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SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

SPOKEO, INC.,

Plaintiff,

No. 16-2-07970-9 SEA

v.

WHITEPAGES, INC.,

Defendant.

ORDER GRANTING
WHITEPAGES' RENEWED
MOTION FOR JUDGMENT AS A
MATTER OF LAW ON SPOKEO'S
CONSUMER PROTECTION ACT
CLAIM

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3 **1. Introduction**

4 This matter has come before the court on Defendant Whitepages, Inc.’s Renewed
5 Motion for Judgment as a Matter of Law on Spokeo’s Consumer Protection Act Claim
6 (Dkt. 360) (“Motion”).

7 **2. Documents Considered**

8 The Court has considered the pleadings and other documents filed by the parties, and
9 in particular the following items, including their attachments:

<u>Pleadings</u>	<u>Dkt. No.</u>
Whitepages’ Renewed Motion for Judgment as a Matter of Law on Spokeo’s Consumer Protection Act Claim	360
Spokeo, Inc.’s Opposition to Whitepages’ Renewed Motion for Judgment as a Matter of Law	367
Declaration of Karl Neumann in Support of Spokeo, Inc.’s Opposition to Whitepages’ Renewed Motion for Judgment as a Matter of Law	369
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20
21 **3. Background**

22 **A. Trial**

23 On January 16, 2018, this case came before this court for a jury trial. Plaintiff
24 Spokeo, Inc. (“**Spokeo**”) sought to recover damages from Defendant Whitepages, Inc.
25 (“**Whitepages**”) totaling more than 27 million dollars, based upon breach-of-contract claims,
26

1 claims for fraud and negligent misrepresentation, and a claim pursuant to the Consumer
2 Protection Act (“CPA”).

3 On February 13, 2018, after both parties had rested, and prior to closing arguments,
4 Whitepages filed and served a Motion for Judgment as a Matter of Law Pursuant to CR 50(a)
5 (Dkt. 344), requesting the court to enter a judgment in favor of Whitepages and dismissing
6 all of Spokeo’s claims. The court orally denied Whitepages’ motion. On February 15, 2018,
7 the court filed an order memorializing the ruling (Dkt. 350).

8 On February 22, 2018, the jury returned a verdict in favor of Spokeo for \$72,915 on
9 the CPA claim, and found for Whitepages on all of Spokeo’s other claims. Dkt. 353A) The
10 jury also found in favor of Whitepages on its counterclaim. *Ibid.*

11 **B. Whitepages’ Motion to Dismiss Spokeo’s CPA Claim**

12 Following the trial, both parties filed post-trial motions totaling approximately 2,700
13 pages. Whitepages has filed and served a Renewed Motion for Judgment as a Matter of Law
14 on Spokeo’s Consumer Protection Act Claim (Dkt. 360) (“**Motion**”). In its Motion,
15 Whitepages requests the court to vacate the jury’s verdict on Spokeo’s CPA claim because

16 [t]he acts by Spokeo and found by the jury neither (1) “violat[ed]
17 the] public interest” nor (2) “ha[d] the capacity to deceive
18 substantial portions of the public” [and thus] are not “unfair or
19 deceptive under the CPA as a matter of law. *Klem v. Wash. Mut
20 Bank*, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013). And because
21 the acts had no “impact on the public interest,” and were motivated
22 by “legitimate business concerns,” the CPA does not apply
Hangman Ridge Training Stables, Inc. v Safeco Title Ins. Co., 105
Wn.2d 778, 780, 719 P.2d 531 (1986); *Boeing Co. v. Sierracin
Corp.*, 108 Wn.2d 38, 54, 738 P.2d 665 (1987).

23 Motion at 1 (Dkt. 360).

24 On May 7, 2018, the court heard oral arguments on all of the post-trial motions,
25 including Whitepages’ Motion.

1 **4. Legal Standards for Judgment Notwithstanding a Verdict**

2 At any time before a case is submitted to the jury, a party may move for judgment as
3 a matter of law on grounds that there is no legally sufficient evidentiary basis for a
4 reasonable jury to find for a party. CR 50(a). If a party makes such a motion after the close
5 of the evidence, and if the court does not grant the motion, the court is considered to have
6 submitted the action to the jury subject to the court later deciding the legal questions the
7 motion raised by the motion. CR 50(b).

8 In ruling on a renewed motion for a matter of law after a jury verdict, the court may
9 either (a) allow the verdict and the judgment to stand, (b) order a new trial, or (c) direct entry
10 of judgment as a matter of law notwithstanding the verdict. CR 50(b)(1)(A)-(C).

11 A trial court appropriately denies a motion for judgment notwithstanding the verdict
12 if, viewing the evidence most favorably to the nonmoving party, it can say as a matter of law
13 that there is competent and substantial evidence to sustain the verdict for the nonmoving
14 party. *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997); *State v. Hall*, 74
15 Wn.2d 726, 727, 446 P.2d 323 (1968).

16 One who challenges a judgment as a matter of law “admits the
17 truth of the opponent's evidence and all inferences which can
18 reasonably be drawn [from it].” *Davis v. Early Constr. Co.*, 63
19 Wn.2d 252, 254, 386 P.2d 958 (1963). [The court must] interpret
the evidence “against the [original] moving party and in a light
most favorable to the opponent.” *Id.*

20 *Faust v. Albertson*, 167 Wn.2d 531, 537-538, 222 P.3d 1208 (2009). Evidence is substantial
21 to support a verdict if it is sufficient to persuade a fair-minded, rational person of the truth of
22 the declared premise. *Brown v. Superior Underwriters*, 30 Wn.App. 303, 306, 632 P.2d 887
23 (1980).

24 If it is clear that the evidence and reasonable inferences are insufficient to support the
25 jury’s verdict, then the trial court must grant the motion and enter judgment in favor of the
26

1 moving party notwithstanding the jury's verdict. *Bishop of Victoria Corp. Sole v. Corporate*
2 *Business Park, LLC*, 138 Wn.App. 443, 453-454, 158 P.3d 1183 (2007).

3 As explained below, having reviewed all of the evidence that was presented and
4 having considered all reasonable inferences most favorably to Spokeo, the court concludes as
5 a matter of law that the evidence and the reasonable inferences are legally insufficient to
6 support the jury's verdict on Spokeo's CPA claim. The court therefore will grant
7 Whitepages' Renewed Motion for Judgment as a Matter of Law on Spokeo's CPA Claim,
8 reverse the jury's verdict, and dismiss Spokeo's CPA claim.

9 **5. Discussion**

10 Washington's Consumer Protection Act was enacted to promote free competition in
11 the marketplace, for the ultimate benefit of consumers. *State v. Black*, 100 Wn.2d 793, 799,
12 676 P.2d 963 (1984); *Ballo v. James S. Black Co.*, 39 Wn.App. 21, 25, 692 P.2d 182 (1984);
13 *Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 684, 911 P.2d 1301
14 (1996).

15 It is a question of law whether Whitepages' acts give rise to a violation of the CPA.
16 *Leingang v. Pierce Cty Med. Bureau, Inc.*, 131 Wn.2d 133, 150 940 P.2d 288 (1997);
17 *Svendsen v. Stock*, 143 Wn.2d 546, 553, 23 P.3d 455 (2001); *State v. L.A. Investors, LLC*, 2
18 Wn.App.2d 524, 538, 410 P.3d 1183 (2018); 6A WASHINGTON PRACTICE:
19 WASHINGTON PATTERN JURY INSTRUCTIONS (WPI): CIVIL 310.08, comment at 43
20 (6th ed. Supp. 2013).

21 To prevail in a private CPA claim, a plaintiff must prove (1) an unfair or deceptive
22 act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury
23 to a person's business or property, and (5) causation. *Hangman Ridge Stables, Inc. v. Safeco*
24 *Title Ins. Co.*, 105 Wash.2d 778, 784, 719 P.2d 531 (1986).

1 In *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013) the
2 Washington Supreme Court set out three alternate bases for a CPA claim:

3 [W]e hold that a claim under the Washington CPA may be
4 predicated upon [1] a per se violation of statute, [2] an act or
5 practice that has the capacity to deceive substantial portions of the
6 public, or [3] an unfair or deceptive act or practice not regulated by
7 statute but in violation of public interest. [Emphasis added]

8 *Klem*, 176 Wn.2d at 787, 295 P.3d 1179.

9 The first alternate basis for a CPA claim, namely, a *per se* violation of a statute, is not
10 at issue here.

11 As explained below, the jury’s verdict cannot be sustained under the second alternate
12 basis or the third alternate bases set forth in *Klem*.

13 **A. The Jury’s Verdict Cannot Be Sustained Under the Second Alternate
14 Basis in *Klem v. Washington Mut. Bank* Because Whitepages’ Conduct
15 Had No Capacity to Deceive a Substantial Portion of the Public**

16 The second alternate basis for a CPA claim, namely, “an act or practice that has the
17 capacity to deceive substantial portions of the public,” is encapsulated in the court’s Jury
18 Instruction No. 23 (Dkt. 343C), which is based upon Washington Pattern Instruction No.
19 310.08, and which was given to the jury without objection.

20 Spokeo presented no evidence at trial that could have allowed the jury to reasonably
21 infer that Whitepages’ conduct had the “capacity to deceive a substantial portion of the
22 public.”

23 No witness testified in the role of a “consumer,” or as a member of the public at large,
24 or on behalf of the public at large. All of the corporate employees who testified had primary
25 obligations to their own respective employers, not to the public. No witness testified that any
26 persons, other than employees of Whitepages and/or employees of the respective endemic
partner corporations, had any knowledge of Whitepages’ allegedly unfair or deceptive
activities, including Whitepages’ efforts to develop the Whitepages Premium product; or any

1 knowledge of Whitepages’ allegedly deceptive communications with Spokeo and the other
2 endemic partners. The court agrees with Whitepages’ assertion that:

3 At most, Spokeo proved conduct aimed at the handful of tech
4 companies participating in ad campaigns, that Whitepages (1) used
5 information it developed running ad campaigns but which it owned
6 and was contractually entitled to use “in any manner, in its sole
7 discretion” to develop its competing product; (2) from September
8 to December 2, 2015, concealed from those advertisers that
9 Whitepages was developing and testing a competing product; and
10 (3) between December 2, 2015 and February 12, 2016, did not tell
11 those advertisers that if the new product was successful,
12 Whitepages might choose to no longer sell advertisements by
13 auction. [Emphasis in original]

14 Motion at 3 (Dkt. 360). For purposes of this motion, the court assumes that the jury found
15 that Whitepages’ actions were unfair and deceptive vis-à-vis Spokeo and the other “endemic
16 partners” (auction participants similarly situated to Spokeo). But the evidence presented
17 could not possibly justify an inference that anything Whitepages said or did had the capacity
18 to deceive a substantial portion of the public.

19 The relationship that Spokeo and the other endemic partners had with Whitepages is
20 similar to the relationship that the dealers had with Goodyear Tire & Rubber Co. in
21 *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn.App. 732, 935 P.2d 628 (1997).

22 In that case, the court stated:

23 [The claimant’s] evidence does not show Goodyear engaged in
24 unfair or deceptive acts or that its conduct affected the public
25 interest. Only acts that have the capacity to deceive a substantial
26 portion of the public are actionable. *Hangman Ridge [Training
Stables, Inc. v Safeco Title Ins. Co.]*, 105 Wn.2d [778] at 785, 719
P.2d 531 [(1986)]. [The claimant] has not made such a showing
here. *Goodyear’s conduct was not directed at the public. Its
competition with dealers and the tactics it used to secure
dealership expansions had no deceptive capacity affecting the
public in general.* [Emphasis added]

Goodyear, 86 Wn.App. at 744, 935 P.2d 628.

1 Whitepages' conduct, however unfair and deceptive, was directed exclusively at, and
2 had adverse effects only on Spokeo and the handful of other endemic partners. Whitepages'
3 conduct had no "deceptive capacity affecting the public in general." *Ibid.* See also *Micro*
4 *Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn.App. 412, 438-439, 40 P.3d
5 1206 (2002) (affirming dismissal because deceptive contracts were sent to approximately
6 nine clients rather than "to a substantial portion of the public"); *Henery v. Robinson*, 67
7 Wn.App. 277, 291, 834 P.2d 1091 (1992) (defendant's misrepresentations were directed at
8 plaintiff alone and therefore were not capable of deceiving "substantial portion of the
9 public").

10 It is possible that the jurors may have misinterpreted Jury Instruction No. 23, which
11 provides:

12 In order to prove that Whitepages engaged in an unfair or
13 deceptive act or practice, it is sufficient to show that the act or
14 practice had the capacity to deceive a substantial portion of the
public. Neither intent to deceive nor actual deception is required.

15 Jury Instruction No 23 (Dkt. 343C). Jury Instruction No. 23 is based upon WPI 310.08 and
16 was given to the jury without objection by either party.

17 One of the jurors' questions was:

18 Regarding Jury Instruction No. 23: what is the meaning of
19 "capacity to deceive a substantial portion of the public"? Does
"the public" include only endemic advertisers, or the entire public?

20 Jury Note and Court Response (Dkt. 353E). After consulting with the parties' counsel, the
21 court responded:

22 The admitted exhibits and the jury instructions contain all of the
23 information that is relevant for purposes of reaching your verdict
regarding Spokeo's claims.

24 *Ibid.*

25 The court was advising the jurors to consider Jury Instruction No. 23 in conjunction
26 with all of the other jury instructions, including Jury Instruction Nos. 23-29 (the instructions

1 dealing with the CPA). Considering Jury Instruction Nos. 23-29 together, there can be seen a
2 common thread of “public policy” and “public interest” that must be inherent in Whitepages’
3 conduct, such that the phrase “substantial portion of the public” must mean exactly what it
4 says – a substantial portion of the public – and not just the limited group of companies that
5 advertised on Whitepages’ website.

6 To summarize, the court concludes that Spokeo presented no evidence at trial that
7 could have allowed the jury to reasonably infer that Whitepages’ conduct, however unfair
8 and deceptive to Spokeo, had the “capacity to deceive a substantial portion of the public.”

9 Thus, the court concludes as a matter of law that the jury’s verdict cannot be
10 sustained under the second alternate basis enunciated in *Klem v. Washing Mut. Bank*, 176
11 Wn.2d 771, 787, 295 P.3d 1179 (2013).

12
13 **B. The Jury’s Verdict Cannot Be Sustained Under the Third Alternate Basis**
14 **in *Klem v. Washington Mut. Bank* Because Whitepages’ Conduct Did Not**
15 **Impact the Public Interest**

16 Whitepages argues that Spokeo’s evidence fails to support the jury’s verdict under the
17 third alternate test enunciated in *Klem*, which requires proof of “an unfair or deceptive act or
18 practice not regulated by statute but in violation of public interest.” *Klem v. Washing Mut.*
19 *Bank*, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013).

20 Whitepages argues that no evidence was presented from which the jury reasonably
21 could infer that Whitepages’ conduct adversely impacted the public interest. Motion at 5-9.

22 The court agrees.

23 Washington’s CPA is modeled after federal consumer protection laws, and
24 incorporates many provisions of the federal acts. In enacting the CPA, the Legislature stated:

25 The legislature hereby declares that the purpose of this act is to
26 complement the body of federal law governing restraints of trade,
unfair competition and unfair, deceptive, and fraudulent acts or
practices in order to protect the public and foster fair and honest
competition. It is the intent of the legislature that, in construing this

1 act, the courts be guided by final decisions of the federal courts
2 and final orders of the federal trade commission interpreting the
3 various federal statutes dealing with the same or similar matters

RCW 19.86.920.

4 In *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 92 S.Ct. 898, 31 L.Ed.2d 170
5 (1972), the U.S. Supreme Court highlighted the federal public interest requirement, stating,
6 “[T]he Federal Trade Commission . . . like a court of equity, considers *public values* beyond
7 simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.”

8 [Emphasis added] 405 U.S. 233, 244, 92 S.Ct. 898, 31 L.Ed.2d 170. The U.S. Supreme
9 Court enunciated the federal public interest test:

10 ‘(1) whether the practice, without necessarily having been
11 previously considered unlawful, offends public policy as it has
12 been established by statutes, the common law, or otherwise—
13 whether, in other words, it is within at least the penumbra of some
14 common-law, statutory, or other established concept of unfairness;
15 (2) whether it is immoral, unethical, oppressive, or unscrupulous;
16 (3) whether it causes substantial injury to consumers (or
17 competitors or other businessmen).’ Statement of Basis and
18 Purpose of Trade Regulation Rule 408, Unfair or Deceptive
19 Advertising and Labeling of Cigarettes in Relation to the Health
20 Hazards of Smoking. 29 Fed.Reg. 8355 (1964). [Emphasis added]

21 *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 fn. 5, 92 S.Ct. 898, 31 L.Ed.2d 170
22 (1972), quoted in *Magney v. Lincoln Mut. Sav. Bank*, 34 Wn.App. 45, 57, 659 P.2d 537
23 (1983), and also quoted in *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 786, 295 P.3d 1179
24 (2013).

25 The language highlighted in the excerpt from the *Sperry & Hutchinson Co.* case,
26 above, is the basis for WPI 310.08, and it is the basis of Jury Instruction No. 24 (Dkt. 343C).

In 1976, in *Lightfoot v. MacDonald*, 86 Wn.2d 331, 544 P.2d 88 (1976), the
Washington Supreme Court emphasized the public interest element of a CPA claim:

Since the purpose of the [CPA] is to *protect the public interest*, it is
natural to assume that the legislature, in granting a private remedy

1 in RCW 19.86.090, intended to further implement the protection of
2 that interest. [emphasis added]

3 *Lightfoot*, 86 Wn.2d at 334, 544 P.2d 88. In the same discussion, the Supreme Court
4 emphasized the need for proof of a public-interest impact as part of a CPA claim:

5 It is the obvious purpose of the Consumer Protection Act to *protect*
6 *the public* from acts or practices which are injurious to consumers
7 and *not to provide an additional remedy for private wrongs which*
8 *do not affect the public generally*. [Emphasis added]

9 *Lightfoot*, 86 Wn.2d at 333, 544 P.2d 88 (1976).

10 Ten years later, in *Hangman Ridge Training Stables, Inc. v Safeco Title Ins. Co.*, 105
11 Wn.2d 778, 780, 719 P.2d 531 (1986), the Supreme Court acknowledged that Washington, at
12 that time, was one of only two states that required every private plaintiff to prove a public-
13 interest impact in every consumer action. The Court reaffirmed its public-interest-impact
14 requirement, in part, because RCW 19.86.920 states that the CPA “shall not be construed to
15 prohibit acts or practices which ... are *not injurious to the public interest*” [Emphasis added];
16 and in part because

17 [a]lthough the specific section creating a private right of action
18 does not mention public interest, we are compelled to interpret
19 RCW 19.86 in its entirety and conclude that the Legislature
20 intended that even a private plaintiff should be required to show
21 that the acts complained of affect the public interest.

22 *Hangman Ridge*, 105 Wn.2d at 788, 719 p.2d 531.

23 The court stated that “[o]rdinarily, a breach of a private contract affecting no one but
24 the parties to the contract is not an act or practice affecting the public interest.” *Hangman*
25 *Ridge*, 105 Wn.2d at 790, 719 P.2d 531. The Court went on to say that a trier of fact may
26 find that a breach of a private contract affects the public interest by evaluating several
factors:

Where the transaction was essentially a private dispute [citations
omitted] ... it may be more difficult to show that the public has an
interest in the subject matter. ... *Factors indicating public interest*
in this context include: (1) Were the alleged acts committed in the

1 *course of defendant's business? (2) Did defendant advertise to the*
2 *public in general? (3) Did defendant actively solicit this particular*
3 *plaintiff, indicating potential solicitation of others? (4) Did*
4 *plaintiff and defendant occupy unequal bargaining positions? As*
5 *with the factors applied to essentially consumer transactions, not*
6 *one of these factors is dispositive, nor is it necessary that all be*
7 *present. [Emphasis added]*

8 *Hangman Ridge*, 105 Wn.2d at 790-791, 719 P.2d 531.

9 In 2009, the Legislature enacted RCW 19.86.093, which provides additional non-
10 exclusive factors that may be helpful to CPA claimants in proving a public-interest impact.

11 The statute provides, in relevant part:

12 In a private action in which an unfair or deceptive act or practice is
13 alleged under RCW 19.86.020, a claimant *may* establish that the
14 act or practice is *injurious to the public interest* because it:

15 * * *

16 (3) (a) Injured other persons; (b) had the capacity to injure
17 other persons; or (c) has the capacity to injure other persons.
18 [Emphasis added]

19 RCW 19.86.093. The quoted language of RCW 19.86.093 is the basis for WPI 310.04,
20 which both parties proposed, and which the court gave to the jury as Jury Instruction No. 26.
21 (Dkt. 343C).

22 To summarize, evidence that a defendant's act or practice "injured" others, or that it
23 "had" or "has" the capacity to injure others, may (in context with other facts) support a
24 finding of public-interest impact. But such evidence, by itself, does not automatically
25 establish that the conduct is "injurious to the public interest." The trier of fact may evaluate
26 various other factors to tie the challenged conduct to public values and determine that the
challenged conduct adversely affects the public interest.

Numerous cases provide examples of misconduct that injures the public interest. *See,*
for example, Panag v. Farmers Ins. Co. of Washington, 166 Wn.2d 27, 204 P.3d 885 (2009)
(defendant's "deceptive use of traditional debt collection methods ... is precisely the kind of

1 ‘inventive’ unfair and deceptive activity the CPA was intended to reach,” 166 Wn.2d at 49,
2 204 P.3d 885); *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 786-787, 796-797, 295 P.3d 1179
3 (2013) (foreclosing trustee committed unfair or deceptive practice impacting the public
4 interest where trustee failed to exercise its authority to decide whether to postpone
5 nonjudicial foreclosure sale); *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 118,
6 285 P.3d 34 (2012) (mortgage registration company’s misrepresentation of its role as lawful
7 beneficiary of deeds of trust impacted public interest for purposes of homeowner’s CPA
8 claim); *Svendsen v. Stock*, 143 Wn.2d 546, 559, 23 P.3d 455 (2001) (real estate broker’s
9 knowing failure to disclose known material defect in real property to purchase impacted
10 public interest under *Hangman Ridge* test because broker’s conduct occurred in course of his
11 business, broker had advertised the real property to the public, and the parties occupied
12 unequal bargaining positions).

13 Conversely, in other cases courts have held that a claimant’s proof of injury or
14 potential injury, by itself, and without proof of any public-interest impact, is insufficient to
15 sustain a private plaintiff’s CPA claim. *See, for example, Magney v. Lincoln Mut. Sav. Bank*,
16 34 Wn.App. 45, 58, 659 P.2d 537 (1983) (bank’s attempt to enforce a due-on-sale clause did
17 not impact the public interest, and thus was not subject to CPA); *Hangman Ridge Training*
18 *Stables, Inc. v Safeco Title Ins. Co.*, 105 Wn.2d 778, 794, 719 P.2d 531 (1986) (public
19 interest element not met where (a) there was no evidence that defendant did “widespread
20 advertising” of the services that it performed for the plaintiffs, (b) defendant did not solicit
21 plaintiffs’ business, and (c) plaintiffs “had a history of business experience,” and thus were
22 “not representative of bargainers subject to exploitation and unable to protect themselves.”);
23 *Lightfoot v. MacDonald*, 86 Wn.2d 331, 338-339, 544 P.2d 88 (1976) (no public-interest
24 impact proved because “appellant has not shown that an attorney’s breach of contract causing
25 damage to no one but his client has a sufficient impact upon the public to qualify it as one of
26

1 those acts or practices which are prohibited under RCW 19.86.”); *Goodyear Tire & Rubber*
2 *Co. v. Whiteman Tire, Inc.*, 86 Wn.App. 732, 935 P.2d 628 (1997) (no public-interest impact
3 proved because the claimant (a Goodyear dealer) and other dealers allegedly victimized by
4 Goodyear’s allegedly unfair and deceptive acts were “not representative of bargainers
5 vulnerable to exploitation”); *Segal Co. (Eastern States), Inc. v. Amazon.com*, 280 F.Supp.2d
6 1229, 1234 (W.D.Wash. 2003) (no public interest impact because it was “unreasonable to
7 infer an entire pattern of deceptive solicitation affecting the public interest from [the] isolated
8 incident [pleaded in the plaintiff’s complaint].”

9
10 Considering all of the evidence and inferences in the light most favorable to Spokeo,
11 the court answers the exemplar questions posed in the *Hangman Ridge* case and RCW
12 19.86.093 as follows:

- 13 1. Were the alleged acts committed in the course of defendant’s business?
14 Yes.
- 15 2. Did defendant advertise to the public in general? No. Whitepages solicited
16 only a small number of companies to participate in Whitepages’ auction
17 program.
- 18 3. Did defendant actively solicit this particular plaintiff, indicating potential
19 solicitation of others? Even assuming that Whitepages actively solicited
20 Spokeo, the handful of other companies that Whitepages could solicit to
21 participate in its auction program was too small to justify a finding that any
22 such solicitations affected a substantial portion of the public.
- 23 4. Did plaintiff and defendant occupy unequal bargaining positions? No.
24 Spokeo and Whitepages are sophisticated business entities, and it cannot be
25 said that “plaintiff and defendant occupied unequal bargaining positions.”
26

1 *Hangman Ridge*, 105 Wn.2d at 790-791, 719 P.2d 531; *Goodyear Tire &*
2 *Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn.App. 732, 935 P.2d 628 (1997).

- 3 5. Did Whitepages' acts or practices injure other persons? Yes. Whitepages'
4 closure of its auction program and its initiation of the Whitepages Premium
5 product affected Spokeos and the several other endemic partners (auction
6 participants) in approximately the same way.
- 7 6. Did Whitepages' acts or practices have the capacity to injure other persons
8 (i.e., other than the endemic partners)? No. Once Whitepages discontinued
9 its auction program, there was no possibility of harm to any persons other than
10 the endemic partners.
- 11 7. Do Whitepages' acts or practices currently have the capacity to injure other
12 persons? No. Whitepages has terminated the auction program.

13 Having answered these questions, the court concludes as a matter of law that
14 Whitepages' actions did not impact the public interest, and thus that the jury's verdict cannot
15 be sustained under the third alternate basis enunciated in *Klem*, 176 Wn.2d 771, 787, 295
16 P.3d 1179 (2013).

17 **C. Whitepages Was Motivated by Legitimate Business Concerns**

18 Even if a private claimant proves injury and the potential for injury to others, such
19 evidence will not support a finding of public-interest impact where the defendant's conduct is
20 motivated by legitimate business concerns. In *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38,
21 738 P.2d 665 (1987), the court explained:

22 In applying the [CPA], we must follow two broad guidelines: (1) it
23 shall be liberally construed so that its beneficial purposes may be
24 served, and (2) *it shall not prohibit acts or practices which are*
25 *reasonable in relation to the development and preservation of*
26 *business, or which are not injurious to the public interest.* RCW
19.86.920. The latter consideration requires courts to “weigh the
public interest in prohibiting anticompetitive conduct against the

1 recognition that businesses *need some latitude within which to*
2 *conduct their trade.*” *State v. Black*, 100 Wn.2d 793, 803, 676 P.2d
3 963 (1984). *Where conduct is motivated by legitimate business*
4 *concerns, there can be no violation of RCW 19.86. Black*, [101
5 Wn.2d] at 802–03, 676 P.2d 963. [Emphasis added]

6 *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d at 54, 738 P.2d 665. In that case, the court found
7 that there was no evidence of any public-interest impact, and reversed a jury verdict on the
8 plaintiff’s CPA claim, because “Boeing’s actions [fell] well within the protection of RCW
9 19.86.920 of ‘acts or practices which are reasonable in relation to the development and
10 preservation of business or which are not injurious to the public interest.’” *Id.* at 60, 738 P.2d
11 665.

12 Here, as in *Boeing Co. v. Sierracin Corp.*, Whitepages’ acts or practices were
13 motivated by legitimate business concerns. Whitepages had a duty to its shareholders to
14 operate profitably. Its activities were directed to that goal. The jury found that Whitepages
15 did not violate the parties’ Marketplace Agreement (Verdict (Dkt. 353A)), which necessarily
16 means that (a) Whitepages’ efforts to develop the Whitepages Premium program did not
17 violate the parties’ contract, and (b) Whitepages’ termination of the auction program without
18 written notice did not violate the contract. The jury also found that Whitepages did not
19 commit fraud or make any negligent misrepresentations to Spokeo. *Ibid.*

20 Given the jury’s findings in favor of Whitepages on these non-CPA claims, the court
21 concludes that, however harmful Whitepages’ conduct may have been to Spokeo and to the
22 other endemic partners, such conduct was motivated by legitimate business concerns; and
23 that Whitepages acted in good faith to promote Whitepages’ own business interests. RCW
24 19.86.920. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d at 54, 58, 738 P.2d 665 (1987).

25 Thus, as a matter of law, Whitepages’ conduct does not provide a factual basis for a
26 CPA claim, and the jury’s CPA verdict must be reversed.

1 **D. Negative Inference Instruction Did Not Permit Jury to Conclude That**
2 **Whitepages’ Conduct Had Capacity to Deceive Substantial Portion of**
3 **Public or that Whitepages’ Conduct Impacted Public Interest**

4 Jury Instruction No. 37 allowed the jury to draw negative factual inferences from the
5 fact that during discovery, Whitepages did not to turn over to Spokeo the original files of
6 certain intra-company electronic communications generated by and distributed solely among
7 Whitepages’ employees. Instruction No. 37 states, in part:

8 Based on the evidence presented during the trial, you may (but you
9 are not required to) infer that had the native Yammer files been
10 turned over to Spokeo during discovery, the files would have
11 contained or led to relevant admissible evidence favorable to
12 Spokeo’s claims and harmful to Whitepages’ defense in this case.

13 Based on this same evidence, you may (but you are not required
14 to) infer that Whitepages did not produce the Yammer
15 communications to Spokeo and that Whitepages terminated its
16 Yammer.com account for the reason that Whitepages was
17 concerned that some information in the native Yammer files was
18 (or might be) adverse to Whitepages’ position in this case

19 Jury Instruction No. 37 (Dkt. 343C).

20 Despite having been given the latitude allowed by this instruction, the jury
21 nevertheless determined that Whitepages did not breach the parties’ MPA, did not commit
22 fraud, and did not make negligent misrepresentations to Spokeo. Special Verdict
23 (Dkt. 353A).

24 Given the jury’s rejection of Spokeo’s non-CPA claims, the court concludes that the
25 jury chose not to draw any negative inferences from the fact that Whitepages did not turn
26 over its intra-company electronic communications during discovery (or at least the jury
determined that any such inferences were insignificant).

 In any event, no matter how many intra-company electronic communications
Whitepages might have withheld from Spokeo during discovery, Instruction No. 37 would
not have justified the jurors in inferring that Whitepages’ conduct had the capacity to deceive

1 a substantial portion of the public; or that Whitepages' conduct negatively impacted the
2 public interest; or that Whitepages was not motivated by legitimate business concerns; or that
3 Whitepages' actions were not taken in good faith to promote its own business interests.

4
5 **E. Conclusion**

6 Having reviewed all of the evidence and all reasonable inferences most favorably to
7 Spokeo, the court concludes, as a matter of law, that the evidence and the reasonable
8 inferences are legally insufficient to support the jury's verdict on Spokeo's CPA claim under
9 any of the three alternate tests set out in *Klem v. Washington Mut. Bank*, 176 Wn.2d 771,
10 787, 295 P.3d 1179 (2013). Thus, the jury's verdict on Spokeo's CPA claim cannot be
11 sustained and must be reversed.

12 **6. Order**

13 For the reasons stated above, the court:

- 14 1. Grants Defendant Whitepages, Inc.'s Renewed Motion for Judgment as a
15 Matter of Law on Plaintiff Spokeo's Consumer Protection Act Claim (Dkt. 360).
16 2. Reverses the jury's \$72,915 verdict (Dkt. 353A) on Plaintiff Spokeo, Inc.'s
17 claim against Defendant Whitepages, Inc., based upon the Consumer Protection Act, Chapter
18 19.86 RCW.

19 Date: August 1, 2018.

20 s/ John R. Ruhl
21 John R. Ruhl, Judge

King County Superior Court
Judicial Electronic Signature Page

Case Number: 16-2-07970-9
Case Title: SPOKEO INC VS WHITEPAGES INC

Document Title: ORDER GRTG D'S MOT FOR JNOV

Signed by: John Ruhl
Date: 8/2/2018 9:00:00 AM



Judge/Commissioner: John Ruhl

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