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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

AMERICAN MASTER LEASE, LLC,

Plaintiff and Appellant,

v.

IDANTA PARTNERS, LTD. et al.,

Defendants and Respondents.

B287909

(Los Angeles County
Super. Ct. No. BC367987)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ramona G. See, Judge. Affirmed.

Klapach & Klapach and Joseph S. Klapach for Plaintiff and Appellant.

Fox Rothschild, John Shaeffer and Jeffrey Grant for Defendants and Respondents.

INTRODUCTION

In 2012 a jury awarded American Master Lease, LLC (AML) $7,075,891 in restitution on its cause of action for aiding and abetting breach of fiduciary duty against defendants Idanta Partners, Ltd. (Idanta), David J. Dunn, Steven B. Dunn, and the Dunn Family Trust (collectively, the Idanta defendants). In *American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451 (*AML I*) we held the trial court erroneously instructed the jury on the amount of unjust enrichment it could award. Therefore, we reversed the judgment and remanded for a new trial on the amount of the defendants' unjust enrichment. (*Id.* at pp. 1486, 1494.)

On retrial the jury awarded AML zero dollars in unjust enrichment. AML appeals, arguing that the trial court again erroneously instructed the jury on unjust enrichment and that counsel for the Idanta defendants engaged in misconduct. AML has not demonstrated, however, that the court erroneously instructed the jury or that any misconduct by counsel for the defendants was prejudicial. Therefore, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Underlying Dispute*

In 1998 Neal Roberts formed AML to invest in real estate, using an investment vehicle known as a 1031 FORT.[1] Roberts

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[1] FORT stands for Fractionalized Ownership in Real estate Tax deferred, and 1031 is the section of the Internal Revenue Code applicable to real estate exchanges. (*AML I*, *supra*, 225 Cal.App.4th at p. 1459.)

was AML's managing member and board chair. AML's other members were Jim Andrews, Charles Runnels, and Michael Franklin, who together served as AML's operational managers (the Operating Group). AML's operating agreement included a noncompete provision: "'The Members agree that the business of the LLC, either to sell AML Products . . . directly to purchasers or to sell AML Products indirectly through an accommodator as part of a tax-exempt transaction, is unique. . . . No Member, Principal of a Member or holder of an Economic Interest of a Member, may have any interest, directly or indirectly, in any business that offers to sell or exchange AML Products or is otherwise competitive with [AML], nor may any such Member, Principal or Economic Interest holder be employed by, or act as a consultant to, any such competitive business without the approval of a Majority In Interest of the Class A and Class B Members, voting as a Class.'" (*AML I*, *supra*, 225 Cal.App.4th at p. 1459, fn. omitted.)

In 2003, after several years in which AML unsuccessfully sought investment partners, Roberts vetoed a proposal by the Operating Group to partner with Idanta, a venture capital firm whose managing general partner was David Dunn. Dunn was also the sole trustee of the Dunn Family Trust, which held most of his assets. Dunn's son, Steven, had also worked for and been a partner in Idanta. For a period in early 2004, the Operating Group, Roberts, and David Dunn discussed proposals to form a new company to pursue AML's FORT transactions, but they could not reach agreement.

In March 2004 Runnels formed FORT Properties, Inc. (FPI), an entity to whom the Operating Group, purportedly on behalf of AML, granted a nonexclusive license to use AML's business method. Initially, Runnels and Franklin owned 100 percent of FPI's shares, but in April 2004 David and Steven Dunn, the Dunn Family Trust, and Idanta bought 2,441,176 of FPI's preferred shares for $1 per share, giving them 83 percent of FPI's common and preferred stock.

In September 2004 Roberts notified the Dunns and Idanta that FPI's license agreement with AML was not authorized by AML and that Roberts believed the members of the Operating Group, in granting the license, breached their duties under AML's operating agreement and their fiduciary duties to AML. Within a month, FPI cancelled the license agreement with AML, and then engaged in several FORT transactions without AML. Idanta and the Dunn Family Trust provided $25 million in financing for these transactions "'[p]lus a commitment to put in up to 25 million for subordinated loans on [each] individual [FORT] transaction.'" (*AML I*, *supra*, 225 Cal.App.4th at p. 1465.) FPI paid Idanta and the Dunn Family Trust $2.45 million in interest, at prime plus eight percent, on loans totaling approximately $74 million.

In March 2007 AML filed this action against the Idanta defendants alleging, among other causes of action, aiding and abetting breach of fiduciary duty and interference with contract.[2] Shortly thereafter, in June 2007, the Idanta defendants sold back to FPI the preferred shares they had purchased in April 2004. In *AML I*, *supra*, 225 Cal.App.4th at page 1466, we described that transaction as one in which "FPI agreed to pay Idanta and the Dunn Family Trust $5.8 million for the preferred stock they had

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[2] Roberts instituted arbitration proceedings against the members of the Operating Group, and those parties ultimately settled their dispute.

purchased in April 2004 for $2.3 million. The initial payment for the repurchase of the stock was $2.9 million, with the payment of another $2.9 million after closing. FPI made the first $2.9 million payment, and then, during the pendency of this litigation in 2009, paid $300,000 towards the second $2.9 million payment. Idanta and the Dunn Family Trust agreed to accept an additional $100,000 in lieu of the remaining $2.6 million owed on the second payment."

B. *The First Trial*

In June 2012 the court conducted a jury trial on AML's causes of action for aiding and abetting breach of fiduciary duty and for interference with contract. In support of AML's request for restitution, its expert, Kelly Melle, testified he was "'asked to compute the dollar amount of the benefit that the defendants received [as of June 13, 2012,] from a revolving loan agreement and a preferred stock sale.'" (*AML I*, *supra*, 225 Cal.App.4th at p. 1468.) He calculated that the defendants earned $2,328,892 in interest on loans to FPI between 2004 and 2007 and that with prejudgment interest the total amount of this benefit was $3,399,287. He also "'did an analysis of the benefits [defendants] received'" from the June 2007 sale of their FPI stock. (*Ibid*.) The "'sale called for a payment of 2.9 million dollars and then following the closing, other payments of another 2.9 million, for a total of 5.8 million dollars or 5,808,826 dollars.'" (*Ibid*.) Adding interest through June 13, 2012, Melle calculated the total amount of this benefit was $7,075,891.

Melle acknowledged, however, that shortly after he performed his calculations "'there were payments of about 300,000 dollars,' and that the defendants subsequently 'took

100,000 dollars instead of [the remaining] 2.6 million.'" (*AML I*, *supra*, 225 Cal.App.4th at 1468.) Melle's calculations did not take into account that, because the Idanta defendants did not receive all of the second $2.9 million payment, they did not receive the entire $5.8 million. Nor did Melle take into account the Idanta defendants' initial investment of $2.3 million to acquire the FPI stock. Melle stated he did not take these facts into account because his task was to calculate the gross benefits defendants received "'at the time they closed the deal,'" not "'profits.'" (*Ibid*.)

The jury found that AML proved the elements of both its causes of action, but that the statute of limitations barred AML's cause of action for interference with contract. The jury awarded AML restitution (the verdict form called it "damages") in the amount of $7,075,891—the exact figure Melle had calculated as "'the benefits [defendants] received'" from the June 2007 sale of their FPI stock, including interest. (*AML I*, *supra*, 225 Cal.App.4th at pp. 1470-1471.)

C. *The First Appeal*

The Idanta defendants appealed, contending among other things, equitable remedies available for breach of fiduciary duty, including unjust enrichment and disgorgement, were not available for aiding and abetting breach of fiduciary duty. We did not agree with this contention. (*AML I*, *supra*, 225 Cal.App.4th at pp. 1471-1486.) We did agree with the Idanta defendants, however, that the trial court prejudicially erred in instructing the jury on unjust enrichment and disgorgement and that the amount the jury awarded was not consistent with controlling law or supported by substantial evidence. (*Id.* at pp. 1486-1487.)

As we explained, "There are two types of disgorgement: restitutionary disgorgement, which focuses on the plaintiff's loss, and nonrestitutionary disgorgement, which focuses on the defendant's unjust enrichment." (*AML I*, *supra*, 225 Cal.App.4th at p. 1482.) The latter, we held, "is an appropriate remedy for aiding and abetting a breach of fiduciary duty." (*Id.* at p. 1483.) We stated that, "[i]n measuring the amount of the defendant's unjust enrichment, the plaintiff may present evidence of the total or gross amount of the benefit, or a reasonable approximation thereof, and then the defendant may present evidence of costs, expenses, and other deductions to show the actual or net benefit the defendant received." (*Id.* at p. 1487.) "Thus, '[a]s a general rule, the defendant is entitled to a deduction for all marginal costs incurred in producing the revenues that are subject to disgorgement. Denial of an otherwise appropriate deduction, by making the defendant liable in excess of net gains, results in a punitive sanction that the law of restitution normally attempts to avoid.'" (*Id.* at pp. 1487-1488.)

We concluded that two of the trial court's jury instructions violated these principles. First, Special Instruction No. 7 in the first trial "incorrectly told the jury that it had to consider the value of the benefits defendants received at the time of acquisition of the benefits." (*AML I*, *supra*, 225 Cal.App.4th at p. 1488.) The instruction also "incorrectly told the jury that it could not reduce the value of the benefits defendant received 'by any events occurring after they were first acquired, including any later decision by Defendants to accept less for the benefits they received than their value on the date they received them.'" (*Id.* at p. 1489.)

Second, Special Instruction No. 4 in the first trial "compounded the problem by instructing the jury that it 'must only focus on the profit received or to be received by Defendants.'" (*AML I*, *supra*, 225 Cal.App.4th at pp. 1489-1490.) We explained there was no difference between the profit or benefit "received" and that "to be received": "Defendants received one benefit, an equity interest in FPI. There may have been a dispute about how to value this benefit, but both sides were entitled to present evidence of its value, and the jury was entitled to determine how much it was really worth. The 2004 value of $2.3 million and the 2007 values of $3.5 million and $400,000 were evidence of the value of the unjust enrichment defendants obtained as a result of their wrongful conduct, but none of these values was conclusive, and the jury was entitled to 'focus' on any or all of them." (*Id.* at p. 1490, fn. omitted.)

We determined these instructional errors were prejudicial because, among other considerations, "the evidence was that defendants obtained a net benefit from the sale of their FPI stock of approximately $1 million ($600,000 from the first $2.9 million payment, plus $400,000), not the $5.8 million [plus interest] the jury awarded." (*AML I*, *supra*, 225 Cal.App.4th at p. 1491.) We therefore reversed the judgment "as to the amount of defendants' unjust enrichment," affirmed the judgment in all other respects, and directed the trial court to grant a new trial on "the issue of the amount of defendants' unjust enrichment only." (*Id.* at p. 1494.)

We included in our opinion in *AML I* several jury instructions the trial court should give at the retrial. We stated: "On remand, the trial court should instruct the jury that the amount by which defendants were unjustly enriched 'is the net profit attributable to the underlying wrong.' [Citation.] In calculating the net profit attributable to the underlying wrong, the jury will need guidance on how to evaluate three important numbers in this case: (1) the $2.3 million defendants paid for the FPI stock in April 2004, (2) the value of the FPI stock defendants received when they purchased the stock in April 2004, and (3) the value of defendants' right to receive the second $2.9 million payment when they sold the stock in June 2007. On the first issue, the trial court should instruct the jury that it should give defendants 'credit for money expended in acquiring or preserving the property or in carrying on the business that is the source of the profit subject to disgorgement.'" (*AML I*, *supra*, 225 Cal.App.4th at pp. 1491-1492.) "On the second issue, the trial court should instruct the jury it should consider the face value of the benefits at the time defendants received them (i.e., the $2.3 million defendants paid for the FPI stock), as well as evidence that the benefits were worth more or less than what defendants paid for them." (*Id.* at p. 1492.) "On the third issue, the trial court should instruct the jury that in determining whether defendants have met their burden of proving any deductions or discount from the right to receive the second $2.9 million, the jury may consider defendants' ability to collect the full contract price for the sale of their stock and FPI's solvency [citations], or even evidence that defendants intentionally chose not to collect the full amount due for the sale of their FPI stock in order to minimize their liability in this litigation." (*Id.* at pp. 1492-1493.)

"Finally," we stated, "the trial court should instruct the jury . . . that '"[w]here a person is entitled to a money judgment against another because by fraud, duress or other consciously tortious conduct the other has acquired, retained or disposed of his property, the measure of recovery for the benefit received by the other is the value of the property at the time of its improper acquisition, retention or disposition, or a higher value if this is required to avoid injustice where the property has fluctuated in value . . . ." [Citation.]' [Citations.] Such an instruction will assist the jury in deciding how to value the second $2.9 million payment, which defendants essentially claim decreased to $400,000." (*AML I*, *supra*, 225 Cal.App.4th at p. 1493, fn. omitted.)

D. *The Second Trial*

1. *The Dispute over the Scope of the Retrial*

The second trial began in June 2017, and from the outset the parties disputed its proper scope. The Idanta defendants contended that the trial was limited to determining the value of the benefit they received from selling their FPI stock and that the trial court should exclude evidence concerning any other alleged benefit they received, such as interest earned on loans they made to FPI. They argued that the verdict from the first trial demonstrated the jury found the stock sale benefit was the only alleged benefit attributable to the defendants' wrongdoing and that this court had affirmed the judgment in that respect. They cited, for example, our statement in discussing instructional error that "[d]efendants received one benefit, an equity interest in FPI" (*AML I*, *supra*, 225 Cal.App.4th at p. 1490) and our focus, in providing jury instructions for retrial, on properly evaluating the benefit defendants' received from the stock sale.

AML, on the other hand, argued that "it doesn't matter what the jury did with respect to that particular set of issues because the court of appeal, at [defendants'] request, reversed it and said, 'Go back and make a new determination'" on the issue of unjust enrichment. According to AML, that meant a new trial on unjust enrichment "with no limitations" and "a blank slate" regarding "the benefit [defendants were] able to get from the underlying wrong." Responding to the defendants' argument that the remittitur was not for a determination on unjust enrichment generally, but only "the amount" of unjust enrichment, AML strenuously contended a "distinction between unjust enrichment and the amount of unjust enrichment . . . simply doesn't exist."

The trial court agreed with AML, denying a motion in limine by the defendants to exclude evidence regarding their revolving loan agreement with FPI and the interest they earned on loans made under that agreement. The trial court ruled "the new jury will evaluate the evidence of unjust enrichment . . . anew. The appellate court does not definitively state that the new jury must 'start' with the baseline profit figure that the prior jury decided and then make deductions accordingly."

2. *Relevant Evidence*

During the second trial AML's expert, John Duross O'Bryan, Jr., opined that, at the time the Idanta defendants bought their shares of FPI stock in April 2004, the value of their resulting 83 percent ownership interest in FPI was $25,248,589. He based this figure on, among other things, a "discounted cash flow" valuation model and a projection of FPI's revenues prepared by Franklin in February 2004. O'Bryan stated he was opining only on the value of the FPI stock at the time the defendants acquired it in April 2004, not on any benefit the defendants may have received as a result of acquiring the stock and not on whether the stock was AML's property. Asked about earlier opinions he offered in deposition relating to benefits received by the defendants, O'Bryan stated, "My understanding is this case has progressed. The benefits piece has come out . . . , and the value piece is what stayed in. . . . My understanding is the benefit component is out and now we're talking about value."

David Dunn testified the 2,441,176 shares of FPI stock the Idanta defendants bought in April 2004 were, on the day they bought them, worth the $1 per share they paid for them. He also testified concerning the terms of the revolving loan agreement with FPI and the interest Idanta and the Trust earned on the money they loaned FPI under that agreement.

The Idanta defendants' expert, Adam Meislik, opined that at the time the defendants bought their FPI shares in April 2004 those shares were worth what the defendants paid for them. He testified the discounted cash flow model O'Bryan relied on to value FPI was not appropriate because FPI did not have enough of an operating history to make O'Bryan's projections anything more than "guesses." Meislik also addressed the 2007 sale of the defendants' FPI shares, opining that the defendants did not in fact receive any benefit from it. He testified that, although Idanta and the Dunn Family Trust ultimately received about $950,000 more for their shares than they paid for them, this money represented compensation for the commitment to continue providing loans to FPI, a commitment "which costs money in the open market." He testified that, because Steven Dunn actually received less money for his shares than he paid for them, he lost money on the FPI shares he purchased.

3. *Jury Instructions*

At the conclusion of testimony in the second trial, the trial court instructed the jury that a previous jury had already determined the defendants were liable to AML for aiding and abetting breaches of fiduciary duty by certain minority owners of AML. The trial court gave the following instructions for determining the amount for which the defendants were liable.

Special Instruction No. 4: "An individual is required to make restitution if he or she is unjustly enriched at the expense of another. A person is unjustly enriched if the person received a benefit at another's expense. Benefit means any type of advantage. The 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. A third person who has colluded with a fiduciary in committing a breach of duty, and who obtained a benefit therefrom, is under a duty of restitution to the beneficiary."

Special Instruction No. 1: "Where a plaintiff is entitled to a money judgment against defendants because by their conduct, aiding and abetting the breach of fiduciary duties of others, the defendants have acquired, retained or disposed of plaintiff's property, the measure of recovery for the benefit received by defendants is the value of the property at the time of its improper acquisition, retention or disposition, or a higher value if this is required to avoid injustice where the property has fluctuated in value."

Special Instruction No. 5: "Plaintiff has the burden of producing evidence from which you can make at least a reasonable approximation of the Defendants' unjust enrichment, and the Defendants are then free to introduce evidence tending to show that the true extent of unjust enrichment is something less."

And Special Instruction No. 3: "The amount by which Defendants were unjustly enriched is the net profit attributable to the underlying wrong. You should consider the face value of the benefits at the time Defendants received them, as well as evidence that the benefits were worth more or less than what Defendants paid for them.

"You should give Defendants credit for money expended in acquiring or preserving the property or in carrying on the business that is the source of the profit subject to an award of unjust enrichment. The object of restitution is to eliminate profits from wrongdoing while avoiding, so far as possible, the imposition of a penalty.

"In determining whether Defendants have met their burden of proving any deductions or discount from the right to receive the second $2.9 million, you may consider Defendants' ability to collect the full contract price for the sale of their stock and [FPI's] solvency or even evidence that Defendants intentionally chose not to collect the full amount due for the sale of their [FPI] stock in order to minimize their liability in this litigation."

4. *Closing Argument*

Counsel for AML began his closing argument: "First, what's this case been about? This case is about the value of the ownership in April 2004 the defendants had in [FPI], which they had set up by aiding and abetting breaches of fiduciary duty by

AML's management team . . . . [P]ut simply, they gutted AML and they took all the valuable assets and they put it into [FPI]." Citing Special Instruction No. 1, counsel for AML argued it was entitled to recover "the biggest number" for the value of the property wrongfully acquired by the defendants, which was $25.2 million, the value AML's expert assigned the defendants' ownership interest at the time they acquired it in April 2004. Throughout his closing argument, counsel for AML insisted that when the members of AML's management team, aided and abetted by the Idanta defendants, breached their fiduciary duties, AML's "property was taken," including its intellectual property and its management team, and "stuffed . . . into [FPI]." AML told the jury: "You're here to value . . . the contents of AML that were taken."

In his closing argument, counsel for the Idanta defendants told the jury it could make an award using one of "two methods": It could award AML the value of its property that the Idanta defendants acquired, or it could award the value of any net profits by the defendants that were attributable to the underlying wrong. He argued AML had focused entirely on the first method, did not "seem to care a bit" about the second, and had "introduced zero evidence . . . defendants earned anything on anything they received from [FPI]." Moreover, he argued, AML had not shown that any of the ownership interest in FPI the defendants acquired in April 2004 was AML's property or that the defendants acquired any other property belonging to AML. Regarding the second method, he argued that AML failed to carry its burden of producing evidence from which the jury could make a reasonable approximation of the defendants' unjust enrichment and that, in any event, the defendants did not receive any net profits attributable to the underlying wrong. Thus, he argued, AML was not entitled to recover anything under either method.

In his rebuttal argument, counsel for AML expressed his disbelief that opposing counsel continued "to pretend that these guys [i.e., the Idanta defendants] didn't get anything that belonged to the plaintiff." He argued that, to the contrary, the defendants acquired AML's "company," "management team," "partners," "methodology," and "the 'FORT' name"—"[t]hey took everything except [Roberts], the guy who had the idea." Counsel for AML still did not address the second "method" counsel for the Idanta defendants identified for determining an award (i.e., the defendants' net profits attributable to the wrong).

5. *Verdict, Motion for a New Trial, and Appeal*

Finding the Idanta defendants "were unjustly enriched" in the amount of zero dollars and were "entitled to credit (if any) . . . for expenditures they made to acquire the property they wrongfully obtained" in the amount of zero dollars, the jury awarded AML zero dollars. AML filed a motion for a new trial on the grounds, among others, of instructional error and misconduct by counsel for the Idanta defendants. The trial court denied the motion, and AML timely appealed.

DISCUSSION

A. *The Trial Court Did Not Commit Reversible Instructional Error*

"Appellate courts apply a de novo standard of review when determining whether the trial court's jury instructions were proper because the propriety of a jury instruction is a question of law." (*Harb v. City of Bakersfield* (2015) 233 Cal.App.4th 606, 617.) "In addition to showing an instructional error occurred, an appellant must establish the error was prejudicial," meaning the appellant must show that, but for the error, "it was 'reasonably probable the jury would have returned a more favorable verdict.'" (*Ibid.*; see *Evans v. Hood Corp.* (2016) 5 Cal.App.5th 1022, 1045.)

AML contends the trial court made two instructional errors in the second trial. First, AML points to the statement in Special Instruction No. 1 that, where a plaintiff is entitled to a money judgment against the defendants because by their conduct the defendants "have acquired . . . plaintiff's property," the measure of recovery for the benefit received by defendants is the value of the property at the time of its improper acquisition, unless a higher value is required to avoid injustice where the property has fluctuated in value. According to AML: "This instruction incorrectly advised the jury that AML's right to recover from the Idanta Defendants was limited exclusively to the restitution of *AML's* property . . . . Or, to put it another way, the trial court mistakenly instructed the jury that AML could only recover *restitutionary* disgorgement based on what property AML had lost and could not recover *nonrestitutionary* disgorgement based on what net profits the Idanta Defendants had gained."

This argument verges on the frivolous. We specifically directed the trial court to give an instruction materially identical to Special Instruction No. 1, and both versions correctly stated the law.[3] (*AML I*, *supra*, 225 Cal.App.4th at p. 1493.) Moreover,

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[3] In its reply brief, AML appears to suggest, incorrectly, that Special Instruction No. 1 misstated the law because it substituted the words "plaintiff" and "plaintiff's" for the words "person" and "person's" in the instruction we directed the trial court to give.

nothing in the language of this instruction on restitutionary disgorgement suggested AML could not instead (or even also) recover nonrestitutionary disgorgement, which the trial court addressed, again as we directed, in Special Instruction No. 3. In addition, this instruction provided the jury necessary guidance regarding two arguments AML made in its closing: (1) that the defendants had wrongfully acquired some of AML's property and (2) that AML was entitled to recover the $25 million it claimed the FPI stock was worth at the time the defendants acquired the stock, which would only be true if the stock were AML's property. And finally, even assuming this instruction erroneously suggested AML could not recover nonrestitutionary disgorgement (i.e., disgorgement of defendants' net profits), AML was not prejudiced because it made no attempt to argue for recovery based on the defendants' net profits.

Second, AML cites Special Instruction No. 4, the general instruction on unjust enrichment, and in particular its statements that "[a]n individual is required to make restitution if he or she is unjustly enriched at the expense of another" and that "[t]he person receiving the benefit [of unjust enrichment] 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." AML does not suggest these are incorrect statements of the law, and they are not; they come directly from our review of the law of restitution in *AML I*, *supra*, 225 Cal.App.4th at pages 1481-1482.

Rather, AML argues it was error for the trial court to give these instructions because they "invited the jury to decide not merely the *amount* of the Idanta Defendants' unjust enrichment, but also the threshold question of whether the Idanta Defendants had been unjustly enriched from their misconduct at all," which AML now maintains was beyond the proper scope of the retrial. According to AML, "this Court remanded this case for a narrow re-trial 'on the issue of the *amount* of unjust enrichment *only*.' [Citation.] By affirming the [previous] jury's verdict 'in all other respects,' this Court contemplated that the re-trial would focus solely on the '*value*' of the Idanta Defendants' 'equity interest in FPI,' and that the jury would award AML the net profits obtained by the Idanta Defendants from their stock after the reduction of any offsets."

In other words, AML takes exactly the opposite position it took in the trial court, when, to avoid limiting its recovery to the defendants' net benefit from the stock sale, AML ardently contended we remanded for retrial with a "blank slate" regarding the defendants' "benefit . . . from the underlying wrong." Indeed, as discussed, at the second trial AML refused to recognize any "distinction between unjust enrichment and the amount of unjust enrichment." And it was AML that persuaded the trial court not to limit the trial to a determination of the value of the benefit the defendants received from the stock sale, but to have the jury "evaluate the evidence of unjust enrichment . . . anew."

We agree with the Idanta defendants that AML is estopped from challenging Special Instruction No. 4 on the ground AML asserts. "[W]hen a party bears some responsibility for the claimed error, they are generally estopped from taking a different position on appeal or are deemed to have waived the error. [Citations.] '[W]here a deliberate trial strategy results in an outcome disappointing to the advocate, the lawyer may not use that tactical decision as the basis to claim prejudicial error.'" (*City of Scotts Valley v. County of Santa Cruz* (2011) 201

Cal.App.4th 1, 29; see *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403 ["'[w]here a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal' on appeal"]; *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1191 ["'"[i]t seems patently wrong to allow a person to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite"'"]; see also *Kerley v. Weber* (2018) 27 Cal.App.5th 1187, 1195 ["[t]he doctrine of judicial estoppel 'prohibits a party from asserting a position in a legal proceeding that is contrary to a position he or she successfully asserted in the same or some earlier proceeding'"].)

B. *Any Misconduct by Counsel for the Idanta Defendants Does Not Warrant Reversal*

1. *Applicable Law and Standard of Review*

"'The law, like boxing, prohibits hitting below the belt. The basic rule forbids an attorney to pander to the prejudice, passion or sympathy of the jury.' [Citation.] 'The rule also manifests itself by prohibiting irrelevant ad hominem attacks.' [Citation.] 'Personal attacks on the character or motives of the adverse party, his counsel or his witnesses are misconduct.' [Citation.] Similarly, repeated violations of pretrial in limine rulings, despite sustained objections, is misconduct." (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 295; accord, *Martinez v. Department of Transportation* (2015) 238 Cal.App.4th 559, 566-567.)

But to justify a new trial, "it is not enough for a party to show attorney misconduct. [Rather,] the party must demonstrate that the misconduct was prejudicial. [Citation.] As to this issue, a reviewing court makes 'an independent determination as to whether the error was prejudicial.' [Citation.] It 'must determine whether it is reasonably probable [that the appellant] would have achieved a more favorable result in the absence of that portion of [attorney conduct] now challenged.' [Citation.] It must examine 'the entire case, including the evidence adduced, the instructions delivered to the jury, and the entirety of [counsel's] argument,' in determining whether misconduct occurred and whether it was sufficiently egregious to cause prejudice. [Citation.] 'Each case must ultimately rest upon a court's view of the overall record, taking into account such factors, inter alia, as the nature and seriousness of the remarks and misconduct, the general atmosphere, including the judge's control, of the trial, the likelihood of prejudicing the jury, and the efficacy of objection or admonition under all the circumstances.'" (*Garcia v. ConMed Corp.* (2012) 204 Cal.App.4th 144, 149; accord, *Bigler-Engler v. Breg, Inc.*, *supra*, 7 Cal.App.5th at p. 296.)

2. *AML Has Not Demonstrated Prejudicial Attorney Misconduct*

AML contends counsel for the Idanta defendants procured the jury's verdict through persistent misconduct "designed to exploit the trial court's erroneous [jury] instructions." AML provides a long list of what it argues were instances of such misconduct, beginning with counsel's indirect reference during opening statement to an arbitration between AML and its management team, despite a ruling by the trial court prohibiting references to that proceeding. AML contends counsel for the Idanta defendants also referred to excluded evidence throughout the trial and asked witnesses “hundreds” of improper questions. AML also argues opposing counsel engaged in improper closing argument by, for example, suggesting the jury should consider David Dunn’s advanced age, the fact the defendants “don’t have $25 million,” and whether this is “the type of case that should be in our courts.”

But even assuming the conduct of which AML complains constituted attorney misconduct, the conduct was not prejudicial. First, AML has not shown there were any erroneous jury instructions for defendants’ counsel to “exploit.” Second, the trial court sustained AML’s objections to the improper references and questions, struck offending statements, and at AML’s request gave curative instructions concerning improper arguments made by counsel for defendants.[4] (See *Hernandez v. First Student, Inc.* (2019) 37 Cal.App.5th 270, 286 [“‘Attorney misconduct is incurable only in extreme cases.’”]; *Pope v. Babick* (2014) 229 Cal.App.4th 1238, 1250 [“[a]bsent some indication in the record, we presume the jury followed the court’s instructions [to disregard statements resulting from attorney misconduct] and that its verdict reflects the limitations the instructions imposed”]; *Dominguez v. Pantalone* (1989) 212 Cal.App.3d 201, 211-212 [“the effect of misconduct can ordinarily be removed by an instruction to the jury to disregard it”].)

Third, and most important, AML’s unfavorable result at trial is independently attributable to its trial strategy and tactics. The record shows that AML’s object at trial was to establish its right to recover $25 million, the amount it claimed the FPI stock

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[4] The trial court also let counsel for AML “explain” to the jury his successful objection to improper closing arguments made by counsel for defendants.

was worth when the defendants acquired it in 2004. But the only way AML would be entitled to that amount was on a theory of restitutionary disgorgement, which required AML to establish that (a) the FPI stock was AML's property and (b) the stock was worth $25 million when (or at some relevant point after) the defendants acquired it. As AML now acknowledges, however, AML "was never going to be able to prove that the FPI stock was AML's property" because "AML never owned the FPI stock." And AML made no attempt to establish its right to recover any amount on a theory of nonrestitutionary disgorgement, which counsel for AML did not even address in his closing or rebuttal argument. AML does not suggest that any of the supposed attorney misconduct it cites influenced its choice to pursue this fatal trial strategy. It is therefore not reasonably probable AML would have obtained a more favorable result in the absence of the conduct it complains of.

DISPOSITION

The judgment is affirmed. The Idanta defendants are to recover their costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J.

STONE, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.