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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MODERN PROPS, INC.,

Plaintiff and Appellant,

v.

MARK ROBINSON et al.,

Defendants and Respondents.

B211761

(Los Angeles County  
Super. Ct. No. BC357510)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Michael L. Stern, Judge. Affirmed.

Funsten & Franzen and Don Erik Franzen for Plaintiff and Appellant.

Law Offices of Stephen E. Ensberg and Stephen E. Ensberg for Defendants  
and Respondents.

Modern Props, Inc. (Modern Props) appeals from the judgment entered following a jury trial in its action against Mark Robinson and Cannell Production Services (Robinson and Cannell, respectively, and respondents collectively). We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *Founding of Modern Props*

Founded in the late 1970's by John Zabucky, its President and CEO, Modern Props is a company that rents modern, contemporary, and science fiction props to movie and television productions. It is based in Los Angeles and has a satellite facility in Vancouver, Canada.

Mark Robinson, a Canadian citizen, invested \$10,000 in Modern Props in the late 1970's, and served as president from 1995 to 2004. While president, Robinson recommended that Modern Props open a satellite business in Vancouver. He took several trips to Vancouver, and informed Zabucky that the prop houses there were "crap" and could not come "even close" to the modern, futuristic types of props that Modern Props provided. Robinson helped Modern Props set up the Vancouver satellite.

### *Robinson Leaves Modern Props*

In 2004, disagreements with Zabucky led Robinson to leave the company. Nonetheless, it was important to Zabucky to retain Robinson to help with the Vancouver facility. Thus, in conjunction with Robinson's departure, Robinson and Modern Props executed an Agreement for Purchase and Sale of Stock (the agreement) on April 15, 2004. Pursuant to the agreement, Modern Props bought Robinson's stock in the company for \$500,000. In addition, Robinson received Modern Props' interest in a company called Boffi LA LLC, to which Modern

Props made a capital contribution of \$400,000. Modern Props agreed to employ Robinson as a consultant for three years at a salary of \$33,333.33 a year plus other benefits, thus offsetting a \$93,000 loan Robinson owed to Modern Props.

In paragraph 3(b) of the agreement, Robinson agreed “not to divulge or utilize any trade secrets of [Modern Props] . . . or . . . to solicit customers of, or compete directly or indirectly with [Modern Props] in connection with the sale or rental of modern/contemporary furniture and science fiction props including electronics and hand props.” In addition, under paragraph 15(a), Robinson agreed “that he will not, at any time within the three (3) year period immediately following the date hereof, directly or indirectly engage in, or have any interest in any person, firm, corporation, or business (whether as an employee, officer, director, agent, security holder, creditor, consultant, or otherwise) that engages in any activity in any of the counties of San Luis Obispo, Santa Barbara, Ventura, Los Angeles, Orange, San Bernardino, Riverside, Imperial, Kern and San Diego, California, that is the same as, similar to, or competitive with the business now engaged in by [Modern Props] or any affiliate or subsidiary of [Modern Props] in any of these counties.”

Modern Props never used Robinson’s services (though it paid his salary and benefits), and after the first year of the agreement, as described below, learned that Robinson was starting a props company in Vancouver.

### *Robinson Buys Cannell Production Services*

When Robinson was scouting for Modern Props in Vancouver, he met Doug Carnegie, who owned a prop company in Vancouver called Background Production Services. In 2005, during the term of Robinson’s agreement with Modern Props, Carnegie told Robinson that Cannell Production Services (Cannell), a Vancouver prop house owned by a subsidiary of 20th Century Fox, was for sale.

Robinson did not notify anyone at Modern Props of the opportunity, and together with Carnegie he purchased Cannell through Background Production Services.<sup>1</sup>

*Evidence Concerning Whether Cannell Competed with Modern Props*

In March 2006, Kenneth Sharp, the vice president and head of operations for Modern Props in Los Angeles and Vancouver, learned that Robinson was purchasing Cannell. Sharp believed that the purchase constituted a conflict of interest for Robinson, because Robinson was still considered an employee of Modern Props. Sharp visited Cannell and took photographs of its props department. According to Sharp, many of the photographs depicted props that were identical to (and thus directly competitive with) props carried by Modern Props. Moreover, according to Sharp, Cannell's displays began to closely resemble Modern Props' displays.

Similarly, Rod Fee, an employee of Modern Props, noted that although Cannell was not a competitor of Modern Props in April 2004, it became competitive after Robinson purchased it. Items seen in photos of Cannell's props taken by Sharp were very similar to items Modern Props carried.

Carnegie, co-owner of Cannell with Robinson, acknowledged that Modern Props and Cannell had the same types of props for rent and shared some of the same customers, including customers in Los Angeles. However, according to Robinson, Cannell did not compete with Modern Props, because Modern Props decorated "the penthouse," while Cannell did "the crack house."

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<sup>1</sup> After Robinson and Carnegie acquired Cannell, the name was changed to Vancouver Props and Costumes. The names are used interchangeably in the record. We refer to it as Cannell.

Law student Holly Bright was hired by Modern Props to compile and review 15,000 Cannell invoices dated December 2005 through September 2007, looking for certain terms, such as “contemporary,” “modern,” and “science fiction.” Bright determined that approximately 20 percent of Cannell’s business during that time period was attributable to such props, for a value of \$247,618.57. Bright also determined that there were about 23 Cannell customers who were also customers of Modern Props.

### *Modern Props Sues Robinson and Cannell*

Modern Props sued Robinson, Cannell, and others. The case was tried to a jury on three causes of action in the fourth amended complaint: breach of contract, misappropriation of trade secrets under the Uniform Trade Secrets Act, and intentional interference with existing economic relationships. Before the case was submitted to the jury, the court granted respondents’ motion for non-suit as to the cause of action for intentional interference with existing economic relationships. The jury returned a special verdict, finding that Robinson did not breach his agreement with Modern Props, did not misappropriate trade secrets of Modern Props, and did not receive money from Modern Props without the company receiving from him that which he promised in exchange. Modern Props’ claim for restitution based on unjust enrichment, a claim in equity, was subsequently submitted to the court without additional evidence.

The court entered a partial judgment, ordering that Modern Props receive nothing and awarding costs to respondents. The court awarded Robinson \$245,753.78 in attorney fees and ordered that Modern Props recover no damages in its default judgment against Background Film Services. The court subsequently ordered judgment entered in favor of Robinson on Modern Props’ claim for restitution based on unjust enrichment.

Modern Props filed a motion for new trial and for judgment notwithstanding the verdict. In the new trial motion, Modern Props contended that the judgment must be reversed for jury misconduct. The court denied both motions.

Modern Props filed separate notices of appeal in B211761, B215030, and B219248. The appeals were consolidated for the purposes of briefing, oral argument, and decision.

## **DISCUSSION**

Modern Props raises a number of contentions on appeal. We find none of them meritorious and therefore affirm.

### **I. *Sustaining of Demurrers Without Leave to Amend***

#### **A. *Breach of Fiduciary Duty***

Modern Props' second amended complaint contained a cause of action against Robinson for breach of fiduciary duty. The claim alleged that Robinson was an agent, servant and/or employee of Modern Props and was acting at all times in the scope of that agency or employment. It alleged that he owed a fiduciary duty to Modern Props as a president and director of the company and as a recipient of confidential information in that capacity. Further, the claim alleged that, pursuant to the agreement, Robinson owed a fiduciary duty to Modern Props as an employee who was entrusted with confidential information and had agreed not to disclose the information.

Before trial, the trial court sustained Robinson's demurrer without leave to amend as to this claim, concluding that Robinson did not owe Modern Props a fiduciary duty. Modern Props assigns that ruling as error. We disagree.

In reviewing a complaint to which a demurrer has been sustained, "we must assume the truth of all facts properly pleaded by the plaintiff and matters properly

judicially noticed. [Citation.] However, we ‘do not assume the truth of contentions, deductions, or conclusions of fact or law and may disregard allegations that are contrary to the law or to a fact which may be judicially noticed.’ [Citation.]” (*Haro v. City of Solana Beach* (2011) 195 Cal.App.4th 542, 549 (*Haro*)). In addition, although we “assume the truth of the allegations in the complaint[,] . . . [t]he allegations that we accept as true necessarily include the contents of any exhibits attached to the complaint, and in the event of a conflict between the pleading and an exhibit, the facts contained in the exhibit take precedence over and supersede any inconsistent or contrary allegations in the pleading. [Citation.]” (*Jibilian v. Franchise Tax Bd.* (2006) 136 Cal.App.4th 862, 864, fn. 1.)

“Further, ‘[i]f the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. . . . If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. . . . The plaintiff has the burden of proving that an amendment would cure the defect.’ [Citation.] ‘[S]uch a showing can be made for the first time to the reviewing court . . . .’ [Citation.]” (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1153-1154 (*Gomes*)).

“The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach. [Citation.]” (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086 (*Stanley*)). “A fiduciary relationship is “any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. . . .” [Citations.] [¶] Traditional examples of fiduciary relationships in the commercial

context include trustee/beneficiary, directors and majority shareholders of a corporation, business partners, joint adventurers, and agent/principal. [Citations.] [¶] Inherent in each of these relationships is the duty of undivided loyalty the fiduciary owes to its beneficiary, imposing on the fiduciary obligations far more stringent than those required of ordinary contractors.” (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29-30.)

According to Modern Props, it alleged sufficient facts to create a fiduciary duty on Robinson’s part, in that it alleged that Robinson was an employee agent of the company. Modern Props relies on *Sequoia Vacuum Systems v. Stransky* (1964) 229 Cal.App.2d 281 (*Sequoia*), in which the court held that there was sufficient evidence to support the finding that the appellant, a director and officer of the respondent corporation, breached his fiduciary duty to the corporation when he “entered into a competing business and used his position of trust and confidence to further his own private interests.” (*Id.* at p. 283.) *Sequoia*, however, is distinguishable. The appellant there engaged in the conduct while he was still a director and officer of the corporation. The court therefore reasoned that “the actionable wrong is premised upon appellant’s violation of his duties as a managerial employee and director of the respondent corporation [citation].” (*Id.* at p. 287.)

Here, by contrast, Robinson resigned his positions as president and a director of Modern Props as of April 15, 2004, pursuant to the agreement. Thereafter, he was employed as a consultant only “when and if called upon . . . .” Thus, unlike the appellant in *Sequoia*, Robinson was no longer an officer at the time of the conduct that allegedly constituted a breach of fiduciary duty.

Similarly, Robinson’s status as a consultant employed by Modern Props did not create a fiduciary duty. Employer/employee relationships generally are not fiduciary relationships. (*O’Byrne v. Santa Monica-UCLA Medical Center* (2001)



94 Cal.App.4th 797, 811.) Notwithstanding the allegations that Robinson owed Modern Props a fiduciary duty as an employee of the company, “no presumption of a confidential relationship arises from the bare fact that parties to a contract are employer and employee; rather, additional ties must be brought out in order to create the presumption of a confidential relationship between the two. [Citation.]” (*Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 129.)

Here, Modern Props’ claim for breach of fiduciary duty did not allege additional facts to support the bare allegation of the existence of a fiduciary duty. Although we assume the truth of facts alleged in the complaint, we do not assume the truth of contentions or conclusions of facts or law. (*Haro, supra*, 195 Cal.App.4th at p. 549.) Thus, we may disregard the unsupported assertion that Robinson owed a fiduciary duty as an employee.

Further, the complaint did not sufficiently allege that Robinson owed a fiduciary duty as an agent of Modern Props. “Civil Code section 2295 defines an agent as ‘one who represents another, called the principal, in dealings with third persons.’ An agent acts on behalf of the principal and subject to the principal’s control. [Citation.] “‘In the absence of the essential characteristic of the right of control, there is no true agency. . . .’” [Citation.]” (*Korean Air Lines Co., Ltd. v. County of Los Angeles* (2008) 162 Cal.App.4th 552, 562.) “‘The fact that parties had a preexisting relationship is not sufficient to make one party the agent for the other. . . . [Citation.] An agency is proved by evidence that the person for whom the work was performed had the right to control the activities of the alleged agent. [Citation.]’ [Citations.]” (*Van’t Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 572.)

There are no allegations that Robinson represented Modern Props in dealings with third persons or acted on Modern Props’ behalf and subject to

Modern Props' control. The complaint therefore does not sufficiently allege that Robinson was an agent of Modern Props.

Finally, even if the trial court erred in sustaining the demurrer to the breach of fiduciary duty claim, the purported error was harmless. "When an appeal is taken from a judgment and the appellant alleges the trial court made an erroneous pretrial ruling, it is not enough to show that the ruling was indeed erroneous. In addition, the appellant must also 'show resulting prejudice, and the probability of a more favorable outcome, *at trial*.' [Citation.]" (*Reid v. Balter* (1993) 14 Cal.App.4th 1186, 1195.)

Here, the breach of fiduciary duty allegedly occurred because Robinson stole, disclosed to third parties, and used confidential information he obtained from Modern Props. This alleged conduct also was the basis of the breach of contract and misappropriation of trade secrets claims which were presented to the jury. In the fourth amended complaint's breach of contract claim, Modern Props alleged in relevant part that Robinson breached the agreement by using confidential information acquired at Modern Props to enable Cannell to compete with Modern Props. However, the jury made a special finding that Robinson did not breach the agreement.

Similarly, in its misappropriation of trade secrets cause of action, Modern Props alleged that Robinson misappropriated confidential information under the agreement for his own benefit. However, the jury found that Robinson did not misappropriate trade secrets of Modern Props, and that he did not receive money from Modern Props without the company receiving from him what it was entitled to in exchange. In light of the jury findings on the breach of contract and misappropriation of trade secret claims, it is not reasonably probable that a different result would have been reached had the breach of fiduciary duty claim been presented to the jury.

Modern Props asserts that the absence of the breach of fiduciary duty cause of action from the trial “distorted” the legal standards and burden of proof. According to Modern Props, the burden of proof shifts to the agent where the principal alleges the agent placed its interest ahead of its fiduciary duty. However, the burden-shifting identified by Modern Props occurs only when the plaintiff has *proved* that the defendant is an agent. (*Timmsen v. Forest E. Olson, Inc.* (1970) 6 Cal.App.3d 860, 871 [“‘When the acts of an agent have been questioned by his principal *and the fiduciary relationship has been established*, the burden is cast upon the agent to prove that he acted with the utmost good faith toward his principal [citations] and that he make a full disclosure prior to the transaction of all the facts relating to the transactions under attack’” (italics added)].) Here, the evidence showed that during the term of the agreement, Modern Props paid Robinson’s salary and benefits under the agreement, but never used his services. Thus, it is clear that Robinson never acted as Modern Props’ agent under the agreement in dealings with third parties. Moreover, on the evidence presented, the jury found that Robinson did not breach his agreement with Modern Props, did not misappropriate trade secrets, and did not receive money from Modern Props without the company receiving from him what it was entitled to in exchange. Given these findings and the showing that Robinson never acted on Modern Props’ behalf as its agent, it is not reasonably probable that if the breach of fiduciary duty claim proceeded to trial, a different result would have been reached.

In short, the trial court did not err in sustaining the demurrer to Modern Props’ breach of fiduciary duty cause of action without leave to amend. Moreover, any alleged error was harmless.

B. *Other Causes of Action*

Modern Props contends that the court's erroneous reasoning regarding the breach of fiduciary duty claim "suffused the entire case and created error with respect to" the court's rulings sustaining demurrers without leave to amend as to certain other causes of action, namely, claims for prohibited business transactions (first amended complaint), negligent interference with economic relations (second amended complaint), tortious inducement to breach a contract, and intentional interference with prospective economic relations (third amended complaint). However, Modern Props fails to explain precisely how the court's reasoning on the breach of fiduciary duty claim infected its rulings on the other claims. In any event, as discussed above, the trial court did not err in sustaining the demurrer to the breach of fiduciary duty cause of action, and thus there was no error to be perpetuated in the rulings on the other claims. Moreover, without going into detail, the allegations supporting the other causes of action relied on the same corpus of alleged facts – in particular, Robinson's alleged violation of the agreement and use of confidential information – as those supporting the breach of contract and misappropriation of trade secrets claims that were presented to the jury. As with the claim for breach of fiduciary duty, the jury's findings on those two claims – that Robinson did not breach his agreement with Modern Props, did not misappropriate trade secrets, and did not receive money from Modern Props without the company receiving from him what it was entitled to in exchange – show that any error was harmless.

C. *Leave to Amend*

Though Modern Props argues that the trial court erred in not granting leave to amend, it fails to explain how each claim could be amended, and nothing in the record suggests how Modern Props could have made the claims viable. Therefore,

Modern Props has not met its burden of proving that amendments would cure the defects. (*Gomes, supra*, 192 Cal.App.4th at p. 1153.)

## II. *Discovery Sanctions*

Modern Props contends that the trial court erred in refusing to sanction respondents for violations of discovery orders. We disagree.

During discovery, Modern Props moved for an order compelling Cannell to answer deposition questions and to produce documents, such as invoices for Cannell's rental of props and documentation of its inventory from 2004 through 2007. In February 2008, the court granted the motion and ordered respondents to produce the requested documents and produce for deposition the employees most qualified to testify on the matters.

In August 2008, Modern Props filed a motion for terminating sanctions or for evidentiary or issue sanctions. The motion stated that Cannell had not produced any invoices for the period prior to December 22, 2005, even though it had been ordered to produce invoices from 2004 through 2007, and that it had produced inventory documents for only 13 prop chairs, even though it had thousands of props in its inventory. The court declined to impose terminating sanctions, but agreed to impose issue sanctions and directed Modern Props' counsel to provide a proposed order setting forth appropriate sanctions. Modern Props submitted several proposed orders, but the court found all of them defective and declined to sign them.

“‘We review the trial court’s ruling on a discovery sanction under the deferential abuse of discretion standard. [Citation.]’ [Citation.] ‘A court’s decision to impose a particular sanction is “subject to reversal only for manifest abuse exceeding the bounds of reason.” [Citation.]’ [Citation.]” (*Doe v. United States Swimming, Inc.* (2011) 200 Cal.App.4th 1424, 1435.) “The sanctions the

court may impose are such as are suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery he seeks but the court may not impose sanctions which are designed not to accomplish the objects of the discovery but to impose punishment. [Citations.]” (*Caryl Richards, Inc. v. Superior Court* (1961) 188 Cal.App.2d 300, 304.) “The penalty should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery. Where a motion to compel has previously been granted, the sanction should not operate in such a fashion as to put the prevailing party in a better position than he would have had if he had obtained the discovery sought and it had been completely favorable to his cause. [Citations.]” (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 793 (*Deyo*).)

In its motion for sanctions, Modern Props explained that the invoice and inventory documents that respondents refused to produce were necessary in order to establish damages and to show that Cannell changed its business to compete directly with Modern Props after Robinson purchased Cannell. The proposed orders submitted by Modern Props, however, were overly broad, internally inconsistent, or addressed issues that Modern Props had the opportunity to raise through testimony. Thus, while we do not condone respondents’ refusal to comply with the court’s discovery order, we conclude that the trial court properly rejected Modern Props’ proposed sanction orders.

The first proposed order imposing issue or evidence sanctions was submitted on August 11, 2008. Modern Props asked the court to order that the following facts be taken as established: respondents competed with Modern Props from April 15, 2004 to April 15, 2007; Modern Props suffered economic loss from business diverted to respondents during that period; and in November 2005, Robinson changed Cannell’s business to begin competing directly with Modern

Props. Modern Props also asked the court to order that respondents be prohibited from opposing those claims.

Such proposed sanctions would have amounted to a directed verdict for Modern Props. Thus, the court ruled that the evidentiary sanctions framed by Modern Props in the proposed order were too broad. The court directed counsel to tailor the proposed order to the “specific issues that are of concern” with respect to the discovery that was withheld. After hearing further argument, the court advised counsel to draft a one-sentence proposed order stating, “the court finds and the jury is instructed. And you can fill in the blank.”

The following day, the court addressed Modern Props’ submission of another multi-paragraph proposed order. The court queried whether Modern Props’ counsel could simply ask Robinson what inventory records were kept by Cannell, whether there was a request for them, and whether they were produced. After hearing further argument regarding whether it was possible for Cannell to produce the requested inventory lists, the court recommended that counsel raise the issue through cross-examination of Robinson.

Modern Props submitted a different proposed order, asking the court to find and instruct the jury that, from April 15, 2004 to April 15, 2007, Cannell’s inventory included modern/contemporary furniture and science fiction props, and that Cannell did not have such inventory prior to December 22, 2005. The court noted the inconsistency in this order, which sought to instruct the jury that Cannell had modern/contemporary inventory from 2004 to 2007 and yet did not have such inventory prior to December 2005.

On August 25, 2008, Modern Props submitted another proposed order, this time asking the court to instruct the jury that, from December 22, 2005 to April 15, 2007, Cannell’s inventory “included modern/contemporary furniture and science fiction props including electronics and hand props.” The court denied Modern

Props' request, explaining that counsel had not taken the opportunity to question the witnesses with the most knowledge about Cannell's inventory – Carnegie, Robinson, and Celia Bell, Cannell's long time bookkeeper. The court noted that counsel could have questioned any of these witnesses about how Cannell tracked its inventory and kept its inventory records.

We agree with the trial court that the first proposed order framed the issues too broadly. The facts that Modern Props asked to be taken as established were factual issues at the heart of some of its claims – whether respondents competed with Modern Props, whether Modern Props suffered economic loss from business diverted to Cannell, and whether Robinson changed Cannell's business to begin competing with Modern Props. Granting such an order would have decided key issues in Modern Props' favor and placed it in a better position than it would have been if it had “obtained the discovery sought and it had been completely favorable to [its] cause. [Citations.]” (*Deyo, supra*, 84 Cal.App.3d at p. 793.) The court thus properly declined to sign this order.

Nor did the trial court abuse its discretion in declining to sign Modern Props' other proposed orders. The proposed order that sought to instruct the jury that Cannell had modern/contemporary inventory from April 15, 2004 to April 15, 2007, and yet did not have such inventory prior to December 22, 2005, was clearly inconsistent because Cannell could not both have and not have modern/contemporary inventory from April 15, 2004 to December 22, 2005. Finally, as the court reasoned, Modern Props had the opportunity to elicit testimony from several witnesses regarding Cannell's inventory from December 22, 2005 to April 15, 2007, the subject of Modern Props' last proposed order.

Further, the record indicates that Modern Props in fact did present evidence regarding Cannell's inventory during the relevant time period. For example, Sharp testified about the similarity between Cannell's and Modern Props' inventory, and



Modern Props introduced into evidence numerous photographs taken by Sharp to establish this similarity. Fee similarly testified that Cannell's props were very similar to those rented by Modern Props. Sharp and Fee both testified that Cannell became competitive with Modern Props after Robinson's involvement. In addition, Carnegie, the co-owner of Cannell, acknowledged that Modern Props and Cannell rented the same types of props and shared some of the same customers. Bright also testified that her analysis of Cannell's invoices indicated that approximately 20 percent of Cannell's business from December 2005 through September 2007 was attributable to modern or science fiction props. Modern Props thus was not hampered in its presentation of its case by the court's refusal to sign the proposed orders.

### III. *Juror Misconduct*

Modern Props contends that the trial court erred in denying its motion for a new trial premised on jury misconduct. The focus of the motion, and the argument on appeal, is that the jury allegedly engaged in misconduct by rewriting the parties' agreement. According to Modern Props, the jury incorrectly applied the geographic limitation in paragraph 15(a) of the agreement, under which Robinson agreed not to compete with Modern Props in numerous counties, to paragraph 3(b) of the agreement, under which Robinson agreed not to divulge trade secrets of Modern Props.

The argument fails. First, the claim is not truly one of jury misconduct. If anything, it is a claim that the evidence is insufficient to support the verdict: that is, that no evidence supported imposing a geographic limitation on Robinson's duty not to divulge confidential information. Indeed, in *Smyth v. Tennison* (1914) 24 Cal.App. 519, 521 (*Smyth*), on which Modern Props erroneously relies, the court did not find jury misconduct, but rather concluded that the verdict should

have been set aside on motion for new trial because the jury's interpretation of the oral agreement at issue was not supported by the evidence.<sup>2</sup>

Second, even if the claim were properly characterized as one of jury misconduct, Modern Props failed to introduce admissible evidence to support it. In support of its new trial motion, Modern Props submitted the declaration of juror Polina Solok. Solok stated that although the jurors agreed that Robinson “indirectly competed with Modern Props because his new companies, Vancouver Props and Cannell Production Services, rented contemporary and modern furniture,” the jurors “concluded that he did not breach the Agreement for Purchase and Sale of Stock because they did not do that business in any of the Southern California counties listed in paragraph 15 of that Agreement. [¶] In other words, although paragraph 3(b) did not contain any geographic limitation on that provision that precluded Mr. Robinson from competing directly or indirectly with Modern Props . . . , we decided that the geographic limitation contained in paragraph 15 should apply to paragraph 3(b).”

Solok's declaration was clearly inadmissible as evidence of misconduct. “Evidence of jurors' internal thought processes is inadmissible to impeach a verdict. [Citations.] Only evidence as to objectively ascertainable statements, conduct, conditions, or events is admissible to impeach a verdict. [Citations.] Juror declarations are admissible to the extent that they describe overt acts constituting jury misconduct, but they are inadmissible to the extent that they

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<sup>2</sup> In *Smyth, supra*, 24 Cal.App. at page 521, the court stated, in relevant part: “It is true, since the contract was oral, its interpretation in the first instance was a question of fact to be determined by the jury; but since such interpretation was clearly erroneous, it became the duty of the trial court, upon application therefor, to set the verdict aside and grant the motion for a new trial. Our conclusion renders it unnecessary to discuss the alleged misconduct of the jury assigned as another ground in support of the motion.”

describe the effect of any event on a juror's subjective reasoning process.

[Citation.] Accordingly, juror declarations are inadmissible to the extent that they purport to describe the jurors' understanding of the instructions or how they arrived at their verdict. [Citations.]' [Citation.]" (*Barboni v. Tuomi* (2012) 210 Cal.App.4th 340, 349 (*Barboni*).)

Obviously, Solok's description of the jurors' interpretation of the contract and how this helped them arrive at their verdict is evidence of their internal thought processes. It was thus inadmissible. (*Barboni, supra*, 210 Cal.App.4th at p. 345.)

Finally, although the jury misconduct claim is perhaps more properly characterized as a claim that the jury's verdict was not supported by substantial evidence, Modern Props does not make that argument, and it is therefore forfeited. (*Behr v. Redmond* (2011) 193 Cal.App.4th 517, 538.)

#### IV. *Restitution*

Modern Props contends that the trial court erred in refusing to consider the equitable remedy of restitution. We disagree.

After the jury rendered its verdict, the trial court granted Modern Props' motion to set its claim for restitution based on unjust enrichment for a court trial. Modern Props filed a trial brief, and the court held a hearing in May 2009, at which it explained that the parties should submit trial briefs and evidence regarding the restitution issue, and the issue then would be submitted. After the parties submitted briefs and supporting exhibits,<sup>3</sup> the court entered judgment in favor of

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<sup>3</sup> The exhibits submitted by the parties consisted of the following. Respondents submitted the partial judgment, the special verdict, the fourth amended complaint, the agreement between Robinson and Modern Props, and the court's ruling on respondents' demurrer. Modern Props submitted three of the jury instructions, a federal district court

Robinson on Modern Props’ cause of action for restitution based on unjust enrichment.

“Under the law of restitution, “[a]n individual is required to make restitution if he or she is unjustly enriched at the expense of another. [Citations.] A person is enriched if the person receives a benefit at another’s expense. [Citation.]” [Citation.] However, “[t]he fact that one person benefits another is not, by itself, sufficient to require restitution. The person receiving the benefit is required to make restitution only if the circumstances are such that, as between the two individuals, it is *unjust* for the person to retain it. [Citation.]” [Citation.] As a matter of law, an unjust enrichment claim does not lie where the parties have an enforceable express contract. [Citation.]” (*Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1370.)

Here, the parties had an express, enforceable contract covering the same relationship between them and the same purported conduct as that underlying the unjust enrichment claim. Thus, Modern Props did not have a viable claim for restitution.

Moreover, the jury concluded that Robinson did not breach his agreement with Modern Props, and also did not misappropriate trade secrets or fail to provide Modern Props what it was entitled to receive under the contract. The jury’s findings of fact were binding on the court insofar as they overlapped with factual issues involved in the unjust enrichment claim. (*Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 156 (*Hoopes*).) Those findings obviated that claim, and the court could not grant inconsistent equitable relief. (*Ibid.*)

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case, Solok’s declaration, and the special verdict, asking the court to take judicial notice of the exhibits.

Modern Props argues that the jury's findings did not preclude the trial court from considering restitution because the remedy of restitution is broader in scope than its contract claim. Modern Props relies on *Hoopes, supra*, in which a commercial tenant sued his landlord and another tenant, claiming exclusive parking rights under his lease. The defendants disputed the plaintiff's interpretation of the lease and asserted equitable estoppel as a defense, asserting that the plaintiff "stood silent for years when he knew defendants believed parking was shared between the tenants." (*Hoopes, supra*, 168 Cal.App.4th at p. 150.) The trial court held a jury trial on the plaintiff's legal claims for breach of contract, trespass, and fraud without first considering the defendants' equitable estoppel defense. After the jury found in the plaintiff's favor, the trial court ruled on the parties' requests for declaratory and injunctive relief and, in doing so, the court rejected the jury's factual findings. The trial court further found that equitable estoppel barred the plaintiff's claims for breach of contract, fraud, and trespass and so entered judgment in favor of the defendants.

On appeal, the court held that the trial court "erred in disregarding the jury's verdict when fashioning equitable relief founded on the same evidence and the same operative facts as the verdict." (*Hoopes, supra*, 168 Cal.App.4th at p. 150.) However, the court found that the jury's findings did not "resolve[] the factual matter presented by the defense of equitable estoppel." (*Id.* at p. 162.) Concluding that "the defense of equitable estoppel was a matter within the exclusive province of the trial judge and that it raised legal and factual issues undecided by the jury," and that the judge's decision was supported by substantial evidence, the court affirmed. (*Id.* at pp. 150-151.)

*Hoopes* is distinguishable. In *Hoopes*, the equitable estoppel issue "was a distinct matter . . . that raised legal and factual issues undecided by the jury." (*Hoopes, supra*, 168 Cal.App.4th at p. 155.) By contrast, here, the unjust

enrichment claim seeking restitution depended on the same factual issues decided by the jury: whether, despite the prohibition of the agreement, Robinson used confidential information for his own benefit in operating Cannell at the expense of Modern Props. Given the binding findings that Robinson did not breach his agreement with Modern Props, did not misappropriate trade secrets, and did not receive money from Modern Props without the company receiving from him that which he promised in exchange, there was no basis on which the court could conclude that Robinson was unjustly enriched at Modern Props' expense.

Modern Props also relies on *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54 (*DRG*), in which the trial court refused to consider the appellants' estoppel claim, finding it to be unnecessary in light of the jury's verdicts on waiver. The appellate court concluded that the trial court erred, because waiver and estoppel are separate and distinct doctrines. Thus, the trial court had the responsibility to determine the estoppel claim on the merits. (*Id.* at p. 61.)

*DRG* is distinguishable. Here, the trial court did not refuse to consider Modern Props' restitution claim. Instead, the court ordered the parties to submit trial briefs and all the evidence supporting their arguments. Also, as discussed above, the jury's findings preclude a finding that Robinson was unjustly enriched at Modern Props' expense. The trial court therefore correctly entered judgment in favor of Robinson on Modern Props' claim for restitution based on unjust enrichment.

## V. *Attorney Fees*

Modern Props contends that the trial court's award of attorney fees violated statutory law and the agreement between Robinson and Modern Props. "On review of an award of attorney fees after trial, the normal standard of review is

abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law.’” (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175.) “The court abuses its discretion whenever it exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish that discretion was clearly abused and a miscarriage of justice resulted. [Citations.]” (*Carver v. Chevron U.S.A., Inc.* (2004) 119 Cal.App.4th 498, 505 (*Carver*).)

The agreement between Robinson and Modern Props contained this attorney fee clause: “If any legal action or other proceeding is brought for the enforcement of this Agreement, or because of an alleged dispute, breach, default, or misrepresentation in connection with any of the provisions of this Agreement, the successful or prevailing party or parties will be entitled to recover reasonable attorney fees and other costs incurred in that action or proceeding, in addition to any other relief to which it or they may be entitled.” As prevailing party, Robinson sought \$321,442.50 in attorney fees, pursuant to Civil Code section 1717.<sup>4</sup>

Modern Props opposed Robinson’s motion, arguing, in part, that fees were not appropriate for work related to the defense of causes of action not based on the contract. Robinson countered that Modern Props’ contract claim was “inextricably intertwined with its tort claims,” such that it was not necessary to apportion the

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<sup>4</sup> The statute provides, in part: “In any action on a contract, where the contract specifically provides that attorney’s fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney’s fees in addition to other costs.” (Civ. Code, § 1717, subd. (a).)

fees between the contract and non-contract claims. After holding a hearing, the court awarded Robinson \$245,753.78 in attorney fees.<sup>5</sup>

Modern Props argues that Robinson is not entitled to fees because the breach of contract claims overlapped with Trade Secrets Act claims. The Trade Secrets Act provides for an award of reasonable attorney fees “[i]f a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists.” (Civ. Code, § 3426.4.) “Because the award is a sanction, a trial court has broad discretion in awarding fees. [Citation.] [¶] On appeal from such an order, the appellant has an ‘uphill battle’ and must overcome both the ‘sufficiency of evidence’ rule and the ‘abuse of discretion’ rule.” (*FLIR Systems, Inc. v. Parrish* (2009) 174 Cal.App.4th 1270, 1275.)

Modern Props relies on *Carver, supra*, 119 Cal.App.4th at page 505 in which Chevron U.S.A., Inc. prevailed in an action brought by Chevron dealers that asserted antitrust violations under the Cartwright Act, as well as tort causes of action such as breach of contract and fraud. Chevron sought attorney fees based on a provision in its lease with the dealers, but the trial court found that “fees incurred by defending issues common to both the Cartwright Act claims and non-Cartwright Act claims” were barred by the attorney fees provision of the Cartwright Act, which prohibits an award of fees to a prevailing defendant. (*Carver, supra*, 119 Cal.App.4th at p. 501.) The appellate court agreed, reasoning that the nonreciprocal fee provision was a deliberate public policy decision to “encourage injured parties to broadly and effectively enforce the Cartwright Act ‘in situations where they otherwise would not find it economical to sue.’ [Citation.]” (*Id.* at p.

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<sup>5</sup> In a prior hearing, the court held that it would not allocate fees between contract and non-contract claims.



504.) Because allowing Chevron to recover fees for Cartwright Act issues that overlapped other issues would frustrate the legislative intent to promote this public policy, the court held that the Cartwright Act’s “unilateral fee–shifting provision . . . prohibits an award of attorney fees for successfully defending Cartwright Act and non-Cartwright Act claims that overlap.” (*Ibid.*)

According to Modern Props, because the Trade Secrets Act (like the Cartwright Act in *Carver*) limits the circumstances in which fees can be awarded, Robinson cannot rely on the contractual fee provision to recover fees for overlapping claims. We disagree. The Trade Secrets Act fee shifting provision differs from the Cartwright Act provision in a significant respect. The *Carver* court’s decision was premised on the reasoning that allowing a prevailing defendant to recover fees for Cartwright Act issues that overlap with other claims would violate the statute’s explicit “one-way fee-shifting right for a successful plaintiff but not for a defendant who successfully defends such a claim.” (*Carver*, *supra*, 119 Cal.App.4th at p. 504.) By contrast, the Trade Secrets Act does not contain a one-way fee-shifting provision, but rather a bilateral provision that allows fees to be awarded to either a successful plaintiff or defendant.

We find *Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 579 (*Yield*) instructive. There, the defendants prevailed in an action alleging in part that they breached a contract and misappropriated trade secrets. The trial court awarded the defendants attorney fees, and on appeal, they asserted the fees were based on both a provision in the contract and on the fee provision of the Trade Secrets Act, Civil Code section 3426.4. The appellate court found nothing in the record to indicate that the fee award was based on Civil Code section 3426.4. (*Yield*, *supra*, 154 Cal.App.4th at p. 579.) The court concluded, however, that the contractual fee provision justified allowing fees on the trade secret claim,

reasoning that the claim “shared issues in common, and was intractably intertwined” with the breach of contract claims. (*Ibid.*)

*Yield* reasoned: “Where fees are claimed under a contract allowing for their recovery, the scope of activities for which fees may be recovered is governed by the terms of the contract. [Citations.] Unless the contract permits it, an award may not include fees incurred solely in the pursuit or defense of claims not arising from the contract. [Citation.] However, all fees falling *within* the provision are recoverable, even if the activities on which the fees are predicated also supported the prosecution or defense of claims outside the provision. The prevailing party is entitled to recover all expenses incurred in litigating “‘common issues’” between covered and uncovered claims or defenses. [Citations.] And the trial court need not seek to disentangle claims so as to apportion fees when the matters litigated are ‘so interrelated that it would have been impossible to separate them into claims for which attorney fees are properly awarded and claims for which they are not . . . .’ [Citation.]” (*Yield, supra*, 154 Cal.App.4th at p. 577.)

Here, as in *Yield*, Modern Props’ breach of contract claim alleged that the major purposes of the agreement were to prohibit Robinson from disclosing Modern Props’ confidential information, protect the information from use by other entities, and to “affirm” that Robinson was under a duty not to disclose the confidential information. The misappropriation of trade secrets claim alleged that the confidential information was a trade secret and that Modern Props used the agreement with Robinson to protect the information. Thus, as in *Yield*, the misappropriation of trade secrets claim “shared issues in common, and was intractably intertwined, with” the breach of contract claim. (*Yield, supra*, 154 Cal.App.4th at p. 579.) In fact, one of the breaches of the agreement alleged by Modern Props was “precisely the conduct at the heart of the trade secret claim.”

(*Ibid.*) Finally, also similar to *Yield*, there is no indication here that “any part of the fee award actually rested on Civil Code section 3426.4.” (*Ibid.*)

“‘Attorney’s fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed.’ [Citations.] [¶] Further, ‘Apportionment is not required when the claims for relief are so intertwined that it would be impracticable, if not impossible, to separate the attorney’s time into compensable and noncompensable units.’ [Citations.]” (*Maxim Crane Works, L.P. v. Tilbury Constructors* (2012) 208 Cal.App.4th 286, 298.) Because the claims were so intertwined, the trial court did not err in declining to apportion the fees.

The trial court accordingly did not err or abuse its discretion in its award of attorney fees.<sup>6</sup>

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<sup>6</sup> In addition to Robinson and Cannell, Modern Props also sued Background Film Services, a prop company owned by Carnegie, for intentional interference with economic relations. Background Film Services failed to file a responsive pleading, and Modern Props took its default. In the final judgment, the trial court entered judgment for Modern Props in the amount of \$0, reasoning that an award of damages would be inconsistent with the jury’s verdict. Modern Props contends that this portion of the judgment must be reversed, because “prejudicial error has been elsewhere committed, requiring reversal of the . . . judgment.” However, as we have explained, no prejudicial error occurred. Thus, there is no basis to reverse the portion of the judgment as to Background Film Services.

### **DISPOSITION**

The judgment is affirmed. Respondents are entitled to costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.