APPENDIX TABLE OF CONTENTS

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SAFEWAY STORES 46 INC., Plaintiff-Appellant/ Cross-Appellee, v. WY PLAZA LC, Defendant-Appellee/ Cross-Appellant.	Nos. 20-8064 & 20-8066

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING
(D.C. No. 2:19-CV-00143-KHR)

(Filed Apr. 7, 2023)

John F. Kurtz, Jr., Kurtz Law PLLC, Boise, Idaho (Frederick J. Hahn, III, Hahn Law Office, Idaho Falls, Idaho, with him on the briefs), for the Plaintiff-Appellant/ Cross-Appellee.

Sean M. Larson (Lucas Buckley with him on the briefs), Hathaway & Kunz, LLP, Cheyenne, Wyoming, for the Defendant-Appellee/Cross-Appellant.

Before **BACHARACH**, **MURPHY**, and **CARSON**, Circuit Judges.

BACHARACH, Circuit Judge.

This appeal grew out of overpayments that a lessee (Safeway Stores 46, Inc.) had made to its lessor (WY Plaza, L.C.). The lease allowed Safeway to deduct construction costs from the payments to WY Plaza. But Safeway neglected to make these deductions for twelve years before demanding repayment. WY Plaza rejected the demand based on Safeway's delay. Safeway responded by paying under protest and suing for restitution and a declaratory judgment.[1] Both parties sought summary judgment.

In its own motion, WY Plaza denied the availability of restitution because the parties' obligations had been set out in a written contract. The district court agreed with WY Plaza. But the court went further, deciding sua sponte that Safeway's delay prevented recovery under the doctrine of laches. So the court granted summary judgment to WY Plaza and denied Safeway's motion.

---

[1] Safeway also claimed breach of the contract and a covenant of good faith and fair dealing, and the district court granted summary judgment to WY Plaza on these claims. Safeway does not challenge the rulings on these claims.

This appeal followed, and it turns mainly on three issues:

1. **Notice and an opportunity to respond.** The district court granted summary judgment to WY Plaza, relying in part on laches. But laches constitutes an affirmative defense, so WY Plaza had to prove prejudice from Safeway's delay.

   In seeking summary judgment, WY Plaza hadn't asserted a laches defense. So Safeway lacked notice that it needed to present evidence disputing prejudice in order to avoid summary judgment. Given this lack of notice, did the district court err in sua sponte granting summary judgment to WY Plaza based on laches? We answer *yes*.

2. **Lack of evidence on prejudice.** Because laches constitutes an affirmative defense, WY Plaza had to present evidence of prejudice in order to prevent summary judgment to Safeway on the claim for declaratory relief. Rather than present such evidence, WY Plaza relied on conclusory assertions of faded memories and financial costs. Did the lack of evidence on prejudice entitle Safeway to summary judgment on the claim for declaratory relief? We answer *yes*.

3. **Restitution for overpayments to conform to the contract.** Generally, a claimant cannot obtain restitution based on an implied right when the parties have identified their rights in a written contract. But Safeway relies on the contract itself rather than an

implied right. Does Safeway's reliance on the contract prevent restitution to recoup the overpayments? We answer *no*.

I. For twelve years, Safeway mistakenly overpaid under the lease.

The dispute largely involves legal implications from undisputed historical facts surrounding Safeway's delay in exercising contractual rights.

A. The parties form a contract that allows Safeway to deduct its costs to construct an addition.

These rights originated in Safeway's lease of store space from WY Plaza's predecessor (City View Partners). Under the lease, Safeway owed (1) fixed monthly payments and (2) yearly payments based on a percentage of the sales revenue. In exchange, Safeway had the option to expand the store. If Safeway were to expand, it could deduct its construction costs from the yearly payments.

B. Safeway builds an addition, but doesn't deduct the costs from the yearly payments.

Safeway did expand the store, and the lessor then sold the property to WY Plaza. The sale led Safeway and WY Plaza to modify the lease, memorializing the costs of the addition and keeping the terms for Safeway's yearly payments.

For the first three years, Safeway didn't owe any yearly payments because the sales were too low. Without an obligation for yearly payments, Safeway didn't need to deduct construction costs. Starting in 2005, however, Safeway's sales increased enough to trigger the yearly payment obligations. Safeway made these payments from 2005 on without deducting the construction costs.

In 2010, Safeway noticed an unrelated error that had affected the yearly payments. In light of this error, WY Plaza let Safeway reduce its payments for four years. But Safeway still failed to recognize its ability to deduct the construction costs.

C. Safeway finally demands return of the overpayments, and the district court grants summary judgment to WY Plaza.

In 2018, Safeway realized that it could have been deducting its construction costs. With this realization, Safeway demanded reimbursement for the overpayments from 2005 to 2017.[2] WY Plaza refused this demand, so Safeway made the yearly payments in 2018 and 2019 under protest.

Safeway sued for restitution and a declaration of the right to deduct the balance of the amortization account from the yearly payments, and both sides sought

---

[2] On appeal, Safeway seeks recovery of the overpayments starting in 2012, not 2005.

summary judgment. The district court granted summary judgment to WY Plaza mainly for two reasons:

1. Laches prevented relief because Safeway's delay had prejudiced WY Plaza.
2. Restitution wasn't available because Safeway's mistake was unilateral and the parties had a written contract.

Despite the award of summary judgment to WY Plaza, the district court declined to award attorney fees.

Both parties appeal. Safeway argues that the district court erred not only in granting summary judgment to WY Plaza, but also in declining to grant Safeway's motion for summary judgment. WY Plaza challenges the denial of its motion for an award of attorney fees.

II. We apply state law on the substantive issues.

We apply the substantive law of the forum state—Wyoming. *Mincin v. Vail Holdings, Inc.*, 308 F.3d 1105, 1108 (10th Cir. 2002). In determining the content of Wyoming law, we conduct de novo review of the district court's legal rulings. *Id.* at 1108–09.

III. The district court erroneously granted summary judgment to WY Plaza.

The district court granted summary judgment to WY Plaza on the claims for a declaratory judgment and

restitution. For both claims, the district court sua sponte raised the defense of laches and granted summary judgment to WY Plaza. On the restitution claim, the district court added that Safeway couldn't obtain equitable relief because a contract had existed and WY Plaza hadn't shared in the mistake. We disagree with both rulings.

A. The district court erroneously granted summary judgment to WY Plaza on the claim for a declaratory judgment.

Though Safeway waited twelve years to deduct the construction costs, WY Plaza didn't move for summary judgment based on laches. To the contrary, WY Plaza asserted laches only in opposing Safeway's motion for summary judgment on the claim for declaratory relief, arguing there that laches either applied or would create a material dispute of fact. But WY Plaza didn't seek summary judgment based on laches. Despite the lack of any such argument, the district court relied on laches to grant summary judgment to WY Plaza on the claim for declaratory relief.

We conduct de novo review of this holding. *Cillo v. City of Greenwood Vill.*, 739 F.3d 451, 461 (10th Cir. 2013). Conducting this review, we conclude that the district court erroneously failed to notify Safeway before granting summary judgment to WY Plaza based on laches.

1. Safeway lacked notice of a need to address laches when objecting to summary judgment.

Although WY Plaza moved for summary judgment, the motion didn't raise laches. The district court could still raise the issue sua sponte; to do so, however, the court would ordinarily need to provide Safeway with "notice and a reasonable time to respond." Fed. R. Civ. P. 56(f)(2). The district court could forgo formal notice, but only if Safeway had already been "on notice that [it] had to come forward with all of [its] evidence." *Kannady v. City of Kiowa*, 590 F.3d 1161, 1170 (10th Cir. 2010) (quoting *Howell Petroleum Corp. v. Leben Oil Corp.*, 976 F.2d 614, 620 (10th Cir. 1992)).

The district court didn't warn Safeway of the possibility of granting summary judgment to WY Plaza based on laches. Despite the lack of a warning, WY Plaza argues that Safeway had notice because

- laches constituted an important issue and
- WY Plaza had raised this issue when opposing Safeway's motion for summary judgment on the claim for declaratory relief.

We reject these arguments.

The notice requirement turns on a party's recognition that it "had to come forward with all of [its] evidence," not recognition of the issue's importance. *Id.* Here, for example, Safeway had no reason to recognize the need to present evidence on laches. After all, WY Plaza hadn't sought summary judgment based on

laches. So Safeway lacked notice of the possibility that the district court would grant summary judgment *for* WY Plaza based on its use of laches to *oppose* summary judgment. *See Tabura v. Kellogg USA*, 880 F.3d 544, 558 (10th Cir. 2018) (stating that the defendant's assertion of an affirmative defense in opposing summary judgment for the plaintiff doesn't constitute adequate notice of consideration as a basis to grant summary judgment to the defendant).

2. In granting WY Plaza's motion for summary judgment, the district court relied on arguments that WY Plaza hadn't raised.

The lack of notice was particularly prejudicial because the district court not only acted sua sponte in using laches to grant summary judgment to WY Plaza, but also relied on arguments that WY Plaza hadn't even made when responding to Safeway's motion for summary judgment.

For laches, WY Plaza needed to prove that (1) Safeway had inexcusably waited too long to assert the right and (2) the delay had prejudiced WY Plaza. *Windsor Energy Grp., L.L.C v. Noble Energy, Inc.*, 330 P.3d 285, 289 (Wyo. 2014). We can assume for the sake of argument that Safeway's delay was inexcusable.[3] With

[3] Safeway argues that its delay was excusable, but we need not address this argument.

this assumption, laches would turn on whether the delay had prejudiced WY Plaza.

In opposing Safeway's motion for summary judgment, WY Plaza claimed three disadvantages from the delay:

1. Safeway's mistake resulted from an error by a paralegal, who was no longer available to explain what had happened.

2. Memories had faded and other witnesses were unavailable.

3. WY Plaza had relied on the income from Safeway's yearly lease payments.

Appellant's App'x vol. 3, at pp. 396–97. Safeway replied, addressing these purported disadvantages in supporting its own motion for summary judgment. There Safeway pointed out that WY Plaza had shouldered the burden of proof and had relied solely on conclusory assertions. The district court largely agreed with this characterization of WY Plaza's assertions.

For example, on the first claim of prejudice, the district court agreed with Safeway that WY Plaza's "conclusory statements" about the unavailability of a possible witness hadn't created a triable dispute of fact. Appellant's App'x vol. 4, at p. 452.

For the second claim of prejudice, the district court relied on its own evaluation of the evidence rather than WY Plaza's. In opposing Safeway's motion for summary judgment, WY Plaza had asserted only that "it is apparent that memories have faded, witnesses

are unavailable, and WY Plaza's defense in this matter is therefore disadvantaged." Appellant's App'x vol. 3, at p. 397. But WY Plaza did not point to any specific facts or refer to any evidence. Despite WY Plaza's conclusory assertion, the district court developed its own argument based on uncited stipulations, answers to interrogatories, and declarations. Appellant's App'x vol. 4, at pp. 451–54. But WY Plaza hadn't referred to any of these documents, and Safeway lacked notice that it needed to address them.

On the third claim of prejudice, the district court agreed with Safeway that WY Plaza hadn't created a triable fact-issue based on the "bare assertion[s]" of its reliance on the past payments. *Id.* at p. 451.[4] But the court then crafted its own argument of financial prejudice. *Id.* at pp. 452, 454–56.

Because WY Plaza relied solely on conclusory assertions, Safeway had no notice of the need to address new arguments appearing for the first time in the district court's ruling.

* * *

WY Plaza didn't move for summary judgment based on laches, and the district court provided no notice to Safeway that it would need to address laches to avoid summary judgment. But the district court went further. In sua sponte invoking laches as a basis to

[4] The district court acknowledged that "WY Plaza [did] not meet the necessary burden necessary for summary judgment for their first and third justifications for why they would be prejudiced." Appellant's App'x vol. 4, at p. 451.

grant summary judgment to WY Plaza, the district court relied on evidence that WY Plaza hadn't even raised when it objected to Safeway's motion for summary judgment. Given the lack of notice to Safeway, the district court erred by granting summary judgment to WY Plaza on the claim for declaratory relief.

B. The district court also erroneously granted summary judgment to WY Plaza on the restitution claim.

Safeway not only sought declaratory relief but also claimed restitution to recoup the yearly overpayments mistakenly made from 2012 to 2017. On this claim, the district court granted summary judgment to WY Plaza based on (1) laches and (2) the unavailability of restitution when a contract existed and the mistake was unilateral. We reject both grounds.

1. The district court erred by sua sponte applying laches to the restitution claim.

In district court, WY Plaza raised laches only when opposing Safeway's motion for summary judgment on the claim for declaratory relief. *See* Appellant's App'x vol. 3, at p. 391 (WY Plaza arguing that "[i]ssues of disputed material fact exist relating to WY Plaza's affirmative defenses which preclude a summary judgment on the declaratory relief sought by Safeway."). On the restitution claim, WY Plaza didn't rely on laches in seeking summary judgment or in opposing it. The district court nonetheless relied partly

on laches to grant summary judgment to WY Plaza on the restitution claim. Appellant's App'x vol. 4, at p. 456.

Safeway lacked any conceivable notice of a need to address laches for the restitution claim. So the district court erred by sua sponte relying on laches for the restitution claim.

2. Restitution may be available for a unilateral mistake of fact despite the existence of a contract.

The parties disagree over the availability of restitution for a unilateral mistake when a contract existed. This disagreement involves a matter of law, which we review de novo. *See State St. Bank & Trust Co. v. Denman Tire Corp.*, 240 F.3d 83, 88 (1st Cir. 2001) (stating that "whether restitution is available is a question of law we review de novo"); *Greene v. McLeod*, 156 N.H. 724, 942 A.2d 1254, 1259 (2008) (stating that "the availability of restitution is a question of law"). On this legal issue, the district court sided with WY Plaza, concluding that restitution wasn't available because a contract had existed and Safeway's mistake had been unilateral. We disagree with these legal conclusions.

a. Wyoming would likely adopt the Restatement approach to restitution for mistaken overpayments.

Safeway claimed restitution for overpayments mistakenly made from 2012 to 2017. For this claim,

Safeway attributed the overpayments to a mistaken belief that they were due.

The Wyoming Supreme Court has not decided whether restitution is available for payments that are mistakenly made, so we must "predict how th[e] court would decide the issue." *BonBeck Parker, LLC v. Travelers Indem. Co. of Am.*, 14 F.4th 1169, 1176 (10th Cir. 2021). To make this prediction, we consider the Restatement of Restitution and Unjust Enrichment, the Wyoming Supreme Court's past treatment of equitable claims, case law from other jurisdictions, and treatises. Considering these sources, we predict that the Wyoming Supreme Court would permit restitution for the overpayments.

In predicting the Wyoming Supreme Court's approach, we can consider the Restatement of Restitution and Unjust Enrichment. *See June v. Union Carbide Corp.*, 577 F.3d 1234, 1245 (10th Cir. 2009) ("In our view, . . . it would be too adventurous on our part to assume that Colorado would depart from the Restatements."); *see also Am. Airlines v. Christensen*, 967 F.2d 410, 413 n.5 (10th Cir. 1992) (assuming that Utah has adopted the principles of the Second Restatement of Contracts); *Citizens Bank, Booneville, Ark. v. Nat. Bank of Com.*, 334 F.2d 257, 259 (10th Cir. 1964) ("[W]e assume, in the absence of a clear indication to the contrary, that Oklahoma would follow the Restatement of Conflict of Laws."). The Wyoming Supreme Court has relied on the Restatement of Restitution to

- require restitution for unjust enrichment, *Pennant Serv. Co. v. True Oil Co.*, 249 P.3d 698, 703–04 (Wyo. 2011),
- compel restitution of payments mistakenly induced by an innocent representation, *Racicky v. Simon*, 831 P.2d 241, 243 (Wyo. 1992), and
- address restitution in a clash between two taxing units, *Bd. of Cnty. Comm'rs v. Laramie Cnty. Sch. Dist. No. One*, 884 P.2d 946, 959 (Wyo. 1994).

The Restatement identifies the "[m]istaken payment of money not due" as "one of the core cases of restitution. . . ." Restatement (Third) of Restitution & Unjust Enrichment § 6 cmt. a (Am. L. Inst. 2011). Given this "core case" of restitution, the Restatement allows restitution when someone mistakenly overpays. *Id.* § 6.

To predict what the Wyoming Supreme Court would do, we can consider not only the Restatement but also "decisions from other state and federal courts" and "'the general weight and trend of authority.'" *BonBeck Parker, LLC v. Travelers Indem. Co. of Am.*, 14 F.4th 1169, 1176 (10th Cir. 2021) (quoting *Phillips v. State Farm Mut. Auto. Ins. Co.*, 73 F.3d 1535, 1537 (10th Cir. 1996)). And many other courts have allowed restitution for mistaken overpayments. *See*, *e.g.*, *In re APA Assessment Fee Litig.*, 766 F.3d 39, 46–47 (D.C. Cir. 2014) (concluding that a claim for recovery of mistaken overpayments survived a motion to dismiss because the claim had "fit[] a standard pattern of unjust enrichment recovery" under the Restatement); *Morgan*

Guar. Tr. Co. v. Am. Sav. & Loan Ass'n, 804 F.2d 1487, 1493 (9th Cir. 1986) ("New York courts have allowed restitutionary actions for payments 'by mistake' in a wide variety of circumstances, some of which appear to involve simple carelessness."); *Time Warner Ent. Co. v. Whiteman*, 802 N.E.2d 886, 890 (Ind. 2004) ("In general money paid under a mistake of fact, and which the payor was under no legal obligation to make, may be recovered back, notwithstanding a failure to employ the means of knowledge which would disclose a mistake." (quoting 23 I.L.E., *Payment* § 43 (1970))); *Wilson v. Newman*, 463 Mich. 435, 617 N.W.2d 318, 322 n.4 (2000) (stating that Michigan permits "restitution of mistaken payments, with appropriate exceptions"); *see also DeCoursey v. Am. Gen. Life Ins. Co.*, 822 F.3d 469, 476–77 (8th Cir. 2016) (predicting that the Missouri Supreme Court would recognize restitution of a mistaken payment).

Given the Restatement and the weighty case law elsewhere, we predict that the Wyoming Supreme Court would permit restitution for mistaken overpayments.

b. Restitution may be available to conform to the terms of a written contract when one party overperforms.

WY Plaza argues that even if the Wyoming Supreme Court would ordinarily allow restitution for overpayments, the existence of a contract would prevent relief. We reject this argument.

Wyoming, like many courts, elevates the role of contracts in defining the parties' relative rights and duties. When a written contract exists and defines the respective duties, parties can't use restitution to recover beyond the terms of the contract. So courts often say, as the Wyoming Supreme Court has, that recovery for unjust enrichment isn't generally "available when an express contract exists." *Three Way, Inc. v. Burton Enters., Inc.*, 177 P.3d 219, 224 (Wyo. 2008).

But "[j]udicial statements to the effect that 'there can be no unjust enrichment in contract cases' can be misleading if taken casually." Restatement (Third) of Restitution & Unjust Enrichment § 2 cmt c (Am. L. Inst. 2011). Statements like these simply acknowledge the primacy of the contract in establishing the parties' obligations. *See id.* § 2 cmt. a (stating that "restitution is generally subsidiary to contract"); *id.* § 2 cmt. c ("[T]he parties' own definition of their respective obligations . . . take precedence over the obligations that the law would impose in the absence of agreement."). So an express contract normally prevents recognition of an implied contract under the guise of unjust enrichment. *Id.* § 2 cmt. c.

Given the primacy of the contract, restitution "does not require the court to set aside the contract; to the contrary, restitution serves to enforce 'adherence to the contract, through ordering repayment of a sum to which the recipient was not entitled under the contract.'" *Id.* § 35 cmt. a (quoting 3 George E. Palmer, *Law of Restitution* § 14.1 (1978)). The Third Restatement of Restitution and Unjust Enrichment explains

the overarching role of the contract in restitution for mistaken payments:

> Payments resulting from a misunderstanding of the extent . . . of a valid contractual obligation present[s] a characteristic issue of restitution. Here the typical concern of restitution is with *overperformance* of a contractual obligation. . . . [T]he object of legal remedies for mistake in performance is to bring the transfers between the parties into the conformity with the true state of their contractual obligations.

Restatement (Third) of Restitution & Unjust Enrichment § 6 cmt. c (Am. L. Inst. 2011) (emphasis in original).

Professor Perillo takes a similar approach in his influential treatise:

> When an enforceable contract exists between the parties and one of the parties pays money to the other in the mistaken belief that the payment is required by the contract, the payment can be recovered. The same rule holds true if excess payment is made.

Joseph M. Perillo, *Contracts* § 9.29 (7th ed. 2014) (footnotes omitted).[5]

In arguing that the contract bars restitution, WY Plaza disregards the role of the contract as the measure of the parties' obligations. The Restatement

---

[5] In predicting state law, we can consider treatises. *See Menne v. Celotex Corp.*, 861 F.2d 1453, 1464 n.15 (10th Cir. 1988).

explains the fallacy of WY Plaza's approach through an illustration involving a tenant who overpaid on a lease, explaining that the tenant can enforce the terms of the lease contract and recoup the overpayment:

> Landlord erroneously bills Tenant for rent at $1000 per month, which Tenant pays. In fact, the lease calls for a monthly rent of $500. Tenant has a claim in restitution to recover the overpayment. *The result is the same if Landlord submits no bills for rent, and Tenant pays too much as the result of his own misreading of the lease.*

Restatement (Third) of Restitution & Unjust Enrichment 6 cmt. c, illus. 9 (Am. L. Inst. 2011) (emphasis added); *see also United States v. Bedford Assocs.*, 713 F.2d 895, 902 (2d Cir. 1983) (concluding that a tenant was entitled to restitution for overpayments of rent).

When a party overpays based on a factual mistake, the existence of a valid contract doesn't bar restitution. To the contrary, restitution is "usually . . . granted almost as a matter of course." Gail F. Whittemore, 3 *Palmer's the Law of Restitution* § 14.8 (3d ed. 2020).

The D.C. Circuit has explained the senselessness of using a written contract to bar restitution when the overperforming party seeks only to conform the payments to those set out in the contract. *In re APA Assessment Fee Litig.*, 766 F.3d 39, 47 (D.C. Cir. 2014). There the defendants (like WY Plaza) opposed restitution on the ground that the parties had a contract. *Id.* The D.C. Circuit rejected that argument, reasoning

that the "[d]efendants' basic position, that an unjust enrichment claim is precluded whenever it *relates* to the subject matter of an express contract, would eliminate not just plaintiffs' claim but the entire category of mistaken overpayments—'a characteristic issue of restitution.'" *Id.* (quoting Restatement (Third) of Restitution & Unjust Enrichment § 6 cmt. c (Am. L. Inst. 2011)) (emphasis in original).

WY Plaza argues that "[w]here the parties have agreed to their respective rights and obligations in a written agreement, it is indisputable that this Court cannot step in, in the guise of 'equity,' to *reform* those contracts and create obligations where none were bargained for between the parties." Appellee's Resp. Br. at 27 (emphasis added). But Safeway is trying to *enforce* the contract rather than *reform* it.

Granted, restitution may be unavailable if the contract itself allocates the risk of a party's mistake. But when the contract doesn't allocate that risk, restitution may be necessary to conform performance to the contract. It would make little sense to deny restitution to an overperforming party who seeks to conform its performance to the contract. *See CSX Transp., Inc. v. Appalachian Railcar Servs., Inc.*, 509 F.3d 384, 387 (7th Cir. 2007).[6]

---

[6] There the court said:

> The point of the voluntary-payment doctrine is to prevent recovery when a transfer was made pursuant to an agreement of the parties that allocated between them the risk of any later-discovered mistake. But

Disregarding the reason for limiting restitution to the parties' contractual obligations, WY Plaza argues that the existence of a contract would prevent restitution. This argument turns the Restatement and the case law on their heads, treating the contract as a roadblock to restitution rather than as the measure of the parties' obligations.

In treating the contract as a roadblock, WY Plaza relies on three Wyoming Supreme Court opinions that reject equitable claims when the parties had valid contracts:

1. *Sowerwine v. Keith*, 997 P.2d 1018 (Wyo. 2000)
2. *Wagner v. Reuter*, 208 P.3d 1317 (Wyo. 2009)
3. *Hunter v. Reece*, 253 P.3d 497 (Wyo. 2011)

WY Plaza has misinterpreted these opinions. In *Sowerwine, Wagner*, and *Hunter*, the Wyoming Supreme Court disallowed equitable relief—not because there was a contract, but because (1) the terms of a contract resolved the dispute and (2) the requested relief would have deviated from the contractual terms.

> when the mistake relates to a contingency not contemplated by the parties at the time of the voluntary payment, a claim for restitution exists.

509 F.3d at 387 (citing Restatement (Third) of Restitution & Unjust Enrichment § 6 cmt. d (Am. L. Inst. Tentative Draft No. 1, 2001)).

In *Sowerwine*, for example, the court disallowed equitable relief because it would have altered the terms of the contract. 997 P.2d at 1021. There the court faced a dispute arising from a property sale. *Id.* at 1019. Before the sale, the sellers had requested continued access for a third party (the father of one of the sellers). *Id.* But the sale contract contained no mention of such access. *Id.* After the buyers obtained the property, they denied access to the father; and the sellers claimed unjust enrichment. *Id.* at 1020. The Wyoming Supreme Court rejected the claim, disallowing recovery for unjust enrichment because the sellers had received everything owed under the contract. *Id.* at 1021.

The contract wasn't a barrier to restitution in *Sowerwine*. To the contrary, the contract served as the measure of the sellers' obligations. *Id.*; *see also* Restatement (Third) of Restitution & Unjust Enrichment § 2 cmt. c (Am. L. Inst. 2011) ("[T]he terms of an enforceable agreement normally displace any claim of unjust enrichment within their reach."). So too the contract here serves as the measure of the parties' obligations. Safeway seeks only to restore its payments to what the contract had required and to obtain reimbursement of the excess.

In *Wagner*, the Wyoming Supreme Court took a similar approach, rejecting equitable claims because the contract itself had allocated the parties' relative rights and responsibilities. 208 P.3d at 1322. There the plaintiff had sold his farm to the defendant and sought compensation for his work in preparing the farm for the upcoming crop season. *Id.* at 1320. The Wyoming

Supreme Court disallowed recovery—not because there was a contract, but because (1) the contract itself had spelled out the parties' rights and (2) compensation for the fieldwork would have deviated from the contractual terms. *Id.* at 1320, 1322.

Wagner—like *Sowerwine*—reflects the primacy of the contract in defining the parties' rights and responsibilities. In *Wagner*, the plaintiff was seeking more than the contract had allowed; here Safeway is seeking to restore its payments to the amount required under the contract.

And in *Hunter*, the Wyoming Supreme Court disallowed recovery for unjust enrichment, reasoning that the parties' contract had resolved the dispute. 253 P.3d at 498–99. There two couples had collaborated to restore a house and resell it. *Id.* at 499. Upon starting the collaboration, the couples entered a contract requiring

- one couple (the Hunters) to finance the project and
- the other couple (the Reeces) to supply labor.

Id. With sale of the house, the contract required the two couples to split the profits evenly. *Id.*

But after the house sold, the Reeces sued for a greater share of the profits. *Id.* at 500. The district court ruled that the contract was invalid and granted relief to the Reeces for unjust enrichment. *Id.* The Wyoming Supreme Court reversed, concluding that

- the contract was valid and served to measure the Reeces' entitlement,
- the contract didn't entitle the Reeces to a greater share of the profits, and
- the Reeces couldn't deviate from the contractual terms under the guise of unjust enrichment.

Id. at 504.

Hunter again reflects the primacy of the contract in defining the parties' rights and responsibilities. There the Wyoming Supreme Court disallowed restitution—not because there was a contract, but because the plaintiffs were seeking more than the contract had allowed. Unlike those plaintiffs, Safeway is seeking to conform its performance to the contract.

Sowerwine, Wagner, and *Hunter* do not prevent restitution whenever the parties have a valid contract. To the contrary, these opinions show only that equitable relief can't deviate from the contract. But Safeway isn't trying to deviate from its contract with WY Plaza. To the contrary, Safeway is just trying to match its payments to the amount owed under the contract.

c. The unilateral nature of Safeway's mistake doesn't prevent restitution.

WY Plaza further questions the availability of restitution to Safeway because the mistake was unilateral rather than mutual. We disagree.

The distinction between unilateral and mutual mistakes arises from the law of contracts. Restatement (Third) of Restitution & Unjust Enrichment § 5 cmt. d (Am. L. Inst. 2011). In this setting, mutuality of the mistake dictates the enforceability of a contract. Restatement (Second) of Contracts §§ 152 (mutual mistake), 153 (unilateral mistake) (Am. L. Inst. 1981). For example, when parties form a contract based on a mutual mistake of material fact, courts generally try to protect the parties from unintended contractual obligations. *Id.* § 152. Given that purpose, courts generally allow either party to avoid enforcement when the contracting parties share a material mistake of fact. *See*, *e.g.*, *Alden Auto Parts Warehouse, Inc. v. Dolphin Equip. Leasing Corp.*, 682 F.2d 330, 333 (2d Cir. 1982) (per curiam) (recognizing the remedy of rescission for mutual mistake); *Weissman v. Bondy & Schloss*, 230 A.D.2d 465, 660 N.Y.S.2d 115, 117 (1997) (same); *Merced Cnty. Mut. Fire Ins. Co. v. Cal.*, 233 Cal. App. 3d 765, 771–72, 284 Cal.Rptr. 680 (Cal. 5th App. Div. 1991) (stating that rescission may be available for mistakes that are mutual but not for those that are unilateral).

But the distinction between a unilateral and mutual mistake of fact doesn't apply to restitution claims for overperformance. *See* Gail F. Whittemore, 3 *Palmer's The Law of Restitution* § 14.4 (3d ed. 2020) (stating that "mutuality" of a mistake "should not be necessary when money is paid due to a mistake in performance"); *see also* Restatement (Third) of Restitution & Unjust Enrichment § 5 cmt. d (Am. L. Inst. 2011) ("The distinction drawn in the law of contracts between mutual

and unilateral mistake has no direct application to the law of restitution."); *accord ITT World Directories, Inc. v. CIA Ed. de Listas, S.A.*, 525 F.2d 697, 700 n.4 (2d Cir. 1975) (stating that a party cannot recover based on a unilateral mistake in formation but can recover based on a unilateral mistake in performance). "When a plaintiff seeks restitution on account of mistake, the basis of liability is that the plaintiff has conferred an unintended benefit on the defendant." Restatement (Third) of Restitution & Unjust Enrichment § 5 cmt. d (Am. L. Inst. 2011). So the claim based on mistake "is the same . . . whether or not the [defendant] shared the [plaintiff]'s mistake" or even "was aware of it at the time." *Id.*[7]

The Wyoming Supreme Court applied this principle in *Messersmith v. G.T. Murray & Co.*, 667 P.2d 655 (Wyo. 1983), allowing restitution for a unilateral mistake of fact. There a couple had asked their broker about the possibility of selling stock, and the broker misquoted the stock price. *Id.* at 656. This misquotation led the couple to sell the stock based on the wrong

---

[7] The Third Restatement of Restitution and Unjust Enrichment illustrates the availability of restitution for a unilateral mistake of fact:

> Bank Customer presents Mexican currency for exchange into U.S. dollars. The teller makes the exchange without recognizing that Customer's bills are "old pesos," officially devalued (four years earlier) by a factor of 1000 to 1. Bank has a claim in restitution to recover the amount of the overpayment.

Restatement (Third) of Restitution & Unjust Enrichment § 6 cmt. c, illus. 12 (Am. L. Inst. 2011).

price, and the broker overpaid the couple. *Id.* The broker sued the couple, seeking restitution for the overpayment under a theory of mistake of fact. *Id.*

The Wyoming Supreme Court recognized the broker's right to restitution. *Id.* at 657. Granted, the mistake there was mutual because the broker and the couple had shared an incorrect understanding of the stock price. *Id.* But the Wyoming Supreme Court noted that the broker could have obtained restitution even if the mistake had been unilateral, rather than mutual, because either way the court's goal would have been to return the parties to the status quo. *Id.*

WY Plaza and the district court downplay *Messersmith*, reasoning that it had addressed mistakes only when they involved a sale of securities. It's true that *Messersmith* involved a sale of securities. But the Wyoming Supreme Court said nothing to cast doubt on the need to return the parties to the status quo when the mistake involves the terms of a lease rather than a stock price. *Messersmith* would require the court to return the parties to the status quo even if Safeway's mistake had been unilateral.[8]

---

[8] WY Plaza points out that the deduction for construction costs was optional rather than mandatory. Appellee's Resp. Br. at p. 27; *see also id.* at p. 28 ("The District [Court] found that Article 20(d) of the contract allows, but does not require, Safeway to deduct [build costs] from percentage rents. . . ."). That is true. From 2012 to 2017, Safeway had the option to pay nothing or annual payments totaling $670,873. *See* pp. 494–95, below. But WY Plaza doesn't explain why this distinction matters, and WY Plaza admits that Safeway made a mistake by failing to deduct the

The district court thus erred in rejecting Safeway's theory of restitution based on a mistake of fact. In Wyoming, restitution may be available when a party overperforms based on a unilateral mistake of fact even when the parties have a contract. So we reverse the district court's grant of summary judgment to WY Plaza on Safeway's restitution claim.

IV. Safeway is entitled to summary judgment because WY Plaza failed to create a triable fact-issue.

Safeway not only opposed summary judgment but also sought summary judgment on its own. The district court denied Safeway's motion in light of the award of summary judgment to WY Plaza. Safeway appeals the denial of its motion as well as the grant of WY Plaza's. Given our reversal of summary judgment for WY Plaza, we must consider the denial of Safeway's motion for summary judgment. *McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251, 253 (10th Cir. 1993). We conclude that Safeway was entitled to summary judgment based on the lack of a genuine dispute of material fact.

A. Safeway is entitled to summary judgment on its claim for a declaratory judgment.

In district court, Safeway sought summary judgment on the claim for declaratory relief. In seeking

---

construction costs. Appellee's Resp. Br. at p. 27; *see* p. 491 n.10, below.

declaratory relief, Safeway requested a determination that it could continue to deduct the balance of the amortization account from the yearly payments. In objecting to Safeway's motion for summary judgment, WY Plaza asserted an affirmative defense of laches.

When a plaintiff moves for summary judgment and establishes a right to relief, the burden shifts to the defendant to

- raise a defense and
- show the presence of disputed facts.

SEC v. GenAudio Inc., 32 F.4th 902, 941–42 (10th Cir. 2022). Unless the defendant creates a material dispute of fact on an affirmative defense, the district court must grant summary judgment to the plaintiff. *See id.* (when a plaintiff moves for summary judgment and establishes a right to relief, the court should grant the motion unless the defendant can establish a genuine dispute of material fact on an affirmative defense).

WY Plaza does not dispute Safeway's contractual right to deduct the balance of the amortization from the yearly payments. So Safeway has established its claim. On appeal, WY Plaza invokes laches as a basis to affirm the denial of summary judgment to Safeway on its claim for declaratory relief.

1. In asserting laches, WY Plaza didn't refer to evidence creating a triable issue of fact.

To decide whether Safeway had a right to summary judgment, we consider

- whether WY Plaza had created a "genuine dispute as to any material fact" and
- whether Safeway "was entitled to judgment as a matter of law."

Fed. R. Civ. P. 56(c). In applying this two-part standard, we view the evidence and draw all reasonable inferences in the light most favorable to WY Plaza as the non-moving party. *Cillo v. City of Greenwood Vill.*, 739 F.3d 451, 461 (10th Cir. 2013).

To determine whether WY Plaza created a genuine dispute of material fact, we consider the nature of laches. It is an affirmative defense. *Moncrief v. Sohio Petroleum Co.*, 775 P.2d 1021, 1024–25 (Wyo. 1989). So WY Plaza bore the burden of proof. *See Younglove v. Graham & Hill*, 526 P.2d 689, 693 (Wyo. 1974) (stating that "the burden of proof is upon the one asserting an affirmative defense").

The doctrine of laches bars equitable relief when the claimant inexcusably waits too long to sue and the delay prejudices the defendant.[9] *Moncrief v. Sohio Petroleum Co.*, 775 P.2d 1021, 1024–25 (Wyo. 1989). WY

---

[9] For the sake of argument, we assume that Safeway's delay was inexcusable. *See* pp. 481–82, above.

Plaza asserts prejudice that is both evidentiary and financial.

a. WY Plaza didn't suffer evidentiary prejudice.

On appeal, WY Plaza urges prejudice from its diminished ability to muster evidence against Safeway on its claims.

i. In opposing Safeway's motion, WY Plaza didn't create a triable fact-issue on evidentiary prejudice.

In opposing Safeway's summary-judgment motion, WY Plaza asserted two forms of evidentiary prejudice: (1) the inability to question Safeway's former employee who was allegedly responsible for the mistake and (2) the fading of witnesses' memories. These assertions didn't create a triable issue of fact.

First, WY Plaza relied on its inability to question a former Safeway employee. When Safeway finally asserted the deduction for construction costs, the obvious question was why it had taken so long to discover the mistake.[10] Safeway blamed a paralegal's failure in

[10] In some places, WY Plaza appears to acknowledge that Safeway had made a mistake. Appellee's Resp. Br. at p. 1 ("This is a case about Safeway making a paperwork mistake in early 2006, . . . sending payments by check annually to WY Plaza based on that mistake, and Safeway not noticing that mistake until November of 2018. . . ."); *id.* at p. 27 (arguing that Safeway made a "unilateral mistake"). Elsewhere, WY Plaza questions the

2002 to note the deduction on an accounting form that had recited the payment terms.

Regardless of who was to blame, however, the accounting form was available. It recapped Safeway's payment obligations, but said nothing about the deduction for construction costs:

---

existence of a mistake. *E.g.*, Appellee's Resp. Br. at p. 23 ("Safeway contends that it was mistaken, but evidence in the record supports the conclusion that it may not have been, given its routine audits and consistent payment of percentage rent year-after-year."). But WY Plaza doesn't argue in its briefs that a fact-finder could have determined that Safeway had intentionally overpaid.

In oral argument, WY Plaza suggested that Safeway may have intended to waive its right to deduct these costs. But WY Plaza has waived this argument by waiting to make it in oral argument. *See McWilliams v. DiNapoli*, 40 F.4th 1118, 1126 (10th Cir. 2022).

FORM RE-55
REAL ESTATE INFORMATION TRANSMITTAL

TRANSMITTAL DATE: March 21, 2002
LEASE, FEE OR MISC ID NUMBER: 10458
STORE\FACILITY NO.: CORP #001 DIV: 05 Facility: 2466 Sub-Fac 00
STORE ADDRESS: 544 N. 3rd Street, Laramie, WY

DESCRIPTION OF ACTION

Lessor/Payee change and increased rent as follows:

Landlord:	WY Plaza, L.C., a Utah limited liability company c/o Woodbury Corporation 2733 E. Parleys Way, Suite 300 Salt Lake City, UT 84109	Tax ID# 87-0686344
Payee:	WY Plaza, L.C c/o Woodbury Corporation 2733 E. Parleys Way, Suite 300 Salt Lake City, UT 84109	
Property Manager:	Woodbury Corporation 2733 E. Parleys Way, Suite 300 Salt Lake City, UT 84109 Contact: David Speters, Property Manager Ph: 801-485-7770 x 1403 Cell: 801-450-0220 Fax:801-485-0209 E-Mail: d speters@woodburycorp.com If David is unavailable call: Randy Woodbury Ph: 801485-7770 x 1401 E-Mail: r woodbury@woodburycorp.com	
Rent Increase:	Effective May 1, 2001 rent increased $168.30 per month. (Retroactive rent has been paid for May 1, 2001 through February 2002 in the amount of $1,683.00 per Check Request by Janice Palmer) Going forward, from March 2002 on, please pay increased monthly rent in the amount of $21,384.72 pursuant to Article 4 of the Fifth Lease Modification Agreement. Thank-you.	

Appellant's App'x vol. 2, at p. 256 (highlighting added).

WY Plaza insisted on a need to question the paralegal to scrutinize Safeway's explanation for its delay. Perhaps the paralegal could have explained why she had omitted a reference to the construction costs. But how could the paralegal's explanation affect WY Plaza's ability to defend the underlying claims? No matter who was to blame, the accounting form unquestionably omitted the deduction for construction costs.

Nor could the paralegal have said anything to muddle Safeway's underlying right to the deduction, for that right unambiguously existed under the lease agreement: "If [Safeway] constructs [the] addition, [Safeway] may deduct from [yearly] rent . . . an amount equal to said [yearly] rent until such time as the balance in the amortization account, as hereinafter created, equals zero." Appellant's App'x vol. 1, at p. 148.[11]

Because the lease agreement unambiguously entitled Safeway to the deduction, the district court couldn't consider evidence of intent outside the terms themselves. *See Bowers Oil & Gas, Inc. v. DCP Douglas, LLC*, 281 P.3d 734, 742 (Wyo. 2012) ("When the provisions in the contract are clear and unambiguous, the court looks only to the 'four corners' of the document in arriving at the intent of the parties." (quoting *Amoco Prod. Co. v. EM Nominee P'ship Co.*, 2 P.3d 534, 540 (Wyo. 2000))). Any extrinsic evidence of intent would have been inadmissible. *Revelle v. Schultz*, 759 P.2d 1255, 1258 (Wyo. 1988). So WY Plaza couldn't have used the paralegal's explanation to undermine Safeway's contractual right to the deduction.

Second, WY Plaza asserted in district court that memories had faded: "[A]s indicated in both parties' submissions on summary judgment, it is apparent that memories have faded, witnesses are unavailable, and WY Plaza's defense in this matter is therefore

---

[11] The lease modification agreement left these terms "unchanged and in full force and effect." Appellant's App'x vol. 2, at p. 179; *see* Part I(B), above.

disadvantaged." Appellant's App'x vol. 3, at p. 397. This assertion was conclusory, lacking any specificity about what witnesses could have said to bolster WY Plaza's defense.

Specificity was needed because the contract had unambiguously entitled Safeway to deduct the construction costs. *See* pp. 491–93, above. So testimony about the parties' intent would have been inadmissible. *See* pp. 492–93, above.

We've elsewhere rejected conclusory assertions of faded memories. An example is *United States v. Rodriguez-Aguirre*, 264 F.3d 1195 (10th Cir. 2001). There the United States had urged laches based on the fading of memories and loss of records: "'Memories fade . . . and retrieval of records will be unnecessarily difficult and potentially impossible in some instances if records have been destroyed.'" *Id.* at 1208. We rejected this argument because it was conclusory: "This conclusory allegation of prejudice is insufficient to establish material prejudice to the United States. The seizures occurred only nine years ago, and the forfeiture proceedings concluded only four years ago; given this timeline, we think the possibility of material prejudice arising from faded memories is far from 'obvious.'" *Id.*; *accord Meyers v. Asics Corp.*, 974 F.2d 1304, 1308 (Fed. Cir. 1992) ("Conclusory statements that there are missing witnesses, that witnesses' memories have lessened, and that there is missing documentary evidence, are not sufficient [to establish evidentiary prejudice].").

Under *Rodriguez-Aguirre*, WY Plaza's conclusory assertion couldn't prevent summary judgment on the issue of prejudice. Though memories fade, WY Plaza doesn't identify anything relevant that witnesses could have said while their memories were fresh.

ii. The district court's theories of evidentiary prejudice didn't create a triable fact-issue.

On appeal, WY Plaza adopts the district court's theories of evidentiary prejudice. But these theories didn't create a triable fact-issue.

Evidence About the Lease Modification Agreement. Upon completion of Safeway's addition, the parties entered into a lease modification agreement, which acknowledged the expansion and its effect on the lease. The district court questioned the parties' intent in entering the modification agreement, finding prejudice through WY Plaza's inability to probe the parties' intent.

But how could that probe have helped WY Plaza on the underlying issues? The lease and modification agreement unambiguously state Safeway's right to deduct the construction costs, so extrinsic evidence of intent would have been inadmissible. *See* pp. 492–93, above.

WY Plaza points out that the modification agreement didn't

- require Safeway to create an amortization account or
- identify Safeway's interest rate for credit from the construction costs.

But the modification agreement had already incorporated the existing lease terms as to the amortization account and interest rate. *See* Appellant's App'x vol. 2, at p. 129 ¶ 8 ("Except as modified by this Fifth Shopping Center Lease Modification Agreement, the Lease, as previously modified, remains unchanged and in full force and effect.").[12]

Loss of Evidence Regarding Entry into the 2010 Settlement Agreement. In 2010, the parties settled an unrelated dispute over the yearly payments. *See* Part I(B), above. The settlement agreement included a representation that Safeway hadn't recognized any "defaults under the [l]ease by [WY Plaza]" or "current default-related credits." Appellant's App'x vol. 2, at p. 218.

Pointing to this representation, WY Plaza argues that the dispute should have exposed Safeway's mistake. But even if Safeway should have recognized its mistake, negligence wouldn't prevent recovery. *See Messersmith v. G.T. Murray & Co.*, 667 P.2d 655, 657

[12] In district court, WY Plaza suggested a fact-issue over the availability of interest before the creation of an amortization account: "Additionally, if no account was established for seventeen years following completion of the addition, can interest accrue on the principal balance of a non-existent account[?]" Appellant's App'x vol. 2, at p. 391. On appeal, WY Plaza has dropped this suggestion.

(Wyo. 1983) (concluding that a broker's negligence does not bar his client's recovery for a mistaken overpayment); *see also* Restatement (First) of Restitution & Unjust Enrichment § 18 cmt. c (Am. L. Inst. 1937) ("The fact that the transferor was carelessly ignorant of the facts as to which he was mistaken does not necessarily bar recovery. . . ."); Restatement (Third) of Restitution & Unjust Enrichment § 6 cmt. a (Am. L. Inst. 2011) ("[T]he fact that the claimant may have acted negligently in making a mistaken payment is normally irrelevant to the analysis of the claim."). Because negligence wouldn't prevent recovery, WY Plaza's alleged inability to prove Safeway's negligence wouldn't have affected the outcome.

So a triable fact-issue didn't exist on evidentiary prejudice.

b. WY Plaza didn't suffer financial prejudice.

WY Plaza also asserts two forms of financial prejudice: (1) Safeway's excessive accrual of interest because of the delay and (2) reliance on the payments received. But these assertions don't create a genuine dispute of material fact on financial prejudice.

Accrual of Interest. WY Plaza first adopts the district court's theory that Safeway had obtained too much credit for interest because of the delay. But Safeway's delay didn't affect the amount of interest accruing to Safeway in the amortization account, and the

district court could have remedied any conceivable harm by adjusting the amount of restitution.

The parties agree that the daily amount of interest is $512.72.[13] This amount is based only on the cost of the addition and does not increase with the accrual of interest. Because the amount remains constant, Safeway's delay couldn't affect the daily amount of interest accruing to the amortization account.

When Safeway deducts construction costs, the credit for those deductions would go first toward the accrued interest. *See Moncrief v. Harvey*, 816 P.2d 97, 107–08 (Wyo. 1991) (adopting the rule that "in the absence of an agreement or statute to the contrary, [a partial payment] should first be applied to the interest due").

By 2013 (when restitution would start), Safeway had accrued about $2.2 million in interest and had

---

[13] Safeway's expert witness used simple interest to calculate this amount. WY Plaza relied on that calculation of interest when asserting financial prejudice. Appellee's Resp. Br. at pp. 18–19. But the daily interest would remain constant at $512.72 per day only if the interest weren't compounded.

In oral argument, WY Plaza asserted for the first time that the interest rate was to be compounded. But WY Plaza did not (1) point to anything reflecting the compounding of the interest rate or (2) explain how the interest rate could be compounded if the interest had remained constant at $512.72 each day. In any event, oral argument was too late for WY Plaza to suggest financial prejudice from the compounding of interest. *See McWilliams v. DiNapoli*, 40 F.4th 1118, 1126 (10th Cir. 2022); *see also* p. 491 n.10, above (discussing waiver of a suggestion that Safeway had intentionally withheld the deduction for construction costs).

paid less than $90,000 in yearly rent. In the next five years, Safeway would owe less than $700,000 in yearly rent without the deduction for construction costs. So even if Safeway had promptly started withholding its construction costs, the credit for these costs would have gone toward the accrued interest, leaving the principal amount of debt unaffected. Because the principal amount of the debt would have been unaffected, Safeway's timing didn't affect the daily amount of interest. But even if the delay had affected Safeway's credit for interest, the district court could have remedied the harm by adjusting the amount of the restitution award.

In our view, the district court's theory of financial prejudice didn't create a triable issue of fact. Safeway's delay didn't affect its credit for interest, and the district court could remedy any conceivable harm by modifying the amount of restitution awarded.

Reliance on Payments. WY Plaza also asserts that it made business decisions in reliance on the past payments. But WY Plaza hasn't identified these alleged business decisions or said how Safeway's delay had affected those decisions. In district court, WY Plaza asserted only that its income had been distributed to the owners and used in the regular course of business. With this assertion, WY Plaza supplied no specifics, citation to the record, or explanation of any business decisions affected by the income from Safeway's yearly payment. And the summary-judgment evidence didn't refer to a single distribution to owners or payment in the regular course of business.

Without any specifics or evidence, WY Plaza argues that we can infer reliance from the passage of time and the size of Safeway's payments. But Wyoming law places the burden on WY Plaza to establish a change in position and inability to return to the status quo. *Messersmith v. G.T. Murray & Co.*, 667 P.2d 655, 657–58 (Wyo. 1983). To meet that burden, WY Plaza needed to present evidence that was "certain in every particular with nothing left to inference." *Murphy v. Stevens*, 645 P.2d 82, 92 (Wyo. 1982). So the district court properly rejected WY Plaza's "bare assertion that [it had] relied on the payments in business dealings, tax burdens, and operations. . . ." Appellant's App'x vol. 4, at p. 45.[14]

* * *

WY Plaza bore the burden to prove prejudice but presented no supporting evidence. So WY Plaza failed to create a material dispute of fact on laches.

2. We decline to sua sponte remand on affirmative defenses that WY Plaza has dropped on appeal.

In responding to Safeway's summary-judgment motion on the claim for declaratory relief, WY Plaza

---

[14] In district court, WY Plaza also asserted that it had paid taxes on the income from the yearly lease payments. Appellant's App'x vol. 2, at p. 392. But WY Plaza has never alleged prejudice from its payment of taxes on Safeway's overpayments.

relied in district court not only on laches but also on four other affirmative defenses:

1. Estoppel
2. Accord and satisfaction
3. Waiver
4. Failure to mitigate damages.

The district court didn't address these defenses, and WY Plaza doesn't mention these defenses here.

Given Safeway's appeal from the denial of its own summary-judgment motion, WY Plaza could have

- raised these affirmative defenses as alternative grounds to affirm or
- urged us, in the alternative, to remand for the district court to consider these defenses in the first instance.

WY Plaza bypassed both options, and we must decide Safeway's appeal based on the arguments presented to us. Based on those arguments, we reverse the denial of Safeway's summary-judgment motion; we see no need to remand for the district court to consider the defenses of estoppel, accord and satisfaction, waiver, and failure to mitigate damages.

The dissent suggests that WY Plaza had no reason to present these defenses on appeal. We disagree. Safeway appealed the denial of its summary-judgment motion, so WY Plaza should have presented whatever appellate arguments were needed to uphold the denial

of Safeway's motion. Rather than present these four defenses or request a remand, WY Plaza chose to rely here solely on laches.

The dissent points out that we could affirm on an alternative ground. *Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1180 (10th Cir. 2018)); *see* Dissent at 498–99. But the dissent doesn't suggest that we should affirm or even consider the four affirmative defenses briefed in district court. After all, we consider alternative grounds for affirmance based in part on whether the appellee has briefed the ground on appeal. *Elkins v. Comfort*, 392 F.3d 1159, 1162 (10th Cir. 2004). And we generally consider it imprudent to consider grounds for affirmance that the appellee has not argued on appeal. *See United States v. Chavez*, 976 F.3d 1178, 1203 n.17 (10th Cir. 2020) (stating that it would be imprudent for us to sua sponte affirm on alternative grounds that the appellee has not briefed on appeal); *United States v. Woodard*, 5 F.4th 1148, 1154 (10th Cir. 2021) ("Given our role as arbiter of the parties' arguments, we don't typically 'craft[] arguments for affirmance completely *sua sponte* and, more specifically, without the benefit of the parties' adversarial exchange." (quoting *Chavez*, 976 F.3d at 1203 n.17)). So we would ordinarily decline to sua sponte address the four affirmative defenses that WY Plaza has bypassed in the appeal.

WY Plaza had other options besides urging us to affirm on alternative grounds. For example, WY Plaza could have asked us to remand for the district court to consider the defenses of estoppel, accord and

satisfaction, waiver, and failure to mitigate damages. But WY Plaza didn't do that either. WY Plaza instead chose to rely solely on its laches defense. So we limit our consideration to this defense.

The dissent points out that WY Plaza didn't waive the other four defenses by failing to present them here. We agree, and WY Plaza could have reasserted these defenses if the case had resumed in district court. We addressed that situation in *Oldenkamp v. United American Insurance Co.*, 619 F.3d 1243 (10th Cir. 2010). The dissent seizes on one sentence in that opinion, where we acknowledged that the appellees hadn't waived an affirmative defense by failing to assert it on appeal. Dissent at 2 (quoting *Oldenkamp*, 619 F.3d at 1249). But we have no occasion to consider waiver, and *Oldenkamp* doesn't apply.

There we reversed the grant of summary judgment for the defendant. *Oldenkamp*, 619 F.3d at 1252. But the *Oldenkamp* plaintiffs hadn't appealed the denial of their own motion for summary judgment. So the reversal of summary judgment for the defendant required a remand for further consideration of the plaintiffs' claims; no other disposition would have made sense. Given the need to remand for further argument, we pointed out that the revival of the plaintiffs' claims would trigger the defendant's right to reassert whatever defenses had been preserved in district court. *Id.* at 1249.

Our case has little in common with *Oldenkamp.* If we were just reversing the grant of summary judgment

to WY Plaza and remanding for further consideration of the merits, WY Plaza could reassert whatever defenses it had preserved in district court. Here, though, we must decide whether the district court should have granted summary judgment to the plaintiff itself. That issue didn't exist in *Oldenkamp*, and we have no issue involving waiver of an affirmative defense.

* * *

We reverse the denial of summary judgment to Safeway on the claim for a declaratory judgment rather than sua sponte remand for the district court to consider defenses that WY Plaza chose to forgo on appeal. So we remand for the district court to grant summary judgment to Safeway on its claim for a declaratory judgment.[15]

B. Safeway is entitled to summary judgment on its restitution claim.

We've earlier discussed restitution in connection with WY Plaza's motion for summary judgment. But

---

[15] At this stage, we need not parse the specifics of the declaratory judgment itself. We leave those terms of the district court to address on remand. *See Am. Civ. Liberties Union of Ohio, Inc. v. Taft*, 385 F.3d 641, 650–51 (6th Cir. 2004) (reversing with instructions to enter declaratory relief but giving the district court discretion to decide the terms of that declaratory relief); *Bilbrey by Bilbrey v. Brown*, 738 F.2d 1462, 1472 (9th Cir. 1984) (instructing the district court to "award appropriate declaratory relief"); *Se. Promotions, Ltd. v. City of W. Palm Beach*, 457 F.2d 1016, 1022 (5th Cir. 1972) (instructing the district court to grant declaratory relief but leaving the terms of that relief to the discretion of the district court).

Safeway sought summary judgment on its own, and WY Plaza objected on grounds that restitution wasn't available because a valid contract existed and the mistake was unilateral. But we've already concluded as a matter of law that restitution was available despite the existence of a contract and unilateral nature of Safeway's mistake. *See* Part III(B)(2), above.

In opposing Safeway's motion for summary judgment, WY Plaza also asserted laches. WY Plaza argued that an award of restitution would interfere with business decisions made in reliance on Safeway's past payments. But WY Plaza failed to supply any specifics or evidence. *See* pp. 495–96, above. And we've concluded that the district court had acted correctly in rejecting WY Plaza's conclusory assertion. *See id.*

Even on appeal, WY Plaza presents no specifics, stating instead only a single sentence: "To hold that divesting WY Plaza of $1,000,000 in payments would not financially prejudice the landlord would be to ask the District Court to divorce its judgment from reality." Appellee's Resp. Br. at pp. 19–20. But in district court, WY Plaza had never argued—much less presented evidence—that a restitution award would affect a specific business decision. With no such argument or evidence, the asserted loss of business opportunities didn't create a material dispute of fact on prejudice. *See Murphy*, 645 P.2d at 91 ("Unless the delay has worked injury, prejudice or disadvantage to the defendants or others adversely interested, it is not of itself laches." (cleaned up)).

So Safeway is entitled to summary judgment on its restitution claim.

V. We vacate the denial of attorneys' fees, but decline to consider whether either party is entitled to recover fees.

WY Plaza cross-appeals the district court's denial of attorneys' fees. The lease contained a fee-shifting clause, and the parties agree that the clause entitles the prevailing party to an award of attorneys' fees. But we are vacating the award of summary judgment to WY Plaza. *See* Part III, above. With vacatur of the award of summary judgment to WY Plaza, its argument for attorneys' fees is moot.

VI. Conclusion

The district court erred in awarding summary judgment to WY Plaza based on laches and the unavailability of restitution. So we vacate this award of summary judgment. The court should have instead granted summary judgment to Safeway on the claims for declaratory relief and restitution.

The judgment is vacated and remanded for further proceedings in accordance with this opinion. WY Plaza's cross-appeal is dismissed as moot.

20-8064, Safeway Stores 46 Inc. v. WY Plaza LC

CARSON, J., concurring in part and dissenting in part.

The majority concludes that the district court erred in disposing of this case on laches in favor of Defendant WY Plaza LC ("WY Plaza"). I agree. I further agree with the majority that, in Wyoming, restitution may be available despite the existence of a contract and a unilateral mistake. But I respectfully part ways with the majority when it proceeds to grant summary judgment to Safeway on its claim for declaratory relief.

Even assuming the majority is correct that WY Plaza fails to raise a genuine issue of material fact on its laches defense, I believe it errs by refusing to remand for consideration of the other theories WY Plaza raised to combat Safeway's summary judgment motion at the district court. Indeed, the majority determines that Safeway is entitled to summary judgment because, on appeal, WY Plaza did not raise defenses other than the laches theory upon which the district court granted relief or ask for remand. [See Majority Op. at 39–43.] The majority implies that, when a party wins a denial of summary judgment at the district court and appears before us as appellee, it must be sure to raise all potentially winning defenses and ask us to remand in the event we deem the original basis for denial improper. This newly-minted rule contradicts another we often invoke: "we can affirm on any ground supported by the record, so long as the appellant has had a fair opportunity to address that ground." Lincoln v. BNSF

Ry. Co., 900 F.3d 1166, 1180 (10th Cir. 2018) (quoting Alpine Bank v. Hubbell, 555 F.3d 1097, 1108 (10th Cir. 2009)). That rule, rightly, focuses not on what the *appellee* argued. Rather, it focuses on whether the *appellant* had a fair opportunity to address the grounds supporting the adverse ruling.

The majority's implied rule also contradicts a long-standing rule in this circuit that "[a]lthough the [appellees] could have advanced [an] argument as an alternative ground for affirming the district court's ruling in their favor, a party is not required to raise alternative arguments."[1] Oldenkamp v. United Am. Ins. Co., 619 F.3d 1243, 1249 (10th Cir. 2010). Other circuits agree. For example, the Seventh Circuit explained in a similar context that "the failure of an appellee to have raised all possible alternative grounds for affirming the district court's original decision, unlike an appellant's failure to raise all possible grounds for reversal, should not operate as a waiver." Schering Corp. v. Ill. Antibiotics Co., 89 F.3d 357, 358 (7th Cir. 1996). See also, e.g., Ms. S. v. Reg'l Sch. Unit 72, 916 F.3d 41, 49 (1st Cir. 2019) (collecting cases and explaining that failure to raise all possible alternative grounds for affirmance should not doom an appellee); Eichorn v. AT&T Corp., 484 F.3d 644, 657–58 (3d Cir. 2007) ("As [appellees in the previous appeal], they were not required to raise all possible alternative grounds for affirmance to avoid waiving those

[1] The cited case involved cross-appeals, so the parties were both appellants and appellees. The issue discussed involved the Oldenkamps as appellees.

grounds."); Indep. Park Apartments v. United States, 449 F.3d 1235, 1240 (Fed. Cir. 2006) ("As appellee, the government was not required to raise all possible alternative grounds for affirmance in order to avoid waiving any of those grounds."); Kessler v. Nat'l Enters., Inc., 203 F.3d 1058, 1059 (8th Cir. 2000) ("[A]ppellate courts should not enforce the [waiver] rule punitively against appellees, because that would motivate appellees to raise every possible alternative ground and to file every conceivable protective cross-appeal, thereby needlessly increasing the scope and complexity of initial appeals."); Froebel v. Meyer, 217 F.3d 928, 933 (7th Cir. 2000) ("[S]o long as the [appellees] did not waive their preclusion argument by failing to present the issue to the district court, we may consider it."); Crocker v. Piedmont Aviation, Inc., 49 F.3d 735, 740 (D.C. Cir. 1995) (finding no waiver of issue omitted in prior appeal by then-appellee).

A strong rationale supports the "no waiver by appellees" rule. Appellees and appellants have different roles in framing issues and presenting arguments. See Crocker, 49 F.3d at 740–41. An appellee would find itself in a "difficult, if not impossible" position "to both defend the district court's decision and to present, as the basis for an alternative ground, a reworking of the interpretative framework assumed by the district court." Ms. S., 916 F.3d at 49. And, even if an appellee completed that task, "it would not have had a chance to answer [appellant's] reply brief." Id.

Of course, an appellee can file a cross-appeal, which WY Plaza did here.[2] But "[c]ross-appeals are required only when the party prevailing below seeks to enlarge the scope of that judgment; they are not necessary when the party simply presents alternative bases for affirmance." Crocker, 49 F.3d at 741. In addition to spurring unnecessary cross-appeals, requiring appellees to put forth all grounds for affirmance would "create 'judicial diseconomies,'" "fuel a multiplication of arguments," Ms. S., 916 F.3d at 49 (quoting Crocker, 49 F.3d at 741), and dramatically increase the length of briefs.

By granting summary judgment to Safeway on its claim for declaratory relief because WY Plaza "should have presented whatever appellate arguments were needed to uphold the denial of Safeway's motion," [Majority Op. at 40] the majority suggests that, in our circuit, we will require appellees to raise all possible grounds for affirmance to avoid waiver. The majority states that "we have no issue involving waiver of an affirmative defense," which would be a correct observation but for the majority's implicit injection of waiver into this appeal.

The simple facts are: Safeway moved for summary judgment; WY Plaza responded, raising multiple defenses; the district court latched onto a single defense

---

[2] WY Plaza's cross-appeal addresses only the district court's denial of attorneys' fees. On all other issues (involving the district court's grant of WY Plaza's motion for summary judgment and denial of Safeway's motion for summary judgment), Safeway is the appellant and WY Plaza the appellee.

in denying Safeway's motion; Safeway appealed; WY Plaza responded, asking us to affirm the district court's rationale; the majority disagrees with the district court's rationale, yet instead of reversing and remanding for further consideration, it declares that WY Plaza waived all other defenses and renders judgment for Safeway. Because the majority's requirement that WY Plaza "present these four defenses or request a remand," [Majority Op. at 40,] contradicts our precedent and sound principles of judicial economy, I respectfully dissent. WY Plaza should not have summary judgment granted against it simply because the district court relied on only one theory in granting relief. Instead of granting summary judgment to Safeway on its claim for declaratory relief, I would remand to the district court for consideration of the claim and defenses.

For this reason, I respectfully dissent in part.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

SAFEWAY STORES 46, INC., Plaintiff, vs. WY PLAZA, L.C., Defendant.	Case No. 19-CV-143-R

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [Doc. 23] AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [Doc. 25]

(Filed Oct. 20, 2020)

This matter is before the Court on Plaintiff's *Motion for Summary Judgment* (ECF. No. 23) and Defendant's *Motion for Summary Judgment* (ECF No. 25). This case involves a dispute over a forty-year-old commercial lease. Lessee Safeway sued lessor WY Plaza over a lease provision that permits Safeway to deduct the cost of a 2001 building addition from rent payments. Both sides have moved for summary judgment on all of Plaintiff's claims.

The issues raised between the two motions are: (1) whether WY Plaza's affirmative defenses, including laches, bar Safeway's claims; (2) if not, whether WY

Plaza breached the lease; (3) whether WY Plaza breached the covenant of good faith and fair dealing; (4) whether "money had and received" and "money paid by mistake" are tenable claims when a valid contract exists, and if so, whether Safeway is entitled to relief under those theories; and finally (5) whether declaratory judgment is appropriate for summary judgment, and if so, what that judgment should be.

Having carefully considered the matter, the Court concludes the doctrine of laches bars Safeway's action in all respects. Additionally, and independently, the Court also finds that WY Plaza did not breach the lease or the covenant of good faith and fair dealing. The Court also finds "money had and received" and "money paid by mistake" are nonviable claims in this case. Because laches bars the action, the Court does not need to address declaratory judgment and anticipatory breach of contract.

BACKGROUND

The following facts are undisputed. Safeway and WY Plaza, through their predecessors in interest, entered a lessor-lessee relationship on January 29, 1980. Under the lease, Safeway has operated a grocery store in WY Plaza's shopping center in Laramie, WY for over four decades. Relevant provisions of the lease include Article 2 and Article 20.

The terms for calculating rent are found in Article 2. Article 2(a) computes the monthly "fixed minimum rent" in accordance with Article 2(c). Article 2(b)

calculates the annual payment of "percentage rent" in the amount of one-quarter percent (1-1/4%) of Safeway's gross sales that exceed the minimum rent for that calendar year. Article 20 provides the terms for the possibility of an expansion to the shopping center. Under Article 20(a)–(c), Safeway had the option to construct an addition to the leased premises. Relevant sections read:

> (a) If lessee desires said addition, it shall give written notice to lessor and request lessor to build said addition according to plans and specifications which shall be prepared by lessee and approved by lessor, said approval not to be unreasonably withheld.
>
> (b) If lessor advises lessee within thirty (30) days of lessee's written notice that it is unable or unwilling to construct said addition of if construction has not commenced within sixty (60) days after the approval of the plans and specifications, as aforesaid, then lessee may, at it sole cost and expense, make such addition to the leased premises. . . ."

In September of 2000, Las Vegas Retail, LLC (WY Plaza's predecessor in interest) approved Safeway's construction plans and waived any right to construct the addition on their own. Safeway constructed the addition in May of 2001. Upon completion, Article 20(d) of the lease allowed Safeway to deduct construction costs plus interest from its annual percentage rent obligation until all the costs had been fully recovered.

The interest rate would accrue on the balance of the amortization account for the previous calendar year on January 1 of each year. Specifically, Article 20(d) provides:

> If lessee constructs said addition, lessee may deduct from percentage rent, if any, otherwise payable under the provisions of this lease for any calendar year . . . an amount equal to said percentage rent until such time as the balance in the amortization account, as hereinafter created, equals zero.
>
> An amortization account shall be created to record the operation of the provisions of this paragraph. The original balance of said account shall be the cost of said addition. Interest, at the Industrial "A" rated bond rate (long-term) in effect at the time of completion of said addition, shall accrue on the balance of said account for the previous calendar year on January 1 of each year. [After] accrual of said interest, lessee shall deduct from said account an amount equal to the amount to be deducted, under the provisions of this paragraph, from percentage rent.

Article 20(g) further provides:

> [u]pon completion of said addition and determination of the cost of said addition, but in no event later than ninety (90) days after completion of said addition, the lessor and lessee shall execute a Lease Modification Agreement which shall set forth (1) the cost of said addition, (2) the date of completion of said

> addition, (3) the new extent of the leased premises, by including the expansion area within the RED outline on a new Exhibit "A" to the lease, (4) the interest rate which lessor has to pay to finance said addition at the time of completion of said addition, plus additional minimum rent in the amount of $168.30 per month; and . . . (6) set forth the revised minimum monthly rent as noted above.

On November 30, 2001, about six months after Safeway constructed the addition, WY Plaza purchased the shopping center from Las Vegas Retail, LLC. On March 20, 2002, WY Plaza and Safeway entered into the Fifth Shopping Center Lease Modification Agreement ("fifth modification") based on Article 20(g).[1] The fifth modification detailed Safeway's May 1, 2001 addition at a cost of $2,577,717 and expansion of 7,550 square feet. The fifth modification also increased Safeway's rent by $168.30 per month, and increased the pro-rata share of real estate taxes and common area maintenance expenses. The fifth modification left the remainder of the existing lease in full force and effect. The years following the fifth modification appear to be uneventful between Safeway WY Plaza until 2010.

Safeway's 2010 Letter and the Estoppel Certificate

On February 12, 2010, Safeway sent a letter to WY Plaza claiming Safeway had mistakenly overpaid rent

---

[1] The first four modifications are not in dispute.

from 2005 to 2008. Safeway claimed they overpaid because they failed to deduct the total annual minimum rent from percentage rent. Safeway claimed they had overpaid solely based on their percentage rent obligation under Article 2(b). However, they did not claim an overpayment based on an amortization account referenced in Article 20(d).[2] The letter resulted in both parties compromising on a settlement. The parties executed an "estoppel certificate" on August 2, 2011, under which Safeway received an offset of $228,989.00 against percentage rent. The offsets were taken through the years 2009 to 2012 (Pl. Mot. Summ. J., ECF. No. 23, at 15: tbl. 1).

The Years 2012–2017

In the five years following 2012, Safeway paid percentage rent to WY Plaza in the total of $670,872.94.

---

[2] In their initial Complaint and Motion for Summary Judgment, Safeway claimed they still overpaid during the years of 2005 and 2008 because they mistakenly failed to setoff that amount against Article 20(d). (Pl. Mot. Summ. J., ECF No. 23, at 14). However, in filing their Response to Defendant's Motion for Summary Judgment, Safeway conceded the estoppel certificate settles any percentage rent claims prior to 2012 (Pl. Resp., ECF No., 28, at 28). In dispute is the parties' intent when signing the estoppel agreement and what effect this settlement letter has on claims for the years after 2012. In conceding, Safeway rephrased the recovery they are asking for. They seek recovery of (1) the amount of mistakenly paid percentage rent for the calendar years 2012 to 2017; (2) recovery of amounts paid by Safeway under protest and a reservation of rights for the years 2018 and 2019; (3) percentage rent for 2020 and after in terms of a declaratory judgment that no percentage rent will be due until Safeway has offset the Addition Cost, plus accrued interest.

Safeway did not deduct rent from an amortization account referenced in Article 20(d) during these years.

Safeway's 2018 Letter

On November 7, 2018, Safeway's senior real estate manager sent a letter to WY Plaza seeking recovery of mistaken overpayments in the amount of $1,111,525.94. In the letter, Safeway claimed they inadvertently failed to deduct for the amortized balance of the addition costs in accordance with Article 20 of the lease from 2005 to 2017. Safeway says they discovered the overpayment while reviewing their occupancy costs disbursement program. Safeway has since determined that mistaken payments occurred because an internal Form RE-55 Real Estate Information Transmittal was not properly prepared in 2002. (Pl. Mot. Summ. J. ECF No. 25, at Hanavan Decl. ¶¶ 1–10).

On December 19, 2018 WY Plaza responded and denied Safeway's claims. WY Plaza asserted that the 2010 estoppel certificate had resolved Safeway's percentage rent claims moving forward. (Pl. Mot. Summ. J. ECF No. 25, at Ex. 15).

Rent Under Protest for 2018 & 2019 and the Present Suit

On May 1, 2019, Safeway advised WY Plaza they were paying percentage rent in the amount of $122,340.04 under protest with a reservation of claims, defenses, rights and remedies. About a month

later, on July 10, 2019 Safeway filed suit against WY Plaza for the following causes of action: (1) breach of contract; (2) anticipatory breach of contract; (3) breach of the covenant of good faith and fair dealing; (4) money had and received; (5) money paid by mistake; and (6) declaratory judgment. (Pl. Compl. ECF No. 1). On February 21, 2020, Safeway advised WY Plaza they were making a payment in the amount of $119,369.23 for 2019 percentage rent under protest with a reservation of claims, defenses, rights, and remedies.

Current Motions Before the Court

Both parties moved for summary judgment on the same day. Safeway moved for summary judgment in its favor on all claims: (1) breach of contract; (2) anticipatory breach of contract; (3) breach of the covenant of good faith and fair dealing; (4) money had and received; (5) money paid by mistake; and (6) declaratory judgment. WY Plaza moved for summary judgment in its favor on Safeway's claims on the following grounds: (1) Wyoming's statute of limitations bar Safeway's contractual causes of action of breach of contract, anticipatory breach, and implied covenant of good faith and fair dealing; and (2) money had and received and money paid by mistake are untenable equitable claims. Additionally, in its response to Safeway's Motion for Summary Judgment, WY Plaza moved for summary judgment in its favor on Plaintiff's claims because issues of disputed fact exist relating to their affirmative defenses of estoppel, accord and satisfaction, waiver,

laches, and mitigation of damages. A hearing on the cross motions was held on September 30, 2020.

Relevant Law

As a federal court sitting in diversity, the substantive law of the forum state governs the underlying claims, including the applicable standard of proof. *Jones v. United Parcel Serv., Inc.*, 674 F.3d 1187, 1195 (10th Cir. 2012). Accordingly, Wyoming law applies to the substantive claims in this case. Specifically, "we must ascertain and apply state law to reach the result the Wyoming Supreme Court would reach if faced with the same question. If no state cases exist on a point, we turn to other state court decisions, federal decisions, and the general weight and trend of authority." *Cunningham v. Jackson Hole Mountain Resort Corp.*, 673 Fed App'x 841, 844 (10th Cir. 2016) (internal quotations and citations omitted). Nevertheless, federal law controls the ultimate procedural question of whether granting summary judgment is appropriate. *Wagner v. Live Nation Motor Sports, Inc.*, 586 F.3d 1237, 1244 (10th Cir. 2009).

Standard of Review

Under the Federal Rules of Civil Procedure, summary judgment is appropriate if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. A fact is material if it would affect the outcome of the case. *Anderson v. Liberty Lobby*, 477

U.S. 242, 248 (1986). An issue of material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The trial court decides which facts are material as a matter of law and "only disputes over facts that might affect the outcomes of the suit under governing law will properly preclude the entry of summary judgment." *Id.*

The movant bears the initial burden to either affirmatively disprove an essential element of the nonmovant's case, or to demonstrate the non-movant lacks evidence to support the claim at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–25 (1986). To meet this initial burden, the movant must support its motion with materials such as affidavits, depositions, answers to interrogatories, admissions, stipulations, or discovery requests. Fed. R. Civ. P. 56(c)(1). The nonmovant "must respond with specific facts showing the existence of a genuine factual issue to be tried." *Otteson v. United States*, 622 F.2d 516, 519 (10th Cir. 1980). To defeat a motion for summary judgment, the non-movant must show more than "[t]he mere existence of a scintilla of evidence in support of the [nonmoving party's] position . . . there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Liberty Lobby*, 477 U.S. at 252.

When reviewing a motion for summary judgment, the court's role is not to weigh the evidence, but rather to assess the threshold consideration of whether a genuine issue of material fact exists. *Id.* at 249. All reasonable inferences must be resolved in the light most favorable to the non-moving party. *Id.* at 255. This

inquiry is also guided by applicable evidentiary standards. *Id.*

Cross-motions for summary judgment are treated as two individual motions for summary judgment and held to the same standard, with each motion viewed in the light most favorable to its nonmoving party. *See Banner Bank v. First Am. Title Ins. Co.*, 916 F.3d 1323 (10th Cir. 2019).

RULING OF THE COURT

Before the Court considers the merits of the Safeway's claims, the Court must first address the affirmative defenses raised by WY Plaza, because if the Defendants have a valid affirmative defense, the Court does not need to address the merits of Safeway's claims.

A. Doctrine of Laches

The Court finds that WY Plaza's affirmative defense of laches applies. (Def. Answer ECF No. 8, at 6; Def. Resp. to Pl.'s Mot. Summ. J. ECF No. 27, at 14; Dispositive Mot. Hr'g 19:8, 25:22, 36:9, 39:8, 51:18, 53:8–20). A determination regarding the existence of laches is within the sound discretion of the trial court. *Windsor Energy Group, L.L.C v. Noble, Energy Inc.*, 2014 WY 96, ¶ 23, 330 P.3d 285, 291–92 (Wyo. 2014). Laches is available in limited circumstances in actions at law, including breach of contract actions, governed by a statute of limitations. *Id.* at ¶ 22, 330 P.3d at 291.

While the statute of limitations enforces arbitrary time limits, laches considers the conduct of the parties and their relative positions. *See Eblen v. Eblen*, 234 P.2d 434, 442–43 (Wyo. 1951).

"Laches is defined as such delay in enforcing ones rights that it works to the disadvantage of another." *Dorsett v. Moore*, 2003 WY 7,119, 61 P.3d 1221, 1224 (Wyo. 2003). The defense of laches is based in equity and whether it applies in a given case depends upon the circumstances. *Hammond v. Hammond*, 14 P.3d 199, 201 (Wyo. 2000); *Ultra Resources, Inc. v. Hartman*, 2010 WY 36, ¶ 123, 226 P.3d 889, 929 (Wyo. 2010). Laches is comprised of two elements: (1) inexcusable delay in the assertion of a right; and (2) injury, prejudice, or disadvantage to the defendants or others. *Moncrief v. Sohio Petroleum Co.*, 775 P.2d 1021, 1025 (Wyo. 1989). In assessing the elements,

> "[s]everal conditions may combine to render a claim or demand stale in equity. If by the laches and delay of the complainant it has become doubtful whether adverse parties can command the evidence necessary to a fair presentation of the case on their part, or if it appears that they have been deprived of any such advantages they might have had if the claim had been seasonably insisted upon, or before it became antiquated, or if they be subjected to any hardship that might have been avoided by reasonably prompt proceedings, a court of equity will not interfere to give relief, but will remain passive; and this although the full time may not have elapsed which would

> be required to bar a remedy at law." *Eblen*, 234 P.2d at 442–43.

The undisputed facts of this case satisfy both elements.

B. Inexcusable Delay in the Assertion of a Right

The first element of laches is a party's inexcusable delay in asserting a right. *See Moncrief*, 775 P.2d at 1025. WY Plaza asserts both Safeway's delay and justification for that delay are inexcusable. (Def. Resp. to Pl.'s Mot. Summ. J. ECF No. 27, at 14). The Court agrees.

In evaluating unreasonable delay by a party in asserting a right, the passage of time alone is not enough, rather "the Plaintiff must be chargeable with a lack of diligence in failing to proceed more promptly." *Cathcart v. Meyer*, 2004 WY 49, ¶ 13, 88 P.3d 1050, 1058 (Wyo. 2004). The Court looks to Safeway's "knowledge or ignorance of the facts constituting the cause of action, as well as his diligence in availing himself of the means of knowledge within his control." *Merrill v. Rocky Mountain Cattle Co.*, 181 P. 964, 974 (Wyo. 1918) (quoting *Patterson v. Hewitt*, 195 U.S. 309 (1904)). For the first element of laches to fail, Safeway must have "lacked knowledge of the facts or was without the means of discovering them." *Murphy v. Stevens*, 645 P.2d 82, 91 (Wyo. 1982) (quoting *Harnett v. Jones*, 629 P.2d 1357, 1364 (1981)). Additionally, laches cannot be imputed to a party justifiably ignorant of the

facts creating his cause of action. *Harney v. Montgomery*, 213 P. 378, 384 (Wyo. 1923). The Court finds Safeway was not justifiably ignorant of the facts creating this cause of action. There is no genuine issue of material fact that Safeway had the facts needed to exercise their rights in relation to this cause of action for nearly two decades.

i. The Delay

The initial inquiry in the first element of laches is when did Safeway have the right to exercise Article 20(d) of the lease? Neither Safeway nor WY Plaza dispute that "Article 20(d) of the lease allows Safeway to deduct from its annual percentage rent obligation any costs paid by Safeway, plus interest at the Industrial "A" rated bond rate (long-term) in effect at the time of the completion, until all of cost paid by Safeway and the interest have been fully recovered by Safeway." (Stipulation of Facts, ECF No. 31, at ¶ 4). Additionally, neither party disputes that Safeway constructed the addition on May 10, 2001. *Id.* So, it follows the rights afforded to Safeway in Article 20(d) became ripe in 2001. However, Safeway did not attempt to exercise the rights afforded in Article 20(d) until November 7, 2018, over seventeen years later. (Pl. Mot. Summ. J. ECF No. 23, at Ex. 14). Courts in Wyoming have held laches applicable in cases with significantly shorter delays. *See*, *e.g.*, *See Moncrief*, 775 P.2d at 1026 (finding laches when Plaintiff waited seven years to assert rights); *Eblen*, 234 P.2d at 442 (finding laches when plaintiff waited six years to assert rights); *Merrill v. Rocky*

Mountain Cattle Co., 181 P. 964 (1918) (finding laches when plaintiff waited three years to assert rights).

ii. The Excuse

The next inquiry in the first element of laches is whether an excuse justifies the seventeen-year delay. Safeway claims they did not know of the right in Article 20(d) until 2018 because a paralegal improperly completed a "Form RE-55" on March 21, 2002. (Pl. Mot. Summ. J. ECF No. 23, at Hanavan Decl. ¶ 9). When completing the form, the paralegal omitted reference to Section 20 of the lease. *Id.* As a result of the omission, Safeway argues "it could not reasonably be expected that the company's corporate accounting department which prepares the Percentage Rent statements, which are provided annually to the lessor, would know that the setoff against Percentage Rent should have been deducted." *Id.* at ¶10. In explaining the error, Safeway asserts the paralegal who completed the Form RE-55 "should have been aware that the accounting department . . . relies upon the information provided by the RE-55." *Id.* Further, Safeway has admitted to "routine" audits of its "percentage rent payments to ensure the correct amounts have been paid to our landlords." (Pl. Mot. Summ. J. ECF No. 23, at Ex. 9). Safeway's only explanation for why a routine audit never caught Safeway's right to deduct under Article 20(d) is that the audit conducted in 2010 was a "different type of audit" than in 2018, and the 2010 audit was done in reliance of the Form RE-55 (Dispositive Mot. Hr'g 12:4–21).

WY Plaza argues the Form FE-55 mistake does not justify the delay because Safeway has not given an explanation for the internal mistake. (Def. Resp. to Pl.'s Mot. Summ. J. ECF No. 27, at 14). Additionally, WY Plaza argues that there are factual issues related to the date the Form RE-55 was completed in relation to the fifth modification. Safeway also argues the FE-55 error does not excuse why Safeway didn't exercise their rights under Article 20(d) during the 2010 settlement. *Id.* at 9–16.

In response, Safeway argues the Form FE-55 mistake justifies the delay because the 2010 estoppel agreement only addressed Article 2 of the lease. (Pl. Mot. Summ. J. ECF. No. 23, at 7). Safeway asserts their review in 2010 only focused on Article 2 and "mistakenly failed to recognize that the Amortization account greatly exceeded the percentage rent payments otherwise due." *Id.* (citing Miller Dec., at ¶ 17). Additionally, Safeway argues that an error in using the wrong calculation for minimum rent is an entirely different type of error than failing to recognize the amortization account balance. They point out that minimum rent is found in Article 2 of the lease, while the amortization account is found in Section 20. *Id.*

The Court finds that based on the undisputed facts, no reasonable juror could find justification for Safeway's delay. The undisputed facts indicate that Safeway has known or had reason to know of their rights under Article 20(d) since 2001. The Form FE-55 error explains why Safeway's *accounting department* did not properly deduct rent for seventeen years.

However, Safeway has not explained why Safeway's real estate and legal departments did not assert their rights under Article 20(d) prior to 2018 despite: (1) possessing the lease for nearly four decades; (2) amending the lease at least nine times since 2001; (3) engaging in an eighteen month long legal dispute over the lease in 2010; and (4) signing a settlement agreement over the lease in 2010.

A chronological look at Safeway's involvement with the lease is helpful. First, Safeway, through its predecessor, has been in possession of the lease since it was initially signed in January 28, 1980. Importantly, the Article in dispute, Article 20, was included in the 1980 lease. (Pl. Mot. Sum. J. ECF No. 23, at Ex.1). Since the creation of the lease, Safeway and WY Plaza have modified the lease numerous times. As part of those modifications under the lease, Safeway has the right to exercise five-year options to extend the lease. After 1980 and prior to constructing the addition, Safeway modified or amended the 1980 lease in agreements dated March 17, 1980, July 2, 1980, August 20, 1980, May 5, 1981, August 31, 1981, and August 1, 2000. (Def. Mot. Summ. J., ECF No. 25, at Ex. 7).

After constructing the addition in 2001, the "fifth modification" was signed on March 20, 2002. This modification was drafted in accordance with Article 20(g) from the 1980 lease. *Id.* The lease was modified again on December 4, 2006, and May 8, 2009. (Def. Mot. Summ. J., ECF No. 25, at Ex. 7).

Next, on February 12, 2010 Safeway initiated a dispute with WY Plaza over percentage rent overpayments. This dispute lasted over a year, ending in a settlement agreement signed on August 2, 2011 (Pl. Mot. Summ. J, ECF No. 23, at Ex. 15). In the settlement agreement estoppel certificate, Safeway stated "to Safeway's knowledge, there are no defaults under the Lease by the Lessor. To Safeway's knowledge, there are no current default-related credits." (Def. Mot. Summ. J., ECF No. 25, at Ex. 7). In signing the legally binding estoppel agreement pertaining to the exact lease in dispute, it can only be inferred that Safeway would have read the lease in full, which included Article 20(d). Wyoming law is clear. "One who signs a paper, without reading it, if he is able to read and understand is guilty of negligence in failing to inform himself of the nature that he cannot be relieved from the obligation contained in the paper thus signed." *Mendoza v. Gonzales*, 2009 WY 50, ¶ 10, 204 P.3d 995, 999 (Wyo. 2009). This rule is especially relevant when both parties to a commercial contract are "sophisticated business people . . . [who] have a duty to read the contract carefully." *Herling v. Wyo. Mach. Co.*, 2013 WY 82, ¶ 39, 304 P.3d 951, 961 (Wyo. 2013) (quoting *Cara's Notions, Inc. v. Hallmark Cards, Inc.*, 140 F.3d 566, 571 (4th Cir. 1998)). Safeway, a sophisticated business, would have, or should have, read the lease in full, especially the portions relevant to rent payments that were in dispute in during the 2010 settlement agreement.

After the settlement agreement, on February 11, 2015, Safeway notified WY Plaza that Safeway was

exercising its fourth option to extend the lease for five years, through February 17, 2021 (Pl. Mot. Summ. J. ECF No. 23, at Ex. 13). No facts indicate Article 20(d) was ever removed from the lease throughout the modifications or options.

These dates show at least nine times Safeway would have, or should have, looked at and read the original 1980 lease. The lease has always undisputedly shown Safeway had the right to create and deduct from the amortization account after building an addition. (Stipulation of Facts, ECF No. 31, at ¶ 4). And after the addition specifically, these dates reference at least five times, including a yearlong legal dispute and legally binding settlement agreement in while Safeway would have, or should have, read the lease and asserted their rights under Article 20(d). The fact that Safeway, a sophisticated corporation involved in a commercial contract, did not read the lease in full for at least seventeen years despite exercising options to extend it, modifying it, and engaging in a legal dispute and settlement agreement over it is inexcusable.

At best, the Form RE-55 mistake may explain, not excuse, the accounting department's overpayments. The lack of proper audits may excuse the delay in a case in while the party had not engaged with the lease for decades. That is not the case here where Safeway has actively extended the lease for decades at their own option. The Court finds neither the paralegal's 2002 mistake or the insufficient 2010 audit excuse Safeway's legal and real estate departments' failure to exercise their rights for seventeen years. No reasonable

juror could find otherwise and the first element to laches is met.

C. Injury, Prejudice, and Disadvantage to the Defendants

The second element of laches is injury, prejudice, or disadvantage to the defendants or others as a result of the inexcusable delay. *See Moncrief*, 775 P.2d at 1025. WY plaza asserts three reasons they would be prejudiced in the event Safeway was successful in bringing this suit: (1) Safeway cannot produce Ms. Rosemary Westlund who made the Form FE-55 mistake, on information and belief she is deceased; (2) memories have faded, witnesses are unavailable, and WY Plaza's defense in this matter is disadvantaged; (3) WY Plaza has relied on fifteen years of rent payments in its business dealings, tax burden, and operations. (Def. Res. to Pl. Mot. Summ. J. ECF No. 27, at 14). In sum, WY Plaza asserts they are at a disadvantage for multiple reasons because of Safeway's delay.

In response, Safeway claims WY Plaza's bare assertions are not enough. (Disp. Mot. Hr'g 42:19–2). In order to win summary judgment, evidence must be based on more than speculation, conjecture, or surmise. *Cypert v. Independent Sch. Dist. No. I-050 of Osage County*, 661 F.3d 477, 481 (10th Cir. 2011). Additionally, "relying on conclusory statements or mere opinion will not satisfy that burden, nor will relying solely upon allegations and pleadings." *See Boehm v. Cody Cntry. Chamber of Commerce*, 748 P.2d 704, 710

(Wyo. 1987). WY Plaza does not meet the necessary burden necessary for summary judgment for their first and third justifications for why they would be prejudiced. The bare assertion that they relied on the payments in business dealings, tax burdens, and operations is not satisfactory. (Def. Res. to Pl. Mot. Summ. J. ECF No. 27, at 15). Neither is conclusory statements such as the "information and belief" that Ms. Westlund has passed away. *Id.* However, notwithstanding the fact that Defendant's failed to meet their burden on these arguments, the Court finds the undisputed facts demonstrate enough prejudice against WY Plaza to justify a finding of laches.

There are two reasons the Court finds WY plaza at a disadvantage such that no rational trier of fact could resolve the issue the other way: (1) the three situations surrounding Safeway's delay happened in 2002 and 2010, making reliable witnesses and evidence difficult to procure; (2) the undisputed lease language and numbers indicate the delay financially injures WY Plaza.

i. Prejudice in Procuring Witnesses and Evidence due to the Delay

The undisputed facts show three circumstances relevant to the Article 20(d) dispute. The Court finds that due to the delay, WY Plaza would be disadvantaged in procuring witnesses and evidence surrounding those situations.

> "The rule as to laches is peculiarly applicable where the difficulty of doing entire justice arises through the death of a principal participant in the transactions complained of, or of the witness or witnesses, or by reason of the original transactions having become so obscured by time as to render the ascertainment of the exact facts impossible." *Mackall v. Casilear*, 137 U.S. 556, 556. (1890).

Further, "if the lapse of time has caused doubt as to the ascertainment of the facts as where witnesses have died or papers have been lost, or where the time elapsed is so great that witnesses may have forgotten the facts, the chance that the respondent will be dealt with unjustly may be sufficiently great to prevent the granting of restitution." RESTATEMENT OF THE LAW OF RESTITUTION, § 148 d.

The first circumstance relevant to the dispute about Article 20(d) is the execution of the fifth modification. It is undisputed that the fifth modification memorialized Safeway's construction. However, the fifth modification was initially drafted between Safeway and Las Vegas Retail, LLC (Stipulation of Facts, ECF No. 31, at ¶ 9). Because WY Plaza purchased the shopping center just months after Safeway constructed the addition and before Safeway and Las Vegas Retail finished the fifth modification, Las Vegas Retail left its completion up to WY Plaza. There are factual issues over the intent of the parties when they drafted the fifth modification in accordance with Article 20(g). However, WY Plaza has indicated that the parties

involved with the acquisition cannot recall specific facts (ECF No. 23, Answer to Pl's. Second Set of Interrogatories, at ¶ 17). Additionally, the WY Plaza stated they "do not specifically recall the discussion surrounding percentage rent or how percentage rent might be affected by the Safeway addition around the time of the acquisition. Discussions may have occurred but may not be recalled given the number of years it has been since the acquisition occurred." *Id.* at ¶ 20.

The second circumstance relevant to the Article 20(d) dispute is Safeway paralegal Ms. Rosemary Westlund's mistake when completing the Form FE-55. Safeway claims this mistake is the source and sole cause of every overpayment. However, Safeway has not explained *why* the error occurred. Safeway has only provided a third party proffering that Ms. Rosemary Westlund "should have been aware that the accounting department relied upon the Form RE-55." (Pl. Mot. Summ. ECF No. 23, Decl. of Thomas Hanavan). Safeway did not produce any affidavits from Ms. Rosemary Westlund herself explaining *how* or *why* she made the error. WY Plaza argues this may not have been a mistake considering Ms. Westlund completed it just a day after the fifth modification. Regardless, the form was completed over eighteen years ago. No reasonable juror could conclude that eighteen years is a reasonable amount of time to assure that the witness recollections are reliable.

The third relevant circumstance is why Safeway failed to consider Article 20(d) when signing the 2010 estoppel agreement. Safeway has noted that the

employees involved in the settlement agreement with WY Plaza in 2010 are no longer employees of Safeway. (Pls. Answer to Defs. Interrogatory at ¶13). Significantly, Safeway's in-house lawyer at that time, Ms. Linda MacDonald, who agreed to the settlement on behalf of Safeway passed away in 2017. (Pls. Answer to Defs. Interrogatory No. 13). "The rule as to laches is peculiarly applicable where the difficulty of doing entire justice arises through the death of a principal participant in the transactions complained of." *Mackall*, 137 U.S at 556. Even if other employees involved in the settlement agreement could be procured for trial, the estoppel certificate was signed over ten years ago, making memories for employees who have moved on faded and unreliable.

Facts surrounding all three of these events could be crucial in determining both Safeway's claims and WY Plaza's affirmative defenses. Based on the undisputed facts alone, WY Plaza is prejudiced in its ability to gather reliable testimony and evidence surrounding the 2002 fifth modification, the 2002 Form FE-55 mistake, and the 2010 settlement.

ii. Financial Prejudice due to the Delay

In addition to the passage of time, a change in the value of property is a material consideration in application of the doctrine of laches. *See Moncrief v. Sohio Petroleum Co.*, 775 P.2d 1021, 1026 (1989). The plain, undisputed language of the lease reads:

> "Interest, at the Industrial "A" rated bond rate (long-term) in effect at the time of completion of said addition, shall accrue on the balance of said account for the previous calendar year on January 1 of each year. Interest shall be prorated from the date of completion to December 31 of the year of completion of said addition. After accrual of said interest, lessee shall deduct from said account an amount equal to the amount to be deducted, under the provisions of this paragraph from percentage rent."

More specifically, the lease provides that interest on the completion accrues on "the balance of the amortization account for the previous calendar year on January 1 of each year." A plain reading of that provision indicates if Safeway had exercised their right to create an amortization account and deducted rent credit from the account, the interest would accrue less each year. Essentially, the undisputed terms of the lease read that interest is calculated on the balance of the amortization account at the end of each year. So, the longer Safeway does not deduct from the amortization account, the more interest WY Plaza accumulates.

Further, according to Safeway's expert witness, WY Plaza currently owes Safeway $6,080,097.11. (Pl's. Designation of Expert Witness, ECF No. 15). Of that amount, $3,502,380.11 is interest. The expert calculated interest from May 1, 2001 to January 13, 2020, a total of 6,831 days. The expert calculated the daily per-diem increase by multiplying the starting amount (the cost of the expansion at $2,577,717.00) by the daily interest (A rated bond rate of 7.26% divided by 365 which

equals 0.01989%) to get a daily increase of $512 in interest. Thus, the expert multiplied $512 by 6,831 days to get the total accumulated interest balance of $3,502,380.11.

Safeway argues that WY Plaza is not financially harmed because they were never entitled to rent payments in the first place, and it is a windfall for WY Plaza to have received them. But, based on the lease, had Safeway exercised their right to create and deduct from the amortization account sooner, WY Plaza's per diem interest rate would decrease as the account decreased each year. For example, by the time the amortization account reached, for simplicity, $1,000,000 on January 1st of a year, the per-diem interest rate, would be roughly $198 dollars a day, as opposed to $512 dollars a day ($1,000,000 multiplied by 0.01989%). Applying the elements of laches to the present case, it is plain to see how Safeway benefits financially from the delay, while WY Plaza suffers. A "significant increase in value during the period of delay, where the claimant might have asserted the right before such change, is ordinarily fatal to the plaintiff's case." *Moncrief*, 775 P.2d at 1026.

D. Conclusion

Safeway could have exercised their undisputed rights under Article 20(d) for over seventeen years prior to bringing this suit. Safeway has provided no excusable justification for the delay when they have had access to that provision since 1980, had reason to

exercise that provision since 2001, and actively modified the lease numerous times over the last two decades. Significant circumstances surrounding this suit occurred eighteen years ago. At least one witness essential to the claim has passed away. A plain reading of the lease shows Safeway's dormant approach financially benefits them while it damages WY Plaza. The delay renders Safeway's claim stale and deprives WY Plaza a chance to gather the necessary evidence to present their case.

Accordingly, the Court finds that the doctrine of laches bars Safeway's claims for breach of contract, anticipatory breach of contract, breach of covenant of good faith and fair dealing, money had and received, money paid by mistake, and declaratory judgment. Safeway's Motion for Summary Judgment is DENIED. WY Plaza's Motion for Summary Judgment is GRANTED.

FURTHER RULING OF THE COURT

Even if Safeway's claims were not barred by laches, the Court finds that WY Plaza did not breach the lease or the covenant of good faith and fair dealing. Further, the Court finds the claims for "money had and received" and "money paid by mistake" are not viable in this case. Finally, the laches finding precludes the need for the Court to address declaratory judgment and anticipatory breach of contract. *See United States v. Wald*, 216 F.3d 1222, 1229 n.3 (10th Cir. 2000)

(declining to address alternative argument when party entitled to judgment on primary argument).

Both parties have asked the Court to find in their favor on all causes of action in this matter. Each of the Motions will be addressed separately. Because Safeway bears the burden of proof on all claims at trial, WY Plaza's Motion for Summary Judgment will be considered first, as the they can either disprove an essential element of a claim or demonstrate a lack of evidence for that claim. If WY Plaza's Motion for Summary Judgment is granted on an issue, the Court need not address Safeway's motion on that same issue since the WY Plaza would prevail as a matter of law, even with the evidence viewed in the light most favorable to Safeway, and there is no genuine dispute as to any material fact which would require the Court to revisit the issue.

If WY Plaza's Motion for Summary Judgment fails on an issue, then a genuine issue of material fact might exist. However, Safeway could still be entitled to summary judgment as a matter of law, so the Court will then address Safeway's Motion for Summary Judgment on the same issue.

A. Breach of Contract

i. Statute of Limitations

WY Plaza first argues that the statute of limitations bars Safeway's contractual claims. As this affirmative defense would be dispositive, the Court will consider this issue first.

Under Wyoming Law, actions for recovery on a contract must be brought within ten years after the cause of action accrues. Wyo. Stat. Ann. § 1-3-105 (2016). In contracts, an action usually accrues at the time of a breach of a contractual agreement, rather than the time that actual damages are sustained as a result of the breach. *See Richardson Associates v. Lincoln-Devore*, 806 P.2d 790 (Wyo. 1991). Thus, the issue in this statute of limitations claim turns on when Safeway's cause of action accrued. Wyoming is a discovery state, meaning the statute of limitations is triggered when a plaintiff knows or has reason to know of existence of a cause of action. *See*, *Amoco Prod. Co. v. EM Nominee Pshp. Co.*, 2 P.3d 534 (Wyo. 2000).

Generally, the application of the discovery rule is "a difficult candidate for summary judgment." *Robert L. Kroenlein Trust v. Kirchlefer, 2015 WY 127*, ¶ 31, 357 P.3d 1118, 1128 (Wyo. 2015). The application of the discovery rule to a statute of limitations often requires asking a mixed question of law and fact; consequently, "the entry of summary judgment on the issue of when a statute of limitations commences to run is typically inappropriate." *See*, *e.g.*, *Cathcart v. Meyer*, 2004 WY 49, ¶ 30, 88 P.3d 1050, 1062–63 (Wyo. 2004); *Murphy v. Housel & Housel*, 955 P.2d 880, 883 (Wyo. 1998). Thus, the question of when an action accrued can only be resolved as a matter of law if uncontroverted facts establish when a reasonable person should have been placed on notice of his claim. *Hiltz v. Robert W. Horn, P.C.*, 910 P.2d 566, 569 (Wyo. 1996).

WY Plaza argues that if it did breach the lease, it would have been in 2006. Since WY Plaza did not create and credit of an amortization account when Safeway first paid percentage rent in 2006 and would have been in breach since. Because the breach was over ten years ago, WY Plaza asserts Safeway's claims of breach of contract, anticipatory breach of contract, and connected breach of covenant of good faith, must be barred by the statute of limitations.

In response, Safeway concedes their claims for Percentage Rent for the years 2005 to 2008 were settled by the 2010 Estoppel Certificate. (Pl. Mot. Summ. J., ECF No. 23, at 14). Thus, the remaining claims are for the years 2012 and on. Safeway argues these are all clearly within the 10-year statute of limitations period. Further, Safeway argues that the ten-year statute of limitations to the initial breach is not applicable because the lease is an installment contract. *See* INSTALLMENT CONTRACT, Black's Law Dictionary (11th ed. 2019) ("A contract requiring or authorizing the delivery of goods in separate lots, or payments in separate increments, to be separately accepted."); *Installment Contract*, Legal Information Institute Encyclopedia, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/installment_contract (last visited Oct. 20, 2020) ("An installment contract is a single contract that is completed by a series of performances – such as payments – rather than being performed all at one time.").

In *Moncrief v. Williston Basin Interstate Pipeline Co*, 880 F. Supp. 1495, 1505–1506 (D. Wyo. 1995) the Court found the failure to make a monthly payment

under a lease constituted a new breach each month for statute of limitations purposes. The Court held that in an installment contract, a cause of action accrues, and the statute of limitations begins to run on each installment that a party fails to render performance in accordance with the terms of the contract. *Id.*

Here, the Court finds the lease is an installment contract. Article 2 of the Lease provides for the payment of a "fixed minimum rent" due each month. Additionally, the calculation of "percentage rent" is based on each calendar year of the lease term and is due annually. Safeway has always paid rent both monthly and annually. Thus, the cause of action accrues, and the statute of limitations runs from the date of breach for each rent payment. For these reasons, the Court holds that the statute of limitations with respect to the post-2012 claims has not run.[3]

ii. Breach of Contract

Safeway alleges WY Plaza breached the lease because Safeway's rights under Article 20(d) are undisputed. WY Plaza argues Safeway has not proven they breached a specific provision in the lease.

The purpose of interpreting any contract is to determine the true intent of the parties. *State v. Pennzoil Co.*, 752 P.2d 975, 978 (Wyo. 1988). If the language of

---

[3] Since Plaintiff concedes that the Estoppel Certificate bars claims for the years prior to 2010, the Court does not need to address those years.

the contract is plain and unequivocal, that language is controlling. *Dewey v. Dewey*, 2001 WY 107, ¶ 20, 33 P.3d 1143, 1148 (Wyo. 2001). The plain meaning is the meaning which the language would convey to a reasonable person at the time and place of its use. *Dickson v. Thomas*, 2009 WY 10, ¶ 7, 199 P.3d 1090, 1094 (Wyo. 2009). The court secures the intent of an unambiguous contract as the words are expressed within the four corners of the document. *Wolter*, 979 P.2d at 951. When the terms of the agreement are unambiguous, the interpretation is a question of law, and summary judgment is appropriate because there is no genuine issue of material fact. *Examination Management Services, Inc. v. Kirschbaum*, 927 P.2d 686, 689 (Wyo. 1996).

A breach of contract is a failure without legal excuse to perform any promise which forms a whole or part of a contract. *Sagebrush Dev., Inc. v. Moehrke*, 604 P.2d 198, 201 (Wyo. 1979). Reviewing the question of breach necessarily requires reference to the four corners of the lease to determine if its terms have been violated. *See generally Scherer Const., LLC v. Hedquist Const., Inc.*, 2001 WY 23, ¶ 29, 18 P.3d 645, 656 (Wyo. 2001). The provision in dispute, Article 20(d), reads:

> If lessee constructs said addition, lessee may deduct from percentage rent, if any, otherwise payable under the provisions of this lease for any calendar year after all other offsets and deductions against percentage rent provided in this lease are first taken, an amount equal to said percentage rent until such time as the balance in the amortization account, as

> hereafter created, equals zero: An amortization account shall be created to record the operation of the provisions of this paragraph. The original balance of said account shall be the cost of said addition. Interest, at the Industrial "A" rated bond rate (long-term) in effect at the time of completion of said addition, shall accrue on the balance of said account for the previous calendar year on January 1 of each year. Interest shall be prorated from the date of completion to December 31 of the year of completion of said addition. After accrual of said interest, lessee shall deduct from said account an amount equal to the amount to be deducted, under the provisions of this paragraph, from percentage rent.

WY Plaza argues that the plain reading of this section *allows*- but does not *mandate*-percentage rent payments "may" be withheld by lessee and used to offset the balance of the amortization account. In another explanation, WY Plaza asserts Safeway had the choice to either pay percentage rent *or claim* an offset. Since Safeway paid percentage rent from 2005 to 2019, they chose the former. Further, WY Plaza points to an absence of any provision in the lease *requiring* either WY Plaza or Safeway to deduct and offset percentage rent otherwise due payable or imposing a duty on WY Plaza to reject overpaid percentage rent payments. Lastly, WY Plaza argues that all rights relative to the decision to deduct such payments belong to Safeway.

In response, Safeway argues a clear reading of the contract in full shows Safeway was never entitled to a

payment for any amount of Percentage Rent after the addition was constructed. Safeway asserts the lease expressly entitles Safeway to deduct the cost of the addition to the leased premises against percentage rent. Additionally, Safeway argues the lease should be interpreted to read that any amounts owed for percentage rent should have been applied to reduce the amortization account to zero before any amounts of percentage rent were paid to WY Plaza.

The Court finds no dispute of fact that Article 20(d) of the lease permitted Safeway to deduct the cost of the addition from percentage rent. The parties do not dispute that Safeway paid percentage rent without an offset from 2005 to 2017. Finally, the parties also do not dispute that Safeway did not create the amortization account until November 2018. (Pl. Ans. To Int. No. 3 & 10 ("Safeway did not prepare or maintain accounting document in which it made journal entries . . . prior to November 2018.")). However, based on a plain reading of the Lease, the Court does not find WY Plaza in breach of any a provision in the lease. The rights described in Article 20(d) can only be exercised by Safeway, not WY Plaza. When a contract is silent on a particular matter that easily could have been drafted into it, a court should refrain from supplying the missing language under the pretext of contact interpretation. *Mendoza v. State*, 368 P.3d 886, 895 (Wyo. 2016) ("Courts are not at liberty to rescue parties from the consequences of a poorly made bargain or a poorly drafted agreement by rewriting a contract under the guise of constructing it."). By the express and

unambiguous terms of the lease, no specific provision indebted WY Plaza an affirmative duty to deduct rent. The Court also cannot find any language in the lease that obligated WY Plaza to create the amortization account, deduct payments, or reject rent payments that were not offset. Accordingly, WY Plaza did not breach the lease.

B. Covenant of Good Faith and Fair Dealing

Safeway's second claim alleges that WY Plaza breached the covenant of good faith and fair dealing by accepting rent payments. WY Plaza argues that they did not breach the covenant of good faith and fair dealing because they were under no affirmative duty to act.

Every contract imposes the duty of good faith and fair dealing upon the parties in their performance in the contract. *Scherer Const., LLC v. Hedquist Const., Inc.*, 18 P.3d 645, 65253 (Wyo. 2001). The implied covenant of good faith and fair dealing is a separate and distinct claim from a breach of contract claim, and the two claims are not mutually dependent. *Cathcart v. State Farm Mut. Auto. Ins. Co.*, 2005 WY 154, ¶ 25, 123 P.3d 579, 589 (Wyo. 2005). Additionally, a party may breach the implied covenant of good faith and fair dealing even if it did not breach the express terms of the contract. *City of Gillette v. Hladky Constr., Inc.*, 196 P.3d 184, 199 (Wyo. 2008).

> The implied covenant of good faith and fair dealing requires that neither party commit an act that would injure the rights of the other

> party to receive the benefit of their agreement . . . Compliance with the obligation to perform a contract in good faith requires that a party's actions be consistent with the agreed common purpose and justified expectations of the other party . . . A breach of the covenant of good faith and fair dealing occurs when a party interferes or fails to cooperate in the other party's performance . . . The purpose, intentions, and expectations of the parties should be determined by considering the contract language and the course of dealings between and conduct of the parties . . . The covenant of good faith and fair dealing may not, however, be construed to establish new, independent rights or duties not agreed upon by the parties . . . In other words, the concept of good faith and fair dealing is not a limitless one. The implied obligation must arise from the language used or it must be indispensable to effectuate the intention of the parties. . . . In the absence of evidence of self-dealing or breach of community standards of decency, fairness or reasonableness, the exercise of contractual rights alone will not be considered a breach of the covenant. *Scherer Const*, 2001 WY at ¶ 19, 18 P.3d at 653–54 (internal citations and quotations omitted).

Although many claims for breach of good faith involve questions of fact making summary judgment inappropriate, summary judgment may be appropriate where, under the facts in the record, the party's actions were in conformity with the clear language of the

contract. *Scherer Constr., LLC v. Hedquist Constr., Inc.*, 2001 WY at ¶ 24, 18 P.3d at 654.

Safeway argues the lease has an implied covenant of good faith that would implicitly obligate WY Plaza to repay percentage rents. Further Safeway argues because the payments for the calendar years 2018 and 2019 were made under protest and reservation, WY Plaza is currently breaching the duty of good faith and fair dealing.

WY Plaza argues they did not breach this duty because no facts indicate they misled Safeway or acted in bad faith by accepting the rent payments. Further WY Plaza argues that the offset was a unilateral decision to be made by Safeway only, and "the covenant of good faith and fair dealing may not, however, be construed to establish new, independent rights or duties not agreed upon by the parties." *Scherer Const.*, 2001 WY at ¶ 25, 18 P.3d at 653. Essentially, WY Plaza argues their actions were in conformity with the plain language of the contract.

Under the plain language of the contract, the Court finds WY Plaza was in conformity with their obligations. Safeway has not offered facts that indicate WY Plaza interfered with Safeway's right to create or deduct from the amortization account. Nor has Safeway offered facts that WY Plaza misled Safeway into paying rent. Additionally, WY Plaza had no duty under the lease to create the amortization account or deduct from it. The Court will not apply the doctrine of good faith and fair dealing to imply a duty that was not

contracted between two sophisticated parties. Thus, WY Plaza did not breach the covenant of good faith and fair dealing.[4]

In sum, even if laches did not bar this suit, the Court finds WY Plaza did not breach the contract or the covenant of good faith and fair dealing.

C. Money Had and Received

Safeway's fourth claim for relief is for "money had and received." WY Plaza argues for summary judgment in their favor because "money had and received" is not a legal cause of action when a valid contract exists.

Safeway relies on *Landeis v. Nelson*, 808 P.2d 216, 217 (Wyo. 1991) to support its claim for "money had and received." In this case, the parties phrased the issue under a claim of "money had and received," however, the Court analyzed the claim under the theory of unjust enrichment. *Id.* at 218; *see also First Nat'l Bank v. Fay*, 341 P.2d 79 (Wyo. X) (analyzing "money had and received" as unjust enrichment); *Anderson v. Bell*, 251 P.2d 572, 580 (Wyo. 1952) ("the gist of the action for money had and received is as to whether or not the party receiving the money has been unjustly enriched").

Unjust enrichment is "the failure to make restitution of benefits received under circumstances that give

[4] To the extent WY Plaza failed to cooperate in 2018 and 2019, the affirmative defense of laches precludes analysis.

rise to a legal or equitable obligation." *See Rocky Mountain Turbines, Inc. v. 660 Syndicate, Inc.*, 623 P.2d 758, 763 (Wyo. 1981) (quoting 66 AM.JUR.2D RESTITUTION AND IMPLIED CONTRACTS § 3). The Wyoming Supreme Court has held "[r]ecovery in such case is based on a promise implied by law or quasi contract and on the equitable principle that one who has been unjustly enriched at the expense of another is required to make restitution." *Anderson v. Bell*, 251 P.2d 572, 577 (Wyo. 1952).

Under Wyoming law, quasi contractual claims, including unjust enrichment, are not viable when an express contract exists between the parties. *See Hunter v. Reece*, 2011 WY 97, ¶ 28, 253 P.3d 497, 504 (Wyo. 2011); *Sowerwine v. Keith*, 997 P.2d 1018, 1021 (Wyo. 2000) (citing 66 AM.JUR.2D RESTITUTION AND IMPLIED CONTRACTS § 6 (1973)); *see also Schlinger v. McGee*, 2012 WY 7, ¶ 13, 208 P.3d 1317, 1322 (Wyo. 2009) ("Unjust enrichment is an equitable remedy. As such it cannot exist where there is an express contract governing the relationship between the parties.").

To understand the relationship between unjust enrichment and express contracts, it is useful to further analyze the *Landeis* case. Before the *Landeis* Court applied unjust enrichment, it found a "quasi contract" existed between the parties. In his concurrence, Justice Thomas disagreed with the application of unjust enrichment because he found a valid contract existed between the parties, not a quasi-contract. Thus, Justice Thomas argued the Court should have found a

breach of contract instead of applying unjust enrichment:

> The trial court simply decided a straightforward breach of an express contract case. The decision was correct, and it should be affirmed without any reliance upon unjust enrichment. The result of the majority opinion seems to suggest that one cannot recover damages for breach of contract, but instead must invoke a quasi-contract theory. The law justifies recovery of damages for breach of contract, and that is what the district court awarded. *Id.* at 219 (J. Thomas concurring).

Here, there is no dispute of fact that a valid, enforceable lease exists between WY Plaza and Safeway. The Court also finds "money had and received" is a claim of unjust enrichment. Unjust enrichment is an equitable remedy not available to contract disputes. Because a valid contract exists between Safeway and WY Plaza, "money had and received" or unjust enrichment is not an available remedy.

D. Money Paid by Mistake

Safeway's fifth claim is for "money paid by mistake." WY Plaza argues Wyoming has not recognized this cause of action. And if they have, it is in the form of restitution, which is a form of equitable relief that can only be sought if there is no express contract. *See Hunter v. Reece*, 2011 WY 97, ¶ 28, 253 P.3d 497, 504 (Wyo. 2011).

Safeway relies on *Messersmith v. G.T. Murray & Co.*, 667 P.2d 655 (Wyo. 1983) to support its claim for "money paid by mistake." In *Messersmith*, plaintiff Frances Messersmith contacted G.T. Murray and Company to find out how much she could sell her stocks in Western Preferred for. The stockbroker, James King, looked up the Western Preferred stock and informed Ms. Messersmith it was selling for $46 per share. Ms. Messersmith subsequently sold her shares and received a check from G.T. Murray based on the $46 per share rate.

About two months later, G.T. Murray's parent company called James King and informed him that there was an error in the price of the Western Preferred Stock. The stock was actually only worth about 1/5 of what had been reported. After learning of the error, James King contacted the Messersmith's to recover the overpayment. The trial court found in favor of G.T. Murray. It determined there was a mutual mistake between Mr. King and Ms. Messersmith, and thus ordered Ms. Messersmith to give the overpayment back to G.T. Murray. The Court held "money paid under a mistake of fact, which would not otherwise have been paid, may be recovered unless the payee has changed his position to the extent that it would be unjust to require a refund." *Messersmith* 667 P.2d at 655 (citing *Akerson v. Gupta*, 458 F. Supp. 189, XXX (E.D. Mo. 1978)). *Messersmith* also held the burden shifts to the payee to show how they have changed their position such that demanding a refund would be "both unfair and damaging to the payee." *Id.* The Messersmith's

appealed. The relevant issue on appeal was whether the trial court erred in its determination that a mutual mistake of fact occurred. The Court affirmed there was a mutual mistake between the parties as neither Ms. Messersmith nor Mr. King knew of the true value of the stock and they both were mistaken.

The distinction between Messersmith and the dispute in front of the Court is the finding of the mutual mistake. Under Wyoming law, when there is a mutual mistake, there is no assent of the parties. *Shrum v. Zeltwanger*, 559 P.2d 1384, 1387 (Wyo. 1977). Upon finding a mutual mistake, a Court may then reform or cancel the contract. *Id.* at 1386. Only after a contract is voided may the Court apply equitable relief.[5] Here, unlike *Messersmith*, there is a valid contract. No facts indicate a mutual mistake occurred between Safeway and WY Plaza which would void the contract. Thus, the Court cannot apply equitable remedies.

---

[5] To any dispute that the Court in Messersmith does proffer the distinction between mutual and unilateral mistakes unnecessary, they do so only with respect to the mistaken sale of securities, "however, most courts have not found it necessary to distinguish between mutual and unilateral mistakes *with respect to mistaken sale of securities.* The courts have proceeded upon the principle that money paid under a mistake of fact, which would not otherwise have been paid, may be recovered unless the payee has changed his position to the extent that it would be unjust to require a refund. So long as the parties can be returned to the status quo, courts should strive to achieve such a result. However, if the payees suffer damage as a result of a mistake *made by the broker, recovery by the broker* may be barred to the extent of the damage." *Messersmith*, 667 P.2d at 657 (emphasis added) (internal quotations omitted).

Additionally, even if this situation was analogous to *Messersmith*, the Court equated a claim of money paid by mistake to a claim of restitution. The Wyoming Supreme Court precedent is clear that equitable relief, such as restitution, is not available where a valid contract exists. *See Wagner v. Reuter*, 2009 WY 75, ¶ 13, 208 P.3d 1317, 1322 (Wyo. 2009); *Sowerwine v. Keith*, 997 P.2d 1018, 1021 (Wyo. 2000); *Three Way, Inc. v. Burton Enters.*, 2008 WY 18, ¶ 22, 177 P.3d 219, 226 (Wyo. 2008). Based on the Wyoming Supreme Court precedent following *Messersmith* and the narrow issue in it, the Court finds that *Messersmith's* holding only applied to an invalid contract to the sale of stocks and securities. As Wyoming law applies to the substantive claims in this case, "we must ascertain and apply state law to reach the result the Wyoming Supreme Court would reach if faced with the same question. If no state cases exist on a point, we turn to other state court decisions, federal decisions, and the general weight and trend of authority." *Cunningham v. Jackson Hole Mountain Resort Corp.*, 673 Fed App'x 841, 844 (10th Cir. 2016) (internal quotations and citations omitted).

First, each of the cases cited in Messersmith relate exclusively to the sale of stocks and involve disputes between stockbrokers and stockholders. *See Akerson v. Gupta*, 458 F. Supp. 189 (E.D. Mo. 1978); *Ohio Co. v. Rosemeier; Westamerica Securities, Inc. v. Cornelius*, 520 P.2d 1262 (1974). Further, the A.L.R. *Messersmith* cited is titled "effect, as between stockbroker and customer, of broker's mistaken sale of security other than that intended by customer." *See* 48 A.L.R 3d 513.

Second, every Restatement cited in *Messersmith* involved restitution. The Restatement states that restitution is not available where a valid contract exists. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (2011). "A valid contract defines the obligations of the parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment." *Id.* at § 2. It also states,

> "Restitution claims of great practical significance arise in a contractual context, but they occur at the margins, when a valuable performance has been rendered under a contract that is invalid, or subject to avoidance, or otherwise ineffective to regulate the parties' obligations." Contract is superior to restitution as a means of regulating voluntary transfers because it eliminates, or minimizes, the fundamental difficulty of valuation. Considerations of both justice and efficiency require that private transfers be made pursuant to contract whenever reasonably possible, and that the parties' own definition of their respective obligations—assuming the validity of their agreement by all pertinent tests—take precedence over the obligations that the law would impose in the absence of agreement. Restitution is accordingly subordinate to contract as an organizing principle of private relationships, and the terms of an enforceable agreement normally displace any claim of unjust enrichment within their reach." *Id.*

To conclude, the *Messersmith* case is distinct from the present situation. First, the *Messersmith* Court

applied equitable principles only after the Court found the contract invalid due to mutual mistake. Second, *Messersmith's* holding only applies specifically to the sale of securities and bonds. Here, there is a valid contract. No facts indicate a mutual mistake or any reason why the lease should be invalidated. This is not a dispute over the sale of securities or bonds. *Messersmith is* not applicable and a claim for restitution or "money paid by mistake" is not appropriate because there is a valid contract between Safeway and WY Plaza.

In the event laches did not bar this suit, the Court finds that neither "money had and received" or "money paid by mistake" are viable claims in this case. A valid contract exists between the parties and the Court cannot apply equitable remedies of unjust enrichment or restitution.

E. Attorney's Fees

The Court declines to award attorney fees.

CONCLUSION

"The defense of laches is bottomed on the principle that equity aids the vigilant, not those who sleep on their rights." *Park County Resource Council, Inc. v. United States Dept of Agriculture*, 817 F.2d 609, 618, (U.S. App. 1987). Safeway slept on their rights under Article 20(d) for nearly seventeen years. No reasonable juror could conclude Safeway's delay is excusable or WY Plaza is not prejudiced from the delay. Granting

relief for Safeway would work an inequity and laches must be applied.

Accordingly, as a matter of law, WY Plaza is entitled to summary judgment on the defense of laches. Laches is a dispositive affirmative defense and the Court finds in favor of WY Plaza on all claims. Even if the claims were not barred by the doctrine of laches, the Court finds WY Plaza did not breach the contract and did not breach the covenant of good faith and fair dealing. Additionally, the Court finds the claims of "money had and received" and "money paid by mistake" fail because there is a valid contract between the parties.

NOW, THEREFORE, IT IS ORDERED Defendant's Motion for Summary Judgment [Doc. 25] is GRANTED.

NOW, THEREFORE IT IS FURTHER ORDERED Plaintiff's Motion for Summary Judgment [Doc. 23] is DENIED.

Dated this 18th day of October, 2020.

/s/ Kelly H. Rankin
Kelly H. Rankin
United States Magistrate Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SAFEWAY STORES 46 INC., Plaintiff-Appellant/ Cross-Appellee, v. WY PLAZA LC, Defendant-Appellee/ Cross-Appellant.	Nos. 20-8064 & 20-8066 (D.C. No. 2:19-CV-00143-KHR) (D. Wyo.)

ORDER

(Filed Jun. 8, 2023)

Before **BACHARACH, MURPHY**, and **CARSON**, Circuit Judges.

Appellee/Cross-Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge

in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT, Clerk

App. 101

Case Nos. 20-8064 and 20-8066

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SAFEWAY STORES 46, INC.,

Plaintiff-Appellant/Cross-Appellee,

v.

WY PLAZA, L.C.,

Defendant-Appellee/Cross-Appellant.

On Appeal from the United States District Court
for the District of Wyoming
The Honorable Judge Kelly H. Rankin
Docket No. 2:19-CV-00143-KHR

BRIEF OF APPELLEE/CROSS-APPELLANT

(Filed May 7, 2021)

Lucas Buckley, Wyoming State Bar #6-3997
Sean Larson, Wyoming State Bar #7-5112
HATHAWAY & KUNZ, LLP
2515 Warren Avenue, Suite 500
P.O. Box 1208
Cheyenne, Wyoming 82003-1208
Phone: (307) 635-7723
Fax: (307) 634-0985

ATTORNEYS FOR DEFENDANT-APPELLEE/CROSS-APPELLANT

-Oral Argument Not Requested-

[i] **CORPORATE DISCLOSURE STATEMENT**

WY Plaza, L.C. has no parent corporation or publicly held corporation that owns 10% or more of its stock.

[ii] **10TH CIR. R. 26.1 DISCLOSURE STATEMENT**

WY Plaza, L.C. was formed as a Utah Limited Liability Company. The members of WY Plaza L.C. are (1) Big Hat, L.C., a Utah Limited Liability Company and citizen of the State of Utah; (2) Affiliated Investments, LLC, a Limited Liability Company and citizen of the State of Utah; (3) Heber S. Jacobsen, an individual and citizen of the State of Utah; and (4) Christine Lake, an individual and citizen of the State of Utah.

[iii] **TABLE OF CONTENTS**

[v] **TABLE OF AUTHORITIES**

Cases:

Statutes, Rules, and Other Authorities:

Prior or Related Appeals

None

[1] **PRIOR OR RELATED APPEALS**

There are no prior or related appeals to Case Nos. 20-8064 and 20-8066.

SUMMARY OF ARGUMENT

WY Plaza contends that the District Court properly decided the issues below on summary judgment, except as to the denial of an award for its requested attorneys' fees and costs related to this matter. The District Court properly determined that summary judgment was warranted in favor of WY Plaza concerning (1) the doctrine of laches; (2) the lack of restitutionary relief in the face of a written contract; and (3) the non-existence of any breach of contract by WY Plaza. Safeway's argument concerning prejudgment interest in Wyoming is improper and an inaccurate statement of Wyoming law. Finally, WY Plaza was the prevailing party below, and as such the District erred in not awarding attorneys' fees and costs as allowed under the contract at issue.

ARGUMENT

I. Background & Posture on Appeal.

Background

This is a case about Safeway making a paperwork mistake in early 2006, Safeway reviewing documents annually and not noticing that mistake, Safeway sending payments by check annually to WY Plaza based on that mistake, and Safeway not noticing that mistake until November of 2018, more than 16 years later. [2] Instead of accepting the financial consequences of its own mistake, Safeway has sought to shift the risk of its error through a suit against WY Plaza for more than $7.3 Million Dollars—$1.2 Million Dollars for past damages and $6.1 Million Dollars (and counting) in percentage rent credits moving forward—plus interest on past damages and for attorneys' fees. Aplt. App. Vol. 1 at 18–19. The District Court saw through Safeway's specious claims reviewing the facts and the law before it, ruled on summary judgment, and dismissed the case outright.

Through a "Shopping Center Lease" dated January 29, 1980 (the "Lease"), WY Plaza's predecessor in interest, City View Partners, leased to Safeway Stores, Inc. (Safeway's predecessor in interest), a certain portion of a retail shopping center located in Laramie, Albany County, Wyoming (the "Premises"). Aplt. App. Vol. 1 at 139–150. Pursuant to the Lease, Safeway[1] had the option to construct an addition to the Premises. The

[1] Unless otherwise noted, identification of the parties herein includes their predecessor(s) in interest.

Lease provided that upon request by Safeway for the construction of an addition, WY Plaza's predecessor had the option to pay the costs of the addition or, if it was "unable or unwilling" to pay for the costs of such construction, Safeway could elect to undertake the costs of construction. Aplt. App. Vol. 1 at 147. It was undisputed that WY Plaza's predecessor elected not to pay the costs of construction and Safeway, pursuant to the Lease, paid for the construction.

[3] The Lease contains provisions that applied in the situation where, as here, Safeway elected to incur the construction costs for the addition. Specifically, the Lease provides

> If lessee constructs said addition, lessee *may* deduct from percentage rent, if any, otherwise payable under the provisions of this lease for any calendar year . . . an amount equal to said percentage rent until such time as the balance in the amortization account, as hereinafter created, equals zero.

Aplt. App. Vol. 1 at 147. (emphasis added). Percentage rent is defined in the Lease, though for purposes of the instant case, there was no dispute as to the calculation of percentage rent. Instead, the dispute between the parties below centered on Safeway's uninterrupted and voluntary payment of percentage rent from 2006 through 2020 in lieu of electing a deduction from the amortization account as provided in paragraph 20 of the Lease.

> The Lease further states that
>
> > An amortization account shall be created to record the operation of the provisions of this paragraph. The original balance of said account shall be the cost of said addition. Interest, at the Industrial "A" rated bond rate (long-term) in effect at the time of completion of said addition, shall accrue. . . . After accrual of said interest, lessee shall deduct from said account an amount equal to the amount to be deducted, under the provisions of this paragraph, from percentage rent.

Id. The Parties agree that the total cost of the addition was $2,577,717.00 and the addition was completed on May 1, 2001. Aplt. App. Vol. 2 at 178.

> [4] The Lease further provides at ¶ 20(g) that
>
> > [u]pon completion of said addition and determination of the cost of said addition, but in no event later than ninety (90) days after completion of said addition, the lessor and lessee shall execute a Lease Modification Agreement which shall set forth (1) the cost of said addition, (2) the date of completion of said addition, (3) the new extent of the leased premises, by including the expansion area within the RED outline on a new Exhibit "A" to the lease, (4) the interest rate which lessor has to pay to finance said addition at the time of completion of said addition, plus additional minimum rent in the amount of $168.30 per month; and

> . . . (6) set forth the revised minimum monthly rent as noted above.

Aplt. App. Vol. 1 at 148.

On November 30, 2001, WY Plaza purchased the shopping center in which the Premises is located. Aplt. App. Vol. 3 at 333–337. On March 20, 2002, WY Plaza—and not a predecessor in interest—entered into the "Fifth Shopping Center Lease Modification Agreement" (the "Fifth Modification") relating to the Premises. Aplt. App. Vol. 2 at 177–180. The Fifth Modification appears to have been drafted in light of paragraph 20(g) of the Lease, as it identifies the majority of the information contemplated in that paragraph, except that it does not identify an interest rate which was to accrue to finance the addition, as contained in subparagraphs 20(d) & (g). *Id.* The interest rate provision is specific to a lessee-financed transaction, though the omission of an agreement between the parties as to an interest rate applicable at the time—if, indeed, the parties contemplated [5] repayment of the addition through percentage rent offsets—remains conspicuous. Although it appears to have been drafted in light of paragraph 20(g) of the Lease, the Fifth Modification was not entered into within ninety (90) days after completion of the addition, a protection that a lessor expecting repayment of $2.5 Million Dollars might be expected to insist upon.

For the period from the completion of the addition through December 1, 2005, it is undisputed that no percentage rent payments were due under the Lease,

therefore, no issue exists as to whether the percentage rent could be deducted to reduce the balance of the amortization account provided for in the Lease. Aplt. App. Vol. 1 at 11. Beginning in calendar year 2006, however, the percentage rent clause in the Lease was implicated in the following years and for the following amounts (as categorized by the year in which the amount was paid):

- 2006 - $94,020.00
- 2007 - $75,852.00
- 2008 - $92,814.00
- 2009 - $116,856.00
- 2010 - $61,111.00
- 2011 - $0.00
- 2012 - $0.00
- 2013 - $39,153.40
- 2014 - $117,019.80
- 2015 - $125,602.68
- 2016 - $130,988.25
- 2017 - $136,359.82
- 2018 - $121,748.99

[6] • 2019 - $122,340.04[2]

- 2020 - $119,369.23

Aplt. App. Vol. 3 at 343. Safeway paid each of these amounts without fail and, prior to 2019, never sought to offset percentage rent to decrease the amortization account balance relating to the addition. Indeed, the only prior substantive discussion between the parties relating to percentage rent occurred in and around

[2] The payments made in 2019 and 2020 were paid with a reservation of rights pending the outcome of the instant litigation. Aplt. App. Vol. 3 at 345–348.

2010. On February 12, 2010, Safeway sent a letter to WY Plaza concerning Safeway's overpayment of percentage rent based on an undercalculation of the minimum rent owed during that option period. Aplt. App. Vol. 3 at 350–357. Safeway asserted that it had overpaid percentage rent in the amount of $228,989.00. The parties communicated concerning this dispute until September 1, 2010, when the parties reached a compromise with WY Plaza allowing Safeway to recoup the overpaid amount by deducting it from percentage rent amounts moving forward.

Following the 2010 percentage rent dispute, on August 2, 2011, Safeway executed an "Estoppel Certificate" in favor of—and delivered to—WY Plaza. Aplt. App. Vol. 3 at 359–360. The 2011 Estoppel Certificate provided:

> 9. To Safeway's knowledge, **there are no defaults under the Lease by [WY Plaza]**:
>
> 11. To Safeway's knowledge, **there are no current default-related credits**. Pursuant to a compromise agreement between the Lessor and Lessee, the overpayment of percentage rent for the period 2005 [7] through 2008, amounting to $228,989.00 is to be offset from future percentage rents due. To date, an overpayment of percentage rent amounting to $157,402.00 remains to be offset.

Id. (emphasis added).

From August 2, 2011 through November 7, 2018, no communications occurred between the parties

relative to percentage rent other than the ministerial tasks of paying the percentage rent payments without protest or interruption as they came due. *From the date of WY Plaza's purchase of the shopping center in November of 2001 through November 7, 2018, no communication exists relative to offsets of percentage rent to satisfy the addition amortization account, despite Safeway's voluntary payment of over $1,000,000 in percentage rent over that period.* Aplt. App. Vol. 1 at 11.

On November 8, 2018, for the first time, Safeway communicated to WY Plaza that it had "determined that during the years 2005–2017, [Safeway] overpaid Percentage Rent in the total amount of $1,111,525.94." Aplt. App. Vol. 3 at 362363. Safeway admitted that it had committed an "oversight." Aplt. App. Vol. 3 at 363. Following the parties' correspondence, Safeway paid percentage rent to WY Plaza in 2019 and 2020 (for calendar years 2018 and 2019) under a reservation of rights and "under duress."[3] Aplt. App. Vol. 3 at 345–348. Notably, during the [8] summary judgment proceedings below, in an apparent attempt to lessen the number of years for the calculation of the statute of limitations, Safeway began to contend that its claims for past amounts paid only included the years dating back to 2013. *See* Aplt. App. Vol. 1 at 45; *see contra* Aplt. App. Vol. 4 at 484–486. Safeway now relies on this shortened time period on appeal in an apparent

[3] On information and belief, Safeway's parent company, Albertsons Companies, Inc., was ranked number 53 on the Fortune 500 company rankings in 2018.

attempt to mitigate applicable time period over which laches should be considered.

Safeway filed the instant suit on July 19, 2019, alleging breaches of contract, equitable relief for restitution, and a declaratory judgment that Safeway "has the right to deduct from the percentage rent otherwise due . . . amounts equal to such percentage rent until such time as the balance of the Amortization Account equals zero." Aplt. App. Vol. 1 at 18. Safeway also sought its attorneys' fees incurred in the prosecution of this action pursuant to Section 24 of the Lease, which provides that the "unsuccessful party shall pay to the prevailing party a reasonable sum for attorney's fees" in the event of litigation initiated by either party. Aplt. App. Vol. 1 at 18; Aplt. App. Vol. 1 at 149.

Posture on Appeal—Summary Judgment Granted in Favor of WY Plaza

The parties proceeded through discovery and filed cross-motions for summary judgment.[4] The Court held its hearing on summary judgment and took the matter [9] under advisement. On October 20, 2020, the Court issued its Order Denying Plaintiff's Motion for Summary Judgment, Granting Defendant's Motion for Summary Judgment. Aplt. App. Vol. 4 at 436–471. The Court ruled in WY Plaza's favor except as to the award

[4] There were some outstanding issues concerning discovery requested by WY Plaza, including a continuation of the deposition of Safeway's 30(b)(6) representatives as multiple topics remained to be covered.

of attorneys' fees. *Id.* The reasons the Court gave for granting summary judgment in WY Plaza's favor were:

- The doctrine of laches bars Safeway's claims;
- WY Plaza did not breach the lease, nor the covenant of good faith and fair dealing; and
- Money had and received and payment by mistake are not viable claims under Wyoming law in light of an enforceable contract.

Id. Safeway filed its Notice of Appeal on November 11, 2020 and Amended Notice of Appeal on November 23, 2020. Aplt. App. Vol. 4 at 473–474; Aplt. App. Vol. 4 at 476–478. WY Plaza filed its cross-appeal on the issue of attorneys' fees on November 25, 2020. Aplt. App. Vol. 4 at 479–480.

II. Standard of Review

We review the grant of a motion for summary judgment de novo, and apply the same standard as the district court. *T–Mobile Cent., LLC v. Unified Gov't of Wyandotte County*, 546 F.3d 1299, 1306 (10th Cir.2008). In a civil case, we ask ourselves whether, by a preponderance of the evidence, the moving party has established that it is entitled to a favorable verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In doing so, "[w]e examine the record and all reasonable inferences that might be drawn from it in the light most favorable to the non-moving party." *T–Mobile*, 546 F.3d at 1306 (internal citations omitted). In sum, summary

> judgment is appropriate when "there is no genuine issue as to any material fact and . . . the movant is [10] entitled to judgment as a matter of law." *Id.* (quoting Fed.R.Civ.P. 56(c)).

Gross v. Hale-Halsell Co., 554 F.3d 870, 875 (10th Cir. 2009).

III. The District Court Properly Granted WY Plaza's Motion for Summary Judgment and Denied Safeway's Motion for Summary Judgment on All of Safeway's Claims under the Doctrine of Laches.

The District Court properly found that Safeway's claims were barred by the doctrine of laches.[5] Laches is an equitable defense available in limited circumstances in actions at law, including breach of contract actions. *Windsor Energy Group, L.L.C. v. Nobel Energy,*

---

[5] Safeway contends that it was surprised and not provided notice concerning the issue of laches prior to the Court ruling on summary judgment. This is not the case. Safeway knew laches was an important defense in the case given its claims dating back seventeen plus years and considering WY Plaza's affirmative defenses. In the briefing on and during the hearing concerning summary judgment, laches was discussed on multiple occasions including within WY Plaza's brief in opposition to Safeway's motion and during WY Plaza's oral argument at the hearing on summary judgment. Aplt. App. Vol. 3 at 396-397; Aplt. App. Vol. 4 at 501, 507, 518, 521, 533, and 535. The issue was clearly before the Court and Safeway had an opportunity to respond to the issue in its briefing, during oral argument, and in post-hearing supplemental briefing. Ultimately, the Court ruled in WY Plaza's favor on other dispositive issues independent of its decision on laches.

Inc., 2014 WY 96, ¶ 22, 330 P.3d 285, 291 (Wyo. 2014). While the statute of limitations enforces arbitrary time limits, laches considers the conduct of the parties and their relative positions. *See Eblen v. Eblen*, 234 P.2d 434, 442–43 (Wyo. 1951). "Laches is defined as such delay in enforcing one's rights that it works to the disadvantage of another." *Dorsett v. Moore*, 2003 WY 7, ¶ 9, 61 P.3d [11] 1221, 1224 (Wyo. 2003).

The defense of laches is based in equity and whether it applies in a given case depends upon the circumstances. *Ultra Resources, Inc. v. Hartman*, 2010 WY 36, ¶ 123, 226 P.3d 889, 929 (Wyo. 2010); *Hammond v. Hammond*, 14 P.3d 199, 201 (Wyo. 2000). Laches is comprised of two elements: (1) inexcusable delay in the assertion of a right; and (2) injury, prejudice, or disadvantage to the defendants or others. *Moncrief v. Sohio Petroleum Co.*, 775 P.2d 1021, 1025 (Wyo. 1989).

> [s]everal conditions may combine to render a claim or demand stale in equity. If by the laches and delay of the complainant it has become doubtful whether adverse parties can command the evidence necessary to a fair presentation of the case on their part, or if it appears that they have been deprived of any such advantages they might have had if the claim had been seasonably insisted upon, or before it became antiquated, or if they be subjected to any hardship that might have been avoided by reasonably prompt proceedings, a court of equity will not interfere to give relief, but will remain passive; ***and this although***

> ***the full time may not have elapsed which would be required to bar a remedy at law***.

Eblen, 234 P.2d at 442–43 (emphasis added); *see also Windsor Energy Group*, 330 P.3d 285 at 291 (noting that time periods to which laches applies are generally shorter than the applicable statutes of limitations).

The first element of laches is a party's inexcusable delay in asserting a right. See *Moncrief*, 775 P.2d at 1025. There can be little doubt that the District Court's holding that Safeway's delay and lack of justification were inexcusable.

[12] In evaluating unreasonable delay by a party in asserting a right, the passage of time alone is not enough, rather "the Plaintiff must be chargeable with a lack of diligence in failing to proceed more promptly." *Cathcart v. Meyer*, 2004 WY 49, ¶ 13, 88 P.3d 1050, 1058 (Wyo. 2004). The analysis is focused on Safeway's "knowledge or ignorance of the facts constituting the cause of action, as well as his diligence in availing himself of the means of knowledge within his control." *Merrill v. Rocky Mountain Cattle Co.*, 181 P. 964, 974 (Wyo. 1918) (quoting *Patterson v. Hewitt*, 195 U.S. 309 (1904)). For the first element of laches to fail, Safeway must have "lacked knowledge of the facts or was without the means of discovering them." *Murphy v. Stevens*, 645 P.2d 82, 91 (Wyo. 1982) (quoting *Harnett v. Jones*, 629 P.2d 1357, 1364 (1981)). Additionally, laches cannot be imputed upon a party justifiably ignorant of the facts creating his cause of action. *Harney v. Montgomery*, 213 P. 378, 384 (Wyo. 1923).

The District Court properly found that Safeway was not justifiably ignorant of the facts creating this cause of action and as such determined that there was no genuine issue of material fact that Safeway had the facts needed to exercise their rights in relation to this cause of action for nearly two decades. The District Court discussed the following facts.

Safeway had the right to exercise Article 20(d) and create an amortization account for the Lease beginning in 2001. Aplt. App. Vol. 4 at 431. However, [13] Safeway did not attempt to exercise the rights afforded in Article 20(d) until November 7, 2018, over seventeen years later. Aplt. App. Vol. 3 at 362–363. Courts in Wyoming have held laches applicable in cases with significantly shorter delays. *See*, *e.g.*, *See Moncrief*, 775 P.2d at 1026 (finding laches when Plaintiff waited seven years to assert rights); *Eblen*, 234 P.2d at 442 (finding laches when plaintiff waited six years to assert rights); *Merrill v. Rocky Mountain Cattle Co.*, 181 P. 964 (1918) (finding laches when plaintiff waited three years to assert rights).[6]

Safeway's excuse does not justify the seventeen-year delay. Safeway claims it did not know of the right in Article 20(d) until 2018 because a paralegal improperly completed its own internal "Form RE-55" on

[6] Even if the Court were to accept Safeway's newly reframed time period for its claim that starts in 2013, its delay is still within the time frame under which the doctrine of laches applies in Wyoming.

March 21, 2002. Aplt. App. Vol. 2 at 252.[7] When completing the form, the paralegal, an employee of Safeway and through her own apparent fault, omitted reference to Section 20 of the lease. *Id.* As a result of the omission, Safeway argues "it could not reasonably be expected that the company's corporate accounting department which prepares the Percentage Rent statements, which are provided annually to the lessor, would know that the setoff against Percentage Rent should have been deducted." *Id.* In explaining the alleged [14] error, Safeway asserts the paralegal who completed the Form RE-55 "should have been aware that the accounting department . . . relies upon the information provided by the RE-55." *Id.* Further, Safeway admitted to "routine" audits of its "percentage rent payments to ensure the correct amounts have been paid to our landlords." Aplt. App. Vol. 2 at 182. Safeway's only explanation for why a routine audit never caught Safeway's right to deduct under Article 20(d) is that the audit conducted in 2010 was a "different type of audit" than in 2018, and the 2010 audit was done in reliance of the Form RE-55. Aplt. App. Vol. 4 at 493–494.

Safeway somehow contends that the 2010 estoppel agreement addressed solely a different portion of the Lease, so during that process it still did not notice the

---

[7] It should be noted that Safeway has provided no direct evidence of any mistake. Safeway has provided hindsight testimony through its in-house counsel who performed a surface review of paperwork and who did not talk to the specific individuals who completed these documents.

claimed mistake. Safeway asserted below that its review in 2010 only focused on Article 2 and "mistakenly failed to recognize that the Amortization account greatly exceeded the percentage rent payments otherwise due." Aplt. App. Vol. 1 at 132. Additionally, Safeway argues that the error in using the wrong calculation for minimum rent is an entirely different type of error than failing to recognize the amortization account balance. They contend that minimum rent is found in Article 2 of the lease, while the amortization account is found in Section 20.

The District Court reviewed the entirety of the record on summary judgment and determined that—based on the undisputed facts—no reasonable juror could find justification for Safeway's delay. Safeway knew or had reason to know of its [15] rights under Article 20(d) since 2001. The Form RE-55 error explains why Safeway's *accounting department* did not properly deduct rent for seventeen years, but Safeway did not demonstrate why Safeway's real estate and legal departments did not assert their rights under Article 20(d) prior to 2018 despite: (1) possessing the lease for nearly four decades; (2) amending the lease at least nine times since 2001; (3) engaging in an eighteen month long legal dispute over the lease in 2010; and (4) signing a settlement agreement over the lease in 2010. *See* Aplt. App. Vol. 2 at 249253.

Moreover, Safeway's argument would have this Court treat it as two separate and unrelated entities, an accounting department and a legal/real estate department. Laches looks at the inexcusable delay of a

party in asserting a right and Safeway has not directed this Court to any authority which would indicate that, simply because one department of a party does not know what the other department is doing, errors in communication are excusable. The facts of this case indicate just the opposite. Safeway attempted to put in place safeguards to avoid mistakes exactly such as the one that occurred here, apparently knowing that failures in communication could and would impact its substantive rights under lease agreements. When such a failure occurred, entirely through Safeway's agent's fault, an entirely predictable error came to pass. And additional errors were made year after year during routine annual audits, modifications, and the like in not noticing the original alleged error. The continuous [16] errors resulted in an egregious delay in the assertion of Safeway's rights and the delay was entirely inexcusable. At the heart of Safeway's case in this matter is a fundamental admission that Safeway simply, without excuse, and entirely through its own fault failed to keep proper records.

The second element of laches is injury, prejudice, or disadvantage to the defendants or others. The District Court properly found that WY Plaza was prejudiced (1) by not being able to procure witnesses and evidence; and (2) financially.

On whether a party is prejudiced by not being able to procure witnesses and evidence, the District Court cited to the Restatement of the Law of Restitution—heavily relied upon by Safeway—which states as follows.

> [I]f the lapse of time has caused doubt as to the ascertainment of the facts as where witnesses have died or papers have been lost, or where the time elapsed is so great that witnesses may have forgotten the facts, the chance that the respondent will be dealt with unjustly may be sufficiently great to prevent the granting of restitution.

RESTATEMENT OF THE LAW OF RESTITUTION, §148 d.

Three circumstances existed which demonstrated WY Plaza's inability to procure witnesses and evidence: (1) lack of witnesses and evidence concerning the execution of the Fifth Modification; (2) lack of witnesses and evidence concerning the RE-55 Form that was filed out improperly; and (3) lack of witnesses and evidence regarding the 2010 settlement agreement. These were clear in the record.

[17] The fifth modification concerned the subsequent agreement the parties signed after WY Plaza acquired the property and began working with Safeway under the Lease. Aplt. App. Vol. 2 at 177–180. This document is crucial to the relationship as it is some of the earliest written evidence of the parties' relationship concerning this Lease. *Id.* The Fifth Modification contains a number of important terms for the parties, but leaves out others, such as the creation of the amortization account or an agreement upon the then-existing interest rate. *Id.* Given the number of years between the modification and the filing of this suit, WY Plaza did not have the witnesses and evidence available to it

to address the claims being made by Safeway. Aplt. App. Vol. 1 at 121–122.[8]

The same lack of direct knowledge concerns exists in Safeway's attempts at proof. Safeway alleges that the RE-55 Form is the form where Safeway's alleged mistake occurred. This form was created in 2006. Safeway's only proffered evidence on this form was the form and third-party testimony from a witness who reviewed the form in retrospect and attempted to deduce what happened. Aplt. App. Vol. 2 at 249–253. While Safeway's assumption as to its form may or may not be correct, the parties are left having to accept that the RE-55 form mistake and a scapegoated paralegal are the culprits in this matter without direct evidence due to the passage of [18] time. *This argument amounts to the parties' best guess as to what happened in this case.* The circumstances surrounding that mistake are completely unknown through direct personal knowledge, however, given the extensive passage of time. This is the exact injury, prejudice, and disadvantage that laches is intended to prevent.

Further, the 2010 settlement agreement is also crucial to this matter. WY Plaza contends that even if Safeway's annual audits missed the mistake, the discussions and negotiation of settlement concerning percentage rent in 2010 involved circumstances where Safeway should have discovered its mistake. This is a crucial period of time for the case, and Safeway had no

---

[8] This includes through its own witnesses which do not recall what occurred during this timeframe. Aplt. App. Vol. 1 at 122.

available witnesses to discuss the circumstances of the settlement from its perspective. Aplt. App. Vol. 3 at 376–377 (Safeway's answer to Interrogatory No. 13 describes the lack of available witnesses). Safeway defends itself on this point by arguing that the 2010 dispute focused on another Lease provision, so its agents simply didn't notice the mistake. Due to the passage of time, however, Safeway could not produce any testimony from any firsthand witnesses to support that assertion. *Id.*

Financial prejudice is clear from the record given the consequences of interest being applied to a $7.3 Million Dollar claim which accrued 16 years ago. In addition to the passage of time, a change in the value of property is a material consideration in application of the doctrine of laches. *See Moncrief v. Sohio Petroleum Co.*, 775 P.2d 1021, 1026 (1989). Safeway's own expert provided the relevant testimony to [19] the Court concerning interest. According to Safeway's expert, WY Plaza currently owed Safeway $6,080,097.11 in credits under the amortization account. Aplt. App. Vol. 2 at 248. Of that amount, $3,502,380.11 is interest. *Id.* The expert calculated interest from May 1, 2001 to January 13, 2020 a total of *6,831* days. *Id.* The expert calculated the daily per-diem increase by multiplying the starting amount (the cost of the expansion at $2,577,717.00) by the daily interest (A rated bond rate of 7.26% divided by 365 which equals 0.01989%) to get a daily increase of $512 in interest. *Id.* Thus, the expert multiplied $512 by 6,831 days to get the total accumulated interest balance of $3,502,380.11. *Id.* A "significant increase

in value during the period of delay, where the claimant might have asserted the right before such change, is ordinarily fatal to the plaintiff's case." *Moncrief*, 775 P.2d at 1026. Sitting on its rights and accruing $3.5 Million Dollars in interest was fatal to Safeway's case.

Moreover, Safeway ignores that it willingly and without objection paid WY Plaza over $1,000,000 in percentage rent payments during the relevant period and allowed WY Plaza to retain the benefit of those funds. Based on this fact alone, the District Court could infer financial prejudice in the form of financial transactions taken or foregone in reliance on payments, distributions made, or capital retained, improvements or expenditures paid, or any of the other financial transactions that a landlord must undertake over a period of decades. To hold that divesting WY Plaza of $1,000,000 in payments would not financially prejudice the landlord would be to [20] ask the District Court to divorce its judgment from reality.

Considering the two elements of laches using the factual record on summary judgment, it is clear that the District Court's analysis is sound. Considering all of the facts considered on summary judgment—including a substantial portion of the facts provided by Safeway in its motion for summary judgment—it was well within the Court's discretion to apply the doctrine of laches barring Safeway's claims.

IV. The District Court Properly Granted WY Plaza's Motion for Summary Judgment and Denied Safeway's Motion for Summary Judgment on Safeway's Claims for Restitution.

The District Court properly held that Safeway's claims for restitution were not viable under Wyoming law. In Wyoming, equitable and quasi-contractual claims cannot lie in the face of a valid and enforceable contract. Safeway asserted three equitable causes of action in its Complaint for "Money Had and Received," "Money Paid by Mistake," and "Payment under Protest." Given their equitable nature, Safeway's claims must fail in the light of a written contract, i.e., the Lease.

The District Court properly analyzed the claims under the theory of unjust enrichment and quasi-contract. Aplt. App. Vol. 4 at 465–470. A claim for "Money Had and Received" is an action for unjust enrichment in Wyoming. Specifically, the Wyoming Supreme Court has "recognized that an action for money had and received 'is an equitable action, and no recovery can be had except upon proof that the [21] defendant has received money of the plaintiff which, in equity and good conscience, it ought not retain. That is the foundation of the action.'" *Landeis v. Nelson*, 808 P.2d 216, 217 (Wyo. 1991). The Court in *Landeis* ultimately concluded that an action for "money had and received" is really an equitable claim of unjust enrichment. *Id.* at 217–218. Specifically, the Court noted that the "words 'unjust enrichment' concisely state the

necessary elements of an equitable action to recover money, property, etc., which 'good conscience' demands should be set over to the [plaintiff] by [defendant] pursuant to an implied contract between them." *Id.* at 218. As such, applying Wyoming law, this Court must analyze Safeway's "Money Had and Received" cause of action as one asserting a claim for unjust enrichment.

If the Wyoming Supreme Court were to recognize a claim for "Money Paid by Mistake" in Wyoming, the claim would likely be considered is an action for unjust enrichment, given its restitutionary nature. Wyoming has not recognized a civil cause of action for "Money Paid by Mistake," though it has discussed such an idea in broad strokes. *See Thurmon v. Clark*, 507 P.2d 142, 143 (Wyo. 1973) (finding that it "is well settled that where money has been voluntarily paid with full knowledge of the facts, it cannot be recovered on the ground that the payment was made under a misapprehension of the legal rights and obligations of the person paying").

[22] On this claim, restitution is Safeway's requested remedy for the numerous past percentage rent payments voluntarily made to WY Plaza. Wyoming Courts closely associate restitutionary damages to a cause of action for unjust enrichment as well.

> Wyoming has recognized that restitutionary damages are historically related to, yet distinct from, the equitable cause of action termed "unjust enrichment":

> The touchstone of the rule is the moral obligation arising out of unjust enrichment to the tortfeasor. The principal is of ancient origin. It has lost its early common law fictions and is firmly entrenched as a cause of action with only its "historical echoes" remaining.
>
> *Western Nat'l Bank of Casper v. Harrison*, 577 P.2d 635, 641–42 (Wyo. 1978).

Cross v. Berg Lumber Co., 7 P.3d 922, 934 (Wyo. 2000). "The phrase 'unjust enrichment' is used in law to characterize the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor. It is a general principle, underlying various legal doctrines and remedies, that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained, or appropriated[.]" *Rocky Mountain Turbines, Inc. v. 660 Syndicate, Inc.*, 623 P.2d 758, [23] 763 (Wyo. 1981) (*quoting* 66 Am.Jur.2d *Restitution and Implied Contracts* § 3, p. 945).

Safeway relies exclusively on *Messersmith v. G. T Murray & Co.*, 667 P.2d 655 (Wyo. 1983) for Wyoming authority to support its claim for "money paid by mistake." In *Messersmith*, there was a mutual mistake between the parties justifying restitutionary relief. *Id.* at 655–58. Under the facts on the record on summary judgment, this case only involves a situation concerning

unilateral mistake, if any.[9] Safeway contends that it was mistaken, but evidence in the record supports the conclusion that it may not have been, given its routine audits and consistent payment of percentage rent year-after-year. And there is no evidence in the record of any mistaken belief on behalf of WY Plaza concerning the interpretation of the Lease. Even if the theory of "Money Paid and Received" is recognized as a cause of action and the *Messersmith* case applies in this analysis, the existence of the written, valid, and enforceable contract between the parties bars the equitable claim.

The District Court correctly found that *Messersmith* involved an invalid contract due to mutual mistake and that its holding has been extremely limited exclusively to securities and bonds. Further, if not extremely limited to its facts, [24] *Messersmith* has been implicitly overruled by the extensive and unambiguous authority cited herein and decided after the 1983 *Messersmith* decision. *See infra*, (holding that quasi contractual claims, including for unjust enrichment, may not lie where an express contract exists between the parties). *Even if Messersmith* had any bearing in the instant case—which it does not—relief for money paid by mistake is improper where the party in receipt of the funds has changed his or her position in reliance on such payment. *Messersmith*, 667 P.2d at 657.

---

[9] Safeway contends that the language of *Messersmith* could be extended by the Wyoming Supreme Court to apply to unilateral mistakes. However, even if that were the potential extension of the reasoning by the Wyoming Supreme Court, *Messersmith* still only would apply narrowly to the mistaken sale of securities.

Safeway ignores this requirement of the *Messersmith* case in its briefing. As discussed hereinabove relative to the second laches factor, the District Court properly held that there is no material dispute of fact that WY Plaza had changed its position and would be prejudiced by the relief sought by Safeway in this matter.

The three restitutionary claims brought by Safeway are in the nature of unjust enrichment and quasi-contract. Though Safeway cites to numerous authorities outside of Wyoming to try to avoid the clear result under Wyoming law, at its most basic level, Safeway is asking this Court to imply a term in the Lease that, in fairness, should allow it to recover through restitution money validly and properly paid to WY Plaza under § 20 of the Lease.

Unjust enrichment is "the failure to make restitution of benefits received under circumstances that give rise to a legal or equitable obligation." *See Rocky Mountain Turbines,Inc. v. 660 Syndicate, Inc.*, 623 P.2d 758, 763 (Wyo. 1981) [25] (quoting 66 AM.JUR.2D RESTITUTION AND IMPLIED CONTRACTS § 3). Relating specifically to an action for money had and received—but seemingly equally appropriate to in a restitutionary claim for money paid by mistake and money paid under protest—the Wyoming Supreme Court has noted that "[r]ecovery in such case is based on a promise implied by law or quasi contract and on the equitable principle that one who has been unjustly enriched at the expense of another is required to make restitution." *Anderson v. Bell*, 70 Wyo. 471, 487, 251 P.2d 572, 577 (1952).

Safeway's Complaint asserted three equitable, implied by law, or quasi-contractual theories, which are claims for unjust enrichment requesting restitutionary relief. However, Wyoming law is clear that quasi contractual claims, including for unjust enrichment, may not lie where an express contract exists between the parties. *Hunter v. Reece*, 2011 WY 97, ¶ 28, 253 P.3d 497, 504 (Wyo. 2011); *Sowerwine v. Keith*, 997 P.2d 1018, 1021 (Wyo. 2000) (*citing* 66 Am.Jur.2d *Restitution and Implied Contracts* § 6 (1973)). Unjust enrichment or other quasi-contractual claims cannot lie where an express contract exists between the parties because

> "Quasi contracts" or "constructive contracts" do not arise because of the manifestation of an intention to create them. The intention of the parties in such case is entirely disregarded while in cases of express contracts and contracts implied in fact, the intention is of the essence of the transaction. A quasi contract is without reference to the intent of the agreement of the parties. The obligation is imposed in spite, and frequently in frustration of, their [26] intention where justice so requires. Otherwise stated, contracts implied in law do not arise from the traditional bargaining process but rather rest on a legal fiction arising from equitable principles that operate whenever justice requires compensation to be made.

66 Am. Jur. 2d *Restitution and Implied Contracts* § 6 (2020) (footnotes omitted).

In this case, there was a valid, enforceable contract which both parties acknowledge identifies their respective rights and obligations: the Lease. If Safeway seeks a remedy for the course of conduct between itself and WY Plaza, it must look to the four corners of the contract and this Court cannot imply a contract using equitable principals.

Though the parties' relationship is governed by the express terms of the Lease, Safeway makes these equitable claims under three quasi-contractual theories—Money Had and Received, Money Paid by Mistake, and Payment under Protest—in an attempt to create new obligations between the parties that were never negotiated and agreed upon. This is precisely why Wyoming law prevents quasi-contractual equitable claims in cases where the parties have entered into a valid and enforceable written agreement. *Sowerwine v. Keith*, 997 P.2d 1018, 1021 (Wyo. 2000) (*citing* 66 Am.Jur.2d *Restitution and Implied Contracts* § 6 (1973) ("[Defendants] received only what they were entitled to receive under the contract after they performed their end of the bargain, and, accordingly, they were not unjustly enriched").

[27] Where the parties have agreed to their respective rights and obligations in a written agreement, it is indisputable that this Court cannot step in, in the guise of "equity," to reform those contracts and create obligations where none were bargained for between the parties. Safeway's equitable claims for payment by mistake, money had and received, and return of the payments made under protest are "precluded by the

existence of an enforceable contract." *Wagner v. Reuter*, 2009 WY 75, ¶ 13, 208 P.3d 1317, 1322 (Wyo. 2009).

This case presents an even further departure from the equitable principles of restitution and unjust enrichment. Unlike the examples provided by Safeway in its principal brief, this case does not present a situation where excess funds were obviously overpaid (i.e., $1,000 is paid on a $500 invoice). Here, § 20 of the Lease provides that Safeway *may* withhold percentage rent payments in favor of an offset to the Lease amortization account. Aplt. App. Vol. 1 at 147–148. Safeway was under no obligation to do so, nor was WY Plaza under any obligation to refuse these percentage rent payments that were properly due. It is further noteworthy that Safeway itself annually computed these payments and tendered the payment to WY Plaza without invoicing or demand from WY Plaza. Under these circumstances, WY Plaza was not on notice of Safeway's unilateral mistake, further eroding the equitable underpinnings of Safeway's argument.

[28] Therefore, under clear and unequivocal Wyoming law, as applied by the District Court when sitting in diversity, summary judgment on these claims in favor of WY Plaza is appropriate.

V. The District Court Properly Granted WY Plaza's Motion for Summary Judgment and Denied Safeway's Motion for Summary Judgment on Safeway's Claims for Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing.

The District Court applied the appropriate tenets of Wyoming law in interpreting the terms of the Lease between the parties and applying them to the facts in the record. Aplt. App. Vol. 4 at 460–465. The District found that Article 20(d) of the contract allows, but does not require, Safeway to deduct from percentage rents amount from its amortization account. *Id.*

After making that finding the District Court considered whether the facts on summary judgment demonstrated a breach. There was not any dispute that Safeway paid percentage rent without an offset from 2005 to 2017. Aplt. App. Vol. 3 at 343, 345–348. And Safeway admits that it did not create the amortization account until November 2018. Aplt. App. Vol. 3 at 370–371, 375 ("Safeway did not prepare or maintain accounting document in which it made journal entries . . . prior to November 2018."). The District Court found specifically that WY Plaza did not breach the Lease, nor did it breach its implied covenant of good faith and fair dealing. In fact, [29] WY Plaza has at all times acted in complete conformity with the Lease terms and obligations. WY Plaza did not take any action that it was prohibited from taking, nor did it fail to perform any action it was required to perform under the Lease.

Safeway is required under the Lease to pay percentage rent and at all times it has done so. Aplt. App. Vol. 3 at 343, 345–348; Aplt. App. Vol. 4 at 431. Assuming all facts in the light most favorable to Safeway, it had the option under the Lease to retain percentage rent payments in order to offset the balance of the amortization account provided in Paragraph 20(d). Such an offset was not required, however, and in no instance did WY Plaza have an obligation to refuse percentage rent payments. The District Court properly decided this issue on summary judgment.

VI. Safeway's Improper Argument Concerning Prejudgment Interest Rate is Outside of the Scope of this Court's Jurisdiction and it is an Inaccurate Statement of the Percentage Rate for Prejudgment Interest in Wyoming.

Safeway raises a new issue that was not addressed by the District Court and is not properly before this Court regarding prejudgment interest.

The District Court's Order did not address prejudgment interest in this matter, and the issue is not properly before this Court. Aplt. App. Vol. 4 at 436–471. Safeway contends that prejudgment interest in Wyoming is calculated at a rate of ten percent (10%) interest per annum. But that amount is not accurate, as Safeway cited the statute in Wyoming concerning post judgment interest.

> [30] All decrees and judgments for the payment of money bear post-judgment interest. *Parker v. Artery*, 889 P.2d 520, 527 (Wyo.1995) ("In Wyoming, statutory interest begins to accrue when a judgment is entered.").

Halling v. Yovanovich, 2017 WY 28, ¶ 37, 391 P.3d 611, 623 (Wyo. 2017) (referring specifically to WYO. STAT. § 1-16-102).

Prejudgment interest accrues at 7% per annum in Wyoming. § 40-14-106(e); *Hoist v. Guynn*, 696 P.2d 632, 635 (Wyo. 1985). Because this issue is improperly before this Court and because the amount is inaccurate, Safeway's argument on this point should be disregarded.

VII. The District Court Erred in Denying WY Plaza's Claim for Attorneys' Fees as Prevailing Party under Section 24 of the Lease.

On cross-appeal, WY Plaza raises one issue to be addressed by this Court: whether the District Court erred in denying WY Plaza's request for attorneys' fees and costs. In Wyoming, attorneys' fees and costs are awarded where the contract specifically calls for an award. *See Platt v. Platt*, 2014 WY 142, ¶ 65, 337 P.3d 431, 446 (Wyo. 2014); *see also* WYO. STAT. § 1-14-126 (allowing Court to order attorneys' fees to the prevailing party).

Paragraph 24 of the Lease unambiguously provides that if "lessor or lessee files a suit against the

other ***which is in any way connected with this lease***, the unsuccessful party ***shall pay*** to the prevailing party a reasonable sum for attorney's fees, which shall be deemed to have accrued on the commencement of such action [31] and shall be enforceable whether or not such action is prosecuted to judgment." Aplt. App. Vol. 1 at 149.

In the case below, Safeway, as lessee, filed a lawsuit which is intimately connected with the Lease, through the express contractual causes of action (Counts 1-3 of the Complaint), relating to the equitable, quasi-contractual causes of action which allege that Plaintiff should recover money under the Lease (Counts 4-5 of the Complaint), and specifically requesting Declaratory Judgment concerning the Lease terms (Count 6 of the Complaint). WY Plaza was awarded summary judgment in full on every single Count of the Complaint. The District Court provided the following statement concerning its decision concerning the award of attorneys' fees: "The Court declines to award attorney fees." Aplt. App. Vol. 4 at 471.

There is no doubt WY Plaza was the prevailing party below in a lawsuit filed by the lessee concerning the Lease. The District Court erred, and this Court should reverse the denial of the attorneys' fees award, remanding the issue for an award by the District Court of WY Plaza's reasonable attorneys' fees.

VIII. Conclusion

The District Court properly determined that summary judgment was warranted in favor of WY Plaza concerning (1) the doctrine of laches; (2) the lack of restitutionary relief in the face of a written contract; and (3) the non-existence of any breach of contract. Safeway's argument concerning prejudgment interest in [32] Wyoming is improper and an inaccurate statement of Wyoming law. WY Plaza was the prevailing party below, and as such the District erred in not awarding attorneys' fees and costs as allowed under the contract at issue.

As such, this Court should affirm the District Court's Order Denying Plaintiff's Motion for Summary Judgment, Granting Defendant's Motion for Summary Judgment, except as to the issue of awarding WY Plaza's attorneys' fees and costs, which should be remanded for an award by the District Court of WY Plaza's reasonable attorneys' fees.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,958 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed R. App. P. 32(a)(5) and the type style requirements of Fed R. App. P. 32(a)(6) because this brief

has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

DATED this 7th day of May, 2021.

By: *s/Sean Larson*
Lucas Buckley (Wyo. Bar # 6-3997)
Sean Larson (Wyo. Bar #7-5112)
HATHAWAY & KUNZ, LLP
2515 Warren Avenue, Suite 500
P.O. Box 1208
Cheyenne, WY 82003-1208
(307) 634-7723

ATTORNEYS FOR DEFENDANT-APPELLEE/CROSS-APPELLANT

STATEMENT REGARDING ORAL ARGUMENT

The Defendant-Appellee/Cross-Appellant does not believe that this matter warrants oral argument before the Court and therefore respectfully requests this matter be decided on the briefs of the parties.

s/Sean Larson
Lucas Buckley (Wyo. Bar # 6-3997)
Sean Larson (Wyo. Bar #7-5112)
ATTORNEYS FOR DEFENDANT-APPELLEE/CROSS-APPELLANT

May 7, 2021

CERTIFICATE OF DIGITAL SUBMISSION

All required privacy redactions have been made in this brief.

The hard copies to be submitted to the court are exact copies of the version submitted electronically.

The electronic submission of this brief was scanned for viruses using the most recent version of Sophos Anti-Virus, updated May 6, 2021, and according to the program, is free of viruses.

s/Sean Larson
Lucas Buckley (Wyo. Bar # 6-3997)
Sean Larson (Wyo. Bar #7-5112)
ATTORNEYS FOR DEFENDANT-APPELLEE/CROSS-APPELLANT

May 7, 2021

CERTIFICATE OF SERVICE

I certify that on this 7th day of May, 2021, I electronically filed the foregoing Brief of Appellee/Cross-Appellant with the Clerk of the United States Court of Appeals for the Tenth Circuit using the CM/ECF system which will automatically send email notification of such filing to the following attorney of record:

John F. Kurtz, Jr.
jfk@kurtzlawllc.com

Frederick J. Hahn, III
fjh@hahn-law.net

One hard copy will be submitted to Plaintiff-Appellant/Cross-Appellee's counsel identified above by U.S. Mail, and an original and seven hard copies will be submitted to the Clerk of the United States Court of Appeals for the Tenth Circuit via Federal Express.

HATHAWAY & KUNZ, LLP

By: *s/Sean Larson*

Lucas Buckley (Wyo. Bar # 6-3997)
Sean Larson (Wyo. Bar # 7-5112)
HATHAWAY & KUNZ, LLP
2515 Warren Avenue, Suite 500
P.O. Box 1208
Cheyenne, WY 82003-1208
(307) 634-7723

ATTORNEYS FOR DEFENDANT-APPELLEE/CROSS-APPELLANT