

68309-8

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No. 68309-8
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

WEST CONSULTANTS, INC,

Appellant,

v.

CAROLYN E. DAVIS, an individual dba ADVANCED ENTERPRISE
SYSTEMS and "A&E" SYSTEMS as a Washington Sole Proprietorship;

Respondents,

and

DELTEK SERVICES, INC., a Delaware corporation; DELTEK SYSTEMS,
INC., a Delaware corporation; DELTEK CORP., a Delaware corporation;
DELTEK, INC., a Delaware corporation; and DELTEK PARTNERS, a
purported Washington partnership,

Respondents/Cross-Appellants.

**BRIEF OF RESPONDENTS/CROSS-APPELLANTS
DELTEK, INC. AND, TO THE EXTENT THEY EXIST,
"DELTEK SERVICES, INC.," "DELTEK SYSTEMS, INC.,"
"DELTEK CORP.," AND "DELTEK PARTNERS"**

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Inc.," "Deltek Corp.," and "Deltek Partners"

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I. INTRODUCTION

Respondent/Cross-Appellant Deltek, Inc., and, to the extent they exist, “Deltek Services, Inc.,” “Deltek Systems, Inc.,” “Deltek Corp,” and “Deltek Partners,” (collectively, “Deltek”)¹ respectfully request that the Court affirm the trial court’s enforcement of the venue provision in the applicable License Agreement providing for exclusive venue in Fairfax County, Virginia or the United States District Court for the Eastern District of Virginia. When West Consultants, Inc. installed Deltek’s DVS software on its file server, West affirmatively accepted the terms of a License Agreement that contains a venue provision. The License Agreement and the venue provision contained therein are valid and enforceable. West did not dispute below (and cannot dispute here) that its claims against Deltek fall within the scope of the venue provision in the License Agreement. Because all of West’s claims against Deltek relate to the License Agreement, these claims must be brought against Deltek in Fairfax County, Virginia or the United States District Court for the Eastern District of Virginia. The Court should therefore enforce the venue

¹ West has alleged claims against Deltek, Inc., “Deltek Services, Inc.,” “Deltek Systems, Inc.,” “Deltek Corp,” and “Deltek Partners” as if they were one entity. *See* CP 3 [Complaint ¶ 1.8]. In April 2007, Deltek Systems, Inc. converted to a Delaware corporation and changed its name from “Deltek Systems, Inc.” to “Deltek, Inc.” *See* CP 235 [Tadano Decl. Ex A (Form 10-K filed March 15, 2010)]. Deltek, Inc. denies the existence of any entity named “Deltek Services, Inc.” or “Deltek Corp” or “Deltek Partners.”

provision and affirm the trial court's dismissal of West's claims against Deltek without prejudice.

The "partnership" argument relied on by West is not germane. Subsequent to the date of the purchase order relied on by West, the License Agreement became the binding, applicable contract between West and Deltek regarding matters covered by the License Agreement—which includes all the "quality" claims asserted by West in the lawsuit. Thus, regardless of whether Deltek and A&E are partners, the particular claims asserted in the lawsuit were required to be brought in Virginia pursuant to the governing venue provision in the License Agreement.

II. ASSIGNMENTS OF ERROR

The trial court properly dismissed without prejudice the claims against Deltek, Inc., Deltek Services, Inc., Deltek Systems, Inc., Deltek Corp., and Deltek Partners ("Deltek") set forth in Plaintiff's Complaint for Breach of Implied Warranties of Merchantability and Fitness for a Particular Purpose; And Violation of the Consumer Protection Act ("Complaint"). The trial court also properly awarded Deltek fees and costs incurred in defending the action. But the trial court erred by denying Deltek, Inc.'s Motion to Strike the Declaration of Richard D. Seward.

Issues Pertaining to Assignment of Error.

1. Whether the trial court erred by denying Deltek, Inc.'s Motion to Strike the Declaration of Richard D. Seward, despite (i) West's introduction of new evidence 1½ years after the venue motion was fully briefed and decided, and (ii) West's failure to oppose Deltek's motion to strike.

III. STATEMENT OF THE CASE

A. West's Purchase And Installation Of Deltek Vision Software License And Other Services

On or about March 28, 2008, plaintiff/appellant West Consultants, Inc. ("West") purchased a Deltek Vision Software ("DVS") license and quarterly maintenance from Deltek's re-seller, co-defendant Carolyn E. Davis, an individual doing business as Advanced Enterprise Systems and A&E Systems ("A&E Systems"). *See* CP 5 [Complaint ¶ 3.6]; CP 22 [Complaint Ex. E (Purchase Order)]. On or about May 16, 2008, West installed the DVS software on a new file server located in West's Salem, Oregon office. CP 6 [Complaint ¶ 3.7].

During the DVS installation process, the terms of the License Agreement appear in a scroll box on the screen with the heading "License Agreement" in bold letters. *See* CP 216-217, 225 [Eckroth Decl. ¶¶ 2, 4, Ex. B (Screen Shot of the scroll box displaying the License Agreement

during installation)].² On the same screen, below the text of the License Agreement, are the options “I accept the terms of the license agreement” and “I do not accept the terms of the license agreement.” CP 217, 225 [Eckroth Decl. ¶ 2, Ex. B (Screen Shot)]. **The user cannot continue with the installation process unless the option “I accept the terms of the license agreement” is affirmatively selected.** CP 217, 225 [Eckroth Decl. ¶ 2, Ex. B (Screen Shot)]. West’s employee, Mr. Hans Hadley, although claiming not to have seen the License Agreement during installation (an impossibility), affirmatively accepted the terms of the License Agreement. *See* CP 6 [Complaint ¶ 3.7] (alleging West clicked “yes” in order to download the software); CP 237 [Hadley Decl. ¶ 5] (stating he clicked certain buttons to allow installation to move forward).

West also purchased installation, training, and support services from Deltek. CP 27 [Complaint ¶ 3.6]. West’s purchase of these services is governed by the terms of the License Agreement accepted by Mr. Hadley. *See* CP 217, 227 [Eckroth Decl. ¶ 5, Ex. C (Work Order)]. The Work Order provides that it “will be governed by the terms of the current License and Services Agreement between you and Deltek, and the applicable Statement of Work, if any.” CP 227.

² A button marked “Print” allows the user to print the terms of the License Agreement. CP 217, 225 [Eckroth Decl. ¶ 2, Ex. B (Screen Shot)].

B. West's Claims Against Deltek Relate To The License Agreement

The License Agreement grants West a license to use the software and sets forth terms governing West's use of the software. The License Agreement provides certain warranties regarding the software's operation. *See, e.g.*, CP 220 [License Agreement § 8(a)] ("Deltek warrants that the Software will operate in substantial accordance with the applicable Documentation, as it exists at the date of delivery, for a period of ninety (90) days from the date of delivery ('Warranty Period'), when the Software is used in accordance with that Documentation."). The License Agreement also disclaims implied warranties. *See, e.g.*, CP 221 [License Agreement § 8(h)] ("Deltek does not warrant that the functions contained in the Software will meet Licensee's requirements or that the operation of the Software will be uninterrupted or error-free."); CP 221 [License Agreement § 9] ("Disclaimer of Warranties. EXCEPT AS SET FORTH IN SECTION 8 ABOVE, ALL EXPRESS OR IMPLIED CONDITIONS, REPRESENTATIONS AND WARRANTIES INCLUDING, BUT NOT LIMITED TO, THE WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, ARE HEREBY EXCLUDED TO THE EXTENT PERMITTED BY LAW.").

All of West's claims against Deltek relate to the License Agreement, and in particular, the warranties and disclaimers provided in the License Agreement. The gravamen is West's allegation that the DVS software was not useful or fit for West's particular purpose. *See* CP 6-8 [Complaint ¶¶ 3.9, 3.11, 3.13, 3.14]. Specifically, West alleges that Deltek breached implied warranties of merchantability and fitness for a particular purpose (CP 8 [Complaint ¶¶ 3.12-3.15]) and that Deltek violated the Consumer Protection Act by selling a "poor quality product" and by "failing to provide adequate installation, training and maintenance services" to render the product useful for any purpose or the special and particular purposes of West. CP 7-8 [Complaint ¶ 3.11].

Given the obvious fact that all of West's claims relate to the License Agreement, West appropriately did not contest before the trial court (and cannot contest now) that the claims relate to the License Agreement.

C. The License Agreement Contains A Valid And Binding Forum Selection Clause

The License Agreement contains a detailed and clear venue provision which provides for exclusive venue in Virginia:

19. Disputes. Licensee (i) agrees that it may bring a cause of action relating in whole or in part to this Agreement only in either a state court located within Fairfax County, Virginia or the United States District Court

for the Eastern District of Virginia, (ii) agrees that it may not initiate any such cause of action against Deltek in a court located in any state other than Virginia and (iii) specifically waives any right it may otherwise have to initiate any such cause of action against Deltek in a court located in any state other than Virginia. Licensee further agrees that it is subject to personal jurisdiction in the Commonwealth of Virginia with respect to any cause of action that relates in whole or in part to this Agreement, specifically including any such cause of action that Deltek may bring against Licensee. All parties agree that venue for any cause of action relating in whole or in part to this Agreement shall be properly laid in the Virginia state courts located in Fairfax County, Virginia and in the United States District Court for the Eastern District of Virginia. Notwithstanding the foregoing, Deltek may, in its sole discretion, bring an action against Licensee in any other jurisdiction in which proper jurisdiction over Licensee may otherwise be obtained.

The venue provision encompasses all causes of action “relating in whole or in part to [the License Agreement].” This venue provision thus governs each of West’s claims against Deltek. The License Agreement also sets forth a choice of law clause:

18. Governing Law. The Agreement is made under and shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia, without reference to its choice of law provisions. The United Nations Convention on Contracts for the International Sale of Goods shall not apply to this Agreement.

D. Procedural History

West filed a Complaint on March 22, 2010 in the Superior Court of Washington for King County. CP 1-24. Deltek filed a motion to dismiss for improper venue, to enforce the Virginia venue provision contained in

the License Agreement. *See* CP 201-215. West filed a brief in opposition [CP 48-67], and Deltek filed a reply in support of its motion to dismiss [CP 68-75]. On May 25, 2010, the trial court entered an order granting Deltek's motion to dismiss for improper venue, dismissing without prejudice the claims asserted against Deltek. CP 76-77. West's claims against A&E Systems were not dismissed at that time.

On June 4, 2010, Deltek moved for an award of fees and costs as a prevailing party pursuant to RCW 4.28.185(5). CP 78-83. West filed a brief in opposition [CP 84-113], and Deltek filed a reply in support of its fees motion [CP 114-120]. On June 14, 2010, the trial court entered an order granting Deltek certain attorneys' fees and costs. CP 121-122.

On June 18, 2010, West prematurely filed a notice of appeal seeking review of the trial court's May 25 Order and June 14 Order. CP 123-131. This Court held on September 14, 2010 that the standards for discretionary review had not been satisfied, and denied discretionary review. CP 134-136.

Over a year later, West settled and dismissed its claims against the remaining defendant, A&E Systems. CP 142-143. On December 27, 2011, Deltek filed a Notice of Presentation of Judgment pursuant to CR 54, to enter judgment on the fees Order entered 1½ years prior, because West had not paid the fees awarded. CP 146-151. On January 3,

2012, West filed a response opposing Deltek's request for entry of final judgment and requested oral argument. CP 152-155. West attached to its response as Exhibit A the Declaration of Richard D. Seward. CP 157-158. On January 4, 2012, Deltek filed a reply in support of the Notice of Presentation of Judgment. [CP 160-164.] However, on January 17, 2012, West changed course and filed a brief in *support* of final judgment. CP 165-169. West attached to its brief as Exhibit A the same Declaration of Richard D. Seward. CP 172-174.

At the same time it filed its reply in support of the Notice of Presentation of Judgment on January 4, 2012, Deltek separately filed a motion to strike paragraphs 4-6 of the Declaration of Richard D. Seward on the grounds that West was improperly attempting to introduce new evidence (1½ years late) in an attempt to have the trial court review the legal conclusions it had made in deciding Deltek's venue motion 1½ years earlier. CP 246-249. West did not oppose Deltek's motion to strike. However, on January 15, 2012, the trial court erroneously denied Deltek's motion to strike because, according to the trial court, "[the motion to strike] is not a proper remedy for arguing the court should not consider Mr. Seward's argument on entry of judgment." CP 199-200.

IV. ARGUMENT PART 1: TRIAL COURT PROPERLY DISMISSED WEST'S CLAIMS AGAINST DELTEK AND PROPERLY AWARDED DELTEK FEES AND COSTS

In reviewing a trial court's decision on the enforceability of a forum selection clause, generally the abuse of discretion standard applies. *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). "Under this standard of review, a trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds." *Id.* "Thus the abuse of discretion standard gives deference to a trial court's fact-specific determination on enforceability of a forum selection clause, while permitting reversal where an incorrect legal standard is applied." *Id.* at 833-34.

Each of West's arguments on appeal is without merit, and this Court should affirm the trial court's May 25, 2010 Order granting Deltek's motion to dismiss for improper venue.³ West contends on appeal that the venue provision in the License Agreement should not be enforced because (i) West supposedly did not enter into the License Agreement; (ii) the License Agreement allegedly lacks consideration; (iii) the License Agreement's venue provision supposedly implicates some public policy

³ In its opening brief on appeal, West asserts in its Statement of the Case that Deltek's venue motion was noted without oral argument. AB 7, n. 1. West is correct that Deltek did not request oral argument on its venue motion. However, King County LCR 7 does not mandate oral argument for such a motion. Per LCR 7(b)(4)(C), *any* party may request oral argument. West was free to request oral argument on Deltek's venue motion, but chose not to do so.

related to the Washington CPA (though West's argument is vague and does not actually assert a public policy violation); and (iv) the venue provision in the purchase order between A&E Systems and West should, according to West, bind Deltek, and control over the venue provision in the subsequent License Agreement. West's only argument in support of its assignment of error regarding the award of fees and costs to Deltek is that the trial court incorrectly granted Deltek's venue motion.

As discussed below, the Court should reject West's arguments and affirm the trial court's May 25, 2010 order because (i) West plainly entered into the License Agreement and is bound by the venue provision therein; (ii) the License Agreement is enforceable; (iii) the License Agreement's venue provision is enforceable; and (iv) the venue provision in the Licensing Agreement governs West's claims against Deltek. Likewise, because the trial properly dismissed West's claims against Deltek, this Court should affirm the award of fees and costs to Deltek.

A. West Entered Into The License Agreement

In bringing its motion to dismiss for improper venue, Deltek presented evidence showing that during the DVS installation process the terms of the License Agreement appear in a scroll box on the screen, and that the option "I accept the terms of the license agreement" (on the same screen) had to be affirmatively selected in order to continue with the

installation. *See* CP 216-217, 225 [Eckroth Decl. ¶ 2, Ex. B (Screen Shot)]. In its response to Deltek’s motion, West asserted that its employee, Mr. Hadley, “never saw or read” the terms of the License Agreement while installing the software. *See* CP 51. Given that it was physically impossible for West to install the software without taking the affirmative step of selecting the option of “I accept the terms of the license agreement” (CP 217 [Eckroth Decl. ¶ 2]), the trial court properly rejected West’s argument.

On appeal, West merely repeats its demonstrably false statement that Mr. Hadley “never saw” the License Agreement. *See* Appellant’s Brief (“AB”) at 7. West makes no effort whatsoever to argue that the trial court’s rejection of West’s far-fetched argument was an abuse of discretion.

The plain fact is that Mr. Hadley had to have looked at the scroll box containing the terms of the License Agreement in order to click “accept” and proceed with the installation. *See* CP 217 [Eckroth Decl. ¶ 2]; *see also* CP 6 [Complaint ¶ 3.7] (alleging West never saw any licensing agreement, but admitting it had to click the “yes” button in order to download the software). The trial court did not abuse its discretion in rejecting West’s unbelievable assertion.

On appeal, West also argues that “there never was a meeting of the minds between all parties” as to the License Agreement, and in particular, the venue and choice of law provisions in the License Agreement. AB at 15-16. West does not provide any explanation of why it contends there was never a meeting of the minds, and this argument is completely without merit. By clicking “yes” to accept the terms of the License Agreement, West affirmatively accepted the terms of the License Agreement, including the venue and choice of law provisions contained therein, even if West did not actually read the provisions. *See M.A. Mortenson Co. v. Timberline Software Corp.*, 140 Wn.2d 568, 584, 990 P.2d 305 (2000) (“[I]t was not necessary for [plaintiff] to actually read the agreement in order to be bound by it.”); *First Nat. Exchange Bank of Va. v. Johnson*, 355 S.E.2d 326, 330 (Va. 1987) (“[A]n individual having the capacity to understand a written document who signs it after reading it, or who signs it without reading it, is bound by the signature.”).

B. The License Agreement Is Enforceable

The trial court also did not err in rejecting West’s consideration argument.⁴

⁴ On appeal, West characterizes the License Agreement as a “modification” of an existing agreement (the purchase order), rather than characterizing it as a “new agreement” as it did below. *Compare* AB at 14 to CP 52 (West’s brief in opposition to venue motion at 5). In any event, West’s argument for why the “modification” or “new agreement” is

In its reply brief responding to West’s argument to the trial court that the License Agreement lacked “new” consideration, Deltek cited numerous on-point precedents involving the purchase and installation of software, all of which hold that the purchase of software is generally subject to terms that are provided at a later date, **and the terms are accepted by use or installation of the software**. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996) (holding license terms are binding where notice of the license is on the outside of the box, terms are inside, and there is a right to return the software for a refund if the terms are unacceptable); *I.Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 338 (D. Mass. 2002) (“‘Money now, terms later’ is a practical way to form contracts, especially with purchasers of software. If *ProCD* was correct to enforce a shrinkwrap license agreement, where any assent is implicit, then it must also be correct to enforce a clickwrap license agreement, where the assent is explicit.”); *Meridian Project Sys., Inc. v. Hardin Constr. Co.*, 426 F. Supp. 2d 1101 (E.D. Ca. 2006) (holding that license agreement was not invalid merely because defendant purchased the software and then later received the terms of the license

supposedly invalid is the same – alleged lack of consideration. Compare AB at 14 to CP 52.

agreement; defendant had notice of the license agreement and had an opportunity to return the software).⁵

These precedents are directly on-point and should guide the Court in affirming the trial court's decision.⁶ As in *ProCD* and other on-point precedents, West was on notice at the time of its purchase that the software would be subject to a license; the purchase order between A&E Systems and West expressly notes that West's purchase was for a *license* to use the software. See CP 22 [Complaint Ex. E]. Furthermore, the purchase order gave West notice that Deltek, Inc. would propose terms governing warranties for the software. See CP 22 [Complaint Ex. E] ("Any warranties for the Deltek, Inc. software will be given directly by Deltek, Inc...."). West chose not to return the software for a full refund,⁷ **and** West explicitly assented to the terms of the License Agreement. Under *ProCD* and its progeny, the License Agreement is valid and enforceable.

⁵ Deltek also notes that West is familiar with this method of contracting. West had purchased and installed other Deltek software prior to installation of the DVS software at issue here. See CP 5 [Complaint ¶ 3.6] (regarding West's purchase of interim upgrade to MS SQL software).

⁶ See also *Doe v. Project Fair Bid Inc.*, No. C11-809 MJP, 2011 WL 3516073, *4 (W.D. Wash. Aug. 11, 2011) (rejecting plaintiff's arguments against enforceability of clickwrap agreement on internet site, stating "this kind of 'clickwrap' agreement has been upheld in several cases in this circuit and elsewhere."); *Timberline Software Corp.*, 140 Wn.2d at 583-84 (following other courts in upholding shrinkwrap agreements and finding terms of license were part of contract and that buyer's use of software constituted assent).

⁷ See CP 219 [License Agreement] ("IMPORTANT – READ CAREFULLY....IF YOU DO NOT INSTALL, COPY OR USE THE SOFTWARE; YOU MAY RETURN IT TO YOUR PLACE OF PURCHASE FOR A FULL REFUND, IF APPLICABLE.")

On appeal, West does not cite any authority to support its argument that the trial court was “erroneously swayed” by these compelling authorities. Indeed, West acknowledges “the policy of enforcing ‘click-wrap’ agreements” [AB at 2] and admits “the tendency of courts to enforce ‘click-wrap’ agreements.” AB at 20. Other than wishing that the settled body of law were different, West offers this Court nothing. West simply fails to distinguish this case from the long line of decisions enforcing such agreements.

West still would not prevail even if the Court were to ignore the on-point authority and hold that the License Agreement required new consideration to be valid. The License Agreement sets forth sufficient *additional* obligations on the part of Deltek, Inc. which are not included in the purchase order between A&E and West (to which Deltek was not a party), including express warranties and Deltek’s duties to defend, indemnify and hold West harmless from infringement actions. *See* CP 220-21 [License Agreement §§ 8, 10]. These obligations plainly constitute additional consideration, and West does not argue otherwise. The trial court did not err in holding the License Agreement enforceable.

C. Venue Provision Is Enforceable

The trial court also did not err in rejecting West’s argument that the court should not enforce the venue provision because it supposedly

would somehow prohibit West from bringing a CPA claim in Virginia. West, in response to Deltek's venue motion, cited *Dix v. ICT Group, Inc.*, 125 Wn. App. 929, 106 P.3d 841 (2005), *aff'd*, 160 Wn.2d 826 (2007), to argue that the forum clause should not be enforced because West and other "persons" would not be able to bring a Washington CPA claim in Virginia. CP 52-53. West's argument was properly rejected by the trial court, for numerous reasons.

West's argument is based on an erroneous interpretation of *Dix* and is inapposite to this lawsuit. The plaintiffs in *Dix* had filed a class action in Washington and argued that the forum selection clause providing for venue in Virginia violated Washington public policy because class action lawsuits were not available in Virginia. *Dix*, 125 Wn. App. at 844. Because the amount of damages suffered by each individual was less than \$250, consumers had little incentive to bring individual Washington CPA claims in Virginia, thereby implicating the Washington CPA's public policy of protecting citizens from unfair and deceptive business practices. *Id.* at 844-45. Unlike in *Dix*, West has not sought to bring its claims on a class-wide basis, but has chosen to assert claims solely on its own behalf. Therefore, Virginia's lack of a class-action procedure is irrelevant and does not impair West's ability to bring a claim. Furthermore, West is seeking \$119,544 in damages. *See* CP 9 [Complaint]. Any similarly

situated plaintiffs with similar damages would not require a class action to bring their claims.

On appeal, West now argues that it is time-barred from bringing a CPA claim in Virginia. AB at 18. West did not raise this argument before the trial court, and therefore this Court should not consider this new argument. RAP 2.5(a).⁸ Even if it had been timely made, this argument misses the point. If, as West now posits, Virginia law has a shorter statute of limitation for a Virginia CPA claim, that is no basis for rejecting a *venue* clause, which was the sole subject of the dismissal motion on which Deltek prevailed. West simply did not oppose Deltek's *venue* motion on *choice-of-law* grounds. In addition, if it is true that Virginia law has a shorter statute of limitation, and if West cannot now file a CPA claim in Virginia, West has no one but itself to blame for not timely filing a claim in Virginia in accordance with the governing venue clause. West is a sophisticated business with hundreds of customers. CP 49. Neither courts nor statutes of limitation are manipulable to provide extended claim periods for business litigants who sit on their rights. There is no inherent

⁸ In his declaration improperly filed 1½ years after the trial court ruled on the venue motion, plaintiff's lawyer makes a cryptic statement that, "It was determined [by whom?] that Virginia law barred Plaintiff's Consumer Protection Act claim . . ." CP 158 at ¶ 4. That cryptic statement regarding a *choice-of-law* question, even if it had been timely made to the trial court 1½ years previously in conjunction with the *venue* motion, would not be sufficient to form a cognizable argument against enforcement of the *venue* clause. In any event, the "argument" made 1½ years too late should have been stricken by the trial court, as explained in Section V of this brief.

defect in a consumer protection act that requires a business to sue another business in a period shorter than four years. Last, West's argument fails because the License Agreement contains a severability clause. CP 222 [License Agreement § 16]. Thus, even if the choice of law provision were unenforceable for public policy reasons, the venue provision would remain enforceable.

West also argues on appeal that the venue provision should not be enforced because pursuing its claims against Deltek in Virginia would be "cost prohibitive." Again, West did not raise this argument before the trial court when opposing Deltek's venue motion, and therefore this Court should not consider this new argument. RAP 2.5(a). The first time West raised this argument was *more than a year and a half after* the trial court's May 25, 2010 Order, when it improperly attempted to introduce new evidence in response to Deltek's Notice of Presentation of Judgment on January 3, 2012 (which Deltek then moved to strike and which is the subject of Deltek's cross-appeal addressed in Section V of this brief). Even if the Court considers this argument, and considers the improperly introduced testimony in support of this argument, such evidence is plainly insufficient to bar enforcement of the venue provision. West provided no evidence other than its counsel's conclusory statement that pursuing claims in Virginia would be "cost prohibitive." West provided no

evidence regarding the estimated costs of litigating in Virginia as opposed to Washington, no evidence of its financial circumstances⁹ or other evidence tending to show that it could not afford to pursue its claims in Virginia courts. *See Spradlin v. Lear Siegler Management Servs. Co.*, 926 F.2d 865, 869 (9th Cir. 1991) (noting appellant failed to provide any evidence of inconvenience he would suffer in being forced to litigate in Saudi Arabia, including any specific allegations as to travel costs or financial ability to bear such costs and inconvenience); *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 308, 103 P.3d 753 (2004) (rejecting appellants' "cost-prohibitive" argument; appellant had provided no specific information to the trial court about why bringing claims in arbitral forum would be cost prohibitive).

D. Venue Provision In License Agreement Controls

The trial court also did not err in holding that the venue provision in the Licensing Agreement governs West's claims against Deltek. Before the trial court, West argued that the venue provision in the purchase order between A&E Systems (Deltek's re-seller) and West also binds Deltek because Deltek and A&E Systems are allegedly "partners," and that

⁹ Evidence of costs and financial circumstances is particularly relevant where, as here, the party is not an individual but a sophisticated business. *See* CP 49 [West's Response to Deltek's Motion to Dismiss] ("WEST is an environmental engineering firm whose primary customers are federal, state and local governmental agencies. WEST has over 200 clients, mostly in the Western states.").

Deltek should therefore be required to defend against West's claims in Washington. This Court should reject West's argument for two reasons.

First, West's partnership arguments miss the point, and this Court need not determine whether a partnership existed between A&E Systems and Deltek in order to affirm the trial court's May 25, 2010 Order. Even if Deltek were to be considered a party to the purchase order (through a supposed partnership relationship with A&E Systems or otherwise), all of West's claims against Deltek arise under the License Agreement, not under the purchase order. Indeed, West appropriately did not dispute below (and thus cannot dispute here) Deltek's argument that "[a]ll of plaintiff's claims against Deltek relate in whole or in part to the License Agreement, and in particular, the warranties and disclaimers provided in the License Agreement." CP 37 (Motion to Dismiss for Improper Venue, at 3:13-15). The gravamen of West's complaint is that because the DVS software was not useful or otherwise fit for West's particular purpose, Deltek breached implied warranties of merchantability and fitness for a particular purpose. *See* CP 6 – 8 (Complaint ¶¶ 3.9, 3.11, 3.13, 3.14). The purchase order between A&E and West clearly provides that A&E Systems provides no express warranties regarding the DVS software and expressly disclaims any implied warranties. CP 22 (Complaint Ex. E). The purchase order further states: "Any warranties for the Deltek, Inc.

software will be given directly by Deltek, Inc. to the client, and the client will look solely to Deltek, Inc. in regard to such warranties.” *Id.* Thus, West was always explicitly on notice that warranty/quality issues would be governed by a separate agreement with Deltek, Inc. The License Agreement governs West’s use of the software and sets forth certain express warranties regarding the DVS software’s performance and limitations of warranties. *See, e.g.*, CP 220 – 221 [License Agreement § 8 (Warranty); § 9 (Disclaimer of Warranties)]. The License Agreement also contains a limitation of liability provision regarding “any loss or damages arising out of, resulting from or in connection with...(ii) the use or performance of the Software.” *See* CP 222 [License Agreement § 13]. West’s claims against Deltek clearly arise under the License Agreement with Deltek, Inc., not the purchase order. Therefore, even if Deltek were to be considered a party to the purchase order, the venue clause in the License Agreement governs West’s claims.

Second, although the Court need not decide this issue, Deltek was clearly not a party to the purchase order between A&E and West. *See* CP 22 (Complaint Ex. E) (“Licensee hereby agrees to purchase *from A&E Systems* [sic] a license to use the software application...”)(emphasis added). Nor did West adequately show that Deltek was a party to the purchase order through an alleged “partnership” between A&E Systems

and Deltek. “The burden of proving the existence of a partnership rests on the party alleging it and its existence depends on the intention of the parties and the totality of the circumstances.” *Curley Elec., Inc. v. Bills*, 130 Wn. App. 114, 116, 121 P.3d 106 (2005). Before the trial court below, Deltek and A&E Systems both expressly denied the existence of a partnership between Deltek and A&E Systems. CP 26 (Answer of A&E Systems ¶ 1.7) (denying West’s allegation that “Deltek Partners” is a partnership comprised of Deltek, Inc. and A&E Systems); CP 72 (Deltek’s reply in support of venue motion at 4:17). On appeal, West cites cases describing factors that would tend to indicate the existence of a partnership, such as a partnership agreement, sharing of profits, shared property, shared decision-making, or conduct “inconsistent with any other theory.”¹⁰ But West failed to present to the trial court any evidence of any partnership agreement, shared profits, shared decision-making, shared property, or conduct that could only lead a person to conclude the existence of a partnership. The documents that West references to support its partnership allegations (and purported partnership allegations) instead show that A&E Systems is a *re-seller* of licenses to Deltek’s software. West also did not present evidence, argue, or even allege in its Complaint

¹⁰ See AB at 9-10 (citing *In re Thornton’s Estate*, 81 Wn.2d 72, 499 P.2d 864 (1972); *Kintz v. Read*, 28 Wn. App. 731, 626 P.2d 52 (1981)).

that it purchased the DVS software from A&E Systems in reliance upon any representations of a purported partnership relationship. See RCW 25.05.135 (“purported partner is liable...if that person, *relying on the representation*, enters into a transaction with the...purported partnership”; “purported partner is an agent of persons consenting to the representation to bind them....with respect to persons who enter into transactions *in reliance upon the representation*”).

The Court should therefore affirm the trial court’s May 25, 2010 Order dismissing West’s claims against Deltek for improper venue.

E. The Court Should Affirm The Trial Court’s Award of Fees and Costs

The trial court awarded certain of Deltek’s requested fees and costs. CP 121-122. West does not, on appeal, contend that the amount of such award is unreasonable or improperly calculated.¹¹ West’s only argument in support of its assignment of error regarding the award of fees and costs to Deltek is that the trial court incorrectly granted Deltek’s venue motion. AB at 19-20. Because the Court should affirm the trial court’s May 25, 2010 Order dismissing West’s claims against Deltek for improper venue, the Court should likewise affirm the June 14, 2010 Order granting fees and costs.

¹¹ The trial court awarded Deltek \$14,343.23 of the requested \$27,250.18 of fees and costs.

F. The Court Should Award Deltek Fees And Costs Incurred In Defending This Appeal

Deltek respectfully requests that the Court award Deltek attorneys' fees and costs incurred in defending this appeal pursuant to RAP 18.1 and RCW 4.28.185(5).¹² Washington courts have held that a prevailing party under RCW 4.28.185(5) is entitled to fees on appeal. *See, e.g., Voicelink Data Services, Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 937 P.2d 1158 (1997) (awarding defendant/respondent attorneys' fees on appeal pursuant to RCW 4.28.185(5) and RAP 18.1). The purpose of the statute is to "compensate a foreign defendant for the added costs of litigating in Washington." *See Payne v. Saberhagen Holdings, Inc.*, 147 Wn. App. 17, 36, 190 P.3d 102 (2008)(awarding attorneys' fees on appeal under RAP 18.1 and RCW 4.28.185(5)). Deltek would not have been compelled to expend costs and attorneys' fees to defend this appeal if West had brought suit in Virginia pursuant to the venue provision. Deltek thus respectfully requests the Court award Deltek attorneys' fees and costs incurred in defending this appeal pursuant to RAP 18.1 and RCW 4.28.185(5).

¹² West does not dispute that Deltek, Inc., Deltek Systems, Inc., Deltek Corp., Deltek Services, Inc., and Deltek Partners were personally served with the Complaint in Delaware under Washington's long-arm statute. CP 79 [Deltek's fees motion at 1].

V. ARGUMENT PART 2: TRIAL COURT IMPROPERLY DENIED DELTEK'S MOTION TO STRIKE

A year and a half after the trial court dismissed West's claims against Deltek for improper venue, West attempted to introduce new evidence in the Declaration of Richard D. Seward (attached to West's opposition to the Notice of Presentation of Judgment) to support new, untimely arguments for why the venue provision in the License Agreement should not be enforced—that pursuing the claims in Virginia would be “cost prohibitive” for West and that the Virginia statute of limitation for a CPA claim is supposedly shorter than in Washington. CP 157-158; CP 172-173. On January 4, 2012, Deltek, separately from its reply in support of the Notice of Presentation of Judgment, filed a motion to strike paragraphs 4-6 of Mr. Seward's declaration. CP 246-249. West did not oppose Deltek's motion to strike.

The trial court incorrectly denied Deltek, Inc.'s Motion to Strike the Declaration of Richard D. Seward. The trial court, perhaps erroneously believing that Deltek filed a motion to strike *instead* of a reply brief in support of the Notice of Presentation of Judgment to respond to West's arguments, stated in its January 24, 2012 order: “This is not the proper remedy for arguing the Court should not consider Mr. Seward's argument on entry of judgment.” CP 261. That posited reason for the trial court's erroneous denial of Deltek's strike motion is speculation; the trial

court gave no reason whatsoever for its erroneous ruling, stating that “I don’t think it matters.” [RP 6]

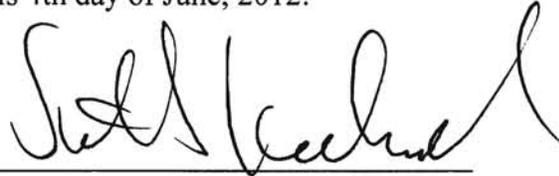
First, Deltek did separately respond to Mr. Seward’s arguments in its reply brief in support of the Notice of Presentation of Judgment. CP 160-164. Second, there is no reason West could not have introduced such evidence 1½ years previously, when the parties briefed Deltek’s venue motion. In contravention of CR 59 and CR 60, West offered no reason to the trial court for why it failed to timely raise those arguments 1½ years previously. Third, West waited one and a half years after the record was closed before proffering this evidence, well past the maximum time for seeking reconsideration under CR 59 or CR 60. Under CR 59(a)(4) and (b), West had 10 days after entry of the May 25, 2010 Order to offer “[n]ewly discovered evidence . . . which he could not with reasonable diligence have discovered and produced.” Under CR 60(b), the maximum time to offer “[n]ewly discovered evidence which by due diligence would not have been discovered” is “1 year after the . . . order . . . was entered.” West’s proffer was untimely under the most lenient standard. Fourth, West did not oppose Deltek’s motion to strike, essentially conceding the issue.

The trial court thus erred in denying Deltek’s motion to strike, and the January 24, 2012 order should be reversed.

VI. CONCLUSION

The May 25, 2010 Order dismissing West's claims against Deltek and the June 14, 2010 Order granting Deltek certain fees and costs should be affirmed, and the January 24, 2012 Order denying Deltek's motion to strike should be reversed. For all of the above reasons, the Court should also award Deltek attorneys' fees and costs incurred in defending this appeal, pursuant to RAP 18.1 and RCW 4.28.185(5).

Respectfully submitted this 4th day of June, 2012.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing, Brief of Respondents/Cross-Appellants Deltek, Inc. and, to the extent they exist, "Deltek Services, Inc.," "Deltek Systems, Inc.," "Deltek Corp.," and "Deltek Partners", was caused to be served on the following:

Richard D. Seward Law Offices of Richard D. Seward, P.C. 6610 Gleneagle Avenue SW Port Orchard, WA 98367 <i>Attorneys for appellant</i>	<input checked="" type="checkbox"/> Via Hand Delivery (on 6/5/12) <input type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Email (on 6/4/12)
Robert C. Kelley Oseran, Hahn, Spring, Straight & Watts, P.S. 10900 NE Fourth Street, Suite 1430 Bellevue, WA 98004 <i>Attorneys for respondents Carolyn E. Davis, dba Advanced Enterprise Systems and A&E Systems</i>	<input checked="" type="checkbox"/> Via Hand Delivery (on 6/5/12) <input type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Email (on 6/4/12)

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 4th day of June, 2012.


Patsy Howson