

64747-4

64747-4

No. 64747-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

TORRES MAZATLAN REMAINDER, LLC, et al.

Respondents,

vs.

FLRX, INC.,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 JUL -6 AM 10:11

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

BRIEF OF APPELLANT

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

SNELL & WILMER, L.L.P.

By: Catherine W. Smith
WSBA No. 9542
Howard M. Goodfriend
WSBA No. 14355

By: James D. Kilroy

1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974

1200 Seventeenth Street
Tabor Center, Suite 1900
Denver, CO 80202
(303) 634-2000

Attorneys for Appellant

TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR	1
II.	ISSUES RELATED TO ASSIGNMENTS OF ERROR.....	2
III.	STATEMENT OF FACTS	3
	A. Plaintiffs' Principals Sold Timeshares In Vacation Properties That Reverted To The Plaintiffs After 40 Years.	3
	B. Plaintiffs' Principals Sold Their Business to Defendant, Which Agreed To Convey Remainder Interests to Plaintiffs.....	5
	C. Defendant Was Unable To Transfer The Remainder Interests In Three Timeshare Properties In A Manner Satisfactory To Plaintiffs.....	7
	1. The Oasis Remainders.	8
	2. The Tower II Remainders.....	10
	3. The Tower I Remainders.....	12
	D. Plaintiffs Sued, Claiming Unfair Competition And Lost Profits In A "Unique" New Business Selling Remainder Timeshare Interests As A Standalone Product.	12
	E. Plaintiffs Put On A Case For Lost Profits Solely Through An Accounting Expert, Who Testified Her Analysis Did Not Encompass The CPA Claim.	15

F.	The Jury Awarded \$29 Million Damages After Finding That Defendant Failed To Convey Marketable Title. The Trial Court Entered Judgment On The Jury's Verdict, And In Addition Ordered Defendant To Convey Marketable Title.	17
G.	The Trial Court Denied Defendant's Motion For New Trial Based Upon A Juror's Failure To Reveal His Negative Experiences With Defendant In Voir Dire, Which The Juror Then Related To The Jury During Deliberations.	20
IV.	ARGUMENT	22
A.	Plaintiffs Were Not Entitled To Recover As Contract Damages \$14.8 Million For The Lost Opportunity To Sell Remainder Timeshare Interests, A Unique Product That Had Never Been Marketed Anywhere.....	22
B.	Plaintiffs Failed To Establish That The Defendant's Alleged Deceptive Disclosures To Purchasers Of PPU Contracts Caused The Plaintiffs Any Damages At All, Let Alone The \$14.8 Million Awarded By The Jury.	31
C.	The Trial Court Gave Plaintiffs A Double Recovery By Awarding Both Damages For Lost Profits And Specific Performance.	37
D.	Defendant Was Entitled To A New Trial Because A Juror Failed To Reveal His Bias Against Defendant In Response To Direct Questioning During Voir Dire.	41
1.	The Juror's Misconduct Deprived Defendant Of Its Constitutional Right To Trial By Jury.	41

2.	The Trial Court Erred In Denying A New Trial Without Holding An Evidentiary Hearing.	47
E.	This Court Should Vacate The Fees Awarded To Plaintiffs And Award Defendant Its Fees At Trial And On Appeal.	49
V.	CONCLUSION	50
	APPENDICES	

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.</i> , 241 F.3d 696, 701 (9th Cir.), <i>cert denied</i> , 534 U.S. 891 (2001)).....	33
<i>Autotrol Corp. v. Continental Water Systems Corp.</i> , 694 F.Supp. 603 (E.D.Wis. 1988).....	28
<i>Browne v. Avvo Inc.</i> , 525 F.Supp.2d 1249 (W.D. Wash. 2007)	33
<i>Burton v. Johnson</i> , 948 F.2d 1150 (10th Cir. 1991).....	49
<i>Speakers of Sport, Inc. v. ProServ, Inc.</i> , 178 F.3d 862 (7th Cir. 1999).....	36

STATE CASES

<i>Allison v. Dep't of Labor and Indus.</i> , 66 Wn.2d 263, 401 P.2d 982 (1965)	46
<i>Allyn v. Boe</i> , 87 Wn. App. 722, 943 P.2d 364 (1997), <i>rev. denied</i> , 134 Wn.2d 1020 (1998)	46
<i>Birchler v. Castello Land Co., Inc.</i> , 133 Wn.2d 106, 942 P.2d 968 (1997)	37
<i>Crafts v. Pitts</i> , 161 Wn.2d 16, 162 P.3d 382 (2007)	38, 41
<i>Crest Inc. v. Costco Wholesale Corp.</i> , 128 Wn. App. 760, 115 P.3d 349 (2005).....	38
<i>Earle M. Jorgensen Co. v. Tesmer Mfg. Co.</i> , 10 Ariz.App. 445, 459 P.2d 533 (1969).....	28

<i>Farm Crop Energy, Inc. v. Old National Bank</i> , 109 Wn.2d 923, 750 P.2d 231 (1998).....	23, 25-27
<i>Fidelity Mortgage Corporation v. Seattle Times Co.</i> , 131 Wn. App. 462, 128 P.3d 621 (2005).....	32, 33, 35
<i>Gordon v. Deer Park School Dist. No. 414</i> , 71 Wn.2d 119, 426 P.2d 824 (1967).....	42, 46
<i>Heasley v. Nichols</i> , 38 Wash. 485, 80 P. 769 (1905)	46
<i>Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.</i> , 162 Wn.2d 59, 170 P.3d 10 (2007)	32
<i>Kritzer v. Moffat</i> , 136 Wash. 410, 240 P. 355 (1925)	38
<i>Larsen v. Walton Plywood Co.</i> , 65 Wn.2d 1, 390 P.2d 677, 396 P.2d 879 (1964).....	23-25
<i>McKown v. Driver</i> , 54 Wn.2d 46, 337 P.2d 1068 (1959)	38
<i>National School Studios v. Superior School Photo Service, Inc.</i> , 40 Wn.2d 263, 242 P.2d 756 (1952)	24, 29
<i>No Ka Oi Corp. v. National 60 Minute Tune, Inc.</i> , 71 Wn. App. 844, 863 P.2d 79 (1993), rev. denied, 124 Wn.2d 1002 (1994)	25-27
<i>O'Brien v. Larson</i> , 11 Wn. App. 52, 521 P.2d 228 (1974)	36
<i>Panag v. Farmers Ins. Co.</i> , 166 Wn.2d 27, 204 P.3d 885 (2009)	31
<i>Pardee v. Jolly</i> , 163 Wn.2d 558, 182 P.3d 967 (2008)	40

<i>Robinson v. Safeway Stores, Inc.</i> , 113 Wn.2d 154, 776 P.2d 676 (1989)	42-43, 45-46
<i>Smith v. Kent</i> , 11 Wn. App. 439, 523 P.2d 446, rev. denied, 84 Wn.2d 1007 (1974).....	42-43, 45-46
<i>State Dept. of Highways v. Evans Engine and Equipment Co., Inc.</i> , 22 Wn. App. 202, 589 P.2d 290 (1978), rev. denied, 92 Wn.2d 1010 (1979)	39
<i>State v. Cho</i> , 108 Wn. App. 315, 30 P.3d 496 (2001)	47-49
<i>Texas Instruments, Inc. v. Teletron Energy Management, Inc.</i> , 877 S.W.2d 276 (Tex. 1994).....	28
<i>Tiegs v. Watts</i> , 135 Wn.2d 1, 954 P.2d 877 (1998)	24
<i>Wappenstein v. Schrepel</i> , 19 Wn.2d 371, 142 P.2d 897 (1943)	36

STATUTES

RCW ch. 19.86	49
RCW 19.86.020	34
RCW 19.86.090	31, 32, 36
RCW ch. 64.36.....	14
RCW 64.36.020	13

RULES AND REGULATIONS

CR 59.....	41
RAP 18.1.....	49

I. ASSIGNMENTS OF ERROR

1. The trial court erred in denying defendant's motion to exclude the testimony of damages expert Randi Rosen and in overruling defendant's objections to that testimony. (CP 218-29, 810-11; 10/9 RP 29; 10/21 RP 287; 10/22 RP 23-24, 28, 59)

2. The trial court erred in denying defendant's motion to exclude evidence of lost profits. (CP 231-38, 808-09; 10/9 RP 36-37)

3. The trial court erred in giving Court's Instruction No. 27 (CP 964) (App. A), and in refusing to give Defendant's Proposed Instruction D, on lost profits. (CP 824; 10/29 RP 97) (App. B)

4. The trial court erred in giving the jury its Verdict Form. (CP 969-75; 10/29 RP 98-103)

5. The trial court erred in denying defendant's Motions for Judgment as a Matter of Law after plaintiff rested, and again after trial. (10/27 RP 3-8; CP 1916-17, 1934-35)

6. The trial court erred in entering its Order Denying Defendant's Motion For New Trial. (CP 1918-19)

7. The trial court erred in entering its Judgment and Order of Specific Performance (CP 1965-70) (App. C), its Findings of Fact and Conclusions of Law re: Specific Performance (CP

1953-58), and in particular those findings and conclusions underscored in Appendix D.

8. The trial court erred in entering its Order Granting Plaintiffs' Motion for Attorney Fees and Costs and its Findings of Fact and Conclusions of Law Re: Attorney Fees and Costs, and in particular those conclusions underscored in Appendix E. (CP 1938-39, 1941-46)

II. ISSUES RELATED TO ASSIGNMENTS OF ERROR

A. May a plaintiff recover lost business profits for breach of contract in the absence of any evidence of the plaintiff's own profit history or of the profitability of similar businesses selling the same product?

B. May a business recover lost profits as damages under the Consumer Protection Act based on an allegation that the defendant's deceptive statements reduced the market for the plaintiff's product in the absence of any evidence that any consumer purchased the defendant's product instead of the plaintiff's product?

C. In an action for breach of contract to convey real property, may the plaintiff recover damages for its claimed lost profits based upon its inability to engage in a business using the

real property in addition to a decree ordering the defendant to specifically convey the real property free and clear of the encumbrances plaintiff claimed caused its lost profits?

D. Is the defendant entitled to a new trial where a juror in voir dire misrepresented that his prior experience with the defendant in marketing and operating timeshare in vacation properties was "satisfactory," failed to disclose in response to specific questions that he had a negative experience when defendant marketed to the juror a timeshare product that was at issue in the litigation, and then discussed his negative experience with other jurors during deliberations?

III. STATEMENT OF FACTS

A. Plaintiffs' Principals Sold Timeshares In Vacation Properties That Reverted To The Plaintiffs After 40 Years.

Plaintiffs/respondents are three limited liability corporations created by the former owners of a timeshare company called Vacation Internationale Ltd ("VI"), Bob Ringgenberg and Bob Burns ("The Bobs" or "plaintiffs' principals"). (CP 64-65) VI ran the Vacation Time Share program ("VTS program") beginning in 1974. (10/13 RP 125, 156) In 1977, the Bobs developed this "points"-based timeshare system, in which customers ("VTS owners")

received “points” that allowed them to vacation at any number of VI properties for a designated number of years. The program gave VTS owners greater flexibility and range of choices than the traditional timeshare interest in a specific resort. (10/13 RP 169)

VI placed its interests in the real properties in the VTS program into a trust. (10/13 RP 133-34) Under the terms of the VTS trust, properties would exit the trust and title to the properties would revert to VI after 40 years. (10/13 RP 154-55) These “remainder interests” – the future real property interests created after the properties exited the VTS trust – are at issue in this litigation.

VI’s primary business was selling new VTS owner agreements to consumers and managing the resort properties in the VTS program. (10/13 RP 157) Seeking to capitalize on VTS owners’ desire to continue vacationing at specific resorts, VI began selling “extension agreements” to VTS owners. These extension agreements allowed existing VTS owners to extend their ownership agreements in order to continue using VTS properties after those properties exited the VTS trust. (10/13 RP 195; 10/14 RP 10-11; 10/15 RP 178-79) In addition to extension agreements, VI marketed to VTS owners the opportunity to purchase either a fee or

leasehold interest in the remainder interests in specific units. (10/14 RP 11; See Ex. C to Ex. 7)

VI sold 7,150 extension agreements to approximately 3,500 VTS owners between 1983 and 1997. (10/14 RP 12, 99) In order to honor the extension agreements, VI had to ensure that it had clear title to the remainder interests in VTS program properties. Because many of the VTS properties were not owned in fee by VI, but were held for terms of varying years, acquisition of remainder interests would have been required in order to honor two-thirds of the extension agreements VI sold before 1997. (10/20 RP 163)

B. Plaintiffs' Principals Sold Their Business to Defendant, Which Agreed To Convey Remainder Interests to Plaintiffs.

In 1997, Signature Resorts International (SRI), a publicly traded company, offered to purchase VI from the Bobs. When the parties began negotiating this sale in 1997, there were 709 apartments in the VTS trust. (10/13 RP 174) Some of the timeshare properties would be coming out of the VTS trust in less than 20 years, beginning in 2015. (10/13 RP 154-55)

Bob Ringgenberg wanted \$16 million for the company, a price SRI was unwilling to pay. The parties eventually settled on a purchase price of \$8 million, which included all assets of the

company except the remainder interests in real property held in the VTS trust. VI claimed that it valued these excluded assets at \$8 million, and thus the parties arrived at an \$8 million purchase price. (10/13 RP 204) However, the Bobs valued the remainder interests under the 1997 purchase agreement “for tax purposes” at \$800,000. (10/14 RP 119)

The 1997 purchase agreement was structured as a sale of all the stock in VI, but included a provision that required defendant to convey the remainder interests to the Bobs. (Ex. 5 at § 1.6; 10/13 RP 200) When the parties were unable to accomplish a transfer of all of the remainder interests prior to closing, the parties entered into two follow up agreements in 1998. (10/13 RP 205-06) The 1998 agreements were executed between VI’s successor Sunterra Pacific and the plaintiff LLCs, which the Bobs created for the purpose of receiving title to the remainder interests. (Exs. 6, 7; 10/14 RP 54-56; 10/15 RP 188)

Without providing a deadline to do so, nor requiring that title to the remainder interests be clear of the encumbrances which existed when the Bobs sold the company to defendant, the 1998 agreements obligated defendant to convey the remainders that had not yet been transferred to plaintiff LLCs. The 1998 agreements

also allowed plaintiffs to sell those remainder interests to VTS owners following a five-year term during which plaintiffs agreed not to compete with defendant. (10/14 RP 63; Ex. 5 at § 4.11(b); Ex. 6 at § 9)

Following execution of these agreements, defendant continued to operate the VI business until April 1, 2004 under the name Sunterra Pacific, Inc. After Sunterra Pacific, Inc. ceased doing business, it went through two name changes; it was known first as Diamond Resorts Pacific, Inc., and now as FLRX, Inc. ("FLRX"). FLRX continued to sell extension agreements to VTS owners, just as the Bobs had done before selling the company. FLRX called these extension agreements Perpetual Point Upgrade ("PPU") contracts. (10/15 RP 190-91; 10/26 RP 59)

C. Defendant Was Unable To Transfer The Remainder Interests In Three Timeshare Properties In A Manner Satisfactory To Plaintiffs.

FLRX conveyed the vast majority of the remainder interests to the plaintiffs before this action was commenced. (10/14 RP 64; 10/15 RP 68-69. See Illustrative Ex. 427) However, FLRX was unable to complete the transfer of the remainder interests in three timeshare properties (the "disputed remainders"), largely because

of title problems that predated the 1997 purchase agreement.
(10/15 RP 142)

1. The Oasis Remainders.

The Oasis property was leased from three Native American landowners to a Master Lessor. (10/13 RP 189-91; 10/14 RP 237) Because the Oasis Resort is on Native American land, and subject to Native American law, any transfer of the Oasis property, or creation of new property at the Oasis resort, requires approval from the Bureau of Indian Affairs (the "BIA"), as well as the Master Lessor. (See Exs. 54 and 57)

The Oasis remainders had a number of title problems, many of which arose before defendant's purchase of VI in 1997. (10/14 RP 240) For instance, plaintiffs' principals had amended the VTS trust to change the date when certain Oasis units would come out of trust, and therefore when the Oasis remainders would begin. Plaintiffs' principals also had divided several Oasis units into two units, and then dedicated the split units to the VTS trust without amending the master lease or creating new condominium subleases. (Ex. 56) Because the Bobs did not obtain approval from the Master Lessor and the BIA for these changes, the

remainder interests in certain Oasis units thus did not legally exist.

(10/15 RP 75-77)

Bob Ringgenberg conceded that it would have been impossible to convey the title plaintiffs claimed they were entitled to until these issues were resolved, and that the issues were not discovered until 2005-06. (10/15 RP 78) Nevertheless, plaintiffs insisted at trial that the transfers should have occurred in 1998.

(10/15 RP 115-16)

FLRX quit-claimed the remainder interests by executing and recording an assignment that transferred FLRX's interest in the Oasis remainders to plaintiffs. (10/15 RP 17) At trial, plaintiffs asserted that this quit-claim assignment did not give them valid title to the Oasis remainders because it did not correct the title problems that FLRX had inherited from plaintiffs' principals. (Ex. 261 at 18-20) Plaintiffs claimed that in order to properly transfer title under their proposed "starting fresh" plan, approval to create a new sublease by the three Native American families, the Master Lessor, and the BIA would be required. (10/14 RP 244; 10/15 RP 16)

2. The Tower II Remainders.

FLRX's subsidiary, Torres Vallarta S.A. de C.V. ("TOVSA"), owned the beneficial interests in the Tower II remainders. TOVSA did not actually own the property. In accordance with Mexican law, the property was held in trust, and TOVSA was the beneficiary of those trusts. (10/13 RP 185-89)

When plaintiffs' principals sold the Tower II properties to defendant, the properties did not legally exist, because they had not been properly described in a condominium declaration. (10/15 RP 105) Further, the Mexican government had an undisclosed claim to the beachfront, including a portion of the land on which the resort was built, when plaintiffs' principals sold this property to defendant in 1997. (10/15 RP 132) Nevertheless, although Bob Ringgenberg admitted in testimony that it had no legal obligation to do so (10/15 RP 109; 10/29 RP 57), in an effort to fulfill the obligations of the 1998 agreements TOVSA transferred the Tower II remainders to Inmuebles NBR ("NBR"), a Mexican entity that plaintiffs had created to receive those interests. (10/14 RP 167-70; Exs. 71, 76) NBR paid no consideration to TOVSA when it transferred the Tower II remainders in December 2007. (See Ex. 88 at 2; 10/14 RP 166, 174)

In the summer of 2008, FLRX learned that the December 2007 deed from TOVSA to NBR incorrectly stated that NBR had paid and TOVSA had received 15,422,090 Mexican pesos (approximately US \$1.5 million) for the Tower II remainders. (10/14 RP 226; 10/15 RP 158; Ex. 88) FLRX determined it could not prepare and file a tax return for TOVSA with the Mexican government that incorrectly stated TOVSA received income it never received. (See Ex. 88 at 3) TOVSA filed a civil action in Mexico to demand an accounting of, and information regarding, the 2007 transaction from plaintiffs' principals, among others, and notified the Mexican authorities of the true nature of the transaction. (Ex. 88 at 3)

Plaintiffs claimed FLRX and TOVSA put a cloud on NBR's title to the Tower II remainders by filing these legal actions in Mexico. (10/15 RP 71) Plaintiffs never responded to TOVSA's suggestion that the parties jointly request a private letter ruling from the Mexican tax authorities by divulging the true nature of the December 2007 transaction and seeking guidance on the tax consequences of the deal that actually occurred. (Ex. 368 at 2)

3. The Tower I Remainders.

FLRX's subsidiary TOVSA also owns the beneficial interests in the Tower I remainders. Under Mexican law, the trust term could not exceed 50 years. Extending the Tower I trusts beyond the commencement dates for the Tower I remainders would have required those trusts to remain in place beyond their termination dates. (10/14 RP 175; 10/21 RP 33-35) New trusts therefore were necessary before the Tower I units could be transferred. (10/21 RP 78-79) FLRX offered to transfer the Tower I apartments to a new trust created by plaintiffs. Although it had created NBR to receive the remainders in Tower II, plaintiffs refused to pay the fees associated with creating new trusts for the Tower I remainders. (10/21 RP 33-35; 10/29 RP 57-58)

D. Plaintiffs Sued, Claiming Unfair Competition And Lost Profits In A "Unique" New Business Selling Remainder Timeshare Interests As A Standalone Product.

This action was commenced in 2003 by plaintiffs Torres Matzatlan Remainder, LLC and related entities. (CP 5-12) Plaintiffs claimed that FLRX had breached the 1998 agreements by not conveying clear title to the disputed remainders and by not allowing plaintiffs to sell, as timeshares rather than as real property,

other remainder interests that had been conveyed to plaintiffs by FLRX. Plaintiffs also alleged unfair competition by defendant. (CP 64-72)

Plaintiffs did not claim as contract damages the inability to profit from the real estate value of the disputed remainder interests. In fact, plaintiff Torres Mazatlan had sold only a portion of the remainder interests conveyed by FLRX for \$10.7 million, as real estate rather than standalone timeshare product. (10/20 RP 32-33) Instead, plaintiffs asserted as contract damages the profits they claimed to have lost because they were unable to sell the disputed remainders as “standalone” timeshare products. (10/21 RP 145, 149-50; CP 1635-37; Ex. 161)

Plaintiffs never solicited nor closed any sales of remainder interests as timeshares. (10/14 RP 103; 10/15 RP 199) No one had previously sold the type of remainder timeshare interests, unconnected to an existing timeshare contract, that plaintiffs claimed as the basis for lost profits. (10/14 RP 103; 10/19 RP 38; 10/21 RP 141, 243; CP 1635) Plaintiffs also admitted that state registration would be required to sell their contemplated timeshare remainder interests, see RCW 64.36.020, and plaintiffs had never

registered to sell such a product.¹ (10/15 RP 42, 186; 10/19 RP 86, 93-94; 10/20 RP 45, 102; 10/21 RP 139; 10/22 RP 214-16; 10/28 RP 52; see Ex. 193) Plaintiffs nevertheless claimed that they were unable to develop this unique business model and sell remainder interests as a standalone timeshare product because of FLRX's breach of contract.

Plaintiffs also asserted that FLRX had violated the Consumer Protection Act by selling PPU contracts to VTS owners and failing to adequately disclose when properties would exit the VTS trust and thus be inaccessible to PPU customers. (10/19 RP 106, 121; Ex. 261 at 10) Bob Ringgenberg admitted that FLRX was not prohibited from selling PPU contracts. (10/19 RP 101) He also admitted that he could not "point to a single person on the face of

¹ When plaintiffs explored registration with the Washington department of Licensing (DOL) in 2002, the Attorney General's office expressed serious reservations about their proposal "to sell interests in timeshare units that will not become available for occupancy **until 13 to 18 years into the future** [because o]n its face, this poses a substantial risk to purchasers." (Ex. 193 (emphasis in original)). Further, by severing the sale of remainder interests from the ownership and management of presently existing timeshares, plaintiffs' business model also appeared to run afoul of RCW ch. 64.36's "paramount" purpose – to give purchasers "the right to occupy the unit within a reasonable time from the date of purchase." (Ex. 193) The DOL told Bob Ringgenberg in 2002 that "in order to protect consumers, [it] would likely require, at a minimum, that monies paid toward the purchase price be impounded until the purchaser has the ability to occupy the unit." (Ex. 165) Thereafter, plaintiffs never attempted to register to sell its "unique" timeshare product.

the earth who's told [him] that they would have bought [his] product but for [defendant's] so-called misrepresentations." (10/19 RP 122-23; *see also* 10/28 RP 157-58) At trial, plaintiffs did not call a single FLRX customer or VTS owner to testify regarding defendant's allegedly deceptive conduct. (See CP 1417)

E. Plaintiffs Put On A Case For Lost Profits Solely Through An Accounting Expert, Who Testified Her Analysis Did Not Encompass The CPA Claim.

Plaintiffs presented KPMG accountant Randi Rosen as an expert on lost profits. Ms. Rosen had never provided an opinion regarding lost profits for a company that wanted to sell remainder interests as a standalone product, as plaintiffs intended. (10/21 RP 244) Ms. Rosen was not aware of any company that had ever sold such a product, or of a jurisdiction that had registered such a product for sale. (10/21 RP 238-39, 245) She did not compare the sales and cost data for any company selling remainder timeshare interests as a standalone product. (10/21 RP 238-39; 244-45; 10/22 RP 154; 10/26 RP 26-27) Ms. Rosen acknowledged that the sales data she did analyze – the defendant's own revenue figures, and those of VIOA, the entity in charge of selling VTS extension products after FLRX ceased doing business in 2004 - did not represent sales of a standalone product. (10/21 RP 243)

Ms. Rosen did not even obtain, much less take into account, the expenses incurred by FLRX or VIOA in earning the revenue she relied upon in estimating plaintiffs' "lost profits" from their contemplated new business. (10/21 RP 244; 10/22 RP 154-55; 10/26 RP 26-27) Instead, she compared this revenue data to cost estimations compiled from general industry group data, and "interviews with industry experts," including plaintiffs' principal Bob Ringgenberg. (10/21 RP 211, 242-43; 10/22 RP 154)

To account for the plaintiffs' ability to sell the remainder interests that they indisputably had received as real property, Ms. Rosen subtracted the real estate value of those remainder interests from the total lost profits she calculated for plaintiffs, to arrive at plaintiffs' total damage figure. (10/22 RP 32-33) However, plaintiffs' expert did not subtract the real estate value of the *disputed* remainder interests from plaintiffs' claimed damages. (See 10/22 RP 32-35, 57-59, 62-63)

Ms. Rosen estimated that plaintiffs' contract lost profits were \$29,588,025 with marketable title, and roughly \$7 million more without marketable title to the disputed remainders. (10/22 RP 81-82) Plaintiffs' expert testified that her lost profits analysis was

directed only to the breach of contract claims, and not to the CPA claims. (10/22 RP 110)

F. The Jury Awarded \$29 Million Damages After Finding That Defendant Failed To Convey Marketable Title. The Trial Court Entered Judgment On The Jury's Verdict, And In Addition Ordered Defendant To Convey Marketable Title.

The case went to trial before King County Superior Court Judge Mary Yu and a 12-person jury October 12-29, 2009.

Jury instruction No. 25 dealt with the breach of contract damages. It instructed the jury, "In calculating the plaintiffs' actual damages, you should determine the sum of money that will put the plaintiffs in as good a position as they would have been in if both plaintiffs and defendant had performed all of their promises under the contract." (CP 961) The trial court rejected defendant's proposed instruction that would have limited the recovery of lost profits for a new business (CP 824), and, over defendant's exception (10/29 RP 97) instructed the jury that plaintiffs could recover "net profits if they prove with reasonable certainty that net profits would have been earned, but were not earned because of defendant's breach." (CP 964)

Plaintiffs' special verdict form asked the jury to find whether the defendant conveyed marketable title of the remainder interests.

(CP 1003-04) The verdict form instructed the jury to value the remainder interests if it found that the defendant had conveyed marketable title. (CP 1004) Plaintiffs' expert explained that this amount should be deducted from damages to avoid compensating the plaintiffs twice. (10/22 RP 33) The special verdict form did not ask the jury to value the remainder interests if it found that the defendant had not delivered marketable title. (CP 1004) Over FLRX's objection (10/29 RP 98-103), the verdict form instructed the jury to calculate the real estate value of the disputed remainders only if the jury determined that FLRX delivered marketable title to the disputed remainders. (CP 1004)

The jury found that plaintiffs did not receive marketable title to the disputed remainders. (CP 1003) As a result, in accordance with the method advocated by plaintiffs' damage expert, the jury did not subtract any amount for the real estate value of the disputed remainders from their damage award to plaintiffs. (CP 1001-07) The jury awarded \$14,794,013 for breach of contract (CP 1002) and \$14,794,012 for violation of the CPA. (CP 1006)

The trial court entered judgment on the jury's verdict, and on plaintiff's post-trial motion (CP 1051), and in addition ordered defendant to specifically perform the agreements by conveying

marketable title to the remainder interests. (CP 1947) The trial court's judgment orders FLRX to prepare, execute, gain approval for, and record all documents necessary to legally create the Oasis remainders, and to then transfer those remainders to plaintiffs, bearing the expense of negotiating with the Master Lessor and the BIA to obtain the approvals needed to effectuate those transfers and making no provision for the consequence of FLRX being unable to obtain those approvals. (CP 1950-51) The trial court's judgment directs FLRX to create a new trust, transfer the Tower I apartments to the new trust, and then transfer the Tower I remainders to plaintiffs using that new trust. (CP 1951-52) Finally, the trial court's judgment requires FLRX to compel TOVSA to withdraw any pending allegations in Mexico relating to plaintiffs, NBR, or plaintiffs' principals with respect to the 2007 Tower II transaction. (CP 1950)

The trial court rejected defendant's objection that granting both specific performance and damages would give plaintiffs a double recovery, and that the court did not have authority to compel either party to undertake actions not authorized by Mexican law. (CP 1521-32)

G. The Trial Court Denied Defendant's Motion For New Trial Based Upon A Juror's Failure To Reveal His Negative Experiences With Defendant In Voir Dire, Which The Juror Then Related To The Jury During Deliberations.

The trial court also denied defendant's motion for a new trial based on juror misconduct. (CP 1918) Much of voir dire had been directed to prospective jurors' experiences with timeshare companies. (10/12 RP 57-100) In response to general voir dire questions, Juror No. 12, Bob Thompson, revealed that he had been at Oasis Resort in Palm Springs, one of the disputed properties, and that he was an owner of Vacation Internationale (VI) and WorldMark timeshares. (10/12 RP 59, 70) In response to direct inquiry about his timeshare ownership, Mr. Thompson represented that his experience had been "satisfactory." (10/12 RP 71)

Immediately after excusing for cause two veniremen who admitted to bad experiences with timeshare companies, FLRX's counsel again invited response from anyone else who had similar experiences that would be difficult to set aside:

Again, is there anyone else on that list that has those similar kinds of feelings that it's going to be difficult to set aside because of some experiences that you've had? Anyone else that would fit in that kind of thinking?

(10/12 RP 96) Mr. Thompson did not respond to this direct question about negative experiences that would be difficult to set aside. Mr. Thompson was given yet another opportunity to disclose any negative timeshare experiences at the close of voir dire:

A couple more questions and then I will finish up. The lawyers try to do the best they can to ask good questions. Maybe we asked too many. Probably. But are you sitting there thinking that there's some information that Mr. Quackenbush or myself should know about your background or your attitude or views that no one's given you that question yet? Anyone here kind of harboring some thought or some concern that you haven't had a chance to share because the lawyers didn't ask the right question? Anyone have any concerns or thoughts in that regard? Okay.

(10/12 RP 123) (emphasis added). Again, Mr. Thompson did not respond.

Based on his answers to voir dire questions, Mr. Thompson was seated as a member of the jury. Once in the jury room, Mr. Thompson stated on several occasions during deliberations that he had been a VTS owner both before and after 1997. (CP 1412) He told the jury members that prior to 1997, when the company was owned by plaintiffs' principals, he had had a good experience, but that after the sale in 1997, when the company was no longer affiliated with plaintiffs' principals, he had bad experiences as a

VTS owner in connection with defendant's attempt to sell him a PPU contract. (CP 1412-14)

Defense counsel learned of juror Thompson's failure to reveal his bias against defendant only when approached by a juror after the jury was discharged. (CP 1414) The trial court denied FLRX's motion for new trial based on juror misconduct on December 11, 2009. (CP 1918)

FLRX timely appealed. (CP 1928, 1961)

IV. ARGUMENT

A. Plaintiffs Were Not Entitled To Recover As Contract Damages \$14.8 Million For The Lost Opportunity To Sell Remainder Timeshare Interests, A Unique Product That Had Never Been Marketed Anywhere.

The jury's award of \$14,794,013 for plaintiffs' lost profits on their breach of contract claim is unsupported by Washington law and must be reversed. Washington follows the "new business rule," under which lost profits may be awarded to a new business with no profit history only based on evidence of the profits of comparable businesses operating in the same locale, or at a minimum, a comparable market. Here, plaintiffs were indisputably new businesses that never sold anything and that had no profit history. The product that plaintiffs wanted to sell in their new

business was a new product that had never previously been sold. Finally, the only comparable businesses identified by plaintiffs sold not standalone remainders, but extensions of existing timeshare agreements. Because plaintiffs had no profit history at all, let alone with this unique product, and because they failed to identify any comparable business, the jury's award of almost \$15 million in lost profits for breach of contract cannot stand.

The trial court erred in refusing to instruct the jury, in accordance with Washington law, that lost profits may be recovered as damages for the breach of contract when (1) they are within the contemplation of the parties at the time the contract was made, (2) they are the proximate result of the defendant's breach, (3) they are proven with reasonable certainty; and (4) are based on evidence of the profit history for similar businesses operating in the same industry and operating under substantially the same conditions. (CP 824; 10/29 RP 97); see ***Farm Crop Energy, Inc. v. Old National Bank***, 109 Wn.2d 923, 750 P.2d 231 (1998); ***Larsen v. Walton Plywood Co.***, 65 Wn.2d 1, 390 P.2d 677, 396 P.2d 879 (1964). The trial court's instruction erroneously omitted any iteration of the new business rule, holding plaintiffs only to a standard of

“reasonable certainty,” which itself was limited to “the fact of damage rather than the amount of damage.” (CP 964)

Traditionally, a new business was unable to recover lost profits in Washington state because such businesses lack a profit history, making proof of lost profits speculative and conjectural. **Larsen**, 65 Wn.2d at 16. Compare **National School Studios v. Superior School Photo Service, Inc.**, 40 Wn.2d 263, 242 P.2d 756 (1952) (prohibiting recovery of lost profits in absence of proof of plaintiff’s profit history) with **Tiegs v. Watts**, 135 Wn.2d 1, 18, 954 P.2d 877 (1998) (allowing “experienced commercial potato farmers” to recover lost profits based on testimony of their “profit history”). The **Larsen** Court created a narrow exception to the new business rule where “factual data is available to furnish a basis for computation of probable losses.” 65 Wn.2d at 17.

The plaintiffs in **Larsen** demonstrated their lost profits based upon an expert’s “analysis of market conditions and a profit showing of identical or similar businesses in the vicinity, operating under substantially the same conditions” 65 Wn.2d at 17. The Court stated that such expert opinions were permissible, but must be “based upon tangible evidence rather than upon speculation and hypothetical situations.” **Larsen**, 65 Wn.2d at 19.

In ***Farm Crop***, the Washington Supreme Court reversed a jury's \$295,000 verdict for claimed lost profits for breach of a contract to provide financing for an ethanol plant. The plaintiff introduced an expert's pro forma projections that assumed that the ethanol plant would have produced one million gallons in the first year of production, but failed to consider the profitability of any similarly situated businesses. The Court noted "the criteria identified in ***Larsen*** as justifying a departure from the new business rule" arise only where a reasonable estimation of damages can be made through analysis of "market conditions and profits showing of identical similar business in the vicinity, operating under substantially the same conditions," and held that the trial court had erred in submitting the issue of lost profits to the jury. ***Farm Crop***, 109 Wn.2d at 931.

In the absence of "identical similar business in the vicinity," where the business is a franchise operating nationwide, comparable businesses elsewhere may provide a basis for an expert's testimony of the plaintiff's lost profits. ***No Ka Oi Corp. v. National 60 Minute Tune, Inc.***, 71 Wn. App. 844, 851-53, 863 P.2d 79 (1993), *rev. denied*, 124 Wn.2d 1002 (1994). Characterizing the sales data from 300 other national franchise

outlets as a “wealth of available information,” this court held that the plaintiff could recover lost profits because “costs and profit histories of existing franchise outlets *are* known and largely uniform.” **No Ka Oi**, 71 Wn. App. at 853 (emphasis in original).

The trial court here erroneously held that the Court of Appeals in **No Ka Oi** “loosened up” the standard established by the Supreme Court in **Farm Crop** for the recovery lost profits. (10/9 RP 30) The **No Ka Oi** court simply held that a new business would not be denied lost profits because there were no comparable businesses operating in the same location where the business was a nationally operated franchise, in which the costs and profit history of similar businesses do not vary from location to location because the nature of a franchise is to follow a uniform business plan wherever it happens to be located.

In the instant case, plaintiffs elected not to claim the usual measure of damages for breach of a contract – the difference between the value of the remainder interests promised by defendant less the value of the property that they actually received. (10/20 RP 57-58) Instead, plaintiffs elected to seek as damages the profits they claimed they could potentially have earned had they pursued what they continually characterized as a new business

model involving the sale of a “unique” product to a “unique set” of potential customers. (CP 1635)

Bob Ringgenberg testified that plaintiffs would offer “a dramatically different product” than defendant’s PPU contracts. (10/15 RP 192) Plaintiffs’ principal Michael Burns testified that he was “not aware of anybody that has sold or is selling a product like that today and the process and the structure for doing such is completely different.” (10/21 RP 141) The former licensing manager for the Washington DOL timeshare section had never heard of or seen the kind of product that plaintiffs wished to sell. (10/28 RP 47-49) It was undisputed that no company had ever sold remainder interests in timeshares as a standalone product. (10/14 RP 103-104; 10/21 RP 140-41, 243)

Under the new business rule, plaintiffs could not recover lost profits unless they could establish the **Farm Crop** exception, which required an expert’s analysis of “market conditions and profits showing of identical similar business in the vicinity, operating under substantially the same conditions.” **Farm Crop**, 109 Wn.2d at 931. This plaintiffs utterly failed to do. Nor could they meet the exception enunciated by the **No Ka Oi** court, because plaintiffs’ “unique” new business model was not a franchise and plaintiffs

could point to no similar businesses anywhere to establish profitability. See also **Earle M. Jorgensen Co. v. Tesmer Mfg. Co.**, 10 Ariz.App. 445, 459 P.2d 533, 539 (1969) (rejecting lost profits in case of “not only a new business . . . but marketing . . . a new product” in absence of evidence of “any history of prior sales of this identical product by a predecessor or even by a competitor.”); **Texas Instruments, Inc. v. Teletron Energy Management, Inc.**, 877 S.W.2d 276, 280 (Tex. 1994) (rejecting lost profits claim based on “the proposed sale of a new and unique product which had never been sold before.”); **Autotrol Corp. v. Continental Water Systems Corp.**, 694 F.Supp. 603, 605 (E.D.Wis. 1988) (rejecting lost profits claim in part because “no one in the industry has ever produced or marketed” the product).

Rather than analyze the profit history of any similarly situated business, plaintiffs were allowed to present the testimony of an accountant who analyzed data from disparate sources. Plaintiffs’ accountant acknowledged that she was not aware of any similarly situated company, or of a jurisdiction that had registered such a company (10/21 RP 238-39, 245), and that the VIOA sales data she analyzed did not represent sales of a standalone timeshare product. (10/21 RP 243) Because her testimony did not

address the correct legal standard for recovering lost profits under Washington law, it should have been excluded. (CP 808-11; RP 10/21 285-89)

Although they disclaimed any equivalency between the two products, plaintiffs relied principally on defendant's revenues in selling PPU contracts to VTS owners. Not only were the PPU contracts a different product, plaintiffs' expert used only the revenues and disregarded the attendant costs of selling those upgrade contracts in calculating lost profits. (10/22 RP 20) As the Supreme Court held in ***National School Studios***, a plaintiff may not rely solely on the revenue of a business, without considering its costs, in establishing a claim for lost profits:

In the absence of reasonably certain proof as to what appellant's net profit would have been had it continued to enjoy this business, there is no competent evidence upon which a judgment can be based. The burden was upon appellant to furnish such proof and this it failed to do.

40 Wn.2d at 275-76.

Moreover, even though plaintiffs claimed that they would have sold their product to the general public, their expert discounted cost data from general timeshare industry groups and industry experts, and in fact relied on an assumption that overhead

and marketing costs are significantly less in marketing extension agreements would be substantially less than industry standard costs, resulting in substantially higher profits. (10/21 RP 275-80, 10/22 RP 7-10, 24) But her analysis ignored, and the expert testified she was unaware, that plaintiffs' claimed business plan was not limited to existing owners (10/15 RP 200; 10/20 RP 74), that plaintiffs had no sales presence at the resort properties that they no longer managed but where they intended to sell the remainder timeshare interests, and that the DOL (if it would approve their scheme at all), would have required plaintiffs to impound sales proceeds for years (or decades) in order to protect purchasers of remainder interests that did not vest until well into the future. (10/21 RP 239; see Exs. 165, 193; 10/28 RP 49)

Plaintiffs were indisputably new businesses, presenting a claim for lost profits from the sale of timeshare products that had never been sold, before or since. In the absence of any comparable data from any similar business anywhere, the trial court erred in allowing plaintiffs' claim of lost profits to go to the jury and in denying defendant's motion for judgment as a matter of law. (RP 10/27 5-8; CP 1934-35) This court should reverse the award of \$14,794,013 in contract damages for lost profits. At a minimum,

the court should order a new trial in which the jury is properly instructed on the availability of lost profits for breach of contract.

B. Plaintiffs Failed To Establish That The Defendant's Alleged Deceptive Disclosures To Purchasers Of PPU Contracts Caused The Plaintiffs Any Damages At All, Let Alone The \$14.8 Million Awarded By The Jury.

The trial court also erred in entering judgment on the jury's verdict for \$14,794,012 under the Washington Consumer Protection Act (CPA), RCW 19.86.090. "To prevail in a private CPA claim, a plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation." *Panag v. Farmers Ins. Co.*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009). Plaintiffs failed to establish that they suffered *any* monetary damages as a result of any unfair or deceptive act committed by defendant, let alone the sum of \$14.8 million, which could only have been based on plaintiff's expert calculation of lost profits based on breach of contract.² In the absence of any proof that plaintiffs were damaged by any unfair and deceptive act committed by

² The CPA damages awarded by the jury were one-half of the amount Ms. Rosen calculated as plaintiffs' lost profits damages for breach of contract. (CP 1002, 1006; 10/22 RP 81-82) However, Ms. Rosen expressly stated that she had not analyzed and her lost profit calculations were not attributable to plaintiffs' CPA claim. (10/22 RP 110)

defendants, this court should reverse and vacate the award under RCW 19.86.090.

In order to establish proximate cause under the CPA, “[a] plaintiff must establish that, but for the defendant’s unfair or deceptive practice, the plaintiff would not have suffered an injury.” ***Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.***, 162 Wn.2d 59, 83-84 ¶ 57, 170 P.3d 10 (2007). However, plaintiffs were not the *consumers* of defendant’s PPU contracts, alleging that they were deceived into paying more for a product than they otherwise would have paid. Instead, plaintiffs alleged competitive injury – that the defendant’s claimed deceptive marketing “ultimately damaged [plaintiffs] in the sense that the owners’ dissatisfaction level would impact their willingness to buy” plaintiffs’ “unique” timeshare remainder interest product. (10/19 RP 122)

This court addressed the CPA causation requirement in an action based on a similar theory of indirect injury in ***Fidelity Mortgage Corporation v. Seattle Times Co.***, 131 Wn. App. 462, 128 P.3d 621 (2005). Fidelity alleged that the Seattle Times drove away potential customers by publishing inaccurate mortgage rate charts. Plaintiff presented a statistical expert who estimated that it had lost roughly \$500,000 in loan business, but could not name a

single borrower who went to a competitor instead of Fidelity. This court affirmed summary judgment for failure to establish causation, reasoning that consumers who may have been misled by the rate charts were the direct victims, not Fidelity, and that there were “staggering complexities in ascertaining how many loans were diverted from Fidelity as a result of the *Times*’ chart.” **Fidelity**, 131 Wn. App. at 471 ¶ 16.³ See also **Browne v. Avvo Inc.**, 525 F.Supp.2d 1249, 1254-55 (W.D. Wash. 2007) (Lasnik, J.) (rejecting causation in CPA claim brought by attorney who alleged lost income due to deceptive and misleading ratings by defendant attorney rating service).

Similarly here, plaintiffs failed to prove that any single consumer would have purchased a remainder interest from the

³ This court adopted the test to determine whether CPA causation is too remote that was first enunciated by the Ninth Circuit:

(1) [W]hether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of the plaintiff’s damages attributable to defendant’s wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries.

Fidelity Mortgage Corporation v. Seattle Times Co., 131 Wn. App. 462, 470-71, 128 P.3d 621 (2005), quoting **Ass’n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.**, 241 F.3d 696, 701 (9th Cir.), cert denied, 534 U.S. 891 (2001).

plaintiffs, rather than an extension of an existing timeshare agreement from the defendant. (See 10/19 RP 122-23, (acknowledging that plaintiffs cannot “point to a single person on the face of the earth who’s told you that they would have bought your product.”)) Plaintiffs claimed that by failing to disclose the precise properties to which purchasers of PPU contracts would have access, defendant engaged in a “deceptive act or practice” within the meaning of RCW 19.86.020. (10/19 RP 123; CP 1639-40) Plaintiffs identified (but did not call to testify) one purchaser who had written a letter expressing dissatisfaction with the limited number of properties that were available to purchasers of PPU contracts in 2001, a year *before* plaintiffs could begin marketing their timeshare product. (Ex. 397; 10/14 RP 63; Ex. 5 at § 4.11(b); Ex. 6 at § 9) It was undisputed that in this single instance, defendant offered to refund the consumer’s purchase price. (Ex. 397; 10/26 RP 143-45)

While plaintiffs argued that “[t]he jury could infer . . . that other VTS owners were similarly deceived” (CP 1645), they offered no evidence that the *plaintiffs* suffered damages as a result of the defendant’s alleged incomplete disclosure. Under the trial court’s

instruction, given without exception, “[t]he burden of proving the amount of their pecuniary loss rests with the plaintiffs.”

- (a) Loss resulting to the plaintiffs from sales or other revenues lost because of defendant’s conduct;
- (b) Loss resulting from sales made by the plaintiffs at prices that have been reasonably reduced because of the defendants’ [sic] conduct;
- (c) Harm to the market reputation of the plaintiffs’ goods, services, business, or trademark; and
- (d) Reasonable expenditures made by the plaintiffs in order to prevent, correct or mitigate the confusion or deception of prospective purchasers resulting from the defendant’s conduct.

(CP 963)

In the absence of any competent proof, plaintiffs’ speculation that purchasers may have been dissuaded from buying a remainder timeshare interest from plaintiffs was akin to the testimony that consumers “might have refrained from obtaining a Fidelity mortgage as a result” of misstatements in the published rates. *Fidelity*, 131 Wn. App. at 469 ¶ 11. Moreover, unlike the expert in *Fidelity*, plaintiffs’ expert did not even purport to tie her estimate of plaintiffs’ lost profits to defendant’s disclosures, and affirmatively testified that she had not calculated damages under the CPA. (10/22 RP 110) There was simply no evidence to support the

plaintiffs' theory that "defendant's sale of PPU contracts through unfair and deceptive means reduced the available marketplace," (CP 1640) or caused any other injury or damage to plaintiffs.

Even were plaintiffs' speculation sufficient to allow a jury to infer that plaintiffs suffered some tangible injury to their "business or property" under RCW 19.86.090, there was no evidence to support an award of \$14.8 million. "Where pecuniary damages are sought, there must be evidence not only of their actuality but also of their extent, and there must be some data from which the trier of the fact can with reasonable certainty determine the amount." **Wappenstein v. Schrepel**, 19 Wn.2d 371, 375, 142 P.2d 897 (1943). This rule applies to the recovery of lost profits under Washington law, **O'Brien v. Larson**, 11 Wn. App. 52, 54-55, 521 P.2d 228 (1974), and particularly to claims under consumer protection statutes that a competitor's deceptive disclosures drove away potential business. **Speakers of Sport, Inc. v. ProServ, Inc.**, 178 F.3d 862, 868 (7th Cir. 1999) (rejecting sport agent's claim that competitor's deceptive practices caused plaintiff to lose business where the "only consumer in the picture . . . doesn't claim to have been defrauded, or otherwise wronged").

Plaintiffs offered no evidence that they suffered any quantifiable damages as a result of defendant's allegedly deceptive statements. This court should reverse the award of \$14,794,012 in damages to plaintiffs' business or property under the CPA.

C. The Trial Court Gave Plaintiffs A Double Recovery By Awarding Both Damages For Lost Profits And Specific Performance.

The trial court erred in ordering specific performance on top of a money judgment of over \$29 million. Plaintiffs were not entitled to both the profits that plaintiffs allegedly would have earned had they received marketable title to the disputed remainders, and a decree requiring defendant to convey marketable title. By granting both damages and specific performance, the trial court gave plaintiffs a double recovery.

"The purpose of the doctrine of election of remedies is to prevent a double redress for a single wrong." *Birchler v. Castello Land Co., Inc.*, 133 Wn.2d 106, 112, 942 P.2d 968 (1997). This purpose is consistent with the general policy behind the award of damages for breach of contract, which, as the jury without objection was instructed, is to "put the plaintiffs in the as good a position as they would have been if both plaintiffs and defendant had performed all of their promises under the contract." (CP 961); see

Crest Inc. v. Costco Wholesale Corp., 128 Wn. App. 760, 764 ¶ 1, 115 P.3d 349 (2005).

While plaintiffs seeking redress for breach of the promise to convey real property may plead alternative claims for damages and specific performance, they are barred by the election of remedies doctrine from recovering a money judgment and a decree of specific performance for the same wrong. **Crafts v. Pitts**, 161 Wn.2d 16, 27 ¶ 13, 162 P.3d 382 (2007) (“[T]he injured party in a land conveyance dispute always has a *choice* between specific performance and money damages”); **McKown v. Driver**, 54 Wn.2d 46, 55, 337 P.2d 1068 (1959) (“When an executory contract for the sale of real estate has been breached by the seller, the purchaser has the *option* to institute an action for specific performance of the contract *or* for damages resulting from the breach. . . .”); *see also* **Kritzer v. Moffat**, 136 Wash. 410, 240 P. 355 (1925) (“on a breach of contract to convey land, the injured party had a *choice of remedies* – he could either sue in law for damages, *or* resort to equity to enforce a specific performance.”) (all emphases added).

Here, it was undisputed that FLRX executed or was willing to execute deeds conveying all its right, title and interest to the disputed remainders – all that it was obligated to do under the

parties' agreements. Plaintiffs claimed that the titles that they received did not comport with the implied obligation to transfer "marketable title" to the remainder interests under the 1998 agreements. The plaintiffs elected as their remedy an award of damages that, according to their expert's theory, compensated the plaintiffs for the profits they would have earned had defendant delivered marketable title to the remainder interests. (10/22 RP 57-58)

The jury specifically found in its special verdict, as proposed by plaintiffs, that plaintiffs did not receive marketable title to those remainder interests, and consequently awarded plaintiffs their lost profits under an instruction that directed the jury to place the plaintiffs in as good a position as if the defendant had fully performed. (CP 1003-04) "[A] judgment must be entered that is consistent with the special verdict . . ." ***State Dept. of Highways v. Evans Engine and Equipment Co., Inc.***, 22 Wn. App. 202, 205, 589 P.2d 290 (1978), *rev. denied*, 92 Wn.2d 1010 (1979). Having obtained an award of damages that fully compensated plaintiffs for their inability to sell remainder interests, plaintiffs were not additionally entitled to a decree requiring defendant to convey marketable title to these same remainder interests.

To the extent specific performance is a matter of the trial court's equitable discretion, it was particularly inappropriate here, where, as the trial court itself recognized (12/11 RP 74-75), its specific performance decree will require years of cumbersome court oversight of FLRX's attempts to obtain the approval of non-parties, to create a trust with the approval of the Mexican government, and to influence the discretionary decisions of a prosecutor in Mexico. (CP 1950-52)

The trial court's other justifications for its decree, as reflected in its post-trial findings of fact, do not provide a basis for *both* specific performance *and* damages. The trial court found that the real property remainder interests are "unique," that the amount of damages was difficult to prove, that defendant would have difficulty satisfying a money judgment, and that "a monetary judgment will not compensate Plaintiffs for [FLRX's] failure to transfer marketable title to the remainder interests. . .". (CP 1955-57)

Every piece of real property is unique; that is why specific performance is available as an alternative to damages for breach of a contract to convey real property. ***Pardee v. Jolly***, 163 Wn.2d 558, 568-69 ¶ 15, 182 P.3d 967 (2008) ("Specific performance is frequently the only adequate remedy for a breach of a contract

regarding real property because land is unique and difficult to value.”) The difficulty of proving damages, or the difficulty in collecting a judgment, likewise provides a basis for a plaintiff’s election of specific performance, but does not justify an award of both damages and specific performance. See **Crafts**, 161 Wn.2d at 24 ¶ 18, 162 P.3d 382 (2007) (court may consider likelihood of collecting judgment in exercising discretion to award specific performance in lieu of damages).

This court should reverse the decree of specific performance. At a minimum, this court should remand with instructions that plaintiffs must elect between damages and specific performance.

D. Defendant Was Entitled To A New Trial Because A Juror Failed To Reveal His Bias Against Defendant In Response To Direct Questioning During Voir Dire.

1. The Juror’s Misconduct Deprived Defendant Of Its Constitutional Right To Trial By Jury.

“Irregularity” or “misconduct” of the jury are grounds for a new trial. CR 59(a)(1), (2). “A juror’s misrepresentation or failure to speak when called upon during voir dire regarding a material fact constitutes an irregularity affecting substantial rights of the parties. When the failure to respond in voir dire relates to a material

question, the appropriate remedy is to grant a new trial.” ***Robinson v. Safeway Stores, Inc.***, 113 Wn.2d 154, 159, 776 P.2d 676 (1989), *citing Gordon v. Deer Park School Dist. No. 414*, 71 Wn.2d 119, 122, 426 P.2d 824 (1967). Here, the trial court erred in refusing to grant defendant a new trial because Juror No. 12 failed to reveal a bias against defendant that would have caused his removal from the jury panel had he answered truthfully during voir dire.

In ***Robinson***, the trial court properly granted a new trial to plaintiff, a California resident, when the jury foreman failed to disclose a bias against Californians as litigants. The ***Robinson*** Court quoted extensively from ***Smith v. Kent***, 11 Wn. App. 439, 523 P.2d 446, *rev. denied*, 84 Wn.2d 1007 (1974), in which the trial court committed reversible error in refusing to grant a new trial when a juror failed to reveal his experience as a truck driver in response to voir dire about his employment history in a case arising from an injury caused by a rock thrown from a dump truck in front of plaintiff’s automobile.

Both courts recognized that a juror’s false answer to a material question during voir dire deprives the parties of the constitutional right to trial by jury:

. . . The right of trial by jury means a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct. That misconduct may consist of a prospective juror's false answer to a material question that either (1) conceals or misrepresents his bias or prejudice, or (2) prevents the intelligent exercise by a litigant of his right to exercise a peremptory challenge or his right to challenge a juror for cause. These rights of challenge are important, substantial rights which serve to protect a litigant's constitutional right of trial by jury.

Robinson, 113 Wn.2d at 159, *quoting Smith*, 11 Wn. App. at 443.

Under the standard established in **Robinson**, FLRX is entitled to a new trial because Juror No. 12, in response to direct questioning, failed to reveal a bias he knew would result in his removal from the jury because other prospective jurors were removed for precisely the type of experiences that Juror No. 12 claimed were not evidence of bias in his post-trial declaration admitting his bad experiences.

Juror No. 12 affirmatively, and falsely, answered in response to voir dire questioning that his time share experience in defendant's properties was "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: 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.**

(10/12 RP 70-71) (emphasis added).

Juror No. 12 then sat silent when given two other opportunities to reveal his negative experience and bias against defendant. (See 10/12 RP 96, 123) Juror No. 29 was excused for cause after relaying that she once had a negative experience in a time share sales presentation she attended. (See 10/12 RP 85-91) Juror No. 29 began by disclosing that she disliked a time share salesperson, but after further questioning, revealed that her negative experience with that salesperson underscored a general negative attitude toward time share companies. Counsel and the court were only able to uncover that bias, however, because Juror No. 29 honestly disclosed her negative experience with a time share salesperson in the first instance. Juror No. 27 was also removed for cause based on a negative experience in a time share sales presentation. (10/12 RP 91-93)

Tellingly, immediately after Juror No. 29 was excused, Juror No. 12 failed to reveal his similar negative experiences in response to defense counsel's direct question: "are any of you that have gone through that same experience [a negative time share sales 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?" (10/12 RP 91-92) Then, after representing to defense counsel and the court that he did not have a negative timeshare sales experience that he would bring with him to jury deliberations, Juror No. 12 admittedly explained his negative sales presentation experience with the defendant in this case to the entire jury as part of their deliberations. (See CP 1660-61)

This juror's falsehood, and his failure to reveal his bias against defendant, were clearly material. The trial court on defendant's motion had earlier excused for cause two other veniremen who truthfully answered during voir dire that they had had bad experiences with timeshare companies. (See 10/12 RP 93, 95) As in **Robinson** and **Smith**, defendant is entitled to a new trial:

The jury a litigant accepts on the basis of misleading information on which he has a right to rely is not the constitutional jury to which he is entitled. The only remedy that will obviate the harm done to his right of trial by jury is to grant a new trial.

Robinson, 113 Wn.2d at 160, quoting **Smith**, 11 Wn. App. at 445.

See also **Gordon v. Deer Park**, 71 Wn.2d at 122 (new trial warranted when voir dire questioning failed to uncover juror's strong bias in favor of teachers); **Allison v. Dep't of Labor and Indus.**, 66 Wn.2d 263, 265, 401 P.2d 982 (1965) (new trial warranted when juror claimed in voir dire that he could be fair and impartial even though he had appealed his workers' compensation claim three times, and then stated during deliberations that "anyone claiming against the state should get everything they can."); **Heasley v. Nichols**, 38 Wash. 485, 486-87, 80 P. 769 (1905) (trial court committed reversible error in refusing to grant new trial when juror claimed during voir dire that he "knew nothing about the case" after he had told three third parties "he would like to get on the jury, for I would give her all she sued for and a d— sight more."); **Allyn v. Boe**, 87 Wn. App. 722, 730, 943 P.2d 364 (1997) (new trial warranted when juror concealed bias against party's real estate appraiser expert), *rev. denied*, 134 Wn.2d 1020 (1998).

2. The Trial Court Erred In Denying A New Trial Without Holding An Evidentiary Hearing.

Juror No. 12 attempted to limit his admitted bias to timeshare *salespersons*, rather than timeshare *companies*. (CP 1660) But the trial court had already determined that the types of experiences with timeshare salespersons that Juror No. 12 apparently relayed to other jurors would be a basis for removal for cause before he failed to respond to defense questions intended to elicit the negative experiences he now admits. Indeed, Juror No. 29's disclosure about her negative experience with a timeshare salesperson led to follow up questions that revealed deeper bias against timeshare companies generally. Juror No. 12 deprived defense counsel from asking similar follow up questions of him by not disclosing his negative experience with a salesperson employed by *this defendant*. If the conflicting affidavit testimony of the jurors raised an issue whether a new trial should be ordered, however, the trial court erred in denying a new trial without first holding an evidentiary hearing. See **State v. Cho**, 108 Wn. App. 315, 30 P.3d 496 (2001).

In **Cho**, this court remanded for an evidentiary hearing to determine if a juror deliberately failed to inform the court during voir dire that he was a retired police officer in order to be seated on the

jury. 108 Wn. App. at 328-29. The trial court did not have a transcript of voir dire in **Cho** when it denied a motion for new trial based on a juror's failure to reveal that he was a former police officer. 108 Wn. App. at 326. In ruling on the motion, the trial court assumed there had been a material nondisclosure, but concluded it would not give rise to a challenge for cause. 108 Wn. App. at 326-27.

With the benefit of a transcript, the Court of Appeals noted that in fact the trial court's voir dire specifically asked about past employment only in connection with *military* police, but that the court also questioned potential jurors about "whether they, or close friends, 'have ever had a particularly favorable experience with police?'" 108 Wn. App. at 327. This court concluded that "the transcript considered as a whole does raise a troubling inference of deliberate concealment," reversed the denial of a new trial, and remanded "for further findings after an evidentiary hearing in which the parties may, if they choose, present additional testimony to illuminate juror number eight's answers on voir dire as well as the statements he allegedly made to defense counsel after the verdict." 108 Wn. App. at 327, 329.

“Doubts regarding bias must be resolved against the juror.” *Cho*, 108 Wn. App. at 330, citing *Burton v. Johnson*, 948 F.2d 1150, 1158 (10th Cir. 1991). For this reason, defendant was entitled to a new trial based on the conflicting juror declarations. At a minimum, defendant was entitled to an evidentiary hearing before the trial court ruled on defendant’s new trial motion.

E. This Court Should Vacate The Fees Awarded To Plaintiffs And Award Defendant Its Fees At Trial And On Appeal.

The trial court awarded plaintiffs a total of \$1,536,405.90 for their attorney fees and costs as prevailing parties under the parties’ agreement and the CPA. (CP 1945) When the judgment for breach of contract and violation of RCW ch. 19.86 is reversed, that attorney fee award must also be vacated. Upon reversal, FLRX is the substantially prevailing party and entitled to fees under the 1998 Remainder Interests Agreements. (Ex. 6 at 3; Ex. 7 at 4)

This court should award FLRX its attorney fees on appeal. RAP 18.1. The trial court should be directed to award FLRX its fees and costs incurred in superior court.

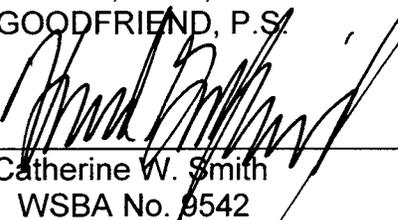
V. CONCLUSION

This court should reverse. The plaintiffs did not prove either contract lost profits nor CPA damages, and were not entitled to specific performance. At a minimum, defendant is entitled to a new trial before an impartial and properly instructed jury.

Dated this 2nd day of July, 2010.

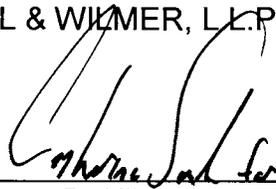
EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By:


Catherine W. Smith
WSBA No. 9542
Howard M. Goodfriend
WSBA No. 14355

SNELL & WILMER, L.L.P.

By:


James D. Kilroy

Attorneys for Appellant

DECLARATION OF SERVICE

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

That on July 2, 2010, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

Office of the Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Andrew Salter Salter Joyce Ziker, PLLC 1601 Fifth Avenue, Suite 2040 Seattle, WA 98101 asalter@sjzlaw.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
James D. Kilroy Timothy O'Neill Snell & Wilmer, L.L.P. 1200 Seventeenth Street, Suite 1900 Tabor Center Denver, CO 80202 jkilroy@swlaw.com toneill@swlaw.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
R. Broh Landsman Landsman & Fleming LLP 1000 Second Avenue, Suite 3000 Seattle, WA 98104 broh@lf-law.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

<p>Karl J. Quackenbush Ken Lederman Lisa Werner Kelly Hamilton Stephanie Blair RIDDELL WILLIAMS, P.S. 1001 Fourth Avenue, Suite 4500 Seattle WA 98154 kquackenbush@riddellwilliams.com</p>	<p><input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E Mail</p>
<p>Charles K. Wiggins Kenneth W. Masters Wiggins & Masters, P.L.L.C. 241 Madison Avenue N Bainbridge Island, WA 98110-1811 charlie@appeal-law.com ken@appeal-law.com</p>	<p><input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail</p>

DATED at Seattle, Washington this 2nd day of July, 2010.



Tara D. Friesen

APPENDIX

- App. A: Court's Instruction No. 27 (CP 964)
- App. B: Defendant's Proposed Instruction D (CP 824)
- App. C: Judgment and Order of Specific Performance (CP 1965-70)
- App. D: Findings of Fact and Conclusion of Law re: Specific Performance (CP 1953-58)
- App. E: Findings of Fact and Conclusion of Law re: Attorneys' Fees and Costs (CP 1941-1946)

INSTRUCTION NO. 27

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 the amount of damage.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

INSTRUCTION NO. D

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.

WPI 303.04, cmt; *Tiegs v. Watts*, 135 Wn.2d 1, 17-18, 954 P.2d 877 (1998) (sets forth elements for recovery of lost profits and confirms proposition that lost profits must be proved with reasonable certainty); *Farm Crop Energy v. Old Nat'l Bank of Wash.*, 109 Wn.2d 923, 927-31, 750 P.2d 231 (1988) (new business without its own profit history can only recover lost profits by putting on evidence of the "profit showing of identical or similar business in the vicinity, operating under substantially the same conditions).

ORIGINAL

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Honorable Mary Yu

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

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,

Plaintiffs,

v.

DIAMOND RESORTS PACIFIC, INC., a
Washington corporation, formerly known as
SUNTERRA PACIFIC, INC., formerly
known as VACATION
INTERNATIONALE, INC.,

Defendant.

NO. 03-2-31401-3 SEA

JUDGMENT AND ORDER OF
SPECIFIC PERFORMANCE

*Clerks Action
Required*

I. JUDGMENT SUMMARY

Pursuant to RCW 4.64.030, the following information should be entered in the
Clerk's Execution Docket:

- 1. Judgment Creditors: Torres Mazatlan Remainder, LLC
Vallarta Torre Remainder, LLC
Vacation Timeshare Program Remainder, LLC
- 2. Judgment Debtor: Diamond Resorts Pacific, Inc., a Washington
corporation.

JUDGMENT AND ORDER OF SPECIFIC PERFORMANCE - 1
4813-4346-0357.01
63746.00001

Riddell Williams P.S.
1001 FOURTH AVENUE
SUITE 4600
SEATTLE, WA 98154-1192
206.824.3600

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

3. Attorneys for Judgment Creditors: Karl J. Quackenbush
Ken Lederman
RIDDELL WILLIAMS P.S.
1001 Fourth Avenue, Suite 4500
Seattle, WA 98154
206-624-3600
4. Principal Judgment Amount: \$29,588,025 total:
• \$9,868,168 to Vallarta Torre Remainder, LLC;
• \$11,243,449 to Mazatlan Remainder, LLC; and
• \$8,876,408 to Vacation Timeshare Program Remainder, LLC.
5. Attorneys' Fees: \$ 1,141,593 total:
• \$380,531 to Vallarta Torre Remainder, LLC;
• \$380,531 to Mazatlan Remainder, LLC; and
• \$380,531 to Vacation Timeshare Program Remainder, LLC.
6. Costs and Other Recoverable Amounts: ~~\$ 406,801~~ total: **\$ 394,812.30**
• \$135,600 to Vallarta Torre Remainder, LLC;
• \$135,600 to Mazatlan Remainder, LLC; and
• \$135,601 to Vacation Timeshare Program Remainder, LLC.
7. Total Judgment against Judgment Debtor: ~~\$31,136,419~~
\$ 31,124,430.30

per order in fees + costs entered on Dec. 11, 2005
(Signature)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

II. FACTS

The Court, being fully advised, finds as follows:

1. Plaintiffs Torres Mazatlan Remainder, LLC; Vallarta Torre Remainder, LLC; and Vacation Timeshare Program Remainder, LLC initiated this lawsuit in 2003 against Defendant Diamond Pacific, Inc. The claims arose from two 1998 contracts entered into between Plaintiffs and Defendant: (1) the Agreement Regarding Purchase, Sale and Reconciliation of Beneficial Interests ("Beneficial Interests Agreement") executed on June 17, 1998 (Trial Ex. 6); and (2) the Agreement Regarding Purchase, Sale and Reconciliation of Undivided Remainder Interests ("Remainder Agreement") entered into on August 15, 1998 (Trial Ex. 7) (collectively, the "Agreements"). On February 24, 2009, Plaintiffs filed a Second Amended Complaint which maintained the original breach of contract and tort claims, and which added a claim under the Washington Consumer Protection Act ("CPA"), Chapter 19.86 RCW.

2. The case was tried by a jury of 12 from October 12, 2009 to October 29, 2009, the Honorable Judge Mary Yu presiding. Plaintiffs appeared through their attorneys of record, Karl Quackenbush and Ken Lederman of Riddell Williams, P.S. Defendant appeared through their attorneys of record, James Kilroy and Timothy O'Neill of Snell & Wilmer LLP, admitted pro hac vice, and Broh Landsman of Landsman & Fleming LLP.

3. The parties presented evidence and testimony to the jury and on November 2, 2009, the jury rendered a verdict in favor of Plaintiffs on its claims of breach of contract and violation of the Washington Consumer Protection Act. The jury awarded a total of \$29,588,025 on Plaintiffs' breach of contract and CPA claims. Specifically, the jury awarded \$9,868,168 to Vallarta Torre Remainder, LLC; \$11,243,449 to Mazatlan Remainder, LLC; and \$8,876,408 to Vacation Timeshare Program Remainder, LLC. The jury also determined that Defendant did not convey marketable title to the remainder apartments at both the Oasis Resort and the Vallarta Torre Resort. A copy of the jury's

JUDGMENT AND ORDER OF SPECIFIC PERFORMANCE - 3

4813-4346-0357.01
63746.00001

Riddell Williams P.S.
1001 FOURTH AVENUE
SUITE 4500
SEATTLE, WA 98154-1192
206.624.3800

1 verdict is attached as Exhibit A.

2 **III. JUDGMENT**

3 Based on the foregoing, pursuant to CR 54 and consistent with the jury's verdict in
4 this action, the Court hereby enters final Judgment in this matter as follows:

5 1. Plaintiff Vallarta Torre Remainder, LLC is awarded judgment against
6 Defendant Diamond Pacific, Inc. in the amount of \$9,868,168.

7 2. Plaintiff Mazatlan Remainder, LLC is awarded judgment against Defendant
8 Diamond Pacific, Inc. in the amount of \$11,243,449.

9 3. Plaintiff Vacation Timeshare Program Remainder, LLC is awarded
10 judgment against Defendant Diamond Pacific, Inc. in the amount of \$8,876,408.

11 4. All Plaintiffs are awarded costs in the amount of ~~\$406,801~~^{394,812.30}, to be allocated
12 equally among the three Plaintiffs.

13 5. All Plaintiffs are awarded reasonable attorneys' fees in the amount of
14 \$1,141,593, to be allocated equally among the three Plaintiffs.

15 6. The Court finds that specific performance is an appropriate remedy for
16 Defendant's failure to convey marketable title to the remainder apartments at the Oasis
17 resort in Palm Springs, California and the Vallarta Torre resort in Puerto Vallarta, Mexico,
18 as required by the Agreements. As such the Court renders the following judgment of
19 specific performance:

20 A. With respect to the remainder interests in the condominium units at
21 Oasis Palm Springs, Defendant is hereby ordered to:

22 i. Within 90 days of the date of this Judgment, Prepare, execute
23 and cause to be recorded all documents necessary to transfer marketable title to the Oasis
24 Remainder apartments to Plaintiff Vacation Time Share Remainder LLC, including any
25 required approvals;

26

1 ii. Within 30 days of the date of this Judgment file with the
2 Court and serve on counsel for Plaintiffs a report detailing the steps Defendant will take to
3 convey marketable title to the Oasis Remainder apartments;

4 iii. Within 90 days of the date of the Judgment Defendant shall
5 provide to the Court a report indicating that it has complied with the Judgment with regard
6 to the Oasis remainder apartments;

7 B. With respect to the remainder interests in the condominium units at Vallarta
8 Torre Tower II, Defendant is hereby ordered to:

9 i. Within 30 days of the date of this Judgment, provide Plaintiffs with
10 a document, in a form acceptable to Plaintiffs, confirming that Defendant and its Torres
11 Vallarta, Sociedad Anonima de Capital Variable ("TVSA") do not and will not ever
12 challenge the validity of the December 2007 conveyance to Inmuebles NBR;

13 ii. The referenced document will be notarized with formalities
14 necessary for it to be valid in the U.S. and Mexico, in a form acceptable to Plaintiffs;

15 iii. Defendant will direct its TVSA subsidiary to withdraw the
16 allegations against Inmuebles NBR, Robert Ringgenberg, and/or Vallarta Torre Remainder,
17 LLC that were made to any Mexican prosecutor or other authority on behalf of TVSA or
18 Defendant, with regard to the December 2007 Tower II transaction;

19 iv. Within 45 days of the date of the Judgment, Defendant shall provide
20 to the Court a report indicating that it has complied with the Judgment with regard to the
21 Vallarta Tower II remainder apartments.

22 C. With respect to the remainder apartment interests in the condominium units
23 at Vallarta Torre Tower I, Defendant is hereby ordered to:

24 i. Within 60 days of the date of this Judgment, Defendant shall transfer
25 marketable title to the six Tower I properties consistent with the Beneficial Interests
26 Agreement;

ORIGINAL

Honorable Marv Yu

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

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,

Plaintiffs,

v.

DIAMOND RESORTS PACIFIC, INC., a
Washington corporation, formerly known as
SUNTERRA PACIFIC, INC., formerly
known as VACATION
INTERNATIONALE, INC.,

Defendant.

NO. 03-2-31401-3 SEA

~~PROPOSED~~ *B*

**FINDINGS OF FACT AND
CONCLUSION OF LAW RE:
SPECIFIC PERFORMANCE**

This matter came before the Court on Plaintiffs' Motion for Entry of Judgment,
Order of Specific Performance, and for an Award of Attorneys' Fees and Costs. The Court
considered the following: (1) Plaintiffs' Motion for Entry of Judgment, Order of Specific
Performance, and for an Award of Attorneys' Fees and Costs; (2) Defendant Diamond
Resorts Pacific, Inc.'s Response (if any); (3) Plaintiffs' Reply; and (4) the records and
pleadings on file. The Court, being duly informed, makes the following Findings of Fact
and Conclusions of Law:

[PROPOSED] FINDINGS OF FACT AND CONCLUSION OF LAW RE:
SPECIFIC PERFORMANCE - 1
4824-8516-3013.01
110909/1343/63746.00001

Riddell Williams P.S.
1001 FOURTH AVENUE
SUITE 4500
SEATTLE, WA 98154-1192
206.824.3600

1 **FINDINGS OF FACT**

2 1. On June 17, 1998, Defendant Diamond Pacific, Inc. ("Diamond Pacific")
3 and Plaintiffs Torres Mazatlan Remainder LLC and Vallarta Torre Remainder LLC entered
4 into the Agreement Regarding Purchase, Sale and Reconciliation of Beneficial Interests.
5 ("Beneficial Interests Agreement") Trial Ex. 6.

6 2. On August 15, 1998, Diamond Pacific and Plaintiff Vacation Time Share
7 Remainder LLC entered into the Agreement Regarding Purchase, Sale and Reconciliation
8 of Undivided Remainder Interests. ("Remainder Agreement") Trial Ex. 7.

9 3. The Remainder Interests Agreement provides in relevant part:

10 SELLER hereby agrees to sell and PURCHASER hereby agrees to purchase
11 the REMAINDER interests in the VTS Apartments listed on Exhibit A . . .

12 4. The Beneficial Interests Agreement provides in relevant part:

13 SELLER hereby agrees [to] sell and to cause TMSA and TVSA to sell and
14 PURCHASERS hereby agrees to purchase the Beneficial Interest in the
15 Remainder of the VTS Apartments located at the Torres Mazatlan
16 Condominium in Mazatlan, Sinaloa Mexico, and the Vallarta Torre
17 Condominium located in Puerto Vallarta, Jalisco Mexico, as listed on
18 Exhibit A and Exhibit B respectively . . .

19 5. The case was tried to jury. The jury returned its verdict on November 2,
20 2009. The jury determined that Diamond Pacific breached the Remainder Interests
21 Agreement and awarded damages to Plaintiff Vacation Time Share Remainder LLC. The
22 jury also determined that Diamond Pacific failed to transfer marketable title to the
23 remainder interests in the Oasis Palm Springs condominium units to Vacation Timeshare
24 Program Remainder, LLC. The jury also determined that Diamond Pacific had failed to
25 transfer marketable title to the remainder interests in the Vallarta Torre Tower I and Tower
26 II condominium units to Vallarta Torre Remainder, LLC.

6. In December, 2007 Diamond Pacific, through its wholly owned subsidiary
Torre Vallarta, S.A. ("TVSA"), conveyed title to 58 Vallarta Tower II remainder

[PROPOSED] FINDINGS OF FACT AND CONCLUSION OF LAW RE:
SPECIFIC PERFORMANCE - 2
4824-8516-3013.01
110909/1343/63746.00001

Riddell Williams P.S.
1001 FOURTH AVENUE
SUITE 4500
SEATTLE, WA 98154-1192
206.624.3600

1 apartments to Inmuebles NBR ("NBR"), a subsidiary of Plaintiff Vallarta Torre
2 Remainder LLC.

3 7. In 2008 Diamond Pacific, through its wholly owned subsidiary TVSA
4 initiated civil and criminal proceedings in Mexico challenging the validity of the
5 December, 2007 transaction.

6 8. The civil and criminal actions initiated in Mexico by Diamond Pacific
7 attacking the validity of the transfer of the remainder interests in the Vallarta Torre Tower
8 II remainder apartments creates a cloud on the marketability of those properties.

9 9. Diamond Pacific has not transferred marketable title to the remaining six
10 Vallarta Tower I remainder apartments to Vallarta Torre Remainder LLC.

11 10. Diamond Pacific has not transferred marketable to the Oasis remainder
12 apartments to Plaintiff Vacation Time Share Remainder LLC.

13 11. It is not impossible or impractical for Diamond Pacific to complete the
14 transfers of marketable title to the Vallarta Tower I and Oasis remainder apartments to
15 Plaintiffs.

16 12. Plaintiff Vacation Time Share LLC and counsel for Diamond Pacific agreed
17 on a plan to complete the conveyance marketable title to the Oasis Remainder apartments
18 to Plaintiff Vacation Time Share Remainder LLC. That plan is set out in Ex. B to Trial
19 Ex. 79 ("Ringgenberg/Schlect plan"). The Ringgenberg/Schlect plan is not impossible or
20 impractical.

21 13. The remainder apartments that are the subjects of the Remainder Agreement
22 and the Beneficial Interests Agreement, including the remainder apartments at Oasis, Palm
23 Springs and Vallarta Torre, Mexico, are unique and could not be readily replaced by
24 suitable substitute property.

25 14. Diamond Pacific is unlikely to be able to satisfy a money judgment.
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CONCLUSIONS

1. Under Washington law, “[i]n the absence of any provision in the contract indicating the character of the title provided for, it is presumed that the vendor of real estate will convey a good or marketable title to the purchaser.” *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.”)).

2. Under the Beneficial Interests Agreement, Diamond Pacific was obligated to transfer marketable title to the remainder interests in the Vallarta Torre Tower I condominium units to Vallarta Torre Remainder, LLC.

3. Under the Beneficial Interests Agreement, Diamond Pacific was obligated to transfer marketable title to the remainder interests in the Vallarta Torre Tower II condominium units to Vallarta Torre Remainder, LLC.

4. Under the Remainder Interests Agreement, Diamond Pacific was obligated to transfer marketable title to the remainder interests in the Oasis Palm Springs condominium units to Vacation Timeshare Program Remainder, LLC.

5. “When a court's legal powers cannot adequately compensate a party's loss with money damages, then a court may use its broad equitable powers to compel a party to specifically perform its promise.” *Crafts v. Pitts*, 161 Wn. 2d 16, 23-24, 162 P.3d 382 (2007).

6. Specific performance is appropriate when a party has breached a contract, and “is frequently the only adequate remedy for a breach of a contract regarding real property because land is unique and difficult to value.” *Pardee v. Jolly*, 163 Wn. 2d 558, 568-69, 182 P.3d 967 (2008).

[PROPOSED] FINDINGS OF FACT AND CONCLUSION OF LAW RE:
SPECIFIC PERFORMANCE - 4
4824-8516-3013.01
110909/1343/63746.00001

Riddell Williams P.S.
1001 FOURTH AVENUE
SUITE 4600
SEATTLE, WA 98154-1192
206.624.3600

1 7. “When determining whether damages would provide adequate
2 compensation, courts inquire as to (i) the difficulty of proving damages with reasonable
3 certainty, (ii) the difficulty of procuring a suitable substitute, and (iii) the likelihood that an
4 award of damages could not be collected.” *Crafts*, 161 Wn. 2d at 24.

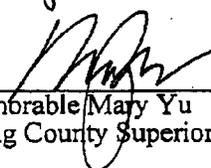
5 8. The remainder interests in the Vallarta Torre Tower I, Vallarta Torre Tower
6 II, and Oasis Palm Springs condominium units are unique and suitable substitute property
7 is not readily available.

8 9. It is unlikely that Plaintiffs will be able to recover a monetary judgment
9 against Diamond Pacific, Inc.

10 10. A monetary judgment will not compensate Plaintiffs for Diamond Pacific,
11 Inc.’s failure to transfer marketable title to the remainder interests in the Vallarta Torre
12 Tower I, Vallarta Torre Tower II, and Oasis Palm Springs condominium units.

13 11. Plaintiffs are entitled to specific performance of Diamond Pacific’s
14 obligations under the Beneficial Interests Agreement and the Remainder Interests
15 Agreement to transfer marketable title to the remainder interests in the Vallarta Torre
16 Tower I, Vallarta Torre Tower II, and Oasis Palm Springs condominium units.

17 DATED this 11 day of ~~November~~ January 2009. 2010

18
19 
20 _____
21 Honorable Mary Yu
22 King County Superior Court Judge
23
24
25
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Presented By:

RIDDELL WILLIAMS P.S.

By 

Kark Quackenbush, WSBA #9602
Ken Lederman, WSBA #26515
Charlie S. Fitzpatrick, WSBA #33096

Andrew H. Salter, WSBA #11954
Todd W. Wyatt, WSBA #31608
SALTER JOYCE ZIKER, PLLC
1601 Fifth Avenue, Suite 2040
Seattle, WA 98101

Attorneys for Plaintiffs

[PROPOSED] FINDINGS OF FACT AND CONCLUSION OF LAW RE:
SPECIFIC PERFORMANCE - 6
4824-8516-3013.01
110909/1343/63746.00001

Riddell Williams P.S.
1001 FOURTH AVENUE
SUITE 4500
SEATTLE, WA 98154-1192
206.824.3600

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Honorable Mary Yu
Noted for Consideration: December 11, 2009

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

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. 03-2-31401-3 SEA

**FINDINGS OF FACT AND
CONCLUSION OF LAW RE:
ATTORNEYS' FEES AND COSTS**

Plaintiffs,

v.
~~FLRX INC., F/K/A~~
~~DIAMOND RESORTS PACIFIC, INC., a~~
~~Washington corporation, formerly known as~~
~~SUNTERRA PACIFIC, INC., formerly~~
~~known as VACATION~~
~~INTERNATIONALE, INC.~~

Defendant.

This matter came before the Court on Plaintiffs' Motion for Entry of Judgment and
for an Award of Attorneys' Fees and Costs. The Court considered the following:

- (1) Plaintiffs' Motion for Entry of Judgment and Plaintiffs' Motion for an Award of
Attorneys' Fees and Costs; (2) Declaration of Karl J. Quackenbush (and exhibits thereto);
- (3) Declaration of Andrew H. Salter (and exhibits thereto); (4) Declaration of Robert L.
Ringgenberg (and exhibits thereto); (5) Diamond Resorts Pacific, Inc.'s Response (if any)
and any exhibits or attachments thereto; and (6) the records and pleadings on file. The
Court, being duly informed, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT AND CONCLUSION OF LAW RE:
ATTORNEYS' FEES AND COSTS (NO. 03-2-31401-3 SEA) - I
4846-7635-9429.02
121109/1012/63746.00001

Riddell Williams P.S.
1001 FOURTH AVENUE
SUITE 4500
SEATTLE, WA 98154-1192
206.624.3600

1 **FINDINGS**

2 1. Paragraph twelve (12) of the 1998 Beneficial Interests Agreement (Trial
3 Ex. 6) between Defendant Diamond Pacific, Inc. and Plaintiffs Vallarta Torre Remainder,
4 LLC and Torres Mazatlan Remainder, LLC provides:

5 In the event legal action of any kind is initiated to collect any sums due
6 under this agreement or otherwise require performance of this agreement,
7 the party substantially prevailing shall be entitled to the amounts due, costs
8 and attorney fees actually incurred in such legal action.

9 2. Paragraph 6.1 of the 1998 Remainder Interests Agreement (Trial Ex. 7)
10 between Defendant Diamond Pacific, Inc. and Plaintiff Vacation Timeshare Program
11 Remainder, LLC provides:

12 In the event legal action of any kind is initiated to collect any sums due
13 under this agreement or otherwise require performance of this agreement,
14 the party substantially prevailing shall be entitled to the amounts due, costs
15 and attorney fees actually incurred in such legal action.

16 3. The jury determined that Diamond Pacific, Inc. breached the Remainder
17 Interests Agreement as to Vacation Timeshare Program Remainder LLC.

18 4. The jury determined that Diamond Pacific, Inc. breached the Beneficial
19 Interests Agreement as to Vallarta Torre Remainder LLC.

20 5. The jury determined Diamond Pacific, Inc. breached the Beneficial Interests
21 Agreement as to Torres Mazatlan Remainder LLC.

22 6. The jury determined that Diamond Pacific, Inc. violated the Washington
23 Consumer Protection Act as to Vacation Timeshare Program Remainder LLC.

24 7. The jury determined that Diamond Pacific, Inc. violated the Washington
25 Consumer Protection Act as to Vallarta Torre Remainder LLC.

26 8. The jury determined that Diamond Pacific, Inc. violated the Washington
Consumer Protection Act as to Torres Mazatlan Remainder LLC.

1 4. The award of attorneys' fees in a CPA claim is mandatory and only the
2 amount of the award is within the trial court's discretion. *Clark v. Luepke*, 60 Wn. App.
3 848, 856 n.12, 809 P.2d 752 (1991).

4 5. In Washington, Courts apply the lodestar method to calculate attorneys'
5 fees. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn. 2d 581, 597, 675 P.2d 193 (1983).

6 6. Under the lodestar method, the court must calculate (i) the number of hours
7 reasonably expended by each attorney, and (ii) a reasonable hourly rate of compensation
8 for each attorney. *Bowers*, 100 Wn. 2d at 597. The court then multiplies those two figures
9 together. *Id.*

10 7. The court typically relies upon the attorneys' billing records as reasonable
11 documentation of the work performed because those records "inform the court, in addition
12 to the number of hours worked, of the type of work performed and the category of attorney
13 who performed the work (*i.e.*, senior partner, associate, etc.)." *Id.*

14 8. In addition, RPC 1.5(a) outlines the factors that guide members of the Bar
15 (including the court) as to the reasonableness of a fee. *Allard v. First Interstate Bank of*
16 *Wash.*, 112 Wn. 2d 145, 149, 768 P.2d 998, 773 P.2d 420 (1989). The RPC 1.5(a) factors
17 include:

- 18 (1) The time and labor required, the novelty and difficulty of the questions
19 involved, and the skill requisite to perform the legal service properly;
- 20 (2) The likelihood, if apparent to the client, that the acceptance of the
21 particular employment will preclude other employment by the lawyer;
- 22 (3) The fee customarily charged in the locality for similar legal services;
- 23 (4) The amount involved and the results obtained;
- 24 (5) The time limitations imposed by the client or by the circumstances;
- 25 (6) The nature and length of the professional relationship with the client;
- 26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) Whether the fee is fixed or contingent; and

(9) The terms of the fee agreement between the lawyer and the client, including whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.

9. The Plaintiffs were the prevailing party in this case with regard to their claims pursuant to the Remainder Interests Agreement and Beneficial Interests Agreement.

10. The Plaintiffs were the prevailing party in this case with regard to their claims pursuant to the Washington Consumer Protection Act.

11. The attorneys' fees and costs incurred by Plaintiffs, as established through provided affidavits and documentation, were reasonable, appropriate, and warranted in light of the breadth, novelty and complexity of the questions involved.

12. The final amount of costs incurred by Plaintiffs does not include \$11,989.63 incurred by Plaintiffs in the retention of Alonso Gonzalez-Villalobos. Plaintiffs are not requesting recovery of these costs, and the court issues no ruling on whether those costs are recoverable under the facts and law of this case.

13. Plaintiffs are entitled to an award of \$1,141,593.60 in attorneys' fees and \$394,812.30 in costs in prevailing in this case, for a total of \$1,536,405.90.

There was no objection to the fees as requested above
[Signature]

DATED this 11 day of December, 2009.

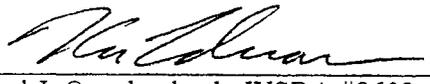
[Signature]

Honorable Mary Yu
King County Superior Court Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Presented By:

RIDDELL WILLIAMS P.S.

By 
Karl J. Quackenbush, WSBA #9602
Ken Lederman, WSBA #26515
Charlie S. Fitzpatrick, WSBA #33096

Andrew H. Salter, WSBA #11954
Todd W. Wyatt, WSBA #31608
SALTER JOYCE ZIKER, PLLC
1601 Fifth Avenue, Suite 2040
Seattle, WA 98101

Attorneys for Plaintiffs

FINDINGS OF FACT AND CONCLUSION OF LAW RE:
ATTORNEYS' FEES AND COSTS (NO. 03-2-31401-3 SEA) - 6
4846-7635-9429.02
121109/1012/63746.00001

Riddell Williams P.S.
1001 FOURTH AVENUE
SUITE 4500
SEATTLE, WA 98154-1192
206.624.3600