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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PAUMA BAND OF LUISEÑO MISSION INDIANS, Plaintiff and Appellant, v. HARRAH'S OPERATING COMPANY, INC., et al., Defendants and Appellants.	D050667 (Super. Ct. No. GIC847406)

APPEALS from a judgment and orders of the Superior Court of San Diego County, John S. Meyer, Judge. Affirmed in part; reversed in part with directions.

This case arises from unsuccessful negotiations between the Pauma Band of Luiseño Mission Indians (Pauma) and Caesars Entertainment, Inc. (Caesars), for Caesars's development and operation of an expanded casino on Pauma's reservation, and the merger during the negotiations of Caesars and Harrah's Operating Company, Inc. (Harrah's), which operates a nearby casino for the Rincon Band of Luiseño Indians

(Rincon).[1] In Harrah's appeal, the issue is whether a $30 million judgment against it on the cause of action in Pauma's complaint for intentional interference with prospective economic relations must be reversed because the jury's special verdict is fatally inconsistent. We answer the question in the affirmative. The complaint's causes of action for a violation of the Cartwright Act (Bus. & Prof. Code, § 16700 et seq.), and for tortious interference were both predicated solely on the same alleged wrong, an agreement between Harrah's and Caesars to restrain trade by allocating or dividing customers or territories. The jury found in Harrah's favor on the Cartwright Act claim, but in Pauma's favor on the tortious interference claim. Because the inconsistency cannot be reconciled, we reverse the judgment insofar as it concerns these two causes of action against Harrah's, and direct the court to enter an order granting Harrah's motion for a new trial.

In its appeal, Pauma contends the court improperly denied its equitable cause of action against Caesars for promissory estoppel, on the ground Pauma did not detrimentally rely on Caesars's conduct in obtaining an amended gaming compact from the State of California, which increased the number of slot machines Pauma's casino may operate in exchange for annual payments to the state. We find no abuse of discretion and affirm the judgment as to Caesars. Further, we reverse an order awarding costs, and an order purporting to make an interlocutory order the final appealable order.

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1 Various related entities of Harrah's and Ceasars are involved in this case, but to avoid confusion we refer to all Harrah's entities collectively as Harrah's, and to all Caesars entities collectively as Caesars.

FACTUAL AND PROCEDURAL BACKGROUND

In 2001 Pauma opened a casino with 850 slot machines on its reservation in San Diego County. Pauma wanted to be more competitive with other casinos in the area, and in 2003 it requested proposals for the expansion of the casino and its operation. Several companies responded, including Caesars. In September 2003 Pauma's general council, which consists of all adult members of the tribe, voted to pursue a deal with Caesars. Caesars represented that it is "the best-known, most powerful casino brand in the world," and the "Caesars database has nearly a half million qualified players within 100 miles of Pauma."

By March 2004 Pauma and Caesars had agreed on most of the terms of draft agreements, one for the development of a casino with 2,000 slot machines and a resort hotel, and another for its operation. The estimated development cost was $285 million, and Caesars was to advance initial development costs and assist Pauma in obtaining financing for the project. Pauma was entitled to Caesars "high-end" brand, meaning features that distinguish it from other casinos, such as columns and fountains in the architectural design, and to Caesars's customer database. Caesars was entitled to a development fee, an intellectual property fee and a 27 percent management fee. Pauma's general council approved the agreements and the tribe's chairman signed them in early July 2004.

Caesars's obligations under the proposed deal depended on Pauma's ability to obtain authorization from the State of California to operate 2,000 slot machines. In June 2004 Pauma successfully negotiated an amended gaming compact with the state, which

allowed it to operate 2,000 or more slot machines, and extended its right to conduct gaming operations by 10 years, in return for an 18-year commitment to pay the state approximately $5.75 million per year beginning January 1, 2005.

Rincon, whose casino (named Harrah's Rincon) is about six miles from Pauma's casino, brought an unsuccessful federal court challenge to the validity of Pauma's amended compact. In November 2003 Rincon had announced plans to expand its resort and build a second hotel tower, and Harrah's guaranteed $320 million in loans to Rincon for its original facility and the expansion. In opposing the amended compact, Rincon argued "there will be a direct impact on Rincon's revenues, thereby jeopardizing the economic viability of the operation. As a result, Rincon would have difficulty paying its loan obligations, making distributions for its economic self-sufficiency, and self-reliance, and it may jeopardize it[s] relationships with its banks and with [Harrah's]."

On July 14, 2004, Caesars and Harrah's announced plans to merge.[2] Caesars had not yet signed the draft agreements for the Pauma project. When Pauma asked what it should do with the drafts given the merger announcement, Caesars advised it to hold onto them until its negotiators learned more about the situation.

Pauma was concerned about the merger because it appeared that Harrah's would step into Caesars's shoes in the proposed deal. Pauma worried that it may no longer get what it bargained for on the "Caesars brand" and that Caesars may share its customer database with Harrah's. Further, Pauma assumed (correctly) that the Rincon's

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2 The merger was not finalized until June 2005.

management agreement with Harrah's had an exclusivity clause that precluded Harrah's from operating another gaming facility in the area, and Pauma questioned whether Rincon would agree to Harrah's operating a casino for Pauma.

Thus, before finalizing a deal with Caesars, Pauma demanded stronger written assurances it would still get the "Caesars brand." Pauma's attorney, Larry Stidham, "wanted it as clear as possible in the documents what Caesars brand was, what it was going to be, and then how you guarantee that brand." "So that if the Caesars people are no longer there, the Harrah's people come in, they can look at a document and see what we are talking about." Pauma "didn't want the Caesars concept to get lost once . . . Harrah's takes over."

According to Caesars's CEO, Caesars initially intended to proceed with the project notwithstanding the merger. In late July 2004, a Caesars's negotiator, Michael Soll, met with Stidham and Pauma tribe members and offered to sign the draft agreements Pauma had already signed. Pauma, which still held the documents, declined the offer and told Soll the tribe needed the additional assurances. Soll said he was open to the idea, and Caesars's attorney, Kent Richey, confirmed that Pauma's expanded casino "would be a Caesars."

Stidham proposed modifications to the contract documents, including stronger assurances pertaining to the Caesars brand, and liquidated damages for any breach of the assurances. The liquidated damages clause ensured Pauma's profits by requiring Caesars to pay it the difference (minus Caesars's 27 percent management fee) if earnings fell below levels projected in a business plan submitted to the federal government.

According to the chairman of Pauma's general council, Pauma wanted a "harsh" penalty so Caesars "would not renege on our deal."

Richey attempted to draft contract language that would satisfy Pauma. On August 18, 2004, Richey e-mailed Stidham a draft document entitled "Outline of Terms for Caesar Guarantees Relating to a Harrah's Acquisition." (Some capitalization omitted.) The draft made minimum brand guarantees and included a liquidated damages clause.

Also on August 18, Pauma's general council held a meeting, during which the tribe realized the proposed deal with Caesars may not go through. Several other entities, however, were interested in developing the project and several tribe members felt Pauma was in the "driver's seat." The amended compact with the state was not yet final, but Pauma voted to proceed with it despite the obligation to begin making substantial payments to the state in January 2005. Pauma also voted to send out requests for proposals (RFP's) to other casino developers, but it did not rule out proceeding with Caesars.

Shortly thereafter, Pauma sent RFP's to all entities who had previously expressed interest, including Hard Rock, Station Casinos and Foxwoods. It also sent an RFP to Caesars. Pauma released the RFP to several media outlets, resulting in an article titled "Tribe's deal with Caesars may die," and stating Caesars "has apparently been ditched at the alter by the Pauma Band of Mission Indians."

On August 24, a Caesars vice president advised Richey and Stidham to continue working on "the brand language" outlined in the draft revisions. On August 27, Richey sent Stidham a "first draft at revisions designed to include the brand protection points we

have been discussing." Richey's cover letter stated, "This has not received full review by all Caesars folks but in the interest of proceeding I am sending it out." Richey included that language because he "wanted to make sure that it was understood that Caesars had every right to come back and reject what I had written."

During this period, Rincon advised Harrah's that in the best interest of the Rincon tribe, it would not waive the exclusivity clause in their management agreement. Caesars later notified Pauma it would not agree to modifications of the original agreements to provide brand guarantees and a liquidated damages clause. Caesars offered to sign the original draft agreements, but Pauma declined to produce them for signature.

In late September 2004, Pauma's negotiating team traveled to Las Vegas to meet with Caesars's negotiators. Caesars again offered to sign the original draft agreements, without any revisions. Caesars also, however, advised Pauma that Rincon "was not happy," and "would probably sue Harrah's if [it] supported [Pauma] being a Caesars" casino. Caesars told Pauma that it could "walk away from the deal and seek other options." Caesars offered to introduce Pauma to other casino developers in Las Vegas and give Pauma other assistance.

At an October 10, 2004 meeting of Pauma's general council, Caesars again offered to proceed under the original agreements. After discussing the possibility of Rincon litigation and delay, Pauma voted to terminate its relationship with Caesars, but to accept its offer of assistance. Pauma was concerned about "the lack of assurances [and] . . . the lack of knowing what was going to happen with the Rincon and Harrah's."

In early 2005, Pauma entered into negotiations with Hard Rock, but they ended unsucccessfully. Pauma then negotiated a deal with Foxwoods and signed agreements with it in about mid-2006.[3]

In May 2005 Pauma sued Caesars and Harrah's. The second amended complaint (hereafter complaint) contained causes of action against Caesars for breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel, and negligent and intentional misrepresentation; against Caesars and Harrah's for fraud and conspiracy to defraud, and violation of the Cartwright Act; and against Harrah's for intentional interference with contract and intentional interference with prospective economic relations.[4]

After a lengthy trial, the jury returned a special verdict in which it fully exonerated Caesars, but found against Harrah's on a single cause of action. As to the Cartwright Act claim, the jury rejected the theory that Caesars and Harrah's agreed to allocate or divide customers or territories. Even though that theory was also the sole predicate for the claim for intentional interference with prospective economic relations, the jury found against Harrah's on that claim. The jury awarded Pauma $8 million for lost profits and $22

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3 At the time of trial in October 2006, the agreement between Pauma and Foxwoods was under review by the National Indian Gaming Commission. The new casino was expected to open in 2009.

4 The complaint also contained a cause of action against Caesars and Harrah's for violation of California's unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.), but Pauma abandoned that claim.

million for increased construction costs. Below, we discuss postverdict procedural matters.

DISCUSSION

I

Appealability

Preliminarily, we address Pauma's concern there may not be an appealable judgment in this case. As it notes, "there was considerable confusion surrounding the trial court's attempts to conclude this matter."

An appeal may only be taken from a final order or judgment. (Code Civ. Proc., § 904.1, subd. (a)(1).) This rule codifies the " 'one final judgment' rule, a fundamental principle of appellate practice that prohibits review of intermediate rulings by appeal until final resolution of the case. 'The theory is that piecemeal disposition and multiple appeals in a single action would be oppressive and costly, and that a review of intermediate rulings should await the final disposition of the case.' " (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 697.)

The uncertainty began with the court's entry of a document entitled "JUDGMENT" before resolution of the entire case. When the jury retired for deliberations on the legal causes of action submitted to it, Pauma reminded the court about its remaining equitable promissory estoppel claim against Caesars. The court decided to "wait and see what the jury has to say" before deciding the promissory estoppel claim.

On receipt of the jury's verdict on December 1, 2006, the court directed Pauma to submit a proposed judgment. On December 22, 2006, Pauma delivered a proposed judgment to the court, with a cover letter asking the court "to enter [it] without further delay." The letter also reminded the court of Pauma's outstanding promissory estoppel claim, and stated that depending on the court's ruling on the claim "an amended or additional judgment may need to be entered." On December 22, the court signed and entered the proposed judgment.

In January 2007 Pauma and Caesars briefed the merits of the promissory estoppel issue. The court held a hearing on January 26 on the issue, along with Harrah's motions for judgment notwithstanding the verdict (JNOV) or new trial. The court had issued a tentative ruling that denied both motions, and stated the court declined to hear the promissory estoppel claim for mootness since it could only modify the December 22, 2006 judgment for limited reasons, such as clerical error. The court nonetheless explained at the hearing that it had considered the merits of the promissory estoppel claim, and if it had jurisdiction to decide the matter, it would not be inclined to grant Pauma any relief.

Pauma argued the court could modify the judgment since it was entered before all issues were resolved. Harrah's characterized the situation as "a mess," and the court stated, "I've never quite had this happen." Harrah's argued the court should issue a new judgment, and the court responded, "I don't know if I can." At the close of the hearing, the court invited the parties to submit a new judgment, saying, "It doesn't matter to me, I'll go ahead and sign off on an amended judgment. I don't want this thing to go on and

on." After taking the matter under submission, however, on January 29, 2007, the court issued an order that confirmed its tentative ruling.

On February 13, 2007, Harrah's submitted a proposed amended judgment to the court, which stated "[t]he court finds that its December 22, 2006 judgment was not final and was interlocutory in that it did not resolve all causes of action alleged by [Pauma] against the Caesars Defendants or Harrah's. That judgment is hereby vacated." The proposed amended judgment also stated that on "January 29, 2007, the court . . . ruled the promissory estoppel claim was not timely presented for adjudication and, in any case, was denied on its merits."

On February 16, 2007, however, Harrah's filed a notice of appeal of the December 22, 2006 judgment and the January 29, 2007 order denying its motion for JNOV. Pauma cross-appealed.

On February 20, 2007, the court signed and filed the amended judgment vacating the December 22, 2006 judgment. Harrah's then refiled its motions for JNOV and a new trial. Pauma then moved the court to vacate the February 20 judgment, arguing Harrah's appeal of the December 22 judgment divested the court of jurisdiction to enter a new judgment.

On March 28, 2007, this court dismissed Harrah's purported appeal of the December 22, 2006 judgment "on the grounds it is from a non-final judgment and interlocutory order." We also dismissed Pauma's cross-appeal.

After an April 13, 2007 hearing, the trial court issued an order in which it declined to rule on Pauma's motion to vacate the February 20 judgment or Harrah's renewed

motions for JNOV and a new trial, based on a lack of jurisdiction. Further, the ruling stated that "for clarification purposes, the December 22, 2006 judgment is the final judgment, the Court having been without jurisdiction to enter the February 20, 2007 Amended Judgment."

On April 13, Harrah's and Caesars appealed the February 20 judgment. On April 24, Pauma appealed the February 20 judgment.[5]

We conclude the court retained jurisdiction to enter the February 20, 2007 judgment, and it is appealable under the one final judgment rule because it disposed of all causes of action. "Timely filing of the notice of appeal vests *jurisdiction* in the appellate court, and subject to certain exceptions (such as new trial motions . . .) terminates the lower court's jurisdiction." (Eisenberg et al., Cal. Practice Guide, Civil Appeals and Writs (The Rutter Group 2008) ¶ 3:2, p. 3-1; Code Civ. Proc., § 916.) "The time to appeal begins to run once a final *appealable* order or judgment is entered." (*Eisenberg, supra,* at ¶ 3:5:5, p. 3-2, italics added.) Even a document entitled "final judgment" is not appealable unless it "does . . . *in fact* conclude matters between the parties." (*Jackson v. Wells Fargo Bank* (1997) 54 Cal.App.4th 240, 244.) The December 22, 2006 judgment on the jury verdict was interlocutory, and the purported appeal of that judgment did not vest jurisdiction in this court or divest the trial court of jurisdiction to enter a new judgment. An "interlocutory judgment is subject to modification at any time prior to the entry of a final judgment." (*European Beverage, Inc. v. Superior Court* (1996) 43

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[5] In addition, Harrah's appealed the April 13, 2007 order, Harrah's and Caesars appealed a March 2 order pertaining to costs, and Pauma appealed the same orders.

Cal.App.4th 1211, 1214.) The parties have properly appealed the February 20, 2007 final judgment and postjudgment orders.

II

Harrah's Appeal/Inconsistent Jury Verdict

A

" 'Inconsistent verdicts are " 'against the law' " ' and are ground for a new trial. [Citations.] 'The inconsistent verdict rule is based upon the fundamental proposition that a factfinder may not make inconsistent determinations of fact based on the same evidence. The rule finds parallel expression in the law relating to court findings: "Where the findings are contradictory on material issues, and the correct determination of such issues is necessary to sustain the judgment, the inconsistency is reversible error." ' [Citations.] An inconsistent verdict may arise from an inconsistency between or among answers within a special verdict [citation] or irreconcilable findings." (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 682.)

A trial court may reject an inconsistent verdict and require the jury to clarify it. (7 Witkin, Cal. Procedure (5th ed. 2008) Trial, § 371, p. 433.) "The power to correct continues until the verdict is recorded and the jury is finally discharged." (*Id.* at p. 434.) "In a trial, the court, the parties and the jury have invested time and energy towards the goal of providing the parties with a fair trial and a result based upon the jury's accurate understanding of the law. If the jury renders an inconsistent or ambiguous verdict, it is prudent, economical, and judicious to provide that jury with an opportunity to correct

those inconsistencies before it is discharged." (*Mizel v. City of Santa Monica* (2001) 93 Cal.App.4th 1059, 1072 [inconsistent special verdict].)

After discharge of the jury, a "trial court has both the power and the duty to make the judgment conform to the intention of the jury, where such is clear from the language of the verdict considered in connection with the pleadings, the evidence and the instructions." (*Tri-Delta Engineering, Inc. v. Insurance Co. of North America* (1978) 80 Cal.App.3d 752, 758.) "Where the trial judge does not interpret the verdict or interprets it erroneously, an appellate court will interpret the verdict if it is possible to give a correct interpretation. [Citations.] If the verdict is hopelessly ambiguous, a reversal is required . . . ." (*Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 457.)

"A court reviewing a special verdict does not infer findings in favor of the prevailing party [citation], and there is no presumption in favor of upholding a special verdict when the inconsistency is between two questions in a special verdict." (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1092.) We analyze the verdict's correctness as a matter of law. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285 (*Trujillo*).)

B

Pauma contends defendants waived appellate review of the inconsistent verdict issue by not asking the trial court to obtain a more certain verdict from the jury before it was discharged. It was Pauma's counsel, however, who first argued that jury clarification was not required. Harrah's counsel agreed, and the court stated, "I'm not sure . . . what I could do." Harrah's counsel then said, "I just wanted to raise the issue before you

discharge the jury, we're going to be asking you to throw the verdict out." The court responded, "Well, that's fine," "I don't know what I could do now," and "I think to tell them that there's an inconsistency would be — I don't know how I'd do that."

Harrah's was forthcoming, and it does not appear it acted in bad faith. Pauma could have asked the court to reject the verdict and require the jury to clarify it just as well as Harrah's could, and the court could have acted on its own. Further, the court's finding that the verdict was consistent, even after the matter was fully briefed and heard in a posttrial motion, indicates that a request by Pauma for clarification before the jury was discharged would have been futile.

At any rate, there was no waiver as a matter of law. The failure to object to the *form* of a verdict before the jury is discharged may constitute waiver (*Woodcock v. Fontana Scaffolding & Equip. Co.*, *supra*, 69 Cal.2d 452, 457, fn. 2; Code Civ. Proc., § 619), but Pauma does not object to the form of the verdict. It is well established that no objection is required to preserve the issue of inconsistent verdicts. (*Woodcock v. Fontana Scaffolding & Equip. Co.*, *supra*, at pp. 456-457; *Zagami, Inc. v. James A. Crone, Inc.*, *supra*, 160 Cal.App.4th 1083, 1093, fn. 6; *Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1182; *Cavallaro v. Michelin Tire Corp.* (1979) 96 Cal.App.3d 95, 105.)

C

We agree with Harrah's contention the jury's special verdict is fatally inconsistent.

Pauma's Cartwright Act count was based exclusively on Harrah's alleged agreement with Caesars to restrain trade by allocating or dividing customers or territories.

"The Cartwright Act (Bus. & Prof. Code, § 16700 et seq.), like the Sherman Antitrust Act (15 U.S.C. § 1 et seq.), was enacted to promote free market competition and to prevent conspiracies or agreements in restraint or monopolization of trade." (*Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1680.) The Cartwright Act prohibits "horizontal restraints," which include agreements between direct competitors to allocate or divide customers or territories. (*Ibid.*; *Guild Wineries & Distilleries v. J. Sosnick & Son* (1980) 102 Cal.App.3d 627, 634.) Horizontal restraints are ordinarily illegal per se. (*Exxon Corp. v. Superior Court, supra,* at p. 1680.) "Per se principles are formulated where the conduct involved is manifestly anticompetitive and has no clearly discernible benefits to competition." (*Guild Wineries & Distilleries v. J. Sosnick & Son, supra,* at p. 634.)

" ' "The tort of intentional . . . interference with prospective economic advantage imposes liability for improper methods of disrupting or diverting the business relationship of another . . . . [Citation.]" [Citation.]' [Citation.] The elements of the tort 'have been stated as follows: "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff, (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant."

[Citations.]' " (*Gemini Aluminum Corp. v. California Custom Shapes, Inc.* (2002) 95 Cal.App.4th 1249, 1255-1256, some capitalization omitted.)[6]

In *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392-393 (*Della Penna*), the California Supreme Court held that a "plaintiff seeking to recover for alleged interference with prospective economic relations has the burden of pleading and proving that the defendant's interference was wrongful 'by some measure beyond the fact of the interference itself.' " In *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1159-1160 (*Korea Supply*), the court explained: "It is this independent wrongfulness requirement that makes defendants' interference with plaintiff's business expectancy a tortious act. . . . [T]he requirement of pleading that a defendant has engaged in an act that was independently wrong distinguishes lawful competitive behavior from tortious interferences. Such a requirement 'sensibly redresses the balance between providing a remedy for predatory economic behavior and keeping legitimate business competition outside litigative bounds.' "

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6 The "competition privilege" protects a business from inducing a third party not to enter into a prospective contractual relationship with a competitor when " ' " '(a) the relationship [between the competitor and third person] concerns a matter involved in the competition between the actor and the competitor, and (b) the actor does not employ *improper means*, and (c) the actor does not intend thereby to create or continue an illegal restraint of competition, and (d) the actor's purpose is at least in part to advance his interest in his competition with the other.' . . . ." [Citation.] In short, the competition privilege furthers free enterprise by protecting the right to compete *fairly* in the marketplace. One may compete for an advantageous economic relationship with a third party as long as one does not act improperly or illegally.' " (*Gemini Aluminum Corp. v. California Custom Shapes, Inc.*, *supra*, 95 Cal.App.4th at p. 1256.)

In *Korea Supply*, the court clarified that "an act is independently wrongful if it is *unlawful*, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." (*Korea Supply, supra,* 29 Cal.4th at p. 1159, italics added.) "[S]uch an act must be wrongful by some legal measure, rather than merely a product of an improper, but lawful, purpose or motive." (*Id.* at p. 1159, fn. 11.)

The directions for CACI No. 2202, the instruction for the tort of intentional interference with prospective economic relations, explains that as to the element of independent wrongful conduct "*the court must specifically state for the jury the conduct that the judge has determined as a matter of law would satisfy the 'wrongful conduct' standard*. This conduct must fall outside the privilege of fair competition. [Citations.] The jury must then decide whether the defendant engaged in the conduct *as defined by the judge*." (CACI No. 2202 (2009 ed.), Directions for Use, p. 1166, italics added.)

The record reveals that the only theory of anti-competitive conduct Pauma argued to the jury on *both* the Cartwright Act and the tortious interference claims was the alleged Cartwright Act violation of allocating or dividing customers or territories. During closing argument, Pauma's attorney, Dennis Stewart, first addressed the Cartwright Act claim, explaining "it is the actual jury instruction, having to do with restraints on competition and in this case, restraint on territorial competition, what it is is an agreement between two or more competitors that they're not going to compete for the particular business or particular territories. Remember what I said each of these causes of action have elements, well, these are the elements of that claim whether Caesars and Harrah's were competitors, whether Caesars and Harrah's agreed to, a division of the territory or

an allocation of the territory, whether Pauma was harmed, and whether Caesars and Harrah's conduct was a substantial factor in causing that harm." Stewart argued that the market allocation agreement "had the effect of restricting competition in the North County territory."

After ensuing argument on Pauma's breach of contract claims against Caesars, Stewart discussed the claim against Harrah's for intentional interference with prospective economic relations. In relevant part, he stated, "then the additional element in this claim . . . is that you have to find also that Harrah's entered into independently wrongful conduct. And in this case, we talked at length about the anti-competitive nature of Harrah's conduct. [¶] We have discussed at length how basically, Harrah's was placating Rincon and attempting to insulate Rincon from effective competition in the Pauma Valley." Stewart was obviously referring to the alleged agreement to allocate or divide customers or territories, as he raised no other theory of anti-competitive conduct.

Further, the only anti-competitive conduct the court instructed the jury on was the alleged violation of the Cartwright Act by allocating or dividing customers or territories. For the tortious interference claim, the court did not instruct on the elements of any other type of independently wrongful anti-competitive conduct, which under *Korea Supply* had to be conduct proscribed by "some constitutional, statutory, regulatory, common law, or other determinable legal standard." (*Korea Supply*, *supra*, 29 Cal.4th at p. 1159.) At hearings on Harrah's motions for JNOV or new trial, the court conceded many times that the only instruction it gave on anti-competitive conduct was the Cartwright Act market allocation theory.

Additionally, the special verdict form uses the term "anti-competitive conduct" interchangeably. The section on the Cartwright Act claim does not mention the Cartwright Act, but is instead entitled "Anti-Competitive Conduct Claim Against Harrah's . . . and Caesars." (Boldface omitted.) The form asked the jury to determine whether those parties agreed to allocate or divide customers or territories. The section on the claim for intentional interference with potential economic relations asked the jury to decide whether Harrah's engaged "in wrongful conduct by agreeing with Caesars to engage in anti-competitive conduct." The term "anti-competitive conduct" in the section on tortious interference necessarily referred exclusively to the alleged Cartwright Act violation, because there was no other independently wrongful conduct at issue.

In its denial of Harrah's motions for JNOV and new trial, the court found there was sufficient evidence to support a jury finding that Harrah's and Caesars agreed to "withhold branding and marketing assurances" from Pauma, and that constituted independently wrongful conduct for purposes of tortious interference. The court determined "a concerted refusal to deal may run afoul of the antitrust statutes," citing Business and Professions Code sections 16720 and 16726, provisions of the Cartwright Act.[7] The court also cited the following language from *Marin County Bd. of Realtors v. Palsson* (1976) 16 Cal.3d 920, 930-931, which also concerns the Cartwright Act:

" '[T]here are certain agreements or practices which because of their pernicious effect on

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[7] Business and Professions Code section 16720 sets forth various definitions of a "trust" in restraint of trade, and section 16726 provides, "Except as provided in this chapter, every trust is unlawful, against public policy and void."

competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.' [Citation.] Among these per se violations is the concerted refusal to deal with other traders, or, as it is often called, the group boycott." The court's ruling states those "anti-competition laws provide the 'legal measure' " of independently wrongful conduct under *Della Penna*, *supra*, 11 Cal.4th 376, to support the jury's verdict on the tortious interference claim.

The court's, ruling, however, ignored that Pauma's sole theory and argument to the jury on anti-competitive conduct was Harrah's alleged per se violation of the Cartwright Act by allocating or dividing customers or territories, and that is the sole theory on which the court instructed the jury. CACI includes jury instructions and verdict forms on group boycott (CACI Nos. 3403, 3404, VF 3403, 3404), but it was not an issue at trial. To any extent a "refusal to deal" based on the withholding of branding assurances could constitute independently wrongful conduct within the meaning of *Della Penna* and *Korea Supply*, the court gave no instructions on that theory. Antitrust is a complex and specialized area of the law, often encumbered by complicated facts and economic market analyses. (See, e.g., *Bos Material Handling, Inc. v. Crown Controls Corp.* (1982) 137 Cal.App.3d 99, 110; *Nork v. Pacific Coast Medical Enterprises, Inc.* (1977) 73 Cal.App.3d 410, 414-415; *Guthrie v. Times-Mirror Co.* (1975) 51 Cal.App.3d 879, 886; *Union Oil Co. v. Chandler* (1970) 4 Cal.App.3d 716, 726; *Delta Turner, Ltd. v. Grand Rapids-Kent County Convention/Arena Authority* (W.D.Mich. 2009) 600 F.Supp.2d 920, 938; *Singh v. Memorial Medical Center, Inc.* (D.N.M. 2008) 536 F.Supp.2d 1244, 1250;

In re Short Sale Antitrust Litigation (S.D.N.Y. 2007) 527 F.Supp.2d 253, 260.) CACI includes more than two dozen instructions and verdict forms on the Cartwright Act alone. (CACI Nos. 3400-VF-3409.)

A jury of laypersons cannot be expected to determine what the amorphous term "anti-competitive conduct" means without instructions on the elements of the particular violation at issue. The jury here was instructed only on the market allocation theory, and it made inconsistent determinations of fact based on the same evidence. Accordingly, the verdict is too inconsistent for enforcement. (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc., supra*, 126 Cal.App.4th at p. 682; *Trujillo, supra,* 63 Cal.App.4th at p. 289 [when the jury expressly rejects foundational predicate for statutory cause of action, the verdict cannot stand].)

D

Pauma denies that it relied exclusively on the Cartwright Act market allocation theory for the tortious interference count. Pauma cites evidence from which it asserts the jury could find Harrah's violated federal and state law by, before governmental approval of its merger with Caesars, "repeatedly communicat[ing] and coordinat[ing] with Caesars regarding the effect of [the proposed deal between Pauma and Caesars] on Rincon and the North County gaming market." For instance, Pauma cites deposition testimony of Michael Soll, Caesars's principal negotiator on the proposed deal with Pauma, that Caesars had contacted Harrah's about whether it would agree to operate both Harrah's Rincon and a Pauma casino. Soll also testified he had two or three phone conversations with William Buffalo, a Harrah's attorney, on "the practicality of operating the casinos

side by side and whether commercially it was a good thing or a bad thing." Pauma also cites the deposition testimony of Mark Clayton, a Caesars attorney, that Pauma was a topic at one or more "merger integration committee meetings."

We need not further elaborate on the evidence Pauma cites, because it does not establish an intentional interference with prospective economic relations unless it shows conduct proscribed by "some constitutional, statutory, regulatory, common law, or other determinable legal standard." (*Korea Supply, supra,* 29 Cal.4th at p. 1159.) As to the supposed federal law violation, Pauma relies solely on title 15 United States Code section 18a(d)(1), a provision of the federal Hart-Scott-Rodino Antitrust Improvements Act, which requires merging companies to supply such "documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws." Pauma's evidence does not suggest noncompliance with this statute. As to the supposed state law violation, Pauma relies solely on an *unspecified Nevada* law, without explaining how a Nevada law could possibly apply here. At any rate, Pauma did not argue either of those theories to the jury, and the court did not instruct on them as a predicate of the tortious interference claim. Obviously, the jury could not find Harrah's guilty of violating statutes of which it had no knowledge.

Pauma asserts it did argue that "Harrah's conduct constituted *both* (1) a market allocation in the Cartwright Act Claim; *and* (2) an agreement to engage in anticompetitive conduct in the interference claim based, in part, on 'illegal' pre-merger

coordination of activity by competitors," and the jury was "presented with both theories." Pauma, however, does not cite the record in support of either statement. "The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment. It is entitled to the assistance of counsel." (9 Witkin, Cal. Procedure (5th ed. 2009) Appeal, § 701, p. 769.) Accordingly, where a party provides a brief without citation of "record reference establishing that the points were made below," we may "treat the points as waived, or meritless, and pass them without further consideration." (*Troensegaard v. Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218, 228.)

In any event, we have reviewed the entire closing argument of Pauma's counsel, Stewart, and he never mentioned any illegal "coordination" theory. Pauma's claim that "[a]t trial" it presented an alternative theory of independently wrongful conduct to support the tortious interference claim is misleading. Pauma raised an alternative "coordination" theory during discussions with the *court* on jury instructions after the close of evidence, but it did not argue the issue to the *jury* even though the court gave it permission to do so.

" 'The rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant. [Citation.]' " (*Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 874.) An appellate court may allow a party to assert a new theory on appeal "where the facts were clearly put at issue at trial

and are undisputed on appeal. [Citation.] However, 'if the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at trial the opposing party should not be required to defend against it on appeal. [Citation.]' " (*Id.* at p. 879.) Pauma has waived theories it did not present to the jury at trial. (*Id.* at p. 880.)

Additionally, Pauma cites *Settimo Associates v. Environ Systems, Inc.* (1993) 14 Cal.App.4th 842, 845, for the proposition that the "tort of intentional . . . interference with prospective economic advantage imposes liability for improper methods of disrupting or diverting the business relationship of another which fall outside the *boundaries of fair competition*." (Italics added.) Citing *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 186 (*Cel-Tech*), Pauma asserts that a "practice may fall outside the boundaries of fair competition, even if not unlawful." Pauma submits that even if not unlawful, Harrah's conduct was "unfair." *Settimo,* however, was decided before the California Supreme Court issued its opinions in *Della Penna* and *Korea Supply*. As discussed, for purposes of a tortious interference claim, the alleged interference must be unlawful, meaning "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." (*Korea Supply, supra,* 29 Cal.4th at p. 1159.) The nebulous concept of unfairness does not meet the criteria. (See *Gemini Aluminum Corp. v. California Custom Shapes, Inc., supra,* 95 Cal.App.4th at p. 1259.)

Further, Pauma's reliance on *Cel-Tech* is misplaced because it does not concern a tortious interference claim. Rather, it concerns claims for violation of the UCL under the

Business and Professions Code. (*Cel-Tech, supra,* 20 Cal.4th at pp. 168-169.) In any event, in *Cel-Tech* the court explained that "to guide courts and the business community adequately and to promote consumer protection, we must require that any finding of unfairness to competitors under [Business and Professions Code] section 17200 be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." (*Id.* at pp. 186-187.) The court held that in direct competitor actions, "the word 'unfair' [for purposes of a UCL claim] means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (*Cel-Tech, supra,* at p. 187.) Again, the only alleged anti-competitive conduct the jury was instructed on was the Cartwright Act violation.

Pauma also asserts "the jury undoubtedly concluded Harrah's was motivated by a desire to protect its Rincon operation from the adverse effects of the expansion of the market and increased competition." As the court concluded in *Della Penna, supra,* 11 Cal.4th at page 403, however, in considering a claim for intentional interference with prospective economic relations, "focus on the interfering party's motive is simply inappropriate. That is because . . . motive is altogether immaterial." The court further explained that "[e]ven if it were not inappropriate, the focus on the interfering party's motive surely has a tendency to yield untoward results. [Citation.] [¶] To understate the point, 'ambiguities [are] inherent in the motive inquiry . . . .' " (*Id.* at p. 405; *Korea*

Supply, supra, 29 Cal.4th at p. 1159, fn 11; *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 47 Cal.App.4th 464, 477 ["bad thoughts are no tort"].)

Further, Pauma suggests the jury could have found independently wrongful conduct based on Harrah's violation of common law. Pauma cites *Klor's, Inc. v. Broadway-Hale Stores, Inc.* (1959) 359 U.S. 207, 211 (*Klor's*), for the proposition that the law recognizes "classes of restraints which from their 'nature or character' [are] unduly restrictive, and hence forbidden by both the common law and the statute." (Citing *Standard Oil Co. of New Jersey v. United States* (1911) 221 U.S. 1, 58, 65 (*Standard Oil*).) *Klor's* pertains to a trade restraint in violation of the Sherman Act, a group boycott that created a monopoly and interfered with interstate commerce. (*Klor's* at pp. 210-213.) *Standard Oil* likewise concerns the Sherman Act's prohibition of monopolies in restraint of trade, and it does state the prohibition originated in common law. (*Standard Oil, supra,* at pp. 51, 58-59.) Here, however, Pauma did not argue any violation of common law as a predicate for its tortious interference claim, and the court gave no instruction on the issue. Even on appeal Pauma does not articulate any particular common law violation. In sum, Pauma's attempts to reconcile the jury's verdict are unpersuasive.

E

The parties disagree on the remedy. Pauma contends that if Harrah's prevails on the inconsistency issue we must remand the matter for a new trial. Citing *Trujillo, supra,* 63 Cal.App.4th 280, Harrah's contends it is entitled to JNOV. It is established that the proper remedy for an inconsistent jury verdict is a new trial. (*Stillwell v. The Salvation Army* (2008) 167 Cal.App.4th 360, 383; *Shaw v. Hughes Aircraft Co.* (2000) 83

Cal.App.4th 1336, 1341-1345.) "Where there is an inconsistency between or among answers within a special verdict, both or all the questions are equally against the law. [Citation.] The appellate court is not permitted to choose between inconsistent answers." (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc., supra,* 126 Cal.App.4th at p. 682.)

Trujillo is inapplicable here. In *Trujillo, supra,* 63 Cal.App.4th 280, 289, this court held a jury's special verdict was too inconsistent to be enforced because it did not include "an essential foundational predicate of harassment or discrimination, as required by the statutory scheme to support a finding of violation of Government Code section 12940, subdivision (i)," a provision of the California Fair Employment and Housing Act. In *Trujillo,* the appeal was from an order granting the defendants' motion for JNOV. The parties raised no issue as to the propriety of a JNOV procedurally, and we affirmed the ruling. (*Trujillo,* at pp. 283, 289.) Further, in *Trujillo, supra,* at page 289 we explained that in addition to the inconsistent special verdict, "the noneconomic and punitive damages that were awarded by this jury lack support in the record."[8]

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8 For the first time on appeal, Harrah's contends it cannot be liable for intentional interference with prospective economic relations because as Caesars's contemplated successor in interest it had a legitimate economic interest in the proposed deal between Pauma and Caesars. We decline to reach the issue, as it would be unfair to Pauma and the trial court to permit Harrah's to change its theory on appeal. (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 847.) Further, the issue is not purely one of law, and rather involves matters for the trier of fact. (*Gardner v. Superior Court* (1986) 182 Cal.App.3d 335, 340.)

II

Pauma's Appeal/Promissory Estoppel

A

Pauma contends the court erred as a matter of law by finding its promissory estoppel claim against Caesars was "not timely presented for adjudication." We agree with Pauma. The finding was based on the court's erroneous belief it lacked power to modify the December 22, 2006 judgment. The court should not have entered a judgment on December 22 before Pauma's promissory estoppel claim was adjudicated, and it compounded the problem by then ruling its mistake rendered the promissory estoppel claim moot. The December 22 judgment was merely interlocutory as it did not resolve the promissory estoppel claim, and thus the court had the power to modify it to address the outstanding promissory estoppel claim. (*European Beverage, Inc. v. Superior Court, supra,* 43 Cal.App.4th at p. 1214.)

B

Caesars does not contest that the court erred by finding the promissory estoppel claim moot. Caesars urges us, however, to uphold the judgment on the promissory estoppel claim on the court's alternative ground that it lacks merit substantively. We agree with Caesars.

" 'In California, under the doctrine of promissory estoppel, "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promissee or a third person and which does induce such action or forbearance is binding

if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires." [Citation.] Promissory estoppel is "a doctrine which employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced." ' [Citation.] The elements of promissory estoppel are: (1) a clear promise, (2) reliance, (3) substantial detriment, and (4) damages ' "measured by the extent of the obligation assumed and not performed." ' " (*Poway Royal Mobilehome Owners Assn v. City of Poway* (2007) 149 Cal.App.4th 1460, 1470-1471.) "Because promissory estoppel is viewed as an 'informal contract,' causation must be required as an element that a plaintiff must prove, just as in ordinary contract actions." (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 904.)

Since promissory estoppel is an equitable doctrine, courts are given wide discretion in its application. (*US Ecology, Inc. v. State*, *supra*, 129 Cal.App.4th at p. 905; *Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, 692-693.) Under the abuse of discretion standard, " 'we resolve all evidentiary conflicts in favor of the judgment and determine whether the court's decision " 'falls within the permissible range of options set by the legal criteria.' " ' " (*Zanelli v. McGrath* (2008) 166 Cal.App.4th 615, 638.) "Existence of an estoppel is generally a question of fact for the trial court whose determination is conclusive on appeal unless the opposite conclusion is the only one that can be reasonably drawn from the evidence." (*People v. Surety Ins. Co.* (1978) 77 Cal.App.3d 533, 536.)

Pauma's promissory estoppel theory was that in reliance on Caesars's promise to develop an expanded casino for Pauma by 2007, it secured an amended gaming compact

from the state that required it to begin making payments to the state beginning in January 2005. Pauma sought reimbursement for payments it made to the state between 2007 and 2009 when it was scheduled to open an expanded casino with Foxwoods.

The evidence shows that in 2001 Pauma opened its 850 slot machine casino in a temporary structure, with the assistance of casino developer Pacific Coast Gaming (Pacific Coast). The same year, Pacific Coast advised Pauma that its casino could not compete with other casinos in the area because the market "is geared for the Las Vegas approach." Several potential investors advised Pauma the market could accommodate a Pauma casino with 2,000 slot machines. Pauma began considering an expansion, referred to as "Phase II."

In a September 2001 meeting of Pauma's general council, Pacific Coast presented an architect who had prepared a draft design for an expanded casino, a hotel, restaurants and other amenities. Pauma and Pacific Coast identified two possible ways to obtain the state gaming licensing required for additional slot machines for Phase II[9]: through the state's license pool, or beginning in 2003, through an amendment to its existing gaming compact with the state.

In an October 2001 meeting of Pauma's general council, it considered the potential of having Lakes Gaming as a development partner for Phase II. The meeting minutes state Lakes Gaming contemplated a casino with 2,000 slot machines, and it knew "of the

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9 Under the federal Indian Gaming Regulation Act (25 U.S.C. § 2701 et seq.), Indian tribes are required to have compacts with the states that govern gaming operations on their reservations. (*Id.* at § 2710(d)(1).)

North County competition and the mediocre state of our casino and believe [it] can turn us around." The minutes also state, "We are running out of time, we need to grow, we have no choice. If we don't grow we may have to get out of gaming." Ultimately, Lakes Gaming decided to pursue another opportunity.

Pauma then asked Pacific Coast to seek other potential development partners for Phase II. In the summer of 2003, Caesars, Hard Rock and Stations Casino made presentations to Pauma. Each company assumed Pauma would obtain the additional licenses necessary to operate at least 2,000 slot machines.

In the fall of 2003, Pauma decided to pursue negotiations with Caesars. Further, Pauma applied to the state license pool for as many additional licenses as it could get. Pauma was able to obtain only 200 additional licenses, for a total of 1050.

In early 2004, Pauma joined several other tribes to negotiate with the state for additional slot machines. Pauma signed an amended compact in June 2004, which gave it the right to operate an unlimited number of slot machines and extended its right to conduct gaming operations from 2020 to 2030, in return for an 18-year commitment to pay the state approximately $5.75 million annually beginning in January 2005.

On July 14, 2004, Pauma learned that Caesars and Harrah's had announced plans to merge. At an August 18, 2004 meeting Pauma's general council questioned whether the merger meant Caesars was out of the proposed deal. The meeting minutes state: "The scenario with Caesars, they're up and down. According to one side from Harrah's and Caesars, Harrahs [*sic*] is willing and open to have this project go through. Rincon has an exclusivity agreement and they are challenging that, and Harrahs [*sic*] can't

manage 2 facilities within 6 miles [of] each other. In some aspects you have to look at it, you have one manager operating 2 facilities, how assured are we that 100% of the marketing is going to our interest or to Rincon and vice versa." The minutes state it would be a "tough decision" as to whether Pauma should still pursue a deal with Caesars. The chairman of the general council offered that "there's no commitments either way," and the general council could decide what developer to go with. Some tribe members stated Pauma was in the "driver's seat" and should consider all its options with other developers.

The August 18 minutes also show Pauma had already contacted Hard Rock and Stations Casino, which were originally Pauma's second and third choices, respectively, after Casears, and they both remained interested in developing a project with Pauma. Additionally, Viejas had made an offer. The minutes state that as "word got out that we were in this predicament, we've received interest from other outside gaming entities that are willing to step forward."

Additionally, the minutes show that Patricia Dixon, Pauma's vice chairperson at the relevant time, stated, "I think this is our last chance, *if we want to, to not go with the revised compact*." (Italics added.) She pointed out that "*if we choose to continue with this compact then we are in this real time crunch because then we'll have to start making these million dollar plus payments to the state starting in January*. . . . We are in the driver's seat but we don't have along [*sic*] *to court somebody*." (Italics added.) A motion nonetheless carried to continue with the amended compact. A motion also carried to

request proposals from Hard Rock, Stations Casino and other developers. Pauma, however, did not rule out proceeding with Caesars.

At trial, Pauma conceded that on August 18, 2004, it could have withdrawn from the amended compact as it was not yet final. Pauma acknowledged that its attorney, Stidham, had worked on the amended compact on its behalf for approximately six months, and in June 2004 he had told Pauma that it got "the best deal out there" from the state, and "if [Pauma] didn't do the deal, that it would cost . . . more in the future to do that." Further, Stidham had explained to Pauma in June 2004 that the amended compact's annual payment of approximately $5.75 million was 10 percent of a figure calculated by multiplying a daily "win per unit" of $150 by the number of slot machines Pauma currently had permission to operate, 1050, and multiplying that figure by 365 days. Stidham cautioned that any tribe "that comes in after this is going to have to pay between 15% and 20% on what they operate or if they don't go into the bond 15% to 20% on what machines they bring into play. So, there's a significant savings there. That's why we tried to get you in now." He also advised that the "win per unit" figure would likely increase in the future, and "You're paying the lowest amount and lowest win per unit."

Stidham testified that permission to operate 2,000 slot machines "pretty much had everything to do" with Pauma's ability to get the necessary financing necessary for Phase II. He elaborated as follows: "[I]n order for us to expand the way [we] wanted to expand, adding the hotel, the restaurants and the amenities, you had to have the machines to drive that revenue to be able to . . . convince somebody to loan you the money. Because the people that loan you the money know that the machines are the principal

source of the revenue. [¶] So the more machines that you have based on a marketing study or however you determine how many that you can actually put in there, that drives how much money that you can borrow because they want to see your source of repayment."

Dixon testified that when Pauma "started the whole bidding process for a new casino, we needed to have the 2000 slot machines approximately. And everybody [potential developers] presented to us on the 2000 machines." She also testified that at the August 18, 2004 general council meeting, she was concerned because the amended compact carried a "very, very heavy financial obligation" for Pauma, and she cautioned tribe members to "take a deep breath and make up your mind what you want to do. [¶] And so I think I actually . . . carried on quite a bit about this whole process during this meeting and the membership made it very clear that they were committed to the revised compact and . . . everything that it entailed." She also testified that tribe members were frustrated that the Caesars deal may not go through, and it directed the general council to begin the process of getting proposals from other "big brand names."

The court found Pauma did not justifiably or detrimentally rely on Caesars's conduct. We find no abuse of discretion, as the evidence amply supports the findings. Pauma concedes that its final approval of the amended compact did not occur until August 2004. Even if Pauma signed the amended compact in June 2004 in reliance on Caesar's alleged promise to develop an expanded casino for Pauma by 2007, the court could reasonably infer that Pauma proceeded with the amended compact on August 18, 2004, based on factors unrelated to Caesars's conduct — such as expected substantial

future cost savings, the ability to quickly attract a new developer to finance Phase II, and the avoidance of further delay. The meeting minutes from the August 18 meeting indicate Pauma had no idea whether the Caesars deal would actually go through, but it was nonetheless committed to obtaining licenses for 2,000 or more slot machines and was confident it would expand its casino with or without Caesars. Several other entities had expressed interest in being a development partner, and Pauma had misgivings about consummating a deal with Caesars because of Harrah's conflict with Harrah's Rincon. Under the circumstances, the court could reasonably reject the notion that but for Caesars's conduct Pauma would have held off on obtaining an amended compact.

Further, the evidence amply supports a finding that Caesars's conduct did not *cause* Pauma any damages, since it could have canceled the amended compact in August 2004 and avoided its obligation to begin making payments to the state in January 2005. "The linchpin for equitable estoppel is equity–fairness." (*Grigson v. Creative Artists Agency L.L.C.* (5th Cir. 2000) 210 F.3d 524, 528.) Under the circumstances, equity does not require Caesars to reimburse Pauma for any payments to the state under the amended compact.

C

Pauma cites the evidence favorable to itself, and argues that based on that evidence the court should have decided the matter differently. For instance, Pauma asserts that Caesars's alleged offer to sign the original draft agreements was a sham; the testimony of Tony Santo, a Caesars vice president, that he found Pauma's proposed revised terms onerous "was simply not credible"; and Pauma voted not to proceed with

the proposed deal with Ceasars only because it was obvious that Caesars wanted out. As a reviewing court, however, it is not our province to reweigh the evidence and reassess the credibility of witnesses. (*Camarena v. State Personnel Bd.* (1997) 54 Cal.App.4th 698, 703.) Further, the "testimony of a witness 'in derogation of the judgment may not be credited on appeal simply because it contradicts the [prevailing party's] evidence, regardless how "overwhelming" it is claimed to be.' " (*Peak-Las Positas Partners v. Bollag* (2009) 172 Cal.App.4th 101, 108.) A "record presenting facts on which reasonable minds may differ is not a record establishing an abuse of discretion." (*People v. Moya* (1985) 184 Cal.App.3d 1307, 1313, fn. 2.) Our task is limited to determining whether the court's ruling exceeds the bounds of reason, and we conclude it does not.

Additionally, Pauma asserts the court "indicated its intent to use the jury's verdict 'as an advisory verdict.' " Pauma claims that "[i]n its verdict, the jury found in favor of Pauma on *all* of the elements of promissory estoppel," and thus the court should have found in its favor. (Italics added.)

"There can be no question that there may be an advisory jury in an equitable action, and that a trial court has the discretion to submit issues to a jury and adopt the jury's findings on factual matters." (*Saks v. Charity Mission Baptist Church* (2001) 90 Cal.App.4th 1116, 1147.) It is the court's duty, however, "to make its own independent findings and to adopt or reject the findings of the jury as it deems proper." (*A-C Co. v. Security Pacific Nat. Bank* (1985) 173 Cal.App.3d 462, 474.)

Here, the court actually stated, "in addition to the jury's advisory verdict, *if I wanted to use it* as an advisory verdict, I've got some questions about justifiable reliance."

(Italics added.) Even if the court intended to use it as an advisory verdict, however, Pauma's position lacks merit.

The special verdict did not ask the jury to decide any factual matters pertaining to the promissory estoppel claim. Pauma cites portions of the verdict pertaining to its legal claims against Caesars for false promise and negligent and intentional misrepresentation. For the false promise count, the jury found Caesars made an unspecified promise to Pauma "that was important to the transaction." The jury found for Caesars on the claim, however, on the ground Caesars intended to perform the promise when it was made. For the misrepresentation counts, the jury found Caesars made an unspecified false representation of a fact important to Pauma, it did not have reasonable grounds to believe the representation was true, it intended that Pauma rely on the representation, and Pauma did so. However, the jury found for Caesars on the claims on the ground that Pauma's reliance was not a substantial factor in causing Pauma any harm.

Since detriment and causation are elements of a promissory estoppel cause of action, Pauma is incorrect in saying the jury found in its favor on *all* elements of the claim. Pauma's advisory verdict theory actually undermines its cause since the verdict supports the trial court's finding of lack of detriment. Further, Pauma has not shown the jury's nonspecific findings pertained to the amended compact issue on which its promissory estoppel claim was based.

Pauma also argues the court misunderstood the nature of its damages claim. Pauma cites the court's remarks at the hearing that by entering into the amended compact Pauma "get[s] more slot machines, . . . which puts [it] where, Caesars has come and gone,

. . . and [Pauma's] in a deal now and [its] got more slot machines," and "Pauma is in the position now to play with the big boys, they've got 2000 slot machines." Pauma asserts the comments show the court focused on Pauma's potential future earnings with Foxwood, rather than its past damages. The court also indicated, however, that it was not satisfied that Pauma justifiably relied on Caesars's conduct, and without justifiable reliance Pauma cannot prevail on a promissory estoppel theory.

IV

Costs

Caesars and Pauma were the prevailing parties at trial. On March 2, 2007, the court issued a tentative ruling that (1) granted in part Harrah's motion to tax Pauma's costs, and awarded it $205,930 in allowable costs; and (2) granted in part Pauma's motion to strike or tax Caesars's costs, and awarded it $69,356.20 in allowable costs. The court noted in its tentative ruling that Caesars made no effort to allocate costs between itself and Harrah's. The court's minutes from the hearing on that date state the court confirmed its tentative ruling, with the modification that "Pauma's costs are allocated to allow recovery at a rate of two-thirds." It is unclear from the record what the court did, but Caesars asserts "the court made no affirmative costs award to Caesars despite its statutory right to such costs," and "[i]nstead, in view of the fact that Caesars and Harrah's have merged, the trial court simply reduced the award of costs to Pauma and against Harrah's by one-third to reflect Caesars' right to recover costs." The court directed the parties to submit a formal order, and they explained "we'll have to do some calculations." The parties, however, do not cite the record for any formal order.

"An order awarding costs falls with a reversal of the judgment on which it is based." (*Merced County Taxpayers' Assn. v. Cardella* (1990) 218 Cal.App.3d 396, 402.) Accordingly, Pauma is no longer entitled to costs as a prevailing party. Further, because the court's award to Caesars was interwoven with the award to Pauma, the court must reconsider an award to Caesars on remand.

DISPOSITION

The February 20, 2007 judgment is reversed insofar as it concerns the complaint's causes of action against Harrah's for violation of the Cartwright Act (ninth) and intentional interference with prospective economic relations (eighth), and the court is directed to enter an order granting Harrah's motion for a new trial on those counts. In all other respects, the judgment is affirmed. The March 2, 2007 order pertaining to costs is reversed, and the court is directed to reconsider a cost award to Caesars on remand. The April 13, 2007 order that purports to designate the December 22, 2006 interlocutory judgment as a final judgment is also reversed. Harrah's and Caesars are entitled to costs on appeal.

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MCCONNELL, P. J.

WE CONCUR:

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HALLER, J.

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O'ROURKE, J.