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No. 64747-4-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

TORRES MAZATLAN REMAINDER, LLC, et al.

Respondents,

vs.

FLRX, INC.,

Appellant.

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

REPLY BRIEF OF APPELLANT

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I. REPLY ARGUMENT

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

Plaintiffs' allegations that FLRX "blocked" them from engaging in the business of selling remainder interests as a stand alone product in fact demonstrates why this new business was separate and distinct from their previous business of selling time shares. Plaintiffs concede that they did not even attempt to sell "Extension Agreements" in Washington after the Washington Attorney General questioned the viability of plaintiffs' "evolving business model." (Exs. 165, 193) The record wholly refutes the contention that this regulatory decision was orchestrated by FLRX.

Plaintiffs cite to a June 2003 letter from defendant's general counsel, written after plaintiffs filed suit, asserting that plaintiffs' remainder program was separate and distinct from the VTS program purchased by FLRX. (Ex. 19) Plaintiffs fail to explain how this accurate statement made in 2003 was responsible for the Washington regulator's decision in 2002, one year earlier, to protect prospective purchasers by requiring plaintiffs to impound all sums paid by purchasers until the purchasers could occupy the unit, 13 to 18 years after sale. (Ex. 165)

Plaintiffs also complain that FLRX refused to allow Extension Agreement purchasers to “extend their points in the VTS system,” or “access the online reservations system.” (Resp. Br. 9) But nothing in the parties’ contract required FLRX to take these steps to facilitate plaintiffs’ marketing of their supposed “direct-demand substitute” product. FLRX agreed to allow plaintiffs “to sell and/or solicit the VTS Owners of record . . . for the sales of the VTS Remainders being purchased or reconciled herein beginning November 7, 2002.” (Ex. 7 ¶4.2) Plaintiffs’ assertion that they suffered lost profits from the sale of remainder interests because FLRX “blocked [plaintiffs] from the market” (Resp. Br. 8) rests on the fallacy that FLRX was required to affirmatively assist the plaintiffs in developing their new business. See **Badgett v. Security State Bank**, 116 Wn.2d 563, 569, 807 P.2d 356 (1991) (duty of good faith does not impose upon party obligations in addition to those expressly stated in contract).

Finally, plaintiffs’ implication on appeal that FLRX “blocked” their proposed new business of selling remainder timeshare interests because it competed with FLRX’s PPU contracts is directly contrary to their position below. 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 that was not limited to existing owners. (CP 1635; 10/20 RP 74) 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 in the structure for doing such is completely different.” (10/21 RP 141) 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 103-04; 10/19 RP 38-39; 10/21 RP 141, 238-39, 243, 245; CP 1635)

In fact, the term “Extension Agreement,” adopted by plaintiffs to characterize their “unique” product before the jury, is an absolute misnomer. The proposed sale of remainder timeshare interests by the plaintiffs, who were new businesses set up to hold the remainder interests in real estate coming out of the VTS Trust, did not “extend” anything. Prior to 1997, plaintiffs’ principals originally sold new customers “VTS Agreements” that gave consumer the right to use properties in the VTS Trust, and sold those customers

“Extensions Agreements” that basically extended the VTS Agreements. (10/13 RP 197, 10/15 RP 178-79) When plaintiffs’ principals sold their business in 1997, they sold the entire business, including the right to sell Extension Agreements for properties in the VTS Trust. (10/15 RP 190-91)

What plaintiffs proposed selling in 2002 was a standalone remainder timeshare product, unrelated to any timeshare interest that plaintiffs controlled or could benefit from in marketing their “unique” new product. Plaintiffs argue that the trial court correctly held that their sale of remainder timeshare interests was not a “new business,” but in fact, the trial court never made that legal determination. Instead, the trial court incorrectly held that this court had “loosened up” the standard established by ***Farm Crop Energy, Inc. v. Old National Bank***, 109 Wn.2d 923, 750 P.2d 231 (1998), under which a new business can recover lost profits. (10/9 RP 30) The trial court erred in refusing to hold plaintiffs to the ***Farm Crop*** burden (CP 824, 964), and in submitting the plaintiffs’ lost profit claim to the jury. (See App. Br. 25-27)

Plaintiffs then convinced the jury to award damages for “lost profits” in an untested “standalone” remainder timeshare business based on the experience of companies with *existing* interests in

timeshare properties (10/21 RP 238-45; 10/26 RP 26-29) – property interests that plaintiffs had sold to FLRX’s predecessor, at a hefty price, years earlier. No company had ever sold such a product; no jurisdiction had registered such a product for sale. (10/21 RP 238-39, 245) Plaintiffs had no sales presence at the resort properties that they no longer managed but where they intended to sell the remainder timeshare interests. (10/14 RP 65, 10/22 RP 162-63) The existing timeshare contract businesses on which plaintiffs’ expert based her damage calculations could not as a matter of law support an award of damages for “lost profits” in plaintiffs’ “unique” and “totally new” proposed standalone remainder timeshare product.

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.

Plaintiffs also failed to prove that they suffered any damages arising from FLRX’s allegedly deceptive marketing to potential purchasers. Plaintiffs’ three arguments in support of the jury’s award of \$14.7 million under the CPA – (1) that plaintiffs did not have to prove that they were injured as a result of an “unfair or deceptive act or practice,” because they established that FLRX engaged in an “unfair method of competition” under the CPA; (2)

that plaintiffs were entitled to a presumption of damages once they showed that defendants engaged in an “unfair or deceptive” act by failing to disclose the precise properties available to PPU purchasers; and (3) that their expert’s testimony of lost profits for breach of contract sufficed to meet their burden of proving CPA damages – have no merit. Not only did plaintiffs fail to make a colorable claim for lost profits (Arg. A, *supra*), but they offered no evidence, and in fact affirmatively disclaimed, that FLRX’s alleged failure to disclose the precise properties available to PPU purchasers caused plaintiffs to suffer any lost profits at all, let alone the staggering sum of \$14.8 million.

1. Plaintiffs Did Not Allege Or Prove A Claim For “Unfair Methods Of Competition” Under The CPA.

Starting with the premise that the CPA specifically prohibits “unfair competition” (Resp. Br. 27), plaintiffs advance on appeal a theory that FLRX violated the Consumer Protection Act by selling “its own competing product . . . using unfair and deceptive practices, thus reducing the size of the market” available for plaintiffs’ sale of their remainder timeshare interests. (Resp. Br. 26) However, plaintiffs did not propose and the trial court did not instruct the jury to consider this theory. Leaving aside plaintiffs’

disavowal below that its product competed with defendant's, plaintiffs did not sue for "unfair methods of competition" – which, as plaintiffs note (Resp. Br. 27), is a claim distinct and separate from the prohibition against "unfair or deceptive acts" under the CPA:

Unfair methods of competition *and* unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

RCW 19.86.020 (emphasis added).

Plaintiffs argue that "selling a product by deceptive means" is actionable because this alleged conduct has "the capacity to damage a competitor in the same market." (Resp. Br. 27) But Washington courts have consistently recognized the distinction between these two methods of seeking damages under the CPA. *See Seaboard Surety Co. v. Ralph Williams' Northwest Chrysler Plymouth, Inc.*, 81 Wn.2d 740, 746, 504 P.2d 1139 (1973) (while damage from deceptive acts or practices requires proof of a consumer's loss, proof that such acts harmed a competitor requires "the fact and the amount of lost profits of that competitor."); *Aetna Cas. and Sur. Co. v. M & S Industries, Inc.*, 64 Wn. App. 916, 927, 827 P.2d 321 (1992) (prohibition against unfair methods of competition is directed toward competitors, not customers); *Boggs v. Whitaker, Lipp & Helea, Inc., P.S.*, 56 Wn.

App. 583, 586-87, 784 P.2d 1273 (“Suits based on conduct that is harmful to consumers but not competitors arise under the prohibition of unfair and deceptive practices, not unfair competition.”), *rev. denied*, 114 Wn.2d 1018 (1990).

Plaintiffs’ argument would not only eliminate the legal distinction between these two types of CPA claims, but also ignores the record in this case. Plaintiffs proposed and the trial court instructed the jury under only the “unfair or deceptive” prong of RCW 19.86.020, and not under a theory of unfair methods of competition. (CP 525, 530, 955-56) Plaintiffs cannot support the jury’s verdict for lost profits based on a theory of unfair competition that they never asked the court below to submit to the jury. See ***Lecy v. Bayliner Marine Corp.***, 94 Wn. App. 949, 962-63, 973 P.2d 1110 (1999) (refusing to consider theory in support of jury’s verdict that was not presented below and on which jury was not instructed), *rev. denied*, 139 Wn.2d 1025 (2000).

2. Plaintiffs Were Not Entitled To A Presumption Of Damages, And Had The Burden Of Proving But/For Causation Under the CPA.

Ignoring the trial court’s instructions, as proposed by plaintiffs, that placed upon them the burden of proving “but/for” causation, plaintiffs alternatively attempt to support the \$14.8

million judgment under the CPA by arguing that they were entitled to “a presumption” that “consumers were deceived,” citing cases involving false commercial advertising under the Lanham Act. (Resp. Br. 31)¹ While plaintiffs argue that “federal decisions are persuasive in construing the Washington CPA” (Resp. Br. 31), they do not cite any decisions under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), the parallel “federal law governing . . . unfair competition and unfair, deceptive, and fraudulent acts or practices” to which Washington courts turn in construing our CPA. RCW 19.86.920; see *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 47, ¶ 39, 204 P.3d 885 (2009); *State v. Black*, 100 Wn.2d 793, 799, 676 P.2d 963 (1984) (“The unfair methods of competition provision is taken verbatim from section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1).”)

The Lanham Act is irrelevant to the elements of a private cause of action for unfair or deceptive acts under RCW 19.86.020. Whatever presumptions may be available under the Lanham Act,

¹ See *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302 (1st Cir. 2002) (garment manufacturer that falsely represented that its garments were “cashmere blazers” was liable under the Lanham Act); *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134 (9th Cir. 1997) (defendants claimed its turf seed was better than plaintiff’s in advertisements) (both cited at Resp. Br. 31).

the decisions in ***Fidelity Mortgage Corp. v. Seattle Times Co.***, 131 Wn. App. 462, 128 P.3d 621 (2005) and ***Browne v. Avvo Inc.***, 525 F. Supp. 2d 1249 (W.D. Wash. 2007) (App. Br. 33-34) make clear that the CPA does not allow a business to recover treble damages and attorney fees simply by establishing that its competitor made a deceptive representation or engaged in misleading advertising. Even if a CPA plaintiff need not show “direct reliance by a deceived consumer” (Resp. Br. 29), it must still show a “causal link between the misrepresentation and the plaintiff’s injury.” ***Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.***, 162 Wn.2d 59, ¶¶ 56, 83, 170 P.3d 10 (2007). The Supreme Court in ***Indoor Billboard*** expressly rejected the argument “that causation may be established merely by a showing that money was lost,” in a consumer CPA claim. 162 Wn.2d at 81, ¶ 49. “A [CPA] plaintiff must establish that but for the defendant’s unfair or deceptive practice, the plaintiff would not have suffered an injury.” ***Indoor Billboard***, 162 Wn.2d at 84, ¶ 57.

There is no reason to believe that the Court would eliminate the causation requirement in a claim alleging competitive injury or unfair methods of competition, as plaintiffs advocate here. Even under the Lanham Act, a plaintiff cannot recover damages without

establishing that a competitor's false advertising actually caused its lost sales. See **Cashmere & Camel Hair Mfrs. Institute v. Saks Fifth Ave.**, 284 F.3d 302, 318 (1st Cir.) (affirming damages based on “uncontradicted evidence that Packard's customers actually reduced their purchases of Packard's cashmere-blend fabric because they could not compete with Harve Benard’s lower-priced garments.”), *cert. denied*, 537 U.S. 1001 (2002); **Seven-Up Co. v. Coca-Cola Co.**, 86 F.3d 1379, 1388 (5th Cir. 1996) (“We have . . . rejected inferences of causation based solely on the chronology of events. . .”).

In any event, plaintiffs’ discussion of the presumptions that may benefit a hypothetical CPA plaintiff are wholly academic in the instant case, because the trial court instructed the jury that plaintiffs bore the burden of establishing that defendant’s unfair or deceptive “act or practice caused plaintiffs’ injury” under a traditional “but/for” test of proximate cause. (CP 955, 957) It is this instruction, rather than federal law under the Lanham Act, that establishes the law of the case.

3. Plaintiffs Failed To Prove Any Damages From Defendant's Allegedly Deceptive Disclosures To PPU Purchasers.

Plaintiffs made no attempt at trial to establish that any single sale was diverted to FLRX as a result of an allegedly deceptive disclosure to a PPU purchaser, and do not argue on appeal that they are entitled to recover \$14.8 million in damages as a private attorney general on behalf of the hypothetical purchasers allegedly misled into purchasing perpetual point upgrade contracts from FLRX. See *Fidelity Mortgage*, 131 Wn. App. at 470-71, ¶¶ 15-16. Nor could they do so on this record, where plaintiffs' evidence of deceptive conduct consists of a single complaint by one customer who was immediately offered his money back, and a 2000 memo addressing plaintiff Bob Riggerberg's allegation of deceptive advertising, which he made two years *before* plaintiffs were contractually permitted to engage in the business of selling extension agreements to time share owners. (Exs. 11, 397)

FLRX's disclosures were accurate in 2002, when plaintiffs had the right to start selling remainder interests. (Ex. 31; 10/28 RP 138-39) Plaintiffs had no evidence of any unfair or deceptive act committed while they were authorized to market extension agreements.

Moreover, plaintiffs' expert's lost profit analysis cannot support the \$14.8 million CPA award. Plaintiffs' expert limited her lost profits calculations to FLRX's alleged failure to timely convey the disputed remainders to the plaintiffs, and expressly disavowed any connection between her damages calculations and the allegedly deceptive act of failing to make a full disclosure to FLRX's PPU contract purchasers. (10/22 RP 110, 135-36)

Plaintiffs also attempt to support the CPA verdict by alleging that FLRX sold \$12 million in PPU contracts. (Resp. Br. 35, *citing* Ex. 337) But the fact that FLRX earned money selling PPU contracts is not evidence that these "purchasers of PPU contracts . . . were deceived into buying VI's direct-demand substitute for Extension Agreements," as plaintiffs contend. (Resp. Br. 35) (emphasis added) Contrary to their current contention that *all* of the purchasers of PPU contracts would have opted for extension agreements that could not be marketed anywhere but in the state of Oregon, plaintiffs stated in discovery responses that "50% of VTS owners who purchased perpetual point upgrade contracts . . . would have purchased plaintiffs' VTS Program Remainder/Extension Interests . . . had [FLRX] not [engaged in] . . . false and misleading [marketing]." (Ex. 212 at 16) Moreover, the

exhibit plaintiffs cite to establish \$12 million in lost timeshare remainder interests sales purports to show sales through 2009, and it was undisputed that FLRX stopped selling PPU contracts in 2004 when VIOA took over the program. (Ex. 337; 10/26 RP 40) Even were plaintiffs' estimate of FLRX's gross revenues accurate, it cannot support a \$14.8 million verdict for plaintiffs' CPA damages.²

This failure of proof is not an issue of whether damages must be established with "mathematical exactness," or of "allocation of damages between the contract and CPA claims," as plaintiffs argue. (Resp. Br 34-35 (*citing Conrad ex rel. Conrad v. Alderwood Manor*, 119 Wn. App. 275, 78 P.3d 177 (2003).) In *Conrad*, Division Three rejected a tortfeasor's argument that the jury awarded double damages when it allocated damages for the plaintiff's personal injuries between her claims for common law negligence and for neglect under the Abuse of Vulnerable Adults statute, RCW 74.34.200. Because plaintiff could "legally recover for both common law negligence and neglect . . . there could be no

² Exhibit 337 established approximately \$8.7 million in "total sales value," (not profit) from the sale of PPU contracts through 2002, when the allegedly deceptive disclosures to potential purchasers took place. If, as plaintiffs now contend, 50% of those sales would have gone to plaintiffs, their lost revenue would have been substantially less than 50% of \$8.7 million, because corresponding expenses would have to be subtracted to arrive at plaintiffs' damages.

‘double recovery’ on a special verdict form which contained two damage sections – one for neglect and one for negligence.” 119 Wn. App. at 291.

Here, by contrast, the issue is not whether the damages awarded under the CPA were duplicative of those awarded for breach of contract, but whether plaintiffs met their burden of proving the requisite elements of the CPA claim, including damages. Because plaintiffs presented no evidence that they suffered any damages as a result of FLRX’s allegedly misleading disclosures regarding the precise properties that were available to PPU purchasers, their speculation that the jury necessarily allocated their expert’s calculation of contract lost profits equally between plaintiffs’ two causes of action is not only improper, but irrelevant.

Plaintiffs offered no evidence that they suffered any damages as a result of defendant’s allegedly deceptive disclosures to PPU purchasers, let alone \$14.8 million in lost profits. This court should reverse the \$14,794,012 damage award under the CPA.

C. The Trial Court Gave Plaintiffs A Double Recovery By Awarding Both Specific Performance And Damages For Profits Lost Because of Defendant’s Failure to Perform.

“It is a basic principle of damages, both tort and contract, that there shall be no double recovery for the same injury.” *Eagle*

Point Condominium Owners Ass'n v. Coy, 102 Wn. App. 697, 702, 9 P.3d 898 (2000). Plaintiffs do not contest the established principle that they may not recover both benefit of the bargain damages for breach of contract as well as a decree requiring the defendant to specifically perform the contract. ***McKown v. Driver***, 54 Wn.2d 46, 55-56, 337 P.2d 1068 (1959) (App. Br. 38). By entering both a money judgment for benefit of the bargain damages and a decree granting plaintiffs the actual physical benefit of the bargain, the trial court gave plaintiffs an impermissible double recovery. See ***Forster v. Boss***, 97 F.3d 1127, 1129 (8th Cir. 1996) (reversing damages for breach of contract as well as specific performance because by receiving “both the money and the property, [they] are in a better position than they would have been in had there been no . . . breach of contract in the first place.”).

Citing their expert’s calculations, plaintiffs argue that they were not awarded damages for FLRX’s “failure to provide marketable title,” which they contend “are separate and distinct from the LLC’s lost profits,” and that the jury did not make them whole by awarding the lower amount of damages calculated by their expert. (Resp. Br. 38) Plaintiffs’ speculation that the jury’s award of \$14.8 million in contract damages did not fully

compensate them for the failure to convey marketable title ignores the trial court's instruction directing the jury to award as damages the amount that plaintiff would have earned had the contract been fully performed – an instruction plaintiffs themselves proposed, and which is now the law of the case. (CP 512, 961) See **Smith v. Sturm, Ruger & Co., Inc.**, 39 Wn. App. 740, 744, 695 P.2d 600 (instructions proposed by plaintiff and given without exception are binding as law of the case), *rev. denied*, 103 Wn.2d 1041 (1985).

The jury's special verdict refutes plaintiffs' argument that because the jury awarded the lower of their expert's damages assessments – which was premised upon the plaintiffs' ability to ultimately sell disputed remainder interests as real property with marketable title – ordering specific performance as well as damages put plaintiffs in the position they should have been in had FLRX performed its contractual obligations. Plaintiffs' argument also erroneously presumes that having found FLRX liable, the jury was required to award plaintiffs all of the damages calculated by their expert. See **Eagle Point**, 102 Wn. App. at 704 (fact finder allowed to make "its own rough estimates of damage . . . rather than accepting either party's estimate"). The trial court had no authority to then increase the plaintiffs' recovery by ordering

specific performance once they opted for a judgment on a jury's verdict that purported to make them whole for damages suffered because defendant had not conveyed title – that the trial court then ordered the defendant to convey. See *Herriman v. May*, 142 Wn. App. 226, 234-35, 174 P.3d 156 (2007) (reversing additur where jury's award fell within range of evidence).

Upon finding that FLRX breached its obligations under the purchase and sale agreement, the trial court instructed the jury to grant the plaintiffs “the sum of money that will put the plaintiffs in as good a position as they would have been in if both plaintiffs and defendants fully performed *all* of their promises under the contract.” (CP 961) (emphasis added). FLRX's “promises under the contract” included its obligation to convey marketable title to the remainders, and the jury was so instructed. (CP 953) In its special verdict, the jury specifically found that FLRX had breached its contract, that FLRX had not conveyed marketable title, and as a result awarded plaintiffs \$14.8 million in damages “to put the plaintiffs in as good a position as they would have been in” had the contract been “fully performed.” (CP 961, 1002-04) Having elected to reduce that verdict to judgment, plaintiffs were not additionally entitled to an order of specific performance, because this equitable remedy also

“place[s] the parties in the condition that they would have been in had the contract been performed.” **Cornish College of Arts v. 1000 Virginia Limited Partnership**, __ Wn. App. __, __ P.3d __, ¶ 52, 2010 WL 4159298 (2010).³ See Dobbs, 3 *Law of Remedies* 238 (2nd Ed. 1993) (characterizing specific performance as “equitable equivalent” of expectation damages).

“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). Plaintiffs may have been entitled to entry of judgment on the jury’s verdict for compensatory damages, or to a decree requiring FLRX to specifically perform the contract, but they were not entitled to both.

³ In the proper case, the court may award to a purchaser of land incidental or consequential damages in addition to specific performance, in order to compensate the non-breaching purchaser for the delay in obtaining full performance. **Cornish College**, at ¶ 52; **Rehki v. Olason**, 28 Wn. App. 751, 757-58, 626 P.2d 513 (1981). In **Cornish**, this court affirmed an award of specific performance in addition to consequential damages for Cornish’s rental payments for replacement property and for renovation costs incurred after the defendant refused to honor Cornish’s purchase option. Such compensation for incidental out-of-pocket expenses resulting from the delay in performance is materially different from the expectation damages awarded to fulfill the benefit of the parties’ bargain that are at issue in the instant case.

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

Plaintiffs mischaracterize defendant's claim for a new trial based on juror bias, which would have been a basis for removal for cause, not a preemptory challenge. (*Compare* App. Br. 42-43 to Resp. Br. 40-41, 45-46) Although the loss of a *preemptory* challenge because of juror misconduct is no longer a basis for new trial after *In re Personal Restraint of Lord*, 123 Wn.2d 296, 868 P.2d 835, *clarified* 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994) (Resp. Br. 40), that has never been the basis for defendant's argument. Just as jurors No. 27 and No. 29 were removed from the panel *for cause* after honestly disclosing negative experiences with timeshare sales presentations (10/12 RP 84-93; see App. Br. 44-45), Juror Thompson's failure to reveal his own similar bias prevented defendant from obtaining a fair trial. Plaintiffs fail to effectively address that violation of defendant's constitutional right to an unbiased and unprejudiced jury.

Plaintiffs expend considerable energy dissecting the quality of the venire members' hostility toward timeshares and timeshare salespersons and presentations (Resp. Br. 43-46), but they compare the honest answers of individuals removed from the jury

for cause with their post hoc efforts to defend this extraordinary \$29.5 million verdict by attempting to “harmonize” Mr. Thompson’s bland assertion that his experience *with this defendant* was “satisfactory” during voir dire, with his much different, true experience related to his fellow jurors. (10/12 RP 71) It is beyond dispute that Mr. Thompson’s experience with defendant’s salesperson was not “satisfactory.” (CP 1412-14) The reason the failure to reveal that during voir dire deprived defendant of a new trial is because it deprived defendant of the opportunity to follow up and determine whether Mr. Thompson also felt “insulted” or “attacked” in a manner that would have justified a challenge for cause before he sat – and deliberated, and shared his experiences with his fellow jurors before reaching this verdict.

The consequence of the failure to timely reveal this type of bias, derived from personal experience with one of the parties, is apparent when contrasted with the arguments for juror bias rejected in the two cases primarily relied upon by plaintiffs. Far from being “very similar” (Resp. Br. 39) to this case, in ***Dean v. Group Health Co-op. of Puget Sound***, 62 Wn. App. 829, 816 P.2d 757 (1991), the issue was whether a juror’s membership in Group Health Cooperative was a basis for removal from the jury in a medical

malpractice case against Group Health. The plaintiff also argued misconduct, based on disputed recollections of jurors that the juror had expressed concern that a verdict for plaintiff might affect the cost of the health care premiums paid by her employer. But the juror in *Dean* had revealed her affiliation with Group Health during voir dire; there was no indication that she or any other juror had been asked whether the potential consequence of a verdict on her employer-paid premiums might affect her deliberations, or that she had falsely answered such a question during voir dire. Indeed, the *Dean* court recognized that if the juror “had been biased her failure to disclose that bias would constitute misconduct.” 62 Wn. App. at 837.

It was undisputed that the juror in question did not even reveal her potentially disqualifying experiences to the other members of the jury in *Detention of Broten*, 130 Wn. App. 326, 122 P.3d 942 (2005), *rev. denied*, 158 Wn.2d 1010 (2006), the other case relied upon by plaintiffs to argue that Mr. Thompson did not engage in misconduct in failing to reveal his negative experiences with defendant. (Resp. Br. 41) In *Broten*, a juror told the court during trial that the testimony caused her to believe that she had been “stalked” by the defendant years before. When it

was confirmed that the defendant was incarcerated during the time the juror was stalked, she affirmed that she believed the experience would not affect her deliberations, and agreed not to discuss the incident with other members of the jury. **Brotten**, 130 Wn. App. at 333. Unlike here, there was no evidence that the juror had given misleading or false answers to direct questions about her experiences during voir dire, and the juror had affirmatively agreed, and did not discuss, the potentially disqualifying information during deliberation.

As plaintiffs argue, after **Lord** issues of juror bias must be addressed in the context of whether the misconduct would have justified a challenge for cause. But neither the trial court nor plaintiffs adequately address the fact that the loss of preemptory challenges makes an accurate *factual* assessment of both a juror's bias, and of its consequence on deliberation, critical to the determination whether a party was deprived of its constitutional right to a fair trial. That is the basis for this court's holding requiring an evidentiary hearing before a new trial can be denied when, as here, the facts are disputed, because "[d]oubts regarding bias must be resolved against the juror." **State v. Cho**, 108 Wn. App. 315, 330, 30 P.3d 496 (2001) (*discussed at App. Br. 47-49*).

The need for an evidentiary hearing is confirmed by the only other case cited by plaintiffs, where the court considered a claim of bias based on a juror's claimed statement that the defendant "was 'a con' and could be capable of anything." ***State v. Cummings***, 31 Wn. App. 427, 428, 642 P.2d 415 (1982) (Resp. Br. 48). "Without conducting a hearing, the trial court read the affidavits in a light most favorable to [defendant] . . . and denied the motion for a new trial. . . . This was error." ***Cummings***, 31 Wn. App. at 429. Noting that because "each case of juror misconduct is decided on its own facts," it would "not reverse a trial court's discretionary ruling regarding a new trial unless there is a showing of abuse of that discretion," the court held that "[w]here, as here, affidavits establish a question of fact about juror deliberations not inhering in the verdict, a fact-finding hearing should be held to resolve the issue." ***Cummings***, 31 Wn. App. at 429-30, 432.

Here, to the contrary, the trial court resolved factual disputes about both Mr. Thompson's truthfulness in responding to voir dire and the consequences of his misconduct on deliberations *against* the defendant – as do plaintiffs in attempting to defend the denial of a new trial without an evidentiary hearing. Defendant FLXR was

entitled to a new trial, or at a minimum, to an evidentiary hearing to resolve disputed issues of juror misconduct.

II. CONCLUSION

For the reasons set forth in this and the opening brief, this court should reverse. The plaintiffs did not prove contract lost profit damages for their "unique" new business. The plaintiffs' claimed basis for violation of the CPA on appeal was not before the jury, is not supported by the evidence, and plaintiffs' "expert" evidence of contract damages cannot support the speculative CPA damages awarded. Plaintiffs were not entitled to specific performance because they were fully compensated by any supported damage award. At a minimum, defendant is entitled to a new trial before an impartial and properly instructed jury.

Dated this 24th day of November, 2010.

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