

FILED

JAN 13 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

CASE NO. 316670-III

COURT OF APPEALS, STATE OF WASHINGTON,
DIVISION III

GB AUCTIONS, INC., a Washington corporation,

Plaintiff/Respondent,

vs.

PRIVATE LEDGER, INC., a Nebraska corporation,

Defendant/Appellant,

APPELLANT'S REPLY BRIEF

Gregory J. Arpin, WSBA # 2746
Shamus T. O'Doherty, WSBA #43082
PAINE HAMBLEN LLP
717 West Sprague Avenue, Suite 1200
Spokane, Washington 99201
Telephone: (509) 455-6000
Facsimile: (509) 838-0007
Attorneys for Appellant,
Private Ledger, Inc.

TABLE OF CONTENTS

I.	LEGAL ARGUMENT IN REPLY	1
	A. GB Auctions' Removal of the Aircraft from the Market Constitutes Early Termination of the Agreement.....	2
	B. GB Auctions' Refusal to Pay its Obligation Owed was a Breach of the Agreement which caused PLI to Incur Damages in the Liquidated Amount of \$57,000	11
	C. Contractual Attorney Fees are Not Available Under the Contract	17
II.	CONCLUSION	19

TABLE OF AUTHORITIES

Case Law

<i>Brower Co. v. Garrison</i> , 2 Wn. App. 424, 468 P.2d 469 (1970)	13,14
<i>Erwin v. Cotter Health Centers</i> , 167 P.3d 1112, 167 P.3d 1112 (2007).....	17,18
<i>Hulbert, Jr. and Hulbert Revocable Living Trust v. Port of Everett</i> , 159 Wash. App. 389, 245 P.3d 779 (Div. 1 2011).....	3,
<i>In re Det. of Ambers</i> , 160 Wn.2d 543, 158 P.3d 1144, 1151 (2007)	13
<i>Kammerer v. Western Gear Corp.</i> , 96 Wash. 2d 416, 635 P.2d 708 (1981).....	18
<i>Mithoug v. Apollo Radio of Spokane</i> , 128 Wn.2d 460, 909 P.2d 291 (1996)	12
<i>Multicare Medical Center v. State, Dept. of Social and Health Services</i> , 114 Wash. 2d 572, 790 P.2d 124 (1990)	3
<i>Schnall v. AT & T Wireless Services, Inc.</i> , 171 Wash. 2d 260, 259 P.3d 129 (2011).....	18
<i>Smith v. Shannon</i> , 100 Wn.2d 26, 666 P.2d 351 (1983)	12
<i>Stewart v. Bennett</i> , 273 Neb. 17, 727 N.W.2d 424, 429 (2007).....	18, 19
<i>Underwood v. Sterner</i> , 63 Wn. 2d 360, 387 P.2d 366 (1963)	14
<i>Wallace Real Estate v. Groves</i> , 124 Wash. 2d 881, 881 P.2d 1010 (1994).....	14,15
.....	17

<i>Walter Implement, Inc. v. Focht</i> , 107 Wn.2d 553, 730 P.2d 1340 (1987)	13,14
<i>Washington Fed'n of State Employees v. Office of Fin. Mgmt.</i> , 121 Wn.2d 152, 849 P.2d 1201(1993)	12
<i>Wise v. United States</i> , 249 U.S. 361 (1919)	14

Statutes

RCW 4.84.330.....	18
-------------------	----

Rules

RAP 9.12	12,13,
.....	17

I. LEGAL ARGUMENT IN REPLY

In its Response, Respondent, GB Auctions, Inc. ("GB Auctions"), fails to address the single legal issue in this case, whether its email instructions to remove the aircraft from the market constitute early termination of the Aircraft Sale and Listing Agreement ("Agreement") with Appellant, Private Ledger, Inc. ("PLI"). If early termination occurred, the Agreement unambiguously creates an obligation for GB Auctions to pay PLI the liquidated amount of \$57,000.00 which it refused to do.

In its Response, GB Auctions attempts to justify its early termination by alleging that it instructed PLI to remove the aircraft from the market because PLI had made it clear that the aircraft would not sell at the listed price. As detailed below in section A, such contrived justification is not only factually inaccurate, but more importantly irrelevant. The reason behind GB Auctions' removal of the aircraft from the market is heavily disputed; however, it is undisputed that GB Auctions instructed PLI to remove the aircraft from the market only weeks into the third term of the Agreement. GB Auctions' undisputed actions are relevant, its contrived reasoning for such actions is not.

Now, for the first time, GB Auctions argues that, even if it terminated the Agreement early, the causation element of a breach of

contract claim restricts PLI from recovering damages because PLI allegedly failed to establish it would have presented a valid offer "but for" the early termination. As detailed below in Section B, the GB Auctions' causation argument is legally inaccurate, factually flawed, and improperly presented at this stage of the proceeding. Such argument should be denied on consideration.

For these reasons, as well as those stated in its initial brief, PLI requests the Court of Appeals to reverse the Trial Court's Order Granting Plaintiff's Motion for Declaratory Judgment and to direct judgment in favor of PLI for its breach of contract claim, or, in the alternative, to vacate the Order Granting Plaintiff's Motion for Declaratory Judgment and to remand the case for further proceedings.

A. GB Auctions' Removal of the Aircraft from the Market Constitutes Early Termination of the Agreement.

1. Multiple E-Mail Communications From GB Auctions Establish Objective Evidence of Early Termination of the Agreement.

GB Auctions contends that PLI relies entirely upon subjective evidence to establish early termination of the Agreement; however, GB Auctions' early termination is established by its own written email communications, clearly objective evidence. See, Respondent's Brief, pgs. 1, 10-13; CP 83; 91; 94. On August 29, 2011, GB Auctions stated "the decision now is to pull the airplane from the market." CP 83. It follows up

the next day with an email explaining the reason for removing the aircraft from the market was due to Mr. McConkey's inability to work out a partnership agreement to purchase a replacement aircraft. See, CP 91. Then on September 20, 2011, GB Auctions confirms the termination by stating "don't think we are interested in selling at this time at all." CP 94. These objective written communications, all of which occurred within the third term of the Agreement, establish GB Auctions' early termination of the Agreement.

2. Alleged Price Adjustment Requests Played No Role in GB Auctions' Early Termination.

GB Auctions does not dispute that it instructed PLI to remove its aircraft from the market at the beginning of the third term of the Agreement. Rather, GB Auctions attempts to justify its early termination of the Agreement as an intended kind gesture to PLI, who had allegedly made it clear it could not sell the aircraft at the list price by requesting the price be lowered on numerous occasions. Respondent's Brief pgs. 6-7.

GB Auctions' justification is irrelevant to the true issue, whether early termination occurred. When interpreting a contract, the subjective intention of the parties is irrelevant. See, *Hulbert, Jr. and Hulbert Revocable Living Trust v. Port of Everett*, 159 Wash. App. 389, 245 P.3d 779 (Div. 1 2011); *Multicare Medical Center v. State, Dept. of Social and*

Health Services, 114 Wash. 2d 572, 790 P.2d 124 (1990). The Agreement does not differentiate between justified and unjustified early termination. It simply indicates "early termination of this agreement will trigger the sales commission due at asking price." CP 109. GB Auctions' attempted subjective justification is irrelevant and plays no role in determining whether early termination occurred.

Furthermore, if considered it must be noted, **no price adjustment was ever requested by PLI from the execution of the Agreement to the date of GB Auctions' early termination.** See, CP 83, 89, 91-92. PLI never indicated a lower price would be needed to obtain an offer. PLI did state in written correspondence that the aircraft was correctly placed in the market and receiving increased inquiries; however, the lack of requested maintenance documents gave the appearance of a neglected aircraft and materially limited the ability of PLI to successfully respond to inquiries. See, CP 89.

GB Auctions' alleged justification is reliant upon unsubstantiated, self-serving affidavits of Mr. McConkey, its CEO, and his pilot, Mr. Muelheim. CP 127-129, 160. Correspondence between the parties during the relevant time period was conducted almost entirely by e-mail; however, not a single e-mail exists showing, or even referencing, a request from PLI for a price adjustment during the relevant time period.

On two occasions PLI mentioned a price adjustment, once weeks before execution of the Agreement, and once after GB Auctions' early termination. CP 95; 134-135. Prior to execution of the Agreement, PLI mentioned a potential initial asking price of 2.1 million, but in the same email indicated that 1.9 million was what the data suggested as the proper asking price. CP 134. Then, less than six hours later, PLI sent a second email indicating, 1.9 million was the appropriate asking price. CP 135. These emails were hours apart, weeks prior to execution of the Agreement, and completely unrelated to GB Auctions' early termination.

After GB Auctions' early termination of the Agreement, PLI did attempt to convince GB Auctions to remarket the aircraft believing the aircraft was very likely to sell with the proper maintenance documentation and a minor price adjustment, which was less than the devaluation which had occurred from additional miles flown on the aircraft. CP 95. The response received from GB Auctions on September 20, 2011 was "don't think we are interested in selling at this time at all." CP 94.

The dates of these two correspondence establish that neither is related in any way to GB Auctions' early termination. One occurred before the Agreement was executed and the other occurred after GB Auctions removed the aircraft from the market. However, those are the documents GB Auctions relies upon to establish that PLI was continuously indicating

the price had to be lowered because the aircraft could not be sold at \$1.9 million. There is no evidence, other than self serving declarations, that PLI was incapable of obtaining a valid offer at the list price. To the contrary, the language of PLI's August 25, 2011 email indicates "inquiries had increased" and the aircraft had "moved to the front of the line (or very close)," but that maintenance documents were required to move forward. CP 89.

GB Auctions' justification for its early termination is irrelevant, the relevant undisputed fact is that it did terminate the Agreement early by instructing PLI to remove the aircraft from the market. Furthermore, if considered, GB Auctions' justification is a self serving story contrived after the fact in an attempt to avoid liability which is not substantiated by the parties' written correspondence. As indicated by its own pilot, GB Auctions' reason for terminating the Agreement at the end of August 2011 was due to disagreements with its aircraft purchase partner. See, CP 91.

3. Both Parties Took Actions Consistent With a Belief that GB Auctions had Terminated the Agreement Early.

Contrary to GB Auctions' portrayal of the facts, both parties acted as though the Agreement had been terminated following GB Auctions

August 29, 2011 email. See, Respondent's Brief p. 15.¹ The documented actions of the parties fail to support GB Auctions' aggressive allegation that PLI disingenuously, after-the-fact contrived early termination to obtain an unearned commission. See, Respondent's Brief pgs. 15-16.² GB Auctions states "PLI continued to market the aircraft for more than two months after the purported early termination." Respondent's Brief p. 15. However, PLI sent the early termination invoices less than two months from the first instruction to remove the aircraft from the market, which terminated the Agreement. See, CP 83, 148-149.

The factual inaccuracies throughout Respondent's Brief are attempts to mislead the Court from understanding how the parties truly acted following GB Auctions' instruction to remove the aircraft from the market. The following facts show the parties acted as though the Agreement had been terminated.

a. GB Auctions Failed to Provided Required Maintenance Document in Response to PLI's Multiple Requests for Such.

PLI did dismiss its separate breach of contract claim for failure to provide maintenance documents for procedural reasons following the trial

¹ As Respondent does throughout its brief, here it cites disputed facts incorrectly as undisputed facts, as detailed in this section, it is heavily disputed whether PLI acted as though the Agreement was in full effect throughout September and into October (August is irrelevant as GB Auctions did not terminate the Agreement until August 29th)

² It is difficult to determine how Respondent calculates August 29th through September 20th as five weeks.

court's ruling. However, in its dismissal, PLI did not stipulate to any facts surrounding the maintenance documents. The dismissal was done solely so this appeal regarding the early termination could proceed as a matter of right. Such dismissal does not preclude PLI from establishing facts related to the lack of maintenance documents when those facts are relevant to its claim for early termination damages. See, Respondent's Brief p. 1, n. 1.

Pursuant to the Agreement, GB Auctions was required to provide maintenance documents for the aircraft. CP 109. The most important characteristics for establishing an aircrafts' value within a model year are a reputable maintenance history, time in service, and damage history. CP 68, 70. Current maintenance documents, specifically log books, as the legal representation of these characteristics, are critical to the sale effort. CP 70. Maintenance documents and aircraft are sold as a package, the substantive value of one is predicated on the existence and completeness of the other. See, CP 109. An aircraft without logbooks is no longer the same aircraft, which is why the Agreement requires the delivery of both. See, CP 109.

On August 25, 2011, PLI sent an email stating that interest in the Aircraft was increasing and PLI needed the current maintenance documents, which had been requested on previous occasions CP 70, 89. In response to this request for maintenance documents, GB Auctions stated "the decision now is to pull the airplane from the market." CP 83.

Following its decision to "pull the airplane from the market," GB Auctions provided no maintenance documents to PLI. CP 70.

Now, GB Auctions attempts to blame PLI for not presenting a valid offer, alleging proof of a valid offer as the only way PLI could obtain a commission. See, Respondents Brief pgs. 5-7:16-20. However, it is difficult to understand how PLI could present a valid offer from a potential purchaser when GB Auctions failed to provide the maintenance documents which are essential information any potential purchaser would review before making an offer. See, CP 68, 70. Furthermore, GB Auctions knew the critical importance of current maintenance documents to any aircraft sale as it has its own pilot, Mr. Muelheim who was intimately involved with the listing. See CP 68, 150. GB Auctions' failure to provide maintenance documents following its removal of the aircraft from the market is consistent with a belief that the Agreement had been terminated.

b. PLI Immediately Ceased Incurring Future Marketing Costs.

The allegation of continued marketing by PLI was inappropriately raised for the first time in GB Auctions' Reply Memorandum. See, CP 120. For this reason PLI was unable to respond to this factual inaccuracy and it should not be considered.

Contrary to GB Auctions' portrayal of the facts, PLI ceased incurring all marketing costs following GB Auctions' early termination on August 29, 2011. A few advertisements automatically ran in September which had been prepaid for before GB Auctions' early termination on the last days of August. PLI contacted GB Auctions in September in an email titled "Pulling ads" in which it requested further guidance from GB Auctions as to whether it wished advertisements to continue. CP 146. Upon receiving no response, the advertisements were cancelled. PLI did continue to receive residual inquiries regarding the aircraft but in no way did it actively pursue any marketing efforts or incur any additional costs following the early termination. See, CP 148-149.

c. PLI Invoiced GB Auctions for the Liquidated Amount of \$57,000.

Prior to sending an invoice, PLI attempted to reinstate the broker-seller relationship on September 20, 2011. CP 95. The response received from GB Auctions clearly stated it had no interest in selling. CP 94. Therefore, PLI sent an invoice for the amount of \$57,000 on October 18, 2011, explaining the invoice amount was due to early termination because "removal from the market effectively cancels a sales agreement." CP 148-149. Had the Agreement not been terminated early, the third term was not set to end until approximately November 14, 2011. CP 72.

It is difficult to understand how GB Auctions can allege that PLI acted as though the Agreement was in full force during the third term given the undisputed fact that PLI sent an invoice due to the early termination approximately a month before the third term ended.

d. GB Auctions Contracted With a Third Party to Upgrade the Aircraft.

On October 28, 2011, GB Auctions entered into a contract with Elliot Aviations for a complete avionics upgrade to the aircraft, and on that same day made a non refundable initial deposit payment of \$81,000. CP 72, 97-107. A complete avionics upgrade would only be conducted by GB Auctions if it had no intent to sell the aircraft. CP 72. As stated above, if early termination had not occurred, the Agreement was in place until approximately November 14, 2011. CP 72. GB Auctions' agreement with a third party to have substantial upgrades conducted on the aircraft is consistent with its prior early termination of the Sale and Listing Agreement with PLI.

B. GB Auctions' Refusal to Pay its Obligation Owed was a Breach of the Agreement which caused PLI to Incur Damages in the Liquidated Amount of \$57,000.

For the first time on appeal, GB Auctions argues that PLI failed to sufficiently establish a *prima facie* case for breach of contract due to a lack of evidence of damages caused by GB Auctions' early termination. Respondent's Brief pgs. 16-20. The *prima facie* elements of a breach of

contract claim can be established through the undisputed facts available to this Court although they were not addressed by either party, or the trial court, in arguing and ruling upon the motion at issue. As detailed below, GB Auctions' causation argument fails to present grounds to uphold the trial court's ruling. Furthermore, sufficient undisputed facts exist to establish all elements of PLI's claim for breach of contract.

1. GB Auctions' Causation Argument Should Not Be Considered by the Appellate Court as it Was Not Addressed or Considered at the Trial Court Level.

A party may not raise a new argument on appeal that the party did not present to the trial court. *Smith v. Shannon*, 100 Wn.2d 26, 38, 666 P.2d 351 (1983); RAP 9.12 ("On review of an order granting or denying summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court"). While an appellate court may, outside the context of a summary judgment motion, address issues raised for the first time on appeal, they "are not bound to do so and usually refuse." *Smith v. Shannon*, 100 Wn.2d 26, 38, 666 P.2d 351 (1983). "The purpose of this limitation is to effectuate the rule that the appellate court engages in the same inquiry as the trial court." *Mithoug v. Apollo Radio of Spokane*, 128 Wn.2d 460, 462, 909 P.2d 291 (1996) (quoting *Washington Fed'n of State Employees v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 157, 849 P.2d 1201(1993)). In particular, an argument raised for the first time

on appeal should not be addressed where, as here, the opposing party does not have an opportunity to develop the record in order to defend against the new theory presented. *In re Det. of Ambers*, 160 Wn.2d 543, 557, n.6., 158 P.3d 1144, 1151 (2007).

GB Auctions' motion sought a declaratory ruling that it did not terminate the Agreement early and that no commission was owed to PLI. CP 43. The parties, and the trial court, agreed that the motion is procedurally identical to a summary judgment motion. See, Respondent's Brief, p. 10; RP 3. During the trial court proceedings, GB Auctions presented no briefing or argument regarding causation. Therefore, the Court is restricted from considering GB Auctions' causation argument on appeal if the motion is treated as a summary judgment. See, RAP 9.12.

Even if not considered a summary judgment motion, the Court should refuse to consider GB Auctions causation argument at this stage as it would prejudice PLI who has not had an opportunity to fully develop and present evidence regarding causation.

2. The Reasonable Liquidated Damages Agreed to Within the Unambiguous Agreement Forgo the Need to Establish Actual Damages.

A provision for liquidated damages will be upheld unless it is a penalty or otherwise unlawful. *Walter Implement, Inc. v. Focht*, 107 Wn.2d 553, 558, 730 P.2d 1340 (1987); *Brower Co. v. Garrison*, 2 Wn.

App. 424, 432, 468 P.2d 469 (1970). As is the case here, liquidated damage provisions fairly and understandingly entered into by experienced, equal parties with a view to just compensation for the anticipated loss should be enforced. See, *Walter Implement, Inc. v. Focht*, 107 Wn.2d. 553, 558, 730 P.2d 1340 (1987) (citing *Wise v. United States*, 249 U.S. 361 (1919)). "There is no reason why persons, competent and free to contract, may not agree upon this subject (liquidated damages) as fully as upon any other, or why their agreement when fairly and understandingly entered into with a view to just compensation for the anticipated loss, should not be enforced." *Brower Co. v. Garrison*, 2 Wn. App. 424, 435, 468 P.2d 469 (1970) (quoting *Underwood v. Sterner*, 63 Wn. 2d 360, 366, 387 P.2d 366 (1963)).

The liquidated damages amount is judged contemporaneously with contract formation and not at some later date. See, *Wallace Real Estate v. Groves*, 124 Wash. 2d 881, 881 P.2d 1010 (1994). "[P]roof of actual damages is not required as a prerequisite to upholding a liquidated damages clause." *Id.* at 892.

It is undisputed that on February 17, 2011, both parties met in person in Spokane, Washington, and carefully reviewed the Agreement addressing all relevant clauses. CP 68. Both parties were represented by "sophisticated businessmen." RP 5. Both parties had ample opportunity to

discuss, modify, or contest any portion of the Agreement, which totaled less than two pages. CP 68. The Agreement unambiguously states "early termination of this agreement will trigger the sales commission due at asking price." CP 109. The Agreement also provides for a sales commission of 3% and an asking price of "One Million Nine Hundred Thousand USD," equaling a total sales commission due at asking price of \$57,000. See, Id.

At the time of execution of the Agreement, a liquidated damages amount of \$57,000 for early termination was reasonable and directly related to the potential loss of a commission caused by early termination. Actual damages would be difficult to compute given the countless variables that play into market fluctuation and likelihood of potential offers. Therefore, the liquidated damages agreed to within the Agreement are legally enforceable and should be upheld.

Due to the existence of reasonable liquidated damages for GB Auctions' early termination, PLI is not required to prove actual damages to recover on its breach of contract claim. See, *Wallace Real Estate v. Groves*, 124 Wash. 2d 881, 881 P.2d 1010 (1994).

3. Lastly, If Given the Opportunity, PLI Could Easily Establish it was Materially Restricted from Obtaining a Valid Offer by GB Auctions' Removal of the Aircraft from the Market and Failure to Provide Maintenance Documents.

As detailed above, PLI was materially restricted from obtaining a valid offer by GB Auctions' refusal to provide maintenance documents and log books on the aircraft. See, Section 3. c., pgs. 7-9 above. Furthermore, PLI had been instructed to remove the aircraft from the market, receiving written confirmation that GB Auctions was not interested in selling the aircraft. See, CP 83-84, 91, 94-95. GB Auctions had also contracted to have the aircraft substantially upgraded. CP 72, 97-107. Due to GB Auctions actions, PLI was clearly restricted from providing the required documentation to potential purchasers and negotiate and valid offer.

Although PLI has not been given the opportunity to fully develop the record regarding its damages due to the improper timing of GB Auctions' argument, and further is not required to establish its actual damages due to the reasonable liquidated damage provision agreed to in the Agreement, the evidence in the record does establish that PLI was restricted from obtaining a valid offer due to GB Auctions' actions. For this additional reason, GB Auctions' causation argument should be refused consideration.

C. **Contractual Attorney Fees are Not Available Under the Contract.**

GB Auctions, for the first time, presents an argument that Washington law, rather than Nebraska law, should apply to the attorney fee provision of the Agreement. See, Respondent's Brief, pgs. 20-21. For the same reasons indicated above, GB Auctions' failure to present this argument at the trial court level for the trial court's consideration bars the appellate court from considering it. See, RAP 9.12; *Wallace Real Estate v. Groves*, 124 Wash. 2d 881, 881 P.2d 1010 (1994). Specifically, PLI briefed application of Nebraska law to the attorney fee issue in its Responsive Memorandum and GB Auctions chose not to mention it in its Reply Memorandum. See, CP 64-65; 119-126.

If the court chooses to consider GB Auction's argument regarding fees, the issue should be determined pursuant to Washington's choice of law analysis and not Nebraska's. The court must consult the law of the forum to determine whether a legal issue is substantive or procedural. See, *Erwin v. Cotter Health Centers*, 167 P.3d 1112, 1120-1121, 167 P.3d 1112 (2007). Washington courts do not engage in a choice of law analysis unless an actual conflict exists between the laws or interests of Washington and the laws or interests of another state. *Erwin v. Cotter Health Centers*, 167 P.3d 1112, 1120, 167 P.3d 1112 (2007). Such a

conflict exists when, “the result for a particular issue is different under the law of the two states.” *Erwin*, 167 P.3d at 1120. In this case a conflict exists because Washington law would allow for recovery of attorney fees to the prevailing party regardless of the unilateral nature of the attorney fee provision within the contract, but Nebraska would not allow either party to recover attorney fees. See, RCW 4.84.330; *Stewart v. Bennet*, 273 Neb. 17, 22, 727 N.W.2d 424, 429 (2007).

GB Auctions improperly cites to a Nebraska case to determine whether attorney fee awards are substantive or procedural in nature. Respondent's Brief pgs. 20-21. The determination of whether an item is procedural or substantive in nature must be conducted under the law of the forum state, in this instance Washington. See, *Erwin v. Cotter Health Centers*, 167 P.3d 1112, 1120-1121, 167 P.3d 1112 (2007). Pursuant to Washington law, the measure of damages in a case is a substantive issue and not a procedural issue. See, *Kammerer v. Western Gear Corp.*, 96 Wash. 2d 416, 635 P.2d 708 (1981). Because Washington law considers damage issues, which include attorney fee awards, as substantive, Nebraska law must be applied to the attorney fee provision within the Agreement. See, *Schnall v. AT & T Wireless Services, Inc.*, 171 Wash. 2d 260, 266-267, 259 P.3d 129 (2011) (Washington generally acceptance application of the law chosen by the parties within the contract). Nebraska

law does not enforce attorney fee provisions in contracts. See, CP 64-65 citing *Stewart v. Bennett*, 273 Neb. 17, 22, 727 N.W.2d 424, 429 (2007). Therefore, PLI contends that attorney fees are not available to the prevailing party.

However, assuming *arguendo* the Court disagrees and applies Washington law in interpreting the attorney fee provision of the Agreement, PLI requests its reasonable attorney fees if it is found to be the prevailing party.

Lastly, in performance of the Agreement, PLI incurred marketing expenses, travel expenses, and invested substantial amounts of employee time. See, CP 109. GB Auctions, on the other hand, made no payments of any kind pursuant to the Agreement. See, CP 80. In unambiguous language directly above the signature of GB Auctions' Vice President, the Agreement limits PLI's liability to any commission received. CP 110. The liability limitation within the Agreement provides additional grounds to disallow any attorney fee award against PLI as it has never received a commission payment from GB Auctions.

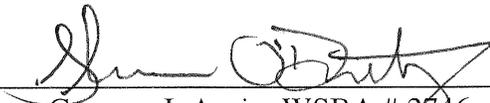
II. CONCLUSION

For the reasons presented herein and in Appellant's Brief, the trial court's Order Granting Plaintiff's Motion for Declaratory Judgment should be reversed on appeal and judgment should be directed in favor of PLI on

its breach of contract claim remanding the case to the trial court for determination of the amount of such judgment, or, alternatively, the matter should be remanded to the trial court for entry of an order denying the declaratory judgment motion.

RESPECTFULLY SUBMITTED this 13th day of January, 2014.

PAINE HAMBLÉN LLP

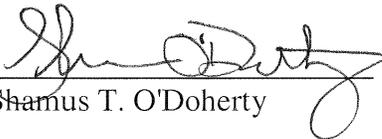
By: 
Gregory J. Arpin, WSBA # 2746
Shamus T. O'Doherty, WSBA #43082
Attorneys for Appellant Private Ledger, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January, 2014, I caused to be served a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF**, by the method indicated below and addressed to the following:

U.S. MAIL
 DELIVERED
 OVERNIGHT MAIL
 FACSIMILE

Timothy M. Lawlor
Michael D. Currin
Witherspoon Kelley
422 W. Riverside, Suite 1100
Spokane, WA 99201


Shamus T. O'Doherty