

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

WORLD FUEL SERVICES, INC., A TEXAS CORPORATION,
Plaintiff/Appellant/Cross-Appellee,

v.

HOTTON ENTERPRISES, INC., AN ARIZONA CORPORATION; AND PREMIER
AVIATION GROUP, LLC, AN ARIZONA LIMITED LIABILITY COMPANY,
Defendants/Appellees/Cross-Appellants.

No. 2 CA-CV 2015-0197
FILED NOVEMBER 10, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20132808
The Honorable D. Douglas Metcalf, Judge

**AFFIRMED IN PART;
REVERSED IN PART AND REMANDED**

COUNSEL

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MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Judge Kelly¹ concurred.

M I L L E R, Judge:

¶1 World Fuel Services (WFS) sued Hotton Enterprises and Premier Aviation Group (collectively, “Premier”) for breach of contract and unjust enrichment, alleging Premier had failed to pay invoices for jet fuel provided by WFS. Premier countersued, claiming WFS had breached the contract first by overcharging for fuel. Following a bench trial, the trial court determined both parties had breached, and awarded WFS the amount owed on the unpaid invoices offset by the overcharges. The trial court denied WFS’s request for contractual attorney fees as well as repayment of prepaid business development funds. WFS appeals from the breach of contract finding as well as the denial of its requests for attorney fees and repayment of the development funds. Premier cross appeals, contending the court’s offset for overcharges was insufficient. For the following reasons, we affirm in part, reverse in part, and remand.

Factual and Procedural Background

¶2 The following facts are undisputed. WFS sells aviation fuels to retailers like Premier. Premier operates as a “fixed base

¹The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

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operator,” providing or reselling fuel to retail customers at the Tucson International Airport.² In 2005, Premier entered into a five-year contract with Air Petro Corporation, WFS’s predecessor-in-interest. Under the 2005 contract, Air Petro agreed to sell Chevron-branded jet fuel to Premier at a price three cents above “the Chevron Tucson contract post listed by Oil Price Information Service, AXXIS (published each business day).” The contract also noted, “The price listing is available to [Premier] on demand.”

¶3 The contract also required Air Petro to pay Premier \$15,000 in business development funds, of which Premier would be required to reimburse the prorated share if the contract was terminated “from whatever cause or without cause,” before the contract expired. Finally, the contract included a unilateral attorney fees clause in the event of Premier’s failure to pay, as well as a “service charge” of 1.5 percent monthly. In 2009, Premier and Air Petro signed an addendum extending the 2005 contract to a ten-year term, and adding \$25,000 to the business development funds paid to Premier. In 2010, Air Petro’s assets were assigned first to Hiller Group, and finally to WFS.

¶4 In April 2013, Premier CEO Ashok Vij sent an email to WFS saying Premier “w[ould] be switching brands sometime soon” because WFS had lost the right to market Chevron fuel. Premier then did not pay for \$223,688.44 in fuel that it had ordered and received. In May 2013, WFS sued Premier for breach of contract and unjust enrichment, seeking the \$223,688.44 in unpaid invoices. It also sought repayment of a pro rata share of the prepaid business development funds. Premier filed a counterclaim for breach of contract and breach of the covenant of good faith and fair dealing,

²Defendant Hotton Enterprises, Inc. is an Arizona corporation that is the “registered owner, user or licensee of the trade names ‘Premier Aviation Group,’ ‘Millionair,’ and ‘Millionair Tucson.’” Defendant Premier Aviation Group is also a separate LLC. The president and chief executive officer (CEO) of Hotton, Ashok Vij, is a managing member of Premier Aviation Group. The trial court frequently referred to Vij in its findings. We refer to Premier rather than Vij when a specific fact was binding on it.

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alleging that WFS had not used AXXIS fuel pricing for a number of years, resulting in overcharges in an amount exceeding \$359,000.

¶5 The trial court provided detailed findings of fact and conclusions of law. In summary, the court found that shortly after signing the 2005 contract, Air Petro had stopped setting its fuel prices for Premier based on the AXXIS price plus three cents as required by the contract. Instead, it started with the retail price at which it purchased fuel and added “the same mark up as before.” In 2010, WFS changed the pricing formula again. Under the new formula, WFS would choose the lesser of twenty-five cents above the “Los Angeles Platts” index plus freight and surcharge or thirty-three cents above the “Gulf Coast Platts” index plus freight and surcharge. The trial court found that “Premier did not know that Air Petro had changed the formula,” because pricing emails sent to Vij each week did not explain how the price was derived. Therefore, the court held, the contract had never been modified and WFS breached first by using different pricing schemes.

¶6 In determining damages, the trial court concluded it was undisputed that Premier owed WFS \$223,688.44 for unpaid invoices in 2013. The court then offset that amount by the amount WFS had overcharged Premier. Finding information limited, the court noted, “There is no evidence before the Court to show that the [WFS] quoted price varied dramatically from the published AXXIS price. Nevertheless, an exact computation cannot be made because [WFS] did not follow the contract term, thus preventing Premier from determining whether it was overcharged.” The court used WFS’s margin of three cents per gallon, multiplied by 2,338,400 gallons, and arrived at an offset amount of \$70,152. The court also ruled that Premier need not repay any business development funds because its performance was excused once WFS materially breached. Finally, the court denied both parties’ requests for attorney fees and ordered Premier to pay WFS’s costs as “the successful party under A.R.S. § 12-341.” WFS appealed, and Premier cross-appealed. We have jurisdiction pursuant to A.R.S. §§ 120.21(A)(1) and 12-2101(A)(1).

Discussion

Breach of Contract Counterclaim

¶7 WFS first argues the trial court erred by denying its request for damages representing a repayment of business development funds it had prepaid to Premier, as well as its request for contractual attorney fees. Because resolution of those two issues necessarily relies on whether WFS was the first party to breach the contract, we begin with analysis of Premier's breach-of-contract counterclaim.

¶8 WFS argues the trial court erred by concluding it had breached the contract, whether in 2005 or separately in 2010. Interpretation of a contract is a question of law we review de novo, but we will not set aside findings of fact by the trial court unless "clearly erroneous." *Huskie v. Ames Bros. Motor & Supply Co.*, 139 Ariz. 396, 401, 678 P.2d 977, 982 (App. 1984). That is, "[w]e will affirm the trial court's judgment if there is any reasonable evidence supporting it." *Spaulding v. Pouliot*, 218 Ariz. 196, ¶ 8, 181 P.3d 243, 246 (App. 2008). However, we may draw our own legal conclusions from facts found or inferred in the judgment of the trial court. *Huskie*, 139 Ariz. at 401, 678 P.2d at 982.

¶9 WFS argues there is no factual support for the trial court's conclusion that it stopped using AXXIS "even though that price continued to be published for the next five years." It focuses primarily on the definition of "publish," although it also argues that "[r]egardless of whether AXXIS actually stopped publication," Premier was informed AXXIS had stopped publishing and was therefore on notice that WFS was using a different pricing method. WFS concedes that AXXIS was "published" for at least a few months in 2005 and 2010, and an email from WFS to Premier in May 2010 included AXXIS data. Further, a witness from the company that owned AXXIS agreed that it had been "available to customers" until June 2010.³ Although WFS argues there is a difference between

³WFS also briefly argues an August 2005 press release from the Oil Price Information Service (OPIS) announcing its purchase of AXXIS indicated the AXXIS index would eventually be

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“available” and “published,” the fact that it was “published” in 2005 and 2010 is enough to support the trial court’s reasonable inference that AXXIS was published during the intervening years as well. *See Shooter v. Farmer*, 235 Ariz. 199, ¶ 4, 330 P.3d 956, 958 (2014) (trial court weighs evidence, resolves conflicting facts and inferences therefrom).

¶10 WFS next argues it did not breach the contract as a matter of law because the contract was modified by a course of performance. *See* A.R.S. § 47-1303(F) (course of performance relevant to show modification of contract term). “[C]ourse of performance” is defined as:

[A] sequence of conduct between the parties to a particular transaction that exists if:

- (1) [t]he agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and
- (2) [t]he other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

§ 47-1303(A).⁴ “‘Knowledge’ means actual knowledge.” A.R.S. § 47-1202(B).

discontinued. While the release stated customers would “have adequate time to change their contracts and systems before merging any data feeds,” no date was given for any change, and the release also stated, “OPIS will honor all agreements to provide existing AXXIS price feeds and formats.”

⁴ Because this contract concerns transactions in goods, Arizona’s Uniform Commercial Code applies. *See* A.R.S. § 47-2102.

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¶11 The trial court found that Premier had no knowledge of a pricing change in 2005, and reasonable evidence supports that finding. Although WFS's employee, Hank Kras, testified that he had spoken to Vij in late 2005 and told him WFS was going to use a "Chevron price" but "keep our margin exactly the same," Vij testified that he had not known about the change. It is the responsibility of the trial court to weigh the credibility of witnesses, *Pugh v. Cook*, 153 Ariz. 246, 247, 735 P.2d 856, 857 (App. 1987), and we accept its finding that Premier lacked knowledge. Because knowledge is required to modify a contract by a course of performance, § 47-1303(A)(2), there was no contract modification in 2005. Therefore, the court did not err by finding WFS had breached the contract at that time.

¶12 WFS also argues the contract was modified by a course of performance in 2010. It is undisputed that the last day AXXIS was published was June 10, 2010. At some point before that, WFS had begun offering Premier jet fuel at a price that was the lesser of the "Los Angeles Platts" index plus twenty-five cents plus freight and surcharge or the "Gulf Coast Platts" index plus thirty-three cents plus freight and surcharge. Several emails in September 2010 indicate that Vij was informed of this new pricing scheme, and the trial court concluded Premier had known "that World Fuel was using a new formula," in late 2010. Despite this finding, the court concluded Premier had not "agree[d] to accept the new formula of the lesser of 25 cents above L.A. Platts plus freight and surcharge, or 33 cents above Gulf Coast Platts plus freight and surcharge," and awarded damages for the continued breach.

¶13 Modification of a contract by course of performance does not require the party to explicitly agree to the new term; indeed, a knowledgeable party may acquiesce to it by continuing to purchase goods without timely objection. A.R.S. § 47-1303(A), (F); *Oskey Gasoline & Oil Co. v. OKC Refining Inc.*, 364 F. Supp. 1137, 1142-43 (D. Minn. 1973) (finding timeliness of objection implicitly required by Minnesota Uniform Commercial Code); James J. White & Robert S. Summers, Uniform Commercial Code § 1-7 at 119 (5th ed. 2006) ("If objection is made, it must be timely."); cf. *Abrams v. Horizon Corp.*, 137 Ariz. 73, 79, 669 P.2d 51, 57 (1983) (finding no

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acquiescence when plaintiff repeatedly objected). Premier ordered fuel 158 more times after Vij was aware of the new pricing. Because Vij knew of the change and did not object, Premier acquiesced to the terms of the contract.⁵ § 47-1303(A); *see also Alarmax Distribs. Inc. v. New Canaan Alarm Co.*, 61 A.3d 1142, 1150-51 (Conn. App. Ct. 2013) (repeated use of open account over fifteen years modified 30-day payment provision of contract). Thus, the trial court's finding that Premier was informed in 2010 about WFS's change in formula and continued to order fuel does not support its legal conclusion that WFS continued to breach the contract after September 2010.⁶ *See Ariz. Bd. of Regents v. Phx. Newspapers, Inc.*, 167 Ariz. 254, 257-58, 806 P.2d 348, 351-52 (1991) (reversing where court's legal conclusions not supported by its factual findings). In sum, WFS first breached the contract in 2005 for failing to use the AXXIS formula, but in late 2010, Premier acquiesced to a new pricing formula and WFS was no longer in breach of contract.

Premier's Damages as an Offset Against Unpaid Invoices

¶14 The parties agree Premier owed WFS \$223,688.44 for failing to pay the 2013 invoices, but they dispute the amount of offset that should be applied due to WFS's earlier breach of the contract. Specifically, WFS contends there was no proof of actual

⁵In one email dated October 7, 2010, Vij appears to question the pricing and says he "want[s] to work with [WFS] to revise our agreement." There is no record of further discussion, and for the next 2.5 years, Premier continued to place orders based on the price quoted in weekly emails, and was aware the pricing structure had changed.

⁶Premier argues there was no contract at all in late 2010 because there was no meeting of the minds on the price. However, both parties agree this case is governed by the Uniform Commercial Code, which "gap-fills" open price terms with the "reasonable price at the time for delivery" if the parties fail to agree. A.R.S. § 47-2305(A)(2). Further, the trial court found the parties were acting under a contract in 2010, and that finding is supported by reasonable evidence.

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damages and Premier contends the trial court erred in failing to award the full amount requested in its trial memorandum, \$196,642.27. The trial court explained how it reached its offset of \$70,152:

There is no evidence before the Court to show that the Air Petro/World Fuel quoted price varied dramatically from the published AXXIS price. Nevertheless, an exact computation cannot be made because Air Petro/World Fuel did not follow the contract term, thus preventing Premier from determining whether it was overcharged.

The Court believes that a fair resolution is that Air Petro/World Fuel damaged Premier by not following the contract terms and that the damages are \$.03 per gallon. The \$.03 per gallon figure is the amount of mark up over the retail AXXIS price Air Petro charged. Given that Premier purchased 2,338,400 gallons, the damages are the overcharged amount of \$70,152.

¶15 WFS argues the court selected an arbitrary number rather than “standard contract damages – the difference between the [c]ontract (e.g.[.] AXXIS) price and the price actually charged by [WFS].” Rather than offering an alternative calculation, it returns to its primary argument that there are no damages. Premier argues the offset should have been calculated based on the difference between the charged price and another index, OPIS, for all purchases after June 10, 2010. Premier also argues other formulas provide higher damages calculations, and that the absence of “contrary” damages evidence by WFS meant that the court was bound by Premier’s request.

¶16 “Arizona has long held that damages for breach of contract are those damages which arise naturally from the breach

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itself or which may reasonably be supposed to have been within the contemplation of the parties at the time they entered the contract.” *All Am. Sch. Supply Co. v. Slavens*, 125 Ariz. 231, 233, 609 P.2d 46, 48 (1980). “The aim is to yield the net amount of losses caused.” *N. Ariz. Gas Serv., Inc. v. Petrolane Transp., Inc.*, 145 Ariz. 467, 478, 702 P.2d 696, 707 (App. 1984); *see also* A.R.S. § 47-2714(A) (buyer may recover damages “as determined in any manner which is reasonable”). The trial court erred as a matter of law when it calculated damages using the “amount of mark up over the retail AXXIS price Air Petro charged” rather than the actual losses. Nonetheless, evidence of actual losses was proffered by Premier, which we examine to determine whether it supports the court’s award.

¶17 The trial court admitted a spreadsheet, created by Premier, which calculated the overcharges from 2005 through 2013. The spreadsheet listed dates and gallons of fuel purchased, the amount paid per gallon, and the “TUS AXXIS published ‘contract [p]rice’ . . . before [three] cent markup as published.” However, Premier’s witness from AXXIS testified that many of the numbers listed in the “AXXIS” column understated the AXXIS index price by nine to fifteen cents because Premier had incorrectly used the OPIS index instead. Indeed, for the few dates in which AXXIS data appears in the record, WFS undercharged on average. After trial, Premier conceded in its post-trial memorandum, “Given the testimony of Art King that the Tucson market AXXIS index remained available through June[] 10, 2010, [Premier’s] Exhibit 3 using the OPIS index . . . through June 10, 2010 should not be considered” We agree with WFS that after Premier withdrew its reliance on the only evidence that arguably supported its damages claim, there was no legal basis for an offset through June 10, 2010.

¶18 Likewise, for the time period in which WFS was in breach of contract but before Premier acquiesced to the new pricing structure—June 17, 2010 through late 2010—Premier presented only OPIS data as support for what it should have paid. But evidence at trial showed OPIS reflected a rate paid by major airlines, which purchase much more fuel than Premier. Moreover, Vij admitted at

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trial that the OPIS rate appeared to be considerably lower than the AXXIS rate, and agreed when asked whether “every indication is . . . that [Premier] d[id]n’t have the damages [it] claimed to have.” At oral argument, counsel for Premier conceded that the only evidence regarding the proper rate during this time period was the OPIS data, and damages could have been calculated by looking at alternative sources, which were not discussed at trial. The trial court also implicitly rejected the use of OPIS as a baseline. Therefore, there is insufficient evidence supporting any offset of WFS’s damages for the time period between June 2010 and late 2010.

¶19 Finally, because we determined above that there was no breach after Premier acquiesced to the new pricing structure, there is no post-acquiescence offset. We therefore vacate entirely the trial court’s offset of \$70,152.

Business Development Funds

¶20 WFS also argues the trial court erred by denying its request that Premier repay \$8,000 in prepaid business development funds as required by the contract and addendum. The contract states:

In the event of a termination of this Agreement prior to completion of the full year term, from whatever cause or without cause . . . [Premier] will be obligated to repay to Air Petro the proportion of the original amount of [business development] capital represented by the number of months or part remaining from the date of termination to the original full term compared to the number of months of the full term.

As noted above, WFS originally paid \$15,000 in business development funds, then added an additional \$25,000 under the 2010 addendum. The addendum extended the contract to April 2015. Premier terminated the contract in April 2013, therefore WFS requested the prorated amount of \$8,000.

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¶21 Below, Premier argued there was no meeting of the minds and no contract at the time it refused to pay the outstanding invoices; therefore, there was no contractual obligation to repay the fees. The trial court found there had been a contract in place at the time Premier terminated. However, citing Restatement (Second) of Contracts § 237 cmt. b (1981), it also found that Premier's termination had been caused by WFS's material breach. Accordingly, it did not require Premier to repay the funds. Specifically, it found, "The testimony at trial showed that Chevron left the business of branded jet fuel," and concluded, "Given that the purpose of the 2005 [contract] was the sale of Chevron branded fuel, the loss of such branding was a significant change in circumstances" amounting to a material breach.

¶22 The trial court is correct that "an uncured material breach of contract relieves the non-breaching party from the duty to perform and can discharge that party from the contract." *Murphy Farrell Dev., LLLP v. Sourant*, 229 Ariz. 124, ¶ 33, 272 P.3d 355, 364 (App. 2012). WFS argues, however, that as a matter of law, its failure to use Chevron-branded fuel was excused because the lack of Chevron-branded jet fuel resulted in an impracticability or impossibility.⁷

¶23 Performance of a contract is discharged if "a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made." Restatement (Second) of Contracts § 261 (1981). The trial court found that Chevron left the market, and there is no indication in the record that

⁷WFS actually argues Chevron's departure from the business of branded jet fuel resulted in a frustration of purpose. Although it is a similar doctrine to impracticability, frustration of purpose occurs when performance is still possible but virtually worthless to the adversely affected party. *See generally 7200 Scottsdale Rd. Gen. Partners v. Kuhn Farm Mach., Inc.*, 184 Ariz. 341, 345, 909 P.2d 408, 412 (App. 1995). In this case, performance was impossible because the Chevron-branded jet fuel required by the contract was not available.

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WFS was at fault or that this could have been assumed at the time the contract was signed. Therefore, to the extent the court relied on lack of Chevron-branded fuel in concluding WFS had materially breached, that conclusion is not supported as a matter of law.

¶24 Generally, however, materiality of a breach is a question of fact. *See Found. Dev. Corp. v. Loehmann's, Inc.*, 163 Ariz. 438, 446-47, 788 P.2d 1189, 1197-98 (1990). Factors to be considered include: the extent to which the injured party will be deprived of the expected benefit, the extent to which the injured party can be compensated, the extent to which the breaching party will suffer forfeiture, the likelihood the breaching party can cure his failure to perform, and the extent to which the breaching party comports with the standards of good faith and fair dealing. *See id.*; *see also* Restatement (Second) of Contracts § 241 (1981).

¶25 In addition to its conclusion that the loss of Chevron-branded jet fuel caused a material breach, the trial court found that use of the AXXIS formula had been important to Premier, and that failure to use AXXIS “denied Premier the benefit of its bargain to use a formula set by a published price.” The court also noted in its findings supporting the denial of attorney fees that WFS “breached the Agreement by not selling fuel at the contract price, which was the purpose of the Agreement in the first place.” Some evidence in the trial record supports the materiality finding, even when considered in isolation from evidence of actual damages.

¶26 Nonetheless, we cannot overlook the possibility that the trial court’s materiality finding on WFS’s failure to use the AXXIS pricing formula was influenced, in part, by its damages findings and award as well as its finding that WFS breached the contract by failing to deliver Chevron-branded fuel. Because we reverse the damages award for the reasons stated, we must remand to the trial court to re-determine—without considering Premier’s failure to prove that it did not pay more for non-AXXIS-priced fuel—whether WFS’s failure to price according to AXXIS constituted a material breach.⁸ Moreover, although the written contract states Premier was

⁸ We recognize that in some cases the failure to prove monetary damages resolves the issue of materiality against the

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to repay the business development funds upon termination “from whatever cause or without cause,” if the trial court finds that WFS materially breached the contract, and this caused Premier to terminate the contract, then Premier was discharged of its duty to render continued performance under the written contract, including its duty to repay the business development funds.⁹ See Restatement (Second) of Contracts § 237 & cmt. b (1981).

Attorney Fees and Service Charge

¶27 WFS also argues the trial court should have awarded attorney fees and an eighteen percent annual service charge for collection pursuant to the terms of the contract. Below, the court concluded that Premier need not pay attorney fees because WFS materially breached. In its final judgment, the court awarded no attorney fees under either the contract or A.R.S. § 12-341.01, but awarded costs to WFS as the “successful party” under A.R.S. § 12-341, and pre- and post-judgment interest at the “legal rate” rather than eighteen percent.¹⁰

complaining party. But where, as here, the evidence supports a failure or refusal to comply with a significant term of the contract, which was a non-monetary inducement for the other party to enter into the contract, we cannot say as a matter of law that the breach was immaterial. See, e.g., *Ellis v. Candia Trailers & Snow Equip., Inc.*, 58 A.3d 1164, 1172 (N.H. 2012) (“The absence of proof of damages is not dispositive of whether a breach is material.”), citing 23 Richard A. Lord, *Williston on Contracts* § 63:3, at 439 (4th ed. 2002) (“[P]roof of a specific amount of monetary damages is not required when the evidence establishes that the breach was so central to the parties’ agreement that it defeated the essential purpose of the contract.”).

⁹Premier’s undisputed obligation to pay the 2013 invoices arises out of the buyer’s general obligation to pay the price of goods accepted under A.R.S. § 47-2709(A)(1), irrespective of whether the contract was breached.

¹⁰The final judgment provided no date on which pre-judgment interest would accrue. WFS requested a starting date of May 15,

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¶28 As with the business development funds, application of the contractual attorney fees and interest provision relies on whether WFS's breach was material. See *Murphy Farrell Dev., LLLP*, 229 Ariz. 124, ¶¶ 30-33, 272 P.3d at 363-64. Further, if the trial court again finds the contractual attorney fee provision does not apply, our conclusions regarding breach and damages above may affect the court's calculus as to whether WFS should be awarded attorney fees in its discretion as the "successful party" under § 12-341.01. We therefore remand for reconsideration of WFS's requests for attorney fees and contractual interest.¹¹

Disposition

¶29 For the foregoing reasons, we affirm the trial court's rulings that Premier breached the contract by failing to pay for jet fuel in the amount of \$223,688.44, and that WFS breached the contract for failing to use AXXIS data for that period when it was available. We reverse the ruling that Premier proved monetary damages for any breach of contract. We remand for reconsideration the requests for business development funds, attorney fees, and contractual interest consistent with this decision.

¶30 Both parties also request attorney fees and costs on appeal, WFS pursuant to the contract terms or § 12-341.01, and Premier pursuant to § 12-341.01. Because we remand to the trial

2013. On remand, the trial court shall determine the date of accrual of pre-judgment interest.

¹¹Because the issue may recur after remand, we note that WFS's reliance on one section of *Murphy Farrell Dev., LLLP*, 229 Ariz. 124, ¶ 33, 272 P.3d at 364, is misplaced. In that case, this court found that the materially breaching party could still be awarded attorney fees because the contractual fee provisions required the court to award fees to the "prevailing" party, rather than directing further performance by a party. *Id.* ¶ 30 & n.8. In contrast, the fee and interest rate provision here states they "will be imposed" if Premier defaults, therefore requiring further performance by the non-breaching party.

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court to determine whether the contractual attorney fee provision applies, and because neither party is yet “successful” in the litigation, we deny both requests. *See Murphy Farrell Dev., LLLP*, 229 Ariz. 124, ¶ 38, 272 P.3d at 365. Likewise, we deny both requests for taxable costs. On remand, however, the parties may include in any attorney fees request those amounts incurred during the pendency of this appeal. *Id.*