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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NORTHWEST MOTORSPORT, INC., a Washington Corporation,

Respondent,

v.

SUNSET CHEVROLET, INC., a Washington Corporation, SUNSET
TRUCK, INC., a Washington Corporation, and PHILLIP
MITCHELL, in his personal and professional capacity,

Appellants.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE EDMOND MURPHY AND
STANLEY J. RUMBAUGH

BRIEF OF RESPONDENT

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I. INTRODUCTION

Beginning in 2011, appellants Sunset Chevrolet, Inc., and Sunset Trucks, Inc. (collectively “Sunset”), began a sustained attack on the brand respondent Northwest Motorsport, Inc. (“Northwest”), spent 15 years and millions of dollars building to support its successful automobile dealership. Northwest sued Sunset for its misconduct, which included purchasing the website “www.northwest-motorsports.com” and 33 other websites with similar names to confuse customers and re-route them to Sunset’s virtual showroom. In a settlement agreement, Sunset promised not to “use in advertising in any manner” Northwest’s name or trademarks and Northwest agreed to dismiss its substantial claims.

Sunset almost immediately breached the settlement agreement by placing violative ads on radio, TV, social media, and the website Craigslist. The parties arbitrated that breach. The arbitrator found Sunset did “exactly what they contracted not to do,” and awarded Northwest damages and fees of over \$800,000.

This litigation arose because Sunset went to great lengths to conceal its ongoing violations of the settlement agreement, a fact that only came to light when Northwest uncovered Sunset’s surreptitious “Brand and Conquest” campaign that redirected Northwest

customers to Sunset's website via ads on Google. Sunset did not disclose its ads on Google, the world's largest search engine, in response to Northwest's interrogatories requiring Sunset to identify "every online platform on which you have advertised," and "all truck-related internet-based marketing or advertising." Sunset even withheld this information in the face of the arbitrator's order compelling its production. "Brand and Conquest" came to light, not because Sunset came clean, but because Google – over Sunset's vigorous objections – responded to Northwest's subpoena. The trial court rightly sanctioned Sunset for its "egregious" misconduct in flagrant disregard of the arbitrator's order, its abuse of the discovery process, and its lies.

The trial court also correctly held Sunset liable for its continued breach of the settlement agreement itself. First, Sunset's purchase of Northwest's trade name as a Google AdWord violated the plain language of its contractual promise not to use Northwest's name "in advertising *in any manner*." (emphasis added). Second, the trial court correctly found, as had the arbitrator, that Sunset could be held liable for liquidated damages each day it violated the agreement, rejecting Sunset's contention that it could continue using Northwest's name to confuse and steal Northwest's customers in

perpetuity without consequences. Third, substantial evidence, including Sunset's "pattern of deception" to cover up the campaign supports the trial court's finding that Sunset's owner and marketing director lied at the arbitration by denying that Sunset advertised on Google. Finally, Sunset's relentless campaign of harassment directed at Northwest amply justified the trial court's discretionary decision to impose a permanent injunction. This Court should affirm and award Northwest its attorney's fees on appeal.

II. RESTATEMENT OF ISSUES

1. Did Sunset breach its promise not to use Northwest's trade name and marks "in advertising in any manner" by purchasing "Northwest Motorsport" and its variations as a Google "AdWord"?

2. Did the trial court correctly find that Sunset "violated" the settlement agreement each day it used Northwest's name as part of its "Brand and Conquest" campaign against Northwest?

3. Despite direct questioning, discovery requests, and even an order compelling production of "all truck-related internet-based marketing or advertising" and "every online platform on which you have advertised," Sunset concealed that it had purchased Northwest's name as a Google AdWord. Does substantial evidence support the trial court's finding that Sunset engaged in sanctionable

discovery misconduct, and that its owner and marketing director “failed to respond truthfully to questions posed under oath”?

4. Did the trial court appropriately exercise its discretion in entering a permanent injunction enjoining Sunset from attempting to misappropriate Northwest’s trade secrets given the undisputed testimony that Sunset was attempting to “pump” Northwest’s employees for trade secrets and Sunset’s nearly decade long campaign of unfair competition against Northwest?

III. RESTATEMENT OF THE CASE

A. Northwest spent 15 years building a strong, recognizable brand, including the trade name “Northwest Motorsport” and trademark “Trucks Trucks & More Trucks.”

Northwest sells used trucks and other vehicles throughout Washington. (CP 434, 2024) Over the past 15 years, Northwest has spent millions of dollars building its brand, including the trade marks and names “Northwest Motorsport,” “NWSRocks,” and “Trucks Trucks & More Trucks.” (CP 434, 615-16) Virtually every Northwest ad includes these slogans, especially “Trucks Trucks & More Trucks,” which appears in more than 90% of Northwest’s ads. (CP 616) Northwest has obtained federal protection for its trademarks. (CP 507-42, 616)

Sunset is a competitor of Northwest. (CP 2025) Appellant Philip Mitchell is the owner and President of Sunset. (CP 3241) This litigation stems from Sunset's nearly decade-long effort to undermine Northwest's brand and confuse its customers.

B. After Northwest sued Sunset for its “cybersquatting” and trademark infringement in 2011, Sunset agreed to never use Northwest’s trade marks and names “in any advertising in any manner.”

In October 2011, Sunset purchased 34 website domain names that were variations of Northwest's trade names and marks, including “www.northwest-motorsports.com,” “www.trucks-trucks-and-more-trucks.com,” and “www.nwmotorsportsrocks.com.” (CP 67-68, 75-78, 434, 444, 947) When consumers visited these websites, they were automatically directed to Sunset's website. (CP 75) Additionally, Sunset “flagged” as “inappropriate” ads posted by Northwest on the classified advertisement website Craigslist.org, which led to their removal. (CP 75)

After repeatedly asking that Sunset stop this conduct, Northwest sued Sunset in December 2011. (CP 63-71) The parties mediated their dispute before retired King County Superior Court Judge Charles Burdell, and reached a settlement in April 2013. (CP 1748-50) Northwest agreed to forego a multi-million dollar damage award in exchange for a settlement of \$75,000 and Sunset's promise

“not to use in advertising in any manner or variation the terms ‘Northwest Motorsport,’ ‘NWMSrocks,’ or the words ‘truck’ or ‘trucks’ consecutively in the same phrase or sentence.” (CP 1748) Sunset agreed that any breach of this agreement would subject Sunset to “[l]iquidated damages of \$5000 per violation.” (CP 1749) The parties also agreed that any dispute regarding compliance with the settlement would be arbitrated before Judge Burdell. (CP 1749)

C. After violating the settlement in thousands of ads and forcing Northwest to commence arbitration, Sunset hid its “Brand and Conquest” campaign against Northwest and lied about it in discovery.

Northwest naively assumed that its settlement would allow the company to focus its energy on selling trucks rather than litigating with a competitor. (CP 2027) In the summer of 2015, Sunset breached its promise not to use “the words ‘truck’ or ‘trucks’ consecutively in the same phrase or sentence,” by purchasing radio and TV ads stating “Sunset Trucks is for you . . . Sunset Trucks Trucks – yes, he said ‘trucks’ twice.” (CP 1763) This ad ran a total 2,334 times on twelve radio stations and three television channels. (CP 1763)

Sunset also posted ads on Craigslist that included, in ultra-fine print at the bottom, the words “Northwest Motorsport” and combinations of “Trucks, trucks, trucks, trucks.” (CP 1763-64) Sunset’s use of the prohibited terms was designed to force Sunset’s

ads to appear if a consumer typed Northwest's name or trademark into a search engine, a practice called "search engine optimization." (CP 1763-64)¹ Sunset posted more than 40,000 of these ads on Craigslist during the last half of 2015. (CP 1764) Sunset also breached the settlement by using the prohibited terms on Facebook, Instagram, and YouTube. (CP 1764)

In August 2015, Northwest served Sunset with a notice of intent to arbitrate. (CP 91-93) As part of the arbitration, Northwest served discovery requests on Sunset, asking "[f]or all truck-related internet-based marketing or advertising, please describe said marketing or advertising efforts utilized between January 1, 2013 and the present," "includ[ing] . . . every website on which you have advertised." (CP 1743, 1770-71) Northwest also asked Sunset to "[p]rovide copies of all truck-related internet-based advertisements utilized between January 1, 2013 and the present." (CP 1773)

Sunset refused to respond to these requests. (CP 1771, 1773) After Judge Burdell granted Northwest's motion to compel and denied Sunset's motion for reconsideration (CP 1783-84, 1779),

¹ "Search engine optimization" or "SEO" is the process of influencing "organic" search results, *i.e.*, results that are not paid advertisements, by optimizing a website. (CP 2051, 2509) "Search engine marketing," or "SEM" in contrast, is the process of influencing the "non-organic" paid advertisements that appear alongside organic search results. (CP 2051, 2509)

Sunset produced its Craigslist's ads (CP 1314-15), but did not disclose its ads on Google or that it purchased as Google "AdWords" the term "Northwest Motorsport" and its various permutations. (CP 1283-84) Purchasing AdWords on Google is a method of search engine marketing in which the purchaser literally buys the search terms in order to direct anyone searching for the purchased term to the purchaser's advertisement. (CP 2511-12, 3429, 3735) A Google user clicking the resulting Sunset ad was instantaneously transferred to Sunset's website and internet showroom. (CP 3429, 3735) Sunset successfully hid its AdWord purchases from Northwest and from Judge Burdell. (CP 1281-84)

Judge Burdell presided over a three-day arbitration hearing in July 2016. (CP 1762) During the arbitration hearing, Northwest first discovered that a Google search for the Northwest's trademark, "Trucks, trucks, and more trucks" would direct the searcher to Sunset's ads. (CP 1462) Surprised, Northwest questioned Mitchell, Sunset's owner, and Mike Conley, Sunset's Director of Marketing, about why Sunset ads appeared in response to a search for Northwest's trademark. (CP 1281, 1462) Both denied that Sunset purchased Google AdWords: Conley "insisted that Sunset must have been 'hacked' since there was no other explanation." (CP 1281, 1462) As Sunset had been

compelled to produce its internet based advertising – and swore that it had done so – Northwest did not further press the issue while the arbitration hearing was underway. (CP 1281-84)

Judge Burdell found Sunset had “clear[ly] breache[d]” the settlement, doing “exactly what they contracted not to do.” (CP 1764) For the radio, TV, and social media ads, Judge Burdell found that Sunset violated the settlement each of the 46 times it “arranged for the offending ad to run . . . on radio, television, Facebook, Instagram, and YouTube,” and awarded Northwest \$230,000 in liquidated damages. (CP 1765) However, with respect to Sunset’s Craigslist ads, Judge Burdell found Sunset “breached the agreement on a daily basis for about 180 days” but “cut off” damages to provide a “fair result” because he believed Northwest should have sent Sunset a cease and desist letter within 60 days after the ads began, awarding Northwest \$300,000 in liquidated damages. (CP 1765, 5149) Judge Burdell also awarded Northwest \$275,224.44 in attorney’s fees and costs, for a total award of \$805,224.44. (CP 1796)

D. Sunset violated Judge Burdell’s discovery order by concealing its “Brand and Conquest” ad campaign on Google.

At the time that Judge Burdell issued his “fair result,” neither he nor Northwest were aware that Sunset had – in violation of Judge

Burdell's discovery order – concealed what Sunset dubbed its “Brand and Conquest” ad campaign on Google. (CP 1281, 1870) Sunset later attempted to explain away its non-disclosure on the ground that “the issue of Google AdWords was never raised during the arbitration until the day of the hearing.” (CP 3185)

Sunset ended its “Brand and Conquest” campaign on July 12, 2016, *the same day* Mitchell and Conley denied in arbitration that Sunset purchased Google AdWords. (CP 1814, 3070) Ten days later, before the final arbitration award had been entered, Conley secretly sent an “advertising directive,” instructing his marketing team that Sunset “cannot bid on or purchase the phrase ‘Northwest Motorsport’ or ‘NWMS Rocks,’ ‘Trucks, Trucks, and More Trucks,[] or any similar phrase as a keyword for any Google AdWords or any other SEO campaign that would trigger the display of our sponsored ads.” (CP 2865) Conley crafted this directive with input from Sunset’s legal counsel. (CP 3186) Though this email was directly responsive to Northwest’s discovery requests in this litigation, Sunset never produced this email, nor informed anyone about a critical “advertising directive” concerning Sunset’s internet-based advertising. The directive came to light only after one of Sunset’s advertising “vendors” responded to Northwest’s subpoena in this

litigation. (CP 2859) The vendor further confirmed that Sunset always retained full control over the advertising, including AdWords. (CP 2978)

Around this time, Northwest also began losing employees to Sunset, only to learn these employees were quickly fired by Sunset once they had been lured away. (CP 32-34, 37-38, 40, 52, 434-35) Sunset was apparently using a “bounty” system, in which Sunset employees who recruited a Northwest employee were paid a bonus. (CP 32, 40-41, 50) Sunset did not similarly target any other competitors. (CP 40, 50, 435) After successfully poaching a Northwest employee, Sunset then “pumped” that employee for information regarding Northwest’s trade secrets, particularly its online marketing and inventory tracking technologies. (CP 34, 37-38, 42) If the employee failed to provide the requested information, Sunset summarily fired the employee. (CP 38, 52, 58, 438)

On October 20, 2016, Northwest filed suit against Sunset in Pierce County Superior Court for tortious interference with business expectancies, misappropriation of trade secrets, false designation of trade names and marks/unfair competition, trademark imitation, and unjust enrichment. (CP 3-12) As Northwest did not yet

understand the extent of Sunset's Brand and Conquest campaign, it did not initially allege a breach of the settlement agreement, but sought an injunction preventing Sunset from misappropriating its trade secrets. (CP 12-13) The case was assigned to Pierce County Superior Court Judge Stanley Rumbaugh. (CP 2)

In discovery requests sent on October 21, 2016 (CP 809), Northwest asked Sunset to "identify every online platform on which you have advertised in the past ten (10) years." (CP 1826) Northwest also asked "[w]ith respect to every search engine, including, but not limited to, Google, Bing, and Yahoo!, please identify every search term you purchased in the past ten (10) years." (CP 1826)

Northwest also sent Google a subpoena on December 27, 2016, asking if Sunset had purchased the search terms "Trucks Trucks & More Trucks," "Trucks Trucks and More Trucks," "Northwest Motorsport," and "NWMSRocks." (CP 724, 729) Sunset moved to quash the subpoena, asserting that any *current* use of the prohibited terms "never returned [the user to] Sunset Chevrolet . . . as a result." (CP 622) Judge Rumbaugh denied Sunset's motion to quash. (CP 687-88)

Sunset objected to Northwest's discovery requests, claiming they were "overly broad" and "not reasonably calculated to lead to

the discovery of admissible evidence.” (CP 1826) Sunset’s attorney, Nick Jenkins, repeatedly represented that he had investigated whether Sunset or any of its third-party vendors purchased as AdWords the terms “Northwest Motorsport,” “NWMSRocks,” and “truck” or “trucks” consecutively, and that “none of Sunset’s current and past advertising vendors and employees state they have ever purchased” the terms as AdWords. (*See, e.g.*, CP 1855, 1858, 1861) Jenkins then threatened to seek sanctions against Northwest under Civil Rule 11 if it enforced its subpoena to Google, accusing Northwest of bringing “[f]actually and legally baseless [claims] . . . in bad faith.” (CP 1862)

Google responded to Northwest’s subpoena on March 7, 2017, revealing for the first time Sunset’s Brand & Conquest campaign. (CP 1864-76) Mitchell was the Google account holder; his credit card was used to pay for Sunset’s AdWord purchases. (CP 1867) Sunset paid Google more than \$97,000 for its Brand and Conquest campaign. (CP 3069, 4218) Sunset’s purchase of Northwest’s trade name as a search term resulted in a Sunset ad being presented to a user (“an impression”) 17,970 times; users clicked on those ads 792 times. (CP 4530)

E. Judge Rumbaugh imposed a \$75,000 sanction on Sunset after finding that it willfully violated its discovery obligations.

Based on Google’s stunning disclosure of data that Sunset had withheld since the arbitration, Northwest asked Judge Rumbaugh, in May 2017, to stay the superior court proceedings so it could arbitrate before Judge Burdell Sunset’s violation of the settlement agreement based on its previously undisclosed Brand and Conquest campaign. (CP 1058-72, 1464-68) Judge Burdell directed the parties back to superior court as Northwest was already litigating and pursuing discovery on its non-arbitrable theories. (CP 1557-60) Northwest amended its complaint in superior court to add a claim for breach of the settlement agreement based on Sunset’s newly discovered Google advertisements. (CP 1579-90)

Northwest also filed a motion seeking sanctions for discovery violations. (CP 1716-40) On September 1, 2017, Judge Rumbaugh agreed that Sunset had acted with secretive intent and found that “Sunset’s Google AdWords campaign—which cost over \$97,000—was clearly responsive to the discovery requested [and] ordered at arbitration,” as well as in this litigation, rejecting Sunset’s contention that it had in good faith “narrowly ‘interpreted’ this discovery.” (CP 3069) Judge Rumbaugh also found that Mitchell and Conley “failed

to respond truthfully to questions posed under oath” by denying that “Sunset ever purchased Google AdWords” and that they both “knew exactly what they were doing,” as confirmed by the fact “Sunset abruptly ended its Google AdWords Campaign the same day the witnesses were testifying at arbitration.” (CP 3069-70)

Judge Rumbaugh concluded Sunset had “engaged in a pattern of deception and outright lies in an effort to conceal their evidence” and that Sunset’s conduct was “egregious and sanctionable.” (CP 3074-75) Judge Rumbaugh imposed a \$75,000 sanction on Sunset and Mitchell, while declining Northwest’s request for the harsher sanction of a directed verdict. (CP 3074-75) Judge Rumbaugh denied Sunset’s motions for reconsideration. (CP 3287, 5956)

Judge Rumbaugh also granted Northwest’s motion for partial summary judgment, holding that Sunset had breached the settlement agreement as a matter of law but reserved judgment on the amount of liquidated damages. (CP 2295-97)² Five months later, in January 2018, Judge Rumbaugh granted Northwest’s request for a permanent injunction enjoining Sunset from misappropriating its trade secrets, including “through recruiting

² Sunset cites nothing to support its assertion this ruling was based on the sanctions ruling. (App. Br. 22, 49) Simply because two rulings are made at the same hearing does not mean one is based on the other.

efforts directed to hiring individuals with the direct or indirect purpose of obtaining” trade secrets. (CP 3310-17)

F. Judge Murphy held that Sunset “violated” the settlement each day it ran its undisclosed Brand and Conquest campaign and awarded Northwest \$985,000 in liquidated damages.

The case was transferred to Pierce County Superior Court Judge Edmund Murphy in January 2018, and Northwest voluntarily dismissed its trademark infringement claim shortly thereafter. (CP 3309, 4718) Judge Murphy rejected Northwest’s contention that Sunset “violated” the settlement each of the 792 times a Google user clicked a Sunset ad after searching for Northwest’s name. (CP 5243-44) But, ratifying Judge Rumbaugh’s decision that Sunset’s breach was “obvious,” Judge Murphy instead held that Sunset “violated” the settlement agreement each “day[] that Sunset ran its Google AdWords advertising campaign” and awarded Northwest \$5,000 for each of those violations (\$985,000), as well as \$580,903.05 in attorney’s fees and costs under the settlement agreement, and \$317,264.56 in prejudgment interest, for a total judgment of \$1,883,167.61. (CP 5962-63, 6658-64)

Sunset appeals. (CP 6665-67)³

³ Northwest filed a cross-appeal (CP 6757-59), which it now withdraws.

IV. ARGUMENT

A. Sunset undisputedly breached its contractual promise not to use Northwest’s name “in advertising in any manner” by purchasing it as a Google AdWord.

Sunset promised not to use Northwest’s name “in advertising *in any manner.*” (CP 1748 (emphasis added)) Sunset then purchased Northwest’s name as a Google **Ad**Word for the undisputed purpose of attracting customers to its website. Judge Rumbaugh correctly found Sunset breached the settlement agreement as a matter of law.

“Summary judgment as to a contract interpretation is proper if the parties’ written contract, viewed in light of the parties’ other objective manifestations, has only one reasonable meaning.” *GMAC v. Everett Chevrolet, Inc.*, 179 Wn. App. 126, 135, ¶ 21, 317 P.3d 1074, *rev. denied*, 181 Wn.2d 1008 (2014). A court interprets “settlement agreements in the same way it interprets other contracts . . . by focusing on the[] objective manifestations as expressed in the agreement,” rather than on the unexpressed subjective intent of the parties. *McGuire v. Bates*, 169 Wn.2d 185, 188-89, ¶ 6, 234 P.3d 205 (2010). Though evidence of the surrounding circumstances and other extrinsic evidence can be used “to determine the meaning of *specific words and terms used*,” it cannot be used to “vary, contradict or modify the written word.” *Hearst Commc’ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493,

503, ¶ 19, 115 P.3d 262 (2005) (emphasis in original) (quoted source omitted). Courts give contractual terms “their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.” *Hearst*, 154 Wn.2d at 504, ¶ 20.

Applying these principles here, Sunset unequivocally breached the settlement as a matter of law.

1. Sunset promised to refrain from using Northwest’s name “in advertising in any manner,” not “in advertisements.”

Sunset’s argument that it did not use Northwest’s name “in advertising” is meritless. Dictionaries do not, as Sunset alleges, support its attempt to transmute the word “advertising” into the word “advertisement.” (See App. Br. 26-27) “Advertising” is “[t]he *activity* of attracting public attention to a product or business, as by paid announcements in the print, broadcast, or electronic media.” “Advertising,” *The American Heritage Dictionary* (5th ed. 2019) (emphasis added), available at <https://ahdictionary.com/word/search.html?q=advertising> (last visited July 23, 2019); see also “Advertising,” Merriam-Webster.com (“the *action* of calling something to the attention of the public especially by paid announcements”) (emphasis added), available at <https://www.merriam-webster.com/dictionary/advertising> (last visited July 23, 2019). These

definitions recognize that “advertising” encompasses more than “advertisements” – it is any activity or action that helps draw public attention to a business. Sunset’s own marketing director agreed, conceding that “search engine *advertising* . . . includes bidding on Google AdWords.” (CP 3184 (emphasis added))

The ordinary meaning of “advertising” alone defeats Sunset’s argument, but the parties removed any possible doubt about their intended interpretation of the term by agreeing that Sunset could not use the prohibited terms “in advertising *in any manner*.” Ignoring the rule that contracts cannot be interpreted in a manner “that renders a term ineffective or meaningless,” *Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475, 487, ¶ 27, 209 P.3d 863 (2009), Sunset refuses to acknowledge the phrase “in any manner,” simply pretending the term does not exist.

Sunset’s assertion that the plain meaning of the term “advertising in any manner” conflicts with the purported purpose of the settlement is meritless. (App. Br. 26-27) While *one* purpose of the settlement was to prevent confusing advertisements, the settlement was based on more than Sunset’s illicit use of Northwest’s trade marks and names – it was also based on Sunset’s “flagging” operation that caused Northwest’s advertisements to be removed from

Craigslist, and re-routing would-be customers to Sunset’s website. (CP 1749; *see also* CP 2216 (the settlement was intended to “prohibit the Defendants from *any future unethical practices or infringements.*”) (emphasis added)) Northwest would not have waived its claim for millions in damages if – as Sunset now argues – Sunset promised only to refrain from using its trade marks and names in “advertisements.”

As Judge Rumbaugh recognized, “the settlement agreement wasn’t just restricted to Craigslist or any of the, shall we say, sins that had preceded it. It was broad.” (9/1/17 RP 26) Sunset claims Judge Rumbaugh “confused” how AdWords worked (App. Br. 21), but the opposite is true. He correctly understood that “‘Northwest Motorsport,’ and, ‘Trucks, Trucks, Trucks’ Those get typed in. And then an impression comes up on Google that is a Sunset impression that does not mention those words.” (9/1/17 RP 7)

Indeed, Sunset’s own actions confirm its AdWord campaign violated the settlement agreement. Sunset ended the AdWord campaign on the same day Mitchell and Conley were questioned about it at the arbitration. (CP 1814, 3070) Days later, Conley sent an “*advertising* directive” instructing his marketing team that Sunset “cannot bid on or purchase the phrase ‘Northwest Motorsport’ or ‘NWMS Rocks,’ ‘Trucks, Trucks, and More Trucks,[’]

or any similar phrase as a keyword for any *Google AdWords*.” (CP 2865 (emphasis added)) Conley confirmed that – consistent with the language of the agreement – Sunset intended “to instruct the recipients in writing that certain words and phrases were not [to] be used in *any way shape or form*.” (CP 3186 (emphasis added))

Sunset conflates distinct issues in arguing that purchasing a competitor’s name as a search term is not “confusing” to consumers for purposes of a separate, discrete trademark infringement claim. (App. Br. 27) The issue here is whether Sunset breached a *contract* by using Northwest’s name “in advertising in any manner,” not whether it “misled” or “confused” consumers generally, although it certainly did (*see* § IV.B.1). Moreover, even the trademark infringement cases cited by Sunset recognize that “Google’s AdWords program is the keyword-triggered *advertising* program.”⁴

⁴ *J.G. Wentworth, S.S.C. Ltd. P’ship v. Settlement Funding LLC*, No. CIV.A.06-0597, 2007 WL 30115, at *2 (E.D. Pa. Jan. 4, 2007) (emphasis added); *Avid Life Media, Inc. v. Infostream Grp., Inc.*, No. CV 12-09201 DDP AJWX, 2013 WL 6002167, at *2, 6 (C.D. Cal. Nov. 12, 2013) (refusing to dismiss claim for breach of settlement alleging defendant used trademarks in “internet advertising” by purchasing them as AdWords) (App. Br. 27 n.6). Sunset also cites an opinion from the Federal Trade Commission ruling that 1-800-Contacts’s numerous lawsuits seeking to prevent its competitors from bidding on its trademarks as keywords were anti-competitive. (*See* App. Br. 27 n.6) 1-800-Contacts sued virtually every competitor for the specific purpose of preventing bidding on its tradename. In contrast, Northwest sought relief from one competitor engaged in relentless effort to attack its brand, and who had agreed, by way of settlement, to forgo that very activity. The case is not comparable.

2. Northwest is not bound by its original complaint, which was superceded by an amended complaint when Sunset's surreptitious misconduct came to light.

Northwest's original complaint, which it subsequently amended, does not, as Sunset argues, create an issue of fact regarding the parties' intent. Moreover, Northwest's original complaint did not "admit" that Sunset's surreptitious AdWord campaign complied with the settlement.

Sunset's contention that Northwest's original complaint creates an issue of fact relies on its assertion that Sunset's purchase of AdWords was "outside of the settlement agreement." (App. Br. 28, citing CP 9) But, as Sunset itself recognized, Northwest's complaint asserted Sunset's AdWord purchases "involved *new* allegations of unlawful activity" that could not have been resolved by an agreement executed *before* they occurred. (CP 1318-19 (emphasis added))

Sunset also rips out of context language from the original complaint stating the website link produced after searching for Northwest's trade marks and names "did not contain Northwest Motorsport's name or unique slogan (and, thus, was not in in [sic] contravention of the settlement agreement.)" (App. Br. 28, citing CP 9) The original complaint recognized that the existence of a *link* did not – in and of itself – "contraven[e] the settlement agreement" (CP

9), but explains that Sunset “misappropriat[ed] Northwest Motorsport’s trade name and marks” because the appearance of Sunset’s link was not mere happenstance. It appeared because “Defendants purchased search terms for ‘Trucks Trucks and More Trucks,’ as well as ‘Northwest Motorsport.’” (CP 9) The only fact “admitted” by Northwest’s complaint is that Sunset had embarked on yet another effort to undermine Northwest’s hard-earned brand.

In any event, once amended, Sunset’s original complaint is “considered abandoned and ceases to perform any function.” *Fluke Capital & Mgmt. Servs. Co. v. Richmond*, 106 Wn.2d 614, 619 n.4, 724 P.2d 356 (1986). Sunset’s own cases recognize “[f]actual assertions in pleadings . . . are considered judicial admissions” “unless amended.” *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) (emphasis added) (App. Br. 29). Here, Northwest learned the extent of Sunset’s misconduct only *after* Google provided Northwest the AdWord purchase information that Sunset should have disclosed almost two years earlier. Northwest then amended its complaint to allege that Sunset “breached the contract through its use of forbidden terms vis-à-vis Google AdWords.” (CP 1588)

Sunset misplaces its reliance on a federal case, *Huey v. Honeywell, Inc.*, 82 F.3d 327 (9th Cir. 1996), to argue that the original complaint is enough to avoid summary judgment. *Huey* reversed a summary judgment based on an amended answer *and* the defendant’s written policies and personnel manual, as well as other course of conduct evidence, expressly leaving “for another day whether an admission in a superseded pleading is evidence that, *in and of itself*, can defeat a summary judgment.” 82 F.3d at 333 n.1 (emphasis added); *see also City of Seattle v. Richard Bockman Land Corp.*, 8 Wn. App. 214, 505 P.2d 168 (citing admission and witness testimony in affirming judgment), *rev. denied*, 82 Wn.2d 1003 (1973) (App. Br. 29). Here, Sunset can identify no other conduct or testimony supporting its assertion that “advertising” does not include purchasing AdWords. Sunset’s exclusive reliance on statements of subjective intent made in a pleading, filed while it was hiding evidence, and later superseded once the hidden evidence was discovered, does not create an issue of fact. *See Hearst*, 154 Wn.2d at 503, ¶ 19 (party’s subjective intent cannot modify the plain language of the parties’ agreement).

Two Superior Court judges properly found that the settlement agreement has one reasonable meaning. This Court should similarly hold that Sunset breached the agreement as a matter of law.

B. Judge Murphy correctly ruled Sunset committed a “violation” of the settlement agreement every day of its undisclosed Brand and Conquest campaign.

Sunset again ignores plain meaning in arguing that Judge Murphy erred in finding a “violation” by Sunset, triggering the settlement’s liquidated damages provision, each day it maintained its Brand and Conquest campaign. Where a party engages in a sustained campaign of misconduct, each day of continued misconduct is a separate “violation.” Sunset’s contention that each “keyword” purchase constitutes a completed single “violation” would encourage, rather than deter, the type of misconduct prohibited by the parties’ settlement because a single purchase bears no relation to the harm caused by Sunset’s sustained campaign to profit from Northwest’s goodwill. Sunset’s reliance on collateral estoppel – a compulsory affirmative defense under CR 8(c) that Sunset never raised in its answer (CP 2223-35) – ignores that Judge Burdell addressed only whether Sunset’s Craig’s List ads, not its undisclosed AdWord purchases, “violated” the settlement. Judge Murphy in fact applied the same definition of “violation” as did Judge Burdell.

“Liquidated damages permit parties to allocate business and litigation risks” and “to resolve disputes efficiently in the event of a breach.” *Watson v. Ingram*, 124 Wn.2d 845, 851, 881 P.2d 247 (1994). Liquidated damages provisions are thus “favored in Washington,” *Watson*, 124 Wn.2d at 850, especially where “liquidated damages agreements [are] fairly and understandingly entered into by experienced, equal parties with a view to just compensation for the anticipated loss.” *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 886, 881 P.2d 1010 (1994) (App. Br. 38). Thus, “[i]t is not the role of the court to enforce contracts so as to produce the most equitable result. The parties themselves know best what motivations and considerations influenced their bargaining.” *Watson*, 124 Wn.2d at 852.

Judge Murphy correctly applied these principles in finding a “violation” of the settlement agreement each day Sunset siphoned Northwest’s customers through its Brand and Conquest campaign.

1. Under the ordinary and widely accepted meaning of “violation,” each day of wrongful conduct is treated as a separate violation.

A “violation” is “the contravention of a right or duty;” when “[a]n unlawful act . . . occurs as part [of] a series of related or recurring unlawful acts over a period of time” those acts are a

“continuing violation” and “[e]ach act is treated as a *separate violation*.” “Violation”, *Black’s Law Dictionary* (11th ed. 2019) (emphasis added). Consistent with this definition, Washington law routinely treats each day of wrongful conduct as a separate “violation.” *See, e.g.*, RCW 46.32.100(1)(b) (vehicle inspection statute: “in case of a continuing violation *every day’s* continuance is a *separate and distinct violation*”) (emphasis added); RCW 70.42.160 (medical test sites); RCW 70.94.431(1) (excess emissions); RCW 70.105.080(1) (hazardous waste management statute: “*every day’s* continuance shall be a *separate and distinct violation*”) (emphasis added); RCW 70.119A.040(1)(a) (public health violations); RCW 70.118B.050(1) (water pollution control); RCW 90.58.210(2) (unapproved shoreline development); RCW 90.48.144 (waste water pollution). Judge Murphy thus did not give “violation” an “arbitrary” construction (App. Br. 6), but one consistent with its widely adopted usage.

Defining a “violation” as every day Sunset ran its Brand and Conquest campaign comports both with the word’s plain meaning and common sense. Sunset used Northwest’s name to divert consumers from Northwest to Sunset each day it maintained its Brand and Conquest campaign. Sunset asserts there is no “evidence

of lost customers or other injury” (App. Br. 38), ignoring the 792 “clicks” that caused people searching for Northwest to end up in Sunset’s virtual showroom instead. (CP 3577-78) Indeed, Northwest’s expert provided the *only* evidence on this issue and confirmed that “confusion *actually occurred*,” because search engine advertising is “of paramount importance” and there is a “well-known likelihood of . . . consumer confusion” when consumers first begin researching a product. (CP 4601, 4603 (emphasis added))

Regardless, even had Northwest not been damaged by Sunset’s conduct – though, it most certainly was – “proof of actual damages is not required as a prerequisite to upholding a liquidated damages clause.” *Wallace*, 124 Wn.2d at 892; *see also Watson*, 124 Wn.2d at 853 (“[t]he reasonableness of liquidated damages is not determined retroactively by their correspondence with actual damages.”). Requiring a plaintiff to prove actual damages defeats the entire purpose of a liquidated damages clause – one Northwest very much hoped to achieve here (*see* CP 2027) – which is to allow “parties to resolve disputes efficiently . . . [r]ather than litigating the amount of actual damages.” *Watson*, 124 Wn.2d at 851.

Moreover, to the extent Sunset’s increasingly inventive efforts to attack Northwest’s brand made it difficult to determine

Northwest’s “actual damages” the consequences of that uncertainty fall on Sunset, not Northwest. “[T]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.” *Moore v. Health Care Auth.*, 181 Wn.2d 299, 314, ¶ 28, 332 P.3d 461 (2014) (quoting *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265, 66 S.Ct. 574, 90 L.Ed. 652, *reh’g denied*, 327 U.S. 817 (1946)).

Sunset’s interpretation of “violation” as “per-keyword” is wholly untethered from the harm Sunset caused. Under Sunset’s definition, an AdWord purchase, regardless of how many days the purchase lasts, how many ads are shown to users, or how many users clicks those ads, is but a single “violation.” According to Sunset, it incurred \$50,000 in liquidated damages on the day it purchased ten keywords and the other 196 days it used Northwest’s name were “freebies.” Judge Murphy correctly rejected Sunset’s attempt to use in perpetuity Northwest’s name and brand, which it had built over years, at a cost of millions of dollars, for the same paltry \$5,000 price Sunset would owe were it to license Northwest’s brand for a single day. *See Honeywell v. Washington State Dep’t of Ecology*, 2 Wn. App.2d 601, 609-10, ¶ 21, 413 P.3d 41 (2017) (rejecting as “absurd” interpretation of “violation” in RCW 90.58.210 that “equate[d] one

unpermitted tree cutting with” cutting “ a hundred regulated trees” because it ignored “the significant disparity in the amount of harm caused”), *rev. denied*, 190 Wn.2d 1011 (2018).

Sunset’s “per-keyword” definition also bears no relationship to the harm Sunset’s unlawful campaign caused Northwest because it ignores that Sunset purchased Northwest’s name as a “broad matching” keyword, meaning that would be shown to a user that searched for any variation of Northwest’s name. (CP 1710, 1809-14, 5716 (noting that a “+” next to a term denotes it is “broad matching.”)) Sunset thus treats as “one” violation its purchase of numerous variations of Northwest’s name. But under the settlement agreement, Sunset promised to refrain from using Northwest’s name “in any manner or *variation*.” (CP 1748 (emphasis added))

Finally, that Judge Murphy’s interpretation of “violation” resulted in nearly \$1 million in liquidated damages reflects only the scope of Sunset’s misconduct, not a “windfall” to Northwest. (App. Br. 38) “[I]t is not the duty of courts of common law to relieve parties from the consequences of their own improvidence.” *Watson*, 124 Wn.2d at 852 (quoting, *Reichenbach v. Sage*, 13 Wash. 364, 368, 43 P. 354 (1896) (alterations omitted)); *see also Boone Coleman Constr., Inc. v. Piketon*, 145 Ohio St.3d 453, 50 N.E.3d 502, 514

(2016) (“It is a perverse rule of law to hold that a court can relieve a breaching party of the consequences it agreed to by refusing to enforce a per diem liquidated-damages provision solely because the breach was an egregious one.”).

Given Sunset’s advertising budget of \$200,000 per month over a period of several years (CP 1789), Sunset’s plea of unfairness rings especially hollow. While this Court should reject Sunset’s “per-keyword” definition of “violation,” in the unlikely event of further proceedings on this issue, this Court should allow the trial court to adopt Northwest’s alternative definition of “violation” to mean “per click” as an appropriate definition of the term “violation” that is commensurate with the harm Sunset actually caused. (See CP 4510-13)

2. Collateral estoppel does not apply because Judge Burdell did not consider Sunset’s surreptitious purchase of Google Ad Words and because Judge Murphy applied the same per-day definition of “violation” as Judge Burdell.

Sunset’s reliance on collateral estoppel is also without merit. The issues decided by Judge Murphy and Judge Burdell are not identical. Moreover, Sunset ignores that Judge Murphy adopted the same definition of “violation” as Judge Burdell.

“Collateral estoppel is limited to situations where the issue presented in the second proceeding *is identical in all respects* to an

issue decided in the prior proceeding and where the controlling facts and applicable legal rules remain unchanged.” *Lemond v. State, Dep’t of Licensing*, 143 Wn. App. 797, 805, ¶ 14, 180 P.3d 829 (2008) (emphasis added; internal quotation omitted).⁵ “Where an issue arises in two entirely different contexts, this requirement is not met.” *McDaniels v. Carlson*, 108 Wn.2d 299, 305, 738 P.2d 254 (1987). “Collateral estoppel is . . . an equitable doctrine that will not be applied mechanically to work an injustice.” *Hadley v. Maxwell*, 144 Wn.2d 306, 315, 27 P.3d 600 (2001). “[W]hether application of collateral estoppel will work an injustice . . . depends primarily on whether the parties to the earlier proceeding received a full and fair hearing on the issue in question.” *Sluman v. State*, 3 Wn. App.2d 656, 695, ¶ 106, 418 P.3d 125, *rev. denied*, 192 Wn.2d 1005 (2018).

Here, the issues are not identical and the controlling facts changed due to Sunset’s concealment of “Brand and Conquest” in the

⁵ Sunset erroneously argues collateral estoppel applies “even if the underlying facts change” (App. Br. 35), but the relevant facts did not change in the cases cited by Sunset. In *Cont’l Holdings, Inc. v. Crown Holdings Inc.*, 672 F.3d 567 (8th Cir. 2012), the court applied one definition of “the Business” to the same set of business entities. Likewise, *United Mine Workers of Am. Int’l Union v. Nobel*, 720 F. Supp. 1169, 1183 (W.D. Pa. 1989), applied collateral estoppel because as in the previous litigation, the employers resisting payment of pension benefits were “financially able, either themselves or through solvent parent corporations, to provide benefits to their pensioners, but they [were] not legally obligated.” In any event, non-Washington cases cannot trump Washington’s requirement that the “controlling facts . . . remain unchanged.” *Lemond*, 143 Wn. App. at 808, ¶ 14.

arbitration. Sunset's discrete attempts to undermine Northwest's brand involve distinct methods – one by using the prohibited terms in its ads on a classified advertisements website (search engine optimization or “SEO”), another by purchasing the prohibited terms as “keywords” to influence the advertisements shown by a search engine (search engine marketing or “SEM”). (CP 2051) Judge Burdell determined how many times Sunset “violated” the settlement by posting SEO-influenced ads on Craigslist and other media, while Judge Murphy decided how many violations arose from Sunset's SEM-based purchase of Northwest's name as an AdWord, an issue that Sunset concedes “was not part of Judge Burdell's award” and (App. Br. 12) was “never raised during the arbitration until the day of the hearing.” (CP 3185; 1803-04 (Judge Burdell: issue of Google ads “was not referenced in my arbitration award.”))

By definition, collateral estoppel does not apply where it was impossible for the issue to have been adjudicated in the prior proceeding. *See Hirata v. Evergreen State Ltd. P'ship No. 5*, 124 Wn. App. 631, 643, 103 P.3d 812 (2004) (refusing to apply collateral estoppel because “[t]he issue of an offset could not have been decided in an earlier proceeding or adjudication.”). Moreover, Northwest certainly did not receive “a full and fair hearing” on an issue where

Sunset *concealed the relevant evidence*. Sunset's attempt to turn its sanctionable conduct into a tactical advantage would work a grievous injustice and eviscerate the equitable nature of collateral estoppel.

Further, Sunset's collateral estoppel argument ignores that Judge Murphy interpreted "violation" just as Judge Burdell did. Contrary to Sunset's assertion he "did not use a per-day definition" (App. Br. 33-34, 36), Judge Burdell found Sunset's use of search engine optimization to drive Northwest customers to its Craigslist ads "breached the agreement *on a daily basis[,]*" and ordered Sunset to pay "\$5,000 per day for the first 60 days." (CP 1765, emphasis added)

Sunset would equate its Google AdWord purchases with TV and radio advertising, not its far more analogous purchase of Craigslist ads using forbidden terms. (App. Br. 33) Sunset used the prohibited terms in both Craigslist and Google advertising to increase the likelihood potential buyers would see its ad when searching for Northwest's name or mark. (See CP 1763, 3069) Google's users, like Craigslist's users, type a specific search term related to a particular product into a search engine *precisely because they want to buy it*. By contrast, traditional TV and radio advertisements target passive consumers, who may not have any interest in the advertised product. Sunset itself distinguished between "traditional and digital media" when explaining the settlement

to its employees. (See CP 2865; see also CP 3184 (Conley claims he is “a traditional marketing specialist focused on television, radio,” unfamiliar with Google AdWord purchases))

Sunset’s remaining attempts to support its “per-keyword” definition distort the record. Sunset claims Judge Burdell found its Craigslist ads were a daily “violation” because Sunset took an “affirmative act” each time it posted ads on Craigslist. (App. Br. 12, 33-34) That is not true – like its Google ads, Sunset’s 40,000 Craigslist’s ads were created through an automated process. (CP 5741) Sunset also falsely claims that how often its ads ran on Google was “outside of [its] control” (App. Br. 36), ignoring its admission it “had [the] authority to shut down this campaign any time it wanted.” (CP 5282, 5296 (Sunset’s vendor confirming that Sunset’s online advertising “will ALWAYS be fully controlled & owned by Sunset”)) Sunset proved as much when it shut down the campaign *the same day* it came up at the arbitration. Judge Murphy correctly held Sunset “violated” the settlement each day of the six months in which Sunset deliberately maintained its Brand and Conquest campaign.

C. Judge Rumbaugh did not abuse his discretion in sanctioning Sunset for its discovery violations.

Sunset does not challenge Judge Rumbaugh’s finding that it engaged in sanctionable conduct by failing to produce “evidence

related to Sunset’s Brand and Conquest campaign [that] was responsive to and discoverable in both the arbitration proceeding and in this litigation.” (CP 3074) Judge Murphy’s unchallenged finding that Sunset *twice* violated its discovery obligations, even under an order to compel, is a verity on appeal and – by itself – supports the trial court’s exercise of discretion in imposing a \$75,000 sanction award. *Estate of Barnes*, 185 Wn.2d 1, 9, ¶ 7, 367 P.3d 580 (2016) (unchallenged findings are verities); *Gosney v. Fireman’s Fund Ins. Co.*, 3 Wn. App.2d 828, 877, ¶ 120, 419 P.3d 447 (“An appellate court can affirm a trial court judgment on any basis within the pleadings and proof.”), *rev. denied*, 191 Wn.2d 1017 (2018).

CR 26(g) authorizes sanctions where discovery responses are not made in good faith or interposed for an improper purpose. Because our legal “system obviously cannot succeed without the full cooperation of the parties the drafters [of CR 26(g)] wisely included a provision authorizing the trial court to impose sanctions for unjustified or unexplained resistance to discovery.” *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 342, 858 P.2d 1054 (1993) (quoting *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 280, 686 P.2d 1102 (1984), *aff’d*, 104 Wn.2d 613, 707

P.2d 685 (1985). Discovery “responses must be consistent with the letter, spirit and purpose of the rules.” *Fisons*, 122 Wn.2d at 344.

“A trial court exercises broad discretion in imposing discovery sanctions . . . and its determination will not be disturbed absent a clear abuse of discretion.” *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). In reviewing whether a finding is supported by substantial evidence, this Court must defer to “the trial court on issues of conflicting evidence, witness credibility, and persuasiveness of the evidence,” *Scott’s Excavating Vancouver, LLC v. Winlock Properties, LLC*, 176 Wn. App. 335, 341-42, ¶ 11, 308 P.3d 791 (2013), *rev. denied*, 179 Wn.2d 1011 (2014), regardless whether the court considered live testimony. *Dolan v. King County*, 172 Wn.2d 299, 311, ¶ 21, 258 P.3d 20 (2011).

Judge Rumbaugh’s found that Mitchell and Conley were not truthful in their arbitration testimony when they denied that Sunset advertised on Google. This is the *only* finding that Sunset challenges on appeal. (App. Br. 8) Judge Rumbaugh’s finding is amply supported by the record. The sanctions are well within his broad discretion.

1. Sunset flagrantly violated CR 26(g) by concealing its AdWord purchases throughout the litigation.

As Judge Rumbaugh found, Sunset brazenly violated the discovery rules by failing to disclose its Brand and Conquest

campaign in both the arbitration and this lawsuit. Though Sunset does not challenge this finding, its brief presents a revisionist history that downplays its misconduct. The scope of Sunset's discovery misconduct and deceit is breathtaking; it is also important context for Judge Rumbaugh's finding that Mitchell and Conley lied about their knowledge of Sunset's Google AdWords purchases.

Because Northwest strongly suspected Sunset, contrary to its denials during the arbitration, was advertising on Google with terms prohibited by the settlement agreement, Northwest asked Sunset to "identify every online platform on which you have advertised" and "[w]ith respect to every search engine, including . . . Google . . . please identify every search term you purchased in the past ten (10) years." (CP 1826) Sunset falsely denied it had purchased prohibited terms as AdWords (*see, e.g.*, CP 1855, 1858, 1861) – a response Judge Rumbaugh found was "flat wrong." (9/1/17 RP 32)

Sunset only made matters worse with its response to the Google subpoena. Rather than come clean with evidence it should have produced in arbitration, Sunset actively discouraged Google's compliance, moved to quash the subpoena, and then threatened to seek sanctions against Northwest for bringing "[f]actually and legally baseless [claims] . . . in bad faith." (CP 1862) Sunset now defends

this conduct by arguing Northwest’s trademark infringement claim, which withstood two motions for summary judgment (CP 3079-81, 4298-99), was meritless. (App. Br. 43) But a party may not “unilaterally determine what [is] relevant to [the opposing party’s] claim,” *Gammon*, 38 Wn. App. at 281, nor does a party “have the option of determining what it would produce or answer, once discovery requests were made.” *Fisons*, 122 Wn.2d at 354.

Sunset’s claim that its attorney “advised [Northwest] in early 2017 that Sunset used Google Ads” and “submit[ted] declarations that acknowledged Sunset’s use of Google AdWords” (App. Br. 17, 43) is entirely disingenuous. Sunset only admitted that it advertised on Google *after* Northwest filed this lawsuit alleging it “purchased search terms for ‘Trucks Trucks and More trucks,’ as well as ‘Northwest Motorsport.’” (CP 9) And, while Sunset was forced to admit that it advertised on Google, it asserted the new lie that it did not purchase prohibited terms as AdWords. Sunset’s attempt to explain away one lie with another is hardly the “spirit of cooperation and forthrightness” in discovery required by *Fisons*, 122 Wn.2d at 342.

2. Substantial evidence, including the fact that Sunset canceled its Brand and Conquest campaign the *same day* Mitchell and Conley denied its existence, supports the finding that Mitchell and Conley lied at the arbitration.

Judge Rumbaugh found, based on overwhelming evidence, that Mitchell and Conley “failed to respond truthfully to questions posed under oath” by denying that “Sunset ever purchased Google AdWords.” (CP 3069-70) As Sunset admits that the arbitration hearing was not transcribed, its argument that Northwest should have provided a transcript of Mitchell’s and Conley’s testimony is without merit. (App. Br. 4, 19, 20) Northwest’s attorneys, Jon Morrone⁶ and Sheryl Willert, both testified that during the arbitration Mitchell and Conley denied that Sunset advertised on Google. (CP 1281, 1462)⁷ Sunset’s own counsel admitted that “[Northwest] never pursued the matter after

⁶ Morrone’s declaration states Northwest discovered during the arbitration that Sunset purchased the phrase “*Trucks, trucks, and more trucks.*” (CP 1462 (emphasis added)). Morrone also authored an email stating Northwest learned before the arbitration that if you “type ‘*Northwest Motorsport*’ into Google, the first paid link is to ‘Sunset Trucks.’” (CP 5943 (emphasis added)) Sunset conflates these distinct assertions in arguing that Morrone’s declaration conflicts with his email. (App. Br. 45)

⁷ Sunset attempts to manufacture a conflict between Morrone’s and Willert’s declarations, arguing that because Willert references Sunset’s “online Google advertising,” she stated that “Mitchell acknowledge[d] that Sunset used Google as an advertising platform.” (App. Br. 42, citing CP 1281) Willert said no such thing. Willert testified that “Sunset did not produce any Google AdWords” in discovery and her reference to Sunset’s “online Google advertising” reflected only that Northwest had *just discovered* Sunset’s advertising on Google. (CP 1280-81)

Sunset's witnesses denied knowledge of any Google AdWords purchases." (CP 1315)

Substantial evidence supports Judge Rumbaugh's finding that Mitchell and Conley both "knew exactly what they were doing" and lied when they denied at the arbitration that Sunset advertised on Google. (CP 3070) Mitchell's name and credit card are listed on Sunset's Google account and Sunset spent nearly \$100,000 on its Brand and Conquest campaign. (CP 1876) As the fact-finder, Judge Rumbaugh could – and did – reject Mitchell's self-serving assertion that he was ignorant of this expenditure. (9/1/17 RP 36 ("I mean is that just chump change? Does that leak out of their pockets and go unnoticed?")) See *Ramos v. Dep't of Labor & Indus.*, 191 Wn. App. 36, 40, ¶ 10, 361 P.3d 165 (2015) ("[w]hether self-serving testimony should be discounted is a credibility issue for the trier of fact") (quoted source omitted). Likewise, Judge Rumbaugh had every reason to reject Conley's assertion that as Sunset's *Director of Marketing* he had no knowledge of Sunset's advertisements on Google.

Judge Rumbaugh was also entitled to find it no mere coincidence that Sunset terminated its Brand and Conquest campaign **the same day** Mitchell and Conley denied any knowledge of it at the arbitration. (CP 3070) Sunset attempted to conceal Conley's

“advertising directive,” instructing that “[w]e . . . cannot bid on or purchase the phrase ‘Northwest Motorsport’ or ‘NWMS Rocks,’ ‘Trucks, Trucks, and More Trucks,[’] or any similar phrase as a keyword for any *Google AdWords*,” which he sent the day after the arbitration ended. (CP 2865 (emphasis added)) Conley continued, “[a]s far as Google AdWords campaigns, we can still bid on or purchase the individual words ‘truck’ and ‘trucks.’” (CP 2865)

Although they both knew the details of Sunset’s campaign against Northwest, Conley and Mitchell denied, and did not, as Sunset argues, “acknowledge,” Sunset’s use of Google AdWords. (App. Br. 42) Mitchell testified that Sunset engaged in “computer advertising” such as “search engine optimization,” but he did not disclose any “search engine marketing” in his deposition (CP 5079) Conley discussed Sunset’s “digital marketing,” including website “banner ads.” (CP 5084) The words “Google” and “AdWords” do not appear anywhere in their testimony. (CP 5077-85)

Sunset’s contention that Northwest should have intuited from its principals’ triangulation the existence of evidence that Sunset swore did not exist makes a mockery of the duty of candor in discovery and manifests contempt for a valid order compelling the production of the Google AdWords. *See Fisons*, 122 Wn.2d at 344-

45 (rejecting argument that doctor should have realized drug company's responses distinguished between brand name drug and its primary ingredient); *Gammon*, 38 Wn. App. at 281 (granting new trial and rejecting defendant's contention it was only required to produce accident reports "that occurred under identical circumstances and involved identical types of equipment"); *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 585, ¶ 27, 220 P.3d 191 (2009) (affirming discovery sanction where car manufacturer limited responses to one vehicle model and falsely stated other models did not have the same faulty mechanism that was at issue))

Sunset's purported reliance on "outside vendors" to manage their online advertising and Mitchell's and Conley's purported "limited involvement in social media advertising" fares no better. (App. Br. 42-43) The "vendor" that purchased Sunset's name as an AdWord, Michael Keenan, confirmed *before* Sunset hired him that Sunset would be "in *full control* of all online aspects." (CP 2978 (emphasis added)) Conley included Keenan in his "advertising directive" as part of "the great team here at Sunset." (CP 2866) Keenan also managed the "online@sunsetmarketing.info" email address, which he used to communicate with Conley about Sunset's online advertising. (See, e.g., CP 3336-37) Keenan was not – as

Sunset wants this Court to believe – some “rogue” vendor that operated without any oversight or direction.

Mitchell’s and Conley’s misrepresentations continued on reconsideration, and Sunset perpetuates them on appeal. Mitchell swore on reconsideration that he did “not know whether anyone at Sunset has ever personally purchased or bid on keywords for Google AdWords” and that he had never “been involved in choosing search terms to bid on for Google AdWords.” (CP 3242) Conley likewise swore that he “testif[ied], truthfully, that I never in my life have been involved in purchasing Google AdWords,” and that he “had no knowledge of . . . what AdWords [Keenan] had purchased at the time of the [arbitration] testimony.” (CP 3184, 3187) That was not true, as yet more undisclosed evidence confirmed.

In an email sent seven months before the arbitration, and discovered long after Conley filed his self-serving, exculpatory declaration, Conley asked Keenan, “do we have an approval on those key words,” noting Sunset’s keyword purchases prompted “letters from lawyers for imitating companies similarly named.” (CP 3337) Keenan responded that when purchasing keywords, Sunset “bid *all the time* on competitors names.” (CP 3336 (emphasis added)) Keenan also told Conley he would not go forward with the keyword

purchases “without your 100% approval.” (CP 3336) Conley forwarded this email to Mitchell. (CP 3336) Keenan’s email, which Sunset also withheld from discovery, refutes Sunset’s contention that Mitchell and Conley truthfully denied having “knowledge of the use of [Northwest] trademarks as keywords” (App. Br. 4; App. Br. 20 (claiming Mitchell and Conley “did not . . . have knowledge of the search keywords [vendors] purchased.”))

Sunset’s assertion before Judge Rumbaugh that “none of Sunset’s current and past advertising vendors and employees state they have ever purchased” Northwest’s name as an AdWord was a lie. (CP 1855, 1858, 1861) And, because Sunset continued to mislead Judge Rumbaugh in its motions for reconsideration, he properly exercised his discretion in denying those motions. (App. Br. 44)

Moreover, Judge Rumbaugh was not, as Sunset argues (App. Br. 46), obligated to consider testimony and documents that could have and should have been presented in response to Northwest’s original motion, rather than long after the fact. *See Wagner Dev., Inc. v. Fid. & Deposit Co. of Maryland*, 95 Wn. App. 896, 907, 977 P.2d 639 (trial court did not abuse its discretion in denying reconsideration because “the additional evidence . . . presented to the court . . . was available when the parties filed their motions for summary judgment”), *rev.*

denied, 139 Wn.2d 1005 (1999).⁸ In any event, contrary to Sunset’s assertion that Judge Rumbaugh “fail[ed] to at least consider” its evidence (App. Br. 46), Judge Rumbaugh’s orders state that he reviewed Sunset’s motions before denying them. (CP 3287, 5956) This Court should affirm Judge Rumbaugh’s \$75,000 sanction as well within his broad discretion to manage discovery and supported by substantial evidence that Sunset’s certification violated CR 26(g).

D. Judge Rumbaugh did not abuse his discretion in entering a permanent injunction aimed at ending Sunset’s unfair competition.

Judge Rumbaugh did not abuse his discretion in enjoining Sunset’s relentless campaign of unfair competition against Northwest, which included misusing Northwest’s trade names and marks in website addresses, on TV, radio, social media, Craigslist, and Google, and poaching Northwest’s employees, “pumping” them for information, and then quickly firing them. (*See* § III.D) This Court “review[s] a trial court’s decision to grant an injunction for abuse of discretion.” *Green v. Normandy Park*, 137 Wn. App. 665, 698, ¶ 81, 151 P.3d 1038 (2007); *see also Niemann v. Vaughn Cmty. Church*, 154

⁸ This case is thus unlike *Coggle v. Snow*, 56 Wn. App. 499, 784 P.2d 554 (1990) (App. Br. 46), where this Court held the trial court abused its discretion in denying a continuance and that the refusal to consider new evidence “was an abuse of discretion flowing from the court’s initial denial of the motion for a continuance.” 56 Wn. App. at 508-09.

Wn.2d 365, 374, ¶ 9, 113 P.3d 463 (2005) (“trial courts have broad discretionary power in fashioning equitable remedies”). “To establish the right to an injunction, the party seeking relief must show (1) that he or she has a clear legal or equitable right, and (2) that he or she has a well-grounded fear of immediate invasion of that right.” *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 699, 974 P.2d 836 (1999).

Conceding that Northwest had a clear right to protect its trade secrets, Sunset’s only contention is that whether Sunset was illicitly trying to obtain trade secrets from Northwest employees was a disputed issue of fact. Sunset cites Mitchell’s declaration, which it submitted with its reply in support of its cross-motion for summary judgment on Northwest’s trademark imitation claim, ignoring that Sunset did not, as it now claims, call Mitchell’s declaration to Judge Rumbaugh’s attention “in opposition to [Northwest’s] motion for a permanent injunction.” (App. Br. 47; CP 3062-64)⁹ Sunset identified *no* evidence disputing Northwest’s assertion that Sunset attempted to obtain Northwest’s trade secrets, arguing instead there was no trade secret, the request was moot, and that any injunction must be narrowly tailored. (CP 2627-31)

⁹ The first time Sunset cited Mitchell’s “much earlier” declaration opposing the injunction was at oral argument. (11/17/17 RP 16, 32)

Sunset cannot create an issue of fact by pointing to evidence it submitted on a *different* motion when it did not call Judge Rumbaugh’s attention to that evidence until oral argument and did not ask for a continuance of the hearing. *See Puget Sound Sec. Patrol, Inc. v. Bates*, 197 Wn. App. 461, 469, ¶ 18, 389 P.3d 709 (2017) (affirming refusal to consider on summary judgment declarations submitted in opposition to motion to strike because nonmoving party “did not ask to amend its summary judgment response by adding the declarations”); *cf. Keck v. Collins*, 184 Wn.2d 358, 366, ¶ 17, 357 P.3d 1080 (2015) (trial court erred in striking untimely affidavit filed before hearing on summary judgment where nonmoving party asked to “continue the motion hearing . . . so that the court could evaluate it.”).

Regardless, Judge Rumbaugh was not required to hold an evidentiary hearing based on Mitchell’s declaration before entering a permanent injunction. Sunset does not argue that Judge Rumbaugh could not rely at a hearing on the merits on his previous finding that Mitchell was not credible, only that it was “error to make credibility determinations *on summary judgment*.” (App. Br. 47 (emphasis added)) But Judge Rumbaugh did not make his credibility determination “on summary judgment” – he made it as the finder of fact on Northwest’s motion for sanctions and then relied on that

finding in granting an injunction. (CP 3312) Sunset cites no authority requiring a trial court to credit testimony from a witness it has already found not credible in the court's fact-finding capacity. Judge Rumbaugh's rejection of testimony from a witness that perjured himself is akin to the long-standing rule allowing a court to disregard a declaration that contradicts earlier deposition testimony. *See, e.g., Bavand v. OneWest Bank*, 196 Wn. App. 813, 832, ¶¶ 62-65, 385 P.3d 233 (2016).

Mitchell's declaration opposing sanctions does not in any event create an issue of material fact. Mitchell does not dispute (nor could he) Sunset's campaign, beginning in 2011, to use unlawful means to gain any and every competitive edge over Northwest, starting with cybersquatting and Craigslist "flagging," then violating the settlement agreement in radio, TV, Craigslist's, and social media ads, and culminating in its Brand and Conquest campaign. Sunset's undisputed conduct amply supports Judge Rumbaugh's finding that "Northwest has a well-grounded fear" of harm. (CP 3315)

E. This Court should award Northwest its attorney's fees on appeal under the settlement agreement.

The settlement agreement provides that "actual attorneys' fees and costs shall be awarded to the prevailing party." (CP 1749) Northwest established in this litigation that Sunset – again – violated

the agreement by using Northwest's name in its Brand and Conquest campaign. Northwest is entitled to its attorney's fees under the settlement agreement. RAP 18.1(a); *Renfro v. Kaur*, 156 Wn. App. 655, 666-67, ¶ 16, 235 P.3d 800, *rev. denied*, 170 Wn.2d 1006 (2010).

V. CONCLUSION

This Court should affirm the judgment and injunction against Sunset and award Northwest its attorney's fees on appeal.

Dated this 24th day of July, 2019.

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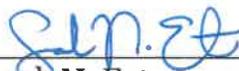
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on July 24, 2019, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

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Sarah N. Eaton

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