

FILED

DEC 13 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 316670 III

COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION III

GB AUCTIONS, INC., a Washington corporation,

Plaintiff/Respondent,

Vs.

PRIVATE LEDGER, INC., a Nebraska corporation,

Defendant/Appellant

RESPONDENT'S BRIEF

MICHAEL D. CURRIN, WSBA #14603
TIMOTHY M. LAWLOR, WSBA #16352
MATTEHW W. DALEY, WSBA #36711
WITHERSPOON KELLEY
422 West Riverside, Suite 1100
Spokane, Washington 99201
(509) 624-5265
mdc@witherspoonkelley.com
tml@witherspoonkelley.com
mwd@witherspoonkelley.com

Counsel for Respondent GB Auctions, Inc.

TABLE OF CONTENTS

I. INTRODUCTION & RELIEF REQUESTED	1
II. RESTATEMENT OF THE ISSUE PRESENTED	3
III. STATEMENT OF THE FACTS.....	4
A. GB and PLI Were Parties to a Written Listing Agreement that Ran for Automatically Renewing 90-Day Terms, and Pursuant to Which PLI Could Have Earned a \$57,000 Sales Commission	4
B. Despite Having Three 90-Day Terms to do so, PLI Produced NO Purchase Offers.	5
C. During the First Contract Term, PLI Was Already Requesting that GB Agree to a Reduced Sales Price.	6
D. By the Third Contract Term, it was Clear that the Airplane Would Not Sell for its List Price.	6
IV. STATEMENT OF CASE.....	8
V. ARGUMENT: The Trial Court Was Correct To Summarily Dismiss PLI's Counterclaim and to declare no commission due	10
A. This is a <i>De Novo</i> Appeal.	10
B. PLI Failed to Create a Triable Issue of Fact With Respect to its Claim for Breach.....	10
C. The Trial Court Was Correct to Hold that the Listing Agreement Expired at the End of its Third Term.....	13
D. PLI's Contention that GB Effected an Early Termination is Directly Contradicted by Undisputed Facts.....	14

1. <i>GB Did Not Terminate the Listing Agreement; GB Merely Let PLI Decide Whether to Market the Airplane.</i>	14
2. <i>PLI Continued to Market the Airplane for Two Months After the Purported Early Termination.</i>	15
E. Regardless of Any Other Issue, PLI's Inability to Present a Valid Purchase Offer Required PLI's Claim to be Summarily Dismissed.....	16
F. GB is Entitled to Attorneys' Fees on Appeal.	20
VI. CONCLUSION	21
CERTIFICATE OF SERVICE	1

TABLE OF AUTHORITIES

Cases

<i>Ballard v. Giltner Public School Dist. No. 2 Hamilton County</i> , 241 Neb. 970 (1992)	10, 18
<i>Berry v. Crown Cork & Seal Co., Inc.</i> , 103 Wn. App. 312 (2000)	16
<i>Brogan & Anensen LLC v. Lamphiear</i> , 165 Wn.2d 773 (2009)	13
<i>Bruning Seeding Co. v. McArdle Grading Co.</i> , 232 Neb. 181, (1989)	16, 20
<i>Building Industry Ass'n of Washington v. McCarthy</i> , 152 Wn. App. 720 (2009)	12
<i>Burmeister v. State Farm Ins. Co.</i> , 92 Wn. App. 359 (1998)	12
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).....	11
<i>Chadd v. Midwest Franchise Corp.</i> , 226 Neb. 502 (1987)	16, 20
<i>Felton v. Menan Starch Co.</i> , 66 Wn.2d 792 (1965)	19
<i>Fisher Props., Inc. v. Arden-Mayfair, Inc.</i> , 106 Wn.2d 826 (1986)	21
<i>Forest Marketing Enterprises, Inc. v. Dept. of Natural Resources</i> , 125 Wn. App. 126 (2005)	18
<i>Fred Steinheider and Sons, Inc. v. Iowa Kemper Ins. Co.</i> , 204 Neb. 156 (1979)	19
<i>Grimwood v. University of Puget Sound, Inc.</i> , 110 Wn.2d 355 (1988)	10

<i>Intel Corp. v. Hartford Accident & Indem. Co.</i> , 952 F.2d 1551 (9th Cir. 1991)	12
<i>Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC</i> , 139 Wn. App. 743 (2007)	11, 18
<i>Lueder Const. Co. v. Lincoln Elec. System</i> , 228 Neb. 707 (1988)	13
<i>Matsushita Elec. Indus. Co. v. Zenith Radio Corp.</i> , 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).....	12
<i>Nebraska Nutrients, Inc. v. Shepherd</i> , 261 Neb. 723 (2011)	20
<i>Peoples Mortg. Co. v. Vista View Builders</i> , 6 Wn. App. 744 (1972)	11, 18
<i>Sutton v. Killham</i> , 285 Neb. 1 (2013)	20
<i>TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc.</i> , 140 Wn. App. 191 (2007)	19
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn.2d 216, n.1 (1989)	11
Statutes	
RCW 4.84.330	21
Rules	
CR 56(e).....	12
RAP 18.1(a)	20

I. INTRODUCTION & RELIEF REQUESTED

G.B. Auctions, Inc. (hereinafter "GB") owned (and continues to own) a private airplane. GB became interested in selling the airplane and, therefore, entered into an Aircraft Sale and Listing Agreement (hereinafter the "Listing Agreement") with Private Ledger, Inc. (hereinafter "PLI"). Pursuant to the Listing Agreement, PLI endeavored to broker a sale of the aircraft.

PLI argues that GB deprived it of the ability to earn a \$57,000 sales commission by effecting an early termination of the Listing Agreement.¹ PLI's argument, however, suffers from two fatal flaws.

First, GB never terminated the Listing Agreement. More to the point, PLI failed to demonstrate an issue of fact regarding whether the Listing Agreement was terminated. PLI now purports a subjective belief that GB terminated the Listing Agreement. However, even assuming that the belief is genuinely held, it cannot create an issue of fact because it is directly contradicted by PLI's undisputed conduct. Despite now arguing that it had an unvoiced and unrecorded belief that GB terminated the Listing Agreement, PLI continued (for about three

¹ PLI's brief also alleges that GB failed to provide maintenance information regarding the aircraft. *See* Appellant's Brief, p. 6. However, PLI voluntarily dismissed its claim regarding this alleged failure to provide maintenance documents. Appellant's Memorandum of Finality, Appendix, pp. 9-14. PLI cannot, therefore, base any argument of the alleged failure to provide maintenance documents, and its efforts to do so should be disregarded.

months after the purported termination) to act as though the Listing Agreement was in full force and effect:

- PLI continued to market the airplane;
- PLI continued to pressure GB to lower the aircraft's list price;
- PLI continued to communicate with GB regarding its ongoing marketing efforts; and
- PLI did not raise the alleged termination until nearly three months after it is alleged to have occurred.

The trial court was correct to reject PLI's efforts to create issues of fact by contradicting its own undisputed conduct with claimed undisclosed mental impressions. Such self-serving contentions cannot create **genuine** issues of fact.

Second, even if PLI's termination argument was valid, no commission would be owed because PLI did not, and could not, present GB with a "valid" purchase offer.² PLI had approximately 300 days, under the Listing Agreement, to market and sell GB's aircraft. Yet, in that time, PLI did not present a single purchase offer to GB. Likewise, PLI did not come forward with any facts to demonstrate that its failure to procure a valid offer was somehow caused by GB's

² The Listing Agreement provided for PLI to earn a 3% sales commission if it presented GB with a "valid offer," which was defined as a purchase offer within 2% of the airplane's list price. If PLI provided such an offer, it earned a commission, even if GB rejected the offer. CP 28-9.

purported termination of the Listing Agreement. Without coming forward with facts, as would be admissible in evidence, demonstrating that but for GB's alleged breach, PLI would have earned a sales commission (*viz.*, performed its contractual obligations), PLI cannot, as a matter of law, recover damages.

PLI asks the Court to interpret the Listing Agreement to provide for a commission where none was earned. PLI's interpretation is inconsistent with the Listing Agreement, itself. And PLI's argument is inconsistent with the law. Reading the Listing Agreement as a whole, a sales commission cannot be separated from a purchase offer. Therefore, PLI's undisputed inability to procure any purchase offer – much less a valid purchase offer – requires the Court of Appeals to affirm the trial court's Order.

PLI failed to meet its summary judgment burden to make at a *prima facie* claim for breach of contract. The trial court was, therefore, correct to declare that no commission was due, and the trial court was correct to summarily dismiss PLI's counterclaim. GB, therefore, respectfully asks the Court of Appeals to affirm the trial court's Order in all respects.

II. RESTATEMENT OF THE ISSUE PRESENTED

The party alleging breach must demonstrate a contractual duty, that the duty was breached, and that, but for the breach, it would have performed its contractual obligations. PLI failed to make a *prima facie* showing that GB

breached the Listing Agreement (by terminating it or otherwise). PLI also failed to make a *prima facie* showing that it would have performed "but for" some alleged breach by GB. On that undisputed record, was the trial court correct to declare no commission due and to dismiss PLI's claim?

III. STATEMENT OF THE FACTS

A. GB AND PLI WERE PARTIES TO A WRITTEN LISTING AGREEMENT THAT RAN FOR AUTOMATICALLY RENEWING 90-DAY TERMS, AND PURSUANT TO WHICH PLI COULD HAVE EARNED A \$57,000 SALES COMMISSION.

On or about February 17, 2011, Greg Mahugh (Vice President for GB) executed the Listing Agreement. CP 24, 28-9. PLI prepared the Listing Agreement, which had an initial term of 90 days. CP 28-9, 134-35. The Listing Agreement also provided for an indefinite number of 90-day renewal terms. *Id.* The renewal terms were automatic, but renewal could be prevented by either party giving written notice. *Id.* The Listing Agreement required notice of non-renewal to be made no less than two weeks prior to the end of a contract term. *Id.*

Pursuant to the Listing Agreement, PLI was to market and sell GB's airplane. *Id.* The Listing Agreement set a price of \$1.9 million for the airplane. *Id.* That price was recommended by PLI. CP 127-28, 134-35. However, it was not the first price that PLI proposed. *Id.* PLI originally set a list price of \$2.1 million; before making any effort to market or sell the plane, PLI asked GB to

agree to a \$200,000 price reduction. *Id.* Thereafter, PLI set out to market and sell the airplane. *Id.*

The Listing Agreement made PLI eligible for a 3% sales commission – nearly \$60,000, based upon the \$1.9 million list price. CP 28-9; *see also* CP 128-29. PLI's entitlement to that commission was **not** contingent upon a sale. *See Id.* However, it was contingent upon PLI presenting GB with a purchase offer within 2% of the \$1.9 million list price – that is, to earn a commission, PLI had to procure an offer of at least \$1,862,000. *Id.* If PLI presented such a purchase offer, GB would be obliged to pay the commission, even if GB opted to hold out for a better offer, and even if GB opted not to sell at all. *See Id.*

B. DESPITE HAVING THREE 90-DAY TERMS TO DO SO, PLI PRODUCED NO PURCHASE OFFERS.

The Listing Agreement's initial term ran from February 17, 2011 to May 18, 2011. *See Id.* During that period, PLI did not present any purchase offers. CP 24. Nonetheless, neither party took any action to stop the Listing Agreement from renewing for another 90 days.

The second term ran from about May 18, 2011 to August 16, 2011. *See* CP 28-9. PLI did not present the parties with any purchase offers during that second term. CP 24. However, GB again allowed the Listing Agreement to renew for a third term. The Listing Agreement's final term began on or about

August 16, 2011. *See* CP 28-9. It is also undisputed that PLI did not present GB with any purchase offers during the Listing Agreement's third term. *See* CP 24.

C. DURING THE FIRST CONTRACT TERM, PLI WAS ALREADY REQUESTING THAT GB AGREE TO A REDUCED SALES PRICE.

Almost immediately after the Listing Agreement was executed, PLI began to tell GB that purchase offers at the list price were unlikely. CP 160. That is, PLI, almost immediately expressed doubt regarding its ability to sell the airplane for the price that PLI had set. *Id.*, see also CP 127-28, 134-35. PLI requested, on multiple occasions, that GB agree to a reduced sales price. CP 129. GB steadfastly declined to consider a lower sales price. CP 129, 160.

D. BY THE THIRD CONTRACT TERM, IT WAS CLEAR THAT THE AIRPLANE WOULD NOT SELL FOR ITS LIST PRICE.

Throughout the Listing Agreement's three terms, PLI continually reported that there was market interest in the airplane. CP 160. However, PLI never identified a single person who requested to see the aircraft or who requested additional information regarding the aircraft, much less who was prepared to make a purchase offer. CP 160. By August 2011, PLI had been attempting to sell the airplane for about seven months without generating a single offer, and for about the same amount of time PLI had expressed doubt regarding its ability to sell the airplane for its list price. *See* CP 24, 28-29, 160-61. GB, therefore, advised PLI that it was free to stop spending time and money marketing the

aircraft, if PLI did not believe that such efforts would generate full (or near full) price offers. CP 160, *see also* CP 136-37. However, at no point did GB terminate the Listing Agreement or tell PLI not to present any offers that were received. Quite to the contrary, PLI was told to bring forward any offer that was received. CP 136-37, 161. Even then, PLI presented no purchase offers to GB. *See* CP 24.

PLI now alleges that the Listing Agreement was terminated in August 2011. Appellant's Brief, pp.11-12. However, its conduct belies its allegation. Throughout August, throughout September, and into October 2011, PLI continued to market the airplane and continued to attempt to cajole GB into accepting a lower sales price. CP 129, 137-46, 160-61. Approximately four weeks after the alleged termination, PLI told GB that the aircraft was the "top choice in the market." CP 144. In fact, it was not until October 19, 2011 (nearly two months after the alleged "termination") that PLI first raised the spectre of a termination or of a default commission being due. *See* CP 148-49.

PLI spends much of its brief attempting to establish that Mr. Mulheim had actual, apparent, or other authority to bind GB. However, it is undisputed that Mr. Mulheim told PLI, at the Listing Agreement's outset, that he did not have

authority to execute agreements on GB's behalf. CP 159. PLI was, therefore, well aware that Mr. Mulheim could not make decisions on GB's behalf. *Id.*³

On October 20, 2011, GB gave PLI notice of its intent not to renew the Listing Agreement, when the then-current 90-day term expired. CP 34. Thereafter, the Listing Agreement expired on or about November 14, 2011. *See id.*, CP 28-9. All said, the Listing Agreement was in effect for approximately 270 days, and during that time, not a single purchase offer was presented to GB. *See* CP 24.

IV. STATEMENT OF CASE

Facing continuing demands for a commission and threats of litigation, GB initiated this suit on December 15, 2011. CP 1-11. GB sought a judicial declaration that no commission was due under the Listing Agreement. *Id.*

On February 10, 2012, PLI filed an answer and asserted a counterclaim. CP 12-18. That counterclaim alleged breach of the Listing Agreement and sought damages in the amount of \$57,000 – that is, PLI sought to recover the unearned sales commission. *See id.*

³ More importantly, PLI's undisputed conduct renders alleged issues of fact regarding whether Mr. Mulheim terminated the Listing Agreement entirely immaterial. *See Hill v. Cox*, 110 Wn. App. 394, 403 (2002) (only those facts that could affect the outcome of the litigation can defeat summary judgment).

On January 4, 2013, GB filed a motion for declaratory judgment. CP 45-6. The motion asked the Court to declare, in light of the undisputed facts, that no commission was owed. *See* CP 35-44. PLI opposed GB's motion arguing, as it does on appeal, that issues of fact regarding whether GB terminated the Listing Agreement precluded the Court from summarily resolving the matter. CP 47-66.

On April 12, 2013, the Spokane County Superior Court entered an Order summarily resolving most of the issues in this litigation. CP 175-78. The Order declared that the Listing Agreement expired at the end of its third term, without a sales commission being due. *Id.* The Order was not case dispositive because it specifically preserved PLI's claim that GB breached the Listing Agreement by allegedly failing to provide certain maintenance information. CP 177.

On May 9, 2013, PLI filed a notice of appeal. On May 23, 2013, the Court of Appeals, via letter, raised questions regarding whether the trial court's April 12, 2013 Order was immediately appealable. In response, PLI voluntarily dismissed its claim alleging failure to provide maintenance information – that is, PLI voluntarily dismissed the sole claim that remained unresolved by the trial court's April 12, 2013 Order. *See* CP 175-77, Appellant's Memorandum of Finality. As a result, the trial court's Order became case dispositive. Thereafter, the Court of Appeals entered a Commissioner's Ruling (on June 20, 2013) acknowledging the matter's appealability.

**V. ARGUMENT: THE TRIAL COURT WAS CORRECT TO
SUMMARILY DISMISS PLI'S COUNTERCLAIM AND TO DECLARE
NO COMMISSION DUE**

A. THIS IS A *DE NOVO* APPEAL.

PLI correctly notes that this appeal is subject to *de novo* review.

Appellant's Brief, pp. 8-9, *see also Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359 (1988). The Court of Appeals, therefore, engages in the same inquiry as the trial court and considers only those facts as would be admissible in evidence. *Id.*

GB's motion was captioned as one for declaratory judgment; however, it was essentially a motion for summary judgment. The trial court considered it in that fashion. VRP 25. The Court of Appeals should, therefore, treat this appeal as a review of a motion granting summary judgment.

B. PLI FAILED TO CREATE A TRIABLE ISSUE OF FACT WITH RESPECT TO ITS CLAIM FOR BREACH.

The party alleging breach of contract bears the burden of demonstrating the existence of a contractual obligation, breach of that obligation, causation and damages. *See Ballard v. Giltner Public School Dist. No. 2 Hamilton County*, 241 Neb. 970, 975 (1992);⁴ *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139

⁴ As PLI points out, this matter is subject to the substantive law of the State of Nebraska. *See* Appellant's Brief, p. 8, CP 54. This matter, however, implicates fairly universal principles of contract law.

Wn. App. 743, 754 (2007); *Peoples Mortg. Co. v. Vista View Builders*, 6 Wn. App. 744, 747-48 (1972). While GB initiated this action, it was PLI that alleged breach of the Listing Agreement. CP 12-18. Therefore, regardless of the Parties' nominal alignment, PLI is the true plaintiff, and PLI bore the burden of production at summary judgment.

At summary judgment, the moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). If the moving party is a defendant (or, as in this case, stands in the position of a defendant), that initial showing requires nothing more than pointing out that there is an absence of evidence to support the non-moving party's case. *Id.* at 325 (*cited by Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, n.1 (1989)). The burden then shifts, and if the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," summary judgment is properly entered. *Celotex*, 477 U.S. at 322.

In making this responsive showing, PLI could not rely on allegations or denials. *Young*, 112 Wn.2d at 225. Nor would it be sufficient for PLI to have shown "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89

L.Ed.2d 538 (1986). Instead, PLI bore the burden of producing significant and probative evidence to support each element of its claim. *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991). And in doing so, it must set forth competent facts that would be admissible in evidence. CR 56(e); *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 365-66 (1998). Absent proof on an essential element of the case, all other facts are immaterial. *Building Industry Ass'n of Washington v. McCarthy*, 152 Wn. App. 720, 735 (2009).

PLI, thus, bore the burden of responding to GB's motion with facts, as would be admissible in evidence, to support each of the elements of its claim for breach. That is, PLI bore the burden of producing facts sufficient to create a triable issue regarding whether it had earned a sales commission.

PLI argues that it is entitled to a sales commission because GB terminated the Listing Agreement. However, PLI failed to make a *prima facie* showing that GB terminated the Listing Agreement. Moreover, even if the Listing Agreement had been terminated, summary judgment was properly entered because PLI failed to make a *prima facie* showing that, "but for" the alleged termination, PLI could have (and would have) performed its contractual obligations. In fact, the undisputed facts show that PLI was simply incapable of living up to its obligations under the Listing Agreement. The trial court was, therefore, correct to

summarily dismiss PLI's claim. The Court of Appeals should, therefore, fully affirm the trial court's Order.

C. THE TRIAL COURT WAS CORRECT TO HOLD THAT THE LISTING AGREEMENT EXPIRED AT THE END OF ITS THIRD TERM.

A "written contract which is expressed in clear and unambiguous language is not subject to interpretation or construction, and the intention of the parties must be determined from the contents of the document alone." *Lueder Const. Co. v. Lincoln Elec. System*, 228 Neb. 707, 707 (1988) accord, *Brogan & Anensen LLC v. Lamphiear*, 165 Wn.2d 773, 776 (2009). PLI concedes that the Listing Agreement is unambiguous. See Appellant's Brief, p. 9. And under the Listing Agreement's unambiguous terms, GB gave appropriate and timely notice of non-renewal.

It is undisputed that the Listing Agreement became effective, for its first 90-day term, on or about February 17, 2011. CP 28-29. Likewise, neither party disputes that the Listing Agreement began its third 90-day term on or about August 16, 2011. See *id.* The parties' dispute centers around whether the Listing Agreement expired at the end of its third term or whether GB terminated the Listing Agreement early.

The Listing Agreement had a defined duration and a specific mechanism for termination. CP 28-29. In accordance with the Listing Agreement, GB gave

written notice of GB's intent to allow the Listing Agreement to expire at the end of its third term. CP 24-25, 34. That written notice was properly submitted, and it resulted in the Listing Agreement's non-renewal. *See id.*, CP 28-29. There was no early termination, and PLI is not entitled to any sales commission.

D. PLI'S CONTENTION THAT GB EFFECTED AN EARLY TERMINATION IS DIRECTLY CONTRADICTED BY UNDISPUTED FACTS.

PLI's sole argument is that it should receive a default commission (of nearly \$60,000) because GB chose to pull the airplane from the market. *See generally*, Appellant's Brief. PLI's argument is directly contradicted by the undisputed facts of this case. First, undisputed facts demonstrate that GB never terminated the Listing Agreement. Instead, GB reaffirmed PLI's ability and discretion regarding whether to market the aircraft. Second, PLI never acted as though the Listing Agreement had been terminated – quite the contrary, PLI continued to actively market and attempt to sell the airplane for approximately two months, **after** the date on which it claims that GB terminated the Listing Agreement. The trial court was, therefore, correct to reject PLI's self-serving contentions and to summarily dismiss PLI's claim.

1. GB Did Not Terminate the Listing Agreement; GB Merely Let PLI Decide Whether to Market the Airplane.

PLI's argument that GB terminated the Listing Agreement in August 2011 is not supported by the facts. There was no direction, no correspondence, and no

communication that directed PLI to cease marketing or attempting to sell the aircraft. Likewise, GB never prevented PLI from marketing or attempting to sell the aircraft. Instead, the undisputed record demonstrates that:

- Even during the first 90-day term, PLI expressed doubt regarding its ability to sell the airplane for its asking price, CP 129;
- GB refused, as was its contractual right, to agree to a reduced sales price, *Id.*; and
- As an accommodation to PLI's inability to sell the airplane, GB gave PLI the option of discontinuing its marketing efforts. *Id.*, *see also* CP 160.

Thus, GB did nothing to preclude, prevent, or even impair PLI's ability to earn a commission by presenting a "valid" purchase offer. *See* CP 83, 91-92, 129, 160.

2. *PLI Continued to Market the Airplane for Two Months After the Purported Early Termination.*

Moreover, PLI continued to market the aircraft for more than two months **after** the purported early termination. PLI cannot avoid the undisputed fact that it continued to act as though the Listing Agreement was in full effect throughout August, throughout September, as well as well into October 2011. On September 20, 2011 (five weeks after the purported termination) PLI asked GB, yet again, to reduce the aircraft's price. CP 129-31, 143-44. If PLI believed the Listing Agreement had been terminated, it would have never asked GB to lower the

aircraft's price. Nine days later (on September 29, 2011), PLI asked GB whether it should renew or cancel the aircraft's advertisements for October. CP 146.

Again, if PLI believed the Listing Agreement had been terminated, it would never have contemplated continuing to advertise the airplane for sale. In fact, it was not until October 18, 2011 that PLI first raised the purported termination and/or that a sales commission was due. CP 31-32.

In short, PLI's argument is a disingenuous, after-the-fact, and self-serving attempt to obtain a commission where none was earned. The argument is flat inconsistent with PLI's contemporaneous conduct and communications. It is, in that respect, an improper effort to create an issue of fact by contradicting itself. *See Berry v. Crown Cork & Seal Co., Inc.*, 103 Wn. App. 312, 321-22 (2000). The trial court was correct to summarily dismiss PLI's claim based upon undisputed and undeniable facts.

E. REGARDLESS OF ANY OTHER ISSUE, PLI'S INABILITY TO PRESENT A VALID PURCHASE OFFER REQUIRED PLI'S CLAIM TO BE SUMMARILY DISMISSED.

A party cannot recover on a claim for breach, unless that party was itself ready, willing, and **able** to perform its own contractual obligations. *Bruning Seeding Co. v. McArdle Grading Co.*, 232 Neb. 181, 186 (1989); *Chadd v. Midwest Franchise Corp.*, 226 Neb. 502, 507 (1987). This renders all other issues moot. At no point was PLI able to present GB with a valid purchase offer. *See*

CP 24, 28-29. And PLI did not – and could not – make out a *prima facie* showing that, "but for" some breach, it would have come forward with a valid purchase offer. That failure is fatal to PLI's claim.

All that PLI was obliged to do was to come forward with a "valid offer." CP 28-29. The Listing Agreement did not condition PLI's entitlement to a commission on a sale being consummated. *Id.* Nor did the Listing Agreement condition PLI's entitlement to a sales commission on GB accepting an offer. *Id.* The Listing Agreement contained exactly one prerequisite to PLI's entitlement to a commission; that requirement was that PLI present GB with a purchase offer within 2% of the aircraft's initial list price.

PLI had approximately 245 days (from the Listing Agreement's execution to Mr. Mahugh's notice of GB's non-renewal) to come forward with a valid offer. *See* CP 8-11. Moreover, PLI had an additional 25 days (between Mr. Mahugh's notice and the end of the Listing Agreement's third term) to come forward with a valid offer. *See Id.* Viewed another way, PLI was given about 175 days **more** than the 90 days that it originally bargained for. *Id.* Despite having set the initial list price, despite GB having agreed to a \$200,000 reduction in the list price, and despite having approximately 270 days to do so, PLI did not, and could not, come forward with a valid offer. *See Id.*, CP 128-29, 134-35. In fact, PLI did not come forward with an offer at any price. CP 24.

Thus, even if PLI were correct in its assertion regarding early termination of the Listing Agreement, PLI would not be entitled to a sales commission. PLI was unable, in nearly 300 days, to procure a valid offer, and PLI did not come forward with any facts to show that, "but for" the alleged termination, it would have done so. That failure is absolutely fatal to PLI's claim. *See Ballard*, 241 Neb. at 975; *Jacob's Meadow Owners Ass'n*, 139 Wn. App. at 754; *Peoples Mortg. Co.*, 6 Wn. App. at 747-48.

PLI asks the Court to interpret the Listing Agreement to provide for a commission, without regard to the undisputed fact that PLI could not perform its contractual obligation. The Court should not accept PLI's unreasonable interpretation.

PLI's interpretation would both give PLI a windfall, and impose a penalty on GB. It would also lead to the absurd result of PLI being given a \$60,000 commission where it is undisputed that no such commission was earned. Notably, PLI does not even assert that this was the parties' intent or expectation. *See Forest Marketing Enterprises, Inc. v. Dept. of Natural Resources*, 125 Wn. App. 126, 132 (2005) (contracts must be interpreted in accord with the parties' intentions and expectations as well as in such a way as to avoid absurd results). In fact, the undisputed facts show that PLI continued to try to earn a sales commission after the purported termination. CP 129-31, 143-44, 146. PLI would

not have continued to try to earn a commission if it believed that it was already entitled to a default commission. PLI's contemporaneous conduct is, therefore, inconsistent with its proffered interpretation of the Listing Agreement.

PLI's interpretation would also require the Court to completely ignore the connection between a sales commission and a purchase offer. To ignore that connection would require the Court to ignore significant portions of the Listing Agreement. The Court, however, must read the Listing Agreement as a whole. *Felton v. Menan Starch Co.*, 66 Wn.2d 792, 797 (1965); *Fred Steinheider and Sons, Inc. v. Iowa Kemper Ins. Co.*, 204 Neb. 156, 161 (1979). When read as a whole, the Listing Agreement only provides for a default commission where a termination impairs PLI's ability to earn a commission. In this case, it is undisputed that the alleged termination had **no impact** on PLI's ability to earn a commission. The Court should reject PLI's invitation to take one clause out of context and elevate it above all other provisions in the Listing Agreement.

Finally, PLI's argument completely ignores the most fundamental aim of contract law; it is entirely disconnected from the aim of placing parties in the same position that they would have been in had the contract have been performed. *See TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 211 (2007). PLI never demonstrated that it would have earned a commission if the Listing Agreement had not been terminated. In fact, it is

undisputed that PLI continued (after the alleged termination) to attempt to earn a commission. That undisputed fact closes the door on PLI's argument. The alleged termination had no impact on PLI's ability to earn a commission.

No matter how this matter is viewed, the end result remains unchanged: (i) PLI did not earn a commission; and (ii) nothing that GB did, or failed to do, had any impact on PLI's ability to earn a commission. Without being able to demonstrate its own ability to perform, PLI's counterclaim could not survive summary judgment. *See Bruning Seeding Co.*, 232 Neb. at 186; *Chadd*, 226 Neb. at 507. The trial court was, therefore, correct to summarily dismiss PLI's claim.

F. GB IS ENTITLED TO ATTORNEYS' FEES ON APPEAL.

As the Court is aware, this matter is governed by the substantive law of the State of Nebraska. However, procedural issues remain governed by the law of the forum State – Washington. *See Nebraska Nutrients, Inc. v. Shepherd*, 261 Neb. 723, 780 (2011), *abrogation recognized on other grounds, Sutton v. Killham*, 285 Neb. 1 (2013). Under Nebraska's substantive law, questions regarding the recovery of attorneys' fees are procedural. *Id.* Therefore, attorney's fees are governed by the law of the forum state. *Id.* Washington law, thus, applies to the question of whether GB is entitled to an award of attorneys' fees.

Pursuant to RAP 18.1(a), reasonable attorneys' fees may be recovered on appeal where provided for by the underlying law. In Washington, attorneys' fees

are recoverable if authorized by a statute, contract, or by a recognized basis in equity. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 849-50 (1986). Likewise, in Washington contractual attorneys' fees provisions are always construed to be bilateral. RCW 4.84.330. Therefore, the contractual attorneys' fees provision at issue in this case applies bilaterally to allow the prevailing party to recover an award of reasonable attorneys' fees. *See Id.*, CP 8-9.

The Court of Appeals should award GB reasonable attorneys' fees in defending against and defeating PLI's claim for breach. GB requested fees in its complaint, as well as in its motion. CP 5, 42. That prayer for fees was never addressed because the trial court's Order did not fully dispose of the litigation. *See* CP 175-77. PLI's dismissal of its sole remaining claim, however, rendered that Order fully dispositive. *See* June 20, 2013 Commissioner's Ruling. Therefore, this is the first occasion on which GB could seek its fees. The Court of Appeals should, therefore, award reasonable fees at the trial court level and on appeal.

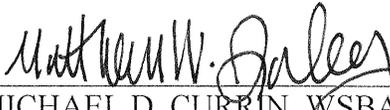
VI. CONCLUSION

Based upon the record and the foregoing, GB respectfully asks the Court of Appeals to affirm the trial court's summary judgment Order. PLI failed to

make out a *prima facie* claim for breach of contract, and the trial court was, therefore, correct to summarily dismiss PLI's counterclaim.

RESPECTFULLY SUBMITTED, this 13th day of December, 2013.

WITHERSPOON · KELLEY, P.S.


MICHAEL D. CURRIN, WSBA #14603
TIMOTHY M. LAWLOR, WSBA #16352
MATTHEW W. DALEY, WSBA #36711
Counsel for Respondent

CERTIFICATE OF SERVICE

On the 13th day of December, 2013, I caused to be served a true and correct copy of the within document described as RESPONDENT'S BRIEF on all interested parties to this action as follows:

Gregory J. Arpin, WSBA Shamus T. O'Doherty Paine Hamblen LLP 717 West Sprague, Suite 1200 Spokane, WA 99201 Phone: (509) 455-6000 Fax: (509) 838-0007	Via United States Mail [] Via Federal Express [] Via Hand Delivery [x] Via Facsimile [] Via Electronic Mail []
---	--


MARIANN BEALS, Legal Assistant