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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0

TODD A. ETELSON, ALBERT CHEN, LEO MIZRAHI, MARIA BELIANINA, GREG ZUNISS, MICHAEL KIM, LOU LAN, CONNORS MANGUINO, JENNIFER MANGUINO, ANTHONY SCIRE, MICHAEL TURNER, LYNN YOUNG, MANAV PRASAD, VARTIKA PRASAD, SANJEEV MORDANI and AMI FADIA,

Plaintiffs-Respondents,

v.

SHORE CLUB SOUTH URBAN

RENEWAL, L.L.C., LEFRAK

ORGANIZATION, INC., NEWPORT

ASSOCIATES DEVELOPMENT

COMPANY and JAMES LEFRAK,

Defendants-Appellants.

March 10, 2014

Argued January 13, 2014 - Decided

Before Judges Parrillo, Harris and Guadagno.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-2775-09.

Darren C. Barreiro argued the cause for appellants (Greenbaum, Rowe, Smith & Davis L.L.P., attorneys; Dean A. Gaver, John North and Mr. Barreiro, of counsel and on the briefs; Steven Firkser and Christopher J. Ledoux, on the briefs).

Keith N. Biebelberg argued the cause for respondents (Biebelberg & Martin and Michael H. Smith (Rosenberg Feldman Smith) of the New York bar, admitted pro hac vice,

attorneys; Stephen M. Rosenberg,
Mr. Smith and Keith N. Biebelberg,
on the brief).

PER CURIAM

In this consumer fraud action, defendants Shore Club South Urban Renewal, L.L.C., LeFrak Organization, Inc., Newport Associates Development Company and James LeFrak (collectively defendants) appeal from a final judgment awarding plaintiffs — sixteen purchasers of ten upper-floor condominium units in a newly constructed Jersey City high-rise luxury riverfront building (Shore South) built by defendants — the collective sum of $4,817,638.12, including treble damages under the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20, and the Planned Real Estate Development Full Disclosure Act (PREDFDA), N.J.S.A. 45:22A-21 to -56, pre-judgment interest and attorney's fees.

Plaintiffs' seven count complaint, alleging both statutory violations and common law causes of action, sought damages for, among other things, the loss of a panoramic view of the Manhattan skyline that they claim was represented to them by defendants' agents and advertised in its pre-construction sales and marketing materials promoting the Shore South project. Their view was partially blocked due to the construction of a taller, thirty-one story residential complex (Aquablu) between Shore South and the Hudson River that plaintiffs allege defendants always contemplated erecting but never disclosed to them. After eight

weeks of trial and four days of deliberations, the jury found that defendants had violated the CFA and PREDFDA by both their affirmative actions and their knowing omissions in representing and advertising the views from plaintiffs' units, and awarded plaintiffs twenty percent of the purchase price of their respective units.[1]

On appeal, defendants contend that they were denied a fair trial as a result of plaintiffs' counsel's inflammatory summation. Defendants also argue that the trial court erred in refusing to grant a severance and in denying their motion to dismiss plaintiffs' claims under the CFA and PREDFDA. For the reasons that follow, we affirm.

By way of background, in the early 1980's, defendants purchased approximately 400 acres of undeveloped and blighted land abutting the Hudson River in Jersey City on which they intended to build "Newport," an extensive mixed-use planned community. After clearing the land and upgrading it with all necessary infrastructure,[2] defendants began the construction of several high-rise rental apartment buildings, an office building and a mall in one of four designated site quadrants.

By the early-2000's, the primary area of Newport that remained to be developed was the thirty-one-acre "northeast quadrant" which directly abutted the Hudson River. In 2005, defendants announced the upcoming construction of "The Shore, Condominium Residences at Newport," a two-tower high-rise

condominium development of over 400 residential units situated atop ground-level retail space, with an adjacent garage, in Newport's northeast quadrant. Notably, although the towers, Shore South and Shore North, were advertised as being twenty-eight stories in height, they were actually only twenty-three stories high due to the non-existent second, fourth, thirteenth, fourteenth, and twenty-fourth floors. The north side of Shore South was angled to maximize northeasterly views.

Construction of the two Shore towers (Shore South and Shore North) was part of a master plan created in 2000, and modified in 2004, for the thirty-one-acre northeast quadrant, which envisioned the development of other buildings nearby, including the Aquablu, a high-rise condominium, to be located across the street and northeast of Shore South, between Shore South and the Hudson River, whose residents would share the garage adjacent to the two Shore towers. In fact, in 2000, well before the announcement of the two-tower Shore condominium project, defendants submitted a waterfront development permit application to the New Jersey Department of Environmental Protection (DEP) prepared by the architectural/planning firm of Gruzen Samton L.L.P. (Gruzen), which included plans depicting a twenty-five story, 386-unit residential building at the particular site on which Aquablu was eventually erected. This permit was granted in 2001.

In 2004, defendants submitted a modified waterfront development permit application to the DEP also prepared by Gruzen, which included plans depicting a 362-unit building with two towers of twenty stories and twenty-five stories on that same site (site 2E). No space was reserved for parking on site 2E because the parking garage to be shared by the two Shore towers had already been designed to also accommodate cars from a 362-unit building on site 2E. A modified permit was granted in July 2004. By this point in time, a Styrofoam model of a two-tower complex had been placed on site 2E on the Newport community map in defendants' Newport corporate office.

In Spring 2005, Gruzen, at defendants' request, prepared massing studies for the building to be constructed on site 2E.[3] On July 11, 2005, just as the Shore South sales office was opening, Richard LeFrak, the chairman and president of LeFrak, Inc., defendants' parent organization, or his son James LeFrak, an executive with LeFrak, Inc., directed David Thom, an engineer and vice president of development for LeFrak, Inc., to issue a request for proposals (RFP) seeking architectural design services for the site 2E building. The deadline for the proposals was August 1, 2005.

In this RFP, Thom noted that the site had preliminary approval for up to 362 residential units. He also confirmed that no on-site parking was needed since parking allowances had been made in the Shore garage. Thom requested that the building be

designed in such a way as to "reasonably minimize" the impact on the views from adjacent buildings including the Shore towers. By October 20, 2005, the architectural firm of Page & Steele International had provided LeFrak, Inc., with draft plans for the building.

Around this same time, namely July 2005, defendants began actively marketing the Shore South project. As noted, defendants opened a Shore South sales office located right in Newport and immediately began promoting its "breathtaking," "unparalleled waterfront views" and "unbelievable panoramic range" of views of the Hudson River and Manhattan skyline. The views were advertised and depicted on defendants' website, display boards, sales brochure, billboards, handouts, video, and a scale model of the complex for use in the sales office.

Defendants actually commissioned a large painting of the entire Shore complex, which reflected not only the South and North towers, but also a much shorter, eleven- or twelve-story building across the street from and slightly to the northeast of Shore South. Defendants hung this painting in the sales office by the receptionist station such that it would be the first item prospective buyers would see upon entering the sales office. An image of this painting was also featured prominently on defendants' flyers, website, and billboards, as well as in their sales brochure.[4]

Defendants' website claimed that the Shore South would have "unparalleled waterfront views," and stated that residents could enjoy all sorts of amenities "against the backdrop of Manhattan's stunning skyline and panoramic harbor". In addition to the painting, the website also contained a "fly around" video depicting the Shore South as having unobstructed northeasterly views with no buildings between it and the Hudson River.[5]

The sales brochure included images of the painting and another artistic rendering which showed no buildings between the Shore complex and the Hudson River. A disclaimer in tiny lettering on page two of the brochure warned that "[r]enderings are artistic representations and should not be deemed accurate." The brochure contained numerous photos of the Manhattan skyline, and boasted that Shore South residents would have "unparalleled waterfront views" and would be able to enjoy the Shore South's various amenities "against the backdrop of Manhattan's stunning skyline and panoramic harbor." The brochure further advised prospective buyers that "[y]ou will find that all floorplans have full-height glass corner windows for an unbelievable panoramic range that maximizes breathtaking views."

One of the display boards in the sales office was six feet long and three and one-half feet high. The board was divided into three sections, the first of which was a huge aerial photograph of Newport looking east with superimposed images of the future

Shore buildings. In this photo the only visible building situated to the southeast of the Shore South was the much shorter Holland Tunnel ventilation building. Three inset photos highlighted the "views looking" east, northeast, and southeast. The "views" were entirely unobstructed. The other two sections of the board contained computerized site maps of Newport, one of which was three-dimensional, showing in different colors all existing and future buildings. Although these site maps reflected a future unnamed building to the east of the Shore complex (again between it and the Hudson River), the building appeared to have two towers, both of which were shorter than the Shore towers. This display board was placed right behind the scale model of the Shore complex in the sales office.

In contrast to the depictions in the marketing materials for the Shore South, in 2004 and perhaps as early as 2003, defendants prepared and placed in their Newport corporate office Styrofoam models of the proposed twenty- and twenty-five story Aquablu towers. These physical displays, however, were never present in the Shore South sales office even though by the time the sales office opened in July 2005, defendant had already issued an RFP for a building — eventually the Aquablu — having 362 units.

The Shore South sold out in five months. Before prospective purchasers could even get a sales appointment, they were required to rank the importance of views to them in a written questionnaire. All of the plaintiffs ranked the views as the number

one or number two feature important to them. And once they met with defendants' sales representatives, they were routinely told that Shore South units above the fifteenth floor[6] would not have their views obstructed by the shorter building depicted in the sales literature. None of the sales agents informed prospective purchasers, including plaintiffs, that a building taller than the Shore South might be built on the undeveloped Aquablu site. In fact, the sales representatives uniformly testified that had they known that the building depicted on the Aquablu site was actually going to be twenty-five stories or higher, they would have disclosed that fact to prospective buyers.

Instead, every plaintiff had conversations with sales staff touting the views from the upper floors of the Shore South. Consistent with their responses on the initial questionnaire ranking their preferences, as one plaintiff put it, "[w]hen you buy on the water it's about the views[,] that's why you're [buying] on the water." Illustrative is the experience of plaintiff Todd Etelson, who purchased a unit on the twenty-third floor rather than an identical one on the twelfth-floor of Shore South for $60,000 more, solely to assure himself of the view. And plaintiffs Sanjeev Mordani and Ami Fadia, who had originally signed a contract to purchase a fifteenth-floor unit in February 2006 were allowed to cancel their contract and purchase an identical apartment four stories higher on the nineteenth floor for almost $20,000 more, simply to preserve their views.

Plaintiffs own respectively ten separate condominium units on the nineteenth through twenty-seventh floors on the north side of the Shore South building facing the Hudson River and the Manhattan skyline. Each of them purchased his or her unit desiring to live on one of the upper floors of this luxury high-rise residential building on the Jersey City waterfront primarily for its great views of the Hudson River and the Manhattan skyline. Fourteen of the sixteen plaintiffs, representing nine of the ten units, signed contracts to purchase their units by September 2005. Each unit owner took title in 2007, prior to completion of the Aquablu project.

Before even being shown around, plaintiffs, as prospective purchasers, were asked to fill out a two-page form containing nine statements, two of which read:

> I understand that neither the Seller nor the Salesperson makes any guarantee as to any properties surrounding the Shore Club. New buildings of any size, shape or color may or may not be built around the Shore Club. Any diagrams in this sales center which show surrounding properties are shown for illustrative and artistic purposes only, and can in no way be construed as factual representations of anything that is known to be built in the future.

> I understand that any renderings, maps, diagrams, models, dioramas or other presentation materials I may see in this sales office, related brochures or website are artistic

> representations and by definition may be inaccurate due to the impressionistic license of the artist.

According to James LeFrak, he drafted this two-page form in part to make clear that there was no guarantee what was going to be built in the immediate vicinity of Shore South. Despite the "importance" of these provisions, plaintiffs were not given a copy of this so-called "disclosure" form, nor was it attached to buyers' sales contacts.

Defendants were only permitted to solicit a non-binding reservation from plaintiffs prior to issuance of a public offering statement (POS) and contracts could only be signed after the POS was filed and approved by the New Jersey Department of Community Affairs. One of the provisions in defendants' 600-page POS (paragraph 3A) for the Shore South advised that the surrounding land was zoned for residential use and stated that:

> The Property is located in the Newport-NE Quadrant Zone pursuant to the current zoning ordinance of the City of Jersey City. The permitted uses within this zone are housing consistent with the existing housing and improved structures. Lands surrounding the property are currently used for retail, residential and office space . . . . The Developer has no knowledge and can make no representation that the present zoning scheme adopted by the City of Jersey City or the existing use of adjacent lands will continue as presently constituted. The Developer has no knowledge of any intent of adjacent property

> owners to change the present use of those lands.

Another provision (paragraph 12I) of the POS, which supposedly disclaimed any rights to any view from a particular apartment, advised that:

> By the acceptance of title to his Unit, each Unit Owner expressly understands and agrees that neither the Condominium Association nor any Unit Owner(s) or resident(s) within the Condominium shall have any right to claim or assert the existence of any sight line or other easement, license or similar right, with respect to any water, skyline or other views from the Condominium Property, either express or implied, that would (i) prevent or impair the development of any other parcel of land in the Newport Community in accordance with applicable law or (ii) otherwise affect any such other parcel.[7]

The POS further contained an integration clause stating that "[n]o person has been authorized to make any representation which is not expressly contained in this Plan".

Plaintiffs received the POS along with their sales contract which, with the exception of the two who switched units in early 2006, were all executed, as noted, by September 2005. Section 15(8) of the contract provided in capital letters that:

> THE SELLER EXPRESSLY WARRANTS THAT SUCH

RESIDENTIAL UNIT OR THE COMMON ELEMENTS WILL SUBSTANTIALLY CONFORM TO THE SALES MODELS, DESCRIPTIONS OR PLANS USED TO INDUCE BUYER TO ENTER INTO THIS AGREEMENT UNLESS OTHERWISE NOTED IN THIS AGREEMENT: DIORAMAS, SMALL-SCALE MODELS, AND ARTISTS SKETCHES AND DRAWINGS CANNOT ACCURATELY DEPICT ALL FEATURES OF THE FULLY CONSTRUCTED CONDOMINIUM OR A PARTICULAR RESIDENTIAL UNIT. THE BUYER UNDERSTANDS THAT THE SELLER'S MODELS MAY CONTAIN OPTIONS AND EXTRAS THAT ARE NOT INCLUDED IN THE BASE PRICE OF THE RESIDENTIAL UNIT. THE SELLER WILL CLEARLY DESIGNATE THESE EXTRAS AND OPTIONS IN THE MODELS.

Plaintiffs also agreed that:

30. ENTIRE AGREEMENT. This Agreement contains the entire agreement between the Seller and the Buyer. Neither party has made any other agreement or promise which is not contained in this Agreement . . . .

31. INTEGRATION AND SCOPE OF AUTHORITY. This Agreement supersedes any and all prior understandings and agreements between the parties and constitutes the entire agreement between them. No representations, warranties, conditions or statements, oral or written, not

> contained in this Agreement shall be considered a part of it . . . .

At some point in November 2005, after nearly all plaintiffs had signed their sales contracts, Richard LeFrak decided that he wanted to "pursue Site 2E quickly." By e-mail dated November 30, 2005, Thom asked senior LeFrak, Inc. employees William Wissemann, a professional engineer; Anthony Scavo, vice-president of construction; and Arnold Lehman, general counsel, to immediately address various open items such as forming a corporation to be the developer of the building. On March 6, 2006, Wissemann submitted an application to the Jersey City Planning Board (JCPB) for preliminary major site plan approval for a 363-unit, thirty-one-story rental apartment building ("The Aqua" later renamed the "Aquablu") on site 2E.[8] The application indicated that 291 parking spots for Aquablu tenants would be provided in the Shore garage. The JCPB granted preliminary approval on April 18, 2006, and memorialized this decision in a May 9, 2006 resolution.

News articles in the spring and summer of 2006 announcing the impending construction of the Aquablu were placed only on defendants' Newport corporate website, not the Shore South website. In fact, in late 2006, defendants released a Shore South construction update wherein they touted the "surprising views" that could now be seen from the Shore South:

The Shore Club
Condominiums at Newport's Sales Team tries hard to not overstate apartment views and unfairly raise customer expectations during the sales process. However, now that the building is up and the actual views from each apartment can be seen, even we have been surprised by some of the unexpected and breathtaking skyline scenes.

Within this update, defendant made no mention of the impending Aquablu construction. Likewise, neither of the two amendments to the POS, copies of which were mailed to plaintiffs in early 2007, mentioned the Aquablu.

The closings on plaintiffs' units occurred between the end of April and June 2007. Immediately upon moving in, plaintiffs were "thrilled" with their views of the Manhattan Skyline, from the George Washington Bridge down to Chelsea, which were as "wonderful" and "stunning" as advertised. Subsequently, however, their "amazing" views were obstructed when the building they understood would be at most fifteen stories high turned into the thirty-one story Aquablu, surpassing the height of the Shore South. Plaintiffs uniformly testified that they would not have purchased their units had the Aquablu been depicted at its actual height. Plaintiffs had relied upon the accuracy of defendants' advertising campaign, in particular the website, and also their conversations with defendants' sales agents.

In fact, one licensed realtor who served as the Shore South sales office receptionist, Lynette Hamara-Creter, confirmed that agents were instructed to advise buyers that a unit on the fifteenth or sixteenth floor of Shore South would be above the Holland Tunnel ventilator building. She also acknowledged that she asked James LeFrak whether there was any more information regarding the buildings that might go up around the Shore South and he replied that they did not know what was going to be built in the future. He never told her that site 2E had received preliminary approval for a 363-unit building. Had she known this, she would have relayed this pertinent information to buyers. She claimed that she only learned that a thirty-one story building was going to be built on site 2E when she began selling units in the Shore North.

James LeFrak defended his organization's advertising campaign. He explained that a DEP waterfront development permit was nothing more than a preliminary step in the construction process and buildings depicted on plans connected with such a permit might not be built as shown or might not be built at all. LeFrak insisted that, as of November 30, 2005, and certainly at the time the painting of the Shore South was commissioned, no organizational decision had yet been made to actually proceed with the construction of the Aquablu.

Although LeFrak believed that plaintiffs were entitled to rely upon the Shore South marketing materials for "some amount

of accuracy," the sales literature must be viewed in the context of the controlling documents, including the POS. He denied that he conspired to conceal his intentions with respect to site 2E at the time the Shore South was marketed, and believed plaintiffs had taken certain aspects of defendants' marketing materials out of context.

On the other hand, Andrea Gorlyn, vice-president of marketing for LeFrak, Inc., who was involved in the creation of all of the marketing materials for the Shore South, acknowledged that the painting was a main representative image used in the advertising of Shore South; that Shore South was marketed as a waterfront condominium with views of the Manhattan skyline and the Hudson River; and that James LeFrak instructed her, in an e-mail, to put a more panoramic picture of the New York skyline in the brochure. She intended for prospective buyers to rely upon the marketing materials, although she, too, insisted that there were disclaimers on the various pictures throughout the sales office.

Plaintiffs' expert, Jon Brody, a real estate appraiser, opined that buyers paid a premium to have a view. Based on comparable listing and sale data from both the Shore North and another high-rise Jersey City condominium building, Brody determined that the average premium on units with an unobstructed view was approximately twenty percent. The expert therefore concluded that plaintiffs lost twenty percent of the value of their units when the Aquablu was built to a height that obstructed their views.

Brody also found this twenty percent differential in comparing the sale prices of other Shore South units with obstructed views with the sale prices of two Shore South units with unobstructed views. This comparison confirmed his opinion that the obstruction of plaintiffs' views actually reduced the value of their units by about twenty percent.

Defendant's expert, Hugh McGuire, also a real estate appraiser, took issue with Brody's methodology, which failed to account for the five to ten percent decline in housing values between 2008 and 2010. He maintained that plaintiffs' units had no demonstrable loss in value due to the obstruction of their views between 2007 and 2010, and that where there was diminution in value, it was due only to general market decline. McGuire conceded, however, that the Shore South units he considered for his paired sales analysis had actually been purchased in 2005, not 2007, and that the Jersey City downtown waterfront market increased in value by as much as eighteen percent between 2005 and 2007, which he had not taken into account. McGuire also acknowledged that views generally do have value and that, in performing other appraisals, he had included a fifteen percent premium for waterfront views. He continued to insist, however, that the value of the views in this case could not be quantified based upon market data.

At the close of evidence and after the court's charge, the jury found in favor of plaintiffs and awarded them an aggregate

$1,253,420 in damages. Following denial of defendants' motions for a new trial, Rule 4:49-1(a), or for judgment notwithstanding the verdict, Rule 4:40-1, the court, on plaintiffs' application, awarded plaintiffs counsel fees of $914,174.47, plus costs of $40,084.85 under the CFA and PREDFDA. The court thereafter entered final judgment in plaintiffs' favor in the amount of $4,817,638.12, which included treble damages under the CFA, as well as pre-judgment interest.

This appeal follows in which defendants raise the following issues:

I. THE UNDULY PREJUDICIAL CLOSING STATEMENT GIVEN BY PLAINTIFFS' COUNSEL DEPRIVED DEFENDANTS OF A FAIR TRIAL.

II. PLAINTIFFS' INFLAMMATORY AND PREJUDICIAL SUMMATION TAINTED THE JURY VERDICT AND WAS NOT CURED BY THE TRIAL COURT'S INCIDENTAL AND INSUFFICIENT CURATIVE INSTRUCTION.

III. THE PRESENTATION OF PLAINTIFFS' DISTINCTIVE CLAIMS IN ONE TRIAL PREJUDICED DEFENDANTS AND CREATED AN UNJUST RESULT, AND THE CLAIMS SHOULD HAVE BEEN

SEVERED IN SEPARATE TRIALS.

IV. THE TRIAL COURT ERRED IN DENYING DEFENDANTS' TRIAL MOTIONS TO DISMISS PLAINTIFFS' CLAIMS UNDER THE CONSUMER FRAUD ACT AND PLANNED REAL ESTATE DEVELOPMENT FULL DISCLOSURE ACT.

I.

Defendants contend that the court erred in denying their motion for a new trial based upon plaintiffs' counsel's inflammatory summation that: (1) repeatedly emphasized defendants' wealth; (2) encouraged the jury to send a message to defendants by awarding damages as a punishment to them rather than compensation to plaintiffs; (3) accused defense counsel of distorting the evidence; (4) attacked the character of James LeFrak; (5) made disrespectful comments about defendants' salespersons and experts; and (6) improperly commented on Richard LeFrak's absence. In our view, the challenged remarks, either singly or cumulatively considered, did not unduly prejudice defendants and do not warrant a new trial.

By way of background, plaintiffs' counsel's summation went unchallenged at time of delivery. It was not until four days later, while the court was still in recess, that defense counsel submitted a letter brief setting forth two objections, specifically complaining that counsel had exceeded the bounds of proper

advocacy by: (1) "asserting that the jurors should not worry about the amount of damages that may be awarded against defendants because 'Jamie LeFrak will not lose any sleep'"; and (2) "assert[ing] that plaintiffs had deposited their life savings to purchase condominium units, and that this did not matter to Jamie LeFrak because other buildings in the Newport area, notably the Aquablu, would make hundreds of millions of dollars."

Defense counsel requested that the court administer the following corrective charge:

> During closing arguments, plaintiffs' counsel suggested that defendants do not care about the claims made by plaintiffs, are only interested in making money, and will not be affected by your verdict. These were improper statements and are not evidence in this case. You should not consider these arguments in your deliberations.

Recognizing the remarks' capacity for improperly influencing the jury, the court agreed and, accordingly, at the conclusion of its charge, instructed the jury that the comments made in

summation were not evidence and were not binding on the jury and further:

> Incidentally, during the closing arguments or summations plaintiffs' counsel suggested that the defendants do not care about the claims that were made by the plaintiffs and are only interested in making money and will not be

> affected by whatever verdict you return. These were statements that are part of summations, they're not considered evidence, they're arguments but they should . . . not be considered by you in your . . . deliberations, that specific claim that . . . all they're interested in is making money, et cetera.

There was no defense objection to this instruction.

At the new trial motion, defense counsel again complained, this time identifying new portions of plaintiffs' counsel's closing, including those now raised on appeal, as objectionable. In denying the new trial motion, the court first noted that defense counsel had not objected to the curative instruction, thereby signaling "passive indifference if not acquiescence" to that instruction, which was nearly identical to the one requested by the defense. In the court's view, the fact that the instruction was given at the very end of the charge likely enhanced its effectiveness. The court was also persuaded that the generalized instruction was appropriate since any positive effect would have been undone had the jury been reminded of the exact improper statements which had been made only "fleetingly" by plaintiffs' counsel.

Moreover, the court found that the jury's verdict "was not consistent" with what one would expect from an "impassioned jury." Indeed, after four days of deliberation, the jury had only accepted plaintiffs' lost views claims, and the amount of damages awarded was consistent with Brody's testimony (and in fact less

than the maximum award Brody had suggested was theoretically warranted here), as well as fairly consistent with McGuire's deposition testimony.

As to defense counsel's newly raised contention that plaintiffs' counsel had improperly emphasized defendants' wealth, the court found that those references were well- supported by the testimony and exhibits offered by defendants themselves regarding the LeFrak "real estate empire" and that, as such, plaintiffs' counsel's comments were fair. The court also disagreed that plaintiffs' summation contained an improper "send a message" argument, and rather was persuaded that counsel had merely been referencing James LeFrak's testimony that the view photos contained on the display board were not misleading but were being considered "out of context," and expressing his hope that the jury, by finding in favor of plaintiffs, could help LeFrak understand the nature of plaintiffs' claims.

We find no abuse of discretion in the trial court's denial of defendants' new trial motion.

Under Rule 4:49-1(a), a trial court must grant a motion for a new trial "if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law." An appellate court must adhere to essentially the same standard when reviewing a trial court's action on a new trial motion. Dolson v. Anastasia, 55 N.J. 2, 7 (1969). We must give

deference to the trial court's feel of the case as to matters such as the demeanor and credibility of witnesses, but otherwise conduct an independent review of the record in order to determine the justness of the result. Jastram v. Kruse, 197 N.J. 216, 230 (2008); Carrino v. Novotny, 78 N.J. 355, 360-61 (1979). "An appellate court may overturn a jury verdict 'only if [that] verdict is so far contrary to the weight of the evidence as to give rise to the inescapable conclusion of mistake, passion, prejudice, or partiality.'" Kassick v. Milwaukee Elec. Tool Corp., 120 N.J. 130, 134 (1990) (quoting Wytupeck v. City of Camden, 25 N.J. 450, 466 (1957)).

Counsel is generally afforded broad latitude in summation to argue any legitimate inference which may be drawn from the evidence. Colucci v. Oppenheim, 326 N.J. Super. 166, 177 (App. Div. 1999), certif. denied, 163 N.J. 395 (2000). "Counsel's arguments are expected to be passionate, 'for indeed it is the duty of a trial attorney to advocate.'" Jackowitz v. Lang, 408 N.J. Super. 495, 504-05 (App. Div. 2009) (quoting Geler v. Akawie, 358 N.J. Super. 437, 463 (App. Div.), certif. denied, 177 N.J. 223 (2003)). Counsel may also respond to arguments made by his or her opponent. State v. C.H., 264 N.J. Super. 112, 135 (App. Div.), certif. denied, 134 N.J. 479 (1993).

However, counsel is not at liberty to misrepresent or unfairly distort the evidence, Diakamopoulos v. Monmouth Med. Ctr., 312 N.J. Super. 20, 32 (App. Div. 1998), or use disparaging language to

discredit or denigrate the opposing party. Rodd v. Raritan Radiologic Assocs., 373 N.J. Super. 154, 171 (App. Div. 2004); Geler, supra, 358 N.J. Super. at 467-68. Arguments should be free of "insinuations of bad faith on the part of defendants who sought to resolve by trial validly contested claims against them." Geler, supra, 358 N.J. Super. at 469. Counsel may not "accuse a party's attorney of wanting the jury to evaluate the evidence unfairly, of trying to deceive the jury, or of deliberately distorting the evidence." Rodd, supra, 373 N.J. Super. at 171. Counsel also may not attack a litigant's character or morals when they are not an issue in the case. Paxton v. Misiuk, 54 N.J. Super. 15, 22 (App. Div. 1959), aff'd, 34 N.J. 453 (1961).

When a summation "cross[es] the line beyond fair advocacy and comment, and ha[s] the ability or 'capacity' to improperly influence the jury's 'ultimate decision making,'" judicial intervention is required. Risko v. Thompson Muller Auto. Grp., 206 N.J. 506, 522 (2011). Appropriate judicial intervention may be sufficient to cure any potential prejudice. Statham v. Bush, 253 N.J. Super. 607, 615 (App. Div. 1992); see City of Linden v. Benedict Motel Corp., 370 N.J. Super. 372, 398 (App. Div.), certif. denied, 180 N.J. 356 (2004) ("[A] clear and firm jury charge may cure any prejudice created by counsel's improper remarks during opening or closing argument.").

However, "'the [f]ailure to make a timely objection indicates that defense counsel did not believe the remarks were prejudicial

at the time they were made,' and it 'also deprives the court of the opportunity to take curative action.'" Jackowitz, supra, 408 N.J. Super. at 505 (quoting State v. Timmendequas, 161 N.J. 515, 576 (1999), cert. denied, 534 U.S. 858, 122 S. Ct. 136, 151 L. Ed.2d 89 (2001)).

Fleeting comments, even if improper, may not require a new trial, especially when the verdict is fair. Jackowitz, supra, 408 N.J. Super. at 505. However, "the cumulative effect of small errors may be so great as to work prejudice." Pellicer v. St. Barnabas Hosp., 200 N.J. 22, 53 (2009). Thus, reversal may be required when a series of errors, considered in combination, has the cumulative effect of casting doubt on a verdict. Barber v. ShopRite of Englewood & Assocs., 406 N.J. Super. 32, 52 (App. Div.), certif. denied, 200 N.J. 210 (2009).

a. "send a message" comments

Defendants now argue, as they did for the first time at the new trial motion, that plaintiffs' counsel "cavalierly" referenced defendants' "hundreds of millions of dollars" and "treasure trove of unlimited millions" in order to inflame the jury's sympathies and create bias, and moreover, improperly encouraged "the jury to punish defendants and to make LeFrak 'get it' – i.e., 'send a message' to LeFrak based upon defendants' wealth."

To be sure, counsel may not make gratuitous comments in summation about a defendant's wealth as part of an appeal for a

large damages award. Purpura v. Pub. Serv. Elec. & Gas Co., 53 N.J. Super. 475, 479-80 (App. Div.), certif. denied, 29 N.J. 278 (1959). That, however, was not the gist of counsel's remarks here. Rather, our review of the record indicates that the above-quoted portions of plaintiffs' counsel's summation were a direct response to the earlier argument of defense counsel that defendants, who were not "fly-by-night," but had been pillars of the Jersey City community for twenty-five years, would have had no reason to risk their reputation by conspiring to deceive plaintiffs regarding the Aquablu. Defense counsel insisted that, while plaintiffs' counsel might argue that defendants were motivated by the money they stood to make from the Aquablu, defendants would not have engaged in consumer fraud "in order to [m]ake some extra money."

In responding to defense counsel's argument, plaintiffs' counsel made no reference to defendants' overall wealth. Rather, counsel referred only to the revenues defendants were receiving from the Aquablu and, as predicted by defense counsel, only in the context of what might have motivated defendants to lie, or conceal information, about the Aquablu. Furthermore, counsel made no further references to defendants' wealth and therefore no curative instruction was required.

We also disagree with defendants' further contention, that plaintiffs' counsel's comment that he hoped the jury's verdict would make James LeFrak "get it" comprised an improper "send a

message" argument. Certainly, urging a jury to use its damages award to "send a message" to a defendant and the rest of society that there are consequences for improper behavior is inappropriate when the sole issue before the jury is the amount of compensatory damages to be awarded. Jackowitz, supra, 408 N.J. Super. at 499. However, when placed in context and considering the testimony elicited at trial,[9] it is reasonable to conclude that plaintiff's counsel was merely expressing his hope that, if finally "held to account" by the jury through an adverse verdict, perhaps James LeFrak would then comprehend that a wrong had been done to plaintiffs and that they were entitled to feel very strongly about it as first-time homebuyers. Counsel in no way urged the jury to punish defendants and others by awarding an exorbitant amount of damages. For these reasons, then, counsel's remarks were fair comment on the evidence, responsive to defense counsel's closing arguments, and did not improperly influence either the jury's liability or damage award.

b. derisive comments - defense counsel

Defendants next take issue with plaintiffs' counsel's repeated comments that defense counsel "misled" the jury as to the meaning of the POS; "insulted" the jury's intelligence by raising the two-page disclosure form; and was "ridiculous" in "absurd[ly]" arguing there was no way to calculate plaintiffs' loss.

All of these remarks were in response to defense counsel's summation wherein he: (1) argued that plaintiffs' claims were

precluded by the provisions in the contract, the POS and the master deed; (2) presented the two-page form signed by plaintiffs as a key document which "totally undercut" plaintiffs' claims; and (3) argued that plaintiffs had presented no proof of damages from any alleged reduced square footage in certain of plaintiffs' units or from the failure to install oak slat floors.

Indeed, the challenged comments by plaintiffs' counsel were no more prejudicial than similar statements made by defense counsel in his closing argument, wherein he suggested that: (1) plaintiff's case was "selectively" put together with "a picture here, a word there, and not show the whole picture and not talk about the whole picture"; (2) plaintiffs "don't want you to focus on the language in the legal contract. They don't want you to focus on the language [in] the public offering statement or really anything else, except a very few items, which I suggest they're taking out of context"; (3) plaintiffs "don't want you to look over here"; (4) plaintiffs were putting up "smokescreens"; (5) plaintiffs' counsel had "twisted and turned" the easement language in the various legal documents; (6) plaintiffs' counsel had "tried to take Mr. McGuire on a detour and a frolic"; and (7) plaintiffs' counsel took Scavo on a "detour." Moreover, plaintiffs' counsel's remark that defense counsel's arguments regarding plaintiffs' flooring and square footage claims were "absurd" and "ridiculous" was obviously of no effect since the jury ultimately rejected these claims.

c. derisive comments - defendant James LeFrak

Defendant also complains about plaintiffs' counsel "venomous" attack on defendant James LeFrak, describing him as a "blowhard" and his testimony as "Lefrakisms."[10]

First, counsel did not equate "LeFrakisms" with "lies" as defendants contend, but with "confusing statements." Next, as highlighted by plaintiffs' counsel, the defense did actually argue that the word "views," which accompanied the three photos on the large display board, did not really mean views, but instead "exposures" or "orientations." Third, counsel was entitled to take the position that the two-page form prepared by James LeFrak was "phony" and incapable of providing a defense where the document was prepared without legal counsel and was not provided to plaintiffs. And while the term "blowhard" may have been ill-advised, it clearly referenced LeFrak's bragging and boasting about the "surprising views" at the Shore South, at the same time plans were moving ahead to build the thirty-one story Aquablu. Finally, counsel properly criticized LeFrak for attempting to claim that the Aquablu was quite a distance from the Shore South when the photos admitted into evidence showed that it was actually much closer.

d. derisive comments - defendants' salespeople

The challenged portions of plaintiffs' counsel's summation read as follows:

> Now, you know, ladies and gentlemen, on Monday, we discovered three smoking gun memos that we should have received from them a year-and-a-half ago as . . . Lehman admitted as he made excuses. They were written and put in the sales files of my clients. The perjury that you heard is astounding. You heard salesperson after salesperson . . . say, number one, they weren't selling the views and, number two, if people said they are most interested in the views, they would be sure to tell them, oh, there's no guarantee of views. Don't think you're buying views here.
>
> Those memos, which you saw on the screen and which will go into the jury room with you, those memos, number one, confirm the truthfulness of my clients' testimony but, number two, confirm the falsehood of the salesperson's testimony. Those memos say, Lynn Young and Michael Turner were most interested in the views, so they bought on the such and such floor. Mr. Kim found that the views were most important to him, so we recommended this unit.
>
> They don't say, these people requested the views and we told them, hold on, you're not here to buy views. There's no guarantee of views.
>
> [(Emphasis added).]

Notably, these comments failed to elicit an objection from the defense. This is likely because counsel was actually challenging

the credibility of the salespeople based upon evidence, i.e., the sticky notes, that were not produced by defendants until the middle of the trial. Additionally, plaintiffs' counsel later suggested that these same salespeople had credibly testified that they had no knowledge the Aquablu was going to be thirty-one stories tall noting that, "the truth is, to give them their due, they didn't know a whole heck of a lot. Jamie LeFrak wasn't filling them in." Thus, these comments were not improper.

e. derisive comments – defense experts

Defendants also contend that plaintiffs' counsel improperly "attacked" and "disparaged" defense experts Appelbaum and McGuire. As to the former, specifically, defendants complain about plaintiffs' counsel's remark that Appelbaum must be smoking marijuana. It is clear, however, that counsel was not suggesting that Appelbaum actually abused drugs, but was rather questioning the expert's credibility vis-a-vis his testimony that his "stitched" together panoramic photos were not misleading as to the size and proximity of the buildings depicted, provided the photos were viewed very closely and held at a certain angle. Moreover, counsel was entitled to respond to his adversary's comment in summation that it was not until Appelbaum took the stand that the jury saw the "whole picture" and the "whole view" from plaintiffs' windows as opposed to select views focusing on the Aquablu.

As for counsel's allegedly disparaging remarks about McGuire's credibility, suffice it to say, once again, that there was no objection voiced. Moreover, during his own summation, defense counsel attempted to explain away McGuire's inconsistent testimony, as well as assert that McGuire had "clarified" his testimony on redirect. Plaintiffs' counsel's remarks were also fair comment on the record given that, following a lunch break, McGuire suddenly attempted to disavow deposition testimony brought out on cross-examination.

f. absence of Richard LeFrak at trial

Defendants also argue that plaintiffs' counsel improperly told the jury to draw an adverse inference against defendants because Richard LeFrak did not testify at trial. However, not only did defendants fail to object, but our reading of the challenged passage indicates that plaintiffs' counsel was simply trying to emphasize that Richard, who was not only the head of LeFrak, Inc., but was also indisputably involved with both the Shore South and the Aquablu, apparently had nothing to add to defendants' defense.

g. conclusion

We find the challenged remarks, collectively considered, do not amount to reversible error. We reiterate that defendants made no objection to any of these remarks either when they were made or at the time they sought a curative instruction. Moreover, the

curative instruction, which was virtually identical to that recommended by defendants, properly remedied any prejudice otherwise inhering in plaintiffs' counsel's remarks. Although impassioned, many of the challenged comments were directly responsive to defense counsel's equally hard-hitting summation.

But separate and apart from these considerations, plaintiffs' counsel's summation simply did not have the capacity to unduly influence the jury's verdict. On the contrary, the verdict rendered here "was not consistent" with what one would expect from an "impassioned jury." The jury deliberated for four days and, in the end, accepted only plaintiffs' lost view claims. Although defendants would have it otherwise, these claims were well supported by the wealth of evidence indicating that defendants withheld key information about their plans for site 2E, and deliberately created a misleading advertising campaign in order to sell units in the Shore South.

In this regard, we emphasize that defendants never argued at trial that any jury award for loss of views should be quantified differently depending on where each plaintiff resided and the particular view lost. Defense counsel in his summation merely questioned Brody's testimony and the comparisons he used, and then argued, in accordance with McGuire's testimony, that plaintiffs' loss of views was not a compensable event since plaintiffs had failed to present any valid proof of damages. Because the jury award was in accordance with Brody's testimony, we

reject defendants' argument that the damages awarded in this case were tainted by plaintiffs' counsel's allegedly inflammatory rhetoric.

II.

Defendants contend that the court erred in denying their motions for severance and to sequester plaintiffs at trial. We disagree.

a. severance

Defendants filed a pre-trial motion to sever plaintiffs' claims at trial claiming that a joint trial would result in prejudice and confusion. The court denied the motion, citing, among other reasons, that: (1) while there might be issues that "may" cause a potential for jury confusion, the risk for such confusion was low; (2) appropriate jury instructions would guarantee that the jury would not use the evidence cumulatively to reach conclusions it might not otherwise have reached; and (3) the interests of expediency and the similarity of the facts underlying plaintiffs' claims outweighed the risk of any possible prejudice to defendants.

At the close of evidence, the court charged the jury as follows:

> Under the law the plaintiffs have the burden of proving their claims. The burden is not on the defendants to prove that plaintiffs are wrong in their assertions. Each plaintiff must independently meet his or her

> burden of proof for each of the claims and may not rely upon the testimony of the other plaintiffs or their witnesses except as that testimony related to his or her individual claims.
>
> Therefore, you must consider the proofs separately for the owners of each condominium unit as if there were ten separate cases before you.

Rule 4:29-1(a) provides in pertinent part that "[a]ll persons may join in one action as plaintiffs . . . if the right to relief asserted by the plaintiffs . . . arises out of or in respect of the same transaction, occurrence, or series of transactions or occurrences and involves any question of law or fact common to all of them." When a defendant, on the ground of undue prejudice, seeks separate trials for claims made against it by more than one co-plaintiff, each of whom asserts an individual claim arising out of similar facts and involving the same legal issues, the issue of prejudice is to be tested by the standard applicable to severance motions by criminal co-defendants, i.e., whether the testimony of each would be admissible in the other's trial. Rendine v. Pantzer, 141 N.J. 292, 307-11 (1995). It is not enough for a defendant to simply assert that a joint trial may "present a risk that the jury might use the evidence cumulatively, reaching conclusions from the aggregate of the evidence that it might not have reached in assessing the claims separately." Id. at 309. The determination whether or not to sever claims rests in the sound discretion of the trial court. Id. at 311.

Defendants now contend the trial court's decision not to sever the claims of the various plaintiffs resulted in undue prejudice to them. In defendants' view, it was "impossible" for the jury not to have been confused about the merits of each individual claim after listening to the testimony of eleven of the plaintiffs, each of whom had "distinct" experiences in the sales office. Defendants contend that the differing versions must have "blended together" for the jury as evidenced by the verdict which awarded a "uniform [twenty] percent damage amount to each plaintiff, regardless of the location of each plaintiff's unit, the actual views from the unit[] [or] the alleged misrepresentation made to the particular plaintiff." We disagree.

The testimony offered by the various plaintiffs regarding their impressions of the Shore South marketing materials and their experiences in the Shore South sales office was straightforward, relatively brief and largely consistent. Defendants do not dispute that, had there been ten separate trials, the testimony of each plaintiff regarding the defendants' marketing would have been admissible at each trial. The minor differences in plaintiffs' accounts were not crucial to the success of their individual claims and, notably, were not highlighted as such by defense counsel during his summation. Further, the uniform damage awards were in accordance with the expert testimony presented. Significantly, defendants did not contend at trial that each plaintiff had been damaged to a different extent depending on the location of their

particular unit, choosing to argue instead that the lost views had no value at all. As such, and in view of the court's cautionary instruction to the jurors, which it must be presumed they followed, State v. Smith, 212 N.J. 365, 409 (2012), we reject defendants' contention that the court erred in denying their motion for severance.

b. sequestration

Prior to trial, defendants filed a motion in limine to require the sequestration of all of the other plaintiffs during the trial testimony of each plaintiff. The court denied this motion, stating:

> I'm not convinced that there is any compelling reason to sequester the plaintiffs. I think it would be confusing, disruptive, and lead to delays in what is already projected to be a rather long trial. In addition, the defendants had the opportunity to depose plaintiffs should their trial testimony differ from what they testified to at their depositions.
>
> Defense counsel will surely confront them with any inconsistencies. Accordingly, I think the chance that they will modify their testimony to have it conform[] to another [party's] version is unlikely and so this motion in limine is denied.

Defendants now argue that the trial court erred in denying their motion for sequestration in view of their concern that the testimony of each plaintiff would influence the testimony of other

plaintiffs. However, our Supreme Court has recognized that "parties to a civil action should be exempted from sequestration because of their due process rights to participate in the conduct of the case." Morton Bldgs., Inc. v. Rezultz, Inc., 127 N.J. 227, 233 (1992). Additionally, as predicted by the court, defense counsel did confront certain plaintiffs with their deposition transcripts when any perceived inconsistency in their testimony arose. Defense counsel, in his summation, also challenged plaintiffs' credibility by suggesting that their memories were faulty as to the particulars of their sales meetings, and that they had undoubtedly discussed the case with each other and with counsel. As such, because defendants have failed to identify any particular prejudice suffered, we discern no abuse of discretion in the court's denial of sequestration.

III.

Defendants contend that the court erred in denying their motion to dismiss plaintiffs' CFA and PREDFDA claims. Again, we disagree.

At the close of plaintiffs' case, defendants moved, pursuant to Rule 4:37-2(b), to dismiss plaintiffs' CFA and PREDFDA claims on the basis of the initialed disclosure forms and the provisions in the POS, the master deed, and plaintiffs' signed contracts. The court denied the motion, ruling:

> [P]laintiffs . . . get[] all the favorable inferences as the non-

> moving party. In spite of the disclaimer forms, which clearly advise that there is no guarantee as to what size, shape, color, et cetera, will be built on surrounding properties, similar language appearing, also, in the [POS] and in the contract, the issue of what the builder knew and whether that was disclosed, it seems to me, goes in the plaintiff[s'] favor.
>
> The painting, the boards, the brochure, the website, et cetera, all show a smaller building than what became eventually the Aquablu. Although the defendants argue that it was not known what would be built on what was Site 2E, the Aquablu site, if the plaintiffs get all the favorable inferences to which they're entitled, it would seem that a 12 to 15 story building was not among the likely structures to be built and that's based on the '02 plans, the '04 revised plans, the waterfront permits, et cetera. So the motion to dismiss the claims with respect to the views is denied.

When reviewing a ruling by a trial judge on a motion for involuntary dismissal at the close of plaintiff's proofs pursuant to Rule 4:37-2(b), an appellate court must "accept[] as true all the evidence which supports the position of the party defending against the motion" and must accord him or her "the benefit of all inferences which can reasonably and legitimately be deduced therefrom," in determining whether a cause of action has been made out. Dolson, supra, 55 N.J. at 5. Like the trial court, we are not concerned with the weight, worth, nature or extent of the evidence. Id. at 5-6.

Under the CFA:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with the intent that others rely on such concealment, suppression, omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice[.]
>
> [N.J.S.A. 56:8-2.]

All violations of the CFA that result in an ascertainable loss are subject to the mandatory punitive trebling of damages, together with attorneys' fees. Garcia v. L&R Realty, Inc., 347 N.J. Super. 481, 492 (App. Div. 2002); N.J.S.A. 56:8-19.

"The consumer fraud statute is aimed at promoting truth and fair dealing in the market place." Feinberg v. Red Bank Volvo, Inc., 331 N.J. Super. 506, 512 (App. Div. 2000). It is intended to "promote the disclosure of relevant information to enable the consumer to make intelligent decisions in the selection of products and services." Div. of Consumer Affairs v. G.E., 244 N.J. Super. 349, 353 (App. Div. 1990). Under the CFA, victims are compensated for their actual losses and wrongdoers are punished

through the award of treble damages. Lettenmaier v. Lube Connection, Inc., 162 N.J. 134, 139 (1999). The CFA is a remedial statute and as such, its provision must be liberally construed in favor of the consumer in order to accomplish its deterrent and protective purposes. Ibid.

To make out a prima facie case under the CFA, a plaintiff must present evidence of: "(1) unlawful conduct by defendant; (2) an ascertainable loss by plaintiff; and (3) a causal relationship between the unlawful conduct and the ascertainable loss." Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 557 (2009). Consumer fraud violations can be divided into three categories: (1) affirmative acts; (2) knowing omissions; and (3) regulatory violations. Feinberg, supra, 331 N.J. Super. at 510. A misrepresentation is actionable under the CFA only if it is material to the transaction, false in fact and induces the buyer to purchase. Gennari v. Weichert Co. Realtors, 288 N.J. Super. 504, 535 (App. Div. 1996), aff'd as modified, 148 N.J. 582 (1997). Oral misrepresentations are covered by the CFA to the same extent as written misrepresentations. Gupta v. Asha Enters., L.L.C., 422 N.J. Super. 136, 147 (App. Div. 2011).

If a plaintiff establishes that a defendant committed a consumer fraud by making an affirmative misrepresentation, "intent is not an essential element." Cox v. Sears Roebuck & Co., 138 N.J. 2, 17 (1994). If, however, the alleged consumer fraud is the result of a defendant's omission, a "plaintiff must show that

the defendant acted with knowledge, and intent is an essential element of the fraud." Id. at 18. A practice can be unlawful even if no person was, in fact, misled or deceived thereby. Id. at 17. It is the mere "capacity to mislead" that is the "prime ingredient of all types of consumer fraud." Ibid.

Finally, any, claimed loss must be established with reasonable certainty. Feinberg, supra, 331 N.J. Super. at 511.

Under PREDFDA, a developer selling an interest in a planned real estate development

> who in disposing of such property makes an untrue statement of material fact or omits a material fact from any application for registration, or amendment thereto, or from any public offering statement, or who makes a misleading statement with regard to such disposition, shall be liable to the purchaser for double damages suffered, and court costs expended, including reasonable attorney's fees, unless in the case of an untruth, omission, or misleading statement such developer sustains the burden of proving that the purchaser knew of the untruth, omission or misleading statement, or that he did not rely on such information, or that the developer did not know and in the exercise of reasonable care could not
>
> have known of the untruth, omission, or misleading statement.

[N.J.S.A. 45:22A-37(a).]

The purpose of PREDFDA is to "[e]nsure honesty, public understanding and trust in the sale of complex interests." Tung v.

Briant Park Homes, Inc., 287 N.J. Super. 232, 237 (App. Div. 1996). PREDFDA requires that a developer register a POS, which must be provided to prospective purchasers and must describe the characteristics of the proposed condominium and the nature of the interest being offered. N.J.S.A. 45:22A-27(a)(15); N.J.S.A. 45:22A-28. The purpose of the POS is to enable a buyer "to make an informed decision regarding the purchase of a unit." Coastal Grp. v. Planned Real Estate Dev. Sec., Dep't of Cmty. Affairs, 267 N.J. Super. 49, 57 (App. Div. 1993). Just as is the case under the CFA, an PREDFDA omission claim must be based on a knowing omission. N.J.S.A. 45:22A-37(a).

Defendants argue, as they did below, that plaintiffs' claim that defendants knowingly omitted key information about the future development of site 2E was precluded by the disclosures and warnings contained in the two-page form given to each plaintiff to initial when he or she arrived at the sales office, as well as in the POS, the master deed and plaintiffs' sales contracts. Defendants further contend that plaintiffs failed to prove that defendants knew that they would be building a high-rise apartment building on site 2E at the time plaintiffs signed their contracts, and that plaintiffs did not establish that defendants misrepresented the height of the building to be constructed on site 2E in their marketing materials and through the statements made by their salespeople.

There is sufficient credible evidence indicating that defendants knowingly failed to inform plaintiffs, prior to the execution of their sales contracts, of the existence of defendants' ongoing plans since 2000 to construct a very tall building on site 2E, and that they had actually requested detailed architectural plans for a 362-unit building. Instead, defendants prepared a variety of marketing materials which falsely showed a smaller eleven- or twelve-story building, which had never been contemplated by defendants, situated on site 2E. This misrepresentation was compounded by defendants' salespeople who reassured plaintiffs that the site 2E building would not be tall enough to obstruct their views.

As for the warnings and disclaimers in the various legal documents plaintiffs were given to review, initial, or sign, the jury was entitled to find that, given the deliberately misleading nature of the Shore South marketing materials, defendants could not hide behind generalized warnings and disclaimers which in no way reflected defendants' actual knowledge regarding their specific plans for site 2E. For example, with respect to the eleven- or twelve-story building depicted on the Aquablu site in the Shore South painting, defendants obviously knew that no such building would ever be built, but nonetheless used the painting as the centerpiece of their marketing campaign. In this regard, the jury was entitled to reject defendants' claim that the depiction was mere "artistic license."

Moreover, the jury could reasonably have discounted the disclaimers in light of the fact that: (1) the two-page "disclosure" form was not reviewed by counsel, discussed with plaintiffs, provided to plaintiffs to keep, or made a part of their sales contracts; (2) the disclaimer in paragraph 3A of the POS was inapplicable to defendants as it refers to the actions of adjacent property owners; and (3) the "easement" disclaimer contained in paragraph 12I of the POS was also inapplicable since plaintiffs never claimed entitlement to an easement, let alone an easement that would preclude other legally-permissible development. In other words, it was for the jury to decide what effect to give to the various clauses contained in the "disclosure" form, the POS, the master deed, and plaintiffs' signed contracts.

Defendants raise two related evidence issues, one concerning the admission of oral representations of the Shore South salespersons as violative of the parol-evidence rule, and the other concerning the instruction given to the jury regarding their consideration of "puffery" in deciding whether plaintiffs established their CFA "view" claims. We find no error in the court's evidence rulings.

As to the former, prior to trial, defendants filed a motion in limine to bar any testimony about oral representations made by defendants' salespeople pursuant to the parol-evidence rule. In denying this motion, the court held that plaintiffs were not offering the testimony as proof of enforceable promises that varied

from the terms of their integrated sales contracts, but merely as evidence that "the sales representative believe[d] the advertising material that plaintiffs' views would not be blocked by a 12 to 15-story building shown on the Aquablu site." The court was persuaded that, "[t]o the extent that the plaintiffs' testimony goes to the issue of what a reasonable consumer would believe on the advertising corroborated by the representations of the sales agents, this motion to bar testimony is denied." We agree.

The parol-evidence rule prohibits the introduction of extrinsic evidence to vary the terms of an integrated contract. Conway v. 287 Corp. Ctr. Assocs., 187 N.J. 259, 270 (2006). The parol-evidence rule does not, however, preclude introduction of extrinsic evidence to prove fraud in the inducement. Filmlife, Inc. v. Mal "z" Ena, Inc., 251 N.J. Super. 570, 573 (App. Div. 1991). "It is well settled that a party to an agreement cannot, simply by means of a provision in a written instrument [that no representations have been made except as set forth therein], create an absolute defense or prevent the introduction of parol evidence in an action based on fraud in the inducement to contract." Ibid. (quoting Ocean Cape Hotel Corp. v. Masefield Corp., 63 N.J. Super. 369, 377-78 (App. Div. 1960)). Extrinsic evidence to prove fraud is admitted because it is not offered to alter or vary or contradict the express terms of a contract, but rather to avoid the contract or "to prosecute a separate action

predicated upon the fraud." Ocean Cape, supra, 63 N.J. Super. at 378.

Defendants now argue that the court should have excluded the representations made by the Shore South salespeople under the parol-evidence rule because these representations contradicted Paragraph 12I of the POS which was incorporated into plaintiffs' integrated sales contracts. As noted, this provision provided that plaintiffs had no right to "assert the existence of any sight line or other easement, license or similar right, with respect to any water, skyline or other views from the Condominium Property, either express or implied, that would (i) prevent or impair the development of any other parcel of land in the Newport Community in accordance with applicable law or (ii) otherwise affect any such other parcel." The representations made by defendants' salespeople in no way negated Paragraph 12I. Plaintiffs never claimed that they were entitled to an easement based upon these representations. They never sought to have these representations enforced in any way. Rather, they simply claimed that they were told that the only future building depicted in the sales materials that had the potential to obstruct their views would not in fact do so because it would not be more than fifteen stories tall. Thus, the representations made by defendants' salespeople were properly admissible to support plaintiffs' claim of fraud in the inducement.

Lastly, defendants contend that plaintiffs improperly argued in summation that defendants' so-called "puffery" was actionable under the CFA and that the trial court erred in failing to instruct the jury otherwise in its final charge.

During a charge conference, defense counsel asked the court to specifically instruct the jury that "defendants' descriptions of the views from the condominium as breathtaking and panoramic are mere puffery and statements of opinion." The court instead generally instructed the jury as follows:

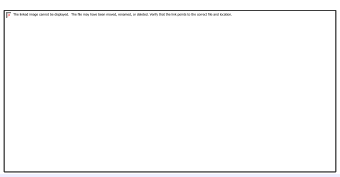
> In order for a statement to be an affirmative misrepresentation the statement must relate to some past or presently existing fact and cannot be predicated upon representation involving matters . . . in the future.
>
> Statements that are mere puffery – puffery in quotes, however, are not misrepresentations – in quotes, under the [CFA]. Puffery is an expression of a seller's opinion and a buyer has no legal right to rely upon such statements. Thus a claim for a violation of the [CFA] cannot be premised upon these opinion statements. By way of further example a slogan such as You're in Good Hands with Allstate, is not a statement of fact and is not a, quote, misrepresentation, end quote, under the [CFA].

Mere puffery, which involves a statement of opinion rather than fact, is not actionable under the CFA, which applies only to

misrepresentations of fact. Rodio v. Smith, 123 N.J. 345, 352 (1991); N.J. Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 13 (App. Div.), certif. denied, 178 N.J. 249 (2003); Hamilton v. Schwadron, 82 N.J. Super. 493, 496-97 (App. Div. 1964).

Even assuming defendant's use of the term "panoramic" constituted "puffery" rather than a factual representation, we discern no error in the charge given. Moreover, as to plaintiffs' counsel's remarks in summation that defendants violated the CFA by claiming that the views from the Shore South would be "breathtaking" and "panoramic," once again, suffice it to say, defendants failed to object to these comments: (1) when they were made; (2) in their June 20, 2011, letter to the court making other objections to the charge; (3) prior to the court's final charge; or (4) at the time of the new trial motion. In any event, the challenged remarks were nothing more than fair comment on the evidence and proper response to the defense position at trial that defendants had not been "selling the views" in marketing the Shore South. As such, the court's charge on "puffery" was sufficient.

In sum, the court properly denied defendants' motion to dismiss plaintiffs' CFA and PREDFDA claims.



Affirmed.

[1]The jury rejected: (1) plaintiffs' CFA and PREDFDA claims regarding the wood floors installed in the units; (2) the CFA claims of certain plaintiffs regarding the square footage of their units; and (3) plaintiffs' breach of contract claims with respect to the views and flooring. The jury did find that certain plaintiffs had proven breach of contract with respect to the square footage of their units, but found that this breach had resulted in no loss to them and awarded no damages therefor.

2 Defendants also funded the renovation of the Pavonia/Newport PATH station to ensure Newport residents easy access to New York City.

3 Other massing studies were also prepared by another firm, Page & Steele International, in the subsequent months.

4 In addition to an image of the painting, defendants' flyer incorporated a disclaimer which provided in part that "[a]ll interior and exterior building images are artist renderings and may not constitute a representation of any aspects of the final project. All specifications, finishes, materials, and other construction details are subject to change."

5 The website also included a disclaimer that provided in pertinent part that "[r]enderings are artistic representations and should not be deemed accurate."

6 As noted, the fifteenth floor of the Shore South was actually the twelfth story.

[7] Substantially similar language was also contained in the master deed, at page 40, Section 8.10 under the heading "No Express or Implied Sight Line Easements."

8 The Aquablu ultimately included 355 rental units rather than 363 units.

9 In this regard, during his testimony, James LeFrak stated that the plaintiffs' case "makes no sense" to him; that he thought plaintiffs were "taking one or two little pieces of the marketing material and taking them out of context"; and that he "appreciate[d] the opportunity now, finally, to express how seriously wrong and flawed and incorrect and misguided the whole premise, this whole assumption that you're trying to draw here is. It's really really wrong." He also testified that the view photographs on the large display board in the sales office were just "one small thing" that plaintiffs' counsel was pulling out of context in order to be misleading.

10 For instance, plaintiffs' counsel stated:

> there should be a new word in the English language called Lefrakisms. Lefrakisms are very confusing statements, which if you think about them long enough, make your head spin.

Referring to the witness's explanation of the word "view" in defendants' marketing literature, counsel stated:

> That's the kind of garbage they're serving up and, ladies and gentlemen[.] [W]hen you go on this journey to search for the truth, I implore you, don't stop at Jamie LeFrak's door because you'll never find the truth there.
