument that it did not delay or that delays were not material. *See Pixton v. State Farm Mut. Auto. Ins. Co.*, 809 P.2d 746, 751 (Utah Ct. App. 1991) (arguments not briefed are waived).

Finally, TIM fails to respond to case law holding that a reasonable timetable is implied in every contract and that unreasonable delays are a breach. (Aplt. Br. at 32-33.) TIM suggests only that the contract "does not state that project delays will constitute a breach." (Aplee. Br. at 22.) Even if true, this is beside the point.

If a party fails to perform its contract obligations, "traditional common law or equitable remedies [are] available" for breach regardless of whether the contract specifically says so. *Kelley v. Leucadia Fin. Corp.*, 846 P.2d 1238, 1241-42 (Utah 1992). TIM's Riazzi conceded in his testimony that TIM would have to perform the contract within a "reasonable" time. (R. 1023T. at 249-50.) The district court found TIM did not. The parties' contract obligated TIM to cooperate and timely perform, which it clearly did not.

Instead of responding to Alpha Partners' argument, TIM argues – irrelevantly – that Liz Hecht told Bill Miller she would notify him and provide backup if she was ever going to charge additional fees. (Aplee. Br. at 22; R. 1022T. at 176.) This courtesy between friends and working partners was not a consideration-based contract obligation of the parties, and TIM cannot claim it was. *See Aquagen Int'l, Inc. v. Calrae Trust*, 972 P.2d 411, 413 (Utah 1998) (contract obligation requires consideration to be binding). Nor was there an obligation to "forewarn" TIM. (Aplee. Br. at 22; R. 1022T. at 176.) Mr. Miller was no longer with TIM at the time the additional fees were billed. (Finding Nos. 23, 35, Addend. Ex. 1, at 8, 12.) Even so, the record is undisputed that Ms. Hecht notified TIM's John Riazzi and provided a detailed invoice packet backing up the additional fees Alpha Partners charged on August 31, 2001. (Addend. Ex. 3; R. 1022T; R. 1023T. at 142-44, 275-76.)

That Mr. Riazzi did not understand the fees pays tribute to the fact he never truly got up to speed on the Alpha Partners contract. The record is clear that Ms. Hecht sent a letter to Riazzi's boss, which Riazzi saw, in which she explicitly referenced budget implications to TIM for continued delays. (R. 1022T, at 136-38, 191, 205; Trial Ex. 22.) In hindsight and with the benefit of this proceeding, he admitted to understanding the charges. (R. 1023T, at 278.) Furthermore, TIM's Lake Setzler explained the basis for the fees to Mr. Riazzi after making a simple phone call to Alpha Partners. (R. 1023T, at 302.)[2]

TIM cites no authority for its repeated implicit suggestion that a party cannot rely on the express terms of a negotiated contract because of courteous accommodations between working partners or communications emphasizing one aspect of a contract without mentioning others. (Aplee. Br. at 22; R. 1022T, at 179-80.) Utah law holds otherwise. *See Willard Pease Oil & Gas Co. v. Pioneer Oil & Gas Co.*, 899 P.2d 766, 770 (Utah 1995).

The project completion date was not so "flexible" that Alpha Partners had to wait indefinitely for action from TIM. The district court's unchallenged findings confirm Alpha Partners repeatedly impressed upon TIM the need for timely efforts on the project. It is a misstatement of the record for TIM to assert that Alpha Partners agreed not to charge additional fees after Mr. Riazzi made it "abundantly clear" he felt TIM had paid enough for the project. (Aplee. Br. at 22-23.) Despite a vaguely worded finding of fact, the district court's ruling is unequivocal that **Alpha Partners agreed not to charge additional fees**

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[2] Based on his conversation with Alpha Partners, Mr. Setzler told Mr. Riazzi: "Liz is exercising her right to bill up to 20 percent more than the original estimate." (Trial Ex. 72; R. 1023T, at 303.) After speaking with Mr. Setzler, Mr. Riazzi understood Alpha Partners' charges. (R. 1023T, at 343.) Alpha Partners also provided TIM documentation showing the delays leading to the charging of the 20%. (Addend. Ex. 3; R. 1023T, at 275-76.)

only if TIM would expedite the already much delayed project performance – i.e., "move the project along and get it done." (Finding No. 26, Addend. Ex. 1, at 9; R. 1022T, at 117-18, 139-40, 185-86, 190; Trial Exs. 19-20; Aplee. Br. at 11; *see also* Finding No. 28, Addend. Ex. 1, at 10.) TIM never did expedite its approvals. This led to Alpha Partners' justified additional fees.

In summary, the district court erred as a matter of law in concluding that TIM's material nonperformance did not constitute a breach. TIM has failed to show otherwise. This Court should correct the lower court's error.

B. TIM Failed to Pay Alpha Partners' Invoices Even Though They Came Within the Contractual Estimate-Plus-20% Range.

In addition to its material delays and non-cooperation, TIM also breached by failing to pay Alpha Partners' invoiced fees and expenses even though they came within the estimate-plus-20% range agreed to in the contract. There is no dispute these were assessed but not paid. The only question is whether the contract allowed them.

1. The 20% clause is not ambiguous.

There is nothing ambiguous about the relevant contract clause: "Fees may vary 20% above or below the estimates stated in this letter of agreement." (Addend. Ex. 2, at 12.) TIM presents no argument to contradict the established case law holding that "estimates" are just that. (Aplt. Br. at 26-28.) Nor does TIM suggest how language providing that fees may vary 20% from the estimate is ambiguous. Indeed, TIM argued below that the 20% clause was *unambiguous*. (R. 1023T, at 291.)

Now, TIM argues (amazingly) that Alpha Partners' Liz Hecht did not know the

purpose of the 20% clause. (Aplee. Br. at 24-26.) The record shows this is simply untrue.[3] Ms. Hecht consistently testified the 20% clause could be invoked if TIM extended the project or increased its complexity. (R. 1022T. at 77-79, 206, 208-11, 224, 229-30; Trial Ex. 5.) This is exactly what the contract says: "material changes in the extent or complexity of any elements of the project." (Addend. Ex. 2, at 12-13.) Her testimony that the 20% clause itself does not contain the word "delay" on page 12 of the contract is absolutely accurate – and fully consistent as well. (R. 1022T, at 167; Addend. Ex. 2, at 12.) There is no requirement in the law that a contract provision contain any one magic word as a *sine qua non* to a breach. The contract must be construed as a whole, giving effect to all its provisions, including those that expressly allow the 20% charged by Alpha Partners. *See Nielsen v. O'Reilly*, 848 P.2d 664, 665 (Utah 1992).

The testimony adduced by TIM evidences *TIM's* confusion about the contract terms – not Ms. Hecht's. (Aplee. Br. at 24-25; R. 1022T, at 209.) The record itself is clear. The original target completion date was the week of April 23, 2001. (Addend. Ex. 2, at 10.) The contract designated September 8, 2001, "nine months from the date of project inception," as the period within which the original quotes remained viable – including the estimate-plus-20% agreement. (Addend. Ex. 2, at 13.) Alpha Partners voluntarily extended this original "grace period" to November and then to December 2001. (R. 1028; Aplee. Br. at 15.) Consequently, no written estimate revision was required to invoke the clause. Ms. Hecht's

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[3] Among other deliberately jumbled citations, TIM slips in a quote from trial counsel's opening statement – which is not evidence. (Aplee. Br. at 24, citing R. 1022T, at 28.) Once the evidence came in, counsel's argument was exactly with Ms. Hecht's testimony. (R. 1023T, at 289-90.)

testimony was clear, direct, accurate – and consistent. It simply reflected the contract.

TIM confuses Ms. Hecht's attempts to accommodate TIM's delays with her construction of the 20% clause. Alpha Partners has demonstrated it extended specific courtesies to TIM that did not amount to "novations." (Aplt. Br. at 33; Conclusion No. 2, Addend. Ex. 1, at 15; Ex. 19.) TIM concedes this. Pursuant to Ms. Hecht's generous proposals, TIM could have avoided the 20% clause altogether by obtaining quick approvals once Mr. Riazzi was CEO. (R. 1022T, at 117-18.) When it became clear TIM would not do so, Alpha Partners charged an additional 18% (and later 2% more) for its work within the original scope of the project – as it was contractually entitled to do. (R. 1022T, at 139-40, 153.) The August 31 invoice was clear about the $43,000: "Fees for work completed to date on the original project (per December 8, 2000 Letter of Agreement)." (Addend. Ex. 3; R. 1022T, at 142-43.) The only "confusion" comes from TIM and appears deliberate.

In short, nothing submitted by TIM changes the immutable fact evinced by the contract itself that the 20% charged by Alpha Partners was within the range of fees TIM agreed to pay. Ms. Hecht's testimony on the point is clear and unambiguous. The district court wrongly concluded this provision was ambiguous.

2. If the 20% clause is ambiguous, the clear weight of the evidence demonstrates the ambiguity should be resolved in favor of Alpha Partners on this record.

Assuming *arguendo* that the provision is ambiguous, the analysis becomes a factual one. *See Plateau Mining Co. v. Utah Div. of State Lands & Forestry*, 802 P.2d 720, 725 (Utah 1990). Alpha Partners undertook a detailed factual analysis, demonstrating the district court's ruling is clearly erroneous. (Aplt. Br. at 38-50.) TIM virtually ignores the

grounds for reversal established by Alpha Partners.

TIM makes only two abbreviated arguments along these lines at all. (Aplee. Br. at 25-26.) First, TIM says the 20% clause "could not be triggered by project delay" because "extra fees for delays were covered under the separate 'estimate revision' clause on page 13 of the Letter of Agreement." (Aplee. Br. at 25.) This is manifestly an erroneous construction of the contract. Page 13 is not limited to written "estimate revisions." It expressly contemplates fees "above th[e] estimate" identified on page 12 without the need for written estimate revisions. (Addend. Ex. 2, at 13.) Moreover, the 20% clause and the more-than-20% clause *both* relate to project delays under the contract. (R. 1022T, at 77-79, 166, 179-80; Trial Ex. 2.) A written estimate revision for increased fees was required if the fees were to exceed the estimate by *more than 20%*; a written estimate revision was *not* needed for fees within the 20% range. (Addend. Ex. 2, at 12-13.) These provisions clearly appear in the contract and are not difficult to read or understand.[4]

Second, TIM argues the 20% clause must be interpreted in conjunction with the language surrounding it: "The fees quoted here are based on an estimate of time required by Alpha Partners to perform the work described as well as fair market value for these services." (Aplee Br. at 26.) Alpha Partners could not agree more. TIM does not challenge the findings that the project went months over its target date and beyond its completion date because of TIM's intransigence. Nor does TIM dispute Ms. Hecht's testimony about the excessive extra time – extra months, including seven weeks beyond the grace period

[4] The contract also required revisions for change orders. (Addend. Ex. 2, at 13.) The record is undisputed that Alpha Partners submitted revised estimates for change orders. (Trial Exs. 11-13, 15; R. 1022T, at 112-13.)

specified by the contract – spent on the project as a result of TIM. (R. 1022T. at 140-42; Aplt. Br. at 46-47; *see also* R. 1022T. at 87-89, 104-11, 113-38; Addend. Ex. 2.)

There is no basis in the contract for requiring Alpha Partners to count individual hours. The fees for the contract were bid based on its anticipated duration in *weeks* and *months*. (Addend. Ex. 2. at 9-10.) Ms. Hecht specifically told TIM "that our price hinged on this time frame." (R. 1022T. at 75.) This was "not an hourly project." (R. 1032.) TIM did not request hourly billing and Alpha Partners did not keep track of its work on that basis. (R. 1022T. at 210.) The invocation of the 20% clause "reflect[ed] the fact that [Alpha Partners] had been working for several months longer than originally expected. It reflected the time period." (R. 1022T. at 211.) When the time frame changed because TIM did not cooperate, the fees changed as contemplated by the contract.

TIM concedes "there was a contract provision under which Alpha Partners could charge TIM up to 20% more than the original fee paid." (Aplee. Br. at 8.) Yet TIM's interpretation of the 20% clause renders it a nullity. This is contrary to established Utah law.

In sum, TIM's truncated arguments do not overcome the "fatal flaws" identified in the ruling below. (Aplt. Br. at 38-50.) If the proper analysis descends to the level of a factual inquiry because of a perceived ambiguity in the contract, reversal is required nonetheless.

3. Alpha Partners' damages are established in the record.

Alpha Partners has made clear it is appealing only the denial of fees and expenses

within the estimate-plus-20% range. (Aplt. Br. at 28 & n.7.)[5] These are:

- $47,800 for fees, representing 20% above the original estimate, as provided in the contract ($43,000 [18%] plus $4,800 [2%]);
- $5,204.67 for expenses and reimbursables, as provided in the contract ($1,741.33 for expenses plus $3,463.34 for reimbursables);
- interest at 1.5% per month as provided in the contract;
- attorney's fees/costs to be determined in the first instance by the district court.

(R. 1022T, at 153-54, 218; Trial Ex. 9; Addend. Ex. 2, at 12-13, 15.) These amounts are adequately supported in the record and should be awarded to Alpha Partners. (R. 1022T, at 138-44, 153-55; Trial Exs. 9, 19-23, 26-27, 29-32.)[6]

C. Alpha Partners Merely Seeks the Benefit of Its Bargain, Not Lost Profits or Consequential Damages.

TIM claims Alpha Partners made "no showing of what 'other business' it might have obtained had it not been working on the TIM project nor what that business was worth." (Aplee Br. at 27.) Alpha Partners is not claiming lost profits from other business or consequential damages. Alpha Partners seeks the benefit of its bargain, as stated in its opening brief. (Aplt. Br. at 37.) TIM's lost profits argument is irrelevant.

TIM suggests Alpha Partners made a profit and so should not be complaining. (Aplee. Br. at 27.) Whether Alpha Partners did is irrelevant to a benefit of the bargain analysis. If that were the appropriate standard, breaches could be excused by a showing that paying less than the contract amount still left the nonbreaching party with a profit. That is

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[5] Accordingly, TIM's discussion of fees or expenses exceeding 20% is moot.

[6] In its opening brief, Alpha Partners also identified record evidence showing how TIM's delays caused Alpha Partners to spend significant additional time on the project. (Aplt. Br. at 46-47.) TIM does not take issue with this evidence.

not the law. TIM cannot escape its contract obligations on such a baseless visceral argument. (*See also* Aplt. Br. at 22 n.5.)[7]

Even if the Court were to deny Alpha Partners damages (which it should not), the Court should still reverse on TIM's liability. Breach of contract is itself a legal wrong entitling Alpha Partners to attorney's fees as the prevailing party. (Addend. Ex. 2, at 15.) "It is the determination of culpability, not the amount of damages, that determines who is the prevailing party." *Brown v. Richards*, 840 P.2d 143, 155 (Utah Ct. App. 1992). "'An unexcused failure to perform a contract is a legal wrong. Action will lie for the breach although it causes no injury.'" *Nasner v. Burton*, 272 P.2d 163, 166 (Utah 1954) (quoting 5 Williston on Contracts § 1339A, at 3766 (rev. ed.) and collecting authorities); *see also Kitchen Krafters, Inc. v. Eastside Bank*, 789 P.2d 567, 571 (Mont. 1990) (same), *overruled on other grounds, Busta v. Columbus Hosp. Corp.*, 916 P.2d 122 (Mont. 1996). Based on TIM's liability for breach of contract, the district court on remand may award attorney's fees to Alpha Partners for successfully establishing its contract claim and resisting TIM's counterclaim. *See Highland Constr. Co. v. Stevenson*, 636 P.2d 1034, 1035, 1038 (Utah 1981); *Bailey-Allen Co. v. Kurzet*, 876 P.2d 421, 428 (Utah Ct. App. 1994).

III. THE COURT SHOULD REVERSE THE AWARD OF COSTS.

TIM inexplicably argues that Alpha Partners did not properly appeal the district court's award of costs to TIM. (Aplee. Br. at 34.) However, Alpha Partners argued the cost

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[7] TIM suggests there is no evidence Alpha Partners' strategic partners charged less because the project was never completed. (Aplee. Br. at 19 n.4.) Ms. Hecht testified at trial that strategic partner Sisco billed only as much as he could under the circumstances because he could not finish the additional contract work and both strategic partners had more time they would need to spend on the project. (R. 1022T, at 202-04, 206, 217.)

award should be reversed both independently *and* with the rest of the judgment. (Aplt. Br. at 24 & n.6, 50 & n.14.) Alpha Partners' analysis includes case law authority for its substantive position – which is more than can be said of TIM's response. (Aplee. Br. at 35.) TIM merely suggests, without authority, that "the definition of 'costs' in the context of an offer of judgment must be more expansive than under Rule 54." (Aplee. Br. at 35.)

The reported decisions hold to the common-sense rule that "costs" recoverable under Rule 68 mean those "costs" allowable under Rule 54. *Mountain Rest. Corp. v. Parkcenter Mall Assocs.*, 833 P.2d 119, 127 (Idaho Ct. App. 1992); 10-54 Moore's Federal Practice § 54.102(2)(g)(iii) (Rule 68 costs are those "properly allowable under the relevant substantive statute or other authority"). The Utah courts' interpretation of Rule 54 limits costs to "those fees which are required to be paid to the court and to witnesses, and for which the statutes authorize to be included in the judgment." *Frampton v. Wilson*, 605 P.2d 771, 774 (Utah 1980) (emphasis added). The statutes limit witness costs to $18.50 for day one and $49 per day thereafter with limited mileage. *See* Utah Code Ann. § 78-46-28, -30. TIM seeks reimbursement for hotel, airfare, meals, parking, a rental car, mileage in California, and costs incurred by its legal counsel, including two Federal Express shipments, long distance telephone and fax charges, copy costs, Westlaw research, and data copy. (R. 963-84, 951-62.) None of these items are appropriate Rule 54 (or 68) costs. *See Frampton*, 605 P.2d at 774. "Witness compensation in excess of the statutory schedule is generally inappropriate as a cost." *Morgan v. Morgan*, 795 P.2d 684, 687 (Utah Ct. App. 1990). This Court should reverse.

CONCLUSION ON ALPHA PARTNERS' APPEAL

For the foregoing reasons and those in Alpha Partners' opening brief, the Court should reverse the denial of Alpha Partners' contract claim and remand for further proceedings. Under any appropriate standard of review, Alpha Partners is entitled to a judgment holding that TIM breached its contract obligations. Alpha Partners is entitled to damages with interest and/or a remand for a determination and award of damages, attorney's fees, and/or costs in the first instance. Costs to TIM should be reversed regardless.

RESPONSE TO TIM'S CROSS-APPEAL

In arguing its own cross-appeal, TIM all but ignores the standard of review. This begins in the Statement of the Case when TIM slants facts to advocate its position.[8] TIM makes no factual challenge in its cross-appeal, so all facts must be viewed in the light most favorable to the district court's ruling. *See College Irr. Co. v. Logan River & Blacksmith Fork Irr. Co.*, 780 P.2d 1241, 1244 (Utah 1989).

Despite TIM's scattergun facts, its ***argument*** on cross-appeal is limited. (Aplee. Br. at 27-34.) This Court's role is not factfinding and its legal decisions are not based on the mere volume of one party's collated evidence. *See Jeffs v. Stubbs*, 970 P.2d 1234, 1242 (Utah 1998); *Utah Med. Prods. v. Searcy*, 958 P.2d 228, 232 (Utah 1998). Arguments not made by a party are waived. *See Pixton*, 809 P.2d at 751. This Court will not make arguments for a party or guess at what a party intimates in its factual statement but does not

[8] As one example of many, TIM suggests certain delays were "beyond Transamerica's control." (Aplee. Br. at 14.) Actually, the unchallenged district court finding states such delays were beyond *Mr. Riazzi's* control. (Finding No. 31, Addend. Ex. 1, at 10.) The delays were directly attributable to TIM, as the district court ruled in unchallenged findings and conclusions.

discuss in its Argument section. *See State v. Yates*, 834 P.2d 599, 602 (Utah Ct. App. 1992). TIM's myopic argument evidences its cross-appeal is a tactic to obfuscate the main appeal.

One example is sufficient to illustrate this recurrent theme. In its fact recitation, TIM reargues its lost fraud claim, haplessly suggesting that Ms. Hecht secretly schemed to defraud TIM. (Aplee. Br. at 12-13.) This unmeritorious claim was heard and properly rejected in the district court. (Addend. Ex. 1, at 10, 15-16.)[9] TIM neither appealed the denial of that claim nor appealed the findings of fact rejecting TIM's view of the underlying evidence. Yet TIM restates and essentially reargues all such evidence without regard to the standard of review or the unchallenged nature of the district court's factual findings. (Aplee. Br. at 12-13.) It should be clear what TIM is trying to do: muddy the waters for Alpha Partners' own appeal by creating the impression of overwhelming factual confusion.

TIM's cross-appeal is fact-intensive. The district court sitting as the trier of fact was entitled to credit Alpha Partners' facts, judge the credibility of witnesses, and draw appropriate inferences. This he did when denying TIM's claims. TIM's cross-appeal is without merit and should be rejected.

I. THE DISTRICT COURT PROPERLY CONCLUDED THAT ALPHA PARTNERS DID NOT BREACH THE CONTRACT AND THAT IT WAS EXCUSED FROM PERFORMANCE BY TIM'S MATERIAL DELAYS.

The district court identified numerous compelling grounds for rejecting TIM's contract counterclaim, each of which requires affirmance.

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[9] The record ultimately shows Ms. Hecht honestly referred to earlier invoices that had not been paid. (Finding No. 25, Addend. Ex. 1, at 9; R. 1022T, at 144, 188-89; R. 1023T, at 361; Trial Exs. 31, 61.) The district court got this exactly right.

A. Alpha Partners Substantially Performed by Doing All It Could To Accomplish the Goals of the Letter of Agreement.

Alpha Partners could not fully perform its obligations without TIM's assistance and input. The contract expressly contemplated as much -- and expressly obligated TIM to provide such assistance. It is undisputed for purposes of this cross-appeal that TIM wholly failed in this obligation. The district court rightly found that "Alpha did all it could to accomplish the goals of the Letter of Agreement." (Addend. Ex. 1, at 16; R. 1032.)[10]

The Court need look no further than the district court's unchallenged findings of fact. They demonstrate Alpha Partners was the driving force in attempting to bring the contract to completion. (Addend. Ex. 1, at 6-13.) Notably, TIM does not dispute this. TIM concedes that Alpha Partners substantially completed its performance. (Aplee. Br. at 28.) TIM merely argues substantial performance was insufficient because complete performance was required. (Aplee. Br. at 28-29.) This argument fails for at least six reasons.

First, materiality and substantial performance are issues of fact. *See Saunders v. Sharp*, 793 P.2d 927, 931 (Utah Ct. App. 1990) ("Whether there was a material breach of contract, and if so, when, and by whom . . . constitute issues of fact for the fact finder.") (citing *American Petrofina Co. v. D & L Oil Supply, Inc.*, 583 P.2d 521, 528 (Ore. 1978) (substantial performance is a question of fact)). TIM has neither marshaled the evidence nor analyzed the facts in light of the appropriate standard of review. *See McPherson v. Belnap*, 830 P.2d 302, 305 (Utah Ct. App. 1992). Consequently, TIM has not properly appealed the

[10] Although contained within a conclusion of law, this is really a finding of fact. *See Gillmor v. Wright*, 850 P.2d 431, 433 (Utah 1993) ("On appeal, we disregard the labels attached to findings and conclusions and look to the substance."); *State v. Pena*, 869 P.2d 932, 935 (Utah 1994) (defining finding of fact as "entailing the empirical").

questions of substantial performance and material breach. Its position necessarily fails.

Second, TIM cites only *Cache County v. Beus*, 1999 UT App 134, 978 P.2d 1043, suggesting the extent to which a party will be deprived of a reasonably expected benefit is a "factor to be considered" in determining materiality. (Aplee. Br. at 28.) This merely highlights the factually intense analysis. TIM does not even discuss the other factors or reveal that *Beus* required a factual inquiry. *See id.* ¶¶ 37-41.

Third, because substantial performance is the flipside of material breach, a party cannot be in material breach if it has substantially performed. *See, e.g., First Sec. Bank, N.A. v. Murphy*, 964 P.2d 654, 659 (Idaho 1998); *Roberts v. Wyman*, 23 P.3d 152, 159 (Idaho Ct. App. 2000); *Howarth v. Olivier*, 52 P.3d 911, 914 (Kan. Ct. App. 2002); *Almena State Bank v. Enfield*, 954 P.2d 724, 727 (Kan. Ct. App. 1998). The record demonstrates Alpha Partners' heroic efforts to substantially complete its work notwithstanding TIM's inaction. (R. 1022T, at 87-99, 104-11, 113-38, 145-47; Trial Exs. 19-22, 32, 39.)[11]

Fourth, a party cannot sue for breach unless it has itself substantially performed. *See Holbrook*, 883 P.2d at 301. TIM indisputably did not.

Fifth, there is evidence Mr. Riazzi himself believed that Alpha Partners' work was complete "for all inten[ts] and purposes." (R. 1023T, at 343, 360.)

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[11] TIM argues without support that Alpha Partners did not meet its contract obligation to budget. (Aplee. Br. at 28 n.9.) TIM cites no evidence of breach and none was admitted. Alpha Partners operated at all times within budget. (R. 1022T, at 211.) TIM also misstates the evidence as to Alpha Partners' "report" of delay-based budget implications. (Aplee. Br. at 22 n.6; R. 1022T, at 205-08.)

Finally, TIM's material nonperformance prevented Alpha Partners from completing its own performance and excused further performance. (*See* part II.B. *infra*.)

B. TIM's Unreasonable Material Delays Excused Alpha Partners' Further Performance.

The district court properly found all delays were the fault of TIM. (Addend. Ex. 1, at 16, 18.) TIM was "not fully cooperating" to get the project done. (Addend. Ex. 1, at 16.) These unreasonable delays excused Alpha Partners from further performance under the contract regardless of whether they are classified as a "breach." *See Holbrook v. Master Protection Corp.*, 883 P.2d 295, 301 (Utah Ct. App. 1994); MUJI 26.40.

C. TIM Did Not Adequately Prove Its Claimed Damages.

The district court was on solid ground on this record in denying TIM's preposterous claims for hundreds of thousands of dollars in damages. The district court had wide discretion in considering damages. *See Clayton v. Crossroads Equip. Co.*, 655 P.2d 1125, 1130 (Utah 1982). As the district court held, TIM's claimed damages were unreasonable, speculative, and avoidable.

1. TIM's damages were not shown to be reasonably certain or foreseeable.

The district court held TIM's claimed damages were neither "reasonably certain nor foreseeable." (Addend. Ex. 1, at 18.) TIM claimed recovery for its employees' "straight salaries" – including Mr. Riazzi's exorbitant $450,000 per year – an expense TIM would have incurred anyway. (R. 1023T, at 297-300.) TIM employees did not keep track of hours spent on the Alpha Partners project. (R. 1023T, at 355-56.) Instead, they made the "most reasonable guess" they could, providing what they admitted could only be an estimate. (R.

1023T, at 355-56.) Mr. Riazzi was only able to say that the lost profits number "sounds reasonable." (R. 1023T, at 354.) TIM translated Mr. Riazzi's "best-guess" time into an hourly rate (even though he wasn't paid by the hour) and tried to charge it to Alpha Partners. (R. 1023T, at 297-300.) It is little wonder the district court rejected this absurd claim.

Consequential damages must be reasonably foreseeable at the time the contract was made. *See In re Estate of Ross*, 1999 UT 104, ¶ 20, 990 P.2d 933; *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461, 466 (Utah 1996). TIM's John Riazzi testified the losses were foreseeable with "the benefit of hindsight." (R. 1023T, at 366.) While this would make consequential damages much easier to prove, hindsight cannot make consequential damages foreseeable. Moreover, TIM's Lake Setzler testified in his deposition the damages were only a "possibility," then changed his testimony at trial. (R. 1023T, at 312.) The testimony to support them was filled with what TIM "would have" or "could have" done. (*E.g.*, R. 1023T, at 296, 310.) Mr. Setzler admitted that he penciled out the damage estimates the week before trial. (R. 1023T, at 313.) He had not revealed such "damages" at his prior deposition because he had not yet figured out their value. (R. 1023T, at 313-14.) His testimony about the damages was itself vague and uncertain. (R. 1023T, at 316-17, 321.) The district court had adequate grounds to reject this shaky evidence.

2. The claimed lost profits were based on estimates from others.

The district court also held "[t]he claimed lost profits were based on estimates from others and that evidence was not compelling to the court." (Addend. Ex. 1, at 18.) Mr. Setzler did not have first-hand knowledge of the damages about which he testified, but based his testimony on a "budget estimate" produced by Bill Miller. (R. 1023T, at 308-09,

316.) Mr. Riazzi agreed "there wasn't any real information to pull from except Mr. Miller's projections." (R. 1023T, at 355.) Mr. Setzler further based his testimony on information provided by non-testifying TIM employees and – notably – legal counsel. (R. 1023T, at 324-25.) Mr. Setzler's bias as an interest owner in TIM was apparent, as he stood to gain from a recovery. (R. 1023T, at 322.) The factfinder could disregard his testimony.

TIM's damage evidence was uneven and inconsistent. Mr. Riazzi contradicted Mr. Setzler, noting the fee rate he had used was overly aggressive in light of historical performance. (R. 1023T, at 355.) He commented that, despite inaccurate variables, he thought Mr. Setzler's number was "pretty close" to what it ought to be when looking back. (R. 1023T, at 355.) Mr. Riazzi tried without success to rely on hearsay and gave testimony related to an exhibit he previously agreed he had never seen. (R. 1023T, at 348-49, 353.)

TIM's numbers and the bases for those numbers did not go unchallenged. Alpha Partners' cross-examination revealed problems with underlying assumptions and assertions. (R. 1023T, at 312-21, 362.) The district court was entitled to weigh the evidence and the credibility of the witnesses, which it obviously did. On this record, it is ludicrous to suggest the district court was required to award damages.

3. TIM's evidence was speculative.

The district court found TIM's lost profits analysis to be "speculative as to what could have been earned had the product been produced by Alpha at a certain time." (Addend. Ex. 1, at 18.) Speculation is an insufficient basis on which to claim damages. *See Bastian v. King*, 661 P.2d 953, 956 (Utah 1983).

TIM sought "profit that it could have obtained if Alpha Partners completed the marketing materials." (R. 1023T. at 306.) Yet TIM admitted there was more to making a profit than simply having marketing materials, acknowledging "other factors that would be needed in order to corral this business." (R. 1023T, at 368.) At a minimum, TIM conceded that "had we been able to generate the business, raise the assets, we would have earned fees on those accounts." (R. 1023T, at 306.) TIM was left to argue it could not market "as successfully" and so "did not have the opportunity to earn that business." (R. 1023T, at 306.) TIM still acts as if all it needs are marketing materials to claim at least $380,000. (Aplee. Br. at 30-31; R. 1023T, at 366-68.) This approach defines speculation.

4. TIM's claims were deniable under the doctrine of avoidable consequences because TIM failed to mitigate.

"The doctrine of avoidable consequences, also referred to as mitigation of damages, generally operates to prevent one against whom a wrong has been committed from recovering any item of damage arising from the wrongful conduct which could have been avoided or minimized by reasonable means." *Angelos v. First Interstate Bank*, 671 P.2d 772, 777 (Utah 1983). TIM indisputably failed to mitigate.

i. *TIM could have taken prompt action.*

The district court held TIM's delays "could have been avoided first by TIM's prompt action under this agreement." (Addend. Ex. 1, at 18.) The record is replete with instances of TIM's delay, as well as evidence of Alpha Partners' diligence. The district court found "there was no agreement or consensus among the individuals involved at TIM . . . and this decision making process took time." (Addend. Ex. 1, at 5.) The court further found "Alpha

Partners was extremely prompt and diligent about getting its work done in the proposed time frame envisioned." (Addend. Ex. 1, at 7.) The district court's unchallenged findings stand.

ii. *TIM could have paid Alpha Partners rather than hire a new provider.*

The district court further held that "even at the end of their dealings, TIM could have paid Alpha an amount very similar to what it paid the new provider, FRCH, and could have been in business months earlier than it was with the product produced after several months by FRCH." (Addend. Ex. 1, at 18.) Record evidence supports this conclusion. (R. 1023T, at 359-60, 369.) Instead, Mr. Riazzi made a "business decision" to hire a new contractor and "start from scratch." (R. 1023T, at 359-60.) Most of the work under the contract was already accomplished by Alpha Partners. (Addend. Ex. 1, at 16.) Had TIM mitigated, it would not have had to "re-do" a substantially completed job.

TIM argues FRCH could not use Alpha Partners' materials. The record says otherwise. (R. 1022T, at 82-83, 152-53, 168-70, 198, 213-14.) The district court sustained an objection to testimony suggesting FRCH could not. (R. 1023T, at 348-49.) Despite that fact, TIM still cites that testimony in this appeal. (Aplee. Br. at 28; R. 1023T, at 349.)

The FRCH project turned out to be a different project altogether. (R. 1023T, at 352.) TIM did not get out of FRCH what it contracted for with Alpha Partners. (R. 1023T, at 352.) There was simply no basis for requiring Alpha Partners to pay for the difference between its cost and FRCH's cost.

iii. *Alpha Partners did not cause the alleged loss.*

The district court also held "the man-hours allegedly lost are not worthy of damages

even if the . . . claims were proven." (Addend. Ex. 1, at 18.) "Again, the delays were those of TIM, not Alpha, so the work done by Mr. Riazzi and Cristina Stivers [sic] on the project, which work consumed hours they could have spent on other income producing work, was the result of TIM's conduct, not traceable to Alpha." (Addend. Ex. 1, at 18-19.) Unchallenged findings of fact support this conclusion. TIM, not Alpha Partners, caused the delays. TIM could have avoided these alleged damages simply by performing.

5. Because TIM cannot bring a breach claim, TIM cannot recover damages.

Finally, TIM cannot prove liability on its contract claim. *See supra parts* II.A & II.B of Response to Cross-Appeal. Accordingly, it is not entitled to damages. The district court's conclusion in this respect is correct. (Addend. Ex. 1, at 19.)

For all the foregoing reasons, individually and collectively, this Court should affirm the district court's denial of TIM's contract counterclaim.

II. THE DISTRICT COURT PROPERLY CONCLUDED THAT ALPHA PARTNERS WAS NOT LIABLE FOR UNJUST ENRICHMENT.

This Court will affirm the district court's denial of TIM's unjust enrichment claim on any ground supported by the record. *See Bailey v. Bayles*, 2002 UT 58, ¶ 10, 52 P.3d 1158, 1161. A contract existed covering the subject matter of the unjust enrichment claim. (Addend. Ex. 2.) The unjust enrichment claim was therefore properly denied. *See Mann v. American W. Life Ins. Co.*, 586 P.2d 461, 465 (Utah 1978); *Five F, LLC v. Heritage Sav. Bank*, 2003 UT App 373, ¶ 24, 81 P.3d 105 (unjust enrichment claim precluded by contract covering subject matter); *Davies v. Olson*, 746 P.2d 264, 268 (Utah Ct. App. 1987) ("*quantum meruit* presupposes that no enforceable written or oral contract exists").

TIM's cross-appeal on the unjust enrichment claim also fails on its own merits. Record evidence supported the district court's findings that Alpha Partners materially completed all its obligations. (R. 1022T. at 87-99, 104-11, 113-38, 145-47; 1023T. at 360.) The existence of record evidence was the hallmark of the reported decisions cited by TIM. *See Jensen v. Whitesides*, 370 P.2d 765, 766 (Utah 1962) (affirming jury's choice of plaintiff's less-credible version of events on disputed record); *Bailey-Allen Co. v. Kurzet*, 945 P.2d 180, 188-89 (Utah Ct. App. 1997) (affirming decision based on sustained amended findings supported by the record). The decision here must likewise be affirmed. *See Jensen v. Whitesides*, 370 P.2d at 765.

Finally, it would not be equitable to require Alpha Partners to pay back fees it earned. (R. 1022T. at 144-45, 147-48, 155-56.) Alpha Partners did as much as it could with TIM's limited assistance. Evidence shows that upon receiving the relevant invoice packet, Transamerica encouraged Alpha Partners to keep working then waited seven weeks before disputing the charges. (R. 1022T. at 144, 147-49.) TIM's own material nonperformance caused the contract termination and relieved Alpha Partners from any further performance requirements. On this record, this Court cannot say the district court should have held any differently.[12]

CONCLUSION IN RESPONSE TO TIM'S CROSS-APPEAL

For the foregoing reasons, the Court should affirm the district court's findings and conclusions exonerating Alpha Partners on TIM's counterclaims.

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[12] TIM's unjust enrichment claim is also properly rejected for all the reasons its contract claim failed. *See supra* part I of this Response to TIM's Cross-Appeal.

DATED this 6th day of July, 2005.

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CERTIFICATE OF SERVICE

Pursuant to Utah R. App. P. 21(d), I hereby certify that on the 6th day of July, 2005, I caused to be served two (2) true and correct copies of the above and foregoing pleading by the method indicated below and addressed as follows:

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