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ORIGINAL

No. 64747-4-I

COURT OF APPEALS, DIVISION ONE,
OF THE STATE OF WASHINGTON

TORRES MAZATLAN REMAINDER, LLC, et al.,

Respondents,

v.

FLRX, INC., formerly known as DIAMOND PACIFIC RESORTS, INC., formerly known as SUNTERRA PACIFIC, INC., formerly known as VACATION INTERNATIONALE, LTD.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE MARY YU

BRIEF OF RESPONDENTS

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WIGGINS & MASTER, PLLC
Charles K. Wiggins, WSBA #6948
241 Madison Avenue North
Bainbridge Island, WA 98110
Tel: (206) 780-5033

RIDDELL WILLIAMS P.S.
Karl J. Quackenbush, WSBA #9602
Kenneth Lederman, WSBA #26515
Charlie S. Fitzpatrick, WSBA #33096
1001 Fourth Avenue, Suite 4500
Seattle, WA 98154
Tel: (206) 624-3600

Attorneys for Respondents

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I. <u>INTRODUCTION</u>

Appellant Vacation Internationale Ltd. ("VI") now known as FLRX, Inc.,[1] appeals from the judgment entered on a verdict after a three-week jury trial. VI does not appeal from the verdict that it breached its contractual obligations to Respondents Torres Mazatlan Remainder, LLC, Vallarta Torre Remainder, LLC, and Vacation Timeshare Program Remainder, LLC (collectively, "the LLCs") and engaged in unfair and deceptive competition in violation of the Consumer Protection Act. Instead, VI only challenges the damages found by the jury and argues that one juror inadequately responded to voir dire questions.

The trial court did not abuse its discretion in admitting the lost profits calculations of the LLCs' expert because the sale of the Extension Agreements was not a "new business" and the expert presented non-speculative evidence of the damages. The jury was well within the evidence in allocating damages between VI's breaches of contract and VI's unfair competition under the CPA, and did not award a double recovery. Finally, the trial court was well within her discretion in rejecting VI's challenge to the voir dire responses given by one juror.

The Court should affirm and award fees and costs to the LLCs.

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[1] For clarity Appellant will be referred to as "VI," its name when it was sold in 1997. Since then VI has had three name changes: first to Sunterra Pacific, Inc. in 1998, then to Diamond Resorts Pacific, Inc. in 2007, and then to FLRX, Inc, its current name. For the Court's convenience the Appendix A contains a chart showing the ownership and name history of VI. The most recent name change was immediately after entry of judgment. CP 1395-1396.

II. RESTATEMENT OF THE ISSUES

A. Did the trial court abuse her discretion in admitting a timeshare industry expert's study of lost profits arising from the LLCs' inability to sell a product that the LLCs had sold for 15 years to 7000 customers, and where the expert relied on non-speculative evidence?

B. Did the LLCs present adequate evidence that VI's deceptive practice proximately caused injury where VI sold a product that was a demand substitute for the LLCs' product, and VI's own manager stated in an internal memo that no one would have purchased their product unless they engaged in deceptive practices?

C. Did the trial court allow the LLCs to recover duplicate damages where the trial court ordered specific performance of VI's contractual duty to convey marketable title to specific real estate, the value of which was not included in the jury's damage verdict?

D. Did the trial court abuse its discretion in denying a new trial after finding that a challenged juror truthfully answered voir dire questions and where more complete answers would not have provided grounds for a challenge for cause?

III. COUNTER STATEMENT OF THE FACTS

A. Burns and Ringgenberg Created the First Modern Timeshare Company in 1974.

VI was founded by Bob Burns and Bob Ringgenberg in 1974. Starting with no capital or investors, the founders built VI into a successful vacation timeshare company with over 31,000 members throughout the world and 709 condominium apartments in 22 resorts in the United States, Canada and Mexico by 1997. The VI program was referred to as the Vacation Time Share program or "VTS." VI was sold in 1997 and is the Appellant here.

Before VI, the typical timeshare program involved a customer purchasing a fractional ownership interest in a particular resort condominium for a particular week during a year. (RP 10/13 at 169.) VI introduced a points-based vacation timeshare system that is now the industry standard. VI customers purchased a VTS owner agreement, typically with a term of 40 years. The VTS owner agreement provided "points" that the owner used to reserve units at a VI resort of his choice. (RP 1013 at 169.) For example, a 100 point annual contract might translate into one week at a two bedroom condominium each year. VI members could use any of the 22 resorts. (*Id.*) The VI memberships did not include any real estate ownership, and the membership expired at the end of the contract term.

B. VI Put Title to Its Real Estate in Trust for an Estate for Years for the Benefit of VTS Owners.

VI acquired its real estate by buying some or all of the condominium units at a resort. VI then transferred title to the timeshare units into a trust (the VTS Trust) created to hold the title for the benefit of the VTS owners. (RP 10/13 at 156.) The trust period was typically 40 years. VI owned the remainder interest in the timeshare units, which began upon the expiration of the VTS Trust period. VI's ownership interest was typically referred to during trial as the "remainder" or "remainder interest."

The VTS owners did not own any interest in any particular condominium. Rather, they owned the right to use any one of the 709 condominium units in the entire pool of 22 resorts in the VTS system.

C. Burns and Ringgenberg Created the Extension Agreement Product in 1983 and VI Sold More than 7000 Extension Agreements to VTS Owners through 1997.

Many VI owners visited the same resort every year. Families vacationed with their children, and as their children grew up grandchildren were included in family vacation tradition. (RP 10/13 at 195.)

In the early 1980's VI customers began to inquire about extending their membership in the VI program after their contract expired. (*Id.*; RP 10/14 at 11.) Many VTS owners were also interested in buying an ownership interest in a favored condominium at their favorite resort that could be kept in their family and passed on to younger generations. (*Id.*) In 1983, VI introduced a new product called the Extension Agreement in response to this demand. (*See* Ex. D to Ex. 6 and Ex. C to Ex. 7; RP 10/13 at 195; RP 10/14 at 10-11.)

The Extension Agreement was a hybrid product that included two components: (1) it extended the VI owner's membership points in the VI program beyond the original expiration date of the owner agreement, and (2) it included a full or part ownership interest in a VI remainder condominium of the owner's choice. (RP 10/14 at 10-11.)

The Extension Agreement program responded to a VTS owner's desire to extend their time in the VI program beyond the expiration of their contract and to acquire a full or partial ownership interest in a vacation property. (*Id.*) The program allowed them to bring all or part ownership of a favored condominium unit into their family and to share in the increased real estate value. (*Id.* at 12-13.)

Like all of VI's timeshare agreements, the Extension Agreement was registered with state regulators. (*Id.* at 27-28.) Importantly, VI's pre-1997 owner agreements included a Schedule B that listed the specific dates that the VI units at the various resorts came out of the VTS trust, *i.e.*, when the units would no longer be in the VI program and available for use by VTS Owners. (RP 10/13 at 193.) The VI Founders believed that full disclosure was essential so the owners would know exactly what they were getting and for how long. (RP 10/13 at 191-192.)

The Extension Agreement program was in operation at the time the VI founders sold the company in 1997 and afterwards. By 1997, there were 31,000 owners in the VI program. (RP 10/14 at 23.) Between 1983 and 1997, VI sold approximately 7,000 Extension Agreements to VTS Owners. (*Id.*)

D. The VI Founders Sold VI to Signature Resorts in 1997 But Excluded the 709 Remainder Condominium Units and the Extension Agreement Business.

Signature Resorts, Inc. ("Signature") was a publicly-traded timeshare operator that was in the process of acquiring smaller timeshare companies in the late 1990s. (RP 10/13 at 198.) In 1997, VI and Signature Resorts, Inc. began discussing an acquisition. (*Id.*)

Signature was anxious to acquire VI but did not want to pay the VI Founders' asking price. (RP 10/13 at 204.) In compromise, the parties reached an agreement that allowed Signature to acquire VI but excluded VI's remainder ownership of its real estate and allowed the VI Founders to go back into the Extension Agreement business after a five-year non-compete period ending November 2002. (*Id.*)

Signature agreed to pay approximately $8 million for all of the VI stock and VI became a subsidiary of Signature in November of 1997. During the due-diligence process and before the stock purchase agreement closed, all of the books and records of VI were made available to Signature for inspection. (*Id.*; RP 10/14 at 45-46.) This disclosure included all title reports, title insurance policies, U.S. and Mexican tax records, condominium declarations and other information concerning title to the VI real estate. (Ex. 442.) The information made available to Signature included everything known to VI concerning the status of VI's title to the condominium remainders in Palm Springs and Puerto Vallarta and concerning claims by the Mexican government. The stock purchase agreement allowed Signature to withhold ten percent of the purchase price for one year after closing as security against any errors or misrepresentations in the pre-sale disclosures or stock purchase agreement representations made by the VI shareholders. (RP 10/13 at 202-203.) At the end of that period, the hold-back was paid without deduction. (*Id.* at 203.)

After the stock sale closed, VI (now a Signature subsidiary) and the

LLCs entered in to two 1998 contracts (Exs. 6 and 7) that provided: (1) the remainder interests in the 709 VTS condominium units would be conveyed by VI to the LLCs; (2) the LLCs would be entitled to go back into the Extension Agreement business using these remainders on November 7, 2002; (3) the LLCs would be entitled to sell Extension Agreements to the 31,000 VTS owners of record as of the 1997 date VI was sold, *i.e.,* to the VTS customer base they created before they sold the contract (RP 10/21 at 124-125); and (4) the Extension Agreement contract would be the same as the one previously and currently in use. (*See* Ex. D to Ex. 6 ; Ex. C to Ex. 7.) The parties attached the Extension Agreement forms being used by VI to both contracts to make it clear that the LLCs would be entitled to continue the Extension Agreement business exactly as before. (RP 10/14 at 45-46, 49-51.) The two contracts identify all of the remainder units to be transferred and the start date of the remainder period. (*See* Exs. 6 and 7.)

Burns and Ringgenberg formed the LLCs to enter into the 1998 agreements and receive ownership of the remainder units, and to operate the Extension Agreement business. (RP 10/14 at 34-35, 55.) VI also provided to the LLCs a database of the names and contact information of the 31,000 VI owners of record as of November 1997. (RP 10/29 at 49.)

E. VI Transferred Most of the Remainder Condominiums to the LLCs but Refused to Transfer the Palm Springs Units and Some Mexican Units as Agreed, Claiming It Was Not Obligated to Do So.

By the November 2002 date for starting the Extension Agreement business, VI had transferred most of the remainder units to the LLCs, including 126 units at the Torres Mazatlan resort in Mexico. (RP 10/14 at 571-64.) But VI did not convey 118 units at the Oasis Resort in Palm Springs, nor did VI convey 64 units at the popular Vallarta Torre Resort in Puerto Vallarta, Mexico. (RP 10/14 at 64; 236-238; RP 10/29 at 53.) VI had also not resolved a property dispute involving the beach property at the Vallarta Torre resort as promised in the Beneficial Interest Agreement. (RP 10/14 at 105-109.) VI asserted that conveying these remainders to the LLCs was too difficult, or that problems in the title to the property existed at the time VI was sold to Signature in 1997, or that the LLCs should to pay the expense of the conveyances, or that performance was otherwise excused.

F. The LLCs Were Prepared to Enter the Extension Agreement in November 2002 but Were Blocked from the Market by VI.

The LLCs prepared to resume the Extension Agreement business as agreed in November 2002 using the remainder inventory that had been transferred at that time. Preparations included: (1) creating the necessary documents; (2) locating an office; (3) registering the program with the state of Oregon; (4) spending over $100,000 to create an online database and transaction system (RP 10/21 at 133-135); and (5) recruiting Michael Burns (Bob Burns' son), a former VI President and Chief Operating Officer and later a senior executive in the Disney and Marriot timeshare companies to help manage the LLCs' Extension Agreement business. (RP 10/21 at 106-113, 118-120; 125-126.)

But VI refused to allow the LLCs to enter the Extension Agreement business in 2002 as agreed. (RP 10/29 at 43.) VI would not cooperate in allowing LLCs access to the VI owners. VI refused to agree that Extension Agreement owners could extend their points in the VTS system as had been done before, with all the benefits of that program - an essential element of the Extension Agreement business. (RP 10/14 at 71-72, 104.) VI said it would not allow owners who purchased Extension Agreements to access the online reservation system. VI wrote the Washington timeshare regulator in an attempt to interfere with Washington registration of the Extension Agreement program. (RP 10/29 at 45-46, 80-81.) VI refused to agree to the modifications in the Extension Agreement form to reference the fact that agreement would be between a VTS owner and the LLCs. (*Id.* at 47.) VI stalled and obstructed the process in many ways. The LLCs filed suit in June of 2003.

G. VI's Management of the VTS Program Was Terminated in 2004, But VI Failed to Provide Means to Fulfill the 1998 Agreements.

By 2003, VI was embroiled in a dispute with the VTS owner's association ("VIOA") over VI's mismanagement of the VTS program. The VIOA filed a complaint in arbitration under the management contract with VI. (RP 10/28 at 123.) In early 2004, after the parties settled the dispute when VI agreed to termination of its management contract, VI turned over management of the VTS program to the VIOA and effectively exited the business. In doing so, VI failed to pass on to VIOA the contract obligation of VI to enable the LLCs to enter the Extension Agreement business. The VI termination agreement did not transfer VI's ownership of the remainder condominiums to the VIOA and title remained with VI. The LLCs attempted to negotiate an agreement with VIOA to fulfill this obligation this, but failed. The LLCs were effectively excluded from the Extension Agreement business and in 2008 agreed to sell their Mazatlan remainder inventory to VIOA as real estate. (RP 10/20 at 149-150.)

After this litigation commenced in 2003, the LLCs tried to work with VI to get the remainder condominiums transferred. In December of 2007, VI finally agreed to transfer some but not all of the Vallarta units to a Mexican company (NBR) formed by the LLCs. In 2007 VI's corporate parent, then called Sunterra Corporation, was acquired by Diamond Resorts Corporation, one of the world's largest timeshare companies.

H. While Keeping the LLCs Out of the Extension Agreement Business VI Marketed a Competing Product in an Unfair and Deceptive Manner.

Between 1997 and 2004, VI marketed a product to VTS owners called a Perpetual Point Upgrade contract ("PPU"). The PPU purported to extend VTS owners' timeshare points in "perpetuity" so in effect their contracts would not expire. It sold these PPU contracts to the same pool of potential customers that the VI contracted to make available to the LLCs for the Extension Agreement business - the 31,000 owners of record as of 1997 referenced in the two contracts between VI and the LLCs. VI sold 4,571 PPU agreements to this group generating total revenues of in excess of $12 million. (RP 10/27 at 200, *see* Exs. 26, 138, 337.)

The PPU contract was exactly like the Extension Agreement in one critical aspect - it extended a VTS owner's use of his VTS points beyond the original contract expiration date. The PPU did not include the real estate ownership component included in the Extension Agreement. But in terms of the extension of VTS points, the Extension Agreement and the PPU were competing products. It was unlikely that a VTS owner would purchase both, and there was no evidence that a VTS owner had ever done so. RP 10/15 at 22; 10/19 at 99-100; 10/21 at 235-236.)

VI's marketing program for PPUs was false and deceptive. The VTS timeshare remainder units were promised to the LLCs under the 1998 contracts. Some of these units would come out of the VTS program as early as 2015. So although VI was selling "perpetual" use rights, it actually had no perpetual rights to sell because they had been contracted away in the 1998 agreements. This fact was concealed intentionally from the PPU purchasers.

Specifically, the Extension Agreement contract and other agreements used by the VI Founders before the acquisition contained "Schedule B," (Ex. 416 at p. 19.) which listed when each VTS timeshare unit came out of the VTS Trust and would no longer be available for use by VTS owners. Thus, for example, if a prospective PPU purchaser favored the Vallarta resort he would be able to know how many more years that resort would be in the VTS programs. (*Id.*; RP 10/13 at 193.)

VI understood that PPU contracts would not sell if customers knew the truth about when properties came out of the VTS program. It solved that problem by removing the Schedule B disclosure from the "perpetual" PPU contracts so the end dates were not disclosed. In 2000, VI's manager of the VTS program described the situation in a confidential internal memo to other VI executives and their superiors at Sunterra Corporation, the corporate parent, entitled "Perpetuity and Profit":

> The truth of the matter is simply this; we are selling perpetual interests 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 the 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).***

(Ex. 386 (emphasis added).) Eventually, VI put Schedule B back in the contract, but did not offer a right of rescission to those purchasers of PPU contracts who never received Schedule B.

I. After a Three Week Trial the Jury Found that VI had Breached Its Contracts, Violated the CPA and Failed to Convey Marketable Title to the Palm Springs and Vallarta Remainder Condominiums as Required.

Judge Mary Yu presided over a three-week jury trial. The LLCs presented evidence of lost profits caused by VI's breaches of contract and unfair business practices. The LLCs provided a detailed lost profits analysis by Randi Rosen, MAI of KPMG. Ms. Rosen's study calculated the net profits that would have been earned by the LLCs' Extension

Agreement business if: (1) they had been allowed to resume that business in November 2002 as agreed, and (2) the market for Extension Agreements had not been reduced by the sale of competing PPU contracts.

The jury found that VI breached the two 1998 contracts and committed unfair business practices in violation of the Washington Consumer Protection Act., RCW 19.86 et seq. ("CPA"). It also determined that VI had failed to convey marketable title to the remainder condominiums in Palm Springs and Puerto Vallarta, and rejected VI's claim that it was impossible to convey these properties. The jury awarded a total of $29,588,0250 to the three LLCs, with $14,794,013 attributable to breach of contract damages and $14,794,012 to CPA violations.

After denying VI's post-trial motions, the court entered judgment in favor of the LLCs for $31,124,430.30, including attorneys' fees and costs under the contract and the CPA. VI did not object to the amount of the LLCs' requested fees and costs. The court also ordered VI to specifically perform its agreement to convey marketable title to the Palm Springs and Vallarta properties.

J. The Court Denied VI's Motion for New Trial Based on Declarations of Two Jurors who Voted against Some or All of the Jury's Verdict.

VI moved for new trial based on juror misconduct. VI asserted that juror No. 12, Robert Thompson, gave intentionally and materially false answers during voir dire. (CP 1397-1410.) The motion was supported with declarations from the two jurors who voted against some or all of the jury's verdict. (CP 1411-1412; 1413-1414.) The transcript of voir dire was available to the trial court. (CP 1404-1410; 1826-1836.) Mr. Thompson and two other jurors, including the jury foreperson, provided declarations disputing the declarations of the two disgruntled jurors concerning statements that they claimed Mr. Thompson made during deliberations.

The trial court held a hearing on VI's motion and denied it. (CP 1918-1919.) The trial court observed: "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." (RP 12/11 at 50.)

IV. ARGUMENT

A. The Court Acted Properly in Allowing Evidence of the LLCs' Lost Profits because the Extension Agreement Business was not a "New Business," and because there was Reliable Evidence of Lost Profits.

The VI Founders created the Extension Agreement product in 1983, and successfully registered and sold approximately 7,000 Extension Agreements to VTS owners through 1997. Under the 1998 agreements, VI agreed that the VI Founders could resume the business in 2002, selling the same Extension Agreements (attached to the 1998 contracts) to the same group of potential VTS owners on the same terms as before. (*See* Exs. 6 and 7; RP 10/14 at 45-46, 46-47, 50-51.)

VI argues that under the "new business rule" the trial court should have excluded any evidence of the LLCs' lost profits. (*See* App. Br.

at 27.) The trial court properly rejected this argument on summary judgment, in a motion in limine, during trial in a CR 50 motion, and on VI's post-trial motion. The trial court was correct because the Extension Agreement business was not "new" - it had been operated for 15 years before VI was sold and had a proven track record of success. And even if it were a new business (which it was not), there was other data and supporting evidence of lost profits sufficient to submit that claim to the jury. The LLCs' expert analyzed the history and other relevant data to project the profitability of the Extension Agreement business if it had been allowed to resume as agreed in the promised market.

Lost profits evidence will not excluded even if a business is "new," so long as factual data is available to furnish a basis for computation of probable losses, whether or not a comparable business exists. *Larsen v. Walton Plywood*, 65 Wn.2d 1, 390 P.2d 677 (1964); *No Ka Oi Corp. v. National 60 Minute Tune, Inc.*, 71 Wn. App. 844, 863 P. 2d 79 (1993). Such factual evidence and computations were provided here, and the trial court properly admitted the lost profits analysis performed by the LLCs' expert. The trial court appropriately rejected VI's proposed Jury Instruction D (CP 824) because it contained an incorrect statement of the law.

1. The Trial Court Properly Rejected VI's Mischaracterization of the Extension Agreement Business in Order to Describe it as a "New Business."

The trial court's decision to admit evidence of the LLCs' lost profits calculations is an evidentiary issue which lies within the sound discretion of the trial court, and the trial court's determination will not be reversed absent an abuse of discretion. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022 (1993). The trial court does not abuse its discretion unless it acts on untenable grounds or its ruling is manifestly unreasonable. *In Re Detention of Broten,* 130 Wn. App. 326, 336, 122 P.2d 942 (2005).

The linchpin of VI's "new business" argument here, as at trial, is its assertion that the Extension Agreement business was selling "standalone remainders," which had never been done before, and that therefore it was a "new business" (App. Br. at 12-15, 22-30.) VI's argument fails because this characterization of the Extension Agreement business cannot be squared with the evidence about the Extension Agreement business, and the trial court was correct to reject it.

The business promised to the LLCs in the 1998 agreements involved selling the Extension Agreement product that had been previously sold and that was described in the Extension Agreement form attached to both 1998 contracts. (Ex. D to Ex. 6; Ex. C to Ex. 7.) By its terms, it is plainly <u>not</u> an agreement to sell only "standalone remainders." (*Id.*) Rather, the product provided VTS owners with an extension of their participation in the VTS program, coupled with a real estate interest in a condominium. (*Id.*) The owner or co-owners could leave that condominium in the VTS program, or take it out of the program, or sell the property.

Extension Agreements are not "standalone remainders," and the

LLCs' Extension Agreement business was not about selling "standalone remainders." (*See* RP 10/21 at 247-48; RP 10/22 at 18-19.) The trial court (and the jury) properly rejected VI's mischaracterization because it was inconsistent with the facts.

2. The LLCs Presented Reliable Non-Speculative Evidence of Lost Profits.

The Extension Agreement business was not new - it was a business with a proven track record. But even if it had been a new business, the trial court acted properly under Washington law by admitting the LLCs' lost profits evidence.

A plaintiff seeking to prove lost profits in a new business must show with <u>reasonable</u> <u>certainty</u> that damages in the form of lost profits have been incurred. *Larsen*, 65 Wn.2d at 16-19 (emphasis added); *see also Alpine Indus., Inc. v. Gohl*, 30 Wn. App. 750, 754, 637 P.2d 998 (1981). *Larsen* and post-*Larsen* cases instruct that lost profits for a new business can be proved by expert testimony alone, so long as that expert opinion is supported by evidence rather than speculation and hypothetical situations. *Larsen*, 65 Wn.2d at 19.

The LLCs provided testimony from Mr. Ringgenberg regarding the previous operation of the Extension Agreement business before VI was sold, as well as expert testimony from Randi Rosen incorporating that evidence and other available data. *See* Section III.A.3, *infra*. Expert testimony need not, as VI suggests, always be based on "an analysis of market conditions and a profit showing of identical or similar business in the vicinity, operating under substantially the same conditions." (*See* App. Br. at 24, 27.) In Washington, lost profits evidence may be admitted even where there is no such comparable business.

No Ka Oi Corp. v. National 60 Minute Tune, Inc., 71 Wn. App. 844, 863 P.2d 79 (1993) involved a similar situation. In *No Ka Oi*, the plaintiff's expert testified about the plaintiff's lost profits, but did not base his opinion on an analysis of similar businesses in the vicinity, referred to as "local comparables." *No Ka Oi*, 71 Wn. App. at 850. The defendant sought to exclude the expert testimony based on the same argument that VI employs here, and the court rejected the defendant's argument:

> 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 there was no comparable business from whose history of profits the damages figure could have been entirely drawn, for there were no comparables.
>
> . . . .
>
> Lost 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.

Id. (citing *Larsen*, 65 Wn.2d at 19) (emphasis added, internal quotations omitted).[2]

[2] The non-Washington cases cited by VI have no application here. *Earle M. Jorgensen Co. v. Tesmer Mfg. Co.*, 10 Ariz.App 445, 459 P.2d 533 (1969) relates entirely to a party's failure to provide adequate evidence and testimony regarding lost profits, with the trial court focusing on the lack of any testimony showing loss of sales, and on the lack of any evidence

No Ka Oi does not preclude lost profits damages for new businesses; rather, *No Ka Oi* establishes the type of evidence that a party must put forth in order to pursue lost profits as damages. And in this case, substantial evidence on which to base the LLCs' lost profits was admitted by the trial court and presented to the jury. *See* Section III.A.3, *supra.*

The "new business" rule requires only that lost profits claims be supported by non-speculative evidence. *See Ultimate Timing L.L.C. v. Simms, et al.*, __ F. Supp. 2d __, 2010 WL 2196116 (W.D. Wash. 2010) ("Defendants simply over-state the reach of the 'new business' limitation for recovery of lost profits."). It is irrelevant that the Extension Agreement business was "unique," as VI repeatedly emphasizes. While unique, this business was not new and untested, as evidenced by the fact that VI sold over 7,000 of these same VTS Extension Agreements to over 3,500 of the same VTS owners prior to November of 1997. (RP 10/14 at 23.) So even though there are no direct current comparables to the promised Extension Agreement business (as in *Larsen* and *No Ka Oi*), the LLCs are not precluded from presenting evidence and data (including evidence related

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showing actual losses directly resulting from an alleged breach of warranty. *Texas Instruments, Inc. v. Teletron Energy Management*, Inc., 877 S.W.2d 276, 280 (Tex. 1994) involved a lost profits claim arising from an inherently risky "new and unproven enterprise" involving completely "untested" products with entry into "unknown or unviable" markets – a circumstance that is inapposite of the Plaintiffs' desire to restart an previously-profitable venture with an established product and a receptive client base. And *Autotrol Corp. v. Continental Water Systems Corp.*, 694 F.Supp. 603, 605 (E.D. Wis. 1988) involved the proposed sale of an experimental prototype where no marketing or sales efforts had been undertaken, and where there was no record of market success (or failure) for any similar product.

to the prior performance of the Extension Agreement business under their own management) from which a qualified expert can estimate the total amount of the LLCs' lost profits. *No Ka Oi*, 71 Wn. App. at 850.

VI's "local comparables" argument would not only be inconsistent with Washington law (as noted by the trial court and the court in *No Ka Oi*), it would unjustly allow VI to hide behind its own breach of contract. *See Alpine Indus.*, 30 Wn. App. at 754 ("Where the fact of damage is firmly established, the wrongdoer is not free of liability because of difficulty in establishing the dollar amount of damages.") (internal quotation omitted). Acceptance of VI's argument would promote the perverse circumstance whereby one party promises to provide a known business opportunity, but then breaches that promise deliberately because there could be no lost profits recovered if the business could be characterized as "new." That is exactly what VI attempts to do here, and the trial court did not abuse its discretion in rejecting that attempt.

3. The LLCs' Expert Testimony Proved Lost Profits with Reasonable Certainty.

Ms. Randi Rosen, MAI, MRICS, a Principal in the Economic and Valuation Services Practice of KPMG, LLP, provided an analysis of the net profits the LLCs would have earned if the Palm Springs and Oasis remainder condominiums had been conveyed by November 2002 when the Extension Agreement business was to start, and if the LLCs had been allowed to enter the business then using all of the condominium remainders as provided in the 1998 agreements.[3] (RP 10/21 at 149-150; *see* Ex. 450.) Ms. Rosen has substantial experience in the timeshare industry, including working directly with timeshare operators (including Starwood, Hilton, and Marriott), valuing timeshare interests, analyzing data and trends in the timeshare industry, calculating lost profits associated with timeshare assets, and providing expert testimony on these topics. (RP 10/21 at 143-158.)

Ms. Rosen's analysis was thorough and consistent with the proper valuation of lost profits. Ms. Rosen calculated the available market of VTS owners from the available data. (RP 10/21 at 227.) She interviewed Mr. Ringgenberg (the most knowledgeable source of information) about the history of the Extension Agreement program under his management, including its cost structure, the number of VTS owners who had bought the product, the profitability of the program, and the marketing techniques employed to sell the product. (RP 10/21 at 174-176, 228, 251.) She then analyzed and verified all of Mr. Ringgenberg's assumptions. (RP 10/21 at 174.) Ms. Rosen also consulted with multiple people with relevant experience in the timeshare industry. (RP 10/21 at 172-173.)

Ms. Rosen determined the proper "currency" (perpetual points) needed to perform the analysis, and then gathered relevant independent

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[3] Her study also estimated the damages resulting from VI's unauthorized taking of condominium common area at Torres Mazatlan, and VI's failure to permanently resolve a beachfront property claim at Puerto Vallarta at its expense as required by the Beneficial Interests Agreement. (RP 10/21 at 150, 179-224; *see* Ex. 450.)

data to calculate the value of that currency. (RP 10/21 at 226, 253-258.) She reviewed timeshare industry data concerning sales, pricing, and demand trends for timeshare products, particularly for products similar (though not identical) to Extension Agreements. (RP 10/21 at 155, 157, 172-173, 236, 246.) She calculated the price of a perpetual point from November 2002 to November 2012 using a "point pricing curve" over the independently-verified absorption period of 10 years. (RP 10/21 at 253-271.) She reviewed information regarding the sales and marketing costs associated with an Extension Agreement to an existing timeshare customer, as compared to the sales and marketing costs associated with a new timeshare product to a brand new customer. (RP 10/21 at 272-281; RP 10/22 at 8-25.) She also analyzed VI's PPU contract sales, pricing, and revenue information to estimate the impact of the PPU contract sales on the promised market of VTS owners that should have been available to the LLCs. (RP 10/21 at 177; RP 10/22 at 70-77.) And she subtracted all costs and expenses from the final calculation of pure lost profits. (RP 10/21 at 264, 272-281; RP 10/22 at 8-26, 32-33.)

Ms. Rosen independently verified all of this relevant data and information, applied accepted valuation principles and methodologies, and reached a conclusion about the LLCs' lost profits as of the trial date. (RP 10/21 at 176, 227, 264; RP 10/22 at 178.) In situations like the one, where the "amount of damages . . . is difficult to prove with exactness," the trial court properly allowed some liberality because the LLCs presented the best available evidence. *Long v. T-H Trucking Co.*, 4 Wn.

App. 922, 927, 486 P.2d 300 (1971). As the trial court noted:

> 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 [sic] 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.

(RP 10/27 at 6-7.) The trial court's determination regarding the substantial evidence presented by the LLCs was not an abuse of discretion.[4]

4. The LLCs' Expert Deducted Projected Costs of the Extension Agreement Business from her Calculation of Lost Profits.

VI asserts that Ms. Rosen's lost profits analysis failed to account for the costs of operating the Extension Agreement business and generating those profits - "[P]laintiffs' expert used only the revenues and disregarded the attendant costs .... in calculating lost profits." (*See* App. Br. at 29.) This claim is flatly inconsistent with the record.

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[4] In rebuttal, VI proffered only its President, C. Albert Bentley (an accountant) to give opinion testimony about the LLCs' lost profits claim. While he reached a different conclusion, he found no fault with the methodology employed by Ms. Rosen. (RP 10/27 at 148.)

Ms. Rosen used an "income approach" which analyzed the costs of operating the Extension Agreement business, and she testified that she deducted the attendant marketing, sales and other costs and expenses that would have been incurred by the LLCs in her projection of total lost net profits. (RP 10/21 at 264, 272-281; RP 10/22 at 8-26, 32-33.) This evidence was presented to the jury along with corroborating testimony from Mr. Ringgenberg, who testified about the costs of operating the Extension Agreement business and profit margins generated by the business, and from Mr. Michael Burns, formerly a senior executive in the Marriot and Disney timeshare programs and the former President and Chief Operating Officer of VI. (RP 10/21 at 104-127.) The claim that Ms. Rosen did not account for costs of the Extension Agreement business is unsupportable.

5. The Trial Court Properly Rejected Proposed Instruction D Because it Was an Incorrect Statement of Law.

The trial court's Instruction No. 27 on lost profits (CP 964) was based on WPI 303.04, and represents a correct statement of the law. VI proposed an amendment to the WPI that incorporated its theory of the "new business" rule, and would have told the jury that the LLCs had the burden to present "evidence in the form of profit history for similar businesses operating in the same industry and operating under substantially the same conciliations at the plaintiffs." (*See* App. Br. at Appendix B, ¶ 4; RP 10/29 at 97.) VI's proposed instruction would have codified for the jury the strict "local comparables" test that has been rejected by the Washington courts. *No Ka Oi*, 71 Wn. App. at 850.

The trial court correctly refused VI's proposed instruction, as a trial court is not required to give an instruction which is erroneous in any respect. *State v. Hoffman*, 116 Wn.2d 51, 111, 804 P.2d 577 (1991). Moreover, the Court's Instruction No. 27 allowed VI to argue in closing that the jury should reject the LLCs' lost profits analysis as speculative. (RP 10/29 at 57-59; CP 964.) The jury's rejection of this argument should not be disturbed.

B. There Was Substantial Evidence that Deceptive Sales of PPU Agreements Damaged the LLCs' Extension Agreement Market. The LLCs Expert Witness Accounted for this Market Decrease.

The contractually agreed market for the LLCs' Extension Agreement business was the 31,000 VTS owners of record as of November 1997, when VI was sold to Signature Resorts. (*See* Exs. 6, 7.) The LLCs were entitled to enter this market in November of 2002, using all of the promised condominium remainder inventory including the Oasis Resort in Palm Springs and Vallarta Torre in Mexico. The evidence established, and the jury found, that VI prevented the LLCs from entering this market as agreed.

While it kept the LLCs out of the market, VI was selling its PPU contracts to this same group of 31,000 VTS owners. According to its records, VI made sales of over $12,000,000 in this market. (*See* Exs. 138, 337.) And although the PPU product was not exactly the same as the

Extension Agreement product, both products provided a common and critical component - the extension of the owner's participation in the VTS program beyond the initial contract expiration date. (RP 10/21 at 236.)

The LLCs presented evidence that the customer who bought a PPU contract would not also buy an Extension Agreement. (RP 10/21 at 234-236.) So in addition to keeping the LLC's competing product out of the market, VI also sold its own competing product into that same market using unfair and deceptive practices, thus reducing the size of the market. In her lost profits analysis, Ms. Rosen determined the impact of VI's conduct based on the number of PPU contracts sold during the relevant period and the resulting loss of the LLC's ability to earn profits from selling Extension Agreements into that market. (RP 10/21 at 234-236, 251.)

Ms. Rosen's study calculated the net profits that would have been earned if the LLCs had entered the market at the time agreed without the market decrease cause by VI. The evidence established that both VI actions (*i.e.* market exclusion and market reduction) resulted in total net lost profits of $29,588,025 arising from the LLCs' inability to sell Extension Agreements to the agreed market as promised. The jury awarded this amount, and allocated the damages between the breach of contract and Consumer Protection Acts ("CPA") claims. The evidence provided a rational basis for the jury's determination.

1. The LLCs Presented Sufficient Evidence that VI's Unfair Sales of PPU Contracts in Violation of the CPA Proximately Caused a Decrease in the Size of the Market for Extension Agreements with Resultant Damage to the LLCs.

The standard of review for VI's argument that the LLCs failed to prove causation for its CPA claim is whether the jury's decision was supported by substantial evidence. Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise. *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). VI bears the burden of showing that the jury's determination regarding damages attributable to VI's unfair and deceptive conduct is not supported by substantial evidence. *Nordstrom Credit, Inc. v. Department of Revenue*, 120 Wn.2d 935, 939-40, 845 P.2d 1331 (1993).

To establish their CPA claim, the LLCs were required to prove, among other things, that: (1) VI's acts or practices had the capacity to deceive a substantial portion of the public, and (2) VI's acts or practices were a proximate cause of the LLCs' claimed injury. (CP 956-957.) VI argues that because the LLCs were not Extension Agreement purchasers, they could not have been damaged by its unfair business practices. (*See* App. Br. at 32.) But VI's argument ignores that the CPA specifically prohibits unfair competition. RCW 19.86.020; .920. It cannot be seriously contended that selling a product by deceptive means does not have the capacity to damage a competitor in the same market.

VI misreads the law in arguing that the LLCs were required to produce direct testimony by a potential customer about what he or she would have done if full and accurate disclosures about the PPU contracts had been provided. (*See* App. Br. at 33-34.) There was substantial evidence that the PPU customers were deceived and that the PPU sales resulted directly from the deception, with the most direct and persuasive evidence coming directly from Ron Graham, the VI manager in 2000:

> We purposely do not disclose that 59% of the properties will drop out of the Trust when the 40 year contracts expire
>
> ....
>
> 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).

(*See* Ex. 11.)

The jury considered the admission by VI that "but for" the omission of Schedule B, the PPU sales would never have happened. It is difficult to conceive of more direct evidence of causation than an admission from the seller of a product that sales would not occur without the challenged deception. From this admission alone, the jury could have reasonably concluded that VI's intentional deception was the proximate cause of the PPU sales, and the resulting decrease in the available market for Extension Agreements.

The jury also heard undisputed testimony about the similarities between the PPU contract and the Extension Agreement, and about how VTS Owners were unlikely to purchase both products. A VIOA representative, former VIOA counsel, testified that PPU contracts and Extension Agreements are similar products with some "overlaps," in that both products extend a VTS contract to allow for continued use beyond the established termination date. (RP 10/26 at 78.) While some VTS Owners have purchased both products, the "general rule" was that VTS Owners would not purchase both products. (*Id.*) Mr. Ringgenberg, the witness with the most direct experience in the Extension Agreement business, also testified that purchasers of a PPU contract were unlikely to purchase an Extension Agreement. (RP 10/15 at 21.) And C. Albert Bentley, VI's President, testified that he was not aware of anyone who owned both a PPU Contract and an Extension Agreement. (RP 10/27 at 140-143, 192.)

While an award of CPA damages requires proof that the damages were caused by the unfair practice, there is no requirement that causation be shown by evidence of direct reliance by a deceived consumer. *Schnall v. AT&T Wireless Services*, 168 Wn.2d 125, 144, 225 P.2d 929 (2010). This is particularly true where, as in the present case, the unfair practice is an omission of a material fact. *Id.*; *see also Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 85, 170 P.3d 10 (2007) (plaintiffs are not required to show reliance where other evidence is sufficient to establish causation). In other words, where the CPA violation is based on unfair competition, causation can be shown through the evidence of the unfair practice and its impact on the competitor. *Id.*

The LLCs presented substantial evidence and testimony establishing that VI's unfair omission of critical information (*i.e.*, the dates that the relevant real estate would leave the VTS Trust) in the marketing and sale of PPU contracts led directly to sales that reduced the available market of potential customers for the sale of Extension Agreements. In other words, the LLCs presented substantial evidence establishing a causal link between VI's act (removing and not providing the necessary disclosures in the sale of PPU contracts)[5] and the injury suffered by LLCs (the reduced number of potential customers and the resulting lost market for the sale of Extension Agreements). *See Schnall,* 168 Wn.2d at 144-147; *see also Schmidt v. Cornerstone Investments, Inc.* 115 Wn.2d 148, 167-68, 795 P.2d 1143 (1990) (Plaintiff, through presentation of substantial evidence, established a fact question for the jury as to whether a party would have taken action had they not been induced to acting differently due to misrepresentations).

There was evidence that the LLCs were damaged VI's deceptive conduct. The LLCs presented undisputed evidence regarding the revenues earned by VI and VIOA from the sale of PPU Contracts to VTS Owners of Record as of 1997, the <u>same market</u> (VTS Owners as of November 1997) to which access had been promised to the LLCs. (RP 10/22 at 91:15-92:15; *see* Exs. 138, 337.) This data, which was presented during the LLCs' case-in-chief and then discussed in detail during closing argument, established that VI earned in excess of $12,000,000 in revenue from the marketing and sale of PPU contracts to VTS Owners of Record before VI turned over management of the VTS program in 2004. (*See* Exs. 138, 337; RP 10/29 at 66-67.)

[5] VI does not challenge the jury's conclusion that the lack of disclosure associated with the PPU contracts was unfair and deceptive in violation of the CPA.

There was also evidence regarding a VTS Owner who was, in fact, deceived by VI's disclosures (in addition to the two VTS owners referenced in Exhibit 11). Landon Estep, the former General Counsel of VI, wrote a letter to a customer who demanded return of the purchase price of their PPU contract after learning of the inaccurate and deceptive information that had been provided to them during the marketing and sales process. (*See* Ex. 397.) The jury could infer directly from this evidence that other VTS Owners were similarly deceived in their purchase of a PPU contract, and that the LLCs lost any opportunity to sell Extension Agreements to those customers.

Here, the deceptive conduct was intentional. (*See* Ex. 11 ("That's why management decided to drop Schedule B....").) Federal cases under the Lanham Act have held that there is a presumption that a defendant who intends to deceive consumers succeeded in its plan and that consumers were deceived. *See Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Avenue*, 284 F.3d 302, 316 (1st Cir. 2002) ("It is well established that if there is proof that a defendant intentionally set out to deceive or mislead consumers, a presumption arises that customers in fact have been deceived."); *accord Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1146 (9th Cir. 1997) ("Plaintiffs may be entitled to a presumption of actual consumer deception and reliance and would therefore be entitled to appropriate monetary relief unless defendants could rebut the presumption."). Federal decisions are persuasive in construing the Washington CPA. RCW 19.86.920 ("...in construing this act the courts should be guided by the final decisions of the federal courts and federal trade commission interpreting the various federal statues dealing with the dame or similar matters....").

VI's reliance on *Fidelity Mortgage Corp. v. Seattle Times Co.*, 131 Wn. App. 462, 128 P.3d 621 (2005), for its CPA causation argument is misplaced, for that case does not address the situation presented here. In *Fidelity*, the "product" (publication of mortgage rate charts) at issue was alleged to be inaccurate, and the plaintiff alleged that the inaccuracy caused lost business. Here, there was substantial evidence that the PPU contract and Extension Agreements were direct-demand substitutes, and that the target customers would not buy both products. (RP 10/15 at 21; RP 10/21 at 234-236; RP 10/26 at 78; RP 10/27 at 192.) Moreover, unlike the *Fidelity* case, there are no "staggering complexities" in the calculation of damages, as evidenced by the analysis and testimony of Ms. Rosen which was understood and accepted by the jury. In reaching her calculation of damages, Ms. Rosen assumed (in a manner consistent with the evidence) that purchasers of PPU contracts would not be customers for Extension Agreement, such that the size of the LLCs' available market was decreased. (RP 10/21 at 236.)

The LLCs' causation theory was not speculative. VI acknowledged that it omitted critical consumer information in the marketing of PPU contracts, and that VI's omission resulted in millions of dollars of sales. (*See* Ex. 11.) The evidence established that VI's conduct caused a decrease in the available market of the LLCs' potential customers, and that each lost customer represented lost profits. The jury concluded logically that VTS Owners who purchased a PPU contract would have instead purchased a VTS Extension Agreement "but for" VI's unfair and deceptive conduct. *See Schmidt*, 115 Wn.2d at 167-68. The jury was entitled to reach this conclusion based on the substantial evidence presented, and its determination should not be reversed. (*See* RP 12/11 at 19-20.)

2. The Jury's Calculation of Damages Associated with the LLCs' CPA Claim Was Reasonable.

The jury is provided the power under the Washington constitution to weigh the evidence and determine the facts, and the amount of damages in a particular case is an ultimate fact. *James v. Robeck*, 79 Wn.2d 864, 868-70, 490 P.2d 878 (1971). Washington courts maintain a strong interest in favor of upholding jury verdicts. *Alger v. City of Mukilteo*, 107 Wn.2d 541, 551, 730 P.2d 1333 (1987). A jury's verdict "must be accorded a strong presumption of validity." *James*, 79 Wn.2d at 868 (citing RCW 4.76.030). So long as the verdict is reasonably within the range of proven damages, whether disputed or not, and where it can be said that the jury could believe or disbelieve some of the evidence yet remain within the range of the evidence in returning the verdict, then it cannot be found as a matter of law that the verdict was unmistakably so excessive or inadequate as to show that the jury had been motivated by passion or prejudice solely because of the amount. *Id.* at 870-71; *Alger*, 107 Wn.2d at 551-52.

The LLCs not only presented substantial evidence that VI breached contractual obligations and violated the CPA, but also presented substantial evidence of the projected total net profits that would have been earned from the lost Extension Agreement business "but for" VI's conduct. (*See* Exs. 138, 337.) It was the province of the jury to evaluate this evidence and to determine the fact and measure of damages attributable to each claim.

The Court of Appeals has held under circumstances like this case that a trial court must not second-guess a jury's allocation of total damages between two different causes of action. *Conrad v. Alderwood Manor*, 119 Wn. App. 275, 291-92, 78 P.3d 177 (2003). In *Conrad*, the decedent's estate sued a nursing home for both negligence and neglect under the Abuse of Vulnerable Adults statute (RCW 74.34.200). The jury found for the plaintiff on both claims and awarded $4.755 million in damages allocated between the two claims. *Conrad*, 119 Wn. App. at 280. The defendant made the same argument made here by VI - that the evidence did not support the jury's allocation of the damages. The Court rejected this argument:

> But such an analysis would necessarily run over the line between identifying the factual basis for the jury's award, and appellate inquiry which would necessarily delve into the jury's thought processes, or at least, our assumptions about those thought processes. Either way, those are matters which necessarily inhere in the verdict.
>
> Here, Conrad presented evidence of negligence. Conrad presented evidence of neglect. RCW 74.34.200. And they presented evidence of damages flowing from both negligence and neglect. *It was then for the jury to sort out*

> *which damages were ascribable to which cause of action. Everything else inheres in this verdict. Inherent in this verdict is a finding that both causes of action contributed to Enid's injuries and suffering. We need not, and indeed cannot, sort out exactly how the jury went about doing that.*

Id. at 292. (emphasis added)

Conrad teaches that the LLCs were not obligated to allocate their damages between the contract and CPA claims. The only question is whether the total verdict amount was within the range of the evidence, and it clearly was.

The expert testimony of Ms. Rosen established that the *total* net profits that the LLCs would have earned if they had entered the Extension Agreement business in 2002 and if there had been no deceptive sales of PPU contracts by VI to the customers in the total available market. (RP 10/21 at 149-150.) Ms. Rosen's calculation of the "Total Available Market" included a deduction for the prior purchasers of PPU contracts who were deceived into buying VI's direct-demand substitute for Extension Agreements. (RP 10/21 at 234-236, 251; RP 10/22 at 29-32; *see* Ex. 11.) The LLCs also presented evidence in support of the total monetary injury resulting from VI's violative conduct, including the data which established $12,000,000 in revenues (at a minimum) from the sale of PPU contracts to VTS Owners of record as of November 1997 - the same market to which LLCs were supposed to be entitled to sell Extension Agreements. (*See* Exs. 138, 337; RP 10/29 at 66-67.) The jury agreed with Ms. Rosen's conclusions, and determined that 50% of the LLCs' damages (plus $1) should be allocated to the breach of contract claim and that 50% of the damages should be allocated to the CPA claim. The jury's discretionary determination should not be disturbed.

Ms. Rosen did not analyze the LLCs' lost profits with a specific delineation between contract-based damages and CPA-based damages because she was neither requested nor required to do so. (RP 10/22 at 110.) The LLCs were not required to prove the damages associated with each claim with "mathematical exactness," so long as the fact of total loss was established with sufficient certainty to provide a reasonable basis for estimating that loss. *Haner v. Quincy Farm Chem., Inc.*, 97 Wn.2d 753, 757, 649 P.2d 828 (1982). The jury should be permitted wide latitude and discretion in their evaluation of evidence, their analysis and drawing of reasonable inferences from that evidence, and their final calculation and allocation of damages. *See Seattle W. Indus., Inc. v. David A. Mowat Co.*, 110 Wn.2d 1, 6, 750 P.2d 245 (1988).

VI had ample opportunity to argue the "maximum amount of damages" that the LLCs could recover under their CPA claim, but VI chose to argue to the jury that the LLCs suffered no monetary loss from either the breach of contract or the CPA violations. (RP 10/29 at 59.) The fact that VI's theory was rejected does not provide an adequate basis for reversing the jury's determination.

The jury's total damages award was consistent with Ms. Rosen's calculation of the LLC's total net lost profits (excluding the fair market real estate value of the disputed remainders, about which VI offered no evidence). The jury's allocation between the contract claims and CPA claims is supported by substantial evidence from which rational unbiased minds (using the evidence and common sense) could raise reasonable inferences and reach reasonable conclusions. (Exs. 138, 337; RP 12/11 at 19-20.) More importantly, that determination is exclusively the province of the jury. VI's complaints about the jury's allocation of the award were properly rejected by the trial court, and that decision should be affirmed.

C. The LLCs' Expert Separately Calculated the Real Estate Value of the Remainder Condominiums to Avoid Double Recovery, and the Verdict Shows the Jury Did Not Make an Overlapping Award.

The total verdict of $29,588,025 correlated with Ms. Rosen's calculation of the lost profits incurred by the LLCs if they had been able to enter into the Extension Agreement business with marketable title to all of the real estate. (RP 10/22 at 29-35, 58-63, 79-82.) Separately, the LLCs claimed that VI had also failed to provide marketable title to relevant real estate holdings in Mexico and Palm Springs, as required by the 1998 agreements. *Valley Garage, Inc. v. Nyseth*, 4 Wn. App. 316, 319, 481 P.2d 17 (1971) (citing *Hebb v. Severson*, 32 Wn.2d 159, 169, 201 P.2d 156 (1948) ("Even in the absence of any provision in the contract indicating the quality of the title provided for, the law implies an undertaking on the part of the vendor to make and convey a good or marketable title to the purchaser."); CP 953 (Instruction #17)). The jury rejected VI's claim that it either had already conveyed marketable title to the Palm Springs units, or that it was impossible to convey the units in Palm Springs and Vallarta, or that it was excused from conveying these units because the LLCs should have borne the expense of accomplishing the work. (CP 1001-1007.) VI cannot meet its burden of showing that the jury's decision regarding marketable title was not supported by substantial evidence. *Nordstrom Credit, Inc.*, 120 Wn.2d at 939-40.

The damages resulting from VI's failure to provide marketable title are separate and distinct from the LLCs' lost profits. To illustrate this fact, Ms. Rosen made two separate calculations of the LLCs' total damages: (1) the total lost profits assuming the LLCs had received marketable title, which was a lower amount ($29,588,025); and (2) the total lost profits assuming the LLCs had not received marketable title, which was a higher amount that included the appraised real estate value of the remainder condominiums ($36,904,025). (RP 10/22 at 34-35, 58-63, 81-82.) The jury awarded the lower amount of Ms. Rosen's calculations ($29,588,025), while separately finding that the LLCs did not receive marketable title. (CP 1001-1007.) These separate findings establish that the jury did not include the appraised value of the real estate with marketable title within their calculation of the LLCs' monetary damages. The jury's ruling established, and ensured, that there was no double recovery.

In lieu of receiving additional monetary damages associated with receiving marketable title to these disputed properties, the LLCs requested an order of Specific Performance that would require VI to provide marketable title to the specific real estate at issue. (CP 1051-1064; RP 10/29 at 105; RP 12/11 at 51-86.) That way, the LLCs would be truly made "whole" as if VI had performed all of its contractual obligations.

Specific performance allows the LLCs to receive the marketable real estate that they were entitled to receive not later than November of 2002. A court should not participate in enforcing an unjust result, for "[s]pecific performance is one such remedy that, like all equitable remedies, strives to do perfect justice." *Crafts v. Pitts*, 161 Wn.2d 16, 23, 162 P.3d 382 (2007) (citations omitted); *see also Pardee v. Jolly*, 163 Wn.2d 558, 569, n.6, 182 P.3d 967 (2008) (noting the "well established body of law regarding the propriety of specific performance as a remedy for the breach of a contract involving the sale or conveyance of real property."). The jury's determinations that the LLCs did not receive marketable title as contracted for, and that the LLCs should not also receive the value of that real estate as part of their monetary damage award, provide the necessary foundation for the trial court's entry of the order of specific performance, and that decision should be affirmed.

D. There Was No Basis for Ordering a New Trial and the Trial Court did not Abuse Its Discretion in Denying VI's Motion.

The trial court has broad discretion in ruling on a motion for new trial for juror misconduct. *Thompson v. Grays Harbor Comm'ty Hosp.*, 36 Wn. App. 300, 307, 675 P.2d 239 (1983). The trial court's decision will only be reversed for clear abuse of discretion. *State v. Briggs,* 55 Wn. App. 44, 60, 776 P. 2d 1347 (1989). As observed in *Dean v. Group Health Cooperative of Pug. Sound*, 62 Wn. App. 829, 837-38, 816 P.2d 757 (1991), a case presenting a very similar factual situation with conflicting juror declarations:

> Appellant assumes that the presentation of the two declarations establishes the facts proving bias and misconduct. The fact remains, however, that appellant's declarations were opposed by other declarations which support the trial court's conclusion that neither bias nor misconduct had been established. It is not the province of this court to reweigh the evidence considered by the trial court. *Although the evidence presented to the trial court in support of the motion for new trial was in the form of declarations, the trial judge also had the advantage of observing the demeanor of the jurors during voir dire and throughout the trial, an advantage not available to this appellate court... We cannot rule that the trial court abused its discretion by believing the proof offered by Group Health rather than the proof offered by appellant as to whether bias or misconduct had been present in the jury deliberations, particularly in view of the trial court's opportunity to observe juror Beier during individual voir dire and throughout the lengthy trial.*

(emphasis added).

A new trial based on voir dire misconduct should be ordered only where: (1) a juror gives a dishonest answer to a material question in voir dire, and (2) an honest response would have provided a valid basis for a challenge for cause. *In Re Personal Restraint of Lord*, 123 Wn.2d 296, 313, 868 P.2d 835, *clarified* 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994); *see also In re Personal 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, 553, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)).

VI incorrectly argues that the fact that an answer could have motivated a party to use a preemptory challenge to remove the juror is not sufficient under current Washington law. (*See* App. Br. at 41-43.) VI mistakenly relies on the former rule set out in *Robinson v. Safeway Stores Inc.* 113 Wn.2d 154, 776 P. 2d 676 (1989) and *Smith v. Kent*, 11 Wn. App. 439, 523 P. 2d 446, *rev. denied*, 92 Wn.2d 1010 (1979). (CP 1397-1401; *See* App. Br. at 42-46.) Washington now follows the federal rule of *McDonough. See Lord*, 123 Wn.2d at 313. In *Detention of Broten*, 130 Wn. App. 326, 338-339 (2005), the court rejected the same argument based on *Robinson* and *Smith,* that a new trial should be granted if the undisclosed information would have led a party to use a peremptory challenge:

> Because we find that juror eight did not commit misconduct, we need not address the second prong of the McDonough test, i.e. ,whether a "correct response" would have provided a valid basis for challenge for cause. McDonough, 464 U.S. at 556, 104 S. Ct. 845. Nevertheless, we note that Broten is in error in asserting that a new trial is warranted where a truthful disclosure would have independently provided a basis for peremptory challenge.

Here, as in *Dean* the trial court considered conflicting juror declarations and its observation of voir dire and the three-week trial and concluded in its discretion VI had not met the first requirement of *Lord*, that juror Thompson gave a false answer in voir dire:

> 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.

(RP 12/11 at 50.) The trial court did not abuse its discretion in making this determination.

1. The Record Supports the Trial Court's Determination that Mr. Thompson Gave a Truthful Answer to the Individual Voir Dire Question.

Mr. Thompson retired from the Army in 1993 or 1994 and has been in the appliance repair business since. (CP 1658-1662 at ¶ 2.) He has also been a volunteer reserve deputy King County Sheriff for approximately 23 years. (*Id.*)

In voir dire Mr. Thompson disclosed that he had been a member of the VTS program for approximately 15 years. (RP 10/12 at 70:14-71:1.) He and his wife also own another timeshare membership in a different program. (*Id.*) VI asserts that Mr. Thompson gave a false answer when he indicated that his 15 year membership in the VTS program had been "satisfactory." Mr. Thompson denied that this answer was false and affirmed the answer in his declaration testimony. (CP 1658 ¶¶ 4-8.) His answer is also consistent with the undisputed fact that he had stayed in the VTS program for 15 years, paying his annual membership fees, and enjoying the vacation opportunities provided by the program together with his wife. (*Id.*; RP 10/12 at 70.)

Mr. Thompson also indicated in response to general voir dire questions that he had been to a timeshare presentation, although counsel for VI asked him no direct questions about this or any other subject. The timeshare presentation referred to by Mr. Thompson in the jury deliberation was apparently a VI PPU presentation in which Mr. Thompson asked a question the salesman could not answer. (CP 1658 ¶ 6.) The entire interaction with this salesman lasted approximately 15 seconds, and Mr. Thompson merely concluded the salesman was not well educated about the product he was selling. (CP 1659-1660 at ¶ 6.) It was not significant to him then or at the time of trial. (*Id.*) He denied any bias and pointed out to the court that in his law enforcement work he "always reserves judgment about what may have happened until I hear both sides of the story. I did that in my jury service on this case." (*Id.* ¶ 8.)

The trial court considered the evidence and determined that Mr. Thompson's answer to the question was honest. This determination was not untenable or manifestly unreasonable. It is consistent with the evidence.

2. Mr. Thompson was Honest in Response to the Two General Voir Dire Questions About "Negative Feelings," Since He Had None.

VI asserts that Mr. Thompson should have raised his hand in response to two general questions asked after two jurors (Nos. 27 and 29) were removed for cause without objection based on their individual answers about experiences with timeshare presentations and their feelings about timeshare companies in general. (*See* App. Br. 41-45.) The trial court determined that Mr. Thompson's responses were truthful. The context of the voir dire examination supports the trial court's decision.

The first general question to the panel that is the basis of VI's appeal came immediately after the questioning of Juror No. 29. (*See* App. Br. 44.) Counsel for VI ask whether any of those jurors who had been to timeshare presentations "couldn't find it in your heart to be fair and balanced in this case just because of that experience, whether it was with any of these parties or at all?" (RP 10/12 at 85.) Juror 29 raised her hand. In answer to questions by counsel for VI she indicated that she was "pretty opposed to timeshares" and that she was concerned that she could not be fair, and that it was probably not fair to VI to have her on the jury. (*Id.* 86-88.) In answer to follow up questioning from Judge Yu, Juror 29 said she did not know if she could put her feelings aside and decide the case based on the evidence. (*Id.* 89.) She told the court that that the timeshare presentation she attended was "insulting," she felt "attacked" and that it was "out of the ordinary." (*Id.*) She testified that she would "automatically find suspect" any testimony related to timeshares. (*Id.* 90.) Understandably, the court excused Juror 29 for cause without objection. (*Id.* 91.) Another juror, No. 27, also felt "demeaned" and "pressured " in a timeshare presentation 30 years prior, had a "low opinion" of the timeshare industry generally, and felt that "both sides are basically sleaze bags." (*Id.* 92-93.) Juror 27 was excused for cause, again without objection. (*Id.*).

Counsel for VI then asked the panel the question it claims Mr. Thompson should have responded to:

> MR. O'NEILL: 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 there 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 into the jury room and not be able to set aside? Is there anyone else on that list?*

(*Id.* at 92 (emphasis added).)

There is no evidence that Mr. Thompson felt the "same way" as jurors 27 and 29 or that he had been "insulted" or "attacked" or "demeaned" or otherwise abused during any timeshare presentation he attended, or that he had negative feelings about timeshares in general. As his declaration indicated, he believed that his answer to the question was truthful and that he would give the same answer if asked again. (CP 1658.) He did not believe that his timeshare presentation experience would lead him to a biased conclusion or that he was biased. (*Id.*)

Mr. Thompson's declaration was corroborated by the declarations of jurors Hunt and Pierce, who testified that Mr. Thompson mentioned his timeshare presentation experience only once and very briefly, and that he otherwise was relatively quiet during deliberations. (CP 1651, 1654.) The declarations of jurors Coatsworth and Kimble (CP 1413-1414; 1411-1412) do not reflect that Mr. Thompson said the presentation in question left him with negative feelings. Rather, Mr. Thompson was left with the impression that one salesperson was uninformed. (CP 1659-1660 at ¶ 6.)

Mr. Coatsworth indicated that Mr. Thompson was critical of VI's sales of the PPU contracts. But this was disputed, and even if true would hardly be surprising given the evidence that he heard during trial, including an internal memo from senior VI executives admitting that they had deceived VTS owners about PPU contracts precisely because it knew VI could not sell millions of dollars of PPU contracts if purchasers knew the truth. (*See* Ex. 11.)

After considering all of the declarations, the transcript and informed by its observation of the voir dire and trial the trial court concluded, as the trial court did in *Dean*, that the juror's answer was honest. There was no reason to believe Mr. Thompson had gone through a VI timeshare presentation and came away with the extreme negative feelings described by Jurors 27 and 29, or that there was something he subjectively believed defense counsel "should know." As such, there was no reason he would or should have raised his hand. A juror is not required to read counsel's mind. *State v. Brenner,* 53 Wn. App. 367, 372, 768 P.2d 509 (1989). The trial court did not abuse its discretion in determining that Mr. Thompson did not make a misrepresentation in response to the general question.

3. Mr. Thompson Would Not Have Been Excused for Cause.

The moving party must show that honest answers by the juror would have been provided an objective basis for a challenge for cause, not merely a peremptory challenge. *In Re Broten*, 130 Wn. App. at 337. A juror will be excused if he is biased such that he or she cannot try a case impartially and without prejudice to a party. *Brady v. Fibreboard Corp.*, 71 Wn. App. 280, 283, 857 P.2d 1094 (1993).

Using the disputed declarations of the disgruntled jurors, VI contends that Mr. Thompson should have raised his hand to indicate a negative timeshare experience and negative feelings about timeshare companies. But even this hypothetical response would not necessarily have resulted in Mr. Thompson being removed for cause.

As demonstrated by the examination of Juror 29 discussed above, a negative presentation experience would not *per se* disqualify a juror for cause. Juror 29 was removed only after follow-up questioning by the court in which she acknowledged that she could not be fair. (RP 10/12 at 88:13-91:12.) Similar questioning of Mr. Thompson would have elicited the testimony set out in his declaration - that he was not unhappy with his membership in the VTS program, that he was not biased against VI, and that he would and did reserve judgment until hearing all of the evidence. (CP 1658-1662.) There is no reason to believe this testimony would not have been believed or that VI would have otherwise elicited testimony that disqualified Mr. Thompson for cause as required by Washington law.

The voir dire examination of Juror 73 illustrates the point. Juror 73 was, like Mr. Thompson, a long term member of VI's VTS program. (RP 10/12 at 84.) He was asked by VI counsel "was the experience satisfactory with Vacation Internationale?" He answered "Yes and no, because we have had a number of experiences." (*Id.*) Counsel did not follow up. So notwithstanding Juror 73 indication of at least some unsatisfactory experiences with VI, he was not challenged for cause by VI. There is no basis for assuming that Mr. Thompson would have been excluded even if he indicated he had an unsatisfactory experience with VI.

4. The Trial Court was not Required to Hold an Evidentiary Hearing.

The trial court decided that an evidentiary hearing was not necessary. That decision is discretionary. *State v. Cummings*, 31 Wn. App. 427, 43-32, 642 P. 2d 415 (1982). No Washington case holds that is an evidentiary hearing is always required on a motion for new trial in where juror declarations are at issue.

VI relies solely on *State v. Cho* for the proposition that a hearing was required because there were conflicting juror declarations. (*See* App. Br. at 47-48.) But *Cho* is inapplicable. In *Cho,* the trial court denied a motion for new trial where the juror did not disclose his previous law enforcement employment. However, at the time of the motion for new trial, the trial court did not have a transcript of voir dire, which was available to the Court of Appeals. (*Id.* at 326.) The Court of Appeals observed that the trial judge had been mistaken in his recollection about the general voir dire question that was the subject of the appeal and thought it had asked a broader questing. (*Id.* at 326-27.) This Court sent the case back for a hearing on the complete record and instructed the trial court to consider the transcript as a whole and hold an evidentiary hearing. There is no holding that it would be a *per se* abuse of discretion to not hold an evidentiary hearing in every case with conflicting juror declarations.

Unlike *Cho*, the trial court had the benefit of a full transcript and the parties submitted the relevant portions with their briefs. Like the court in *Dean*, the trial court determined that it could resolve the question based on the transcript and the evidentiary record on the motion. The trial court did not abuse its discretion.

E. The LLCs Are Entitled to an Award of Attorneys' Fees and Costs on Appeal.

The LLCs are entitled to recover their fees and costs as prevailing parties under the parties' agreements and the CPA. (CP 1945.) Upon affirmance, LLCs will be the substantially prevailing party and this Court should award them their fees and costs incurred on appeal. RAP 18.1.

V. CONCLUSION

Respondents respectfully ask the Court to affirm the judgment on the jury verdict and to award fees and costs on appeal.

Dated this 17th day of September, 2010.

RIDDELL WILLIAMS P.S.

By: ______________________
Karl J. Quackenbush, WSBA #9602
Ken Lederman, WSBA #26515
Charlie S. Fitzpatrick, WSBA #33096
1001 Fourth Avenue, Suite 4500
Seattle, WA 98154
Tel: (206) 624-3600

Charles K. Wiggins, WSBA #6948
WIGGINS & MASTERS, PLLC
241 Madison Avenue North
Bainbridge Island, WA 98110
Tel: (206) 780-5033

Attorneys for Respondents

APPENDIX

Appendix A: FLRX, Inc. History

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FLRX, Inc. History