

FILED
COURT OF APPEALS
DIVISION II

2014 OCT 16 PM 1:10

STATE OF WASHINGTON

BY: 
DEPUTY

No. 46465-9-II

IN DIVISION II OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

JZK, INC.,

Plaintiff-Respondent,

v.

VIRGINIA COVERDALE,

Defendant-Appellant.

AMENDED BRIEF OF APPELLANT

BRECKAN C.L. SCOTT, ATTORNEY OF LAW, PLLC
Breckan Scott, WSBA No. 41585
P.O. Box 1123
Yelm, WA 98597
(360) 960-8951

SCHATZ LAW GROUP
Anthony Gipe, WSBA No. 30491
adgipe@shatzlaw.com

Attorneys for Appellant Coverdale

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENTS OF ERROR.....	3
III.	ISSUES PERTAINING TO ASSIGNMENT OF ERROR.....	4
IV.	STATEMENT OF THE CASE.....	6
A.	Overview of Factual History.....	6
	Coverdale posts video with stated purpose to raise public awareness and prevent further injuries at JZK, Inc after attempts to petition government officials.....	6
	JZK, Inc. claims material has independent value as JZK, Inc.'s instruction, information, and techniques.....	6
	Video alternates between campaign footage, original political commentary, and JZ Knight in an obscenity laced tirade about homosexuality, Catholicism, Jewish people, and bragging about lack of oversight.....	7
	Conditions of Participation introductory provision restricting the agreement to events participated in at the School, prohibiting the release of "any information," and prohibiting customers from "attributing to Ramtha any statement" that JZK, Inc./JZ Knight has not also agreed was made.....	8
	2008 JZK, Inc. email to Ms. Coverdale informing her no longer allowed to participate.....	9
	During February 2012 event JZ Knight makes derogatory remarks about Ms. Coverdale, causing Ms. Coverdale to further question the validity of the organization and its many representations, and begin to investigate.....	10
	Ms. Coverdale's alarm grows as she learns of not only the serious threats to health and safety, but what also appeared to be fraudulent practices and a shocking lack of information available to potential new consumers.....	10
	Breadth of potential harm significant given thousands of people subject to nondisclosure provisions.....	11

JZK, Inc.’s misrepresentations regarding both the validity and nature of scientific studies used to substantiate claims made to induce new customers..... 11

Once an established customer subject to nondisclosure provisions, JZK, Inc.’s business practices include psychological and emotional abuse, sleep and food deprivation..... 13

JZK, Inc.’s instruction to customers to engage in questionable investment schemes, and instruction to apply disciplines in order to manifest wealth by purchasing JZK, Inc. retail products and lottery tickets sold by JZK, Inc.... 14

JZK, Inc. instructs customers to ingest elixir containing industrial lye; many suffer detrimental health effects..... 15

Dangerous conditions at JZK, Inc. events..... 16

Physical Assault and Instruction Not to Seek Medical Attention..... 17

Severe Impact to Customers’ Mental Health..... 18

Most of the customers submitting declarations did not know Coverdale (or each other) prior to 2012, many of them do not live in Washington State, and their testimony is consistent..... 18

Ms. Coverdale proceeds to engage the problem via the political process to petition her local officials, not knowing that her complaints are not being acted upon, but rather forwarded as a “heads up” directly to JZK, Inc..... 19

JZ Knight donates hundreds of thousands of dollars each year to the fire authority that is forwarding Ms. Coverdale’s complaints, and Fire Chief Mark King writes letters of appreciation to the newspapers while this litigation pending..... 20

Ms. Coverdale receives video anonymously in the U.S. Mail on a flash drive depicting the 11 hour February 2012 livestream event and uses footage to make the Youtube video issue..... 20

B.	Procedural History.....	20
	JZK, Inc. files Complaint for Breach of Contract based on nondisclosure provisions in its consumer form contract...	20
	Trial court grants temporary and preliminary injunctions.	21
	Trial court dismisses Ms. Coverdale’s counterclaims.....	22
	Judge Tabor dismisses Ms. Coverdale’s affirmative defenses, citing, in part, that JZK, Inc. is entitled to its beliefs.....	22
	Judge Tabor grants summary judgment for JZK, Inc. and finds that Ms. Coverdale breached the agreement as matter of law but does not explain basis for ignoring limitation in agreement to events in which she participated.....	23
V.	STANDARD OF REVIEW	
1.	Summary Judgment.....	22
VI.	ARGUMENT.....	23
A.	This Court should find that Coverdale’s conduct was not a breach, because consumer contracts requiring secrecy are substantively unconscionable and violate the policies expressed by this Court in <i>McKee v. AT&T Corporation</i> , 164 Wn. 2d. 372 (2008).....	23
1.	The agreement is a standard form consumer contract of adhesion prepared by JZK, Inc. and submitted on a take it or leave it basis to consumers who have no true equality of bargaining power.....	23
2.	The relevant nondisclosure clause is substantively unconscionable as a one-sided and overly harsh provision as a matter of law.....	25
3.	The inherent potential for abuse in the consumer nondisclosure provision renders it substantively unconscionable for the policies expressed by this Court in <i>McKee v. AT&T Corp</i> , 164 Wn. 2d. 372.....	26
4.	The consumer nondisclosure agreement undermines other public policies such as: government accountability; freedom of speech and to petition government; and a	

plethora of other policies undermined by requiring consumer secrecy, such as dignity in the electoral process
.....29

- 5. JZK, Inc.’s consumer nondisclosure provisions also implicate public policy concerns because it allows JZK, Inc. to impermissibly avoid the requirements of the Copyright Act and the Uniform Trade Secrets Act.....33
- 6. This Court should reverse summary judgment for JZK, Inc., enter judgment as a matter of law for Ms. Coverdale, and enter judgment for attorney fees and costs against both JZK, Inc., and JZ Knight individually pursuant to *alter ego*.....35

B. The nondisclosure provisions violate the Consumer Protection Act, RCW 19.86, *et seq.*, as to Coverdale and all other JZK, Inc. customers subject to nondisclosure provisions, and this Court should also find that the class of customers subject to JZK, Inc.’s nondisclosure provisions meet the prerequisites of CR 23(a)(1)-(3).....38

C. This Court should enter judgment as a matter of law for Coverdale because the 2007 CoP is the only controlling agreement, Coverdale did not breach that agreement, and, even if there was a breach, it was excused by JZK, Inc.’s anticipatory breach.....39

- 1. The 2007 CoP is a substitute agreement, and is the only relevant CoP.....40
- 2. Coverdale did not breach the clear terms of the agreement.....41
- 3. Even if ambiguous, Coverdale still entitled to judgment as a matter of law because terms must be construed against the drafter, and JZK, Inc.’s interpretation is both unreasonable and contradictory to the written language of the agreement.....43

4.	JZK, Inc.’s November 2008 email was a clear and unequivocal communication of intent to no longer be bound by the agreement and excused any further performance by Ms. Coverdale.....	48
D.	Summary judgment for JZK, Inc. must be reversed, and the case remanded because it was error as a matter of law to dismiss affirmative defenses, and this Court should reinstate counterclaims for misrepresentation and fraud, and remand for consolidation and trial with the recently re-filed action for defamation and related claims.....	53
1.	Trial court erred as a matter of law by requiring additional elements to the four necessary for the affirmative defense of fraudulent inducement, and by dismissing affirmative defenses despite existence of material factual dispute.....	53
2.	Trial court erred as a matter of law when it ruled JZK, Inc.’s conduct is protected by free exercise of religion, and when it prohibited counterclaims despite existence of material factual dispute.....	54
E.	Trial Court committed reversible error by allowing JZK, Inc. to introduce new evidence and argument in an untimely reply brief, and ruled in favor of JZK, Inc. on summary judgment while JZK, Inc.’s Motion for Protective Order concerning relevant discovery was pending.....	61
F.	This Court should find that Coverdale did not commit contempt of Court as a matter of law when she sold her personal vehicle, because there was no specific order prohibiting the conduct, and thus there can be no evidence of specific intent.....	63
1.	Summary of Background Relating to Contempt Order.....	63
2.	Coverdale could not have been in contempt of the Writ of Execution because a Writ is directed to the Sheriff and does not direct a debtor to take any action or refrain from taking any action.....	66
3.	There is no prohibition in the Oct. 24, 2013 Order Prohibiting Ms. Coverdale’s Sale of her Personal Vehicle.....	68

4. Trial court erred as a matter of law in issuing a Contempt Order containing no legal mechanism capable of performance to purge the Contempt.....	70
G. Coverdale is entitled to attorney fees and costs incurred from the inception of this case, including all fees and costs incurred defending JZK, Inc.'s efforts to collect on the judgment, and incurred on appeal.....	71
VII. CONCLUSION.....	72

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Adler v. Fred Lind Manor,</i> 153 Wn. 2d. 331, 103 P. 3d. 773 (2004)	25
<i>Bader v. Moore Bldg. Co.,</i> 94 Wash. 221, 162 P. 8 (1917).....	40
<i>Bally Total Fitness Holding Corp. v. Faber,</i> 29 F.Supp.2d 1161, (C.D.C. 1998).....	31
<i>Bosley Medical Institute, Inc. v. Kremer,</i> 403 F.3d 672 (9 th Cir. 2005).....	31
<i>Caruso v. Local 690, Int'l Bhd. of Teamsters,</i> 100 Wn.2d 343, 670 P.2d 240 (1983).....	59
<i>Casa del Rey v. Hart,</i> 643 P. 2d 900, 31 Wn. App. 532 (1982).....	67
<i>Cupples v. Level,</i> 103 P. 430, 54 Wash. 299, 302 (1909).....	67
<i>Dice v. City of Montesano,</i> 131 Wn. App. 675, 684, 128 P. 3d 1253 (2006).....	42
<i>Doherty v. Municipality of Metro.Seattle,</i> 83 Wn.App. 464, 921 P.2d 1098 (1996).....	62
<i>Dreiling v. Jain,</i> 151 Wash.2d 900, 93 P.3d 861 (2004).....	28
<i>Ferguson v. Jeanes,</i> 27 Wash. App. 558 (1980).....	54
<i>Go2Net, Inc. v. C I Host, Inc.,</i>	

115 Wn. App. 73, 85, 60 P. 3d 1245 (2003).....	42
<i>Higgins v. Stafford,</i>	
123 Wash. 2d 160, 866 P. 2d 31 (1994).....	41
<i>Ikeda v. Curtis,</i>	
43 Wash. 2d. 449 (1953).....	54
<i>In re Northwest Homes of Chehalis, Inc.,</i>	
526 F. 2d 505 (9th Cir. 1975).....	67
<i>In re the Detention of Capello v. State,</i>	
113 Wn. App. 739 (2002).	61
<i>In re Marriage of Nielsen,</i>	
38 Wash.App. 586, 588, 687 P.2d 877 (1984).....	65
<i>King v. Dep't of Soc & Health Servs.,</i>	
110 Wash.2d 793, 797, 756 P.2d 1303 (1988).....	65
<i>King v. Rice,</i>	
146 Wn. App. 662, 668, 191 P.3d 946 (2008), rev. denied, 165 Wn.2d 1049 (2009).....	22
<i>King v. Riveland,</i>	
125 Wash.2d 500, 511, 886 P.2d 160 (1994).....	29
<i>McKee v. AT&T Corporation</i>	
191 P.3d 845, 164 Wn.2d 372 (2008)	23, 26, 27, 28, 33, 38
<i>Monks & Miller, Inc. v. Fein,</i>	
215 P. 525, 125 Wash. 230, 235 (1923).....	66
<i>Nelson v. McGoldrick,</i>	
127 Wn .2d 124, 131 (1995).....	24
<i>Ockletree v. Franciscan Health System, No. 88218-5 (Wash. 2014).....</i>	56

<i>Olsen Media v. Energy Sciences, Inc.</i> ,	
32 Wash.App. 579, 585, 648 P.2d 493, review denied, 98 Wash.2d 1004 (1982).....	50
<i>Puget Sound Service Corp. v. Bush</i> ,	
724 P.2d 1127, 45 Wn. App. 312 (1986).....	51
<i>R.D. Merrill Co. v. Pollution Control Hearing Board</i> ,	
137 Wn.2d 118, , 969 P.2d 458 (1999).....	62
<i>Scott v. Cingular Wireless</i> ,	
161 P.3d 1000, 160 Wn.2d 843 (2007).....	28, 31
<i>Segaline v. State, Dept. of Labor and Industries</i> ,	
169 Wn.2d 467, 472-73, 238 P.3d 1107 (2010).....	31
<i>Shields v. Enter. Leasing Co.</i> ,	
139 Wn. App. 664, 670, 161 P.3d 1068 (2007).....	22
<i>Sing v. John L. Scott, Inc.</i> ,	
134 Wn.2d 24, 29-30, 948 P.2d 816 (1997).....	38
<i>State v. Conte</i> , 159 Wn. 2d 797, 817, 154 P.3d 194 (2007).....	29
<i>State Dept. of Ecology v. Tiger Oil Corp.</i> ,	
271 P. 3d 331, 166 Wn. App. 720 (2012).....	68
<i>Stofferan v. Depew</i> , 79 Wash. 170, 139 P. 1084 (1914).....	40
<i>White v. Kent Medical Ctr., Inc.</i> ,	
61 Wn.App. 163, 810 P.2d 4 (1991).....	61
<i>Yakima County (W.Valley) Fire Prot. Dist. No. 12 v. City of Yakima</i> ,	
122 Wash.2d 371, 393, 858 P.2d 245 (1993).....	23
<i>Zuver v. Airtouch Communications, Inc.</i> ,	
153 Wn.2d 293, 103 P.3d 753 (2004).....	23, 24, 27

Statutes

17 USC § 106.....33

17 USC § 301.....33

RCW 4.84.330.....67

RCW 5.24.525.....31

RCW 6.17.110.....65,66

RCW 6.17.120.....66

RCW 7.21.030.....70

RCW 7.21.040.....70

RCW 19.86, *et seq* (Consumer Protection Act)..... 10, 12, 21,
23, 37, 38, 39, 54, 55, 58, 60.

RCW 19.108, Uniform Trade Secrets Act.....34

RCW 42.17A.001.....29

RCW 42.17.390.....29

RCW 49.60, *et seq*.....55

Other Authorities

25 DAVID K. DEWOLF, KELLER W. ALLEN, DARLENE S. BARRIER,
WASHINGTON PRACTICE SERIES: CONTRACT LAW AND PRACTICE, § 11.3
(1998).....41

Restatement (Second) of Contracts (1981)

WA Practice Series, Vol. 25

Washington State Constitution.....29, 55, 57

Civil Rules

CR 6.....61

CR 15.....58

CR 23.....37, 38, 39

CR 56.....22, 58, 61

RAP 18.1.....	67
---------------	----

I. INTRODUCTION

Can a for-profit Washington Corporation use a consumer form contract to require customers to maintain secrecy of “any information” they receive from the corporation or received while attending a corporate event? This Court must decide if secrecy should be enforced when doing so undermines corporate oversight and consumer protection, and which may even be facilitating illegal activity and fraud.

JZK, Inc. is a for-profit Washington Corporation (CP 612); Virginia Coverdale is a former customer, having last attended a JZK, Inc. event in 2010. JZK, Inc. sued Ms. Coverdale, alleging breach of the nondisclosure provision of its Conditions of Participation which prohibits customers from releasing “any information” received at or from JZK, Inc.

JZK, Inc. claims Ms. Coverdale breached the nondisclosure by putting a two minute and thirty second video on Youtube during the election season in October 2012, because the video contained footage from a February 2012 JZK, Inc. event. The video combined publicly released footage of a local commissioner campaigning at JZK, Inc.’s facility; footage of JZ Knight (JZK, Inc. President and sole-shareholder); and original political commentary added as text over the footage and in cut screens. The footage of JZ Knight included Knight making derogatory statements about homosexuals, Catholics, and Jewish people (while purportedly channeling “Ramtha,” which JZK, Inc. asserts is a 35,000 year old “Lemurian” God from Atlantis) at the February 2012 event.

It is undisputed that Ms. Coverdale received the February 2012 event video on a flash drive sent to her anonymously in the U.S. mail, and does not know who sent it. JZK, Inc. claims that it did not keep and does not possess any of the February 2012 event footage. It is also undisputed that the event video was taken over two years after Ms. Coverdale ceased attending all JZK, Inc. events and ceased all association with JZK, Inc.

Ms. Coverdale released the video after local officials failed to substantively address health, fire/safety, and consumer protection concerns that she and others had raised about JZK, Inc.'s practices – including JZK, Inc. personnel directing customers to drink a mixture containing industrial lye. After Ms. Coverdale learned that JZ Knight/JZK, Inc. was the largest private campaign contributor to a commissioner responsible for ensuring oversight, and had donated hundreds of thousands of dollars to the local fire authority responsible for investigating many of the complaints that had been made, the lack of substantive response from the municipality seemed suspicious. Ms. Coverdale thus raised public awareness directly by posting the Youtube video at issue, and was promptly sued by JZK, Inc. The sole basis for the lawsuit was alleged breach of the secrecy clause.

There are three primary issues raised in this appeal which require reversal of Judge Gary Tabor's ruling in favor of JZK, Inc. at summary judgment, and require entry of a finding in favor of Ms. Coverdale. First, the clause at issue is substantively unconscionable and a violation of public policies, including the policies expressed by this Court in *McKee v. AT&T*, 191 P.3d 845, 164 Wn.2d 372 (2008). Second, that the trial court

erred by finding that the agreement was not a form contract of adhesion, erroneously ruling that Ms. Coverdale breached the agreement as a matter of law despite a provision restricting application of the CoP to events in which she participated, and by construing the terms against Coverdale rather than the drafter – JZK, Inc. Third, that any breach by Ms. Coverdale was excused by JZK, Inc.’s anticipatory breach in the Nov. 8, 2008 email communicating its intent to no longer be bound by the agreement.

The trial court also committed reversible error: 1) by applying the wrong legal elements to dismiss Ms. Coverdale’s affirmative defenses and prohibit counterclaims when there were issues of material factual dispute; 2) by allowing the prevailing party to introduce unproduced evidence and new argument in an untimely Reply brief; 3) by entering summary judgment while JZK, Inc.’s motion for protective order on Ms. Coverdale’s discovery requests was pending; and 4) by finding Coverdale in contempt for selling her personal vehicle post-judgment.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in ruling as a matter of law that Ms. Coverdale breached the Conditions of Participation.
2. The trial court erred as a matter of law when it dismissed Ms. Coverdale’s affirmative defenses.
3. The trial court erred as a matter of law when it dismissed counterclaims and denied timely motion to amend.
4. The trial court erred as a matter of law when it granted JZK, Inc.’s Motion for Summary Judgment after allowing new evidence and

argument, and while JZK, Inc. had a pending motion for protective order regarding relevant discovery.

5. The trial court erred as a matter of law when it found Ms. Coverdale in contempt for selling her personal vehicle.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Issue No. 1: Did the trial court err in ruling as a matter of law that JZK, Inc.'s nondisclosure provisions are not substantively unconscionable for the policy reasons explained by this Court in *McKee v. AT&T*, 164 Wn. 2d. 372 (2008), or for undermining other well-grounded public policies such as the freedom to petition government?

Issue No. 2: Whether the trial court erred when it applied both the prior agreement and a substitute agreement which covered the same subject matter?

Issue No. 3: Did the trial court err in ruling as a matter of law that Ms. Coverdale breached the agreement when the clear terms limit it to material received from JZK, Inc., at events in which she participated, and it is undisputed that she did not receive the material from JZK, Inc. or participate in the subject event?

Issue No. 4: Did the trial court err in ruling as a matter of law that Ms. Coverdale breached the agreement when Ms. Coverdale's interpretation of the contract is reasonable, and the contract must be construed against the drafter, JZK, Inc.?

Issue No. 5: Did the trial court err in ruling as a matter of law that Ms. Coverdale breached the agreement when JZK, Inc. communicated its intent to no longer comply with its duty to allow participation, and did not reference

the previous agreement or require a new agreement to be signed when Ms. Coverdale was allowed to participate a year later?

Issue No. 6: Did the trial court err as a matter of law when it dismissed Ms. Coverdale's counterclaims and affirmative defenses, despite the existence of issues of material factual dispute, and while JZK, Inc.'s Motion for Protective Order regarding relevant discovery was pending?

Issue No. 7: Whether the trial court committed reversible error when it allowed the prevailing party on summary judgment to introduce new arguments and new unproduced evidence in its reply brief, which was filed four days prior to the summary judgment hearing, over the objection of the non-prevailing party?

Issue No. 8: Whether the trial court committed reversible error when it found Ms. Coverdale in Contempt for selling her personal vehicle, and that her conduct violated a Writ of Execution never delivered to her or the Sheriff, and an Order that did not specifically prohibit the vehicle sale?

IV. STATEMENT OF THE CASE

A. Overview of Factual History¹

On October 18, 2012 Virginia Coverdale posted a Two and a Half

Minute video on Youtube, with the following explanation:

We are former [customers]² of RSE [JZK, Inc.] making our concerns public...in the hope, that in doing so, we may contribute to the prevention of more injuries in the future, and, or, a tragedy from occurring at RSE.

The public...deserve[s] all of the due care and attention, governmental agencies have been established to provide...failure to investigate when violations are brought to the attention of regulating governmental agencies

¹ For brevity and clarity, specific facts may be only in specific sections where relevant.

² An online forum and Does 1-100 were also named, and subsequently dismissed from this suit. JZK, Inc. filed separately in the forum administrator's country, New Zealand.

amount[s] to tacit agreement with the violations, and...a failure to fulfill obligatory duties...

RSE Needs to be Shut Down Now, Before a Major Tragedy Strikes and Lives are Lost. CP 62-63

At the outset, JZK, Inc. asserted that the footage has “independent value” as “instruction, information, and techniques...unique to RSE.” CP 12 Dissemination “...will harm JZK, Inc. because these materials have independent value, in part, by virtue of their limited distribution,” and that it is damaged because the material “...is unavailable to the general public and accessible only upon payment.” CP 26-27 JZK, Inc. must assert this position because only by alleging proprietary economic value of the information would JZK, Inc. possibly capture the video under the terms of the contractual non-disclosure provision.

Despite these purported reasons supporting the claims, the CR 30(b)(6) representative for JZK, Inc. testified that JZK, Inc.’s motivation was that they did not want the footage released due to concerns of alienating potential new customers. CP 1060, VRP (Jun. 28, 2013) at Pg. 42:3-14. It is also uncontested that JZK, Inc. neither kept a copy of the footage or intended to release it as a product in any form. CP 1233.

The released video alternated between footage of Sandra Romero, a county commissioner, campaigning³ at JZK, Inc.’s facility, and footage of JZ Knight making derogatory, bigoted, and hate-filled statements about homosexuality, Catholicism, and Jewish people at a February 2012 JZK, Inc. event. The profanity-laced tirade includes Ms. Knight stating “I take

³ The campaign footage had already been publicly released by JZK, Inc. Hereinafter, reference to “footage” is to the previously unreleased portions of the video.

your [expletive] faith on,” in reference to Catholicism, “All gay men were once Catholic women,” “We will come on you in a terror...we will quake your god damned god released country...,” and other similar bigoted rhetoric directed also at homosexuality and Jewish people. CP 69, CP 90-91.⁴

The original political commentary referencing the connection between JZK, Inc. and Commissioner Romero, and urging voters to be well-informed, was added over the footage of JZ Knight in part as well as in cut-screens. This released montage was only a small fraction of the original video material sent to Ms. Coverdale.

JZK, Inc. alleged the video release breached its contractual terms of participation for JZK, Inc. customers. The alleged breach is based on both the 2006 and a subsequent 2007 versions of the Conditions of Participation – both were signed while physically attending events on 9/21/06, and 11/6/07, respectively. CP 1125-28 The 2007 agreement begins as follows⁵:

These conditions apply to students, teachers, and other participants in the School, and **apply to all future events or activities in which you**

⁴ Unfortunately, JZK, Inc. has successfully insulated this appellate review from the full shock when presented with the actual text of the hate speech on the video. Although JZK, Inc. submitted a sworn declaration (CP 35) that the subject video was included as an exhibit when filing for the TRO and Preliminary Injunction, it was only when the Clerk’s Papers were compiled that it was discovered that JZK, Inc. did not file the video forming the basis of its lawsuit. Although listed on JZK, Inc.’s own Orders (Decl. of Mike Wright, with Exhibits, *See*, TRO and Preliminary Injunction Orders, CP 100, CP 464) as evidence considered, JZK, Inc. refused Ms. Coverdale’s request that it rectify the misrepresentation by simply providing the video to be, as it was designated, part of the record. Instead, JZK, Inc. sought and prevailed before this Court on a motion to exclude the text of the video because the video, technically, was not submitted to the Court (contrary to JZK, Inc.’s previous sworn representation that it had been).

⁵ The only relevant agreement is the 2007 version, as a substitute agreement. The text of the 2006 version is similar, however, and has been omitted for brevity.

participate at the School. Therefore, as a condition to your participation you must agree to the following: (Emphasis added).

By signing these Conditions of Participation, you agree not to teach or otherwise disseminate...**any information** or techniques **that you learn or are taught at the School**...nor will you assist or facilitate other persons in doing so...You further agree not to Teach or Disseminate anything you BELIEVE you received Ramtha in a dream, a vision or discipline, or any other source.

JZK, Inc. also asserts that JZ Knight's trademarked "Ramtha Dialogues®" is the "sole historical record of the teachings of Ramtha" and contractually prohibits its customers from "...attribut[ing] to Ramtha any statement that is not a part of that record." CP 1125. Although JZK, Inc. claimed that the video was "taken out of context," emails between JZK, Inc. and its Public Relations firm confirm that the "context" assertion was a fabrication that followed the release of the video. VRP (6/28/13), Pg. 54:7-15.

In 2008, JZK, Inc. sent an email to Coverdale informing her that she was barred to participate in any future events. CP 1192. JZ Knight directed that the email be sent because Coverdale had begun dating James Flick, an employee of JZK, Inc. who also lived at the facility.⁶ CP 1149 Mr. Flick inaccurately represented to Coverdale that his prior romantic relationship with JZ Knight had ended, and Ms. Knight was agitated by Flick's relationship with Coverdale.⁷ CP 1150-57

Coverdale was prohibited from participation in JZK, Inc. events for about a year; in 2009, JZK, Inc. granted Coverdale permission to again attend JZK, Inc. events. CP 1157 Even though she attended a few events

⁶ JZK, Inc.'s facility is also the residence of Ms. Knight, and was the residence of Mr. Flick during the relevant time period.

⁷ See, Discussion at Section VI.C.

in 2009-2010, Coverdale had begun to seriously question the practices of the organization after continuing to observe Ms. Knight's behavior in 2008, among other factors. CP 1162, CP 1047. In 2010 Ms. Coverdale quietly left RSE and went on with her life – despite that many of her family members were still entrenched in the organization. *Id.* At no time during Ms. Coverdale's brief return to JZK, Inc. events did the company request or require her to execute any new conditions of participation or any amendments or addendum to any prior conditions of participation. CP 1046-47, CP 1193.

Two years later, in February 2012, Coverdale was continuing with her life, beginning to discover the full detrimental impact of her involvement with JZK, Inc., and had not had contact with Flick or Knight for nearly two years. Ms. Coverdale was beginning to reach out to other former JZK, Inc. customers who were also suffering the effects of JZK, Inc.'s practices, and the more clarity she gained, the more concerned she became regarding JZK, Inc.'s business practices. CP 1047, CP 1193-97.

It is unknown whether JZ Knight discovered that Coverdale was in communication with other former customers prior to the February 17, 2012 event. Nonetheless, during that "livestream" event in front of a combined in-person and live audience (including Coverdale's family, friends, and her potential clients⁸), Knight made comments that were certainly directed toward Coverdale. CP 639, CP 1398. Coverdale heard about this from her family members and friends. This caused her to

⁸ Coverdale's primary profession is as a self-employed marketing consultant. CP 1197.

question even further the validity of the company, and she continued investigating the veracity of the many claims by JZK, Inc. and JZ Knight which had induced her into becoming a JZK, Inc. customer. CP 1354-55.

As she and other former customers shared information, Coverdale's alarm grew as she considered not only the serious threats to health and safety, but what also appeared to be fraudulent practices and a shocking lack of information available to potential new consumers. CP 1355-56, CP 1361.

The breadth of potential harm to the public cannot be ignored. JZK, Inc. is a Washington for-profit corporation that claims to have seven thousand customers (7,000) in Thurston County alone, eighty-four thousand (84,000) customers in its database. CP 1294, CP 765. It also conducts numerous international events, and claims to have instructed twenty-two thousand (22,000) customers since 1988. CP 122.

JZK, Inc. is in the business of selling "teachings" and "information" in the guise that this "product" it sells consumers is supported by "...the latest discoveries in neuroscience and quantum physics." CP 524, CP 1076. The underlying gist seems to be based on quantum theories such as Heisenberg's Uncertainty Principle: That particles behave differently depending on whether or not they are being observed. JZK, Inc. has construed and then packaged broad concepts into what it asserts is a scientifically supported conclusion: That everyone, given the "techniques" taught at JZK, Inc. can "create their own reality." CP 571, CP 635, CP 1204. To support these claims, JZK, Inc. even

organized a series of “scientific studies,” and then used the results as “proof” that its claims are based on science. CP 1563. However, the validity and “scientific” nature of the claims are disputed by the same scientists cited by JZK, Inc. in its own materials. CP 1418. CP 1566-67. JZK, Inc. continues nevertheless to advertise that “[t]he teachings of Ramtha are a unique science,” and that “[t]he disciplines are designed in such a way that nothing is left to chance or belief,” CP 1092, CP 1096.

Going far beyond the benign assertion of “power in positive thinking,” JZK, Inc. mixes pseudoscience with misconstrued scientific theories targeted to deceptively recruit new customers, and maintain existing customers. The inquiry would end there if the deceptive inducement did not also result in further harm to customers. And, JZK, Inc. has gone to exhaustive lengths to prevent any inquiry beyond the careful image it has cultivated via imposition of a contractual duty of silence on customers; restricting customer speech by prohibiting them from “attribut[ing] to Ramtha any statement not part of...” the record controlled solely by JZ Knight and JZK, Inc. via its trademark; wielding its contract to maintain complete control over any tangible proof of its business activities; and a business model which deceptively induces customers, and continues that pattern via targeted use of tactics designed to maintain control over customers.

New consumers are not allowed to participate in certain events, and thus are prevented from receiving information, such as what can be viewed on the subject video, until they are entrenched in the organization.

CP 1058-60. By the time the consumer is allowed to access that information, they are already subject to the secrecy clause, and fear of legal liability prevent them from publicly sharing their concerns. CP 643. Notwithstanding these fears of legal reprisal, as more come forward to share information, a startling picture of the business activities shielded from public view by JZK, Inc.'s confidentiality clause comes into focus⁹:

JZK, Inc. keeps customers vulnerable and susceptible to influence via business practices such as sleep and food deprivation, psychological and verbal abuse, and targeted use of fear tactics to unfairly maintain its customer base. *See, e.g.*, CP 569-570, and *See supra* note 12. As a customer moves past the initial events, and thus becomes subject to the nondisclosure provisions required for further participation, JZK, Inc.'s assertion that it teaches disciplines that allow customers to “create their own reality,” becomes a mechanism of abuse. Customers are blamed for anything bad that happens to them in their lives, as that is the result of laziness and “not doing [their] disciplines enough”. *See, e.g.*, CP 633, CP 684, 1195. Positive life events, in turn, are attributed to JZK, Inc.'s product, without regard to actual causation, thus ensuring income regardless of objective outcomes. *See supra* note 12. JZK, Inc. thus effectively sets itself up to benefit financially under either scenario.

⁹ Although this section is seemingly lengthy, much has been omitted for brevity and the full extent cannot be conveyed here – the testimony of the customers themselves is necessary. The underlying testimony substantiating these facts is found at: CP 568-574; CP 575-78; CP 630-38; CP 639-44; CP 668-71; CP 672-77; CP 678-82; CP 683-85; CP 686-92; CP 1392-97; CP 1398-99; CP 1399-1400, CP 1401-1410.

JZK, Inc. machinations to gain financial benefit via unfair, and oftentimes secret, business practices extend also to its retail business and questionable investment schemes. JZK, Inc. profits in retail sales at JZ Rose by instructing customers to take supplements sold at JZK, Inc.'s retail establishment. CP 633. Pursuant to the "teachings" it sells, customers are to manifest wealth via the lottery and scratch tickets – fortuitously, both of which are sold at JZK, Inc. CP 534, CP 680.

JZK, Inc. instructed students to invest in several schemes that were either extremely questionable, or eventually confirmed as fraudulent.¹⁰ CP 1395-96. JZK, Inc. reassured students that "fabulous wealth" was on its way long after the fraudulent nature of at least one scheme was known. *Id.* Between investment schemes, price to attend events, and the resources spent to carry out JZK, Inc.'s instruction to build underground bunkers and stockpile weapons/supplies, many customers are left financially destitute. CP 572, 576-77, CP 631-37, CP 674, CP 689-90.

The detriment to JZK, Inc. customers extends far beyond unfair financial hardships. JZK, Inc. business practices, protected by the nondisclosure provision as "information and techniques," have caused serious health and safety effects, and some even constitute assault:

¹⁰ Such as the Omega Fund and the Harrington-Templar offshore fund in the Caymans, and a highly questionable 2007 offering made to JZK, Inc. customers to "invest" in "RSE International" a "special offering" whereby JZ Knight would remain the largest stockholder, but would sell shares to selected customers given the "opportunity" to invest a minimum of \$100,000.00. Due to "lack of adequate funding," the endeavor fell through – some investors simply never saw a return of their contribution, whereas JZK, Inc. pays others (those who have remained customers) small returns that it now characterizes as "interest" on their investment. CP 1292.

Customers directed to drink industrial lye. Customers were directed to make and ingest an “elixir” consisting of sea water and industrial grade lye – a toxic substance. CP 1392; CP 1398 Initially, students were “encouraged” to “invest” in a business that would be making a substance that granted eternal life. CP 1401. After many students invested, and after it was disclosed no immortality product was forthcoming, JZK, Inc. then advised these students that JZK, Inc. would provide a miracle recipe for students to make their own elixir. CP 1401-02. JZK, Inc. stated that it was even “expected” of certain more “advanced” groups of students. CP 1399. JZK, Inc. both provided the recipe directly and directed students to obtain it from “advanced students” – it was to be kept “secret” from outsiders regardless of the source. CP 1392, CP 1398-99.

Many students suffered detrimental health effects, and one customer believes that the elixir affected her pregnancy. CP 1398. They were instructed not to purchase the lye at the local stores because it was “bringing up unwanted attention to RSE from the police.” CP 1399. Customers, including an elderly woman, who got sick after drinking the product, were encouraged to continue the treatment as “this healing crisis was proof that [the person] was getting better.” CP 1403. This practice continued for at least five years; when the detrimental effects such as loss of hair and serious illness could no longer be ignored, JZK, Inc. told the students that the poor result was because they “were taking it with a bad attitude which was making their hair fall out and get sick,” and those who

were sick were to blame for not being ready to “handle being given such a divine gift as this elixir recipe.” CP 1400.

Dangerous conditions at JZK, Inc. events.

In addition to peddling dangerous products, JZK, Inc. also permits dangerous conditions to persist at its compound. Conditions during events are oftentimes dangerously overcrowded. CP 1394. At the events, customers are encouraged, and at times were required, to ingest potentially dangerous amounts of alcohol. CP 571, CO 633-34, CP 1394. This resulted in some participants to break their long term sobriety, and also resulted in frequent sickness and injury. *Id.* Customers were also encouraged to smoke inside during the events, even with children present. CP 1394, CP 680. Frequent instances of rampant illness break out in unsanitary, overcrowded, and unacceptable tent-housing where 200 or more people sleep on a tarp during multi day events. CP 1406. At one such outbreak, JZK, Inc. staff refused to provide medical attention to the many attendees who were ill because if they assisted JZK, Inc. could be sued if something went wrong¹¹. CP 1407-08.

Physical Assault and Instruction Not to Seek Medical Attention.

Former customers report that customers are physically assaulted on stage at the events, including a woman being slapped. CP 1398 A former student was raped by a JZK, Inc. staff member at a JZK, Inc. event, but did not report it due to the instruction that she “created [her] reality” – which is one of JZK, Inc.’s primary teachings. CP 1411, CP 571. That

¹¹ A detailed account by a former customer with expertise in epidemiology as a result of her dual degrees in mathematics and cell biology is found at CP 1401-10.

rape victim/student was also an employee of JZK, Inc., and was subsequently fired. CP 571-72. Later, she shared her story anonymously online for support. CP 571. JZK, Inc.'s response to her outreach efforts was to initiate an unrequested private investigation of the former employee/victim. CP 571-72.

Another JZK, Inc. practice is to berate and blame students for their failings – including events beyond their control, such as rape. CP 571, CP 577, CP 633. This extends to other medical issues as well - JZK, Inc. discourages customers from seeking medical treatment, asserting that if they were practicing the disciplines correctly, they would not need medical care. CP 674. Yet, it simultaneously instructed customers to take Prozac or other medications – without reference to actual individual medical needs. CP 635

Severe Impact to Customers' Mental Health

Perhaps one of the most tragic effects JZK, Inc.'s secret business practices have on its customers is the severe impact to mental health. Former customers report extreme anxiety and constant fear induced by JZK, Inc.,¹² including the continuing effects after they cease being a customer of the company. CP 573, 631-37, 640-42, 673-79, CP 689-90. This fear is cultivated throughout JZK, Inc.'s business model. CP 577, CP 635. While purportedly channeling “Ramtha,” JZ Knight has stated that Ramtha would “bring certain people down who are against him.” CP 675.

¹² A small glimpse into JZK, Inc.'s fear-based teachings can be found in some published material as well. CP 617-26.

Customers of JZK, Inc. have been diagnosed with PTSD, acute anxiety, and agoraphobia resulting from their association with the company. CP 570-72. One aspect of the fear these customers experience is the fear of being sued for sharing “any information” they receive, even if it is to protect other consumers or the public, even long after they leave JZK, Inc. behind. CP 676-77, CP 680-81.

When former customers began to participate in an online recovery group, JZK, Inc. sent a message to members advising them that legal action had been initiated against several “as yet unnamed members...” and that it was “...advising of what transpired... so that [the members] can make an informed choice about your present membership.” CP 628

Members of the community – including members of the clergy and the health professions – also observe the detrimental impacts to customers, as well as the chilling effect of the CoP. CP 639-644, CP 686-692. These community members are also those who frequently observe the impact to our social system – including disruption to families. CP 683-85.

Unfortunately, the harms outlined both here and in the record are not likely to be the full extent of the potential harms protected from public oversight by the enforcement of this adhesive CoP. Nor can these recorded harms be easily dismissed by JZK, Inc. as the result of bias or friendship with Ms. Coverdale. Most of the customers submitting declarations did not know Coverdale (or each other) prior to 2012, many of them do not live in Washington State, and their testimony is consistent.

See supra note 12. CP 636 Rather, they are all former customers¹³ who, despite the CoP, have come together to share information they learned at RSE which continues to cause them great concern for other consumers. These people include a psychiatric nurse, a former college professor, and a Senior Associate at Price Waterhouse Coopers. CP 672, 679, 1399.

In Spring and Summer of 2012, it was with these concerns in mind that Virginia Coverdale proceeded to engage the problem via the political process to petition her local officials. She attended commissioner hearings and shared information about the health and safety violations ongoing at JZK, Inc. events. CP 275, CP 267, CP 292. The only response from officials was that JZK, Inc. had a long history of permits, and any noncompliance had been resolved. CP 276, CP 285. Ms. Coverdale knew this was clearly not true – as did the many other former customers who have provided testimony. She contacted officials directly – with no substantive response. CP 1376-77. Unbeknownst to her at the time¹⁴, the same officials to whom she was petitioning, such as Fire Chief Mark King, were sending her communications to JZK, Inc. to provide a courtesy “heads up”¹⁵ regarding both the complaint and to prepare for an

¹³ Limited testimony has been provided from non-customers, including local clergy and health professionals.

¹⁴ JZK, Inc. withheld the relevant communications until just after the final day of discovery, when it was produced within 1000+ pages of discovery that was represented to be only a copy of what had already been produced.

¹⁵ At oral argument on 6/28/13, the emails were projected onto a screen as they could not be included in the briefing because JZK, Inc. withheld them until just days prior to the MSJ hearing. Although referenced at oral argument, filed as a supplemental, and even referenced during the oral ruling, the trial court judge inexplicably would not include the supplemental filing, such as the emails between JZK, Inc. and Thurston County Officials, in the record. Pursuant to this Court’s Order granting JZK, Inc.’s motion to exclude the addendum, it has been removed and replaced with alternate sources in the approved record.

inspection. Internal JZK, Inc. correspondence from September 2012 confirmed that Fire Chief King, who claimed to have no authority to act on the complaint, called the Fire Inspector, Bobby May, and then advised JZK, Inc. that the inspector had “no issue with RSE.” VRP (6/28/13) Pg. 54:20-55:13. The fire authority receives hundreds of thousands of dollars in donations from JZ Knight each year, even prompting Fire Chief Mark King to write supportive letters to the editors while this litigation was pending at the trial court. CP 1047.

Shortly thereafter, Ms. Coverdale received the flash drive with the 11 hour video on it in the U.S. Mail. At first, she did not know what it was – and mistook it for “spam” marketing materials, which often have DVDs and the like included. Ultimately, she discovered its nature, and took it to a “techie” to have unedited portions extracted and combined with the campaign footage, with the resulting two and a half minute video posted on Youtube on October 18, 2012. JZK, Inc. then promptly brought this breach of contract action.

B. Procedural History

On Oct. 29, 2012 JZK, Inc. filed the Complaint alleging Breach of Contract and requesting injunctive relief. CP 12-17. A temporary injunction (“TRO”) ensued on 11/1/12 and prohibited copying, reproducing, preparing adaptations, or publicly displaying “RSE information or materials...,” and also “assisting in or facilitating” the same. CP 100-104. Coverdale moved for Compulsory Joinder of Knight, heard concurrently with the preliminary injunction hearing on 11/14/12.

CP 328-361 At that hearing, the TRO was replaced with a nearly-identical¹⁶ preliminary injunction, and joinder was denied. CP 464-67; CP 462-63. Coverdale requested discretionary review on 12/28/12; review was denied on 2/28/13. CP 468-74; CP 555-562.

Coverdale counterclaimed for misrepresentation, fraud, defamation, and violation of RCW 4.24.500, *et seq.* (“Anti-SLAPP”). CP 322-27 On 2/8/13 the misrepresentation claim based on JZK, Inc.’s false claims of Knight channeling Ramtha and Jesus was dismissed. CP 553. Coverdale’s motion to amend¹⁷ to add counterclaims closely related to the then-existing defamation claim¹⁸, as well as violation of the Consumer Protection Act, was denied on 5/5/13. CP 862-63

On 6/14/13,¹⁹ Judge Gary Tabor granted in part JZK, Inc.’s Partial MSJ, dismissing all affirmative defenses and counterclaims²⁰ except the defenses of unconscionability; fraudulent inducement; and misrepresentation and fraud. CP 1898-99; VRP (Jun. 14, 2013) at Pg. 18:20-25. The 6/28/13 hearing on cross motions for summary judgment resulted in a directed finding by Judge Tabor in favor of JZK, Inc. that Coverdale breached as a matter of law, and dismissing the remaining

¹⁶ The resulting 11/30/12 Order adds a clarification that any material posted “where it can be accessed by others is to be immediately removed.” CP 466

¹⁷ The amendment was requested within the case schedule deadline to add claims.

¹⁸ False light, Intentional Infliction of Emotional Distress, Outrage, and Negligence.

¹⁹ JZK, Inc.’s Motion for Protective Order re: Discovery was also heard, but the Court delayed ruling – a ruling on that motion was never made.

²⁰ Dismissed defenses: Lack of Capacity to Sue, Failure to Join a Party, Piercing the Corporate Veil, Federal Preemption (Copyright/Trademark), Failure to State a Claim, Indefiniteness; Violation of Constitutional Rights; and public policy; the court did note that public policy was, however, closely related to the surviving unconscionability defense. VRP (Jun. 14, 2013) at 19:6-9. Dismissed Counterclaims: Defamation, Misrepresentation. *Id.*

defenses. VRP (Jun. 28, 2013); CP 1898-99. The written order was presented and signed on June 19, 2013²¹. *Id.* The final order included a judgment against Coverdale for \$600,021.00 for JZK, Inc.’s attorney fees and costs. CP 1891. JZK, Inc. immediately commenced post-judgment collection actions, the procedural and factual history related to the contempt is discussed at Part VI.F.²²

V. STANDARD OF REVIEW

This is an appeal from a summary judgment ruling, and as such the standard of review is *de novo*. This Court reviews “summary judgment order[s] *de novo*, engaging in the same inquiry as the trial court and viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party.” *King v. Rice*, 146 Wn. App. 662, 668, 191 P.3d 946 (2008), rev. denied, 165 Wn.2d 1049 (2009). Summary judgment is proper only where there is no “genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Shields v. Enter. Leasing Co.*, 139 Wn. App. 664, 670, 161 P.3d 1068 (2007); CR 56.

VI. ARGUMENT

A. This Court should find that Coverdale’s conduct was not a violation of the contract because the relevant clauses are substantively unconscionable as a violation of the policies expressed by this Court in *McKee v. AT&T Corporation*, 164 Wn. 2d. 372 (2008), and a violation of the Consumer Protection Act, RCW 19.86, *et seq.*

²¹ Note that the Index to Clerk’s Papers contains an incorrect filing date of Jul. 18, 2013.

²² A full history of the collection tactics post judgment has also been briefed by both parties pursuant to the Motion to Stay Enforcement in this Court’s file.

The trial court fundamentally misapplied the law in finding that the agreement was not a contract of adhesion or substantively unconscionable:

“Secrecy. This case is not on the plane of the *McKee* case and I’m specifically finding that the contract was not an adhesion contract. It is not overreaching in that regard.” VRP (Jun. 28, 2013) Pg. 67-68.

1. The CoP is a standard form consumer contract of adhesion prepared by JZK, Inc. and submitted on a take it or leave it basis to consumers who have no true equality of bargaining power.

“A standardized agreement is an agreement between two parties evidenced by a specific writing commonly called an adhesion contract.” WA Practice Series, Vol. 25, § 9.26. The agreement is a contract of adhesion because it is (1) a standard form printed contract, (2) prepared by JZK, Inc. on a “take it or leave it basis,” without affording reasonable opportunity to bargain, and (3) there was no true equality of bargaining power between the parties. *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 304, 103 P.3d 753 (2004), *See also, Yakima County (W.Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wash.2d 371, 393, 858 P.2d 245 (1993)(Consumer must adhere to the essential terms of the contract in order to obtain the desired product or services).

All customers sign the same standard form CoP, and are required to sign as a condition of participation. By its terms, the CoP is a “take it or leave it” deal: “...as a condition to your participation you must agree to the following...”²³ CP 1125-26, CP 1069, CP 1072-73. Hundreds of average,

²³Neither at this initial signing, nor subsequent in their relationship with JZK, Inc. do customers have any meaningful influence. *See, e.g.*, CP 1064 (JZK, Inc. is unable to

everyday consumers attend JZK, Inc. events, where they are required to sign the same standard agreement. CP 1070. JZK, Inc.'s assertion that it has thousands of former customers establishes that it is a "repeat player" with vastly greater bargaining power than its customers. CP 122, CP 654, CP, CP 1294. JZK, Inc. has multiple retail locations, engages in domestic and international for-profit events, sells multiple types of products and publications, and has recently pushed its market further via the use of paid online shows. CP 1055-57. There can be no reasonable dispute that the agreement is a contract of adhesion.

2. The relevant nondisclosure clause is substantively unconscionable as a one-sided and overly harsh provision as a matter of law.

Unconscionability is a question of law. *Nelson v. McGoldrick*, 127 Wn .2d 124, 131 (1995). Agreements may be either substantively or procedurally unconscionable. *Zuver*, 153 Wn.2d 293. A clause is substantively unconscionable if it is one-sided or overly harsh, and alone is sufficient to invalidate on the basis of unconscionability. *Id.*, *See also, Adler v. Fred Lind Manor*, 153 Wn. 2d. 331, 346-47, 103 P. 3d. 773 (2004).

The provisions upon which JZK, Inc. bases this action are clearly both one-sided and overly harsh. While simultaneously prohibiting customers from releasing "any information", it reserves the exclusive right to freely disseminate footage of customers in any medium, and without consent, notice, or compensation. CP 1125 (Clause No. 4). JZK, Inc. also

identify any time customer input determined the chosen course of action if JZ Knight and "Ramtha" are in agreement).

asserts that information contained within a video allegedly protected by the nondisclosure clause is confidential.²⁴

The nondisclosure clause would be substantively unconscionable even absent a prohibition on the use of the underlying information: By monopolizing the sole control and use of tangible proof of its own business activities, JZK, Inc. gives itself an unfair advantage over potential claimants, who must instead rely on inherently weaker testimonial evidence. This leaves JZK, Inc. doubly advantaged by both forcing claimants to rely on weaker testimonial evidence, and positioning itself to attack the credibility of that testimony²⁵, knowing that it controls the only method of tangible rebuttal.

3. The inherent potential for abuse in the nondisclosure provision renders it substantively unconscionable for the policies expressed by this Court in *McKee v. AT&T Corp.*, 164 Wn. 2d. 372.

The trial court erred as a matter of law when it failed to follow this Court's holding in *McKee* that each of the separate offending provisions alone were substantively unconscionable.²⁶ This Court's analysis and

²⁴ At the CR 30(b)(6) deposition, JZK, Inc. asserted that testimony as to the defamatory statements forming Coverdale's counterclaim was subject to confidentiality pursuant to the CoP).

²⁵ There are numerous instances of JZK, Inc. engaging in attacks on witness credibility and testimony, dismissing them as merely "disaffected" former customers. *See, e.g.*, CP 715 (Lines 14-15); CP 719 (Ln. 8-10); or, ironically, minimizing the number that have come forward, which is indicative of chilled customer speech due to fears of legal liability. CP 765. JZK, Inc. has also publicly stated that Ms. Coverdale is "not well" mentally. *See*, Coverdale's Motion to Stay Enforcement and supporting materials.

²⁶ [The Supreme Court] specifically found that the secrecy provisions regarding class actions were prohibited, that statute of limitations was shortened, damages were limited, the confidentiality that was required there was as to being able to tell anybody about the arbitration. That contract is substantially different in nature than what we're talking about here, and so the substantive unconscionability of that case does not apply in this circumstance.

conclusion in *McKee* was not limited to arbitration agreements: “We emphasize that these provisions have nothing to do with arbitration.” *McKee*, 164 Wn. 2d at 404. This Court also found each provision, standing alone, substantively unconscionable. *Id.*, at 396-97 (Class Action Waiver), *Id.*, at 398 (Confidentiality), *Id.*, at 399 (Statute of Limitations), *Id.*, at 399-400 (Attorney Fee), *Id.*, at 401 (Damages).

This Court’s decision clearly prohibits confidentiality provisions in a consumer contract:

A confidentiality clause in a contract of adhesion is a one-sided provision designed to disadvantage claimants and may even help conceal consumer fraud. Confidentiality unreasonably favors repeat players... *McKee v. AT&T Corporation*, 164 Wn. 2d. 372, 398 (2008)(Emphasis added).²⁷

This Court prohibited secrecy in consumer contracts for a very valid reason: Even absent specific bad conduct such a clause is so fraught with potential for abuse that it cannot be allowed to stand. For good reason, this Court has applied this principle broadly: “Whether in regard to improper utility surcharges or unreasonably dangerous products, consumer adhesion contracts that require secrecy violate this important public policy.” *McKee v. AT&T Corporation*, 164 Wn. 2d. 372, 398 (2008).

It cannot reasonably be disputed that the provisions prohibiting customers from sharing “any information” received at or from JZK, Inc. are provisions which require secrecy. **Secrecy conceals any patterns of**

VRP (Jun. 28, 2013), P. 62:22-63:8.

²⁷ Citing *Ting*, 319 F. 3d at 1151-52; *Luna*, 236 F.Supp.2d at 1180; *Zuver*, 153 Wash.2d at 312-15, 103 P.3d 753.)

illegal or abusive practices²⁸. Although the secrecy required by JZK, Inc.’s provisions are not specific to arbitration, that lack of specificity does not mitigate the potential harms – instead, it enlarges and compounds the inherent potential for abuse. The potential harms are not limited to “concealing any patterns of illegal or abusive practices” or “hamper[ing] [customers] in learning about potentially meritorious claims” in arbitration specifically; JZK, Inc.’s confidentiality clause goes beyond the AT&T provision. It imposes a duty of secrecy far outside the oversight of the Court or an arbitrator – and ensures that JZK, Inc. not only will “*accumulate* a wealth of knowledge” but also that it alone *controls* any tangible proof of that knowledge – virtually ensuring that justice for potential claimants will be prevented before a consumer reaches the courthouse steps.

“Washington has a strong policy that justice should be administered openly and publicly,” and “Under our constitution, “[j]ustice in all cases shall be administered openly.” CONST. art. I, § 10. Secrecy breeds mistrust and, potentially, misuse of power. *McKee v. AT&T Corporation*, 164 Wn. 2d. 372, 398 (2008) (Citing *Dreiling v. Jain*, 151 Wash.2d 900, 908, 93 P.3d 861 (2004). (Emphasis added).

Justice cannot be administered openly if it is preemptively barred by consumers’ contractual duty of secrecy. It is true that this case is

²⁸ It hampers plaintiffs in learning about potentially meritorious claims and serves no purpose other than to tilt the scales in favor of [the drafter]. It ensures that [the drafter] will “accumulate a wealth of knowledge” about arbitrators, legal issues, and tactics. *McKee v. AT&T Corporation*, 164 Wn. 2d. 372, 398 (2008) (Citing *Zuver*, 153 Wash.2d at 313-14)(Emphasis added).

“...not on the plane of the *McKee* case.” VRP (Jun. 28, 2013) Pg. 67. JZK, Inc.’s confidentiality provisions and ensuing inherent potential harms go far *beyond* the plane of *McKee*.

4. The consumer nondisclosure agreement undermines other public policies such as: government accountability; freedom of speech and to petition government; and a plethora of other policies undermined by requiring consumer secrecy, such as dignity in the electoral process.

“An agreement that has a tendency ‘to be against the public good, or to be injurious to the public’ violates public policy... An agreement that violates public policy may be void and unenforceable.” *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007).²⁹

Impact on Government Accountability

The trial court erred as a matter of law when it ruled that governmental improprieties were irrelevant.³⁰ Washington has clear public policy that: “...public confidence in government at all levels is essential and must be promoted by all possible means.” *RCW 42.17A.001(5)*. Public confidence inherently implicates a corresponding public policy “...to prevent disproportionate or controlling influence of government by financially strong groups.” *See, e.g., RCW 42.17.390, State v. Conte*, 159 Wn. 2d 797, 817, 154 P.3d 194 (2007).

²⁹ (Citing *King v. Riveland*, 125 Wash.2d 500, 511, 886 P.2d 160 (1994) and Rest. (Second) of Contracts § 178 (1981)).

³⁰ “...that fire marshals or fire districts may have been involved, that there may have been improprieties, all of that [is irrelevant as to the breach of contract].” VRP (Jun. 28, 2013) P. 67:15-19.

Coverdale petitioned her commissioners and received no substantive response. *See* discussion *supra* Part IV.A. She contacted officials directly, including both the State Fire Marshal and the Fire Chief of the S.E. Thurston County Fire Authority – with no substantive response. *Id.*, CP 1376-77. She was advised that no one had authority to act, while simultaneously Fire Chief Mark King was secretly sending her complaints directly to JZK, Inc. to provide a courtesy “heads up.” *See* discussion *supra* Part IV.A. He contacted the Fire Inspector and advised JZK, Inc. that the inspector had “no issue with RSE.” *Id.*, VRP (6/28/13), Pg.54:20-55:13. A few months later, while pending trial, King submitted letters to newspapers thanking Knight on behalf of the S.E. Fire Authority for the hundreds of thousands of dollars donated to the fire authority each year. CP 1047. In September 2012, Coverdale did not know that her public officials were forwarding her concerns to JZK, Inc., but she knew that her district commissioner was aware of the dangerous activities, and that Knight was the commissioner’s largest private campaign contributor. CP 1369, CP 1371. Frustrated with the apparent special treatment of JZK, Inc. and lack of response from the political process, she sought to show the connection between JZK, Inc. and raise both voter and consumer awareness by releasing the video at issue. CP 1371, CP 1374-76.

Whether or not there were actual violations by government officials, the nondisclosure clause suppresses existing tangible proof of violations. Tangible evidence cannot even be used to demonstrate that there is at least a basis to investigate further – or that elected officials have

ignored that basis. Even in absence of any actual bad government action, the effect of the provisions undermine “public confidence in government”, and the “prevent[ion] [of] disproportionate or controlling influence...by financially strong groups.” As such, the nondisclosure provisions must be invalidated as a “tendency ‘to be against the public good...injurious to the public.” *Cingular Wireless*, 160 Wn.2d at 851.

The provisions undermine free speech and freedom to petition government

Both the First Amendment to the U.S. Constitution and Article I, Sec. 5 of the Washington State Constitution embody the fundamental policy of free speech.³¹ “Information provided by citizens concerning potential wrongdoing is vital to effective law enforcement and the efficient operation of government.” *RCW 4.24.500* (“Anti-SLAPP” statute).

The legislature specifically enacted protection from “...civil lawsuits...being used to intimidate citizens from exercising their [Free Speech Rights]...particularly when... reporting potential wrongdoing to government agencies” *Segaline v. State, Dept. of Labor and Industries*, 169 Wn.2d 467, 472-73, 238 P.3d 1107 (2010), *See also*, *RCW 4.24.500, et seq.* The legislature emphasized this vital public policy in 2010 by enacting *RCW 5.24.525*.³²

³¹ Further, consumer speech-related postings on the internet regarding corporate activities are protected. *See, e.g. Bally Total Fitness Holding Corp. v. Faber* 29 F.Supp.2d 1161, 1163 (C.D.C. 1998); *Bosley Medical Institute, Inc. v. Kremer*, 403 F.3d 672 (9th Cir. 2005).

³² Providing heightened protections for conduct “...in a place open to the public or a public forum in connection with an issue of public concern...[or]...in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or...of the exercise of the constitutional right of petition.” *RCW 5.24.525(2)(d), (e)*.

The nondisclosure provisions purport to trump these clear policies via an end run around legislatively enacted protections – at a minimum, the nondisclosure provisions tend to injure the clear public policy in the free flow of information to law enforcement, and also undermine the policy of encouraging citizens to share information and *tangible proof* on issues of public concern.

Far-reaching harmful effects include mischief in the electoral process

The video was released during the 2010 election season. Knight made substantial donations to a political party and individual candidates, which became an issue given the statements on the video.³³ CP 65, 69-70. The release of the video was never about political affiliation – the concerns regarded a specific candidate for commissioner and whether her connection with JZK, Inc. was improperly influencing her official duties. CP 1370.

This Court previously cited the inherent dangers of requiring consumer secrecy even when limited to the arbitration context. JZK, Inc.'s CoP goes further, and this Court should affirm its prior reasoning in *McKee*, and clarify that a consumer contract requiring secrecy violates important public policies in any context.

5. JZK, Inc.'s consumer nondisclosure provisions also implicate public policy concerns because it allows JZK, Inc. to avoid the Copyright Act

³³ Regardless of Coverdale's intent, the nondisclosure clause prevented not only consumers from being informed, it also prevented political parties and campaigns from obtaining relevant information about their donors - thus opening them up to unwarranted political attacks and inserting unnecessary conflict in an already divided political climate.

and Uniform Trade Secrets Act by instead imposing a contractual duty of silence on its consumers.

JZK, Inc. does not own the copyright or trademark on the proprietary materials.³⁴ 17 USC § 106 provides that a copyright owner has the exclusive rights to reproduce, prepare derivative works, and distribute copies. 17 USC § 301 provides that “...no person is entitled to any such right or *equivalent right* in any such work under the common law or statutes of any State.” (Emphasis added). Breach of contract is only allowed is based on an “additional element” to pay for the use of the material. *Montz v. Pilgrim Films & Television, Inc.*, 649 F.3d 975, 98 U.S.P.Q.2d 1569 (9th Cir. 2011).³⁵ JZK, Inc.’s contract provides identical protections to copyright³⁶, but lacks the requirement that Coverdale pay for the use of the work. It simply restricts dissemination and imposes requirements solely in the power of the copyright act to impose. JZK, Inc.’s CoP also undermines the Uniform Trade Secrets Act, *RCW 19.108*. JZK, Inc. testified that its proprietary interests are “trade secrets,” yet it sidesteps the elements it would have to prove under UTSA by shifting substantially more burdens upon customers, and the public interest, via contractual silence.

³⁴ Knight owns “all right, title and interest” in the trademarks and copyrights associated with the name RAMTHA and RAMTHA DIALOGUES.³⁴ CP 175-183 JZK, Inc. asserts no ownership interest in the material, and claims to have an exclusive license to use, disseminate, and exploit derivative works. CP 1257. Instead, it characterizes its “proprietary interest[s]” are “in the category...of trade secret.” CP 1257-58. Ms. Knight also asserted that she licensed JZK, Inc. to produce and sell material from “Ramtha’s” teachings. CP 1314. However, in discovery responses, JZK, Inc. stated it was “unaware of any copyright assignments it has received.” CP 1389-90.

³⁵ Contract claims *generally* survive preemption because they require proof of such an extra element.

³⁶ *I.e.*, Reproduction, preparation of derivative works, and dissemination of copies

Allowing a company to impose a contractual duty of silence on its consumers would seriously undermine public policy, including an unfettered ability to sidestep intellectual property law. The existence of those alternate bodies of intellectual property law provide an additional basis to void the nondisclosure provisions as violation of public policy.

6. Ms. Coverdale is entitled to a judgment for her attorney fees and costs against both JZK, Inc. and Knight individually pursuant to alter ego.

Ms. Coverdale is entitled to judgment as a matter of law, and is entitled to all of her attorney fees and costs throughout this litigation. *See infra* Part VI.G. Judgment for fees and costs should be entered against JZK, Inc. as the named plaintiff, and the corporate veil should be pierced and judgment also entered against JZ Knight, individually.

To pierce the corporate veil: 1) The corporate form must be used to violate a duty, and 2) disregarding the entity must be necessary to prevent an unjustified loss to the person injured. *Dickens v. Alliance Analytical Laboratories, LLC*, 127 Wn.App. 433, 440, 111 P.3d 889 (2005).

Knight is the sole shareholder and President of JZK, Inc., and sets her own salary. CP 1286-87. There is conflicting testimony regarding the corporate bylaws and notes.³⁷ The record is rife with similar evidence sufficient to disregard the corporate form.³⁸ Knight wields “JZK, Inc.”

³⁷ Although Knight testified that the corporation has bylaws (“Small, but yes.” CP 1287), JZK, Inc. responded in discovery that it had no bylaws, nor does it have corporate meeting notes. CP 1390. Knight testified that she “doesn’t think [meeting notes] need to be [kept].” CP 1287-88.

³⁸ . In response to questions about non-JZK, Inc. matters, Knight indicated that JZK, Inc.’s representative could provide that information. CP 1284, CP 1286. The CoP itself states it is enforceable “...for the life of JZ Knight, plus 21 years.” CP 1126. Knight testified that she hired her boyfriend as JZK, Inc.’s estate manager “instead of writing a

both as a shield and sword in her pursuit of vendettas against those whom she perceives wronged her personally. Knight wielded *this* litigation to pursue a vendetta against Ms. Coverdale: a vendetta inflamed by Coverdale's interference with the unfair contractual silence Knight and JZK, Inc. use to bind customers and avoid accountability. Knight has sole control over JZK, Inc.'s finances (CP 1286-87), and has demonstrated that she will commit perjury in furtherance of her campaign to destroy Ms. Coverdale and intimidate others to keep Knight's secrets. CP 1115-19.

Ms. Coverdale's fees and costs incurred to date are substantial – given Knight's conduct thus far, there is inadequate assurance that Knight will not simply divest the corporation of sufficient assets to pay the judgment to further harm Ms. Coverdale. Knight has used the corporate form to violate duties to Coverdale and other customers, and disregard of that entity is necessary to prevent further unjustified harm. In the event this Court determines there is a question of fact regarding Knight's individual liability, judgment should be entered for fees and costs against JZK, Inc. and Knight's individual liability remanded for determination.

B. As a matter of law, the nondisclosure provisions violate the Consumer Protection Act, RCW 19.86, et seq., as to Coverdale and others subject to nondisclosure provisions; this Court should find that this class of customers meet CR 23(a)(1) and (2).

check," because he needed money. CP 1114. Knight has JZK, Inc. staff maintain her personal site. "JZKNIGHT.COM." CP 1310-11. JZ Knight and JZK, Inc. used that website as a platform to publish an unfounded character assassination of Ms. Coverdale after she posted the video at issue – made worse because they recruited her estranged family member to write it, thus compounding the harm by giving it an appearance of legitimacy that was completely unwarranted. CP 1385-86.

“Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” *RCW 19.86.020*. “Although the court must draw all favorable inferences that may be reasonably evinced in favor of the nonmoving party...the question of whether a particular conduct gives rise to a CPA violation is reviewable as a question of law.” *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29-30, 948 P.2d 816 (1997).

This Court has already expressed its disdain for secrecy in consumer contracts, and held that confidentiality clauses in consumer contracts of adhesion are “designed to disadvantage claimants” and “serve no purpose other than to tilt the scales in favor of [the drafter].” *Mckee*, 164 Wn. 2d. at 398. By their nature as secrecy clauses in a consumer contract of adhesion, JZK, Inc.’s nondisclosure provisions are both designed to disadvantage its customers, and tilt the scales in favor of JZK, Inc. This Court was previously advised of the specific harms suffered by JZK, Inc. customers due to the lack of consumer information resulting from the secrecy clause. *See*, Section IV.A, *supra*.³⁹ There is no reasonable dispute that JZK, Inc.’s nondisclosure provisions violate the Consumer Protection Act as a matter of law.

The first two prerequisites for certification as a class are: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class. CR 23(a). It is

³⁹ *See also*, CP 568-574; CP 575-78; CP 630-38; CP 639-44; CP 668-71; CP 672-77; CP 678-82; CP 683-85; CP 686-92; CP 1392-97; CP 1398-99; CP 1399-1400, CP 1401-1410.

undisputed that JZK, Inc. has thousands of customers subject to the nondisclosure clause, and all would have an identical cause of action based on the nondisclosure provisions. *See*, Section IV.A., *supra*. Ms. Coverdale does not seek to be the class representative, due to her separate counterclaims.⁴⁰ *See*, Section VI.D., *infra*. Although there is a specific anticipated class representative, for these purposes the only request is a finding that the first two elements of CR 23(a) are met.

C. This Court should enter judgment as a matter of law for Coverdale because the 2007 CoP is the only controlling agreement, Coverdale did not breach that agreement, and any breach would be excused by JZK, Inc.’s anticipatory breach.

JZK, Inc. bases this action on both the 2006 and 2007 versions of the CoP. CP 1125-28. The 2007 version is nearly identical to the 2006 version. *Id.* It is undisputed that Ms. Coverdale last attended a JZK, Inc. event in 2010, and did not participate at any time thereafter. It is undisputed that the video footage at issue was from a Feb. 17, 2012 event, which was broadcast on an internet “livestream.” In sum, it is undisputed that: (1) Coverdale did not participate in that February 2012 event; (2) Coverdale did not receive the video from JZK, Inc., or at JZK, Inc.’s facility; (3) Coverdale does not know the identity of the anonymous sender nor did she ask the anonymous donor to obtain the video; and (4)

⁴⁰ Alternatively, if this Court declines to find that CR 23(a)(1)-(3) are met, Ms. Coverdale requests that her Consumer Protection Act claim be remanded with the counterclaims for misrepresentation and fraud, discussed at Section VI.D.

the earliest JZK, Inc. conducted online livestreams was 2008, a year after Coverdale signed the 2007 CoP.

1. The 2007 CoP is a substitute agreement, and is the only relevant CoP.

The trial court erred as a matter of law when it ruled when it specifically included both versions as “the agreement.” VRP (Jun. 28, 2013), Pg. 60:25-61:3. A substitute agreements is “...a subsequent contract made by the same parties and covering the same subject matter...[and] has the legal effect of rescinding the earlier contract.” 25 *David K. DeWolf, Keller W. Allen, Darlene S. Barrier, Washington Practice Series: Contract Law and Practice, § 11.3 (1998)*; See also, *Higgins v. Stafford*, 123 Wash. 2d 160, 866 P. 2d 31 (1994), *Bader v. Moore Bldg. Co.*, 94 Wash. 221, 224, 162 P. 8 (1917). The substitution in itself constitutes sufficient consideration for the agreement. *Stofferan v. Depew*, 79 Wash. 170, 139 P. 1084 (1914).

JZK, Inc. and Coverdale were the parties in both agreements, both agreements covered identical subject matter, and were nearly identical. CP 1125-28. The 2007 CoP states that it applies to “all future events in which you participate,” and does not incorporate the 2006 version, or otherwise indicate the prior version remained in effect. *Id.* JZK, Inc. itself testified that this action was “principally” based on “the 2007 version as the most recent version.” CP 1263. All relevant conduct to this action occurred subsequent to Coverdale signing the 2007 version, and thus that 2007 version is the sole controlling agreement.

2. Ms. Coverdale is entitled to judgment as a matter of law because she did not breach the clear terms of the agreement.

The trial court found that Coverdale breached the agreement as a matter of law. In doing so, it erred as a matter of law when it ignored material terms in the agreement, and application of those terms compel a finding that, as a matter of law, Coverdale did **not** breach.

The trial court did not provide the specific provision, or any analysis, supporting its ruling.⁴¹ The trial court ruled "...there was a clear clause or provision that protected the proprietary information of the plaintiff from disclosure...",⁴² but did not explain its basis for ignoring other material terms excluding Coverdale's conduct. The court failed to explain how any breach occurred when the video was never provided to Coverdale by JZK, Inc.⁴²

Summary judgment is appropriate if interpretation of the contract does not depend on extrinsic evidence. *Dice v. City of Montesano*, 131 Wn. App. 675, 684, 128 P. 3d 1253 (2006); *See also Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 85, 60 P. 3d 1245 (2003). "Words in a contract are given their ordinary, usual, and popular meaning, absent indication of any contrary intent or use of technical terms." *Washington State Major League Baseball Stadium Public Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Const. Co.*, 176 Wn.2d 502, 509-10, 296 P.3d 821

⁴¹ "As to there not being a breach of the contract, I find that the provisions of the contract are specifically -- well they're there for everybody to look at and they are sufficient to protect this type of disclosure from occurring." VRP (Jun. 28, 2013), Pg. 65:18-22.

⁴² It also failed to explain why, when it was undisputed that Coverdale was **not a student** for almost two years prior to February 2012, it found "...that she was a student." VRP (Jun. 28, 2013), Pg. 63:23-64:3

(2013)(Citing *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wash.2d 493, 504, 115 P.3d 262 (2005); *Berg v. Hudesman*, 115 Wash.2d 657, 669, 801 P.2d 222 (1990)).

The language exempting Coverdale's conduct is clear, and was blown up and displayed at the June 28, 2013 summary judgment hearing:

“These conditions apply to students, teachers, and other participants in the School, and **apply to all future events or activities in which you participate at the School**. Therefore, as a condition to your participation you must agree to the following:

“The information and techniques taught **here** are for your knowledge only. You are licensed to use **this** information and techniques for your personal use only. By signing these Conditions of Participation you agree not to teach or otherwise disseminate ...**any information or techniques that you learn or are taught at the School**...nor will you assist or facilitate other persons in doing so without the prior written consent of the School. You further agree not to Teach or Disseminate anything you BELIEVE you received from Ramtha in a dream, a vision or discipline, or any other source. CP 1125-56 (Emphasis added).

The provision limiting the application of the CoP to events in which Coverdale actually participated is the second line of the CoP, at the top, in perhaps the most obvious location in the document. *Id.* The agreement's restrictive language continues: “taught *here*,” “use *this* information,” “that you learn or are taught *at the School*.” Even the clause which follows, relating to copyrights, continues to use restrictive language: “The materials provided to you *at the School*...” “You are not authorized to copy... any of *those* materials...” *Id.*

The contract clearly compels this Court to find that, as a matter of law, Coverdale did not breach because it undisputed that Coverdale did not receive the subject video at or from JZK, Inc., and *Coverdale did not*

participate in the subject event. By the CoP's clear terms, Coverdale's conduct simply did not breach JZK, Inc.'s Conditions of Participation.

3. Coverdale entitled to judgment as a matter of law because ambiguity must be construed against JZK, Inc., and JZK, Inc.'s interpretation is unreasonable and contradicts the written language of the agreement.

Ambiguous provisions are construed against the drafter. *See, e.g., Sprague v. Safeco Ins. Co. of America*, 276 P.3d 1270, 167 Wn.App. 525 (2012)(“As with any contract, ambiguous policies are construed against the drafter.”).⁴³ Interpretation is focused on determining the parties' intent. *Tanner Electric Coop. v. Puget Sound Power & Light Co.*, 128 Wash.2d 656, 674, 911 P.2d 1301 (1996). Factors relevant to determining the intent of the parties include the specific language, the contract as a whole, the subject matter, the attendant circumstances, and the reasonableness of the proffered interpretations. *Scott Galvanizing, Inc. v. N.W. EnviroServices, Inc.*, 120 Wash.2d 573, 579-80, 844 P.2d 428 (1993). Evidence that varies, contradicts, or modifies the written language of the contract is inadmissible. *Hollis v. Garwall, Inc.*, 137 Wash.2d 683, 695, 974 P.2d 836 (1999).⁴⁴

The CoP language limiting it to events in which Coverdale participated was displayed for the trial court on a projector and argued.⁴⁵

⁴³ Citing *McDonald v. State Farm Fire & Cas. Co.*, 119 Wash. 2d. 724, 733 (1992).

⁴⁴ Evidence of subjective or unilateral intent regarding a word or term in the contract is also inadmissible.

⁴⁵ “And here is the fatal flaw. Plaintiff argues that the CoP covers all future events and, thus, must have covered the event at issue. In doing so, plaintiff misleads by ignoring a fatal undisputed fact. The very first paragraph customers read contains the clear scope of the agreement. ‘These conditions apply to students, teachers, and other participants in the school and apply to all future events or activities in which you participate at the school.’ I

JZK, Inc. offered absolutely no argument regarding why the Court should ignore the provision limiting the CoP to events in which Coverdale participated. JZK, Inc. argued that the word “here” in first sentence of clause 1,⁴⁶ must be ignored based on the absence of an express limitation to the contrary: “[t]here’s no limitation that [the information] has to be handed to you by the school.” VRP (Jun. 28, 2013) Pg. 26. JZK, Inc. asserted that interpretation of the third sentence⁴⁷ also requires one to ignore the phrase “that you learn or are taught at the School.”⁴⁸

Essentially, JZK, Inc.’s argument is that the prohibition is on *all* information, regardless of whether it was taught to Coverdale, because the relevant portion of the provision (“that you learn or are taught at the School”) should *not* be read in context with the words immediately preceding (“that you learn or are taught at the School”), but instead should be read to “track” the first sentence of the paragraph.

The contract terms themselves are limited to information or material received while actually participating at an event, and the contract as a whole repeatedly uses limiting terms such as “in which you participate,” “here,” and “at the School.” It is a “Conditions of Participation,” the key word being “participation.” There is a complete

know this seems obvious. I look at this and think how has this gotten this far. It's clear that it does not apply to her. She did not participate in the event.

VRP (Jun. 28, 2013), Pg. 46:6-18

⁴⁶ “The information and techniques taught **here** are for your knowledge only.

⁴⁷ “By signing these Conditions of Participation you agree not to teach or otherwise disseminate ... **any information or techniques that you learn or are taught at the School**...”

⁴⁸ “...there are two parts to that sentence. ‘Information that you learn here,’ that's something you’re given to by the school when you attend, “or information that is taught, that are taught, at the school.” VRP (Jun. 28, 2013) Pg. 26

lack of language giving notice that the “Conditions of Participation” also apply to information and material not received pursuant to “participation.” Coverdale signed both the 2006 and 2007 CoPs at the registration just before physically proceeding inside and attending a JZK, Inc. event – the attendant circumstances indicate that the CoP was intended to cover what was received at that event, and subsequent events where there were similar circumstances (i.e., physical, in-person attendance).

The unreasonableness of JZK, Inc.’s interpretation is compounded by the fact that 1) Coverdale signed the relevant CoP at least two years prior to JZK, Inc. first offering “livestream⁴⁹” events, 2) by its terms, the CoP is limited to events “in which you participate at the School,” 3) The CoP does not reference online events – which did not exist until at least 2008, and 4) contrary to JZK, Inc.’s implication that it had an online “click-through” CoP that customers must acknowledge prior to viewing the livestream⁵⁰, JZK, Inc. testified that it was “not sure if the web team had incorporated [an online CoP to view livestreams]” and, if required at all, such a separate “click through” agreement was not required until “...within the last six months.” CP 1079-80 (Prior to deposition).

JZK, Inc.’s interpretation requires that the language be re-written with the limiting words excluded, and goes further. JZK, Inc. asserts that the effect of the agreement is to prohibit the release of anything in the

⁴⁹ It is undisputed that the footage was from an event which was also broadcast via “livestream.”

⁵⁰ *See, e.g.*, CP 21 (“...eligible students must agree to the same conditions in the CoP to be granted access to the streaming content.”), CP 32, CP 33 (“In addition to attending RSE as a student, Virginia Coverdale has also ordered access to live-streamed content...this means she agreed to the CoP). These implications are false.

future that a person *might* suspect is JZK, Inc. material, *regardless* of how they received the information, and *despite* the fact that the material came from an event in which the person did not participate. Although livestreams did not exist for two years after the CoP was signed, that Coverdale did not – and was not required – to sign an online CoP; and that there may not even be an *existing* requirement to affirmatively agree to the CoP prior to accessing livestreams, the 2007 CoP applies nonetheless.

JZK, Inc.’s interpretation requires this Court to find, as a matter of law, that Coverdale should have known that *five years* after she attended an in-person event where she signed the consumer contract of adhesion that stated it applied to “future events in which you participate at JZK, Inc.,” *two years* after having last attended any event, that the CoP would prohibit her from releasing less than 2 minutes out of an 11 hour video that she did not receive from JZK, Inc., that was from an event in which she did not participate, and which JZK, Inc. alleges came from a livestream that was itself not even subject to a separate, stand-alone “click through” agreement. This interpretation defies all logic, reason, and legal analysis, and cannot be a “reasonable” interpretation of the contract.

Further, *even if JZK Inc.’s interpretation is reasonable*, Coverdale’s interpretation is also reasonable: That the clear meaning of the introductory phrase “in which you participate at the School” restricts the CoP to, at a minimum, material from events actually participated in, and that the limiting intent of that language continues via use of restrictors such as “here,” “this information,” and “that you learn or are taught at the

School,” which also is reasonable given that the circumstances of signing were in-person, at a physical event, before JZK, Inc. livestreams even existed. JZK, Inc. is the drafter, and regardless of whether its interpretation is reasonable or not, the contract must be construed against JZK, Inc. and in favor of Ms. Coverdale. As such, Ms. Coverdale is entitled to judgment as a matter of law.

4. JZK, Inc.’s 2008 email was a clear expression of intent to no longer be bound to the agreement, constituting anticipatory breach and excusing Ms. Coverdale from compliance with the nondisclosure provisions.

When Knight falsely testified in her deposition that Coverdale was kicked out for “harassment” and because she was a “danger” Knight did not know that Coverdale had managed to locate the 2008 email which prohibited any further participation because “You took my sweet guy away from me. Congratulations.” CP 1192, CP 1156.

In 2008, Coverdale began dating James Flick, a JZK, Inc. employee who also lived at the facility.⁵¹ CP 1149⁵² Mr. Flick represented to Coverdale that he and Knight *previously* were involved romantically. CP 1150-51 Apparently, Knight did not have the same understanding, and was agitated when she learned of the relationship with Coverdale.⁵³ CP 1150-57 Knight admits that she went to Coverdale’s home, at night, and “put [her] handprint on [Flick’s] truck’s window and drove away.” CP

⁵¹ JZK, Inc.’s facility is also the residence of Ms. Knight, and was the residence of Mr. Flick during the relevant time period.

⁵² Knight testified that in addition to being groundskeeper, he was her personal assistant. CP 1111

⁵³ Knight sent text messages to Mr. Flick referring to Coverdale as a whore, Devil’s whore, as well as sending ominous pictures via text of Coverdale’s home apparently taken by Knight – who was not personally acquainted with Coverdale.

1108 Knight asserts that she “went there just to tell them [she] was happy...” and “hope[d] they were happy...” *Id.* However, this contradicts the November 2, 2008 email sent to Coverdale from JZK, Inc. manager Steve Klein informing her that JZK, Inc. would no longer honor its contractual duty to allow Coverdale to participate:

The following is a message from JZ Knight I have been asked to send you: “**You are out of School. You will not be allowed to attend this Event...or any Follow-up...**You have achieved your goal. You got your Card. You made it to The Void.

You took my sweet guy away from me. Congratulations.

JZ Knight

CP 1192 (Emphasis added)

, Knight was unaware that the 2008 email had been located when she was deposed. Coverdale had been unable to locate it, and JZK, Inc. had not produced it on the assertion that it did not have the email. CP 1156. Prior to the email’s disclosure, Knight was asked why Coverdale was prohibited from participation. CP 1115-16. Responding with verbosity uncharacteristic of her responses prior⁵⁴, provided a detailed response that Ms. Coverdale was harassing and stalking another student,⁵⁵ making that person feel in “danger.” CP 1115-16.⁵⁶

⁵⁴ Knight repeatedly asserted throughout the deposition that she “didn’t recall,” “can’t remember,” or, in regards to statements made while purportedly channeling, that “...that was him [Ramtha]. Wasn’t me.” CP 1112.

⁵⁵ Said student being Mr. Flick.

⁵⁶ Knight explained that they “had a policy before... when [they] had people that were a threat to anybody, anywhere...if [they] knew that and there was harassment of any kind, then [they] did not let those people come back to school for a period of time...so what [she] did [was]...made the decision to not have her in school for awhile.” CP 1115-16.

In response to the direct question of whether it was her testimony that Coverdale was prohibited from participation due to this “complaint” Knight responded with an unequivocal “yes.” CP 1117⁵⁷

When presented, for the first time, with the actual email, Knight refused to read it aloud herself, and instead requested her counsel read it into the record. CP 1118. Knight could offer no explanation for the clear conflict with her sworn testimony that occurred just moments prior, and *only* after being presented with direct, tangible, incontrovertible proof, did she acknowledge that the email neither referenced any complaint or limited the time period in which Coverdale would not be allowed to participate. CP 1119.

An anticipatory breach is a “positive statement or action by the promisor indicating distinctly and unequivocally that he either will not or cannot substantially perform any of his contractual obligations.” *Olsen Media v. Energy Sciences, Inc.*, 32 Wash.App. 579, 585, 648 P.2d 493, review denied, 98 Wash.2d 1004 (1982). An anticipatory breach excuses further performance of the contract by the nonbreaching party. *Puget Sound Service Corp. v. Bush*, 724 P.2d 1127, 45 Wn. App. 312 (1986).

There is no question of material fact that JZK, Inc. clearly and unequivocally communicated its intent to no longer perform its obligation to allow Coverdale to participate. JZK, Inc. testified that customers must satisfy specific conditions in order for JZK, Inc. to be obligated to allow

⁵⁷ Although recalling that a staff member made the communication, Knight’s testimony resumed its previously vague character when asked specifics such as which staff member and the method of communication: “I don’t know. You’d have to ask them. And I don’t know who that is.” CP 1118.

participation; namely, sign a CoP, have met any applicable attendance requirements, and pay the fee. VRP (Jun. 28, 2013) P. 21:12-14. JZK, Inc. opted to impose a continuing burden on its customers to keep JZK, Inc.'s secrets until 21 years after JZ Knight dies; it cannot assert entitlement to that benefit while simultaneously avoiding its minimal contractual burden to allow participation if a customer otherwise satisfies the conditions to participate.

JZK, Inc. clearly and unequivocally asserted its intent to forever bar Defendant from attendance in the November 2, 2008 email. CP 1192. There is no question of material fact that the email was sent to Ms. Coverdale, and that, even as Ms. Knight testified, did not contain any allegations of rule breaking nor was it "limited in duration." Knight's fabricated deposition testimony in order to 1) conceal her motivations, 2) continue in her campaign of character assassination, and 3) cover up the anticipatory breach itself, thus avoiding the inevitable legal consequences. Those vicious falsehoods do not change the actual email communication sent to Ms. Coverdale, nor does it alter the fact that JZK, Inc. neither requested Ms. Coverdale sign another CoP or inform her that she was still subject to the CoP when she was allowed to again participate a year after the email was sent. Her return thus did not waive the anticipatory breach.

In sum, blatant fabrications made by the President and sole shareholder of JZK, Inc., JZ Knight, while under oath and subject to penalty of perjury, do not trump the actual communication made at the time JZK, Inc. committed its anticipatory breach. Ms. Coverdale thus was

not bound by the nondisclosure provisions when she released the subject video, and this Court should reverse summary judgment for JZK, Inc., and grant summary judgment to Ms. Coverdale as a matter of law.

EVEN IF THIS COURT DECLINES TO ENTER JUDGMENT FOR MS. COVERDALE, JZK, INC. IS NOT ENTITLED TO SUMMARY JUDGMENT.

D. Summary judgment for JZK, Inc. must be reversed because it was error as a matter of law to dismiss affirmative defenses; this Court should reinstate counterclaims, and remand to be consolidated with the re-filed action for defamation and related claims.

1. Trial court erred as a matter of law by applying wrong legal elements of fraudulent inducement, and dismissing affirmative defenses despite existence of material factual dispute.

In dismissing the fraudulent inducement and undue influence defenses, the trial court stated:

“...this inducement was based upon fraud has not been established in that there would have to be a showing of the **nine elements of fraud**, and one of those is that the material is untrue. I’m not going there. The fact that she may feel manipulated is not sufficiently established, in this Court’s opinion, legally.”
VRP (6/28/13) P. 65:11-17. (Emphasis added).

Coverdale alleged fraudulent inducement, which has four elements.⁵⁸

Untrue statements can also include concealment or non-disclosure. *Rest. (Second) Contracts*, §160 (1981). Half-truths are misrepresentations because they are equally misleading. *Ikeda v. Curtis*, 43 Wash. 2d. 449 (1953). The trial court also indicated that the parties’ relationship

⁵⁸ (1) an assertion or representation not in accord with the facts, (2) that is either fraudulent or material, (3) that was relied upon in manifesting assent, and (4) the reliance was justified. *WA Practice Series, Vol. 25, § 9.12*

implicated “spiritual” issues, yet dismissed Ms. Coverdale’s affirmative defense despite that relationships of a “spiritual” nature can give rise to undue influence. *See, e.g., Ferguson v. Jeanes*, 27 Wash. App. 558 (1980)(Undue influence affirmed as to spiritual advisor). As such, there is at least an issue of fact regarding fraudulent inducement and undue influence, and the trial court erred as a matter of law in applying the wrong elements when it dismissed the affirmative defense.

This was not about whether Ms. Coverdale “may feel manipulated.” Pursuant to the evidence presented throughout this brief, including Section VI.D.2, *infra*, there are clear questions of material factual dispute precluding summary judgment for JZK, Inc.⁵⁹

2. Trial court erred as a matter of law when it ruled JZK, Inc.’s conduct protected by free exercise of religion, and when it prohibited counterclaims despite existence of material factual dispute.

On 2/8/13, Court dismissed counterclaim for misrepresentation and fraud, and on 5/3/13 denied Coverdale’s Motion to Amend the Answer to include, among others⁶⁰, counterclaims for misrepresentation and fraud, and violation of the consumer protection act. CP 553-54; CP 862-63.

2/8/13 Dismissal. Trial court dismissed misrepresentation claim in amended complaint that “[JZK, Inc.] advertised and represented as fact that JZ Knight channels for various spiritual figures, including Ramtha

⁵⁹ The error in dismissing the affirmative defenses was compounded given that Judge Tabor declined to rule on JZK, Inc.’s motion for protective order regarding relevant discovery prior to granting it summary judgment.

⁶⁰ Coverdale also moved to include claims related to her defamation claim, which was dismissed without prejudice; those claims are not included herein, as Coverdale has filed separate litigation on the defamation and related claims. Thurston County Case No. 14-2-00328-2

and Jesus.” CP 532⁶¹. Judge Tabor cited Article 1, Section 11 of the Washington State Constitution.⁶²

5/3/13 Denial of Amendment. Coverdale’s Proposed Amended Counterclaim for misrepresentation and fraud was based on the conduct described *supra* Part IV.A.⁶³. Her counterclaim for violation of the consumer protection act was based on those actions and the use of the confidentiality clause itself. CP 842-43.

Bases for Counterclaim are Not Protected Pursuant to Religious Freedom

JZK, Inc. advertised and sold copies of a tape entitled “Jesus Speaks”: “In this powerful audio cassette Yeshua Ben Joseph [Jesus] speaks through JZ’s body...” CP 615. JZK, Inc. admitted it advertised and sold that material until it discovered “the error” in 2008. CP 1260. Other remove the material, no affirmative steps were taken to inform customers of the “error.” *Id.* On Sep. 9, 2008, Knight testified under oath that she never channeled Jesus. CP 539.

Article 1, Section 11 of the State Constitution references “individuals,” but limited protections are extended outside of natural personhood.⁶⁴ JZK, Inc. is a *for-profit* entity, and asserts that it is “not a religion”; it is an academy that uses the “latest discoveries in neuroscience

⁶¹ “...a person’s intangible beliefs about religious or philosophical matters is not subject to the concurrence of the majority or the ratification of others or the intervention of the court system.” VRP (2/8/13), Pg. 18:1-4

⁶² “...absolute freedom of conscience in all matters of religious sentiment, belief, and worship can be guaranteed to every individual.” VRP (2/8/13), P. 16:19-22

⁶³ E.g., misrepresentation of: the validity of scientific studies in published material; contradictory statements to induce membership; the nature of the organization; the credentials of the organization’s staff; that RSE uses the “latest discoveries in neuroscience and quantum physics,”; and the identities of individuals responsible for publications, materials, and other published products/events. CP 843-844

⁶⁴ E.g. to non-profit organizations, many of which are formed as religious institutions.

and quantum physics” and “teaches students how to access the extraordinary abilities of the brain...” CP 524; CP 534-36, CP 1130.

It is an open question as to whether a for-profit corporation can claim the extent of protections as a non-profit formed for a spiritual or religious purpose. *See, e.g., Sebelius v. Hobby-Lobby, No. 13-354* (U.S., *Oral Argument Mar. 25, 2014*). This Court recently held that a non-profit corporation’s religious freedoms do not trump the Washington Law Against Discrimination⁶⁵ in certain cases where employment is unrelated to religious purpose.⁶⁶

The issue presented here is distinct. JZK, Inc. testified that the representation was, in fact, false. CP 1260. There is no dispute that JZK, Inc. made a false representation. The issue is whether its misrepresentation can form the a claim of misrepresentation. Washington and U.S. Supreme Court precedent is instructive: “...the Amendment embraces two concepts -- freedom to believe and freedom to act. The first is absolute but... the second cannot be.” *United States v. Ballard*, 322 U.S. 78, 86, 64 S.Ct. 882, 88 L.Ed. 1148 (1944). The decision⁶⁷ affirmed that considering *subjective* belief of an assertion’s truth does not run afoul of religious freedom. This is particularly true when relating to acts performed by a for-profit corporation in commercial activity – even if done by a religious group:

When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct

⁶⁵ RCW 49.60, *et seq.*

⁶⁶ *Ockletree v. Franciscan Health System*, No. 88218-5 (Wash. Feb. 6, 2014).

⁶⁷ *Ballard* was charged with crimes related to fraud and conspiracy.

as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. *United State v. Lee*, 455 U.S. 252 , 261, 102 S.Ct. 1051, 1057, 71 L.Ed.2d 127 (1982).

This Court has addressed the issue: “Those who enter into a profession as a matter of choice, necessarily face regulation as to their own conduct and their voluntarily imposed personal limitations cannot override the regulatory schemes which bind others in that activity.” *Backlund v. Board of Commissioners of King County*, 724 P. 2d 981, 990 (1986).

JZK, Inc. incorporated as a for-profit corporate entity, entered the retail business⁶⁸ and voluntarily undertook to abide by regulations binding others that also engage in for-profit business.⁶⁹ It agreed not violate laws such as the Consumer Protection Act, RCW 19.86, *et seq*⁷⁰ and not to make misrepresentations to its customers. JZK, Inc.’s conduct, including false assertions in advertising and lack of affirmative steps to disavow its customers of reliance on the falsity, create at least a question of fact precluding dismissal. CP 1260.

Error to prematurely dismiss counterclaim and deny amendment

CR 15 (a) provides for amendment upon “leave of court ...and leave shall be freely given when justice so requires.” The primary reason for *disallowing* amendment is prejudice to the non-moving party; the purpose of CR 15 is to facilitate a proper decision on the merits. *Caruso v. Local 690, Int’l Bhd. of Teamsters*, 100 Wn.2d 343 (1983).

⁶⁸ See discussion at Part IV.A. *supra*.

⁶⁹ Ms. Knight testified specifically that, at one time, she did operate as a non-profit but voluntarily changed to a for-profit subchapter S corp. CP 1283

⁷⁰ Including the prohibition on unfair and deceptive business practices.

Ms. Coverdale argued and referenced CR 56(f) in response to the motion to dismiss because she had not yet taken depositions, and discovery was incomplete. CP 523-24; VRP (2/8/13), P. 9:1-14. JZK, Inc. may act in the gambit of spirituality, but is not absolved of the duty a for-profit corporation engaged in commercial activity has to comply with laws protecting third parties. *See* discussion, *supra* Part VI.D.2, P.54.

Ms. Coverdale moved to timely amend her answer given the substantial supporting evidence creating at least an issue of fact to be tried on the merits. CP 797-98, *See* discussion Part IV.A.1. *supra*^{71, 72, 73} Claims of scientific validation are presented with claims of “personal experiences” that will be provided,⁷⁴ and asserts “...that nothing is left to chance or belief.” CP 1281; CP 1096; CP 1092-1096; CP 1563-64. Other acts precluding summary judgment can be found throughout Part IV.A. and the record.⁷⁵

⁷¹ JZK, Inc. represents throughout in its standard “blurb” that “Using...the latest discoveries in neuroscience and quantum physics, RSE teaches students how to access the extraordinary abilities of the brain...” CP 524; CP 1076. JZK, Inc. testified that they only “...draw upon the *concepts* of [those] branch[es] of science and show parallels as to how those concepts could, *in principle*, be applied in one’s own life.” CP 1249 (Emphasis added). The importance of the otherwise perhaps subtle distinction is clear when connected JZK, Inc.’s other assertions such as those concerning scientific validity. *See* discussion *supra* Part IV.A

⁷² Contrary to JZK, Inc.’s claims that JZ Knight was measured while channeling, for example, a publication by one of the researchers states that the data was unobtainable due to movement and electrode loss, so Knight’s measurements while channeling were *not* included in their analysis. CP 1552; CP 1566.

⁷³ JZK, Inc. represents that valid scientific studies have confirmed its representations, when in fact both the validity of the study and whether the results are as JZK, Inc. asserts are called into serious question – both by the academics who participated and subsequent publications. CP 1277-1281; CP 1418; CP 1563-64.

⁷⁴ Such as self-healing, manifesting, and other extra-sensory abilities

⁷⁵ For example, false claims that a staff member (who is also JZK, Inc.’s CR 30(b)(6) representative) had held adjunct professor positions (CP 1413, 1414); and holding itself out as a “School,” that uses “neuroscience” and “quantum physics” when it is not registered as any kind of educational institution, does no objective testing, and has no curriculum (CP 1249, CP 1244-45) other than the requirement to attend introductory

JZK, Inc. cannot cloak itself in the guise of religious freedom to escape burdens imposed to protect its consumers from misrepresentations, nor can it escape liability for unfair and deceptive business practices. There is at least a question of fact precluding dismissal, and this Court should remand for trial on the merits of Ms. Coverdale's counterclaims for misrepresentation/fraud and violations of the Consumer Protection Act.

E. Trial Court committed reversible error by allowing JZK, Inc. to introduce new evidence and argument in an untimely reply brief.

JZK, Inc.'s Reply was Untimely. CR 6(a) provides that, in computing *any period of time* under either the civil rules or *local rules*, when the deadline is less than 7 days, intermediate weekends **shall be excluded**. (Emphasis added.) Both CR 56(c) and LCR 5(d)(1)D are subject to CR 6(a), and provide that rebuttal must be served at least five calendar days prior to hearing. *See also, In re the Detention of Capello v. State*, 113 Wn. App. 739 (2002).⁷⁶ JZK, Inc.'s reply was due Friday, Jun. 21, 2013, not Monday, Jun. 24, 2013 because five days is less than seven, requiring that the weekend be excluded from computation.

Reversible Error to Allow New Argument and Unproduced Evidence.

The moving party has initial burden of raising issues; – it **may not submit new evidence or argue matters not contained in its initial motion**. CR 56(c); *Doherty v. Municipality of Metro.Seattle*, 83 Wn.App. 464,

events before participating in secret events (CP 1244-45). JZK, Inc.'s excuse that "Ramtha's School of Enlightenment" is only a trade name does not alter the deceptive, unfair, and misrepresentative nature to consumers. CP 1238.

⁷⁶ Even where a *statute* had specific language that the relevant time period was "72 hours," CR 6(a) applies, and weekends are excluded

921 P.2d 1098 (1996). Because the the non-moving party has no opportunity to respond. *White v. Kent Medical Ctr., Inc.*, 61 Wn.App. 163, 810 P.2d 4 (1991), *R.D. Merrill Co. v. Pollution Control Hearing Board*, 137 Wn.2d 118, 146 149, 969 P.2d 458 (1999).

JZK, Inc.'s scant 10 page motion failed to mention Ms. Coverdale's defenses. CP 1000-1011. The omission cannot be cured with new argument and unproduced evidence presented just four days before hearing. The prejudice was compounded because the hearing on cross MSJs the final day dispositive motions could be heard, and Judge Tabor had still declined to rule on JZK, Inc.'s discovery motion. As a matter of law, the trial court should have struck and not considered JZK, Inc.'s rebuttal, because it was both untimely⁷⁷ and introduced new argument and evidence.

F. As a matter of law, Coverdale is not in contempt of either the Writ of Execution or the Oct. 24, 2013 appraisal Order because there was no prohibition on the conduct, and thus no evidence of intent.

1. Summary of Background Relating to Contempt Order⁷⁸

JZK, Inc. obtained a Writ⁷⁹ directed to Ms. Coverdale's personal vehicle, a 2004 Nissan Xterra.⁸⁰ Although Ms. Coverdale advised JZK,

⁷⁷ The Reply was not subject to either stipulation or a request for untimely filing.

⁷⁸ A complete history of both JZK, Inc.'s collection attempts and additional details related to the personal vehicle specifically is helpful to put the Contempt issue in context, and has been fully brief in Ms. Coverdale's "Motion to Stay Enforcement of Judgment" and accompanying materials, already filed with this Court. As such, this factual summary is a limited history. Relevant factual summaries are also found at: CP 2096-99, CP 2150-52. The Orders relating to the personal vehicle are at CP 2136-37, CP 2147-48. The record relating to the contempt issue is located at CP 1900-2228.

⁷⁹ CP 1904-05.

Inc. counsel that the value did not warrant the attorney fees JZK, Inc. was spending to obtain the writ, it proceeded nonetheless. CP 1921-23. The trial court was advised at the Oct. 23, 2013 hearing that JZK, Inc. could have no proper purpose for the writ, but refused to apply CR 11.^{81 82}

At the outset, Judge Tabor ignored the directive in CR 11 prohibiting use of process for an improper purpose. At that hearing, JZK, Inc. claimed that, at most, the nonexempt value was \$604.00. Judge Tabor ordered the parties to obtain appraisals; the lowest private appraiser quoted Ms. Coverdale \$250.00, so she used an appraisal from Bruce Titus Nissan. CP 2118-19.⁸³ Ms. Coverdale informed JZK, Inc. that Bruce Titus refused to participate in selecting a tie-breaker appraiser; JZK, Inc. responded with an offer to purchase the vehicle for \$3,250.00. Ms. Coverdale received a separate offer of \$3,500.00, and used the \$250.00 difference to prevent her electricity from being disconnected. CP 2118-19, CP 2122-26, CP 2130⁸⁴.

On Nov. 22, 2013 Judge Tabor found Ms. Coverdale in contempt for violating 1) the Writ of Execution itself and 2) the Oct. 24, 2013 appraisal order. The contempt could be purged by getting the vehicle back (which she had no legal authority to do), or paying \$3,000.00 into the

⁸⁰ The vehicle was in “fair” condition with 90,000 miles and a Blue Book Value ranging between \$2,927.00 and \$3740.00. CP 1925

⁸¹ The hourly fees were included in JZK, Inc.’s request for fees and costs at judgment.

⁸² If you look at the plain facts and the financial economic reality, they were going to lose money on this writ from the beginning. There can be no proper purpose.

THE COURT: **I think that's their choice, though, and it's not an issue for me.** VRP (Oct. 18, 2013), Pg. 7:20-25(Emphasis added)

⁸³ JZK, Inc. paid \$350.00 for a professional appraiser to travel to Yelm, WA from Port Orchard, WA.

⁸⁴ At no time did JZK Inc. seek a lien on the vehicle.

court registry (exempt funds which Ms. Coverdale had already used the funds for basic essential human needs, such as heat).

Contempt of court is intentional disobedience of any lawful order of the court. RCW 7.21.010(1)(b); *King v. Dep't of Soc & Health Servs.*, 110 Wash.2d 793, 797, 756 P.2d 1303 (1988). Contempt may be criminal or civil. *Id.*, at 799. The primary purpose of the civil contempt power is to coerce a party to comply with an order or judgment. *Id.*

2. A Writ of Execution is directed solely to the Sheriff and cannot form the basis of the Order finding Ms. Coverdale in contempt.

A Writ is directed *solely* to the Sheriff.⁸⁵ *See also, RCW 6.17.120, "Sheriff's duty on receiving writ."* The Writ at issue also had not been delivered to the Sheriff, as was thus ineffective. *Id.* The writ's language cited by the trial court that "You are required to deliver possession of this property to a location to be provided by JZK, Incorporated," is to the Sheriff, pursuant to RCW 6.17.110(3)(c), not to Ms. Coverdale. *See also Monks & Miller, Inc. v. Fein*, 215 P. 525, 125 Wash. 230, 235 (1923)(Court strictly construed statute; no priority for creditor when levy not properly executed). *Cupples v. Level*, 103 P. 430, 54 Wash. 299, 302 (1909) is the bedrock case on the issue: ...'property shall be levied on in like manner and with like effect as similar property is attached, **and until**

⁸⁵ *RCW 6.17.110 Form and Contents of Writ.*

(1) The writ of execution...**shall be directed to the sheriff**... ..

(3)...(a) If the execution is against the property of the judgment debtor, it shall **require the officer** to satisfy the judgment out of the personal property of the debtor...

(c) If the execution is for ... personal property, it shall... **require the officer to deliver possession of it**... (Emphasis added).

a levv personal property shall not be affected by an execution.”

(Emphasis added).

For over a century, Washington case law has reiterated that a debtor has the right to transfer his property anytime prior to actual levy, so long as the transfer is not fraudulent. *See also, In re Northwest Homes of Chehalis, Inc.*, 526 F. 2d 505 (9th Cir. 1975)⁸⁶, *Casa del Rey v. Hart*, 643 P. 2d 900, 31 Wn. App. 532 (1982)⁸⁷.

The writ was not delivered to either the Sheriff or Ms. Coverdale. It is not directed to Ms. Coverdale. A Writ of Execution only directs the Sheriff to take action, and that the Writ does not effect personal property until after the Sheriff levies the property – which did not occur here.

3. Ms. Coverdale complied with the only directive in the Oct. 24, 2013:

She had the vehicle appraised.

In determining contempt, “we strictly construe the order alleged to have been violated, and the facts must constitute a plain violation of the order.” *In re Marriage of Humphreys*, 79 Wn.App. 596,599,903 P.2d 1012 (1995). “If the finding is based upon the violation of an order, the order must be strictly construed in favor of the contemnor.” *Id. See also, State Dept. of Ecology v. Tiger Oil Corp.*, 271 P. 3d 331, 166 Wn. App. 720 (2012)(“...although the...decree required [Defendant] to install the [system], “strictly construed” in favor of [Defendant], the...decree did not clearly [require its operation]). The trial court also based contempt on the

⁸⁶ Stating that even liens on personal property do not prevent transfer, “... nor is [debtor] prevented from selling that property...”

⁸⁷ Debtor not deprived of use and possession of property, or even ability to sell property, when attached.

Oct. 24, 2013 Order regarding appraisals. VRP (Nov. 22, 2013), Pg. 6:8-17. The Order also suspended the writ. CP 2148-47. Ms. Coverdale complied with her obligation regarding appraisals. *See* discussion, *supra* Section VI.F.1. After complications in the selection of a third appraiser, JZK, Inc. made an offer outside of the process outlined in the Order, Ms. Coverdale accepted a better offer, believing that there was no Order preventing her from doing so. *Id.*

The Order must be strictly construed in favor of Ms. Coverdale. Contempt can only be found if the facts make it clear that a plain violation of the Order occurred. The Order said nothing on its face about transfer of the vehicle, and Ms. Coverdale complied with obtaining an estimate/appraisal and providing the vehicle for JZK, Inc.'s appraisal. The intent of the *Order* is not relevant – there is an ambiguity since restriction on transfer was not on the face of the Order, and that ambiguity must be construed in favor of Ms. Coverdale.

There can be no intentional violation of the Order as it contained no prohibition on transfer, and JZK, Inc. itself understood the Order to allow transfer when it made the offer to purchase while that Order was in effect. CP 2114.

4. The Contempt Order contained no legal mechanism capable of performance to purge the Contempt.

Ms. Coverdale does not have the power to compel the buyer of the vehicle to rescind the transaction. As such, there was no “act that [was] yet within [her] power to perform” when the trial court issued the contempt

ruling. RCW 7.21.030 prohibits the imposition of a remedial sanction; any sanction must be considered punitive. If punitive, the due process requirements of RCW 7.21.040 must be met, and they were not. Since Ms. Coverdale had no legal or possible method to “purge” the contempt, the Order fails to satisfy either RCW 7.21.030 or RCW 7.21.040, and this Court should reverse the finding of contempt against Ms. Coverdale.

G. Coverdale is entitled to attorney fees and costs incurred from the inception of this case, including all fees and costs incurred defending JZK, Inc.’s efforts to collect on the judgment, and incurred on appeal.

The agreement includes an attorney fees provision.⁸⁸ Any contract which provides for fees and costs for one party will obligate the payment of the same to the prevailing party. RCW 4.84.330. Ms. Coverdale is entitled to judgement as a matter of law and an award of all fees and costs incurred throughout this litigation and appeal. *See also*, RAP 18.1.

VII. CONCLUSION

This Court must answer the question: After *McKee*, should JZK, Inc. be allowed to use a form contract of adhesion to prohibit its customers from releasing “any” information, tangible or intangible, when doing so *may* be allowing JZK, Inc. to engage in fraudulent activities, as well as dangerous, deceptive, and unfair business practices? If the nondisclosure provisions are substantively unconscionable, this Court should sever those

⁸⁸ “You agree to pay on demand the reasonable attorneys’ fees and costs incurred by JZK, Inc. in connection with the enforcement of these Conditions of Participation, including those incurred on appeal.” CP 1126.

provisions, and enter a judgment as a matter of law for Ms. Coverdale, against both JZK, Inc. and JZ Knight for Coverdale's attorney fees and costs. This Court should also enter an injunction prohibiting future use of nondisclosure provisions, and requiring JZK, Inc. to notify all current and former customers that the nondisclosure provisions are invalid.

If the clauses are not substantively unconscionable, this Court should find, as a matter of law, Ms. Coverdale did not breach, given the specific limiting terms such as "events in which you participate at the School." Even if Ms. Coverdale's conduct constituted breach, this Court should find it excused by JZK, Inc.'s anticipatory breach in the 2008 email barring her from further participation, and the withholding of discovery and submission of false testimony to misrepresent JZK, Inc.'s basis for its anticipatory breach.⁸⁹ As such, this Court should enter an award for Ms. Coverdale's fees and costs incurred at all stages of litigation against JZK, Inc. and JZ Knight.⁹⁰

⁸⁹ Even if this Court does not find for Ms. Coverdale as a matter of law, it should remand for trial because judgment for JZK, Inc. was error as a matter of law given: the existence of issues of material disputed fact; application of wrong legal elements of defenses; and Judge Tabor's refusal to rule on JZK, Inc.'s pending Motion for Protective Order regarding discovery prior to the summary judgment hearing. This Court should also reverse the Order of Contempt against Ms. Coverdale for violating a Writ of Execution that was neither effective nor binding upon her, and for violating an Order which did not prohibit her from selling her vehicle to provide heat for herself and her daughter in mid-winter. This Court should also reinstate the counterclaims, and remand for consolidation with the pending action recently re-filed⁸⁹ for JZK, Inc.'s defamatory conduct.

⁹⁰ The nondisclosure provisions are, by their nature, substantively unconscionable due to the inherent potential for abuse – including the concealment of abusive or illegal practices. Ms. Coverdale is entitled to a judgment as a matter of law on that basis alone. Yet, in finding the provisions substantively unconscionable, this Court has an opportunity to take the first step in substantial justice for thousands of people. If there is even *potential* that the multiple former JZK, Inc. customers from all over the world, most of whom were previously strangers and who present consistent sworn testimony, are not fabricating their concerns – then the potential dangers are sobering.

This case perhaps represents an inherent potential for abuse that this Court foresaw in the breadth of *McKee's* language: "...consumer adhesion contracts that require secrecy violate this important public policy." Nondisclosure provisions in consumer contracts of adhesion create an inherent potential for abuse, the scope of which is limited only by the imagination of the corporation, and a blind faith that a for-profit corporation will be motivated more by its concern for consumers than for its own financial interests. That JZK, Inc.'s nondisclosure provisions are in a general consumer contract of adhesion, and impress upon consumers that they must maintain secrecy *without limit to a particular venue*, does not *mitigate* the inherent potential for abuse, it increases the inherent danger *exponentially*.

JZK, Inc. has accused Ms. Coverdale of all sorts of motivations and bad actions – and is expected to continue to do so before this Court. Even if the accusations were true (they are not), it does not change that the nondisclosure provisions are, as a matter of law, substantively unconscionable. That the accusations are not true⁹¹ just underscores the manifest injustice that has plagued this case since JZK, Inc. at least implied, if not overtly misrepresented, certain relevant falsities at the outset.⁹²

There is a consistent theme in each of the many errors made in this case, and each instance of manifest injustice: the error by the trial court in legitimizing nondisclosure provisions in a consumer contract of adhesion,

⁹¹ See, e.g., *Motion for Stay of Enforcement, and Reply thereto*.

⁹² See, e.g., Discussion, *supra*, Section VI.C.3, Pg. 46.

without regard to the potential consequences. As the record shows, those consequences have been substantial for both Ms. Coverdale and others harmed by JZK, Inc. For all of the aforementioned reasons, this Court should enter judgment as a matter of law for Ms. Coverdale, and award her attorney fees and costs for all stages of this litigation.

Respectfully submitted this 15th day of October, 2014.

BRECKAN C.L.SCOTT, ATTORNEY &
COUNSELOR OF LAW, PLLC



By: Breckan C. Scott, WSBA No. 41585
Counsel for Appellant Coverdale

Shatz Law Group, PLLP

/s/

Anthony David Gipe, WSBA No. 30491
Associated Counsel for Coverdale

CERTIFICATE OF SERVICE

I certify that I delivered, or caused to be delivered, a copy of the foregoing document on the 15th day of October, 2014 to the following counsel of record at the following addresses, pursuant to a reciprocal agreement for electronic service:

Andrea McNeely	AMcNeely@gth-law.com
Eric Gilman	egilman@gth-law.com
Jeff Grant	JGrant@skellengerbender.com
Anthony Gipe	adgipe@shatzlaw.com



Breckan Scott