FIFTH DIVISION
February 14, 2014

Nos. 1-12-1664 and 1-12-1665, Consolidated

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HERZUM SOFTWARE, LLC, et al.,	)	Appeal from the Circuit Court of Cook County
Plaintiffs-Appellees,	)	
v.	)	No. 08 CH 17194
LUIGI GUADAGNO, et al.,	)	
Defendants-Appellants.	)	The Honorable Nancy J. Arnold, Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.
Presiding Justice Gordon and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held:* Contracts with existing clients were sufficient to support an award of lost profits and anticipated income of a pre-revenue company; and defendants' income resulting from breaching their fiduciary duty to plaintiff supported a finding of unjust enrichment and restitution award. Further, punitive damages were proper

where defendants secretly conspired to break up a joint venture with plaintiff; and a finding of fraud was not erroneous where defendant made false statements intended to reach plaintiff.

¶ 2 Defendants Exeura Knowledge Management Systems, SRL (Exeura) and Luigi Guadagno appeal after a bench trial from a judgment of the circuit court of Cook County awarding plaintiffs Herzum Software, LLC and Herzum SRL (together, "Herzum") compensatory and punitive damages, as well as restitution, after finding in favor of plaintiff and against both defendants on breach of fiduciary duty and civil conspiracy, and against Guadagno under the Deceptive Trade Practices Act, tortious interference with business relationship and fraud. Both defendants contend that the trial court erred in awarding compensatory, restitution and punitive damages based on speculative evidence of future profits and anticipated income of a new enterprise, and in any event, it incorrectly calculated the restitution damages. Defendant Guadagno further contends that the trial court erred in finding him liable for fraud because there was insufficient evidence that he made false statements to plaintiff.

¶ 3 BACKGROUND

¶ 4 This appeal arises from a complaint alleging, *inter alia*, civil conspiracy, breach of fiduciary duty, fraud, deceptive trade practices and tortious interference with business relationship, in connection with a joint venture formed by defendant Exeura and plaintiff, which at that time employed defendant Guadagno. The parties, two of which are software development and service companies, do not appear to dispute the underlying facts with respect to their relationship. Plaintiff is an IT consulting organization that provides software development and

consulting, as well as enterprise level consulting to customers, whose president and majority owner is Peter Herzum. Exeura is a corporation owned by the University of Calabria in Cosenza, Italy, and by professors who work at that university, and its goal is to bring to market the research software created by those professors.

¶ 5 In 2006, plaintiff and Exeura formed a joint venture, which consisted of two entities, namely, Fourthcodex, Spa, an Italian entity that held the intellectual property of the venture's software components, and Fourthcodex, Inc., an entity created for the marketing and selling of software licenses on behalf of Fourthcodex, Spa (jointly, "Fourthcodex"). Plaintiff and Exeura each owned 50% of each of the Fourthcodex entities. The software components held by Fourthcodex were known as Hilex, Olex and Onto DLV, developed by Exeura, as well as Alex, developed by plaintiff. It appears that those software programs are associated with what is called semantic technology, which is designed to try and make useful inferences out of unstructured data. The goal of the Fourthcodex venture was to render those components, which had been traditionally operated in the academic setting, marketable to consumers. While Fourthcodex did not have its own employees, both plaintiff and Exeura contributed their own personnel to the venture. Plaintiff assigned defendant Guadagno, as well as Christopher Lee and Inderbir Sidhu, who were also named defendants, but are not parties to this appeal. Exeura contributed Professor Sergio DeJulio, along with other programmers. By the fall of 2007, Fourthcodex developed a 1.0 version of the software components, sold a license to a company called Full Capture Solutions (FCS) for $150,000, and ran a test-run for a company called Co-Decision. While FCS had the right to renew its license for another $150,000, it did not do so.

¶ 6 The parties also do not appear to dispute that during a trip to Rome in October 2007, Gadagno met with Professor DeJulio to discuss a plan to dissolve Fourthcodex and eliminate plaintiff from the venture, to which DeJulio agreed. Guadagno resigned from plaintiff in December 2007 and subsequently formed his own technology consulting company, Kenetica, LLC, which apparently continued to develop and market software using the components provided by Exeura. Before resigning however, Guadagno directed a Herzum employee to look for office space without telling her that it was going to be for his own new company, and he used brochures from Exeura to help him secure new office space. Also before leaving plaintiff, Guadagno, along with Lee and Sidhu, told Peter Herzum that the product created by Fourthcodex had severe problems. Lee and Sidhu also resigned from plaintiff to work for Kenetica as independent contractors. On January 28, the shareholders of Fourthcodex agreed to dissolve the joint venture, after which the ownership of the software components reverted back to the parties who originally created them, such that Hilex, Olex and OntoDLV reverted to Exeura and Alex to plaintiff.

¶ 7 On May 9, 2008, plaintiff filed its first complaint, later amended, which alleged, in pertinent part, that Guadagno, along with Lee, Sidhu and Herzum's vice-president in charge of marketing and sales Steve Mosca, falsely told plaintiff and Peter Herzum that the components of the software developed by Fourthcodex failed to attain the commercial success expected and had no commercial value. Exeura allegedly made similar false statements. According to the complaint, any failure of that software was attributable to Guadagno, Lee, Sidhu and Mosca, who actively failed to properly pursue the programming development, and who also consciously diverted customers away from plaintiff and from Fourthcodex. Plaintiff further alleged that it

agreed to end its involvement in the Fourthcodex joint venture acting in reasonable reliance on information about the venture provided by Guagdagno, Lee, Sidhu and DeJulio. Furthermore, the complaint alleged that Guadagno, Lee, Sidhu and Mosca intentionally frustrated the development and commercialization of the Fourthcodex software to induce plaintiff to withdraw its involvement from the joint venture, and that they intended to complete the development of the software after plaintiff was no longer involved. In addition, plaintiff alleged that those same employees usurped plaintiff's sales opportunities while Guadagno was still employed by plaintiff, such that those opportunities were never brought to plaintiff's attention and were taken for the benefit of Kenetica.

¶ 8 Plaintiff's complaint further claimed that Guadagno improperly interfered with plaintiff's expectation to continue its joint venture with Exeura, as well as with plaintiff's business opportunities that were taken by Guadagno and Mosca. Plaintiff next alleged that Guadagno breached his fiduciary duty to plaintiff by developing and commercializing the Fourthcodex software and inducing plaintiff to terminate the joint venture for his own gain. Further, the complaint asserted that Guadagno and Exeura acted in concert to defraud plaintiff and induce it to terminate its involvement with Fourthcodex. As a result, plaintiff allegedly suffered the loss of profits from the Fourthcodex software. Based on those allegations, plaintiff sought compensatory damages, as well as restitution for any income that defendants derived from marketing the software that was developed by the Fourthcodex venture.

¶ 9 At trial, plaintiff introduced numerous e-mails written by or to defendants. The first such e-mail, from Guadagno to DeJulio, dated November 1, 2007, stated that he, Lee and Sidhu had

created a strong team and delivered the beginning of "promising results" for their collaboration with Exeura, outside Fourthcodex and plaintiff. Attached to that e-mail was an apparent business plan for a new venture between defendants, which indicated that Guadagno, Lee and Sidhu would contribute certain Herzum employees, including themselves, as well as existing contracts with clients, including FCS and Co-Decision, and the intellectual property for Alex, all of which, as noted above, belonged to plaintiff. In an e-mail from DeJulio dated December 9, 2007, the professor appears to respond negatively to Guadagno's assertion that they should restart "from scratch" in their new venture. DeJulio states that he does not believe Guadagno's assertion is founded, and if it is, then Guadagno's own predictions for their venture are not credible. However, an e-mail from Pasqualle Rullo, an employee of Exeura, to Sidhu, indicated that a new version of a software was ready, but he was "stalling." Similarly, in an e-mail to a Fourthcodex consultant, Guadagno directed him to tell Peter Herzum, in case he asked about the software, that there are " 'good ideas, way too early for market, technology too raw/issues in delivery, need 5-10 millions [sic] to survive/compete.' "

¶ 10 When called to testify, DeJulio acknowledged that when he received the e-mail from Guadagno about a collaboration between the two of them, he did not share those plans with Peter Herzum because at that point, DeJulio no longer trusted him. According to DeJulio, he told Peter in the October 2007 meeting that he already considered Fourthcodex a failure, which is why he wanted to dissolve it. He explained that the employees assigned to Fourthcodex stopped trying to develop the software components for Fourthcodex between November and December 2007. DeJulio further stated that all of the "test-drives" that Fourthcodex had performed for clients had

failed. He admitted, however, that in November 2007, he was looking for an opportunity to further develop the software from Fourthcodex, which, as far as he understood, had enough merit to pursue such a development.

¶ 11 Peter Herzum testified that he first became aware of problems with the Fourthcodex components when he received a call from DeJulio in November 2007, who told him that the software had significant issues related to performance and scalability. After that phone call, Peter spoke to the Fourthcodex technical team, who confirmed what DeJulio had told him. Peter stated that Lee, Sidhu and another employee named Paul Gearon were present at that time, but he could not remember if Guadagno was in the office. However, Peter further stated that he had a follow up team meeting that December in which Guadagno participated, and Peter was again told that they had not reached the objectives with respect to the software. At that meeting, Lee, Sidhu and Guadagno also told Peter that they found it hard to work with Exeura's team members. In his own testimony, Guadagno stated that he told Peter Herzum as early as May 2007 that the Fourthcodex software had problems and was not as mature as previously believed.

¶ 12 Plaintiff further introduced an e-mail sent in December 2007 from Mosca to Guadagno containing a file titled "sales forecast to Peter," which indicated that Mosca predicted the Fourthcodex's revenue to be $513,000 the following year. The next day, Guadagno, who had already resigned from plaintiff, sent Mosca a file with the same title, indicating a lower expected revenue, namely, $479,500. That same day, it appears that Mosca sent Peter Herzum an e-mail containing another file with that title, which indicated an even lower expected revenue, at $381,750. In a second e-mail to Mosca, Guadagno attached sales leads acquired at a conference

called Knowledge World, noting that he had removed the "interesting ones," apparently so that plaintiff would not see them. Guadagno also directed a consultant to tell Peter that they had lost two business leads, which Guadagno described as "hot." Two e-mails from Sidhu to Guadagno were introduced, one from December 17, 2007, stating that Peter Herzum was confident that he could keep the business from FCS and Co-Decision, and another from three days later informing Guadagno that after Peter looked at the books from Exeura, he wanted to shut Fourthcodex down and to stop funding its projects.

¶ 13 With respect to the prospective profit that Fourthcodex would have earned from their contract with FCS, the parties do not dispute, as noted above, that if FCS had renewed its license to the Fourthcodex software, it would have paid $150,000. DeJulio testified that FCS did not renew its license because it was unable to integrate the software components into their system, but he acknowledged that he could not attest to the specific issues with the software. However, in DeJulio's email to FCS's executives in February 2008, he told them that the intellectual property of Hilex, Olex and OntoDLV would return to Exeura, and that from that point on, Exeura would continue "to invest in the development, marketing, and sales of technologies [FCS had] come to leverage in the past year."

¶ 14 Similarly, Sidhu, when called to testify, acknowledged that he also contacted one of FCS' executives, Bill Nadal, and asked him not to let Peter Herzum know of the involvement of Guadagno and Lee in continuing to provide services to FCS after Fourthcodex was dissolved. Sidhu further admitted that in another e-mail, he asked Nadal not to call him on his cell phone because, at that time, he was still an employee of Herzum and his cell phone calls could be

tracked.

¶ 15 Defendants offered into evidence their answers to interrogatories which stated the amount that Exeura had earned for the maintenance and support of the license that FCS had purchased. According to those interrogatories, as of April 6, 2009, Exeura had earned $21,060 in providing those services.

¶ 16 With respect to the lost income from the contracts with Co-Decision, which called for a multi-phase project and went as far as a "test drive" of the software, plaintiff introduced Mosca's sales projections for Fourthcodex, which indicated that the projected revenue from that contract, as of December 2007, was $83,750. When called, Mosca testified that forecasting was one of his functions while employed by Herzum, which he based on certain criteria, including the company's budget, the timing of the contract, "pain points," and events happening with that customer and where they were in the decision process. Mosca acknowledged, however, that forecasting sales was not a scientific process, and that by the time Fourthcodex dissolved, the project with Co-Decision did not reach all of its projected phases which would yield that amount of revenue.

¶ 17 Defendants, again, introduced Exeura's answers to interrogatories as evidence of the income it earned from the contract with Co-Decision after Fourthcodex was dissolved. According to those interrogatories, which did not provide a conversion rate between euros and dollars,[1] Exeura received a total of €10,200 as a result of that contract throughout 2008. They

[1]But which the court may take judicial notice that the official rate of euro to dollar was exchanged at $262,200 per $200,000, which, as discussed below, was part of the amount earned by Kenetica.

also introduced Lee's testimony that the project for Co-Decision did not go past the first phase because the software was too slow for the company's needs.

¶ 18 With regard to plaintiff's claim of restitution against Exeura, the parties do not appear to dispute that those damages correspond to about eight weeks from November 2007, when Exeura allegedly failed to provide human resources to Fourthcodex because by that time it considered the venture "dead," until January 3, 2008, when DeJulio told Peter Herzum to freeze expenses on Fourthcodex in preparation for the wind up. Insofar as the monetary value of those human resources, plaintiff introduced a spreadsheet created by Peter Herzum to demonstrate the cost of the human resources invested in Fourthcodex by Herzum and Exeura through November 2007. The spreadsheet included the number of hours each employee dedicated to Fourthcodex and a rate corresponding to each employee's value to the company. Those costs per employee exceeded the salary paid to each of those individuals, and Peter Herzum stated during his testimony that the rates described as the hourly value of each employee's labor had been previously agreed upon with Exeura. He explained that those rates included not only those employee's base salary and expected bonuses, but also the overall value of the "role" of each employee according to his or her position. The costs reflected on that document, according to Peter Herzum, were "on target costs," which was the amount that each employee would have earned for the employer if they had not dedicated those hours to Fourthcodex. For instance, the document showed that the cost to Herzum of Lee's hours working for Fourthcodex in 2007 was $170,376.00, while his salary that year was $85,951.88.

¶ 19 In support of its claim of restitution from Guadagno and Kenetica, plaintiff introduced a

document titled "professional services letter" pursuant to which Kenetica agreed to provide services to Exeura beginning on February 1, 2008. The services described in that document included business and product development, for the fee of €50,000 per month, which the trial court would later convert into a dollar equivalent as of the date of its decision. It further introduced a contract between Kenetica and a client company named Infogix, to which the parties attached a schedule of rates that Kenetica would charge for services performed by its employees. That schedule showed the total estimated fees as a result of that contract as $49,920.

¶ 20 While Guadagno did not appear to dispute the payments that Kenetica had received from Exeura and Infogix, he testified to incurring expenses hiring software developers, architects, product designers and attorneys. Guadagno further introduced into evidence an invoice from Exeura to Kenetica for $24,000 for what appears to be the cost of three developers from Exeura that performed services for Kenetica, even though the parties' contract specified that it was Kenetica which would render services to Exeura. In addition, Guadagno introduced a document attached to an e-mail from himself to DeJulio containing, *inter alia*, a budget for his project with Exeura, which indicates that the monthly payments of €50,000 he would receive from Exeura would, in part, support Guadagno's own salary, as well as those of Lee and Sidhu, office rental, equipment, telecommunications, healthcare insurance and taxes.

¶ 21 After the close of trial, the court entered a monetary judgment in favor of plaintiff and against both defendants on the counts of breach of fiduciary duty and conspiracy; against Guadagno on the counts of fraud, tortious interference with a business relationship; and against both Guadagno and Kenetica on the count of deceptive trade practices. On the count of breach of

fiduciary duty, which requires showing a fiduciary relation between the parties, and a breach of fiduciary duties with resulting damages (*Neade v. Portes*, 193 Ill. 2d 433, 444 (2000)), the trial court noted that joint venturers, as well as officers of a company, owe that company the fiduciary duty of loyalty. The court found that it was clear from e-mails and the participants' admissions, that Exeura and Guadagno worked together to garner Fourthcodex' prospective customers and planned a new venture to develop the components outside of Fourthcodex. The court rejected Guadagno's argument that he was not an officer after his resignation, as well as Exeura's argument that it did not transfer its components to Fourthcodex. Those findings, along with the undisputed secret meeting in Rome were also the basis of the court's finding of conspiracy, namely, that defendants had: (1) an agreement to accomplish by concerted action either an unlawful purpose or a lawful purpose by unlawful means; (2) a tortious act committed in furtherance of that agreement; and (3) an injury caused by defendant (*Merrilees v. Merrilees*, 2013 IL App (1st) 121897).

¶ 22 The court further found that Guadagno's actions in sabotaging plaintiff's relationship with Exeura were sufficient to establish his tortious interference with plaintiff's business relationship, which is present where: (1) a valid business relationship exists; (2) defendant knew about that relationship; (3) defendant intentionally interfered, inducing the termination of that relationship; and (4) plaintiff suffered damages as a result. *See Dangeles v. Muhlenfeld*, 191 Ill. App. 3d 791, 798 (1989). On the count of deceptive trade practices against Guadagno and Kenetica, which occurs when one "causes likelihood of confusion or misunderstanding as to the source, sponsorship, approval or certification of goods and services," (815 ILCS 510/1, *et seq* (West

2010)), the court found that e-mails, show that Guadagno mislead Co-Decision, as well as an additional customer, into believing that it was dealing with Fourthcodex when Guadagno and Exeura had already usurped those leads.

¶ 23 With respect to the count of fraud, the court found that Guadagno falsely told Peter Herzum that there were serious problems with the Fourthcodex components and that the Fourthcodex team could not work with the developers from Exeura. The court further noted that Guadagno altered a list of sales projections that would be sent to Peter Herzum, and that he advised plaintiff's employees not to share the "hot" sales leads with Peter and to tell Peter that the Fourthcodex products were too raw and had issues in delivery. As a result of his reliance on that false information, Peter Herzum agreed to dissolve Fourthcodex, losing the license renewal from FCS, which would have been worth $150,000.

¶ 24 Significantly, the court found that it did not believe Guadagno's testimony that he determined that the Fourthcodex' components were flawed as early as the first quarter of 2007. It further found that DeJulio and Guadagno agreed to form a new company to continue work on the Fourthcodex components without Herzum or Fourthcodex, and that they even agreed to take over a "hot" Fourthcodex lead. The court stated that Guadagno, in his testimony, showed a marked propensity to "color" everything, at one point referring to a marketing brochure he copied from Fourthcodex to use in his own business as "high level white paper." In addition, it found that Guadagno, Lee and Sidhu, while still employed by plaintiff, prepared and forwarded a business plan to Exeura for a new business and promised to provide "existing contacts" that belonged to Fourthcodex.

¶ 25 In determining the plaintiff's compensatory damages, the court noted that the dissolution agreement gave Exeura the right to negotiate the license renewal with FCS, and that Exeura had taken Co-Decision as a customer after the dissolution, which was projected to bring $83,750 in revenues according to Mosca's projections. Accordingly, the court awarded plaintiff $129,373, representing one half of the value of a license to FCS and one half of the projected revenue from the project with Co-Decision, joint and several between the parties.

¶ 26 The court further noted that as a result of Guadagno's conspiracy with Exeura, Kenetica took the product development work that had been the Fourthcodex components and entered into a contract with Exeura whereby Exeura would pay Kenetica €50,000 per month. It appears that the contract began four months before the complaint was filed, the court accordingly found that Kenetica had received €200,000 by that time, which on the date of the judgment was equivalent to $262,200, as the court took judicial notice based on the exchange rate published on that day, which the parties did not dispute.[2] Thus, the court awarded plaintiff restitution against Guadagno and Kenetica in the amount of $312,129, which included $262,200 from the contract with Exeura and $49,929 from the contract with Infogix. In determining the restitution due from Exeura, for the eight weeks when it failed to supply human resources to Fourthcodex, the court relied on the exhibit that showed the hours worked by each employee during an eleven month period and the rates for each employee. The court looked at the rates to calculate the dollar value of each hour

[2]Although courts of this state have not yet decided on this issue, our sister states have long recognized that a court may take judicial notice of the rate of exchange of a foreign currency. See, *e.g.*, *Air Canada v. Goloaty*, 536 N.Y.S. 2d 962 (1989); *Royatex, Ltd. v. Daughan*, 551 A. 2d 454 (1988).

worked by the employees in question, and then calculated the value of eight weeks' worth of their labor. Having made those calculations, the court awarded plaintiff $145,725.25 in restitution from Exeura.

¶ 27 Lastly, the court found that since the parties' actions were deliberate in committing fraud and breaching their fiduciary duty to plaintiff, punitive damages were warranted. After considering the nature of the parties' wrong and their ability to pay, the court awarded $150,000 in punitive damages against each defendant. The court also ordered Guadagno, Lee and Sidhu to forfeit the compensation received from plaintiff between the beginning of the conspiracy and the time of their resignation, but those awards are not challenged in this appeal.

¶ 28 Defendants filed a posttrial motion requesting the court to vacate or amend its judgment order. The trial court amended its judgment to correct a mathematical error in calculating the compensatory damages award, which was lowered from $129,373 to $116,875. The posttrial order then clarified that the liability for the restitution award against Guadagno and Kenetica is joint and several between those two parties. In all other respects, defendants' motion was denied.

¶ 29 ANALYSIS

¶ 30 A. Sufficiency of the Evidence of the Compensatory Damages Award

¶ 31 On appeal from that judgment, both defendants now contend that the trial court erred in awarding compensatory damages based on what they consider speculative evidence of lost prospective profits and potential profitability. Defendants argue that since Fourthcodex was a pre-revenue company, which did not have a record of past profits, the evidence of the company's

lost potential profits cannot support an award of lost profits and anticipated income as a matter of law. They maintain that the evidence of the prospective income from the contracts with FCS and Co-Decision, which did not ultimately generate the anticipated revenue to Exeura after the dissolution, was too speculative and not recoverable as compensatory damages.

¶ 32 In considering defendants' argument, we are mindful that " '[t]he determination of damages is a question reserved for the trier of fact, and a reviewing court will not lightly substitute its opinion for the judgment rendered by the trial court.' " *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 247 (2006) (quoting *Richardson v. Chapman*, 175 Ill. 2d 98, 113 (1997). Absent a clear indication that the trier of fact failed to follow some rule of law or considered erroneous evidence, or that the ruling was the obvious result of passion or prejudice, a reviewing court will not upset the trial court's assessment of damages. *Id.* However, this court will depart from that general rule in a number situations, such as where, as in this case, we must determine whether an award is speculative, in which case it may be considered erroneous as a matter of law. *SK Hand Tool Corp. v. Dresser Industries, Inc.*, 284 Ill. App. 3d 417, 427 (1996). The controlling principles on this issue are well established. As our supreme court stated:

> "A recovery may be had for prospective profits when there are any criteria by which the probable profits can be estimated with reasonable certainty. [Citation.] In order to recover lost profits, it is not necessary that the amount of loss be proven with absolute certainty. [Citation.] Being merely prospective, those profits will, to some extent, be uncertain and incapable of calculation with mathematical precision. [Citation.] The impossibility of proof of the exact amount

> of lost profits will not justify refusing damages. The law requires only that the plaintiff approximate the claimed lost profits with competent evidence. Such evidence must with a fair degree of probability tend to establish a basis for the assessment of damages for lost profits. [Citation.] However, recovery of lost profits cannot be based upon conjecture or sheer speculation. [Citation.] It is necessary that the evidence afford a reasonable basis for the computation of damages ***. [Citation.]" *Id.* at 248.

¶ 33 Although our courts have recognized a long-standing rule that evidence of lost profits in a new business is generally considered too speculative to sustain the burden of proof, they have also found that the rule is inapplicable to cases where the new business' product has an established market. See *id.*, *Milex Products, Inc. v. Alra Laboratories, Inc.*, 237 Ill. App. 3d 177, 192 (1992). In *Milex*, this court found that the testimony about a drug-marketer's lost profits due to defendant's breach of contract to manufacture a particular drug was not speculative where although the product was new, the evidence showed that the drug had an established market in which other companies profited from similar drugs. *Milex*, 237 Ill App. 3d at 192; see also *Tri-G*, 222 Ill. 2d at 249 (evidence of plaintiff's past success in selling houses was sufficient to establish lost profits in a subsequent real estate project); (*Malatesta v. Leichter*, 186 Ill. App. 3d 602 (1989) (after plaintiff was prevented from acquiring car dealership, the profits from the person who ran the business during the time in question were sufficient to establish damages with the requisite degree of certainty).

¶ 34 Here, while Fourthcodex was a new business, the parties do not dispute that Fourthcodex

sold a license to FCS for $150,000, or that renewing that license would have cost that client another $150,000. Defendants' argument was that even if Fourthcodex had not been dissolved, FCS would still not have renewed its license because, as DeJulio testified, the software did not work with FCS's business. However, DeJulio admitted that he could not testify to the specific issues with the software, and in his e-mail to FCS's executives, he told them that from that point on, it would be Exeura, and not Fourthcodex, that would continue to invest in the software that FCS had received in the previous year. Furthermore, defendants admitted in their answers to plaintiff's interrogatories that after Fourthcodex dissolved, they continued to provide maintenance and support to the license that FCS had purchased. While defendants alleged that the amount of revenue that they received for such maintenance and support was substantially less than the price of a license renewal, their ongoing business with FCS after the dissolution of Fourthcodex, along with their attempt to form a business relationship with that client without plaintiff's knowledge, is not consistent with their allegations that the product initially provided by Fourthcodex did not work with their system.

¶ 35 Similarly, with regard to the lost profits from the contract with Co-Decision, there is no dispute that Co-Decision was an existing client, with whom Fourthcodex had entered into a contract for a multi-phase project. Although the project only reached its initial test-drive phase before the company was winding up its business, plaintiff presented revenue projections, prepared in December 2007, which estimated that Fourthcodex would earn $83,750 by the end of the project. While defendants again alleged that the reason why the project with Co-Decision did not move beyond its test-drive phase was because the software was inadequate for that client's

needs, they acknowledged that they continued to provide services to that client after the Fourthcodex was dissolved, albeit for an allegedly lesser amount of revenue than what Mosca estimated.

¶ 36 In both instances, the evidence of lost profits shows that plaintiff had contracts with existing clients, which did not yield the expected profit before Fourthcodex was dissolved as a result of defendants' conspiracy. In fact, the contracts' revenue potential is further evidenced by defendants' own admission to continuing a relationship with those clients after Fourthcodex dissolved. Thus, we conclude that while Fourthcodex was a new business, the evidence of the market for its products, namely, the contracts with FCS and Co-Decision, is not speculative or based on conjecture, and establishes the damages suffered by plaintiff with reasonable certainty.

¶ 37 Defendants' reliance on *SK Hand Tool*, 284 Ill. App. 3d 417 is not persuasive. In that case, plaintiffs sought damages for lost profits after purchasing an established unprofitable business while relying on the seller's misrepresentations about a marketing program. *Id.* at 421. Plaintiff alleged that if the sellers had made certain investments in a marketing program as represented, the company would have generated greater revenues after plaintiff purchased it. *Id.* at 423-24. However, the expert who calculated the lost profits used only a computer model to calculate the sales that would have been made if the marketing program had been implemented, and did not take into account a different marketing program that the sellers did, in fact, implement. *Id.* at 428-29. In contrast, plaintiffs in this case introduced evidence of two contracts with customers, and the amount of revenue expected from such contracts. While the parties dispute the amount of revenue that Fourthcodex would have made if it had not been dissolved

due to alleged problems with the software, defendants acknowledge that they earned additional revenue from those clients, which Exeura retained after the dissolution.

¶ 38 Exeura's argument that the trial court erred in calculating damages based on gross sales, rather than net profits, is similarly unpersuasive. We note that the sales forecast prepared by Mosca contains one column titled "amount," which appears to indicate the gross amount earned from each project, and another titled "revenue," which contains a lower amount and appears to indicate the actual profit earned. The spreadsheet indicates that from the license sold to FCS, all $150,000 would be "revenue," and from the project with Co-Decision, the amount calculated by the trial court was derived from the "revenue" column and therefore, the company's profits. Furthermore, it does not appear that either party introduced any evidence at trial to indicate any particular costs that Fourthcodex would have incurred in earning the amounts in question. Accordingly, we conclude that the trial court's finding on the amount of lost profits was not manifestly erroneous. See *Apa v. National Bank of Commerce*, 374 Ill. App. 3d 1082, 1086 (2007) (we may reverse the trial court's assessment of damages only upon showing that it was manifestly erroneous).

¶ 39 B. Sufficiency of the Evidence of the Restitution Award

¶ 40 Defendants next contend that the trial court erred in finding unjust enrichment and awarding restitution damages which, according to Exeura, is based on speculative data and inconsistent with the court's other findings. Guadagno further argues that it was improper for the court to award plaintiff with the gross income earned by Kenetica where there was evidence of expenses that his company incurred in earning such income.

¶ 41 As with the findings regarding the amount of compensatory damages, the trial court's findings with respect to restitution will not be disturbed unless they are against the manifest weight of the evidence. *Board of Managers of Hidden Lake Townhome Owners Association v. Green Trails Improvement Association*, 404 Ill. App. 3d 184, 194 (2010). An award of damages is not against the manifest weight of the evidence if there is an adequate basis in the record to support the trial court's determinations of damages. *Schatz v. Abbott Laboratories, Inc.*, 51 Ill. 2d 143, 147 (1972).

¶ 42 It is well established that an award of restitution is designed to prevent unjust enrichment by disgorging the defendant of the benefit that has been conferred upon him by his actions towards the plaintiff. See, *e.g., MC Baldwin Financial Co. v. DiMaggio, Rosario & Veraja*, LLC, 364 Ill. App. 3d 6, 14 (2006). Restitution can be measured by the "reasonable value" of the benefit received by defendant. *Id*.

¶ 43 Exeura does not dispute the court's finding that it was unjustly enriched by failing to supply the required human resources to Fourthcodex after it considered the venture "dead," but argues that the trial court erred in calculating the restitution award against it using the document created by Peter Herzum to demonstrate the value of the labor of each employee that was scheduled to work on the Fourthcodex software. According to Exeura, the document on which the court relied showed a greater cost per employee than the value of the salary paid to those employees, and in any event, the spreadsheet appears to indicate that Exeura's employees contributed 1,755.5 hours of labor in November 2007. Exeura further maintains that the trial court's findings are inconsistent with DeJulio's testimony that its employees continued to market

the Fourthcodex components through November or December 2007, and with the fact that Exeura was not required to contribute as many employees to the Fourthcodex project as it ultimately did. In any event, Exeura further contends that even if the trial court's calculations were correct, it should have awarded plaintiff only half of those damages, since plaintiff owned only half of Fourthcodex.

¶ 44 We note, however, that Peter Herzum explained at trial that the cost of each employee's time invested in Fourthcodex was more than his or her base salary, and included the amount of revenue that the employee would ultimately create for the employer. Furthermore, Peter's spreadsheet was an estimate, which did not appear to reflect the actual amount of hours worked, especially in light of DeJulio's testimony that he considered Fourthcodex "dead" as of November 2007 and stopped contributing to the project. Additionally, while the agreement between plaintiff and Exeura named fewer employees that would work for Fourthcodex than the spreadsheet on which the trial court relied, the agreement also allowed the parties to modify their contributions. Lastly, although the trial court did not divide plaintiff's restitution in half, we note that, unlike compensatory damages, a restitution award is not measured by the plaintiff's loss, but by the defendant's unjust gain. See *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 257 (2004). Thus, the ratio of plaintiff's interest in Fourthcodex does not affect this award.

¶ 45 Guadagno argues, with respect to the restitution award against himself and Kenetica, that the trial court erred in awarding plaintiff the entirety of the income earned from the contracts with Exeura and Infogix without subtracting any expenses incurred by Kenetica in generating that income. While he also does not dispute the impropriety of those gains, he maintains that,

aside from his testimony as to Kenetica's hiring expenses, he introduced into evidence an invoice from Exeura for the services of their developers, as well as his operating budget which showed the cost of his employees' salaries and his own, as well as other operating expenses. However, plaintiff correctly notes that Guadagno has forfeited this argument with respect to the restitution award against him because he raised it for the first time on appeal. See, *e.g., Board of Managers of Hidden Lake Townhome Owners Association*, 404 Ill. App. 3d at 194 ("Issues not raised in the trial court are deemed forfeited and may not be raised for the first time on appeal").

¶ 46 Moreover, even if Guadagno had not forfeited such an argument, he would fare no better. Guadagno's own salary was a gain to himself, through Kenetica, and the salaries of Lee, Sidhu were only incurred because they left plaintiff as part of the conspiracy to continue the project without plaintiff. Furthermore, while the invoice from Exeura appears to bill Kenetica for the service of Exeura's developers, that is inconsistent with the contract, also in evidence, that it was Exeura that hired and paid Kenetica for such services. Significantly, the trial court, which was in a superior position to determine the credibility of the witnesses and weight of the evidence, found Guadagno not credible, and in light of the evidence on the record, we conclude that the trial court's decision was not against the manifest weight of the evidence. See *1472 Milwaukee, Ltd. v. Feinerman*, 2013 IL App (1st) 121,191, ¶ 21.

¶ 47 C. Punitive Damages

¶ 48 Next, defendants contend that the trial court erred in awarding punitive damages, which, according to defendants, are not only unwarranted, but also excessive in light of the evidence presented and the degree of the injury suffered by plaintiff. Guadagno maintains that the punitive

damages awarded against him violated his constitutional right against "the imposition of grossly excessive or arbitrary punishments on a tortfeasor," and in any event, those damages should have been reduced by the amount of the restitution award. Exeura argues that the punitive damages against it were excessive because its behavior did not rise to the level of outrageous conduct so as to warrant such an award.

¶ 49 It is well established that the purpose of punitive damages is to punish defendants and to deter others from the same conduct; such damages should be awarded only in aggravated circumstances involving willfulness, fraud, wantonness or malice. *Dowd and Dowd, Ltd.v,. Gleason*, 352 Ill. App. 3d 365, 387 (2004) (citing *Petty v. Chrysler*, 343 Ill. App. 3d 815, 828 (2003)). Punitive damages are allowable where the wrong involves a violation of a duty that arises from a relationship of trust and confidence, and are appropriate to punish and deter conduct where the defendant has committed a breach of fiduciary duty. *Id.* at 387-88. In reviewing a trial court's decision to award punitive damages, we take a three-step approach, considering: (1) whether punitive damages are available for the specific cause of action, under a *de novo* standard; (2) whether, under the manifest weight of the evidence standard, defendants acted fraudulently, maliciously, or in a manner which warrants such damages; and (3) whether the trial court abused its discretion in awarding those damages, such that no reasonable person would agree with its finding. *Linhart v. Bridgeview Creek Development, Inc.*, 391 Ill. App. 3d 630, 641 (2009). A finding would be considered against the manifest weight of the evidence only where the opposite conclusion is clearly evident, or the finding is arbitrary, unreasonable, or not based on evidence (*Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115, 130, ¶ 17), and a trial court

abuses its discretion only when it acts arbitrarily, without conscious judgment, or, in view of all circumstances, exceeds the bounds of reason and ignores recognized principles of law (*In re Custody of C.C.*, 2013 IL App 3d 120,342, ¶ 40).

¶ 50 First, we recognize that punitive damages are available for a cause of action for breach of fiduciary duty, as well as for a cause of action for fraud. See, *e.g.*, *Dowd and Dowd*, 352 Ill. App. 3d at 387-88; *Gehrett v. Chrysler Corp.*, 379 Ill. App. 3d 162, 179 (2008). We next note that the evidence on the record supports the trial court's finding that defendants were secretly conspiring with each other to break up Fourthcodex and continue Fourthcodex' work by substituting Guadagno, Lee and Sidhu for plaintiff as Exeura's new partner. The e-mails presented also support the finding that defendants conspired to take leads from plaintiff and falsely tell plaintiff that the software did not work. Finally, the trial court did not abuse its discretion in awarding punitive damages, as it specifically found that, after taking into account the enormity of the parties' wrong, as well as their income and available assets, the award of $150,000 against each defendant would appropriately serve the purpose of this type of award.

¶ 51 Next, in considering a constitutional challenge to an award of punitive damages, we consider three factors, namely: " '(1) the degree of reprehensibility of defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive award; and (3) the difference between the punitive damages awarded *** and the civil penalties authorized or imposed in comparable cases.' " *International Union of Operating Engineers, Local 150 v. Lowe Excavating Co.*, 225 Ill. 2d 456, 470 (2006) (quoting *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 418 (2003) (citing *BMW of North*

America, Inc. v. Gore, 517 U.S. 559, 575 (2003)).

¶ 52 Guadagno acknowledges that the punitive damages award is only disproportionate to plaintiff's damages if the compensatory and restitution awards are adjusted according to his prior arguments, which we rejected, and admits that the third factor is inapplicable to this case. He argues, however, that the punitive damages awarded against him are unconstitutional because the reprehensibility of his behavior did not warrant such an award. In determining the degree of reprehensibility of defendant's behavior, the most important indicum of the reasonableness of a punitive damages award, courts are instructed to consider the following factors: (1) whether the harm caused was physical as opposed to economic; (2) whether the tortious conduct evinced an indifference to or a reckless disregard for the health and safety of others; (3) whether the target of the conduct was financially vulnerable; (4) whether the conduct involved repeated actions or an isolated incident; and (5) whether the harm was the result of intentional malice, trickery or deceit, or mere accident. *International Union of Operating Engineers*, 225 Ill. 2d at 475.

¶ 53 While the parties do not appear to dispute that the first two factors are not present, Guadagno's argument hinges on his contention that he did not engage in malice or trickery because he consistently told both Peter Herzum and DeJulio that the Fourthcodex software had serious problems. As discussed above, the evidence on the record indicates that Guadagno conspired with DeJulio to start a new venture without plaintiff, while still employed by plaintiff. In furtherance of it, he falsely told Peter that the problems with the software were more serious than they were, altered the sales projections that would be shown to Peter, and worked with Mosca to take leads from Fourthcodex without Peter's knowledge. Furthermore, with respect to

the fourth factor, we note that Guadagno's conduct was not an isolated incident, but part of a scheme that took place over the course of several months and required repeated actions on his part. Based on our consideration of the relevant factors and the evidence presented, we conclude that the punitive damage award did not violate Guadagno's right to due process.

¶ 54 Lastly, Guadagno contends that the trial court erred in entering a judgment of fraud against him because plaintiff did not present sufficient evidence that any of the statements that he made were false. He further maintains that any false statements made to Peter Herzum came from individuals other than Guadagno.

¶ 55 To establish fraud, a plaintiff must prove: (1) a false statement or omission of material fact; (2) knowledge or belief of the falsity by the party making it; (3) intention to induce the other party to act; (4) action of the other party resulting from reliance on the truth of the statement; and (5) damage to the other party resulting from such reliance. Lindy Lu LLC v. Illinois Cent. R. Co., 2013 IL App (3d) 120,337, ¶26. However, it is well established that it is not necessary to show that the misrepresentations were made directly by defendant to plaintiff, but "it is enough that the statements by the defendant be made with the intention that it reach the plaintiff and influence his action and that it does reach him and that he does rely upon it, to his damage." St. Joseph Hospital v. Corbetta Const. Co., Inc., 21 Ill. App. 3d 925, 954 (1974).

¶ 56 Here, as noted above, the record contains an e-mail from Guadagno to Mosca containing altered sales projections in a file titled "sales forecast to Peter," as well as e-mails to another employee of plaintiff's advising him that he had removed the interesting sales leads from the list to be sent to Peter Herzum. He further asked the consultant to tell Peter that the "hot" leads had

been lost and that the software technology was "too raw/issues in delivery" and needed an additional $5-10 million to compete. Those e-mails strongly indicate that Guadagno's intention was for those statements to reach Peter Herzum, and cause him to rely on them in his decision to dissolve Fourthcodex.

¶ 57 Furthermore, while it appears that Guadagno was not present when Lee and Sidhu told Peter Herzum that the software had significant issues, Peter testified that Guadagno participated in a follow up meeting and told him that the software was not as mature as anticipated. At that later meeting, Guadagno, Lee and Sidhu also told Peter Herzum that they could not work with the Exeura team. Although Guadagno claims that his statements about the software's issues were true, DeJulio testified that he did not believe Guadagno's assessment of the software, and , in fact, the parties do not dispute that Guadagno and DeJulio worked together, after Fourthcodex' dissolution, to further develop the software. While Guadagno maintains that Herzum's employees' alleged inability to work with Exeura's members was not the reason why Peter Herzum agreed to dissolve Fourthcodex, it is reasonable to infer that such statement influenced his decision, since it appears that the Fourthcodex venture was dependent on the collaboration between Herzum and Exeura employees.

¶ 58 Additionally, Guadagno does not appear to dispute that he kept his meeting with DeJulio a secret from Peter Herzum, and concealed the fact that he was creating Kenetica to continue the development of the Fourthcodex software. See, e.g., Chatham Surgicore, Ltd. v. Health Care Service Corp., 356 Ill. App. 3d 795, 803 (2005) (fraud may be perpetrated either by fraudulent misrepresentation or by fraudulent concealment). Accordingly, we conclude that the trial court's

finding that Guadagno committed fraud against plaintiff was not against the manifest weight of the evidence.

¶ 59 CONCLUSION

¶ 60 The record supports the trial court's findings of compensatory, restitution and punitive damages against defendants, as well as its finding of fraud against Guadagno.

¶ 61 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 62 Affirmed.