IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TORRES MAZATLAN REMAINDER, LLC, a Washington limited liability company; VALLARTA TORRE REMAINDER, LLC, a Washington limited liability company; VACATION TIMESHARE PROGRAM REMAINDER, LLC, a Washington limited liability company,	)	No. 64747-4-I
Respondents,	)	DIVISION ONE
v.	)	UNPUBLISHED OPINION
FLRX, INC., formerly known as DIAMOND RESORTS PACIFIC, INC., a Washington corporation, formerly known as SUNTERRA PACIFIC, INC., formerly known as VACATION INTERNATIONALE, LTD.,	)	
Appellant.	)	FILED: November 14, 2011

Schindler, J. — Torres Mazatlan Remainder LLC, Vallarta Torre Remainder LLC, and Vacation Timeshare Program Remainder LLC (LLCs) filed a lawsuit against FLRX Inc. for breach of contract and violation of the Consumer Protection Act, chapter 19.86 RCW (CPA).[1] After a three-week trial, the jury awarded the LLCs $14,794,013 for breach of contract. The jury also awarded the LLCs $14,794,012 for violation of the

[1] FLRX Inc. is the successor in interest to Signature Resorts Inc., Sunterra Pacific Inc., and Diamond Resorts Pacific Inc.

CPA. FLRX asserts the LLCs were not entitled to lost profit damages for breach of contract and the trial court erred in denying the motion to exclude evidence of lost profits. In the alternative, FLRX claims the court erred in refusing to give the jury instruction it proposed on lost profits. FLRX also contends the LLCs did not establish causation or damages for violation of the CPA, and the trial court erred in ordering specific performance and in denying the motion for a new trial based on juror misconduct. We affirm.

FACTS

In 1974, Bob Ringgenberg and Bob Burns founded Vacation Internationale Ltd. (VI). VI developed, managed, and sold timeshare interests in resort properties. Unlike other timeshare programs at the time, the VI program was based on purchasing points that allowed the "Vacation Time Share" (VTS) owner the right to use any of the resort properties owned by VI at any time. The VTS contract price was based on the number of points purchased.

VI acquired real estate for the VTS program by purchasing some or all condominium units at different resorts. VI purchased condominiums in resorts located in the United States, Hawaii, Canada, and Mexico, including the two resort properties that VI developed, Vallarta Torre and Torres Mazatlan.

VI put the condominium units in a trust for the VTS program that expired in 30 to 40 years. When the trust expired, title to the properties returned to VI. VI referred to the real estate interest that it owned after the trust expired as the "remainder interest." Each VTS contract lists the condominiums in the program and the date each unit is

scheduled to come out of the VTS trust.

In 1983, VI began offering VTS owners the opportunity to enter into an agreement to extend membership in the VTS program beyond the term of the original contract and buy an ownership interest in a particular condominium unit. Under the extension agreement, when the original contract ended, the owner could continue using points in the VTS program until the term of the trust expired and VI could transfer ownership interest in the unit. Between 1983 and 1997, VI sold approximately 7,000 extension interests to 3,500 VTS owners. By 1997, VI owned 709 condominiums at 22 different resorts located in the United States, Hawaii, Canada, and Mexico, and there were 31,000 owners in the VTS program.

In 1997, Ringgenberg and Burns entered into negotiations with a large, publically traded timeshare company, Signature Resorts, to purchase VI for approximately $16 million. Signature Resorts was primarily interested in the business rather than the real estate owned by VI and offered to purchase the stock for $8 million. In exchange, Signature agreed that Ringgenberg and Burns would continue to own the remainder interests for the properties.

On August 11, 1997, Signature and Ringgenberg and Burns as the shareholders of VI, entered into the "Agreement for Purchase and Sale of Stock of Vacation Internationale, Ltd. ('VI') and Mazatlan Development, Inc. ('Mazatlan') and Their Subsidiaries and Affiliates By and Among Signature Resorts, Inc. ('SRI') and the Shareholders of VI and Mazatlan" (Stock Purchase Agreement). The Stock Purchase Agreement also gave Signature an option to buy remainder interests owned by

Ringgenberg and Burns by November 7, 2002. The agreement allowed Ringgenberg and Burns to resume selling extension agreements for the remainder interests Signature did not purchase after November 7, 2002.

Because the transfer of the real estate remainder interests could not be accomplished before the closing date for the Stock Purchase Agreement, the parties agreed that Signature would purchase VI stock and real estate and then transfer the remainder interests back to Ringgenberg and Burns after the closing date in December 1997. To facilitate transferring the real estate remainder interests, Ringgenberg and Burns formed three LLCs, Torres Mazatlan Remainder LLC, Vallarta Torre Remainder LLC, and VTS Program Remainder LLC.

In 1998, Signature and Ringgenberg and Burns entered into agreements to transfer the remainder interests to the LLCs, the "Beneficial Interests Agreement" and the "Remainder Interests Agreement."

On June 17, 1998, the parties entered into the Beneficial Interests Agreement. The Beneficial Interests Agreement covers the resort properties VI owned in Mexico. The agreement requires Signature to transfer the remainder interests in the timeshare units located at the Vallarta Torre Resort and the Torres Mazatlan Resort to Vallarta Torre Remainder LLC and Torres Mazatlan Remainder LLC. The agreement provides, in pertinent part:

> SELLER hereby agrees sell [sic] and to cause TMSA [(Torres Mazatlan S.A.)] and TVSA [(Torre[ ] Vallarta S.A.)] to sell and PURCHASERS hereby agree to purchase the Beneficial Interest in the Remainder of the VTS Apartments located at the Torres Mazatlan Condominium in Mazatlan, Sinaloa Mexico, and the Vallarta Torre Condominium located in Puerto Vallarta, Jalisco Mexico, as listed on Exhibit A and Exhibit B respectively, with the term of the Remainder commencing for each

apartment on the day shown on Exhibit A and Exhibit B under the column

> entitled, "First Day of Remainder Term."
> . . . .
> SELLER hereby agrees to execute and to cause TMSA and TVSA to execute and record the necessary transfer documents, in a form acceptable to both SELLER and PURCHASER.

The Beneficial Interests Agreement allows the LLCs to begin marketing and selling the Vallarta Torre and Torres Mazatlan real estate remainder interests beginning November 7, 2002 to VTS program owners of record as of November 7, 1997. Exhibit D to the agreement incorporates the extension agreement Ringgenberg and Burns used to sell remainder interest extension agreements before 1997, "VTS Extension Purchase Agreement." In the Beneficial Interests Agreement, the parties agreed to the terms and conditions in the VTS Extension Purchase Agreement attached as Exhibit D.

> SELLER agrees to allow PURCHASER and or its agent to sell and/or solicit the VTS Owners of record as of November 7, 1997, or their assigns, for the sales of the VTS REMAINDER being purchased or reconciled herein beginning November 7, 2002. SELLER shall permit such sales to be executed pursuant to a VTS Extension Purchase Agreement agreed to by Seller and Purchaser which contains the terms and conditions of the VTS Extension Purchase Agreement attached hereto as Exhibit D.

The VTS Extension Purchase Agreement contained the same terms and conditions as the extension agreement VI had sold since 1983. The extension agreement allowed a VTS owner to purchase all or part of the remainder interest in a condominium in the VTS program. The agreement also extended the VTS owner's original contract until the expiration of the condominium's trust and while the condominium was kept in the VTS program. Owners that purchased an extension agreement agreed to remain bound by the terms of the VTS program. The extension agreement attached as Exhibit D states, in pertinent part:

> The undersigned purchaser . . . desires to purchase a Vacation Time Share ("VTS") Extension Interest comprised of an undivided fee or leasehold interest in a VTS apartment Remainder to be held in the VTS Remainder Trust, coupled with a continuation of existing VTS contract(s), both as more completely defined below.
>
> . . . .
>
> You also agree that during any period that your VTS contract(s) are continued, and so long as the apartment in which You have a Remainder Interest is used in the VTS program, You will be subject to and obligated by all of the terms and conditions of the VTS Owner Agreement, and the operating policies of the VTS program which are hereby incorporated by reference as if set forth verbatim.

Signature also agreed to amend the condominium declarations of the Mazatlan and Puerto Vallarta properties and, at its expense, resolve a dispute with the Mexican government over ownership of beachfront property at the Vallarta Torre.

> SELLER hereby agrees, at is [sic] expense, to complete the amendment of the condominium declaration for the Torres Mazatlan Condominium and the Vallarta Torre Condominium in a form acceptable to both SELLER and PURCHASER . . . including in the case of Vallarta Torre, resolution of the dispute with the Mexican government as to the ownership of a portion of the land upon which the Vallarta Torre Condominium has been constructed.

On August 15, 1998, the parties entered into the Remainder Interests Agreement. That agreement covers the resort properties located in the United States, Hawaii, and Canada, and contains the same terms as the Beneficial Interests Agreement—the obligation to transfer the remainder estate interests in the timeshare properties to the LLCs, and the agreement that the LLCs could begin marketing and selling remainder interest extension agreements after November 7, 2002 according to the terms set forth in the extension agreement used before the sale in 1997, that is attached as an exhibit. The Remainder Interests Agreement provides, in pertinent part:

> SELLER hereby agrees to sell and PURCHASER hereby agrees to purchase the REMAINDER interests in the VTS Apartments listed on

Exhibit A, the REMAINDER commencing in each instance on the day

> show on Exhibit A, as “First Day of VTSRLLC Remainder Interest.”
> . . . .
> SELLER agrees to allow PURCHASER and or its agent to sell and/or solicit the VTS Owners of record as of November 7, 1997, or their assigns, for the sales of the VTS REMAINDER begin purchased or reconciled herein beginning November 7, 2002. SELLER shall permit such sales to be executed pursuant to a VTS Extension Purchase Agreement agreed to by Seller and Purchaser which contains the terms and conditions of the VTS Extension Purchase Agreement attached hereto as Exhibit C.

Signature Resorts later changed its name to Sunterra Corporation. In 2007, Sunterra was acquired by Diamond Resorts Corporation. FLRX is the successor in interest to Diamond Resorts.

FLRX did not transfer title to the real estate remainder interests to the Torres Mazatlan or Vallarta Torre remainder interests by November 7, 2002 as agreed to in the Beneficial Interests Agreement. FLRX also did not resolve the dispute with the Mexican government over the beachfront property at the Vallarta Torre resort.[2] FLRX did not transfer title to the remainder interests by November 7, 2002 as agreed to in the Remainder Interests Agreement to condominium units at Oasis Resort in Palm Springs, California. In addition, FLRX would not sign documents that the LLCs needed to register and obtain approval to begin marketing and selling the remainder interest agreements to the 31,000 VTS program owners.

From 1997 until 2004, FLRX sold perpetual point upgrade (PPU) contracts to the VTS program owners. FLRX marketed the PPU contracts to VTS owners as a means to continue using points “in perpetuity” after the existing timeshare agreement expired. FLRX did not inform purchasers of the PPU contracts that a majority of the units would

[2] FLRX later entered into an agreement giving the government ownership and leasing the property back to the resort for 15 years.

no longer be available for use in the VTS program after the trusts expired. Between 1997 and 2004, FLRX sold 4,571 PPU contracts generating revenues of approximately $12 million.

In an internal memo to FLRX executives, a VTS program manager expressed concern about the failure to disclose to VTS owners who purchased the PPU contracts, that only nine properties were actually available for use "in perpetuity."

> The truth of the matter is simply this; "we are selling perpetual interest into the VTS program that at present will only have 9 properties in perpetuity. We purposely do not disclose that 59% of the properties will drop out of the Trust when the 40 year contracts expire."
>
> It is simple to say, stop selling this product. We presently have a 6 million dollar exposure. We have already refunded 2 contracts that potentially could have been very damaging. If it is not prompted by the board, someone else may get a hold of it.
>
> If we do a proper disclosure, there will not be sales. That's why management decided to drop Schedule B (which listed when the properties would fall out of the Trust).

On July 21, 2003, the LLCs filed a complaint for declaratory and injunctive relief, and damages against FLRX. The LLCs alleged breach of contract, violation of the CPA, and unjust enrichment. The LLCs alleged FLRX breached the 1998 agreements by failing to timely transfer the remainder interests, failing to resolve the property dispute in Mexico, and refusing to allow the LLCs to sell extension agreements to the VTS program owners. The LLCs also alleged that FLRX engaged in a deceptive act or practice by marketing and selling PPU contracts to the 31,000 VTS program owners identified in the 1998 agreements as the potential purchasers of the remainder interest extension agreements the LLCs planned to sell after November 7, 2002. The LLCs requested damages, including lost profits, an order enforcing the two 1998 agreements,

an order requiring FLRX to offer all PPU purchasers the opportunity to rescind, and specific enforcement.

FLRX asserted a number of affirmative defenses, including impossibility of transferring title to remainder interests and resolving the land dispute in Mexico, and failure of the LLCs to mitigate damages. FLRX filed a counterclaim against the LLCs for breach of the implied covenant of good faith and fair dealing. The LLCs filed a motion for partial summary judgment on the counterclaim. The trial court granted the motion for partial summary judgment on breach of the covenant of good faith and fair dealing.

FLRX transferred all of the real estate remainder interests indentified in the Beneficial Interests Agreement and the Remainder Interests Agreement to the LLCs, except 118 units at the Oasis Resort in Palm Springs and 64 units at the Vallarta Torre resort before trial. In May 2008, the LLCs sold the real estate remainder interests at Torres Mazatlan for $8.2 million.[3]

During discovery, the LLCs identified the accounting firm of KPMG LLP and a partner at KPMG, Randi Rosen, as an expert witness at trial on damages. The LLCs also provided FLRX with the “Lost Profit Analysis and Estimate of Damages” prepared by KPMG in June 2009. In the analysis, KPMG calculates the available market for sale of the remainder interests to 31,000 VTS owners as of November 7, 1997, and concludes the number of points were approximately 3.2 million. The analysis assumes approximately one-half of the VTS program owners would have been interested in

[3] FLRX also exercised its option and purchased approximately ten percent of the remainder interests for $2.2 million.

purchasing the remainder interests from the LLCs, or approximately 1.5 million in points valued at $174 per point. After deducting the value of the real estate, KPMG calculated lost profit damages as of May 2007 of approximately $27 million, or approximately $34 million if marketable title to the units at Oasis Palm Springs and Vallarta Torre remained unresolved.

FLRX filed a number of motions in limine, including a motion to exclude evidence of lost profits, and a motion to strike expert testimony because KPMG did not analyze "market conditions and a profit showing of identical or similar businesses in the vicinity, operating under substantially the same conditions" to support an award of lost profits for a new business. The LLCs argued that the new business rule did not apply because Ringgenberg and Burns began selling extension agreements in1983, and the Beneficial Interests and Remainder Interests Agreements expressly incorporated the terms of those extension agreements and allow the LLCs to continue that business. The trial court denied the motion to exclude evidence of lost profits and strike expert testimony.

The three-week trial began on October 12, 2009. Ringgenberg and the LLCs' expert on damages testified extensively at trial. Ringgenberg testified about the timeshare business, the sale of extension agreements, and the agreement to sell VI to Signature. Michael Burns testified about his experience selling extension agreements when he worked for VI, including the cost of sales and marketing the extensions as compared with the cost of selling contracts to new timeshare customers.

Rosen testified about the methodology used by KPMG to calculate lost profit

damages. Rosen also testified about the impact of the sale by FLRX of the PPU contracts on the available market for sale of remainder interest agreements by the LLCs. Rosen stated that VTS owners would not purchase both a PPU contract and an extension agreement. Rosen also testified about the value of the real estate remainder interests. As of the time of trial, Rosen calculated lost profits of $27,059,335 if FLRX transferred marketable title to all the properties, and $34,717,114 if FLRX did not transfer marketable title to the units at Oasis Palm Springs and Vallarta Torre.

FLRX moved for a directed verdict at the conclusion of the LLCs' case in chief. FLRX argued that the LLCs did not prove that FLRX breached the 1998 contracts, that the claim for lost profits was barred by the new business rule, and the LLCs did not prove causation under the CPA. The trial court denied the motion for a directed verdict. In addressing lost profit damages, the court ruled:

> Generally, the projection of lost profits can't be done with absolute certainty and total mathematical predictability when it comes to allegedly new businesses, and I don't think the law requires it. The rule in Washington is that lost profits will not be denied merely because a new business -- or a business is new if factual data is available to furnish a basis for the computation of probable losses where the fact is well established that profits would have been made and the difficulty in proving their amount is directly caused by the defendant's breach. . . . While there are no comparables and I would agree that there are no comparables for Ms. Rosen to have utilized, I still do not find that the law in Washington requires it. I do find the historical evidence adequate and the assumptions upon which Ms. Rosen relied upon adequate for her opinion and it affords a reasonable basis for her conclusion.

Al Bentley, the president of FLRX and a certified public accountant with experience in analyzing the profitability of timeshare companies, testified that the value of remainder interests "is higher as a real estate asset than [when] it is sold as a

timeshare property." Bentley disagreed with the assumption used by Rosen as to the valuation of points and the costs associated with sale of a remainder interest extension agreement. Bentley stated that the points should be valued at $143 a point, not $174, and that based on the costs of sale incurred for the PPU contracts, costs of sale were 70 percent, not 30 percent. However, Bentley agreed that "Ms. Rosen used the appropriate method for calculating lost profits and using the income approach for determination of how this claim should be calculated." FLRX also presented testimony challenging the viability of selling "standalone remainders," and evidence about the marketability of title to the units in Mexico and Palm Springs.

The court instructed the jury on breach of contract, common law unfair competition, and unfair or deceptive trade practices under the CPA, as well as the affirmative defense of impossibility and failure to mitigate. The court also instructed the jury on the measure of damages for breach of contract and unfair competition. The court gave the jury an instruction on lost profits but refused to give the lost profits instruction proposed by FLRX.

In the special verdict form, the jury found that FLRX breached the 1998 agreements and awarded the LLCs $14,794,013. The jury also found that FLRX did not prove impossibility and did not transfer marketable title to the remainder interests in Vallarta Torre and Oasis in Palm Springs. The jury found that FLRX engaged in unfair or deceptive trade practices in violation of the CPA and awarded the LLCs $14,794,012 in damages.

Based on the finding that FLRX did not transfer marketable title to the Vallarta

Torre and Oasis remainder interests, the trial court entered an order of specific performance. In the order, the trial court also ruled that specific performance is appropriate because FLRX was unlikely to satisfy the money judgment and the properties were unique with no suitable substitute.[4] The court awarded the LLCs attorney fees and costs totaling $1,536,405.90.

FLRX filed a motion for judgment notwithstanding the verdict. FLRX argued that the lost profit damages were barred by the new business rule, that the LLCs did not prove causation under the CPA, and that the order of specific performance resulted in a double recovery. FLRX also filed a motion for a new trial asserting juror misconduct. The trial court denied the motion, entered judgment on the jury verdict, and awarded attorney fees. The court denied the motion for judgment notwithstanding the verdict and the motion for a new trial.

ANALYSIS

Lost Profits

FLRX argues that the LLCs are not entitled to recover lost profit damages for the lost opportunity to sell remainder real estate interests to VTS program owners. FLRX asserts that because the sale of remainder interests was a new business, the trial court erred in denying the motion to exclude evidence of lost profits and the motion to strike Rosen's testimony. Alternatively, FLRX asserts the trial court erred in refusing to give its proposed jury instruction on lost profits.

FLRX contends that because the sale of "standalone remainders" was a new

[4] The record reflects FLRX filed for bankruptcy in federal court under Chapter 11 of the Bankruptcy Code.

business, absent evidence of the profit history of similar businesses in the same industry and operating under substantially the same conditions, an award for lost profit damages is speculative. The LLCs argue that selling remainder interests was not a new business, and even if characterized as a new business, Rosen's testimony established lost profits with reasonable certainty.

To recover lost profits, the LLCs must prove lost profits with reasonable certainty. Larsen v. Walton Plywood Co., 65 Wn.2d 1, 16, 390 P.2d 677 (1964). Lost profits are recoverable as damages if contemplated by the parties at the time the contract was made, are the proximate result of defendant's breach, and are proven with reasonable certainty. Larsen, 65 Wn.2d at 15.

In Larsen, the court held that the plaintiff need not prove the exact amount of lost profits for a new business if the evidence is sufficient to establish a reasonable basis for estimating the plaintiff's lost profits. Larsen, 65 Wn.2d at 18. Accordingly, a new business can establish lost profit damages if there is factual data available to furnish a basis for computation of probable losses. Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp., 66 Wn.2d 469, 476, 403 P.2d 351 (1965). The court also states that expert testimony may support lost profits if it is based on "tangible evidence."

> So long as their opinions afford a reasonable basis for inference, there is departure from the realm of uncertainty and speculation. Expert testimony alone is a sufficient basis for an award for loss of profits. . . . Although expert testimony is a sufficient basis for an award of lost profits, their opinions must be based upon tangible evidence rather than upon speculation and hypothetical situations.

Larsen, 65 Wn.2d at 17, 19.

Accordingly, lost profit damages "must be susceptible of ascertainment in some

manner other than by mere speculation, conjecture, or surmise and by reference to some definite standard, such as market value, established experience, or direct inference from known circumstances." Gaasland Co., Inc. v. Hyak Lumber & Millwork, Inc., 42 Wn.2d 705, 713, 257 P.2d 784 (1953).[5]

FLRX asserts that in order to establish lost profit damages, Farm Crop Energy, Inc. v. Old National Bank of Washington, 109 Wn.2d 923, 750 P.2d 231 (1988) required the LLCs to present evidence of comparable businesses operating in the same locale, or at a minimum, in a comparable market. In Farm Crop, a group of investors with no experience in the ethanol industry planned to build an ethanol plant. The investors sued the bank for breach of a contract to provide a loan and alleged lost profit damages. Farm Crop, 109 Wn.2d at 925-27. At trial, the investors presented the testimony of an expert witness with no experience in the ethanol industry who "testified in generalities, without dollar amounts or percentages, as to construction and operation costs." Farm Crop, 109 Wn.2d at 929. While the expert was aware of other ethanol plants operating in the area, he knew nothing of their profitability. Farm Crop, 109 Wn.2d at 931. The expert "candidly admitted that his pro forma estimate of future profits was 'an uneducated judgment.' " Farm Crop, 109 Wn.2d at 931.[6]

Applying the test in Larsen, the court held that the expert's testimony was speculative and did not support the award of lost profit damages. Farm Crop, 109 Wn.2d at 931. The court also noted that the investors did not present evidence based on market conditions and profits of identical or similar businesses "in the vicinity,

[5] (Italics omitted) (citation and internal quotation marks omitted.)
[6] (Italics omitted.)

operating under substantially the same conditions.” Farm Crop, 109 Wn.2d at 928-29.

> Applying the Larsen test, we conclude that here there was no substantial and sufficient basis upon which Christensen based his “expert” testimony regarding Farm Crop’s lost profits. Here, the jury was not presented with evidence based on market conditions and profit showings of identical similar business in the vicinity, operating under substantially the same conditions. See Larsen, at 17. None of the criteria identified in Larsen as justifying a departure from the new business rule are present here. Christensen’s testimony here did not depart from the realm of uncertainty and speculation so as to support an award of lost profits.

Farm Crop, 109 Wn.2d at 931.

In No Ka Oi Corp. v. National 60 Minute Tune, Inc., 71 Wn. App. 844, 850, 863 P.2d 79 (1993), this court addressed the question of whether testimony about “local comparables” are necessary to prove lost profit damages. In No Ka Oi, the expert testified about the plaintiff’s lost profits but did not base his opinion on an analysis of similar businesses in the vicinity, or "local comparables." We rejected the requirement that lost profit damages must always be based on “local comparables.”

> Unwavering adherence to [the "local comparables" rule], regardless of the facts and circumstances actually proved, would be anomalous. Indeed, the Larsen court held that the plaintiff had sufficiently proved that profits would have been realized even though “[t]here was no comparable [business] from whose history of profits [the damages] figure could have been entirely drawn, for . . . there were no comparables. . . . [L]ost profits will not be denied merely because a business is new if factual data is available to furnish a basis for computation of probable losses. . . . Where the fact is well established that profits would have been made and the difficulty in proving their amount is directly caused by the defendant's breach, a greater liberality is permitted in making estimates and drawing inferences.”

No Ka Oi, 71 Wn. App. at 851 (quoting Larsen, 65 Wn.2d at 19).[7]

And here, unlike in Farm Crop, the evidence established a reasonable basis for

[7] (Italics omitted) (some alterations in original) (citations and internal quotation marks omitted.)

estimating lost profits. Rosen conducted an independent analysis of sales, marketing, the costs of extension agreement sales, the extension agreement sales before 1997, and the sales by FLRX of the PPU contracts after 1997. Rosen reviewed timeshare industry data on sales, pricing, and demand trends for products similar to extension agreements, and consulted with former FLRX executives and executives of other timeshare companies and trade groups.[8] Rosen also analyzed FLRX's PPU sales, pricing, and revenue information to determine the impact of PPU sales on the market availability. The court did not err in allowing Rosen to testify and evidence of lost profits.

In the alternative, FLRX contends the court erred in refusing to give its proposed jury instruction on lost profits. "A trial court's decision to give a jury instruction is reviewed de novo if based upon a matter of law, or for abuse of discretion if based upon a matter of fact." Kappelman v. Lutz, 167 Wn.2d 1, 6, 217 P.3d 286 (2009). Instructions are sufficient if they permit each party to argue his theory of the case, are not misleading, and when read as a whole, properly inform the trier of fact of the applicable law. Farm Crop, 109 Wn.2d at 933. The court has no duty to give an incorrect instruction. Griffin v. West RS, Inc., 143 Wn.2d 81, 90, 18 P.3d 558 (2001).

The court instructed the jury on the issue of lost profits as follows:

> In this case, plaintiffs claim lost profits. Plaintiffs' damages may include net profits if they prove with reasonable certainty that net profits would have been earned, but were not earned because of defendant's breach.
>
> "Reasonable certainty" relates to the fact of damage rather than

[8] This case is more like Tiegs v. Watts, 135 Wn.2d 1, 954 P.2d 877 (1998), where the new business rule did not bar a claim for lost profits by a group of experienced commercial potato farmers. Tiegs, 135 Wn.2d at 18. The court held that the farmers' testimony and exhibits provided a reasonably certain basis for determining lost profits. Tiegs, 135 Wn.2d at 18.

the amount of damage.[9]

The instruction FLRX proposed would have required the jury to also find that "[t]he plaintiffs proved the amount of their lost profits by presenting evidence in the form of profit history for similar businesses operating in the same industry and operating

[9] The court also instructed the jury that an award of damages must be based on "the evidence in the case . . . rather than by speculation, guess, or conjecture."

under substantially the same conditions as the plaintiffs."[10] Because FLRX's proposed instruction is contrary to our decision in No Ka Oi, the trial court did not err in refusing to give the instruction.

CPA

FLRX also challenges the jury's findings and award of damages for violation of the CPA. FLRX contends the LLCs did not prove causation, and the evidence does not support the award of damages under the CPA.

The CPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. Trade and commerce "shall include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington." RCW 19.86.010(2). The terms of the CPA are to be "liberally construed that its beneficial purposes may be served." RCW 19.86.920.

In an action for damages under the CPA, a plaintiff must prove (1) an unfair or deceptive act or practice, (2) that occurred in the conduct of trade or commerce, (3)

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[10] FLRX's proposed jury instruction states:

Rules Regarding the Recovery of Lost Profits

In this case, plaintiffs seek to recover damages in the form of lost profits. In order to recover lost profit damages, plaintiffs must prove the following:

(1) The parties, when they entered into the contract at issue, contemplated that they would have to pay the other party's lost profits as a consequence of breaching that contract;

(2) The lost profits were caused by the defendant's breach of the contract;

(3) The lost profits are proven with reasonable certainty and are not based on speculation or conjecture; and

(4) The plaintiffs proved the amount of their lost profits by presenting evidence in the form of profit history for similar businesses operating in the same industry and operating under substantially the same conditions as the plaintiffs.

If you find that a plaintiff did not prove each of those propositions, then you cannot award lost profit damages to that plaintiff. If, on the other hand, you find that a plaintiff proved each of those propositions, then you may award lost profit damages to that plaintiff.

affecting the public interest, (4) resulting in injury to plaintiff of his or her business or property, and (5) a causal link between the unfair or deceptive practice and the injury suffered. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986). An action under the CPA does not require privity of contract. Holiday Resort Cmty. Ass'n v. Echo Lake Assoc., L.L.C., 134 Wn. App. 210, 219, 135 P.3d 499 (2006).

FLRX does not challenge the jury's finding that the LLCs proved by a preponderance of the evidence that FLRX engaged in unfair or deceptive trade practices under the CPA. FLRX argues the award of damages must be reversed because the LLCs did not establish a causal link between the unfair and deceptive conduct in selling the PPU contracts and the right of the LLCs to sell remainder interest agreements to the 31,000 members in the VTS program. Because substantial evidence established a causal link between the misrepresentations FLRX made in the marketing and sale of the competing PPU contracts to the VTS program owners and the impact on the LLCs' ability to market and sell remainder interest agreements to the same members, we disagree.

Causation is a factual question for the jury. Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 83, 170 P.3d 10 (2007). "A plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury." Indoor Billboard, 162 Wn.2d at 84. Sufficient evidence exists if the evidence is sufficient " 'to persuade a fair-minded, rational person of the truth of the declared premise.' " Sign-O-Lite Signs, Inc. v. DeLaurenti Florists,

Inc., 64 Wn. App. 553, 561, 825 P.2d 714 (1992) (quoting Beeson v. ARCO, 88 Wn.2d 499, 503, 563 P.2d 822 (1977)).

There is no dispute that FLRX did not provide a full and accurate disclosure to the VTS program owners that purchased PPU contracts, and that the sale of PPU contracts reduced the market available to the LLCs. The evidence shows FLRX sold 4,571 PPU contracts to VTS program owners, totaling approximately $12 million.[11]

The evidence also showed that FLRX engaged in an unfair and deceptive practice by intentionally failing to disclose that the interest sold in the PPU contracts was not "in perpetuity." The evidence established that FLRX prevented the LLCs from marketing and selling remainder interests to the 31,000 VTS program owners while marketing the competing PPU contracts to the same market available to the LLCs for the sale of remainder interest agreements beginning November 7, 2002. The LLCs also presented testimony that because the PPU contracts and the remainder interest agreements were substantially similar, VTS owners would not purchase both.[12] We conclude substantial evidence supports a causal connection between the sale of the PPU contracts and the market available to the LLCs for the sale of the remainder interest agreements.[13]

Fidelity Mortgage Corp. v. Seattle Times Co., 131 Wn. App. 462, 128 P.3d 621 (2005) is distinguishable. In Fidelity, we held that in the absence of payment from the

[11] The parties stipulated to an exhibit showing that since 1997, FLRX received over $12 million in revenue for the sale of PPU contracts.

[12] Stuart Allen, the manager of FLRX's owner association, Bentley, and Ringgenberg testified that VTS owners would not buy both PPU contracts and extension agreements.

[13] For the first time on appeal, FLRX contends the LLCs did not allege unfair and deceptive practices under the CPA but only unfair competition. This court will not review an issue, theory, argument, or claim of error not presented at the trial court level. RAP 2.5(a); Demelash v. Ross Stores, Inc., 105 Wn. App. 508, 527, 20 P.3d 447 (2001).

lender, the publication of mortgage rates printed in a newspaper did not violate the CPA. Fidelity, 131 Wn. App. at 468-69. Because of the "staggering complexities in ascertaining how many loans were diverted from Fidelity as a result of the Times' chart," and the complexity of "the apportionment of damages among the hundreds of lenders and the Times based on degree of fault, causation, number of loans diverted, and potential profitability of the loans," we held that causation was too remote and Fidelity could not show that its damages were proximately caused by the defendants. Fidelity, 131 Wn. App. at 470-71. However, we also noted that the rate chart could have been properly characterized as occurring in trade or commerce under the CPA if a lender paid the newspaper to include the lender in the chart. Fidelity, 131 Wn. App. at 468-69.

Here, unlike in Fidelity, the market is defined as the 31,000 VTS program owners in existence as of November 7, 1997. FLRX stipulated to the accuracy of the exhibit at trial that showed the number of PPU contracts it sold to these owners and the revenue it received. The LLCs also presented evidence that showed the effect on the LLCs' ability to sell remainder interest agreements to the same defined market.[14]

FLRX next asserts that the record does not support the jury's award of damages for violation of the CPA. We disagree. Rosen's testimony established the total lost profits that the LLCs would have earned if FLRX did not prevent the LLCs from selling

[14] The other cases FLRX cites are in opposite. Seaboard Surety Co. v. Ralph Williams' Nw. Chrysler Plymouth, 81 Wn.2d 740, 504 P.2d 1139 (1973) is a pre-Hangman Ridge CPA case brought by the Attorney General, not a private party; Aetna Casualty & Surtey Co. v. M&S Industries, Inc., 64 Wn. App. 916, 927, 827 P.2d 321 (1992) only states that "[u]nfair and deceptive practices that are harmful to consumers can also constitute unfair competition under the CPA"; Boggs v. Whitaker, Lipp & Helea, Inc., P.S., 56 Wn. App. 583, 588, 784 P.2d 1273 (1990) held that because the allegations and evidence presented did not show harm to a competitor under the CPA, insurance coverage for unfair competition was not available.

remainder interests to the 31,000 VTS program owners beginning November 7, 2002. The calculation of total lost profits takes into account the deceptive and unfair conduct of FLRX in marketing and selling the PPU contracts. The calculation of lost profit damages includes an analysis of the "Total Available Market" for the LLCs' remainder interest agreement business. In determining the total available market, Rosen calculated the number of PPU contracts FLRX sold to VTS owners from 1997 to 2004 and the resulting reduction to the extension agreement market. The evidence established a reasonable basis for the jury to allocate damages for the breach of contract and CPA claim. Conrad v. Alderwood Manor, 119 Wn. App. 275, 292, 78 P.3d 177 (2003) (the jury may allocate damages for the two causes of action).

Specific Performance

FLRX argues the trial court erred in entering an order of specific performance in addition to judgment on the verdict, resulting in a double recovery. We disagree.

An award of specific performance is within the discretion of the trial court. Crafts v. Pitts, 161 Wn.2d 16, 29, 162 P.3d 382 (2007). When a court's legal powers cannot adequately compensate a party's loss with money damages, it may use its broad equitable powers to compel specific performance. Crafts, 161 Wn.2d at 23-24. In determining whether damages will provide adequate compensation, courts inquire as to (1) the difficulty of proving damages with reasonable certainty, (2) the difficulty of procuring a suitable substitute, and (3) the likelihood that an award of damages could not be collected. Crafts, 161 Wn.2d at 24.

In addition to damages for breach of contract and violation of the CPA, the LLCs

claimed FLRX did not provide marketable title to the 64 units at Vallarta Torre and the 118 units at Oasis Palm Springs. At trial, Rosen presented two separate calculations of lost profits based on whether the LLCs received marketable title: (1) $27,059,335 if the LLCs received marketable title or (2) $34,717,114 if the LLCs did not receive marketable title. While the jury expressly found that the LLCs did not receive marketable title, it awarded a total of $29,588,025 in damages for breach of contract and violation of the CPA. Based on the jury findings, the LLCs requested an order of specific performance to provide marketable title to the properties. The trial court did not abuse its discretion in ordering specific performance.

Motion for a New Trial

FLRX argues the trial court abused its discretion by failing to grant a new trial based on juror misconduct. FLRX asserts that in response to questioning during voir dire, Juror 12 falsely stated that his experience as a VTS program owner was "satisfactory."

We review a trial court's decision to deny a motion for a new trial for abuse of discretion. State v. Briggs, 55 Wn. App. 44, 60, 776 P.2d 1347 (1989). A juror's false answers during voir dire require reversal only if the juror did not honestly answer a material question, and a correct response would have provided a basis for a challenge for cause. In re Pers. Restraint of Lord, 123 Wn.2d 296, 313, 868 P.2d 835 (1994); see also In re Pers. Restraint of Elmore, 162 Wn.2d 236, 267, 172 P.3d 335 (2007) (correct answer must have been a valid reason for cause challenge; Washington law is in accord with the rule announced by the U.S. Supreme Court in McDonough Power

Equip. Inc. v. Greenwood, 464 U.S. 548, 554, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)).

During voir dire, Juror 12 told the attorney for the LLCs that he had been a VTS program owner since 1994 and his experience had been "satisfactory."

> MR. QUACKENBUSH: Juror 12, sir, you said you'd heard of the company Vacations Internationale, and I think you raised your hand to several of the timeshare questions; is that right?
> JUROR NO. 12: Yes.
> MR. QUACKENBUSH: Were you an owner of a timeshare?
> JUROR NO. 12: I'm an owner of Vacation Internationale and WorldMark.
> MR. QUACKENBUSH: How long have you been in timeshare ownership?
> JUROR NO. 12: I believe we bought in about 1994.
> MR. QUACKENBUSH: How has that experience been for you? Satisfactory?
> JUROR NO. 12: Yes.

The FLRX attorney did not follow up and ask any additional questions about Juror 12's answer. But after two other potential jurors were excused for cause because of negative experiences with sellers of timeshares, the FLRX attorney asked the remaining members of the jury pool if any of them had "similar kinds of feelings" or "fit in that kind of thinking."

> Let me just continue this idea of those that have been through the timeshare presentation. You've gone through a little bit of a discussion here. Again, because you've heard that you're going to be asked for millions of dollars at the end of this case, are any of you that have gone through that experience feeling the same way, that your sales experience was something that you're going to bring to the jury room and not be able to set aside? Is there anyone else on that list?

Juror 12 did not respond to the question.

Post-trial, FLRX submitted declarations from two jurors stating that Juror 12 Robert Thompson told the jury during deliberations that he had a bad experience with an FLRX salesperson, and that Thompson was critical of the deceptive business

practices FLRX used in selling the PPU contracts. In response, Thompson submitted a declaration reiterating that he "still is a satisfied timeshare owner." The declaration states, in pertinent part:

> 5. During the voir dire questioning[,] I indicated that I owned timeshare memberships in the Vacation Internationale and World Mart programs. Mr. Quackenbush asked me if my experience with timeshare ownership had been satisfactory. My answer was "Yes". That is a true answer. I would give the same answer if asked today. Overall my timeshare experience has been satisfactory and my wife and I continue to be members of both the VTS and World Mart programs. While some timeshare resorts are better than others of course and not every vacation is the same, on balance we have had a good experience as timeshare owners.
>
> 6. I have attended several timeshare presentations by different timeshare companies over the years. I did attend one timeshare presentation given by Sunterra after 1997 that concerned the Perpetual Point Upgrade contract. The presentation likely lasted about ninety minutes. At one point I asked the salesman when the resort properties came out of the trust. He said he didn't have that information and that I should refer back to my original ownership documents. That was the entire exchange between us, which lasted probably 15 seconds. I did not form any negative opinion about Sunterra Pacific as a result of this exchange. I just concluded that this particular salesman was not very well prepared with information about the product he was selling. I did not think he was trying to deceive us. This particular exchange did not seem significant to me at the time and it does not seem significant now. It did not result in me having a bias or prejudice against Sunterra Pacific. I am not even sure I understood that Sunterra Pacific was the program manager at that time as I did not pay much attention to that.

Two other jurors also submitted declarations stating that Thompson did not improperly interject his experience as a VTS program owner. In one of the declarations, the juror states, in pertinent part:

> 4. I have no recollection of Mr. Thompson ever indicating that he had a bad or negative experience with any timeshare company, or that he had any negative feelings or opinions of Sunterra Pacific. As I recall the discussion, Mr. Thompson had a generally negative attitude towards salespeople. Mr. Thompson mentioned that he was and still is a satisfied timeshare owner who continues to use his memberships on a regular

> basis. I do not recall any instance where Mr. Thompson expressed any particular focus or emphasis on the Consumer Protection Act claim, and I do not recall any instance where Mr. Thompson injected his personal experience into the discussions of whether the Plaintiffs had proven their claims.
>
> 5. The insinuation from the declarations that Mr. Thompson's statements affected or impacted the jury's deliberations or the verdict are not accurate. As the jury foreperson, I strongly believe our decision was based on open discussion and analysis of the evidence that we heard and reviewed during the trial. I believe that everyone on the jury, including Mr. Thompson, deliberated in good faith in consideration of the evidence and in accordance with the jury instructions.

After considering the declarations as well as the transcript of the voir dire proceedings, the trial court denied the motion for a new trial based on juror misconduct.

> [E]verybody in this room knew this individual was a current owner of timeshares, disclosed it all, and, frankly, I wondered at the time why none of the lawyers really pursued it further with him, not whether he was biased or not, but the scope of his experience or the number of vacations or why fewer vacations. There were a host of things that everyone could have pursued further had you really wanted to because he wasn't hiding the fact that he was a current owner.
> . . . .
> When I look at this record, I have to say, it was an honest answer to the question that was asked. I did not see and I don't see anything that would lead me to conclude that there was some implied bias that then gets us to a second step. So I'm denying the motion.

The record supports the trial court's determination that in stating his experience was "satisfactory," Juror 12 answered honestly. The trial court did not abuse its discretion in denying the motion for a new trial.

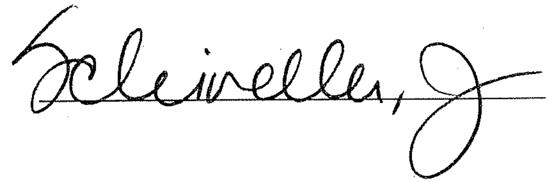
Relying on State v. Cho, 108 Wn. App. 315, 30 P.3d 496 (2001), FLRX also argues the trial court erred in not holding an evidentiary hearing on the motion for a new trial for juror misconduct. But here, unlike in Cho, because the trial court had the transcript of the voir dire proceedings in addition to the detailed declarations and briefing, we conclude the court did not err in ruling on the motion without an evidentiary

hearing.

Attorney Fees

As the prevailing party under the 1998 Agreements and the CPA, upon compliance with RAP 18.1, the LLCs are entitled to recover attorney fees and costs on appeal.

We affirm.



WE CONCUR: