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No. 52799-5-II

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO**

NORTHWEST MOTORSPORT, INC.,

Appellee/Cross-Appellant/Plaintiff,

v.

SUNSET CHEVROLET, INC., SUNSET TRUCKS, INC., and PHILIP MITCHELL,

Appellants/Cross-Appellees/Defendants.

APPELLANTS' BRIEF

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I. INTRODUCTION

Appellants Sunset Chevrolet, Inc. and Sunset Trucks, Inc. ("Sunset") and Appellee Northwest Motorsports, Inc. ("NWMS") sell cars and trucks. Appellant Philip Mitchell is the owner and President of Sunset. This appeal primarily relates to the lower court's interpretation of a Settlement Agreement between Sunset and NWMS. The Agreement was the result of a trademark infringement case, where Sunset had used NWMS trademarks in several domain names, and in connection with certain Craigslist advertising. In addition to a $75,000 payment, Sunset agreed not to use NWMS trademarks "in advertising," and the parties agreed Sunset would pay $5,000 for each "violation" of the terms. The $5,000 was intended to reflect the value of a lost customer.

NWMS later accused Sunset of breaching the Agreement by using NWMS trademarks in Craigslist, TV, and radio ads. Pursuant to the Settlement Agreement, the dispute was referred to Judge Charles Burdell (ret.) for arbitration. As part of that proceeding, he construed the meaning of "violation" in the Agreement. In particular, he rejected NWMS's position that a "violation" occurred every time an ad was broadcast or published. He determined that would render an unconscionable or even ludicrous result, and that the term should be interpreted as limited to the number of times that Sunset *arranged* for such ads to run.

Less than a month after the arbitration award, NWMS filed the lawsuit that led to this appeal. In its Original Complaint, NWMS asserted

trademark infringement based on Sunset's bidding on NWMS trademarks as keywords in the Google Ads program, and trade secret misappropriation for Sunset's recruitment of NWMS employees. Under the Google Ads program, when a Google user performs a word search, Google returns not only the "organic" search results, but separately displays links for advertisements related to the search. These links are presented separately from the organic results and/or are identified as "ads." These ads are tied to one or more search keywords, which companies "bid" on or "purchase" using the Google Ads program. The search keywords themselves are not seen by the user. Google's algorithm matches a user's search query with search keywords, resulting in the display of ads that Google believes are related to what the user is searching for.

In the instant case, a Sunset ad would be displayed when a user searched for, for example, "Northwest Motorsports." The Sunset ad was prominently identified as an ad for Sunset, and there is no allegation that it created any confusion. In fact, courts have uniformly held that the bidding on a competitor's name as a keyword does not, by itself, constitute trademark infringement or unfair competition. The Federal Trade Commission also has held that an agreement amongst competitors not to bid on keywords using each other's names is anti-competitive.

The Original Complaint affirmatively asserted that there was no contract breach arising out of the Google Ads activity because the ads did not include NWMS trademarks. There was thus no use of the NWMS trademarks "in advertising."

Later in the case, however, NWMS amended its Original Complaint to assert that the Google Ads activities *did* constitute breach of contract. The lower court granted summary judgment that Sunset breached the Agreement by its Google Ads activities, interpreting the Agreement not to use NWMS trademarks "in advertising" as extending to advertising that did not use NWMS trademarks, but was in response to searches including NWMS trademarks. Sunset respectfully submits that summary judgment should not have been granted because the Agreement was intended to cover the use of NWMS trademarks in a manner that could create confusion, such as the display of NWMS trademarks within advertisements. Further, NWMS's admission in the Original Complaint that the Agreement did not encompass bidding on keywords at least created a genuine issue of fact.

The lower court also granted summary judgment that Sunset had engaged in trade secret misappropriation by its recruitment of NWMS employees. Sunset respectfully submits that the lower court erred in this decision, because it directly weighed the credibility of the witnesses.

Both of the summary judgment decisions were affected by the lower court's finding that Mr. Mitchell and Sunset's advertising director, Mr. Conley, committed perjury during the arbitration hearing before Judge Burdell. In particular, to explain why it had not raised the Google Ads activities at the arbitration, NWMS asserted that Sunset and its witnesses testified at the arbitration hearing that Sunset did not conduct Google Ads advertising, and that Sunset's counsel tried to hide Sunset's Google Ads activity during the litigation. The *evidence* they offered for these arguments

was limited. There was no transcript, for example, from the arbitration hearing itself. NWMS instead offered declarations from its then in-house counsel and former outside counsel (Jon Morrone) and outside counsel (Sheryl Willert) at the arbitration, but the declarations were inconsistent. Mr. Morrone's declaration, for example, indicated that the Sunset witnesses, including Mr. Mitchell, had denied Sunset was involved in any Google Ads activities. Ms. Willert's declaration, in contrast, indicated that Sunset admitted it advertised on Google, but denied any knowledge of the use of NWMS trademarks as keywords for such advertising.

The lower court (Judge Rumbaugh) was persuaded that Mr. Mitchell and Mr. Conley had committed perjury at the arbitration hearing, and had intentionally tried to hide the relevant facts from NWMS. Based at least in part on his conclusion, he granted the summary judgment motions on the breach of contract and trade secret claims referred to above, expressly holding that he would give no weight to Mr. Mitchell's testimony on the trade secret issues.

Sunset respectfully submits that the lower court was misled as to the actual facts, and that the perjury finding (and any orders dependent on it) should be vacated. First, although NWMS did not disclose the fact in its motion papers, Mr. Mitchell and Mr. Conley had testified in depositions during the arbitration that Sunset engaged in Internet and "search engine" advertising, but did so through vendors, because neither Mr. Mitchell nor Mr. Conley knew how to do such advertising. The fact that no one at Sunset

directly engaged in bidding on Google keywords was confirmed by the declarations of three Sunset employees and six vendors.

A reasonable interpretation of the evidence is that Mr. Mitchell and Mr. Conley testified at the arbitration, consistent with their deposition testimony, that Sunset employees were not involved in choosing keywords or creating Google Ads campaigns. This was truthful and is consistent with the deposition transcripts from the arbitration and the testimony of multiple Sunset employees. The confusion arose because Mr. Mitchell, Mr. Conley and even Sunset's litigation counsel distinguished Sunset's direct participation in bidding on keywords, with employing vendors for that purpose. The lower court seemed to assume that they had testified that Sunset was not involved in any manner in using Google Ads, but that conclusion is contradicted by the deposition testimony, the correspondence from Sunset's counsel (which admitted that Sunset used vendors to conduct Google advertising and referred to contacting vendors that were involved in such advertising), and the fact that NWMS was aware of such advertising at the time it filed the Complaint. Because the lower court's finding of fact was clearly erroneous, and because it was the basis for the award of sanctions, the award should be reversed.

Even assuming, *arguendo*, that the award of sanctions could be supported by other evidence, the finding of perjury has independent significance and should be vacated. Mr. Mitchell and Mr. Conley are well-known members of the local business community, and their reputation and livelihood are directly impacted by the finding of perjury. Given the impact

on their individual interests, and given that there is no substantial evidence to support the finding (and it is contradicted by other evidence, including the deposition testimony) the Court should at least vacate the finding of perjury.

Further, even if Sunset's activity was a technical "violation" of the Agreement, the court erred in construing a "violation" to be each day that the bidding on the relevant search keywords was active. This finding was inconsistent with the finding of Judge Burdell that a "violation" requires an affirmative act by Sunset, and Judge Burdell's finding creates collateral estoppel. Both parties also agree that the amount of the liquidated damages clause was intended to estimate the lost profits associated with a lost customer. That amount makes sense in the context of the underlying Agreement, where Sunset had used NWMS's trademarks in multiple domain names and Craigslist advertisements, such that a customer searching for NWMS might have been confused into going to Sunset's website or ads. The amount makes no sense in terms of the number of days in which a search keyword bid was active, particularly when there is no confusion being created by the resulting advertisement, and there is no relationship between the number of days an order is pending and actions by Sunset. Indeed, the number of days an order is active is as arbitrary as the number of minutes, hours, weeks, months or years. To the extent that bidding on search keywords is subject to any liquidated damages, a "violation" should be based on the number of keywords that were

"wrongfully" bid upon (10). Even that award is a windfall given the lack of confusion, but it is at least is correlated with an affirmative act.

II. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The lower court committed reversible error by granting NWMS's motion for partial summary judgment that "use in advertising" included purchasing search keywords on Google Ads.

Issue: When NWMS trademarks are not used in the advertising itself, does bidding on search keywords, as a matter of law, qualify as "use in advertising," given the purpose of the Settlement Agreement, the circumstances of its formation, and the ordinary meaning of the term "advertising"?

Issue: Were genuine issues of material fact created by NWMS's contradictory interpretations of "use in advertising" and the extrinsic evidence of the Settlement Agreement?

2. The lower court committed reversible error in construing "violation" in the agreement to mean every day that Sunset had a pending bid on a search keyword involving an NWMS trademark.

Issue: Does the lower court's definition of "violation" comport with Judge Burdell's prior ruling and the lower court's own direction?

Issue: Is the per-keyword definition the only fair, reasonable, and principled interpretation of "violation"?

3. The lower court committed reversible error in finding that Mr. Mitchell and Mr. Conley both committed perjury during the arbitration proceeding, and by denying two reconsideration motions.

Issue: Should the lower court's perjury finding be vacated when substantial evidence did not support the finding?

Issue: Should the lower court's perjury finding have been vacated, and further fact-finding ordered, in light of a reconsideration motion that sought to clarify the lower court's confusion and another reconsideration that presented newly-discovered evidence?

4. The lower court committed reversible error in granting summary judgment that Sunset had engaged in trade secret misappropriation.

Issue: Should the lower have made a credibility determination on summary judgment?.

III. STATEMENT OF THE CASE

A. The Original Litigation and the Resulting Settlement Agreement

The dispute between the parties began with a 2011 lawsuit for trademark infringement and related causes of action brought by NWMS. **(Clerk's Papers at 1752-1760)** The dispute arose because Sunset had used NWMS's trademarks, including "Northwest Motorsports" and the advertising slogan "Trucks, Trucks and More Trucks," in multiple domain names and "in its advertisements for automobile sales." **(CP at 1753-1754)** The litigation resulted in a $75,000 settlement that included, among other

terms, an agreement that "Sunset agrees not to use in advertising in any manner or variation the terms 'Northwest Motorsport,' 'NWMS Rocks,' or the words 'Truck' or 'Trucks' consecutively in the same phrase or sentence." **(CP at 1748-1750)** The agreement further provided that any dispute regarding compliance would be arbitrated by Judge Charles Burdell (ret.), who had mediated the settlement, and that NWMS would be entitled to liquidated damages of $5,000 "per violation" for any breach. **(CP at 1750)** The purpose of the Agreement was to avoid conduct that "confuse[d] consumers to think that they were doing business with Northwest - or Northwest Motorsport versus Sunset Chevrolet." **(CP at 4698)** Both Mr. Mitchell and NWMS's owners understood the $5,000 per violation amount represented the approximate loss from a lost customer. **(CP at 4703-4704, 4707, 4760)**

B. The Arbitration Proceedings and Award

In 2015, NWMS claimed that Sunset had breached the Agreement by using "Northwest Motorsports" and "Trucks, Trucks" in TV, radio and Craigslist ads. **(CP at 3463-3466)** Pursuant to the Agreement, the dispute was referred to Judge Burdell for arbitration. As part of the arbitration, appellant Phil Mitchell and Sunset's Director of Marketing, Michael Conley, had their depositions taken. **(CP at 6424-6425, 6428-6429)**

In its arbitration brief, NWMS characterized the Settlement Agreement as preventing the use of NWMS trademarks in Sunset *advertisements*: "Northwest Motorsport specifically negotiated for the inclusion of a . . . clause [that] bars the Defendants from using ***any*** variation

[of] the words 'truck' or 'trucks' consecutively in the same phrase or sentence, and the Defendants cannot use the word 'Northwest Motorsport' *in their ads*, either." **(CP at 2105-2106)** (second emphasis added)

Ken Wren, who was deposed as part of the arbitration and owned NWMS when the Settlement Agreement was negotiated, was present during the mediation, and signed the settlement agreement on behalf of NWMS, testified that the purpose of the Settlement Agreement was to prevent confusion and, more specifically to prevent Sunset from "us[ing] our 'trucks, trucks' consecutively to *confuse consumers* to think that they were doing business with Northwest – or Northwest Motorsport versus Sunset Chevrolet." **(CP at 4698)** (emphasis added)

Before the arbitration hearing, (which was not transcribed), NWMS was aware that Sunset was advertising on the Google search engine, through the Google Ads (previously Google Ad Words) program. **(CP at 5943-5944)** Under the program, a party can bid on search keywords, such that when a Google user enters a search query containing that search keyword or a related variation, the search results page contains both the "organic" search results, and one or more ads related to the results. **(CP at 1295-1296)** The ads are set forth in a separate part of the search results page and/or are identified as "Ads."[1] NWMS knew, by the time of the hearing, that Sunset ads were presented in response to Google searches using the term "Northwest Motorsports." **(CP at 5943-5944)**

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[1] Today, the ads are generally placed above the organic results, and are labeled as "Ad." In the past, they were sometimes placed to the right or bottom of the page.

The text of the advertisements associated with Sunset's Google Ads campaign never used any NWMS trademarks. **(CP at 5944)** Instead, they prominently identified themselves as associated with Sunset, and there was no evidence presented that they caused any confusion.[2] The relevant Google Ads campaign was created by a single Sunset vendor, Michael Keenan. **(CP at 3186-3187)** The ad campaign bid on approximately 913 keywords, 10 of which used NWMS trademarks. **(CP at 5513-5528, 5500-5511)** The total spending on the 10 ad words in question was about $2,600 over six months (in contrast, NWMS spent approximately $97,200 across all its Google Ads activity). **(CP at 5511, 5528)** There has never been an allegation that the ads themselves were misleading or confusing, because, according to NWMS's own search engine marketing expert, they were "clearly identified" as Sunset ads. **(CP at 4791)** Moreover, no more than a few people clicked on the Sunset ads generated by the NWMS-related search keywords **(CP at 5500-5511)**, and there was no evidence indicating that each person who clicks on the ad was likely to have purchased a vehicle from Sunset. Instead, the evidence showed that only 6% of clicks translate to conversions (*i.e.*, interested customers), and only a fraction of those into actual sales. **(CP at 5635-5636, 5638)**

Judge Burdell ultimately awarded liquidated damages of $530,000 for the Craigslist posts and the TV and radio ads, plus interest and attorneys'

[2] As discussed further below, no court has held that bidding on a competitor's name or trademark in itself constitutes trademark infringement or unfair competition. Indeed, the FTC's position is such activities are pro-competitive, because they offer consumers and users more choices. Accordingly, it is common when searching for the brand name of a product, to be presented with ads for alternative products.

fees of $275,224.44. **(CP at 3494-3495)** The judgment was entered on September 12, 2016. **(CP at 4658-4670)**

There is no dispute that the issue of Google Ads advertising was raised at the arbitration hearing but was not part of Judge Burdell's award. As part of his award, however, Judge Burdell construed the meaning of "violation" in the Agreement. **(CP at 4653-4656)** NWMS argued that a "violation" for purposes of liquidated damages occurred each time the accused TV and radio advertisement aired and each time the Craigslist advertisement was posted. **(CP at 4655-4656, 5149-5151)** Sunset countered that a "violation" should be limited to affirmative actions taken by Sunset, such as each time that Sunset arranged for the TV and radio advertisement to be broadcast, regardless of the number of actual broadcasts. **(CP at 5153-5155)**

Ultimately, Judge Burdell agreed with Sunset that a violation required affirmative acts. **(CP at 4656)** ("A more reasonable result is achieved by construing the term 'violation' as each time defendants *engaged in an activity that breached the Agreement*, *regardless of how many ads or postings that were actually created.*") (emphasis added). Judge Burdell concluded that NWMS's position would lead to an "unconscionable, and perhaps, ludicrous" award. **(CP at 4655)**

Although the TV and radio advertisements at issue had been broadcast more than two thousand times **(CP at 4654)**, Judge Burdell ruled that a violation occurred only when Sunset "arranged" with the television or radio station for the offending ad to run, which occurred 46 times. **(CP**

at 4656) And though Sunset posted thousands of Craigslist ads that contained NWMS or its trademarks over a period of six months, Judge Burdell did not adopt a strict per-day definition of "violation" in that context, either. **(CP at 4655)** Instead, he found a violation occurred each day that Sunset took the affirmative act of posting any Craigslist ads, but limited the number of days from 180 to 60 to "allow[] a fair result." **(CP at 4656)**

C. The Evidence About Mr. Mitchell's and Mr. Conley's Testimony at the Hearing

One of the issues on appeal is whether the lower court correctly concluded that Mr. Mitchell and Mr. Conley lied at the arbitration hearing about Sunset's participation in the Google Ads program. NWMS filed a partial summary judgment motion, arguing that Sunset's Google Ads activity violated the Settlement Agreement. In the same motion, NWMS accused Mr. Mitchell and Mr. Conley of falsely denying that Sunset used Google Ads. **(CP at 1716-1741)** NWMS's former outside counsel and now in-house counsel, Mr. Morrone, presented the lower court with a declaration that

> Phil Mitchell denied under oath that Sunset used Google AdWords (he did not say 'I don't know' or 'I have limited knowledge'); and Mike Conley, who managed Sunset's advertising, insisted that Sunset must have been 'hacked' since there was no other explanation, in his eyes, for why Sunset's ad popped. In fact, he even denied that the telephone number in the ad was the one that Sunset used which was offered as more 'proof' of the botched 'hacking.'

(CP at 1461-1462) Mr. Morrone submitted a similar declaration before Judge Burdell. **(CP at 5875-5878)**

In his declaration to the lower court, Mr. Morrone testified that NWMS had only learned of the accused Google Ads activities by "happenstance," during a lunch break during the mediation:

> Mid-arbitration, I believe during a lunch break, but certainly by happenstance, somebody Googled 'Trucks, trucks, and more trucks," and Sunset's ad appeared. This was very surprising, but there was little we could do about it at that stage.

(CP at 1462) NWMS's outside counsel, Sheryl Willert, stated in another declaration filed with the lower court that NWMS "sought discovery [in the arbitration] related to Sunset's online advertising," "Judge Burdell determined that Sunset would have to produce this information," but that "Sunset did not produce any Google AdWords, and argued that this was not in the scope of the arbitration." **(CP at 1280-1281)** She also stated that in the "course of the arbitration testimony, Sunset's representatives repeatedly denied using terms in violation of the contract in their online Google advertising." **(CP at 1281)**

The declarations are inconsistent. Mr. Morrone's declaration states that Sunset representatives denied using Google Ads at all, while Ms. Willert's indicates there was no denial of Sunset's "online Google advertising," but only a denial of using "terms in violation of the contract *in their online Google advertising*." **(CP at 1462, 1281)** (emphasis added)

Neither declaration references the deposition testimony of Mr. Mitchell and Mr. Conley, that occurred prior to the arbitration hearing. In their depositions, Mr. Mitchell and Mr. Conley were each asked about the scope of advertising done by Sunset. In addition to testifying about print, TV and radio advertising, both Mr. Mitchell and Mr. Conley discussed their "Internet" and "digital" advertising. Mr. Conley testified, for example, that he was "pretty hands-on" for radio and TV ads. **(CP at 3299)** In contrast, he admitted that he had limited involvement in social media advertising, such as on Facebook, Instagram and Snapchat. **(CP at 3300)** Similarly, he explained Sunset did "Internet" and "banner ads" advertising, but that it was handled by outside vendors, and he identified Michael Keenan in particular. **(CP at 5447).**

Mr. Mitchell's testimony was to the same effect. He readily agreed that Sunset was involved in "computer" and "search engine optimization" advertising, but that he had no involvement. **(CP at 3245-3249)** In other words, Mr. Conley and Mr. Mitchell *did not hide* the fact that Sunset was involved in "search engine" advertising during the arbitration hearing.

Ms. Willert and Mr. Morrone's declarations also do not reference correspondence from Sunset's litigation counsel sent in January and February 2017—long before NWMS accused Mr. Mitchell and Mr. Conley of perjury—openly acknowledging that Sunset used Google Ads, and that counsel was in the process of contacting Sunset's vendors to inquire about

the search keywords they purchased on behalf of Sunset.[3] NWMS never addressed why Sunset's litigation counsel would make such statements if Mr. Mitchell and Mr. Conley denied at the arbitration hearing that Sunset advertised through Google Ads.

Mr. Mitchell later explained he never testified at the arbitration hearing that Sunset did not use the Google Ads platform:

> That was not my testimony–I am certain I would not have said that because I am not significantly involved in that area of the business. I am kept busy managing my various businesses. While I have involvement in advertising, such as reviewing television and radio ads, I have never directly supervised our digital advertising, much less been involved in choosing search terms to bid on for Google AdWords. I recall testifying at the arbitration hearing that I never purchased or bid on search terms under Google AdWords (I wouldn't even know how to do it) or told others what search terms to bid on or purchase. Again, I am not involved in that area of the business and do not know whether at Sunset has ever personally purchased or bid on keywords for Google AdWords.

(CP at 3242) Mr. Conley also explained he never testified that no one had ever bid on Google AdWords on Sunset's behalf:

> I have never said any such thing, and unaware of any transcript, testimony or other evidence that I did. I would never lie under oath. My recollection is that the arbitration hearing, I was asked about Sunset's

[3] For example, Sunset's litigation counsel wrote in February 2017, "Sunset states that it hires third parties to handle its on line presence," and "Mr. Mitchell and Mr. Conley do not control or direct how these vendors do their job, or know the potentially thousands of search terms these vendors purchased." **(CP at 5494)** In an email from January 2017, Sunset's litigation counsel advised that he was working on "the Google AdWord piece" of discovery and would "see what [he] can get done by Friday." **(CP at 5488)**

> purchase of Google AdWords. I understood this as asking if anyone at Sunset directly selected and purchased Google AdWords. I never said no vendors purchased AdWords for Sunset. That would have been absurd. Of course Sunset, like most dealerships in the country, uses search engine advertising, which includes bidding on Google AdWords. I would never deny such a thing. But I did testify, truthfully, that I never in my life have been involved in purchasing Google AdWords…. Again, I do not even know how to do it.

(CP at 3184) The fact that neither Mr. Mitchell nor Mr. Conley, nor anyone else at Sunset, was involved in bidding on search keywords, was confirmed by declarations of three Sunset employees and six vendors. **(CP at 3281-3823, 3269-3271, 3278-3280, 3284-3286, 3263-3265, 3266-3268, 3260-3262, 3275-3277, 3272-3274)**

In response to NWMS's motion, Appellants filed declarations from two of Sunset's vendors, stating that they were "advertising vendor[s]" for Sunset, "purchas[d] and bid[] on keyword search terms through Google AdWords," but did not purchase search keywords related to NWMS or its trademarks. **(CP at 2217-2219, 2220-2222)** NWMS did not address why Appellants would submit declarations that acknowledged Sunset's use of Google AdWords if Mr. Mitchell and Mr. Conley testified at the arbitration hearing that Sunset did not use Google AdWords at all.

In finding that the witnesses lied when he denied "Sunset" did not bid on Google Ads keywords, the Court relied, in part, on the fact that Mr. Mitchell's credit card was used for the Google Ads purchases. Mr. Mitchell and Mr. Conley explained, however, that it is a "common practice for

Sunset–and many other auto dealers–to give its credit card information to vendors for reoccurring purchases, such as marketing and advertising expenses." **(CP at 3242-3243, 3184-3185)**

NWMS also made much of the fact that Mr. Conley referred to being "hacked" when presented with an ad at the hearing. Mr. Conley later explained, however, that he was referring to the fact that the ad was not an ad that he had authorized, and the phone number was incorrect. **(CP at 3186-3187)**

After being presented with the fact that Sunset ads were presented in response to searches for Northwest Motorsports, Mr. Conley immediately instructed his internet advertising vendors not to bid on "Northwest Motorsports" or any other NWMS trademark as a keyword in the Google Ads program. He explained at the he did so not because they thought it breached the Agreement, but to avoid any future disputes. **(CP at 3185-3186)**

D. Procedural History

A little more than a month after the arbitration judgment was entered in 2016, NWMS filed the Complaint in this action, asserting trade secret misappropriation and that Sunset's past bidding on "Northwest Motorsports" as a keyword, which ended prior to the final arbitration award, constituted trademark infringement. **(CP at 3-13)** According to the Complaint, because Sunset's Google Ads advertisements never contained NWMS's trademarks, they did not fall under the Agreement. **(CP at 9)** ("[T]he link itself did not contain Northwest Motorsports name or unique

slogan (and, thus, was not in contravention of the settlement agreement) . . . .")

At that point, Sunset opposed NWMS's discovery of its Google Ads activity because NWMS's only claim was for trademark infringement, which Sunset believed was meritless. **(CP at 473-477, 618-620)** Sunset also argued that any claims for Google Ads activity that occurred before or during the arbitration were barred by res judicata. **(*Id.*)** After the lower court denied Sunset's motion to quash the subpoena duces tecum to Google **(CP at 687-688)**, Sunset's litigation counsel communicated extensively with NWMS's counsel about efforts to check with Sunset's vendors on their Google Ads activity for Sunset. **(CP at 1858, 1861, 5494, 5488)**

NWMS later amended its Complaint to assert breach of contract, and also ultimately dropped its trademark infringement claim. In the Amended Complaint, NWMS alleged that defendants "breached the contract through their use of forbidden terms vis-à-vis Google AdWords in advertising." **(CP at 1588)** It did not allege any such "forbidden terms" (*i.e.,* NWMS trademarks), were used in the text of the advertisements themselves.

On August 7, 2017, NWMS moved for sanctions as described above, and argued that Sunset had repeatedly, beginning at the arbitration, hidden the fact that it hired vendors to do Google advertising. **(CP at 1716-1741)** It also argued, without presenting any transcripts, or even the deposition testimony of the witnesses, that Mr. Mitchell and Mr. Conley

had affirmatively committed perjury at the arbitration hearing, by expressly denying Sunset did any advertising. **(*Id.*)**

In addition to relying on the declarations of Mr. Morrone and Ms. Willert, cited above, they also pointed out that Sunset had resisted discovery on its Google Ads activities and quoted statements by Sunset litigation counsel, who advised NWMS's counsel that neither Sunset nor Mr. Conley purchase Google AdWords. **(CP at 1858, 1861)** In the same and subsequent correspondence, however, counsel explained that Sunset used *vendors* to conduct Google advertising but Mr. Mitchell and Mr. Conley did not direct the vendors or have knowledge of the search keywords they purchased. **(CP at 1858, 1861, 5494, 5488)**

During the hearing on the sanctions motion, NWMS's litigation counsel, who had not attended the arbitration hearing, represented that Mr. Mitchell and Mr. Conley testified that "we don't buy Google AdWords," and stated that it was a lie. **(Verbatim Report of Proceedings 9/1/17 at 10)** NWMS never, however, presented any testimony from the hearing (which was not transcribed). Nevertheless, the court concluded that "[Sunset] is lying." **(VRP 9/1/17 at 20)**

The lower court (Judge Rumbaugh) thus granted the sanctions motion, awarding NWMS $75,000, and expressly held that Mr. Mitchell and Mr. Conley "failed to respond truthfully to the questions posed under oath and began what is fairly characterized as a pattern of deception discovery." **(CP at 3070, 3075)** The court found that Sunset's discovery failures were "outrageous," and that Sunset "has engaged in a pattern of

deception, outright perjury." **(VRP at 9/1/17 at 39)** He seemed to conclude that Mr. Mitchell and Mr. Conley knew of the Google Ads campaign, including the specific keywords that had been bid on by Mr. Keenan. **(VRP at 9/1/17 at 39)**

At the same hearing, the court also concluded that bidding on keywords was a use of NWMS's trademarks "in advertising." The court seemed to be confused about how Google Ads works, and believed that Sunset's activities caused a user looking for NWMS to be mis-directed to the Sunset site. **(VRP at 9/1/17 at 28)** ("Somebody goes in and embeds those words in a Google AdWord campaign search and misdirects the consumer to another impression.").[4] The court also granted partial summary judgment, without opinion, that "defendants are liable for liquidated damages and attorneys' fees related to their breach of the settlement agreement." **(CP at 2295-2297)**

After the lower court issued its findings of fact and conclusions of law on the sanctions issue (which it adopted almost verbatim from NWMS's proposal) **(CP at 2313-2328, 2329-2344)**, Sunset and Mr. Mitchell filed a motion for reconsideration that sought to correct the court's confusion. **(CP at 3218)** In addition to declarations from Mr. Mitchell and Mr. Conley, the reconsideration motion included portions of Mr. Mitchell's deposition taken before the arbitration hearing. **(CP at 3232-3240)** The motion pointed out, among other things, that the court's conclusions were inconsistent with Mr.

[4] In reality, of course, the Google "organic" search results are not affected–there are simply separate ads for alternatives that are clearly labeled as such.

Mitchell's ready admission that Sunset engaged in "computer advertising," including "search engine optimization." **(CP at 3220)** The lower court denied the motion 11 days later without calling for a response. **(CP at 3287)**

The lower court also denied a second reconsideration motion filed in March 2018 after NWMS's search engine marketing expert, George Brumder, produced his file at his deposition. **(CP at 3624-3687)** His file contained an email dated July 10, 2016—two days before the arbitration hearing—between Mr. Brumder and Mr. Morrone, who was outside arbitration counsel for NWMS at the time, showing that NWMS and its expert were aware that Sunset used Google AdWords in the accused manner. **(CP at 5943-5944)** Mr. Brumder also testified in his deposition that he had conducted Google searches at a "law office" sometime before the arbitration, including a search for "'Trucks and More Trucks,'" resulting in the display of "Sunset's sponsored ads." **(CP at 5460-5461)** This contradicted Mr. Morrone's declaration, upon which the court had relied for its perjury finding, that stated that NWMS did not know of the accused activity until discovering it by "happenstance" during a lunch break during the arbitration proceeding. **(CP at 1461-1462)** Despite this newly-discovered evidence, which went to the reliability of Mr. Morrone's testimony, the lower court denied the reconsideration motion, again without asking for a response from NWMS. (**CP at 5956)**

The lower court's holding that Mr. Mitchell and Mr. Conley perjured themselves affected its resolution of all of the issues in the case. In addition to granting summary judgment on the contract claim, the court

subsequently granted NWMS's summary judgment motion on its trade secret claim, and issued a permanent injunction relating to the threat of trade secret misappropriation. **(CP at 3310-3317)** Although there were directly contradictory declarations on the underlying facts regarding the trade secret claim **(CP at 2589-2591, 2602-2606, 2607-2608, 2401-2404, 2408-2413, 3062-3064)**, the lower court gave no weight to Mr. Mitchell's declaration: "But based on a variety of issues that relate to Mr. Mitchell's veracity and his, frankly, perfidy in prior declarations, testimony under oath, I'm going to issue this injunction." **(VRP 11/17/17 at 32**)

This action was reassigned to the Honorable Edmund Murphy on January 8, 2018. **(CP at 3309)** NWMS then voluntarily abandoned its trademark claim. Only the damages component breach of contract claim remained.[5] **(CP at 4718-4719)** NWMS contended that Sunset committed a "violation" of the Agreement each time a user clicked on one of its ads. There were 792 clicks, which would have resulted in $3,960,000 in liquidated damages. Appellants filed a motion for summary judgment on this theory, arguing that "violation" could not mean "click." **(CP at 4615-4634)** The lower court granted the motion, holding that a "violation" required some affirmative act by Sunset. **(CP at 5241-5242)** The court also ordered the parties to submit briefing on how "violation" should be interpreted. **(VRP at 4/6/18 at 34-39)**

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[5] NWMS did not seek monetary damages for its trade secret claim. **(VRP 11/17/17 at 36)**

Sunset urged the lower court to define "violation" as the number of NWMS-related keywords (*i.e.*, 10). **(CP at 5340-5367)** This interpretation was consistent with the lower court's finding that a "violation" required an affirmative act, and Judge Burdell's finding that a violation occurred each time Sunset "arranged" for particular search keyword an advertisement to run. Sunset also argued that this was the most reasonable interpretation given the absence of any harm to NWMS. The lower court rejected Sunset's proposal, however, and adopted NWMS's alternative theory that a violation occurred each day that a relevant bid was "active" in the Google Ads program, even if neither Sunset nor its vendor had done any relevant acts on a given day (*i.e.,* the bids remain pending until affirmatively cancelled). **(CP at 5256-5269)** Based on this interpretation, the court found 197 separate violations for a total of $985,000 in liquidated damages (197 x $5,000). **(CP at 5962-6963)** After awarding prejudgment interest and attorney fees and costs, the lower court entered a judgment of $1,883,176.61—in a case where no evidence of any actual loss or harm to NWMS was ever presented. **(CP at 6658-6664)**

IV. ARGUMENT

A. The Court Erred in Granting Summary Judgment that the Agreement Covers Bidding on Google Ads Keywords

This Court reviews a lower court's grant of summary judgment *de novo*. *Granville Condo. Homeowners Ass'n v. Kuehner*, 177 Wn. App. 543, 551, 312 P.3d 702 (2013). "When reviewing an order of summary judgment, this court engages in the same inquiry as the trial court."

Highline Sch. Dist. v. Port of Seattle, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976). Summary judgment is proper if the records on file with the trial court show "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." CR 56(c). All facts and reasonable inferences must be construed in a light most favorable to the nonmoving party. *Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77, 88, 272 P.3d 865 (2012).

1. Bidding on Keywords Is Not Use in Advertising as a Matter of Law

The Agreement does not encompass bidding on keywords as a matter of law. This is supported by both the context of the Agreement and the language of the Agreement. In particular, the Agreement was entered into in the context of a dispute where Sunset had used NWMS trademarks in its advertisements. Such use was claimed to have created confusion, and diversion of potential customers. To resolve that dispute, Sunset agreed not to use NWMS's trademarks "in advertising." The most reasonable interpretation of "in advertising," based on the context of the Agreement is "in advertisements," or in some other way that publishes the NWMS trademark to potential customers in a confusing manner.

"This court interprets settlement agreements in the same way it interprets other contracts." *McGuire v. Bates*, 169 Wn.2d 185, 189, 234 P.3d 205 (2010). Washington courts follow the "objective manifestation theory of contracts." *Hearst Commc'ns, Inc. v. Seattle Times*, 154 Wn. 2d 493, 503, 115 P.3d 262, 267 (2005). Under this approach, "the focus is on

the reasonable meaning of the contract language to determine the parties' intent." *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 712-13, 334 P.3d 116 (2014). Courts also utilize the "context rule," which permits consideration of "extrinsic evidence relating to the context in which a contract is made . . . to determine the meaning of specific words and terms" used in the contract. *Hulbert v. Port of Everett*, 159 Wn. App. 389, 399-400, 245 P.3d 779 (2011). "Extrinsic evidence includes both the contract's subject matter and objective, the circumstances surrounding contract formation, both the parties' conduct and subsequent acts, and the reasonableness of the parties' respective interpretations." *RSD AAP, LLC v. Alyeska Ocean, Inc.*, 190 Wn. App. 305, 315, 358 P.3d 483 (2015).

NWMS itself characterized the Agreement as intended to prevent use of its trademarks in Sunset *advertisements*:

> These actions [of Sunset] resulted in actual consumer confusion, which, in turn, resulted in damages which were truly incalculable. So, in an effort to ensure that there would not be any repetition of the conduct which resulted in the initiation of the litigation, Northwest Motorsport specifically negotiated for the inclusion of a legal, cogent, and coherent clause which would prohibit the Defendants from any future unethical practices or infringements; the clause bars the Defendants from using ***any*** variation [of] the words 'truck' or 'trucks' consecutively in the same phrase or sentence, and the Defendants cannot use the word 'Northwest Motorsport' *in their ads*, either.

(CP at 2105-2106) (second emphasis added). This is also consistent with the ordinary meaning of "advertising." As reflected by dictionary definitions, "advertising" is defined as associated with publications or

announcements. *See, e.g.,* The American Heritage College Dictionary (3d. ed. 1997). Sunset's accused activities never published or used NWMS's trademarks in any public manner. In other words, Sunset's "advertising" did not use NWMS's trademarks.

Further, both parties agreed that the purpose of the Agreement was to prevent consumer confusion. **(CP at 4698)** ("The reason for it was, we didn't want Phil to use our 'trucks, trucks' consecutively to *confuse consumers* to think that they were doing business with Northwest – or Northwest Motorsport versus Sunset Chevrolet") (emphasis added). But purchasing search keywords through Google Ads does not, by itself, mislead consumers. There is no credible claim that any confusion occurred from the accused activities. Courts have consistently held that a party may bid on a competitor's trademark as a Google Ads keyword, so as to propose alternatives to the customer, so long as the resulting ads themselves are not confusing.[6]

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[6] *See, e.g., JG. Wentworth, SSC. Ltd. P'ship v. Settlement Funding LLC*, No. 06-0597, 2007 U.S. Dist. LEXIS 288, at *23 (E.D. Pa., Jan. 4, 2007) (finding defendant's purchase of plaintiff's trademarks as search keywords in Google's AdWords program did not result in any likelihood of confusion because the ads displayed on the search results page were "separate and distinct" from the business associated with the search keywords; as a result, "potential consumers have no opportunity to confuse defendant's services, goods, advertisements, links or websites for those of plaintiff"); *Infostream Group Inc. v. Avid Life Media Inc*., No. 12-cv-9315, 2013 U.S. Dist. LEXIS 161940 (C.D. Cal. Nov. 12, 2013).

Indeed, the Federal Trade Commission considers agreements not to purchase competitors' names or slogans as search keywords to be anti-competitive. *Opinion of the Commission* (Nov. 14, 2018), No. 9372, available at https://www.ftc.gov/system/files/documents/cases/docket_no_9372_opinion_of_the_commission_redacted_public_version.pdf (ruling that 1-800-Contacts engaged in unfair methods of competition by suing competitors for purchasing 1-800-Contacts' trademarks as search terms and settling lawsuits with agreements not to purchase the terms).

For these reasons, this Court should find that the Agreement does not encompass Sunset's bidding on Google Ads keywords, even if they contained NWMS's trademarks, so long as those trademarks were not used in the resulting advertising.

2. There Was at Least a Genuine Issue of Fact

At the very least, NWMS's admission in the original Complaint that the Agreement was not intended to cover such activities created a genuine issue of fact. "'[C]ontractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts.'" *Queen Anne Park Homeowners Ass'n v. State Farm Fire & Cas. Co.*, 183 Wn.2d 485, 489, 352 P.3d 790 (2015) (quoting *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 181, 110 P.3d 733 (2005)). Ambiguity is defined as "'an uncertainty of meaning in the terms of a written instrument.'" *Ladum v. Utility Cartage, Inc.*, 68 Wn.2d 109, 116, 411 P.2d 868 (1966) (quoting *State Bank of Wilbur v. Phillips*, 11 Wn.2d 483, 488, 119 P.2d 664 (1941)).

In its Original Complaint, NWMS asserted that Sunset's Google Ads activity "was *not* in in [sic] contravention of the settlement agreement" because the ads "did not contain Northwest Motorsport's name or unique slogan." **(CP at 9)** In the same paragraph, NWMS alleged that "the illegal acts herein [*i.e.*, the Google Ads activity] were *outside* of the settlement agreement" (emphasis added). ***(Id.)***

Complaints, even if superseded, are admissions of a party opponent under ER 801(d)(2). This rule provides, in relevant part, that a statement

offered against a party is not hearsay if (1) it is the party's own statement, made either in an individual or representative capacity, (2) it is made by a person authorized by the party to make the statement concerning the subject, or (3) it is made by the party's agent or servant acting within the scope of the authority to make the statement for the party.

Legal documents signed by a party's attorney are party-opponent admissions. In *Seattle v. Richard Bockman Land Corp.*, the Court of Appeals affirmed the admission of a permit signed by a party's attorney under ER 801(d)(2). *Id.*, 8 Wn. App. 214, 215-16, 505 P.2d 168 (1973). The permit was for the installation of a large sewer line and was offered to prove the defendant's ownership of a home. The Court of Appeals, relying on a Maryland appellate decision, reasoned that the attorney "was clearly within the scope of his agency" when he signed the permit. *Id*. Here, there is no allegation that NWMS's counsel were acting outside the scope of their agency when signing NWMS's Original Complaint.

Similarly, the Ninth Circuit has held that complaints are admissions of party-opponents under the federal equivalent of ER 801(d)(2). *American Title Insurance Co. v. Lacelaw Corp.*, 861 F.2d 224, 227 (9th Cir. 1988). "Where our evidence rules mirror their federal counterparts, we may look to federal case law interpreting the federal rules as persuasive authority in interpreting our own rules." *In re Det. of Pouncy*, 168 Wn.2d 382, 392 n.9, 229 P.3d 678 (2010). Many other authorities in addition to the Ninth Circuit have held that complaints are party-opponent admissions. *Barnes v. Owners-Corning Fiberglass Corp.*, 201 F.3d 815, 829 (6th Cir. 2000);

Enquip, Inc. v. Smith-McDonald Corp., 655 F.2d 115, 118 (7th Cir. 1981); *Wiseman v. Reposa*, 463 F.2d 226, 227 (1st Cir. 1972); *Raulie v. U.S.*, 400 F.2d 487, 526 (10th Cir. 1968); *Walko v. Academy of Bus. & Career Dev., LLC*, 493 F. Supp. 2d 1042, 144 n.4 (N.D. Ill. 2006); *Cascade Corp. v. Am. Home Assurance Co.*, 135 P.3d 450, 461 (Or. Ct. App. 2006).

In *Huey v. Honeywell, Inc.*, the Ninth Circuit held:

> When a pleading is amended or withdrawn, the superseded portion ceases to be a conclusive judicial admission; but it still remains as a statement once seriously made by an authorized agent, and as such it is competent evidence of the facts stated, though controvertible, like any other extrajudicial admission made by a party or his agent. If the agent made the admission without adequate information, that goes to its weight, not to its admissibility.

Id., 82 F.3d 327, 333 (9th Cir. 1996). Consistent with *Huey*, Judge Leighton of the Western District of Washington allowed defendants to introduce a prior complaint as evidence. *Kreidler v. Pixler*, No. 06-cv-0697, 2010 U.S. Dist. LEXIS 49076, at *11 (W.D. Wash. Apr. 15, 2010). The prior complaint included a defendant who had since been dismissed. Judge Leighton admitted the complaint, ruling that it "represents an admission" under FRE 801(d)(2). *Id.* at *11-12.

At a minimum, NWMS's original interpretation of the Settlement Agreement created a genuine issue of material fact that should have precluded summary judgment. "Summary judgment is not appropriate on an ambiguous contract," and, after construing the facts and reasonable inferences in a light most favorable to Appellants, the lower court should

not have granted it on NWMS's breach of contract claim. *Marshall v. Thurston Cnty.*, 165 Wn. App. 346, 351, 267 P.3d 491 (2011); *GMAC v. Everett Chevrolet, Inc.,* 179 Wn. App. 126, 133, 317 P.3d 1074 (2003) ("[I]f two or more meanings are reasonable, a question of fact is presented.").

Moreover, the extrinsic evidence creates a genuine issue of material fact that should have precluded summary judgment. If more than one reasonable inference can be drawn from extrinsic evidence, then summary judgment is inappropriate. *Go2net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 85, 60 P.3d 1245 (2003). The circumstances "under which the contract was made" are a form of extrinsic evidence that is relevant to interpreting its terms. *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990). Plaintiff's first lawsuit from 2011-2013 sought compensation from Sunset for displaying Plaintiff's trademarks within its Craigslist posts and Internet domain names (*e.g.*, "northwest-motorsports.com"). **(CP at 1752-1760)** NWMS acknowledged in its arbitration brief from 2016 that the Settlement Agreement was negotiated to deter use of NWMS trademarks in Sunset advertisements. **(CP at 2105-2106)**

Yet purchasing search keywords through Google Ads does not, by itself, mislead consumers. Further, the parties agreed that the purpose of the Agreement was to prevent consumer confusion. **(CP at 4698)** The extrinsic evidence demonstrates that the parties could not have intended for the Settlement Agreement to cover activity that did not involve any likelihood of consumer confusion.

In sum, the lower court erred by granting summary judgment to NWMS that "use in advertising" includes purchasing search keywords. The lower court decided—at the same hearing where it found Mr. Mitchell and Mr. Conley committed perjury—that the Settlement Agreement had only one reasonable meaning, despite being presented with NWMS's own contradictory interpretations and extrinsic evidence regarding the circumstances of the Settlement Agreement's formation. The lower court failed to construe all facts and reasonable inferences in a light most favorable to Appellants. This Court should at least reverse the lower court's grant of summary judgment for further proceedings to determine if the Settlement Agreement applies to purchasing search keywords with Google Ads.

B. The Court Erred in Concluding that a "Violation" Occurred Each Day a Google Ads Bid Existed

If this Court does not reverse the lower court's summary judgment ruling that "use in advertising" includes bidding on search keywords, it should still reverse the lower court's interpretation of "violation." The lower court's construction is inconsistent with the prior findings by Judge Burdell and the lower court itself that a "violation" required an affirmative act by Sunset, does not reflect the parties' intent or the circumstances of the Settlement Agreement's formation, and is an "unreasonable and imprudent" construction of the Settlement Agreement. *Berg*, 115 Wn.2d at 672. Appellants' definition of "violation" as the number of NWMS-related

search keywords is the only principled and fair construction, and should have been adopted by the lower court.

The construction[7] of a settlement agreement involves a question of law, which is reviewed *de novo*. *Aguirre v. AT&T Wireless Servs.*, 118 Wn. App. 236, 240, 75 P.3d 603 (2003).

1. The Per-Day Definition of "Violation" Does Not Comport with Judge Burdell's Prior Ruling or the Lower Court's Own Direction

Judge Burdell interpreted the meaning of "violation" as applied to TV and radio advertisements and Craigslist posts. For both applications, the definition was tied to an affirmative act by Sunset. The TV and radio advertisements had been broadcast more than two thousand times, but Judge Burdell ruled that a violation occurred only when Sunset "arranged" with the television or radio station for the offending ad to run, which occurred 46 times. **(CP at 4654, 4656)** Sunset posted thousands of Craigslist ads that contained NWMS or its trademarks over a period of six months, but Judge Burdell rejected a rigid per-day definition of "violation." **(CP at 4655)** He found a violation occurred each day that Sunset took the affirmative act of

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[7] In *Hearst Communications*, the Supreme Court recognized a difference between contract interpretation and construction. *Id.*, 154 Wn. 2d at 502 n.9. While the terms are "often used . . . interchangeably," the former "is the process by which we ascertain the meaning we will give to the language of the document by examining objective manifestations of the parties' intent," while the latter "is the process by which we apply relevant legal principles to the circumstances of a case in order to determine the legal consequences of the words." *Id.*

Regardless of whether the lower court engaged in interpretation or construction when it defined a "violation" as each day a NWMS-related search keyword was bid on, the standard of review is *de novo*. "Interpretation of a contract is a question of law, which we also review de novo." *First-Citizens Bank & Tr. Co. v. Cornerstone Homes & Dev., LLC*, 178 Wn. App. 207, 211, 314 P.3d 420 (2013).

posting any Craigslist ads, but reduced the number of days from 180 to 60 to "allow[] a fair result." **(CP at 4656)**

The Google advertising at issue here is comparable to the TV and radio advertising from the arbitration hearing. In both cases, Sunset "arranged" with a third party for an advertisement to be run. Sunset did not control the number of times the advertisement was displayed or broadcast. Even if the Google Ads activity is analogized to the Craigslist posts, Judge Burdell still did not use a per-day definition, as the lower court did here.

Judge Burdell's decision should be given collateral estoppel effect. "[I]t is well settled that in an appropriate case the decision in an arbitration proceeding may be the basis for collateral estoppel or issue preclusion in a subsequent judicial trial." *Robinson v. Hamed*, 62 Wn. App. 92, 96-97, 813 P.2d 171 (1991); *MedChoice Risk Retention Grp. v. Katz*, No.17-cv-387, 2017 U.S. Dist. LEXIS 145958 (W.D. Wash. Sep. 8, 2017) (applying collateral estoppel to issues decided in arbitration); *Hydra-Pro Dutch Harbor, Inc. v. Scanmar, AS*, No. 08-cv-1695, 2010 U.S. Dist. LEXIS 98765, at *12 (W.D. Wash. Sep. 20, 2010) (recognizing that arbitration gives rise to collateral estoppel).

All four elements of collateral estoppel are met: (1) the issue is identical (*i.e.*, interpretation of the term "violation") **(CP at 4656)** ("The agreement does not define the term 'violation.'"); (2) Judge Burdell's award was reduced to judgment and was not appealed **(CP at 4658-4660)**; (3) Plaintiff was a party to the arbitration and to this action; and (4) Plaintiff will not suffer injustice through the application of collateral estoppel.

Paradise Orchards v. Fearing, 122 Wn. App. 507, 514-15, 94 P.3d 372 (2004). The "injustice" factor is met because (1) the prior forum was binding arbitration before a retired superior court judge; (2) Judge Burdell had jurisdiction over the matter; (3) the arbitration was not informal enough to negate the application of collateral estoppel; and (4) the arbitration had procedural safeguards, including an appeal. *State Farm Mut. Auto. Ins. Co. v. Avery*, 114 Wn. App. 299, 306-10, 57 P.3d 300 (2002).

NWMS erroneously argued below that Judge Burdell's ruling does not have collateral estoppel effect because he did not apply the definition of "violation" specifically to Google Ads. But collateral estoppel applies when the issue is one of contract interpretation, even if the underlying facts change. *Cont'l Holdings, Inc. v Crown Holdings Inc.,* 672 F.3d 567, 575 (8th Cir. 2012) (holding that arbitrator's interpretation of the term "the Business" had collateral estoppel effect in subsequent litigation "whether it relates to environmental, occupational or any other type of third-party claim which may arise"); *Gould v. Strescon Indus.*, No. 92-cv-1354, 1994 U.S. Dist. LEXIS 20146, at *10 (D. D.C. May 6, 1994) (collateral estoppel effect given to prior ruling that imposed obligation on employer to contribute to fund for holiday and vacation time, even though prior ruling involved contributions already paid and second case involved contributions not yet paid); *United Mine Workers of Am. Int'l Union v. Nobel*, 720 F. Supp. 1169, 1183 (W.D. Pa. 1989) (applying collateral estoppel to previous interpretation of a collective bargaining agreement even though subsequent case "present[ed] a vriety of specific factual situations").

NWMS tried to limit Judge Burdell's ruling to the specific facts of the arbitration, but Judge Burdell was not simply applying the contract to a narrow set of circumstances. Instead, he was weighing two competing theories of contract interpretation. NWMS argued, including through substantial briefing, that a "violation" for purposes of liquidated damages occurred each time an advertisement was run–an action that was outside of Sunset's control. **(CP at 4655-4656, 5149-5151)** Sunset countered that a "violation" was limited to actions taken by Sunset, such as every time that Sunset arranged for an advertisement to be broadcast, regardless of the number of broadcasts. **(CP at 5153-5155)** Judge Burdell weighed the arguments and concluded that a violation requires affirmative acts by Sunset. **(CP at 4656)** ("A more reasonable result is achieved by construing the term "violation" as each time defendants *engaged in an activity* that breached the agreement, regardless of how many ads or posting that were actually created.")

Judge Burdell's ruling has collateral estoppel effect because it resolved the issue of whether a violation must be based on affirmative action by Sunset, and the lower court's per-day definition of "violation"[8] is incompatible with that ruling. The lower court also did not follow its own

[8] Even if Judge Burdell's ruling does not have collateral estoppel effect, "[a] previous contract . . . already interpreted is strong evidence of the parties' interpretation of the disputed contract." *Hydro Group, Inc. v. United States*, 17 Cl. Ct. 668, 679, 1989 U.S. Cl. Ct. LEXIS 142, *29; *Brown v. Bank of Galveston, Nat'l Ass'n,* 963 S.W.2d 511, 514 (Tex. 1998) ("The contract's operable language is identical to language this Court has already interpreted."); *Stump v. Cyprus Kanawha Corp.*, 919 F. Supp. 221, 225 (S.D. W. Va. 1995) ("The parties need only look to the contract in determining the amount of damages inasmuch as the arbitrator has already interpreted the Collective Bargaining Agreement.")

direction. In rejecting NWMS's previously-offered per-click definition, the lower court ruled that "the focus of the agreement is on the action of Sunset," and a "violation" should relate to "the action of using those words [prohibited by the Settlement Agreement] and posting those Google ads." **(VRP 4/6/18 at 33-34)** The number of days that NWMS-related search keywords were active does not correspond with any "action" taken by Sunset. The only affirmative act was selecting the search keyword. As such, the lower court should have adopted Appellants' per-keyword definition.

2. The Per-Keyword Definition is the Only Fair, Reasonable, and Principled Interpretation of "Violation"

Settlement agreements are interpreted in the same way as contracts. *McGuire*, 169 Wn.2d at 189. Under the objective manifestation theory of contracts, the parties' intent is determined by focusing on the reasonable meaning of the contract language. *Viking Bank*, 183 Wn. App. at 712-13. Courts may also consider extrinsic evidence related to the contract's formation, its subject matter and objective, the parties' conduct and subsequent acts, and the reasonableness of the parties' respective interpretations. *Hulbert*, 159 Wn. App. at 399-400; *RSD AAP*, 190 Wn. App. at 315. A "basic principle[] of contract construction" is that "[t]he intention of the parties must control." *Crofton v. Bargreen*, 53 Wn.2d 243, 251, 332 P.2d 1081 (1958).

The parties agree that the $5,000 per-violation liquidated damages clause was intended to approximate the value of a lost customer. **(CP at 5620, 5633)** In the context of using NWMS marks for domain names or in advertisements that caused consumer confusion, using a violation as a proxy for a lost customer was sensible. It is absurd to assume, however, that NWMS lost a customer for every day that the search keywords ran over six-and-a-half months (*i.e.*, 197 customers). **(CP at 4220-4231)** This assumption is not supported any evidence of lost customers or other injury. *See Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 894, 881 P.2d 1010 (1994) ("[A]ctual damages may be considered where they are so disproportionate to the estimate that to enforce the estimate would be unconscionable").

No more than a few people clicked on the Sunset ad on any given day, and there is nothing that suggests that one person each day was likely to have purchased a vehicle. NWMS's interpretation results in a windfall that has no relationship to actual damages or harm. *See*, *e.g.*, *Forest Mktg. Enters. v. Dep't of Nat. Res.*, 125 Wn. App. 126, 137, 104 P.3d 40 (2005) (enforcing liquidated damages clause because "DNR's recovery under the liquidated damages formula was very close to its estimated actual damages."); *see also Nova Contracting, Inc. v. City of Olympia*, No. 48644-0-II, 2017 Wash. App. LEXIS 913, at *23 (Apr. 18, 2017) ("A liquidated damages clause is unlawful if the estimated probable damages are too

disproportionate to actual damages.") (citing *Wallace Real Estate*, 124 Wn.2d at 894).[9]

The context rule "permit[s] the court to reject any potential unreasonable interpretation" of the contract. *In re Marriage of Carrasco*, No. 45767-9-II, 2015 Wash. App. LEXIS 1286, at *23 (June 16, 2015)[10] (citing *Fedway Marketplace W., LLC v. State*, 183 Wn. App. 860, 877, 336 P.3d 615, 623 (2014)); *Fisher Props. v. Arden-Mayfair, Inc.*, 106 Wn. 2d 826, 837, 726 P.2d 8 (1986); RESTATEMENT (SECOND) OF CONTRACTS § 203. Where the liquidated clause of the Settlement Agreement was (undisputedly) intended to compensate NWMS each time it lost a customer to confusion, it is "unreasonable" to assume that NWMS lost a customer each day that a NWMS-related search keyword was active, especially when there is no evidence of customer confusion.

The per-keyword definition, in contrast, furthers the parties' intent to use the $5,000 figure as a proxy for a customer lost to consumer confusion. Although there is no evidence of any misled or confused consumers whatsoever in this case, the only reasonable proxy remains the number of keywords (10), which amounts to $50,000 in liquidated damages. The undisputed evidence establishes that only 6% of clicks translate to conversions (and only a portion of those into sales). **(CP at 5635-5636, 5638)**There were 792 clicks on ads tied to NWMS-related search keywords, which translates to 48 conversions (and only a portion of those into sales),

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[9] RAP 14.1(a).
[10] *Id.*

an estimate much closer to Appellants' proposal of 10 violations than NWMS's figure of 197. NWMS itself argued below that the definition of violation should take into account the "efficacy of the advertising campaign." **(CP at 5267)** Defining a violation as each keyword selected would "effectuate the purpose of the contract" to approximate the number of lost customers. *State ex rel. Mt. Dev. Co. v. Superior Court for Pierce Cty.*, 190 Wn. 183, 195, 67 P.2d 861 (1937).

"[C]ontract interpretation should not produce an absurd result." *City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 593, 269 P.3d 1017 (2012). Further, an "unreasonable and imprudent" construction of a contract must be rejected in favor of a "reasonable and just" construction. *Berg*, 115 Wn.2d at 672. The per-keyword violation honors the prior construction of the contract by Judge Burdell, upholds the parties' intent, and is "reasonable, fair and just." *Dickson v. United States Fid. & Guar. Co.*, 77 Wn.2d 785, 790, 466 P.2d 515 (1970). The only way to "maintain a consistent interpretation of the agreement's terms" is to focus on the actions of Sunset and its vendor, which was to select a keyword. *Brown v. MHN Gov't Servs., Inc.*, 178 Wn.2d 258, 268, 306 P.3d 948 (2013).

In sum, the lower court erred by interpreting "violation" to mean every day that a NWMS-related search keyword was active. This Court should reverse the lower court's ruling in this respect, and remand with instructions to define "violation" as the number of NWMS-related keywords.

C. The Court Committed Reversible Error in Finding that Mr. Mitchell and Mr. Conley Committed Perjury and Refusing to Reconsider Its Ruling

The lower court abused its discretion in finding that Mr. Mitchell and Mr. Conley committed perjury and by denying two reconsideration motions that sought to clarify the lower court's confusion and present it with newly-discovered evidence.

At the same hearing where it made its perjury finding, the lower court imposed a $75,000 monetary sanction on Appellants for a purported discovery violation. **(VRP 9/1/17 at 39)** While its perjury finding was included in the same order, the perjury finding was not itself a sanction. **(CP at 3070, 3075)** As such, this Court should review the lower court's perjury finding to determine if it was supported by "substantial evidence." *In re Marriage of Rideout*, 150 Wn. 2d 337, 351, 77 P.3d 1174 (2003) (holding that, the "substantial evidence standard of review" should apply to "credibility determinations" made on the basis of "documentary records"); *Dolan v. King County*, 172 Wn.2d 299, 310, 258 P.3d 20 (2011).

Throughout this case, NWMS has conflated two different claims. The first claim, which is false, is that Mr. Mitchell and Mr. Conley denied during the arbitration hearing that Sunset used Google Ads at all. The second claim, which is true, is that Mr. Mitchell and Mr. Conley denied that anyone at Sunset, including themselves, selected the search keywords that were used in Sunset's Google Ads campaigns.

To support its claim that Mr. Mitchell and Mr. Conley denied that Sunset ever used Google Ads, NWMS relied on declarations from Mr.

Morrone and Ms. Willert. Although both witnesses were present at the arbitration hearing, their declarations contradict each other. While Mr. Morrone states that Mr. Mitchell denied that Sunset used Google Ads at all, Ms. Willert—who was lead counsel at the arbitration hearing and questioned nearly every witness—does *not* say that Mr. Mitchell denied that Sunset ever used Google Ads. Instead, she says, "Sunset's representatives repeatedly denied using terms in violation of the contract *in their Google advertising.*" **(CP at 1462, 1281)** (emphasis added) Ms. Willert's declaration correctly draws a distinction between (1) Mr. Mitchell's acknowledgement that Sunset used Google as an advertising platform; and (2) Mr. Mitchell's testimony at the arbitration hearing that he lacked knowledge regarding the bidding of certain search keywords.

Ms. Willert, of course, knew that Mr. Mitchell had never denied that Sunset used Google AdWords at any point during the arbitration. Ms. Willert herself deposed Mr. Mitchell and Mr. Conley in the weeks prior to the arbitration hearing (Mr. Morrone was present at these depositions). Mr. Mitchell testified Sunset engaged in "computer advertising" such as "search engine optimization, stuff like that," while Mr. Conley testified that Sunset uses a "vendor" to conduct "internet" advertising. **(CP at 5077-5085)** He explained that he was "pretty hands-on" for radio and television ads, while having limited involvement in social media advertising. **(CP at 3299-3300)** He explained Sunset's "Internet" and "banner ads" advertising was handled by outside vendors, and Mr. Keenan in particular. **(CP at 5447).** Obviously, Mr. Conley and Mr. Mitchell never hid the fact that Sunset was

involved in "search engine" advertising, and both Ms. Willert and Mr. Morrone heard their testimony to that effect.

Moreover, Sunset's litigation counsel had advised NWMS in early 2017 that Sunset used Google Ads, and even told NWMS's counsel that it was contacting each of Sunset's vendors to inquire about which search keywords they had purchased on behalf of Sunset. **(CP at 5488, 5494)** Early in the underlying action, Sunset opposed NWMS's discovery of Google Ads activity solely because no court in the country has held that the mere act of bidding on a competitor's keywords constitutes trademark infringement (and NWMS was, at that point, only asserting trademark infringement related to Google Ads). But neither Sunset nor its litigation counsel ever tried to cover up Sunset's use of Google Ads, and even explicitly acknowledged such use through statements like, "Sunset states that it hires third parties to handle its on line presence," and "Mr. Mitchell and Mr. Conley do not control or direct how these vendors do their job, or know the potentially thousands of search terms these vendors purchased." **(CP at 5494)**

Appellants also opposed the sanctions motion with declarations from two of Sunset's vendors, who stated they were "advertising vendor[s]" for Sunset, "purchas[d] and bid[] on keyword search terms through Google AdWords," but did not purchase search keywords related to NWMS or its trademarks. **(CP at 2217-2219, 2220-2222)** It makes no sense for Appellants to submit declarations acknowledging Sunset's use of Google

AdWords if Mr. Mitchell and Mr. Conley testified at the arbitration hearing that Sunset did not use Google AdWords.

Appellants respectfully submit that the lower court was confused. The only basis for the lower court's finding was Mr. Morrone's declaration **(CP at 1461-1462)**, who had also told the lower court that "[a]fter the case was filed [*i.e.*, the instant lawsuit], Sunset repeatedly denied it had ever engaged in Google AdWords." **(CP at 1926-1927)** This was not true, as Mr. Morrone exchanged multiple emails with Sunset's litigation counsel regarding their inquiries with Sunset vendors who did oversee Google Ads advertising for Sunset. **(CP at 1858, 1861, 5494, 5488)** In short, the lower court's perjury finding was not supported by "substantial evidence." *Dolan*, 172 Wn.2d at 310.[11]

After the lower court issued its findings of fact and conclusions of law, and realizing that the lower court had been misled, Sunset filed a reconsideration motion attempting to clarify a number of issues, such as the use of Mr. Mitchell's credit card by vendors and Mr. Conley's testimony at the arbitration hearing that he believed Sunset may have been hacked. Mr. Conley explained he had never seen the specific ad presented to him at the

[11] NWMS may reference a declaration from Sunset's counsel filed with this Court in May 2017 as part of Sunset's opposition to NWMS's attempt to stay this proceeding and refer the breach of contract issue to arbitration. The declaration states that during the arbitration hearing, "Sunset's witnesses denied knowledge of any Google AdWords purchases." **(CP at 1315)** NWMS cannot claim that this declaration was confusing given that (1) the declaration states Mr. Mitchell and Mr. Conley only denied knowing about *purchases*, not Sunset's use of Google AdWords as a platform; and (2) by the time the declaration was filed, NWMS knew (through the deposition testimony of Mr. Mitchell and Mr. Conley, investigations by NWMS, its counsel, and its expert, and previous statements by Sunset's litigation counsel) that Sunset used Google AdWords purchased by vendors.

arbitration hearing, and it was inconsistent with the rest of the Sunset advertising campaign. **(CP at 3186-3187)** He also explained that Mr. Keenan was authorized to run ads on his own, although he had made clear that Mr. Keenan could not use NWMS trademarks in any such advertising. **(*Id.*)** (Mr. Keenan presumably did not believe this precluded bidding on NWMS-related search keywords). The lower court denied the reconsideration motion within days and without calling for a response.

After the first reconsideration motion was denied, Appellants deposed NWMS's search advertising expert, Mr. Brumder. At his deposition, he produced a file containing an email from July 10, 2016—dated two days before the arbitration hearing—between Mr. Morrone and himself. This email states, "Our client [*i.e.*, NWMS] states that, when they type 'Northwest Motorsport' into Google, the first paid link is to 'Sunset Trucks.'" **(CP at 5943-5944)** Mr. Morrone included a screenshot that he or his client took of the search. **(*Id.*)**

At his deposition, Mr. Brumder testified that he had conducted Google searches at a "law office" sometime before the arbitration, including a search for "'Trucks and More Trucks'" that resulted in the display of "Sunset's sponsored ads." **(CP at 5460-5461)**

With this newly-discovered evidence, Appellants again asked the lower court to reconsider its perjury finding. The email and Mr. Brumder's deposition testimony contradicted Mr. Morrone's declaration to the lower court stating that NWMS only learned about Sunset's use of Google Ads "by happenstance" on a "lunch break during testimony" at the arbitration

hearing. Mr. Morrone knew Sunset ads were presented in response to searches for "Northwest Motorsports" before the arbitration proceeding, yet told the lower court otherwise. This evidence, at the least, created questions about the reliability of Mr. Morrone's testimony—which was the only evidentiary support for the lower court's finding. Once again, the lower court denied the reconsideration motion without calling for a response. **(CP at 5956)**

The lower court's rulings on the reconsideration motions are generally reviewed on the more stringent manifest abuse of discretion standard. *Fishburn v. Pierce Cty. Planning & Land Servs. Dep't*, 161 Wn. App. 452, 472, 250 P.3d 146 (2011). But "discretion . . . is never arbitrary. It must, like discretion in other matters, be based on reason." *Coggle v. Snow*, 56 Wn. App. 499, 505, 784 P.2d 554 (1990). This Court must ask whether discretion was "exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court's discretion." *Id.* at 507-08.

Even under this more stringent standard, the lower court's failure to at least consider the newly-discovered evidence and the impact it had on the reliability of earlier evidence that supported its perjury finding, was error. *See Coggle*, 56 Wn. App. at 508 (holding that, if lower court refused to consider newly-discovered evidence on a motion for reconsideration, such refusal "was an abuse of discretion").

When considered cumulatively, the initial perjury finding and the denial of two reconsideration motions are reversible error. At a minimum,

the lower court should have vacated its perjury finding and conducted additional fact-finding. The failure to do so, especially in light of the impact of the finding on its other rulings, was error.

D. The Court Erred by Granting Summary Judgment on NWMS's Motion for Permanent Injunction on Related to Its Trade Secret Claim

Having decided (based on inaccurate, misleading, and incomplete statements) that Mr. Mitchell lied under oath during the arbitration hearing, the lower court elected to give no weight to a declaration that Mr. Mitchell submitted in opposition to NWMS's motion for a permanent injunction on its trade secret claim. **(VRP 11/17/17 at 32**) Regardless of what the lower court thought of Mr. Mitchell's credibility, it is clear error to make credibility determinations on summary judgment. "It is axiomatic that on a motion for summary judgment the trial court has no authority to weigh evidence or testimonial credibility." *No Ka Oi Corp. v. National 60 Minute Tune, Inc*., 71 Wn. App. 844, n.11, 863 P.2d 79 (1993); *Jones v. State*, 170 Wn. 2d 338, 354 n.7, 242 P.3d 825 (2010) ("[T]he rule is settled that '[t]he court does not weigh credibility in deciding a motion for summary judgment.'") (quoting 14A KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 25:16 (2009)).

In the lower court, Mr. Mitchell submitted a declaration that denied each of NWMS's allegations that he attempted to improperly recruit its employees or obtain trade secrets from them. **(CP at 2589-2591, 2602-2606, 2607-2608, 2401-2404, 2408-2413, 3062-3064)** Under normal circumstances, this would preclude summary judgment. But the lower court

gave no weight to Mr. Mitchell's declaration: "[B]ased on a variety of issues that relate to Mr. Mitchell's veracity and his, frankly, perfidy in prior declarations, testimony under oath, I'm going to issue this injunction." **(VRP 11/17/17 at 32**)

As explained above, Court reviews summary judgment motions *de novo*, construing all facts and reasonable inferences in a light most favorable to the non-moving party (here, Appellants). *Rice*, 167 Wn. App. at 88. Appellants produced a competing declaration from Mr. Mitchell that refuted the specific allegations raised by NWMS. **(CP at 3062-3064)** It would have been reversible error for the lower court to grant summary judgment after considering Mr. Mitchell's declaration. But the lower court's failure to even *consider* the declaration was clearly reversible error. *Barker v. Advanced Silicon*, 131 Wn. App. 616, 624, 128 P.3d 633 (2006) ("On motion for summary judgment the trial court does not weigh evidence or assess witness credibility."); *see also Duckworth v. Langland*, 95 Wn. App. 1, 8, 988 P.2d 967 (1998).

V. CONCLUSION

NWMS should have raised the issue of Sunset's Google Ads activities in the original arbitration before Judge Burdell. Recognizing that it had not properly pursued the issue (and likely concerned about waiver or res judicata), it filed the Complaint in this action, and expressly stated that the Google Ads activity did not constitute breach of contract. There was no reason for the Complaint to expressly assert that the activities did not

constitute breach of contract unless NWMS was concerned that the claims were subject to arbitration.

Apparently recognizing, however, that its trademark infringement claim had no merit (because of the absence of any confusion and the case authority to the contrary), it amended its Complaint to assert breach of contract, and excused its failure to raise the issue in the arbitration by arguing that Sunset's witnesses had lied at the arbitration by denying that Sunset advertised on Google. The lower court was, unfortunately, misled into believing the story, though it was based almost exclusively on attorney argument. The court's conclusion led it to grant summary judgment to NWMS on both its contract and trade secret claims. Even when presented with countervailing evidence, such as the deposition testimony from the arbitration, and an email undermining the reliability of the only declarant's testimony supporting the perjury claim, the court failed to reconsider the issue. This cascading series of events led to a final judgment of approximately $2 million, and a public finding of perjury, in a case that involved no perjury, and no harm or damage to the plaintiff. The result is an injustice that this Court should correct. The Settlement Agreement between the parties was intended to prevent customer confusion created by Sunset's use of NWMS's trademarks in its advertising. There was no use, and no confusion, so there was no breach of the Settlement Agreement. The lower court's interpretation of "in advertising" as encompassing anything related to advertising is not supportable. It is contradicted by the context of the Agreement, the testimony about its purpose, and the admission by

NWMS in the original Complaint. Even if there was a breach, the liquidated damages amount should not be based on the number of days a Google keyword bid was active. The number of days is an arbitrary measure (as arbitrary as the number of weeks or months), and has no relationship to any alleged harm. Similarly, the lower court erred in granting summary judgment on the trade secret claim, which it did expressly premised on a finding of perjury. Appellants respectfully request this Court to reverse and/or vacate the lower court's findings and rulings as described above.

RESPECTFULLY SUBMITTED this 24th day of May, 2019.

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CERTIFICATE OF SERVICE

On May 24th, 2019, I caused to be served upon the below named counsel of record, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document.

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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, on May 24th, 2019.

s/ Sophia Katinas
Sophia Katinas

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