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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

EVEREST PROPERTIES II et al.,

Plaintiffs and Respondents,

v.

PROMETHEUS DEVELOPMENT CO., INC., et al.,

Defendants and Appellants.

A114305

(San Mateo County
Super. Ct. No. CIV-436873)

The trial court found that appellants breached fiduciary duties to respondents in connection with a merger transaction and liquidation of a partnership. Compensatory damages were awarded to respondents, along with prejudgment interest, and equitable relief was granted in the form of a constructive trust and equitable lien on the partnership units. In this appeal, appellants complain of the trial court's evidentiary rulings, challenge the evidence to support the judgment, assert they were improperly denied a new trial before a jury to assert the defense of collateral estoppel, and contest various aspects of the relief granted to respondents by the trial court. We conclude that the imposition of a constructive trust and equitable lien must be reversed, and the award of prejudgment interest must be modified. We further conclude that no other prejudicial errors occurred and the evidence supports both the finding of breach of fiduciary duties and the compensatory damages awarded to respondents. We therefore affirm the judgment in all other respects.

STATEMENT OF FACTS

Prometheus Income Partners (PIP) was a limited partnership created pursuant to a partnership agreement in 1985 to own, construct, and ultimately sell two apartment buildings located in Santa Clara, California, known as the Alderwood and Timberleaf apartments. Defendant and appellant Prometheus Development Co., Inc. (PDC), a California corporation, was the sole corporate general partner of PIP; defendant and appellant Sanford N. Diller (Diller) was an officer, director and, through family trusts, the sole shareholder of PDC.[1] PIP issued nearly 19,000 limited partnership interest units at a cost of $1,000 per unit to finance the development of the Alderwood and Timberleaf apartments.

In June of 1996, construction defects were discovered in the hardboard siding, flashing, and to a lesser extent the roofing installed in both the Alderwood and Timberleaf apartment buildings. Investigation revealed that necessary remedial measures would include removal and restoration of "the skin of the building" in each complex, along with replacement of the defective waterproofing and repair of structural damages. Estimates were received for the cost of the repairs. PIP also created a reserve account as required by the lender to cover the estimated cost of repair of the construction defects. The reserve was supplemented with an additional amount that in the "business judgment" of PIP management was necessary to "cover contingencies" that may occur with the repairs. The "cash flow" from the projects was used to fund the reserve accounts, so quarterly distributions to the limited partners were suspended between 1996 and 2002. By the end of March 2002, the total amount in the reserve accounts was around $10.2 million. PIP also filed two "construction defects" lawsuits against the general contractor and several subcontractors.

As estimates and plans for repairs of the properties proceeded, respondent Everest Properties II LLC, a company which invests in real estate limited partnerships, and its

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[1] We will refer to PDC and Diller collectively as appellants or PDC.

affiliate Everest Management, LLC (collectively Everest or respondents), undertook an analysis of the PIP limited partnership interest units. According to an internal tender offer analysis dated June of 2000, Everest placed a liquidation value on the PIP partnership units of "at least $1200" per unit, based on "conservative estimates" which included the repair costs. Everest then began to acquire PIP units through tender offers to existing limited partners at $650 to $800 per unit.

By 2000, the limited partners increasingly complained about the impact of the construction defects and litigation, the lack of distributions, the failure of the properties to appreciate, and the illiquidity of the market for the units. PDC explored options for achieving liquidity for the limited partners. PDC decided not to place the Alderwood and Timberleaf apartments for sale on the open market without completion of repairs. PDC management determined that the "known defects" in construction made "marketing the property problematic" due to the "uncertainties" of the cost of repair which would result in fewer potential buyers and sale of the property at less than an optimum price. The alternative of repairing the construction defects first, then selling the properties and distributing the proceeds upon liquidation of the partnership, was also considered but rejected in favor of a merger transaction with an "affiliate organized by Diller" which was willing to purchase the properties with known defects. PDC was aware that structuring the transaction as a merger rather than a sale would result in a tax advantage to Diller and his affiliates – although not to the unaffiliated limited partners.

In January of 2000, PDC investigated and then proposed a merger whereby PIP Acquisition, LLC, would purchase essentially all of the outstanding shares of PIP from the existing unaffiliated limited partners, then merge into PDC. PIP Partners – General LLC (PIP Partners) owned PIP Acquisition LLC, and also then owned approximately 18 percent of the units of the limited partnership. Ninety-nine percent of the interests in PIP Partners was owned by Diller and managed by an entity controlled by appellants. Thus after the merger, entities controlled by Diller would own essentially the entire partnership, and the unaffiliated partners would no longer have any interest in the partnership units. In May of 2000, a merger value of $1,200 was fixed for each unit to be

offered to the limited partners, based upon the estimated market value of the partnership properties of approximately $55.1 million and the potential financial impact of the still-pending construction defects litigation.

PDC was aware that the proposed merger was an affiliate transaction rather than an "arm's length transaction" with an independent third party. Thus, PDC, as an entity with "public reporting responsibilities," filed a preliminary proxy statement and related disclosure materials on the transaction with the SEC in June and September of 2000 that placed a value of $1,200 on each of the units. The same amount per unit was paid by PDC for the acquisition of some partnership units in June of 2000. The SEC responded with comments, which in turn resulted in proxy statement amendments filed by PDC.

In October of 2000, Everest prepared a further analysis of the PIP units that took into account the proxy statement filed by appellants and the pending litigation over the construction defects in the apartment buildings. A value of $1,355 to $1,359 was placed on the units in Everest's analysis.

After PDC reviewed the partnership's most recent favorable financial performance in October 2000, and received an independent appraisal that placed an increased value on the properties of $68.9 million in December 2000, the proposed merger transaction was reevaluated. The proxy solicitation was then modified to provide for the consideration to be based on liquidation value of the property of a minimum of $1,200 per unit, plus a contingent payment dependent upon the recovery in the construction defect litigation, less the cost of repairs. Shortly thereafter Everest expressed to PDC an interest in submitting a competitive bid on the partnership properties, but no offer was made.

The SEC declined to grant approval of the proposed merger transaction with the contingent payment as described in the preliminary proxy solicitation. By its terms, the revised merger proposal terminated without clearance from the SEC at the end of August 2001.

In September of 2001, while PDC continued to evaluate a restructuring of the merger transaction, an independent appraisal placed a reduced market value of $53.2 million on the Alderwood and Timberleaf apartments. The lower appraised value was

due primarily to a decline in net operating income from the apartments caused by a deflated rental market. The appraisal also subtracted the amount of the deferred maintenance costs for the repair of the roof and siding on the buildings, stated by PDC as $3,079,654. Everest, which by that time owned a total of just under 5 percent of the outstanding PIP units, did not have an objection to the merger proposal as it was then constituted with payments of $1,200 per unit plus additional compensation dependent upon the outcome of the construction defects dispute, and so advised its source of financing, Blackacre.

In October of 2001, final settlement of the construction litigation resulted in a net recovery by PIP of $10.8 million, after deduction of expenses and legal fees.[2] PIP also retained the amount of $10.2 million previously accumulated in the reserve account to fund the repairs. The estimate given by PIP of the cost to accomplish the repairs was between $12.5 and $14.6 million.

Soon after settlement of the construction litigation, PDC decided to proceed with a revised version of the proposed merger, and so notified the limited partners by letter. Based upon the most recent property appraisal and the cash assets held by the limited partnership as of December 31, 2001, PDC set the merger consideration at $1,714 per unit.

As advised by counsel, in October of 2001 PIP engaged the investment banking firm of Houlihan Lokey Howard & Zukin Financial Advisors, Inc. (Houlihan) to prepare a "fairness opinion" on the proposed merger as amended.[3] In the opinion dated March 6, 2002, Houlihan found that given the decline in real estate values, the appraisal of September of 2001 remained a reasonable substitute for the enterprise value of the partnership, specified to be in the range of $53.4 to $56.2 million. Based upon the financial statements, forecasts and other information supplied by PIP, Houlihan stated that "it is our opinion that the consideration [of $1,714 per share] to be received by the

[2] The total amount of the settlement was $14.6 million.

[3] A fairness opinion was customary in self-dealing transactions but not required by the SEC.

Limited Partners, other than PIP General and its affiliates, in connection with the Transaction is fair from a financial point of view."

As PDC proceeded to complete a final proxy statement for the merger, Everest sought to obtain a competitive bid to purchase the Alderwood and Timberleaf apartments. Everest was concerned that the merger transaction proposed by PIP was essentially a "deal" by Diller "with himself," and the offered price "was quite low." Everest wanted to obtain a "higher price" for the properties that would benefit all of the limited partners. Aspen Square Management (Aspen), a real estate investment company with a focus "on apartments," was contacted by Everest to direct its attention "to the Prometheus opportunity."

In May of 2002, PDC filed a final proxy statement with the SEC, which was also sent to the limited partners on July 4, 2002. The expected cost of repairs to the Alderwood and Timberleaf apartments was specified in the proxy statement to be "in excess of $12.5 million," and perhaps as high as "$14 million or more." The proxy statement noted that the partnership received "aggregate net recoveries of approximately $10.8 million" from settlement of the construction litigation. In light of the slight decrease in the mortgage balance on the Alderwood and Timberleaf apartments and an increase in cash held by the partnership, the stated consideration to be paid to the limited partners was increased to $1,736 per share. The calculation of the consideration payable to the limited partners was based upon the September 2001 appraisal of $53.2 million, less a two percent sales commission and a one percent disposition fee, along with the projected cost of repairs and deferred maintenance. In an updated opinion letter on May 22, 2002, Houlihan reiterated that the consideration to the limited partners as specified in the final proxy statement was fair. According to the proxy statement, PDC and the other entities controlled by Diller each concluded that the proposed merger was "substantively and procedurally fair to the limited partners" despite the lack of an unaffiliated purchaser of the units, and recommended approval. The limited partners were also notified of a meeting scheduled for July 24, 2002, to vote on the proposed merger.

On June 13, and July 8, 2002, PIP entered into fixed-price agreements with a general contractor to repair the Alderwood and Timberleaf Apartments. The contracts were in existence before the scheduled partnership meeting and vote. The cost of repairs stated in the contracts was considerably less than the amount estimated in the final proxy statement, but the limited partners were not advised of the contractual repair costs.

Meanwhile, Everest remained opposed to the merger. Everest sent a letter to the limited partners expressing concern with the proposal, and continued to lobby Aspen to make an offer to purchase the properties. In June of 2002, Everest offered to sell its shares of the limited partnership to PDC for $2,300 per unit and "go away;" PDC rejected the offer.

Aspen expressed interest in the properties, and prepared a draft proposal of an offer which was sent to Everest for review on June 16, 2002. PIP received a nonbinding offer or "letter of interest" from Aspen on June 25, 2002, which stated a price for the properties that exceeded the proposed merger price, but was contingent upon completion of "due diligence" by Aspen through examination of the properties, and was "subject to negotiation of a mutually acceptable purchase and sale agreement." PDC evaluated the letter and conducted a financial investigation of Aspen. When Aspen's financial resources to complete the proposed transaction were verified, negotiations ensued. PDC asked Aspen if the price initially stated was "the final best offer," but did not make a counteroffer or state a higher sale price that would be accepted. Nor did PDC increase the offer of consideration specified in the merger proposal. PDC also demanded an additional $1.5 million for its general partnership interest as a condition of completing the transaction with Aspen.

As the July 24, 2002 date of the scheduled partnership meeting and vote on the proposed merger neared, PIP[4] imposed a deadline upon Aspen to submit a binding offer or letter of intent; the deadline was ultimately extended to the end of July 19, 2002. PIP

[4] The communications appear to be between Aspen and PIP through its general partner PDC.

sent Aspen requested information, such as insurance, loan documents, bond documents and regulatory agreements. In the event Aspen presented a binding, acceptable offer, PIP also drafted a letter to be sent to the limited partners to advise them of cancellation of the scheduled partnership meeting. Aspen requested a further extension of the deadline to noon on Saturday, July 20, and PIP agreed by fax sent to Aspen after close of business hours on Friday the 19th.[5] PIP received a letter of intent from Aspen the morning of July 22, but despite Aspen's protests rejected it as untimely.

Even as PDC's negotiations with Aspen continued, Everest expressed further opposition to the proposed merger by letter sent to PDC and the PIP limited partners. Everest also filed proxy solicitation materials with the SEC on July 16, 2002, which recommended a vote against the merger proposal. PDC countered with a final letter sent to the limited partners on July 22, 2002, that referred to persistent concerns expressed by "experts" with economic conditions and existing capital markets which posed "risks" to the limited partners, and counseled that the merger transaction represented an "attractive liquidity opportunity" to avoid those risks.

The meeting of the limited partners took place as scheduled on July 24, 2002. Approval of the proposed merger required at least a majority vote of the total of 18,995 limited partnership units "entitled to vote," and 3,457 of those units were owned or controlled by PDC. The final vote tally was 9,630.73 in favor of the merger, 3,300.35 opposed, and a total of 431.42 abstentions.[6] Under the terms of the merger proposal, PDC voted its 3,457 shares in the same proportion as the unaffiliated partners *who actually voted.* The merger was thus narrowly approved by a vote of 50.7 percent.

Thereafter, the limited partners received consideration for their units, less a $3,389,000 loan prepayment penalty incurred when loans were refinanced to fund the merger payment. Everest, like the remaining limited partners, transferred their PIP ownership interests in exchange for the merger consideration of $1,736 per partnership

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[5] Aspen apparently did not receive this fax until Monday morning, July 22.

[6] 36.25 percent of the partnership units did not return a proxy.

unit, but retained its right to pursue any claims against PDC. Everest felt that it had not received a "fair price" for its units. In the three years after the merger transaction, the market value of "apartment complexes" in the Santa Clara area increased by 15 to 20 percent due to a decline in capitalization and interest rates and stabilization of rents.

Following the merger PDC made repairs to the Alderwood and Timberleaf apartments. The total cost of the repair contracts, including additional improvements in the roofing and new signage, internet wiring and unit numbers, was $10,317,579; the total cost associated with the remediation of the properties, including lost rents, was $11.7 million. The settlement recovery of $10.8 million was applied to the cost of repairs.

The present action for breach of fiduciary duty was filed by Everest in August of 2003. The case proceeded to trial before the court on the fourth amended complaint filed in April of 2005,[7] and included the interests of other former limited partners assigned to Everest before trial. Following the presentation of evidence and argument, the trial court found that PDC breached its fiduciary duties to Everest in connection with the merger transaction by specified misrepresentations and nondisclosures which deceived the limited partners. The court also specifically found that the proxy statement was "materially inaccurate and incomplete." Damages were awarded in the total amount of $22,958,789 for all of the limited partners, of which Everest received $3,834,874 as its proportionate share, including assigned claims.[8] Prejudgment interest was awarded for Everest's proportionate share of the amount ($19,160,000) unfairly liquidated by appellants at the time of the merger rather than distributed to the limited partners, calculated at 10 percent from the date of the merger, the last week of July 2002. Based on a finding that money damages are not likely to make Everest whole, the court imposed the further remedy of a constructive trust on the partnership units and an equitable lien on

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[7] The case against Diller was severed before trial.

[8] The assignments were found valid by the trial court.

the past, current and future monies generated by the partnership. This appeal followed the denial of appellants' motion for a new trial.[9]

DISCUSSION

I. The Exclusion of Unclean Hands Evidence.

Appellants have presented a myriad of issues to be considered in this appeal. We first confront their claim that the trial court erred by granting respondents' motion in limine to exclude evidence in support of appellants' "affirmative defense of unclean hands." Appellants asserted the affirmative defense of unclean hands, based in part upon evidence of written tender offers by Everest to limited partners to purchase units without proper disclosure. In their opposition to Everest's motion to exclude the proffered unclean hands evidence appellants made an offer of proof that in June of 2000, PIP negotiated with Liquidity Financial, a PIP limited partner, to purchase its existing limited partnership units "at exactly $1,200" per unit; the negotiations were "non-public information." The opposition further asserted that Everest had "ongoing business relationships with Liquidity Financial," and was concomitantly conducting an internal analysis of PIP as a prelude to its own purchase of partnership units from other existing unaffiliated partners, which indicated a "valuation of $1,113 to $1,291 on a per unit basis." Despite the internal valuation, Everest selected a valuation in the "exact amount of $1,200 per unit" when recommending the tender offer "investment to its source of capital, Blackacre." Thereafter, Everest made tender offers of $650 per unit in June of 2000 and $800 per unit in March of 2001, but did not disclose to the selling limited partners the "significant non-public information" that it had apparently obtained from Liquidity Financial.

As additional evidence of unclean hands appellants proposed to demonstrate that in September of 2001 Everest stated to its financier Blackacre that the proposed merger

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[9] A class action on behalf of the former limited partners of PIP for breach of fiduciary duty was also filed against appellants in the federal district court. A motion to dismiss this action was granted for failure to state a cause of action, and judgment was entered in favor of appellants in that case on February 24, 2006.

"was not that bad," and subsequently offered to withdraw objections to the merger if PDC purchased Everest's interest in the partnership at a premium price of $2,300 per unit. Finally, appellants cited as unclean hands Everest's dealings and connections with Aspen, particularly its request for a finder's fee as a broker of the proposed transaction between Aspen and PDC.

Respondents moved to exclude "all evidence and testimony regarding alleged 'unclean hands' of Everest." Although the trial court granted in limine motion No. 2 to exclude all unclean hands evidence, only the evidence of the inside information Everest actually received when making its tender offers to other limited partners in June of 2000, was not received in support of appellants' unclean hands defense. The remaining proffered evidence of unclean hands was ultimately admitted at trial, without objection, and argued by appellants as part of proof of unclean hands. Appellants now argue that the trial court's evidentiary ruling deprived it of "its unclean hands defense," and requires reversal of the judgment.[10]

We commence our analysis with the settled proposition that, "Only relevant evidence is admissible (Evid. Code, §§ 210, 350), 'and all relevant evidence is admissible unless excluded under the federal or California Constitution[s] or by statute. (Evid. Code, § 351; see also Cal. Const., art. I, § 28, subd. (d).)' [Citation.]" (*People v. Harris* (2005) 37 Cal.4th 310, 337; see also *People v. Vieira* (2005) 35 Cal.4th 264, 293; *Solin v. O'Melveny & Myers* (2001) 89 Cal.App.4th 451, 462–463.) " ' "Relevant evidence" means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' (Evid. Code, § 210.)" (*Firestone v. Hoffman* (2006) 140 Cal.App.4th 1408, 1418.) "We review for abuse of

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[10] The admission of some of the unclean hands evidence apparently contradicted the trial court's earlier ruling on the in limine motion. In this appeal PDC particularly objects to the exclusion of evidence "that Everest improperly acquired its PIP units based on non-public information." Since the other proferred evidence of unclean hands was admitted despite the trial court's ruling on the in limine motion, we will focus upon the excluded evidence. In the statement of decision the trial court found that "no evidence" was presented at trial "that Everest engaged in any conduct that would constitute unclean hands" or to "support any other equitable defense."

discretion a trial court's rulings on the admissibility of evidence." (*People v. Harris, supra,* at p. 337; *Firestone v. Hoffman, supra,* at p. 1418; *City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900.)

We agree with appellants that unclean hands was a defense generally available to PDC in the present action for breach of fiduciary duty. " 'The [unclean hands] doctrine demands that a plaintiff act fairly in the matter for which he seeks a remedy. He must come into court with clean hands, and keep them clean, or he will be denied relief, regardless of the merits of his claim.' [Citation.]" (*Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 322.) Unclean hands "requires inequitable conduct by the plaintiff in connection with the matter in controversy and provides a complete defense to the plaintiff's action." (*Dickson, Carlson & Campillo v. Pole* (2000) 83 Cal.App.4th 436, 446.) "The defense is available in legal as well as equitable actions." (*Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978.) "Whether the defense applies in particular circumstances depends on the analogous case law, the nature of the misconduct, and the relationship of the misconduct to the claimed injuries. [Citation.] The decision of whether to apply the defense based on the facts is a matter within the trial court's discretion." (*Dickson, Carlson & Campillo v. Pole, supra,* at p. 447; see also *CrossTalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 641.)

Respondents' action for breach of fiduciary duties brought into play equitable principles and rights between partners that justified assertion of an unclean hands defense by appellants. (See *Interactive Multimedia Artists, Inc. v. Superior Court* (1998) 62 Cal.App.4th 1546, 1553–1556; *Wallner v. Parry Professional Bldg., Ltd.* (1994) 22 Cal.App.4th 1446, 1454.) "A partner's actions in bad faith are relevant to that partner's rights against other partners." (*O'Flaherty v. Belgum* (2004) 115 Cal.App.4th 1044, 1099.) " 'We deal here with . . . an equitable proceeding [citation], to which equitable doctrines are applicable. [Citation.] One of these is the rule that "he who comes into equity must come with clean hands." [Citation.] . . .' [Citation.]" (*Ibid.*) Unclean hands is "an equitable rationale for refusing a plaintiff relief where principles of fairness dictate that the plaintiff should not recover, regardless of the merits of his claim. It is

available to protect the court from having its powers used to bring about an inequitable result in the litigation before it." (*Kendall-Jackson Winery, Ltd. v. Superior Court, supra,* 76 Cal.App.4th 970, 985.) The issue before us, then, is whether the excluded evidence was probative on the issue of Everest's unclean hands.

The fact that Everest may have improperly acquired inside information prior to its acquisition of PIP units from unaffiliated partners in 2000 does not establish unclean hands associated with the subsequent merger transaction. " ' "[R]elief is not denied because the plaintiff may have acted improperly in the past or because such prior misconduct may indirectly affect the problem before the court." [Citation.]' [Citation.]" (*Murillo v. Rite Stuff Foods, Inc*. (1998) 65 Cal.App.4th 833, 844–845.) "The unclean hands rule does not call for denial of relief to a plaintiff guilty of any past improper conduct; it is only misconduct in the particular transaction or connected with the subject matter of the litigation which is a defense." (*Wilson v. S.L. Rey, Inc*. (1993) 17 Cal.App.4th 234, 244.)

"Past improper conduct or prior misconduct that only indirectly affects the problem before the court does not suffice. The determination of the unclean hands defense cannot be distorted into a proceeding to try the general morals of the parties. [Citation.] Courts have expressed this relationship requirement in various ways. The misconduct 'must relate directly to the transaction concerning which the complaint is made, i.e., it must pertain to the very subject matter involved and affect the equitable relations between the litigants.' [Citation.] '[T]here must be a direct relationship between the misconduct and the claimed injuries . . . " 'so that it would be inequitable to grant [the requested] relief.' " ' [Citation.] 'The issue is not that the plaintiff's hands are dirty, but rather " ' "that the manner of dirtying renders inequitable the assertion of such rights against the defendant." ' " ' [Citation.] The misconduct ' " 'prejudicially affect . . . the rights of the person against whom the relief is sought so that it would be inequitable to grant such relief.' " ' [Citation.]" (*Kendall-Jackson Winery, Ltd. v. Superior Court, supra,* 76 Cal.App.4th 970, 979.) However, "any evidence of a plaintiff's unclean hands in relation to the transaction before the court or which affects

the equitable relations between the litigants in the matter before the court should be available to enable the court to effect a fair result in the litigation." (*Id.* at p. 985.) "The question is whether the unclean conduct relates directly 'to the *transaction* concerning which the complaint is made,' i.e., to the '*subject matter* involved' [citation], and not whether it is part of the basis upon which liability is being asserted." (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 681.)

Further, "the doctrine of unclean hands does not automatically bar equitable relief where the parties are not equally at fault." (*Warren v. Merrill* (2006) 143 Cal.App.4th 96, 115.) " 'The defense of unclean hands does not apply in every instance where the plaintiff has committed some misconduct in connection with the matter in controversy, but applies only where it would be inequitable to grant the plaintiff *any* relief.' [Citation.]" (*O'Flaherty v. Belgum, supra,* 115 Cal.App.4th 1044, 1099.)

We find no abuse of discretion in the trial court's determination that evidence of Everest's prior disputed acquisition of partnership units does not have the requisite direct relationship to the propriety of the merger transaction. (*Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061, 1086.) Past use of inside information by Everest – if, indeed that occurred – to set its offering price for partnership units had no bearing on the structure of the merger transaction proposed by appellants, the disclosures in the proxy statement, or the nature of the negotiations by appellants with Aspen. The manner in which Everest acquired its partnership units did not in any way impact or influence the merger transaction. Everest's entirely separate, prior dealings with other limited partners did not affect the equitable relations between the litigants in the matter of the proposed merger before the court. It was not the type of conduct that was directly related to the merger transaction. (*Kendall-Jackson Winery, Ltd. v. Superior Court, supra,* 76 Cal.App.4th 970, 984; see also *Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 621.) We therefore conclude that the trial court properly excluded for lack of relevance the "inside information" evidence offered by appellants in support of the unclean hands defense. (*People v. Stitely* (2005) 35 Cal.4th 514, 549–550; *Warren*

v. Merrill, supra, 143 Cal.App.4th 96, 114–115; *Wilson v. S.L. Rey, Inc., supra,* 17 Cal.App.4th 234, 244.) We also agree with the trial court's finding that appellants did not prove the affirmative defense of unclean hands on the part of Everest, even if we consider the admitted evidence of Everest's dealings with Aspen and the statement to its lender in September of 2001 that the proposed merger transaction was "not that bad."

***II. The Admission and Exclusion of Expert Testimony*.**

We turn to appellants' complaint that the trial court committed error in its rulings on the admissibility of "expert testimony" on the fairness of the merger transaction. The claim of error is two-pronged: First, that the testimony of Everest's general counsel Christopher Davis, who was "never qualified as an expert on the fairness of merger transactions" and not "identified as an expert witness on any issue," was improperly admitted; and second, that the court erred by "inconsistently" refusing to admit testimony offered by appellants from their designated expert, retired California Supreme Court Justice Cruz Reynoso, on essentially the same subject of the "legal, equitable and ethical issues involving the conduct of Everest, and Aspen and defendants' response thereto." While the proffered testimony of Justice Reynoso was excluded by the trial court as not "appropriate," over appellants' objection Davis was allowed to recite a litany of the bases – along with underlying explanations – supporting Everest's claim that the merger transaction was unfair and essentially violated the general partner's duty of good faith and fair dealing.[11]

We assess the trial court's rulings on the admissibility of expert opinion testimony with established rules in mind. "Opinion testimony is generally inadmissible at trial.

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[11] The trial court granted respondents' in limine motion No. 3 to exclude the testimony of Justice Reynoso. Respondents also sought to exclude the testimony of another of appellants' witnesses, R. Roy Finkle, who was designated as a "partnership expert" to testify on "issues pertaining to the structure and governance of limited partnerships; the duties of partners, and the application of the business judgment rule in connection therewith." The court expressed that it was "on the fence with regard to Mr. Finkle." His testimony was not presented at trial and has not been placed at issue in this appeal. While the exclusion of Finkle's testimony has not been specifically challenged in this appeal, the trial court's evidentiary ruling also prohibited appellants from offering his opinion on whether the merger transaction "was a fair structure" and upon the application of the "Business Judgment" rule to the case.

[Citations.] Two exceptions to this rule exist. First, a properly qualified expert, with 'special knowledge, skill, experience, training [or] education' may provide an opinion. [Citation.] The subject matter of such an opinion is limited to 'a subject that is sufficiently beyond common experience that [it] would assist the trier of fact.' [Citation.] 'Expert opinion is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness. [Citation.]' [Citation.] '[T]he decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' [Citation.] Thus, the purpose of expert testimony, to provide an opinion beyond common experience, dictates that the witness possess uncommon, specialized knowledge." (*People v. Chapple* (2006) 138 Cal.App.4th 540, 546–547.)

Evidence Code section 805 provides that "[t]estimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." "It is neither unusual nor impermissible for an expert to testify to an ultimate issue, and such opinions are expressly contemplated by Evidence Code section 805." (*People v. Doss* (1992) 4 Cal.App.4th 1585, 1596.) "However, the admissibility of opinion evidence that embraces an ultimate issue in a case does not bestow upon an expert carte blanche to express any opinion he or she wishes." (*Summers v. A. L. Gilbert Co*. (1999) 69 Cal.App.4th 1155, 1178.) "There are limits to expert testimony, not the least of which is the prohibition against admission of an expert's opinion on a question of law." (*Ibid*.) The rule admitting expert testimony on the ultimate issue in a case does not " 'authorize an "expert" to testify to legal conclusions in the guise of expert opinion. Such legal conclusions do not constitute substantial evidence. [Citation.] "The manner in which the law should apply to particular facts is a legal question and is not subject to expert opinion. [Citation.]" [Citation.]' " (*Id*., at p. 1179, quoting *Downer v. Bramet* (1984) 152 Cal.App.3d 837, 841–842.)

Further, expert opinion testimony, even if it "does not embrace an issue of law," is "not admissible if it invades the province of the jury to decide a case. ' "Undoubtedly there is a kind of statement by the witness which amounts to no more than an expression of his general belief as to how the case should be decided . . . . There is no necessity for this kind of evidence; to receive it would tend to suggest that the judge and jury may shift responsibility for decision to the witnesses; and in any event it is wholly without value to the trier of fact in reaching a decision." ' [Citations.]" (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 972.) "Notwithstanding Evidence Code section 805, an 'expert must not usurp the function of the jury . . . .' " (*Summers v. A. L. Gilbert Co., supra*, 69 Cal.App.4th 1155, 1183, quoting *People v. Humphrey* (1996) 13 Cal.4th 1073, 1099.)

"A bright line cannot be drawn to determine when opinions that encompass the ultimate fact in the case are or are not admissible. The issue has long been a subject of debate. [Citations.] In *People v. Wilson* (1944) 25 Cal.2d 341, 349 [153 P.2d 720] the Supreme Court said: 'There is no hard and fast rule that the expert cannot be asked a question that coincides with the ultimate issue in the case. "We think the true rule is that admissibility depends on the nature of the issue and the circumstances of the case, there being a large element of judicial discretion involved. . . . Oftentimes an opinion may be received on a simple ultimate issue, even when it is the sole one, as for example where the issue is the value of an article, or the sanity of a person; because it cannot be further simplified and cannot be fully tried without hearing opinions from those in better position to form them than the jury can be placed in." [Citations.]' " (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 651–652.)

In our review of the rulings, "we apply an abuse of discretion standard. [Citation.] A trial court enjoys broad discretion in ruling on foundational matters on which expert testimony is to be based. [Citations.] However, the discretion to admit or exclude evidence is not unlimited. 'The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no

reasonable basis for the action is shown. [Citation.]' [Citations.]" (*Korsak v. Atlas Hotels, Inc*. (1992) 2 Cal.App.4th 1516, 1522–1523.)

Despite the fact that in the present case the court rather than a jury was the trier of fact, we conclude that the matters at issue in the present case were sufficiently beyond common experience that the opinions of experts would assist the trier of fact. Appellants proposed to offer expert testimony on "how" the duties of care, loyalty, good faith and fair dealing "apply in this fairly complicated situation," and "whether or not under these particular facts the Defendants breached any of those duties." The nature and scope of fiduciary duties between a general and limited partners in a complex merger transaction with an affiliated party, the associated disclosure obligations, appellants' dealings with Aspen, and the ultimate fairness of the transaction in light of all of the provisions of the merger, required uncommon, specialized knowledge of experts in the field.

We also find that the proposed expert testimony of former Justice Reynoso was not inadmissible in its entirety. Certainly any opinion on the pure question of law offered by an expert witness that under the facts presented appellants breached fiduciary duties to the limited partners was beyond the permissible scope of expert testimony. (See *Piscitelli v. Friedenberg, supra,* 87 Cal.App.4th 953, 973–974; *Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal.App.4th 679, 689; *Cooper Companies v. Transcontinental Ins. Co.* (1995) 31 Cal.App.4th 1094, 1100; *Klein v. Oakland Raiders, Ltd.* (1989) 211 Cal.App.3d 67, 74; *Williams v. Coombs* (1986) 179 Cal.App.3d 626, 638, disapproved on other grounds in *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 885; *Downer v. Bramet, supra,* 152 Cal.App.3d 837, 841–842.) The dispositive issue of the nature of the fiduciary duty owed by appellants to the limited partners and any breach of that duty was one of law to be decided by the trial court. (See *Knight v. Jewett* (1992) 3 Cal.4th 296, 313; *Pittelman v. Pearce* (1992) 6 Cal.App.4th 1436, 1441.) " '[T]he calling of lawyers as "expert witnesses" to give opinions as to the application of the law to particular facts' " usurps the function of the trier of facts, " 'and results in no more than a modern day "trial by oath" in which the side producing the greater number of lawyers able to opine in their favor wins. [Citation.]' [Citation.]" (*Summers v. A. L.*

Gilbert Co., supra, 69 Cal.App.4th 1155, 1179.) The trial court thus properly excluded any evidence from the defense that offered an opinion on the precise application of the law to particular facts in the case: that is, the precise fiduciary duties associated with the merger transaction, and whether those duties were breached. (See *People v. Frederick* (2006) 142 Cal.App.4th 400, 412; *Piscitelli v. Friedenberg, supra,* 87 Cal.App.4th 953, 974; *Summers v. A. L. Gilbert Co., supra,* at pp. 1179–1180.)

We perceive of no reason, however, for the trial court to preclude presentation of expert testimony on the customary practices, ethical obligations, and the nature of disclosure necessary to accomplish fairness in an esoteric and specialized area of the law that did not encompass any legal conclusions or opinions on how the ultimate issue of breach of fiduciary duty should be decided. (*Kahn v. East Side Union High School Dist*. (2003) 31 Cal.4th 990, 1017–1018; *People v. Frederick, supra,* 142 Cal.App.4th 400, 412; *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 995, fn. 23; *American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, 37; *Staten v. Superior Court* (1996) 45 Cal.App.4th 1628, 1635–1636.) Expert testimony is admissible to establish the elements of a cause of action for breach of fiduciary duty where, as here, the conduct of the defendant is a matter beyond common knowledge. (See *Kotla v. Regents of University of California* (2004) 115 Cal.App.4th 283, 294; *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086–1087; *David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 892–893; *Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, 1146–1147.) Thus, it would have been proper for the trial court to consider the opinions of experts to the extent they described factual principles related to the fairness of the proposed merger transaction and the necessary disclosures, but not to the extent that they contained opinions as to whether PDC committed a breach of duty. (*Kahn v. East Side Union High School Dist., supra,* at p. 1018.) Any part of the expert opinion testimony that avoided conclusions as to the precise fiduciary duties owed by appellants and whether a breach occurred was admissible.

In its evidentiary ruling, however, the trial court did not make any distinction, but instead excluded the entirety of the proffered expert testimony. We recognize that

appellants' offer of proof as to former Justice Reynoso's testimony was quite vague.[12] Only the expected "general substance of the testimony" was stated by PDC: the "legal, equitable and ethical issues" related to the conduct of the parties. Still, at least part of the contemplated testimony of former Justice Reynoso on the nature of fiduciary obligations associated with the merger transaction was admissible. We thus conclude that by expansively and categorically curtailing appellants' right to produce expert testimony, the trial court abused its discretion, particularly where respondent was permitted to offer testimony from Davis that touched upon the same subject while delineating the grounds for Everest's claims of breach of fiduciary duty.

We turn to the issue of prejudice. Appellants have the burden of affirmatively demonstrating prejudice, that is, that the errors have resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475;[13] *Cucinella v. Weston Biscuit Co.* (1954) 42 Cal.2d 71, 82; *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 105.) "[E]rrors in civil trials require that we examine 'each individual case to determine whether prejudice actually occurred in light of the entire record.' " (*Cassim v. Allstate Ins. Co*. (2004) 33 Cal.4th 780, 801–802, quoting *Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 580.) The governing standard is whether it is reasonably probable that a result more favorable to appellants would have been reached in the absence of the error. (*Seaman's Direct Buying Service, Inc. v. Standard Oil Co*. (1984) 36 Cal.3d 752, 770, overruled on another ground in *Freeman & Mills, Inc. v. Belcher Oil Co*. (1995) 11 Cal.4th 85, 87–88; *Kotla v. Regents of University of California, supra,* 115 Cal.App.4th 283, 294.)

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[12] We also observe that appellants did not seek a new ruling on the in limine motion following the testimony of Davis.

[13] Code of Civil Procedure section 475, provides in pertinent part that "[n]o judgment . . . shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown."

We conclude that under the circumstances presented the error was not prejudicial. The court did not admit the testimony of Davis to establish the governing legal standards or breach of fiduciary duties in the case, but rather only to recite Everest's claims that the transaction was unfair. We must assume the court followed its own directive and considered the testimony for only that limited purpose. (See *People v. Jablonski* (2006) 37 Cal.4th 774, 834; *People v. Maury* (2003) 30 Cal.4th 342, 439–440.) The permissible scope of former Justice Reynoso's testimony was also quite limited. As we have observed, he would have been only authorized to touch upon the fairness concerns of the proposed merger transaction; he would not have been able to give any opinions on the precise nature of the fiduciary duties imposed upon appellants or whether those duties had been breached. A multitude of additional evidence on essentially the same subject was presented and argued by the parties. Thus, the admitted testimony of Davis and the excluded testimony of former Justice Reynoso were cumulative of other evidence considered by the court. As we read the record, even apart from the testimony of Davis the trial court had before it extensive evidence upon which to base an assessment of the fairness of the transaction and the fiduciary duties imposed upon appellants. We find that the evidentiary rulings did not render the proceedings unfair, nor would a more favorable verdict for appellants have been reached if the erroneously excluded testimony had been admitted. Therefore, the error was harmless. (*People v. Romero* (1999) 69 Cal.App.4th 846, 856–857; *People v. Vu* (1991) 227 Cal.App.3d 810, 815.)

III. The Evidence to Support the Finding of Breach of Fiduciary Duties.

Appellants present a multi-faceted challenge to the trial court's ultimate finding that a breach of fiduciary duties occurred. Appellants complain that the trial court followed erroneous standards in finding that they breached fiduciary duties to the limited partners. They also argue that the proposed merger transaction was fair, and the proxy statement was complete and accurate. Appellants' position is that approval of the merger by the limited partners following disclosure in the proxy statement "insulates the general partner from liability for an alleged breach of duty of loyalty."

***A. The Duty Imposed on General Partners in a Transaction with Limited Partners*.**

Appellants' first complaint is that the trial court mistakenly imposed upon them the same duties "as those of a trustee" in the proposed merger transaction with the limited partners, including Everest. The gist of appellants' contention is that under current California law found in the Revised Uniform Partnership Act or RUPA, specifically Corporations Code section 16404, general partners, unlike trustees, do not violate fiduciary duties to limited partners merely by furthering their own interests in a transaction. Rather, appellants argue, a general partner is "not held to the same standards as a trustee," and may profit from a transaction with limited partners as long as "there has been a full and complete disclosure" of the material facts and approval is obtained. (*Skone v. Quanco Farms* (1968) 261 Cal.App.2d 237, 241.) We conduct an independent, de novo review of this issue of law concerning the scope of the fiduciary duties imposed on partners. (*Enea v. Superior Court* (2005) 132 Cal.App.4th 1559, 1563.)

An examination of the statement of decision does not indicate to us that the trial court imposed upon appellants the fiduciary duties they object to in this appeal. The court found that Prometheus, as the general partner, "owed to each limited partner a fiduciary duty, including the duty of loyalty. This duty required Prometheus to act with honesty and loyalty in the best interest of the Partnership and the limited partners." The court added that Prometheus, as part of its duty to "treat the limited partners fairly," was required to disclose not only that there was a conflict with the "acquiring entity," but also "all facts relevant to the transaction so the limited partners could make an informed decision on whether to approve the Merger." The court then enumerated the "numerous" breaches of fiduciary duty by appellants associated with the merger transaction, and found that the "materially inaccurate, and incomplete" proxy statement "deceived" the limited partners and vitiated the approval of the "unfair" transaction. The court explained: "A general partner must act as a fiduciary and cannot proceed with a transaction that is unfair to the limited partners, even if the limited partners vote to approve the transaction." Thus, the court did not find that appellants breached their fiduciary duties to Everest by merely profiting from the merger transaction, but rather

that the absence of full and complete disclosure of the material facts to the limited partners tainted the approval of the merger.

The standards followed by the trial court are consistent with California law.[14] Upon forming a partnership, "the partners obligate themselves to share risks and benefits and to carry out the enterprise with the highest good faith toward one another—in short, with the loyalty and care of a fiduciary. '*Partnership is a fiduciary relationship, and partners are held to the standards and duties of a trustee in their dealings with each other*. " ' "[I]n all proceedings connected with the conduct of the partnership every partner is bound to act in the highest good faith to his copartner and may not obtain any advantage over him in the partnership affairs by the slightest misrepresentation, concealment, threat or adverse pressure of any kind." [Citations.]' " ' [Citations.] Or to put the point more succinctly, 'Partnership is a fiduciary relationship, and partners may not take advantages for themselves at the expense of the partnership.' [Citations.]" (*Enea v. Superior Court, supra,* 132 Cal.App.4th 1559, 1564, italics added; see also *Page v. Page* (1961) 55 Cal.2d 192, 197; *Jones v. Wells Fargo Bank* (2003) 112 Cal.App.4th 1527, 1540; *BT-I v. Equitable Life Assurance Society* (1999) 75 Cal.App.4th 1406, 1410.)

"A general partner of a limited partnership is subject to the same restrictions, and has the same liabilities to the partnership and to the other partners as in a general partnership." (*Everest Investors 8 v. McNeil Partners* (2003) 114 Cal.App.4th 411, 424.) "In a limited partnership the general partner manages and controls the partnership business. [Citation.] In exercising his management functions the general partner comes under a fiduciary duty of good faith and fair dealing toward other members of the partnership." (*Wyler v. Feuer* (1978) 85 Cal.App.3d 392, 402.)

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[14] "The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach." (*Stanley v. Richmond, supra,* 35 Cal.App.4th 1070, 1086; see also *Mendoza v. Continental Sales Co*. (2006) 140 Cal.App.4th 1395, 1405.) "The beneficiary of the trust has the initial burden of proving the existence of a fiduciary duty and the trustee's failure to perform it; the burden then shifts to the trustee to justify its actions." (*LaMonte v. Sanwa Bank California* (1996) 45 Cal.App.4th 509, 517.)

“ ‘Moreover, this duty extends to all aspects of the relationship and all transactions between the partners. “ ‘Each [partner] occupie[s] the position of a trustee to the other with regard to all the partnership transactions, including the transactions contemplated by the firm and constituting the object or purpose for which the partnership was formed.’ ” [Citation.]’ [Citations.] ‘ “ ‘A partner has no right to deal with partnership property other than for the sole benefit of the partnership [citation].’ ” ’ [Citations.]” (*Bardis v. Oates* (2004) 119 Cal.App.4th 1, 12.) “ ‘There is an obvious and essential unfairness in one partner’s attempted exploitation of a partnership opportunity for his own personal benefit and to the resulting detriment of his copartners.’ [Citation.] Thus, a partner who seeks a business advantage over another partner bears the burden of showing complete good faith and fairness to the other” (*Everest Investors 8 v. McNeil Partners, supra,* 114 Cal.App.4th 411, 424.)

The partners’ fiduciary duties to each other, however are not unlimited. (*Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1551.) “[T]here is no breach of a fiduciary duty if there has been a full and complete disclosure, if the partner who deals with partnership property first discloses all of the facts surrounding the transaction to the other partners and secures their approval and consent [citation].” (*Skone v. Quanco Farms, supra,* 261 Cal.App.2d 237, 241.)

Corporations Code section 16404 (section 16404), “which codifies the fiduciary duties of a partner under California law” and provides “ ‘ “a comprehensive, but not exhaustive, definition of partnership fiduciary duties,” ’ ” specifies that, “ ‘A partner does not violate a duty or obligation under this chapter or under the partnership agreement merely because the partner’s conduct furthers the partner’s own interest.’ The apparent purpose of this provision, which is drawn verbatim from RUPA section 404(e), is to excuse partners from accounting for incidental benefits obtained in the course of partnership activities without detriment to the partnership.” (*Enea v. Superior Court,*

supra, 132 Cal.App.4th 1559, 1564, 1565, 1566, italics omitted.)[15] The statute does not authorize the kind of conduct that deprives the partnership of assets or results in exclusive benefit realized by the general partner at partnership expense. (*Id*., at p. 1566.) Under section 16404, " ' "A partner owes at least two duties to other partners and the partnership: a duty of loyalty and a duty of care. In addition, an obligation of good faith and fair dealing is imposed on partners." . . .' [Citation.]" (*Id*., at p. 1565, italics omitted.)

While we agree with appellants that the duties of a trustee and a partner may not in all respects and in all transactions be identical, and a general partner is not in all instances precluded from dealing with the partnership, nothing in the record demonstrates that the trial court "applied the wrong legal standard" to resolve the present case. The trial court

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[15] Section 16404 reads in full: "(a) The fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subdivisions (b) and (c).

"(b) A partner's duty of loyalty to the partnership and the other partners includes all of the following:

"(1) To account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property or information, including the appropriation of a partnership opportunity.

"(2) To refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership.

"(3) To refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

"(c) A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

"(d) A partner shall discharge the duties to the partnership and the other partners under this chapter or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

"(e) A partner does not violate a duty or obligation under this chapter or under the partnership agreement merely because the partner's conduct furthers the partner's own interest.

"(f) A partner may lend money to and transact other business with the partnership, and as to each loan or transaction, the rights and obligations of the partner regarding performance or enforcement are the same as those of a person who is not a partner, subject to other applicable law.

"(g) This section applies to a person winding up the partnership business as the personal or legal representative of the last surviving partner as if the person were a partner."

did not find breach of fiduciary duties based on self-dealing or accrual of personal benefit to appellants alone. The court focused upon the lack of complete disclosure and fairness to the limited partners to find that despite their approval of the proposed merger transaction, a violation of appellants' fiduciary duties occurred.

B. The Approval of the Proposed Merger by the Limited Partners as a Defense.

Appellants make the related argument that PDC, as general partner, "fulfilled its fiduciary duty by obtaining approval from the unaffiliated limited partners." They maintain that because "a majority of unaffiliated limited partners approved the merger transaction," under "California law, PDC did not breach any fiduciary duty to the limited partners, and the judgment must be reversed." Appellants also make the converse argument that in light of the approval by the limited partners, the court was not entitled to undertake an "inquiry into whether the proposed transaction was 'fair.' This follows from the fact that there is no breach of fiduciary duty if the requisite partner approval is obtained."

We do not agree with appellants' characterization of the duties imposed on partners by California law. Appellants rely on the decision in *Skone v. Quanco Farms, supra,* 261 Cal.App.2d 237 (*Skone*), to claim that approval of a proposed transaction by limited partners satisfies the general partner's fiduciary duties, but *Skone* is not authority for that proposition. In *Skone*, appellant claimed that respondent, who was vested with exclusive responsibility to undertake marketing for a partnership, violated his fiduciary duties by dealing with the joint-venture property for his own benefit at appellant's expense. (*Id*., at p. 240.) The court stated that, "The fiduciary duty between partners and joint adventurers is a rule of ethics and fairness and is essentially similar to the duty owed by an agent to his principal or by a trustee to his *cestui que trust*. . . . In fact, it would be incongruous to hold that a partner who consented to a partnership transaction, *with full knowledge of all of the facts*, may later complain and seek damages against the other partner simply because he benefited by the transaction." (*Id*., at p. 241, second italics added.) Although respondent "was in an advantageous position when he committed the joint-venture potatoes to his potato-processing contracts without assigning these contracts

to the joint venture," the court nevertheless concluded "that there was substantial evidence for the court to find that respondent did not breach his fiduciary duty to appellant. There was substantial evidence for the court to find that respondent *fully and fairly disclosed his plans* to appellant's officers, . . . and *secured their approval and consent*." (*Ibid*., italics added.)

The crux of the holding in *Skone* is *not* that mere approval and consent of limited partners renders a self-dealing transaction fair and valid. A prerequisite to valid approval, the court emphasized, is full and fair disclosure of all material facts. (*Skone, supra,* 261 Cal.App.2d 237, 240–241.) Even the slightest misrepresentation, concealment, unfairness, threat or adverse pressure of any kind constitutes breach of fiduciary duty in a self-dealing transaction between the general and limited partners. (*Enea v. Superior Court, supra,* 132 Cal.App.4th 1559, 1564.) The mere approval of the proposed merger transaction by the limited partners did not satisfy appellants' fiduciary duties. " 'Neither a trustee nor any of his agents may take part in any transactions concerning the trust except when a *fully informed* beneficiary who is free from the trustee's influence authorizes the transaction [citation].' [Citation.]" (*Bardis v. Oates, supra,* 119 Cal.App.4th 1, 13, italics added.) " ' "Self-dealing in whatever form it occurs should be handled with rough hands for what it is—dishonest dealing. And while it is often difficult to discover self-dealing in mergers, consolidations, sale of all the assets or dissolution and liquidation, the difficulty makes it even more imperative that the search be thorough and relentless.' " [Citation.]" (*Everest Investors 8 v. McNeil Partners, supra,* 114 Cal.App.4th 411, 425.) "As managing partner, [PDC] was prohibited from engaging in self-dealing in any way, shape or form. [Citation.] 'The law does not permit a fiduciary to deal with himself in any transaction in his individual capacity [citation].' [Citations.]" (*Bardis v. Oates, supra,* at p. 13.)

Further, despite the approval of a merger transaction by the limited partners, the general partner's dealings with the partnership must also be *fair*. A fiduciary has the burden " ' "not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein . . . .

The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside." . . .' [Citation.]" (*Jones v. H. F. Ahmanson & Co*. (1969) 1 Cal.3d 93, 108; see also *Smith v. Tele-Communication, Inc*. (1982) 134 Cal.App.3d 338, 344.) California has "adopted 'the comprehensive rule of good faith and inherent fairness to the minority' " in transactions with controlling fiduciaries, which applies to any fiduciaries in the " 'exercise of powers that are theirs by virtue of their position' " in transactions where an advantage is gained. (*Stephenson v. Drever* (1997) 16 Cal.4th 1167, 1178; see also *Singhania v. Uttarwar* (2006) 136 Cal.App.4th 416, 426.) We reject appellants' contention that the rule of inherent fairness applies only to relationships between controlling and minority shareholders, and does not extend to partnerships. "[A] partner who seeks a business advantage over another partner bears the burden of showing complete good faith and fairness to the other." (*Everest Investors 8 v. McNeil Partners, supra,* 114 Cal.App.4th 411, 424.) Appellants did not escape their fiduciary duties just because the proposed merger transaction was approved by the limited partners.

C. The Findings on the Element of Fairness.

We next consider appellants' contention that the fairness of the transaction, even if subject to consideration in the present breach of fiduciary duties case, was established by the evidence. Appellants argue: "In any event, there can be no finding of liability because the uncontroverted evidence establishes that the merger was 'fair' under the totality of the circumstances. Here, PDC obtained an independent opinion that the merger transaction was 'fair from a financial point of view,' and there was no expert or other credible evidence introduced at trial to the contrary." To support their claim of fairness, appellants point to the finding in the Houlihan opinion letter issued in March of 2002, which concluded that the consideration paid to the limited partners for their units in connection with the proposed merger transaction was "fair." Appellants also refer to Everest's "internal valuations" and failure to make an offer to purchase the units as evidence "that $1,736/unit was a fair price."

In contrast to the de novo review we conducted of the governing legal standards, our review of the trial court's findings of fact is quite constrained. "Application of the standards of fairness and good faith required of a fiduciary is a factual question for the trier of fact not subject to independent review." (*Biren v. Equality Emergency Medical Group, Inc.* (2002) 102 Cal.App.4th 125, 138.) Our inquiry is confined to whether respondent presented substantial evidence to support the judgment for breach of fiduciary duty.[16] (*Jones v. Wagner* (2001) 90 Cal.App.4th 466, 471–472; *Quackenbush v. Mission Ins. Co.* (1996) 46 Cal.App.4th 458, 466; *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 917.) " 'In determining whether plaintiff's evidence is sufficient, [we] may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. [We] must give "to the plaintiff['s] evidence all the value to which it is legally entitled, . . . indulging every legitimate inference which may be drawn from the evidence in plaintiff['s] favor . . . ." ' [Citation.]" (*Stanley v. Richmond, supra,* 35 Cal.App.4th 1070, 1086.)

In our review of the trial court's finding that PDC breached the duty to treat the limited partners fairly, the fairness of the transaction is not assessed merely by the price offered to the limited partners. Fiduciary duties, as we have observed, encompass the "duty 'to act with the utmost good faith for the benefit of the other party.' [Citation.]" (*Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1160.) As we have observed, in a fiduciary partnership relationship, "partners may not take advantages for themselves at the expense of the partnership." (*Jones v. Wells Fargo Bank, supra,* 112 Cal.App.4th 1527, 1540; *LaMonte v. Sanwa Bank California, supra,* 45 Cal.App.4th 509, 517.) "[I]n all proceedings connected with the conduct of the partnership every partner is bound to act in the highest good faith to his copartner and may not obtain any advantage

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[16] Without providing us with supporting authority, appellant incorrectly asserts that some nebulous, less stringent standard of review than the substantial evidence rule is applicable to the findings of facts on the fairness of the transaction.

over him in the partnership affairs . . . ." (*Leff v. Gunter* (1983) 33 Cal.3d 508, 514; *Enea v. Superior Court, supra,* 132 Cal.App.4th 1559, 1564; *BT-I v. Equitable Life Assurance Society, supra*, 75 Cal.App.4th 1406, 1410–1411.) We must examine the nature of the transaction in its entirety, as did the trial court, to determine its fairness.

The conclusion of the Houlihan opinion letter that the merger consideration of $1,714 per share to be received by the Limited Partners was "fair from a financial point of view," was not the sole nor definitive evidence offered on the issue of fairness. First, evidence was presented that fairness opinions are not considered binding or even authoritative as to the propriety of a price term in a proposed transaction, but rather are commonly obtained for the purpose of guidance in the course of an SEC inquiry in self-dealing transactions. Evidence was also adduced that the fairness evaluation by Houlihan was predicated upon the accuracy of the information and assumptions provided by appellants, which the court found incomplete and misleading.

Additional evidence in the record supports the trial court's determination of the unfairness of the "CBRE" appraisal and the transaction: the limited partners had been denied distributions for years due to the ongoing dispute over the construction defects, and were therefore inclined to approve some form of liquidation despite the availability of funds to make repairs; the appraised value of the properties of $53.2 million was premised on the existence of construction defects, whereas the proceeds from the construction defect litigation and funds in the reserve accounts were available to repair and improve the buildings; although ample assets existed following the settlement of the construction defect litigation to repair and upgrade the buildings for sale on the open market at a "higher purchase price," appellants decided without adequate explanation to complete a self-dealing transaction; the repair costs as specified in the proxy statement were overestimated when compared to costs specified in existing construction contracts; the construction costs included amounts for capital improvements to the properties which solely benefited appellants following the merger; the loan prepayment penalty of nearly $3.4 million was deducted from the appraisal calculation, also to the sole benefit of appellants; the commissions for the "selling cost," the "disposition fee" and the Houlihan

fairness opinion were inappropriately deducted from the consideration paid to the limited partners; and, appellants failed to properly pursue in good faith an alternative transaction with Aspen as a potential third party purchaser of the properties at a higher price. While much of this evidence was disputed at trial, we cannot reweigh it. (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 622.)

Respondents also contested the Houlihan fairness opinion with evidence that in setting the price paid to the limited partners appellants knowingly relied on an outdated and unfairly undervalued appraisal of the Alderwood and Timberlake apartments by CBRE in September of 2001, which deducted costs (in the amount of $3.1 million) for deferred maintenance that had already been paid. Respondents also presented contrary expert testimony on the appraised value of the properties as of July 1, 2002, which was based on an "income approach," relied on a lower "capitalization rate" of between 6.0 to 6.5 percent, and subtracted "renovation" costs as specified in the construction contracts: $36.5 million for Alderwood and $21 million for Timberleaf, for a total of $57.5 million.[17]

We have before us a classic case of conflicting evidence. Although appellants contested some of the foundations for the conclusions of respondents' expert – particularly on the capitalization rates he used – we cannot discount the testimony, as it was believed by the trial court and is not inherently false or unfeasible. We are required to resolve evidentiary conflicts in favor of the respondent if there is substantial evidence to support it, and we cannot reweigh the evidence. (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 544.) " ' "To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the

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[17] The appraisal obtained by Everest placed a value on the properties of around $67 million before deduction for the cost of repairing the construction defects.

trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]" [Citations.]' [Citations.]" (*Bradley v. Perrodin* (2003) 106 Cal.App.4th 1153, 1166.) The trial court's finding of the unfairness of the merger transaction and dissolution of the partnership without adequate compensation to the limited partners may be subject to some dispute, but it is at least supported by substantial evidence. (*Page v. Page, supra,* 55 Cal.2d 192, 197.)

***D. The Disclosures in the Proxy Statement*.**

Appellants also challenge the trial court's finding that the proxy statement was "materially inaccurate and incomplete." Appellants complain that no misleading or concealed "facts in the Proxy" were identified in the statement of decision. They also object to the findings on the elements of "materiality" and "reliance" by the trial court.

Liability for breach of fiduciary duty based on fraudulent concealment may properly be found where a fiduciary who undertakes to furnish information in a transaction misstates, suppresses, or fails to fully and fairly disclose material facts. (*Persson v. Smart Inventions, Inc., supra,* 125 Cal.App.4th 1141, 1160; *Cicone v. URS Corp*. (1986) 183 Cal.App.3d 194, 201.) " ' "Also, a careless misstatement may constitute constructive fraud even though there is no fraudulent intent." [Citation.]' " (*Jones v. Wagner, supra,* 90 Cal.App.4th 466, 471 (italics omitted), quoting *Salahutdin v. Valley of California, Inc*. (1994) 24 Cal.App.4th 555, 562.) The issue of whether a fiduciary has made full disclosures as required is one of fact. (*Twomey v. Mitchum, Jones & Templeton, Inc.* (1968) 262 Cal.App.2d 690, 715.)

" 'In evaluating whether defendants satisfied their fiduciary duty of candor, the question is one of materiality.' " (*Neubauer v. Goldfarb* (2003) 108 Cal.App.4th 47, 62–63.) "Under California law, a fact is material if ' "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question" . . . .' [Citations.] In this context, a fact is material . . . 'if there is a substantial likelihood that, under all the circumstances, a reasonable investor would consider it important in reaching an investment decision.' Materiality is a question of fact for the jury, 'unless the "fact misrepresented is so obviously unimportant that the

jury could not reasonably find that a reasonable man would have been influenced by it." ' " (*Persson v. Smart Inventions, Inc., supra*, 125 Cal.App.4th 1141, 1163, quoting *Engalla v. Permanente Medical Group, Inc*. (1997) 15 Cal.4th 951, 977, fn. omitted.)

While the lengthy proxy statement fully disclosed the conflict of interest that permeated the proposed merger, we agree with the trial court that the limited partners were not given all of the information they needed to make a fully informed decision on the proposed merger. The primary deficiency of the proxy statement is its failure to thoroughly discuss and debate the merits of an open-market sale to a third party following repair of the construction defects, and the reasons the partnership chose to disregard that option. Funds to complete the repairs were available; the essential cost of the repairs was known; repair contracts were in existence with stated prices less than the costs estimated in the proxy statement. Thus, appellants were aware that repair and sale of the property was a feasible and perhaps ultimately more profitable course of action for the limited partners. Given the self-serving nature of the proposed transaction, we think that to satisfy their fiduciary duties appellants were obligated to comprehensively compare the merger with the alternative of a repair and sale of the properties. The proxy statement noted the "liquidation" alternative, and very briefly stated its benefits and disadvantages, but focused on the vagaries of a sale of the properties without repair of the construction defects. The limited partners were entitled to a more detailed discourse on the potential benefits that may have been expeditiously realized by repair of the properties before sale to an unaffiliated party.

The proxy statement additionally failed to fully disclose the offer by Aspen or discuss the negotiations with Aspen that immediately preceded the vote on the proposed merger.[18] If the limited partners had known more of the Aspen offer at greater price than the merger price, they may have not only decided to at least pursue that option before

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[18] A letter was drafted by PDC to cancel the partnership meeting and merger vote in the event a transaction with Aspen was consummated, but apparently was never sent to the limited partners, who apparently became aware of the Aspen offer only through the efforts of Everest.

finally approving the merger, but also may have been persuaded that some form of future sale was a more attractive and viable alternative.

We therefore find that the deficiencies in the proxy statement specified in the statement of decision are supported by the evidence. We further agree with the trial court that the nondisclosures were material, particularly when considered in the aggregate. The elements of reliance and proximately caused damages are established by the record. The trial court's finding that material misrepresentations and nondisclosures in the proxy statement constituted a breach of fiduciary duties is supported by the evidence.

E. The Business Judgment Rule as a Defense.

Appellants claim that the trial court erred by refusing to apply the "Business Judgment Rule" to insulate the general partner from liability for breach of fiduciary duties. Appellants argue that the "Business Judgment Rule is applicable to transactions that have received informed approval from disinterested shareholders," and, in fact, is "specifically designed for situations such as the present," where "PDC was faced with conflicting demands" and difficult market conditions. Appellants maintain that PDC "exercised honest business judgment" in the merger transaction, and therefore the "Business Judgment Rule protects PDC and prevents the trial court from second guessing the will of a majority of the unaffiliated limited partners."

"Under the business judgment rule, a director cannot be held liable for actions taken in good faith which he or she believes, based on a reasonable investigation, to be in the best interests of the corporation." (*Finley v. Superior Court* (2000) 80 Cal.App.4th 1152, 1157.) " 'A hallmark of the business judgment rule is that, when the rule's requirements are met, a court will not substitute its judgment for that of the corporation's board of directors.' [Citation.] Those requirements are that the directors *act in good faith* and in what they believe to be the organization's best interests. [Citation.] ' "Generally, courts will uphold decisions made by the governing board of an owners association so long as they represent *good faith efforts* to further the purposes of the common interest development, are consistent with the development's governing documents, and comply with public policy." [Citation.]' [Citation.]" (*Ostayan v.*

Nordhoff Townhomes Homeowners Assn., Inc. (2003) 110 Cal.App.4th 120, 128, italics added.) " 'The business judgment rule sets up a presumption that directors' decisions are made in good faith . . . .' [Citation.]" (*Biren v. Equality Emergency Medical Group, Inc., supra,* 102 Cal.App.4th 125, 136.) "[T]he courts have applied the business judgment rule to limited partnerships, although general partners are held to be agents and fiduciaries of the limited partners." (*Lee v. Interinsurance Exchange* (1996) 50 Cal.App.4th 694, 712; see also *Wallner v. Parry Professional Bldg., Ltd., supra,* 22 Cal.App.4th 1446, 1453–1454; *Wyler v. Feuer, supra,* 85 Cal.App.3d 392, 402.)

We acknowledge that PDC was presented with intricate business decisions to resolve: the limited partners were disappointed with the lack of distributions; the rental market remained sluggish; the apartment complexes were in need of extensive repairs. The inquiry here, however, is not into the *prudence* of appellants' business decision to market the properties and enter into a merger. Instead, the focus of the present action for breach of fiduciary duties is upon the self-dealing nature of the proposed merger, appellants' relationship and conflict of interest with the limited partners, the fairness of the transaction to the partners, and the extent of disclosure before approval for the merger was obtained.

The distinction is critical. We are not scrutinizing the business decisions of PDC, interfering with the right of the general partner to carry on the business of the partnership, or seeking to substitute the court's judgment for the discretion of the general partner. We are examining the good faith and fair dealing of the general partner in its relationship with other members of the partnership, and the conflict of interest generated by the self-dealing transaction. The business judgment rule is not pertinent in this context. It " 'does not apply in the case of bad faith or fraud. . . . " 'The policy reasons for keeping a court from evaluating after the fact the wisdom of a particular business decision do not apply when the issue is whether a party to that decision acted fraudulently or in bad faith. The assessment of fraud or bad faith is a function courts are accustomed to perform, and in performing it the courts do not intrude upon the process of business decisionmaking

beyond assuring that those decisions are not improperly motivated." ' [Citation.]" (*Everest Investors 8 v. McNeil Partners, supra*, 114 Cal.App.4th 411, 432.)

While the judiciousness of business decisions made by appellants are protected from inquiry by the business judgment rule, it does not absolve them of fiduciary responsibilities to the limited partners. (*Tran v. Farmers Group, Inc.* (2002) 104 Cal.App.4th 1202, 1214; *Lee v. Interinsurance Exchange, supra*, 50 Cal.App.4th 694, 712–713.) The business judgment "rule cannot be held to supplant the implied covenant of good faith and fair dealing." (*Notrica v. State Comp. Ins. Fund* (1999) 70 Cal.App.4th 911, 925.) Also, "The business judgment rule does not shield actions taken without reasonable inquiry, with improper motives, or *as a result of a conflict of interest*." (*Everest Investors 8 v. McNeil Partners, supra*, 114 Cal.App.4th 411, 430, italics added; see also *Biren v. Equality Emergency Medical Group, Inc., supra,* 102 Cal.App.4th 125, 136–137; *F.D.I.C. v. Castetter* (9th Cir. 1999) 184 F.3d 1040, 1046.) We thus conclude that the trial court did not err by finding that the business judgment rule fails to provide a defense to appellants in the present action based on breach of fiduciary duties, conflict of interest, bad faith, and constructive fraud. (*Everest Investors 8 v. McNeil Partners, supra*, at p. 432.)

IV. The Statement of Decision.

Appellants object to the trial court's failure to "address numerous controverted issues" in the statement of decision as they requested. They maintain that the deficiencies in the statement of decision require reversal of the judgment.

Code of Civil Procedure section 632 requires the court to issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial when a party requests such a written statement within 10 days after the court has announced a tentative decision. " 'A trial court rendering a statement of decision under Code of Civil Procedure section 632 is required only to state ultimate rather than evidentiary facts. A trial court is not required to make findings with regard to detailed evidentiary facts or to make minute findings as to individual items of evidence. Only where a trial court fails to make findings as to a material issue which would fairly

disclose the determination by the trial court would reversible error result. Even though a court fails to make a finding on a particular matter, if the judgment is otherwise supported, the omission is harmless error unless the evidence is sufficient to sustain a finding in favor of the complaining party which would have the effect of countervailing or destroying other findings. A failure to find on an immaterial issue is not error. [Citation.] In issuing a statement of decision, the trial court need not address each question listed in a party's request. All that is required is an explanation of the factual and legal basis for the court's decision regarding such principal controverted issues at trial as are listed in the request. [Citation.]' [Citations.]" (*Kazensky v. City of Merced* (1998) 65 Cal.App.4th 44, 67–68.)

We have examined the statement of decision and find that it adequately explains the factual and legal basis for the court's decision as to each of the principal controverted issues at trial, as required by Code of Civil Procedure section 632. The court was not required to respond to all of the questions listed in appellants' request, only those "regarding the principal controverted issues at trial." (*Sperber v. Robinson* (1994) 26 Cal.App.4th 736, 745; *Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1230.) Appellants fault the trial court's failure to set forth "legal authority for the existence and extent of any fiduciary duty purportedly owed by PDC in connection with the subject transaction," but the statement of decision need do no more than state the grounds upon which the judgment rests and resolve the ultimate issues of fact, not discuss legal authority or issues of law. (*Southern Cal. Gas Co. v. City of Vernon* (1995) 41 Cal.App.4th 209, 220–221; *Republic Indemnity Co. v. Empire Builders Corp*. (1985) 167 Cal.App.3d 1163, 1167.) The issues of "reliance and proximately caused damages" were mentioned in the statement of decision or undisputed at trial. Appellants' remaining complaints with omissions from the trial court's statement of decision –the "expert testimony to establish the nature and scope of PDC's fiduciary duty," the "specific portion of the Proxy Statement which is purportedly misleading," the " 'reasonable investor' standard of materiality," and the effect of the merger approval vote by the

limited partners – fall within the categories of immaterial or irrelevant facts that were not essential to a proper statement of decision. The statement of decision is adequate.

***V. The Right of Appellants to a New Trial by Jury*.**

We proceed to appellants' contention that the trial court erred by refusing to grant a motion for a new trial on the ground that their right to a jury trial of the action was denied. The record shows that at the commencement of trial Everest moved in limine to strike appellants' demand for a jury trial. At the hearing on the motion, appellants expressly withdrew opposition, and the demand for a jury trial was stricken. After trial was concluded and the statement of decision was issued, appellants' new trial motion argued that the "change of legal theory" by respondents at trial – from an unfair merger transaction to "fraud in connection with the proxy materials" – entitled them to a "jury trial on these issues." Appellants requested "a new trial by jury of Everest's claims." Appellants now claim that the trial court's denial of the new trial motion violated "PDC's right to a jury trial," and "is reversible per se." Everest responds that appellants had no right to a jury trial of the present "equitable claim," and in any event "waived its right to a jury trial." We agree with respondents that PDC's right to a jury trial was waived, and the subsequent, renewed demand for a jury trial in the new trial motion was untimely.

"The California Constitution guarantees the right to a jury trial in a civil action at law." (*Salisbury v. County of Orange* (2005) 131 Cal.App.4th 756, 764.) Pursuant to article I, section 16, of the California Constitution, trial by jury is an inviolate right, " 'a basic and fundamental part of our system of jurisprudence. . . . As such, it should be zealously guarded by the courts. . . . In case of doubt therefore, the issue should be resolved in favor of preserving a litigant's right to trial by jury.' [Citations.]" (*Cohill v. Nationwide Auto Service* (1993) 16 Cal.App.4th 696, 699; see also *Johnson-Stovall v. Superior Court* (1993) 17 Cal.App.4th 808, 810.)

The California Constitution also provides in article I, section 16, however, that, "In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute." Code of Civil Procedure section 631, subdivisions (a) and (d) provide in part: "In civil cases, a jury may only be waived pursuant to subdivision (d).

[¶] . . . [¶] (d) A party waives trial by jury in any of the following ways: [¶] (1) By failing to appear at the trial. [¶] (2) By written consent filed with the clerk or judge. [¶] (3) *By oral consent, in open court, entered in the minutes.* [¶] (4) By failing to announce that a jury is required, at the time the cause is first set for trial, if it is set upon notice or stipulation, or within five days after notice of setting if it is set without notice or stipulation. [¶] (5) By failing to deposit with the clerk, or judge, advance jury fees as provided in subdivision (b). [¶] (6) By failing to deposit with the clerk or judge, at the beginning of the second and each succeeding day's session, the sum provided in subdivision (c)." (Italics added.) The provisions for waiver of a jury trial specified in Code of Civil Procedure section 631, subdivision (d), "constitute the exclusive modes of waiver in civil cases. It has long been held in this state that a jury trial may not be waived by implication; it may only be waived affirmatively and in the manner designated by the provisions of section 631, Code of Civil Procedure." (*City of Redondo Beach v. Kumnick* (1963) 216 Cal.App.2d 830, 835; see also *Walton v. Walton* (1995) 31 Cal.App.4th 277, 286; *Cohill v. Nationwide Auto Service, supra,* 16 Cal.App.4th 696, 700.) "And '[n]o waiver results from going to trial after the erroneous denial of a jury, if the party makes a proper objection.' [Citation.]" (*Cohill v. Nationwide Auto Service, supra,* at p. 700.)

Appellants effectively consented to a jury trial waiver by withdrawing in open court their opposition to Everest's motion to strike the jury trial demand. The minute order of the hearing on the motion to strike on June 2, 2005, and the reporter's transcript of the waiver in open court is sufficient compliance with the statute, and constitutes a waiver under Code of Civil Procedure section 631. (*Lee v. Giosso* (1965) 237 Cal.App.2d 246, 248–249; *Ford v. Palisades Corp*. (1950) 101 Cal.App.2d 491, 499.) Appellants complain that the change of the nature of respondent's theory of recovery "[a]fter trial, but before judgment was entered," required a new trial before a jury. We discern no revision in the equitable nature or essence of the action for fraud and other breach of fiduciary duties, and in any event appellants failed to seek a jury trial until after a decision adverse to them was rendered. The request for a jury trial in the motion for

new trial filed after issuance of the statement of decision was untimely and properly denied. (*Lee v. Giosso, supra,* at pp. 248–249; *Holbrook & Tarr v. Thomson* (1956) 146 Cal.App.2d 800, 802–803; *Cloud v. Market Street Ry. Co*. (1946) 74 Cal.App.2d 92, 101–104.) "If a timely demand is not made under section 631, the party loses the right to a jury trial . . . ." (*Conservatorship of Kevin M.* (1996) 49 Cal.App.4th 79, 88.)

***VI. The Affirmative Defense of Collateral Estoppel*.**

Another ground urged by appellants in support of the new trial motion was the defense of collateral estoppel, based on the resolution in appellants' favor of a federal class action (the federal action) filed by some of the former limited partners of PIP for breach of fiduciary duties. A motion to dismiss the federal action was granted for failure to state a cause of action for breach of fiduciary duty, and on February 24, 2006, judgment was entered in favor of appellants in that case.[19] The attorneys who represented Everest in the case before us also represented the plaintiffs in the federal action. Appellants assert that the decision in the federal action in their favor precludes a contrary resolution of the present action, and entitles them "to a new trial on its affirmative defense of res judicata and/or collateral estoppel, given its evidence that Everest was in privity with the federal plaintiffs."[20]

"We very recently restated the fundamental principles that govern the doctrine of collateral estoppel: 'Issue preclusion by collateral estoppel "prevents 'relitigation of issues argued and decided in prior proceedings.' [Citation.]" [Citations.] The doctrine "rests upon the ground that the party to be affected, or some other with whom he is in

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[19] An appeal was taken from the district court's judgment in the federal action, and is apparently still pending.

[20] In conjunction with the collateral estoppel issue, Everest and PDC have requested in separate motions that this court take judicial notice of documents filed in a separate action for injunctive relief filed by PDC in federal district court (No. C 06-02751-WHA). Both motions are denied for lack of relevance and untimeliness. (See *Khawar v. Globe Internat., Inc.* (1998) 19 Cal.4th 254, 273, fn. 5; *Simmons v. Southern Pac. Transportation Co*. (1976) 62 Cal.App.3d 341, 366–367.) Those documents were also not considered by the trial court in ruling on the collateral estoppel issue below. (*County of Los Angeles v. County of Los Angeles Assessment Appeals Bd.* (1993) 13 Cal.App.4th 102, 108, fn. 3.)

privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and the interest of litigants alike require that there be an end to litigation." [Citations.]' [Citation.]" (*Mooney v. Caspari* (2006) 138 Cal.App.4th 704, 717.)

" ' " 'Traditionally, collateral estoppel has been found to bar relitigation of an issue decided at a previous proceeding "if (1) the issue necessarily decided at the previous [proceeding] is identical to the one which is sought to be relitigated; (2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding]." . . .' [Citations.]" [Citations.] "In addition to these factors, . . . the courts consider whether the party against whom the earlier decision is asserted had a 'full and fair' opportunity to litigate the issue." [Citation.]' [Citation.]" (*Mooney v. Caspari, supra,* 138 Cal.App.4th 704, 717.)

" 'Importantly, "collateral estoppel is not mechanically applied, and in each case the court must determine whether its application will advance the public policies which underlie the doctrine. [Citation.] Those policies are '(1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments which undermine the integrity of the judicial system; and (3) to provide repose by preventing a person from being harassed by vexatious litigation.' " [Citations.]' [Citation.] Also, collateral estoppel will not be applied 'if injustice would result or if the public interest requires that relitigation not be foreclosed.' [Citation.]" (*Mooney v. Caspari, supra,* 138 Cal.App.4th 704, 717–718.)

At issue here is the *identity of parties* element of collateral estoppel.[21] " 'This requirement of identity of parties or privity is a requirement of due process of law.

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[21] We observe that despite the pending appeal the judgment in the federal action, unlike a state court judgment, is final for res judicata or collateral estoppel purposes. (*Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1110.) The governing " 'federal rule is that a judgment or order, once rendered, is final for purpose of res judicata until reversed on appeal or

[Citation.]' [Citation.]" (*Garcia v. Rehrig Internat., Inc*. (2002) 99 Cal.App.4th 869, 877.)

Everest was not a plaintiff in the federal action, and in fact was specifically excluded as a party. "Without a strict identity of parties, collateral estoppel must be based upon the concept of privity. 'Collateral estoppel applies not only to parties to an action or proceeding, but also to those in privity with the parties.' [Citation.] Privity ' "refers 'to a mutual or successive relationship to the same rights of property, or to such an identification in interest of one person with another as to represent the same legal rights [citations] and, more recently, to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is "sufficiently close" so as to justify application of the doctrine of collateral estoppel. [Citations.]' [Citations.] ' "This requirement of identity of parties or privity is a requirement of due process of law." [Citation.] . . .' [Citations.]" [Citations.]' [Citation.]" (*Mooney v. Caspari, supra,* 138 Cal.App.4th 704, 718.)

" ' "Even if these threshold requirements are satisfied, the doctrine will not be applied if such application would not serve its underlying fundamental principles." [Citation.] " '[T]he determination whether a party is in privity with another for purposes of collateral estoppel is a policy decision.' [Citations.] 'Privity is essentially a shorthand statement that collateral estoppel is to be applied in a given case [assuming the other requirements are satisfied]; there is no universally applicable definition of privity.' [Citations.]" [Citation.] "In the final analysis, the determination of privity depends upon the fairness of binding appellant with the result obtained in earlier proceedings in which it did not participate. [Citation.] ' "Whether someone is in privity with the actual parties

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modified or set aside in the court of rendition.' " (*TIG Ins. Co. of Michigan v. Homestore, Inc*. (2006) 137 Cal.App.4th 749, 754, fn. 3, quoting *Martin v. Martin* (1970) 2 Cal.3d 752, 761.) In contrast, a state court "civil judgment will not be given collateral estoppel effect until it has become final on appeal . . . ." (*Lomeli v. Department of Corrections* (2003) 108 Cal.App.4th 788, 797; see also *Hellinger v. Farmers Group, Inc*. (2001) 91 Cal.App.4th 1049, 1060; *20th Century Ins. Co. v. Superior Court* (2001) 90 Cal.App.4th 1247, 1278; *People v. Martinez* (1998) 62 Cal.App.4th 1454, 1462.)

requires close examination of the circumstances of each case." [Citation.]' [Citation.]" [Citation.] " 'We review the court's conclusion of privity de novo . . . because the issue, which ultimately involves the requisites and limits of due process, is a legal one.' [Citation.]" [Citation.]' [Citation.]" (*Mooney v. Caspari, supra,* 138 Cal.App.4th 704, 718–719.)

While Everest and the limited partners in the federal action may have pursued comparable and common interests in the two cases, and had the same motive to obtain a finding of breach of fiduciary duty on the part of PDC, we find that that privity does not exist. " '[C]ollateral estoppel may be applied only if due process requirements are satisfied. [Citations.] In the context of collateral estoppel, due process requires that the party to be estopped must have had an identity or community of interest with, and adequate representation by, the losing party in the first action as well as that the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication. . . .' " (*Sutton v. Golden Gate Bridge, Highway & Transportation Dist*. (1998) 68 Cal.App.4th 1149, 1155, quoting *Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 875; see also *George F. Hillenbrand, Inc. v. Insurance Co. of North America* (2002) 104 Cal.App.4th 784, 826.) " 'The "reasonable expectation" requirement is satisfied if the party to be estopped had a proprietary interest in and control of the prior action, or if the unsuccessful party in the first action might fairly be treated as acting in a representative capacity for the party to be estopped. [Citations.] Furthermore, due process requires that the party to be estopped must have had a fair opportunity to pursue his claim the first time. [Citation.]' [Citation.]" (*Old Republic Ins. Co. v. Superior Court* (1998) 66 Cal.App.4th 128, 154.) "In deciding whether to apply collateral estoppel, the court must balance the rights of the party to be estopped against the need to minimize repetitive litigation and prevent inconsistent judgments." (*Children's Hospital v. Sedgwick* (1996) 45 Cal.App.4th 1780, 1788; see also *Sutton v. Golden Gate Bridge, Highway & Transportation Dist., supra*, at p. 1155.)

Although respondents had a "theoretical 'interest' " in the resolution of the fiduciary duties issue in the federal action – at least to the extent that an outcome favorable to the plaintiffs would have been binding upon PDC – they had no proprietary interest in the case. (See *Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 92.) Everest also had no incentive to intervene in the federal action, and, given the express exclusion of Everest's interests from the class of limited partners, had no reason to expect to be bound by any decision in that case. (*Old Republic Ins. Co. v. Superior Court, supra*, 66 Cal.App.4th 128, 154–155; *Lynch v. Glass* (1975) 44 Cal.App.3d 943, 949–950.)

Further, it does not appear that Everest participated in the federal action. " ' "A nonparty should reasonably be expected to be bound if he had in reality contested the prior action even if he did not make a formal appearance," for example, by controlling it. [Citations.] Furthermore, privity appertains "against one who did not actually appear in the prior action . . . where the unsuccessful party in the first action might fairly be treated as acting in a representative capacity for a nonparty." [Citation.]' [Citation.]" (*Rodgers v. Sargent Controls & Aerospace, supra,* 136 Cal.App.4th 82, 92.) The limited partners in the federal action did not act as Everest's representatives, and, so far as the record indicates, Everest did not direct or even exert any impact upon the litigation that produced the decision in favor of appellants. (*Id.* at pp. 92–93; *Old Republic Ins. Co. v. Superior Court, supra*, 66 Cal.App.4th 128, 155; *Aronow v. LaCroix* (1990) 219 Cal.App.3d 1039, 1052.) Nor does the record disclose to us that Everest assisted or played a part in litigating the federal case in any way by gathering information or actively contributing to the efforts of the limited partners to pursue their claims against PDC. (Cf., *Mooney v. Caspari, supra*, 138 Cal.App.4th 704, 720.)

Finally, under the circumstances presented, the fact that Everest is represented by the same counsel as were the plaintiffs in the federal action does not, we conclude, "suffice to extend the doctrine of privity to his case." (*Rodgers v. Sargent Controls & Aerospace, supra,* 136 Cal.App.4th 82, 93.) Everest was aware of the federal action, but distinctly chose to be excluded from it, and had no control over those proceedings. (*Id.*,

at pp. 93–94; *Lynch v. Glass, supra*, 44 Cal.App.3d 943, 949–950.) We find dispositive here the result reached in *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 299, where the defendant law firm which represented the acquiring company in a merger transaction argued that a summary judgment obtained in its favor on fraud claims brought by three shareholders in earlier lawsuits barred the identical fraud claim by the plaintiff, Vega, also a shareholder, under the doctrine of res judicata. The court in *Vega* concluded "The cases uniformly state that, in addition to an identity or community of interest between the party to be estopped and the losing party in the first action, and adequate representation by the latter, 'the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication.' [Citation.] [¶] We discern no basis for concluding Vega 'should reasonably have expected to be bound by' the adjudication of lawsuits in which he did not participate in any way, in which he had no proprietary or financial interest, and over which he had no control of any sort. [Citations.] The only relationship between Vega and the prior lawsuit is that he and the plaintiffs in those suits were shareholders in the same company. We are aware of no precedent for finding this to be a 'sufficiently close' relationship to justify application of the principle of preclusion, and we decline to create one."

We similarly conclude in the case before us that the status of Everest and the plaintiffs in the federal action as limited partners in the same company and their representation by the same counsel in the two cases does not establish that Everest should reasonably have expected to be bound by the federal court judgment. (*Vega v. Jones, Day, Reavis & Pogue, supra,* 121 Cal.App.4th 282, 299.) The lack of privity thus defeats appellants' collateral estoppel defense in the present case. (*Rodgers v. Sargent Controls & Aerospace, supra,* 136 Cal.App.4th 82, 94–95.)

***VII. The Award of Damages*.**

The award of damages is another subject of challenge by appellants. They first claim that the award of $22,958,789 to Everest is "duplicative, excessive, and not supported by any evidence." Appellants submit that "there is no basis in fact or law to

find that Everest suffered any damages, let alone the grossly exaggerated amounts awarded." More specifically, appellants complain that the trial court improperly deviated from the appropriate standard of the "fair value of the PIP units," and improperly added to the calculation of damages "certain fees and other expenses" deducted from the merger consideration: the construction defects litigation proceeds, the selling commission, the disposition fee, and the loan prepayment penalty.

Again, "We have very narrow appellate review" of the trial court's "determination of the amount of compensation" awarded to respondents. (*Rufo v. Simpson, supra,* 86 Cal.App.4th 573, 614.) The award of "damages must be upheld if it is supported by substantial evidence. [Citations.] As in other cases involving the issue of substantial evidence, we are bound to 'consider the evidence in the light most favorable to the prevailing party, giving him the benefit of every reasonable inference, and resolving conflicts in support of the judgment.' [Citation.]" (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc*. (2000) 78 Cal.App.4th 847, 891, italics omitted.) Further, " 'It is well settled that damages are excessive only where the recovery is so grossly disproportionate to the injury that the award may be presumed to have been the result of passion or prejudice. Then the reviewing court must act. [Citations.] The reviewing court does not act de novo, however. As we have observed, the trial court's determination of whether damages were excessive "is entitled to great weight" because it is bound by the "more demanding test of weighing conflicting evidence than our standard of review under the substantial evidence rule. . . ." ' [Citation.] All presumptions favor the trial court's determination and we review the record in the light most favorable to the judgment." (*Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1470–1471.)

The proper remedy afforded by Civil Code sections 1709 and 3333 in the present case for constructive fraud and breach of duty by a fiduciary "aims at compensation for any and all the detriment proximately caused by the breach." (*Salahutdin v. Valley of California, Inc., supra,* 24 Cal.App.4th 555, 568; see also *PPG Industries, Inc. v. Transamerica Ins. Co*. (1999) 20 Cal.4th 310, 315.) " 'California law is committed to the view that the fraudulent breach of fiduciary duty is a tort, and the faithless fiduciary is

obligated to make good the full amount of the loss of which his breach of faith is a cause. [Citations.] In accordance with this general principle, the cases hold that while the fraudulent property transactions between a vendor and vendee are governed by the special "out-of-pocket-loss" rule espoused in section 3343 [citations], where, as here, the defrauding party stands in a fiduciary relationship to the victim of fraud, the damages must be measured pursuant to the broad provisions of sections 3333 and 1709[,] regulating compensation for torts in general.' [Citation.] More recently the California Supreme Court reiterated, ' "In California, a defrauded party is ordinarily limited to recovering his 'out-of-pocket' loss . . . ." [Citation.] [¶] In fraud cases involving the "purchase, sale or exchange of property," the Legislature has expressly provided that the "out-of-pocket" rather than the "benefit-of-the-bargain" measure of damages should apply. (§ 3343, subds. (a), (b)(1).) This section does not apply, however, when a victim is defrauded by its fiduciaries. In this situation, the "broader" measure of damages provided by sections 1709 and 3333 applies.' " (*Strebel v. Brenlar Investments, Inc.* (2006) 135 Cal.App.4th 740, 747, quoting *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240–1241; see also *Gagne v. Bertran* (1954) 43 Cal.2d 481, 490–491.)

"Thus, in an action involving fraud by a fiduciary of the defrauded party, the defrauded party should be awarded damages for all loss proximately caused by the fraud." (*Ambassador Hotel Co., Ltd. v. Wei-Chuan Investment* (9th Cir. 1999) 189 F.3d 1017, 1033.) "The benefit-of-the-bargain measure places a defrauded plaintiff in the position he would have enjoyed had the false representation been true, awarding him the difference in value between what he actually received and what he was fraudulently led to believe he would receive." (*Fragale v. Faulkner* (2003) 110 Cal.App.4th 229, 236.) " 'There is no fixed rule for the measure of tort damages under Civil Code section 3333. The measure that most appropriately compensates the injured party for the loss sustained should be adopted.' [Citation.]" (*Strebel v. Brenlar Investments, Inc., supra,* 135 Cal.App.4th 740, 749.)

Under the benefit-of-the-bargain measure, the trial court properly calculated the primary component of damages as the difference between the value of the Alderwood

and Timberleaf apartments specified in the proxy statement, and the appraised fair market value at the time of the merger approval. The court found the testimony of Everest's expert Chris Carneghi on the market value of the properties after reduction for repair costs ($57.5 million) to be more credible than the opinions offered by appellants' experts, and we cannot disturb that credibility determination. (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968.) Moreover, evidence was presented that the value of the apartment buildings increased after the merger, which was an element of compensatory damages available to respondents, along with lost prospective profits. Appellants' breach of fiduciary duties extended beyond merely an unfair merger consideration paid to the limited partners. As we have mentioned, the court also found that the merger transaction was unfair to the limited partners in many other respects, most meaningfully in the failure of the proxy statement to thoroughly discuss and evaluate the option of a repair and sale of the properties at a higher price on the open market. Civil Code section 3333 provides as a measure of damages an amount that will compensate the injured party for all detriment of any kind proximately caused by the defendant's wrongful conduct, whether it could have been anticipated or not. (*Warren v. Schecter* (1997) 57 Cal.App.4th 1189, 1203; *Miranda v. Shell Oil Co*. (1993) 17 Cal.App.4th 1651, 1657; *Merenda v. Superior Court* (1992) 3 Cal.App.4th 1, 12.) Thus, Everest was not limited to recovery of the actual value of the property of which it was deprived, but was also entitled to any unrealized future profits and increase in assets of the partnership that resulted from approval of the merger transaction. (See *DeBaun v. First Western Bank & Trust Co*. (1975) 46 Cal.App.3d 686, 699–700; *Twomey v. Mitchum, Jones & Templeton, Inc., supra,* 262 Cal.App.2d 690, 732–733; *Ellis v. Navarro* (1943) 61 Cal.App.2d 755, 760.) We also find in the record substantial evidence to support the award of additional components of damages to Everest: the proceeds of the construction defect litigation settlement withheld from the limited partners in the merger transaction, the amount of the misrepresented repair cost excess benefit, the loan prepayment penalty, the sales commission, the fee for the fairness opinion, and the disposition fee.

VIII. The Recovery of Damages for the Interests Assigned to Everest.

Appellants also argue that the trial court erred by "including purportedly assigned claims" in the award of damages to Everest. The trial court found that the assignments of the interests of other limited partners to Everest before trial were "proper and valid," and added those claims to the calculation of damages awarded to Everest. Appellants maintain that assignment of "claims for breach of fiduciary duty" are not valid under California law. They further assert that "Letters of Transmittal" previously signed by the limited partners as part of the merger transaction "constituted a prior assignment," and therefore "the subsequent assignments to Everest were an assignment of nothing." Appellants also object to the fact that some of the assignments were "obtained after the close of discovery," which effectively resulted in the improper "addition of new parties" to the action in derogation of their "due process rights."

Looking first at the essential validity of assignments of actions for breach of fiduciary duty, we observe that, "California 'maintains a policy encouraging the free transferability of all types of property.' [Citation.] . . . [A] ' "chief incident of ownership" ' in property is the right to transfer it, a right which applies equally to tangible and intangible forms of property, including causes of action. [Citation.]" (*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2007) 148 Cal.App.4th 39, 48.) "Originally codified in 1872, [Civil Code] section 954 states: 'A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner.' An assignment is a commonly used method of transferring a cause of action." (*Essex Ins. Co. v. Five Star Dye House, Inc*. (2006) 38 Cal.4th 1252, 1259.)

" 'As a general proposition it can be said " 'that the only causes or rights of action which are not transferable or assignable in any sense are those which are founded upon wrongs of a purely personal nature, such as slander, assault and battery, negligent personal injuries, criminal conversation, seduction, breach of marriage promise, malicious prosecution, and others of like nature. All other demands, claims and rights of action whatever are generally held to be transferable.' " ' [Citations.]" (*Essex Ins. Co. v.*

Five Star Dye House, Inc., supra, 38 Cal.4th 1252, 1260.) " 'Assignable are choses in action arising out of an obligation or breach of contract as are those arising out of the violation of a right of property (§ 954, Civ. Code) or a wrong involving injury to personal or real property.' [Citations.]" (*Baum v. Duckor, Spradling & Metzger* (1999) 72 Cal.App.4th 54, 65.)

The claims for breach of fiduciary duties against appellants have none of the elements of wrongs of a purely private or personal nature that preclude assignment. (*Brown v. Guarantee Ins. Co*. (1957) 155 Cal.App.2d 679, 694–695.) Rather, the actions assigned to Everest relate to fraudulent or bad faith deprivation of rights to property that are assignable under California. (*Essex Ins. Co. v. Five Star Dye House, Inc., supra,* 38 Cal.4th 1252, 1260; *Troost v. Estate of DeBoer* (1984) 155 Cal.App.3d 289, 297; *Certified Grocers of California, Ltd. v. San Gabriel Valley Bank* (1983) 150 Cal.App.3d 281, 288–289; *Brown v. Guarantee Ins. Co., supra*, at p. 694–695.)

Nor, we conclude, did the previously executed letters of transmittal defeat the assignments. Following the approval of the merger agreement, the limited partners were required to sign letters of transmittal which declared: "The undersigned hereby irrevocably sells, *assigns*, transfers, conveys and delivers to, or upon the order of, [PIP] all right, title and interest in, to or in respect of the Units converted hereby pursuant to the Merger, including without limitation, . . . (iv) all present and future claims, if any, of the undersigned against the Partnership, the other limited partners of the Partnership or the general partner and its affiliates, including, without limitation, the Acquirer, under or arising out of the Partnership Agreement, the undersigned's status as a holder of Units, or the terms or conditions of the Merger." (Italics added.) As a *release or waiver* of the claims for willful breach of fiduciary duties this provision is invalid as violative of public policy. (*Neubauer v. Goldfarb, supra,* 108 Cal.App.4th 47, 55–56; *Cohen v. Kite Hill Community Assn*. (1983) 142 Cal.App.3d 642, 654–655.) "[A] breach of fiduciary duty constitutes a 'willful injury to the . . . property of another' under Civil Code section 1668 and therefore cannot be contractually excused." (*Neubauer v. Goldfarb, supra,* at p. 56.) As an *assignment*, the provision in the letters of transmittal does not apply to the present

action. The provision cannot be interpreted as an *assignment to PDC* of any claims by the limited partners for breach of fiduciary duties *by PDC*. The language of the assignment does not specifically include actions for breach of fiduciary duty, and to so construe the provision would be a completely unreasonable interpretation of the language that we will not adopt. (*La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co*. (1994) 9 Cal.4th 27, 37; *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co*. (1993) 5 Cal.4th 854, 867.)

Finally, the trial court did not err by including those assignments that were made – in response to a letter of solicitation sent by Everest to the limited partners – and disclosed to appellants after the close of discovery and the unsuccessful settlement conference in the case. We concur with the trial court that the belated disclosure of the additional assignments was not prejudicial to appellants. The assignments were all essentially identical, and the issues relating to their validity and effect were all the same. Appellants were aware of the nature and terms of the assignments from those that had been disclosed earlier. Thus, the lack of discovery did not prejudice the defense of the case, and did not contravene the purposes of the discovery statutes: to assist the parties and the trier of fact in ascertaining the truth; to encourage settlement by educating the parties as to the strengths of their claims and defenses; to expedite and facilitate preparation and trial; to prevent delay; and to safeguard against surprise. (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 376; *Beverly Hospital v. Superior Court* (1993) 19 Cal.App.4th 1289, 1294.) We find no error in the calculation of damages.

IX. The Imposition of a Constructive Trust and Equitable Lien.

We turn to appellants' contention that the imposition of a constructive trust and an equitable lien on the partnership units or any proceeds from them was error. Appellants submit that a constructive trust improperly granted Everest a "double recovery" and "effectively rescinded the merger, contrary to California law."

A breach of fiduciary duty action may entitle the plaintiff to more expansive equitable remedies including a constructive trust. (*BGJ Associates v. Superior Court* (1999) 75 Cal.App.4th 952, 967; *Interactive Multimedia Artists, Inc. v. Superior Court,*

supra, 62 Cal.App.4th 1546, 1553.) " 'A constructive trust may be imposed when a party has acquired property to which he is not justly entitled, if it was obtained by actual fraud, mistake or the like, or by constructive fraud through the violation of some fiduciary or confidential relationship. . . .' " (*Warren v. Merrill, supra,* 143 Cal.App.4th 96, 113, quoting *Mazzera v. Wolf* (1947) 30 Cal.2d 531, 535; see also *Olson v. Toy* (1996) 46 Cal.App.4th 818, 823.) "A constructive trust is an involuntary equitable trust created by operation of law as a remedy to compel the transfer of property from the person wrongfully holding it to the rightful owner. [Citations.] The essence of the theory of constructive trust is to prevent unjust enrichment and to prevent a person from taking advantage of his or her own wrongdoing." (*Communist Party v. 522 Valencia, Inc.* (1995) 35 Cal.App.4th 980, 990.)

" 'The principal circumstances where constructive trusts are imposed are set forth in Civil Code sections 2223 and 2224. Section 2223 provides that "[o]ne who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner." Section 2224 states that "[o]ne who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." Under these statutes and the case law applying them, a constructive trust may only be imposed where the following three conditions are satisfied: (1) the existence of a res (property or some interest in property); (2) the right of a complaining party to that res; and (3) some wrongful acquisition or detention of the res by another party who is not entitled to it. [Citations.]' [Citation.]" (*Campbell v. Superior Court* (2005) 132 Cal.App.4th 904, 920, italics omitted.) " '[A] constructive trust may be imposed in practically any case where there is a wrongful acquisition or detention of property to which another is entitled.' [Citation.]" (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1069.)

Despite the acquisition by appellants of the partnership assets through breach of fiduciary duties, we conclude that imposition of a constructive trust is not an appropriate or available remedy in the present case. The primary right and remedy granted to Everest

here is legal: the recovery of damages as compensation for the wrongful acquisition of Everest's partnership units by appellants through the merger transaction. Those damages awarded under the broad benefit-of-the-bargain measure fully compensate Everest for the loss incurred as a result of the merger transaction. The remedy afforded to Everest for the breach of fiduciary duties is thus entirely adequate. The " ' "inadequacy of the legal remedy to compensate for the breach is the keystone of equitable jurisdiction." ' " (*Wilkison v. Wiederkehr* (2002) 101 Cal.App.4th 822, 836, quoting *Thompson v. Beskeen* (1963) 223 Cal.App.2d 292, 295; see also *Walton v. Walton, supra,* 31 Cal.App.4th 277, 292.) While an equity court may impose a constructive trust on a defendant's assets, "Perhaps the most basic rule governing equity jurisdiction is that '. . . there is no right to equitable relief or an equitable remedy when there is an *adequate remedy at law*.' [Citation.]" (*Martin v. County of Los Angeles* (1996) 51 Cal.App.4th 688, 696.) A constructive trust is an equitable remedy, "and equitable relief will not be granted if there is a plain, complete, speedy, and adequate remedy at law." (*Andal v. City of Stockton* (2006) 137 Cal.App.4th 86, 91; see *Wilkison v. Wiederkehr, supra,* at p. 834.) Contrary to the trial court's finding, nothing in the record indicates to us that the damages awarded by the trial court will not make Everest whole. Moreover, a constructive trust in addition to damages may result in an impermissible excessive recovery for Everest. (See *Mycogen Corp. v. Monsanto Co*. (2002) 28 Cal.4th 888, 905–906; *Rogers v. Davis* (1994) 28 Cal.App.4th 1215, 1220.) Therefore, imposition of a constructive trust and an equitable lien in addition to the award of damages was error.

X. The Award of Prejudgment Interest.

Appellants' final contention is that the "award of prejudgment interest at a rate of ten percent" was error. Appellants claim that the maximum interest rate allowed in the present case is seven percent. Everest responds that under Probate Code sections 16440 and 16441, a breach of fiduciary duties by a trustee entitles the beneficiary to

prejudgment interest calculated at 10 percent, which is the postjudgment interest rate (Code Civ. Proc., § 685.010, subd. (a)).[22]

We agree with appellants that the proper rate of prejudgment interest to which Everest is entitled is not 10 percent. The trial court had discretion to award Everest prejudgment interest under Civil Code section 3288, which "states that '[i]n an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury.' It is well established that where a litigant proceeds on a theory of a violation of a fiduciary relationship which constitutes constructive fraud, an award of interest is discretionary with the trier of fact." (*Baker v. Pratt* (1986) 176 Cal.App.3d 370, 383; see also *Tevis v. Beigel* (1959) 174 Cal.App.2d 90, 101.) "The inclusion of interest in the verdict pursuant to section 3288 is not the granting of damages in excess of the loss incurred. When, by virtue of the fraud or breach of fiduciary duty of the defendant, a plaintiff has been deprived of the use of his money or property and is obliged to resort to litigation to recover it, the inclusion of interest in the award is necessary in order to make the plaintiff whole. It is for this reason that it is proper to have such interest run from the time the plaintiff parted with the money or property on the basis of the defendant's fraud." (*Nordahl v. Department of Real Estate* (1975) 48 Cal.App.3d 657, 665; see also *Commissioner of Internal Revenue v. Raphael* (9th Cir. 1943) 133 F.2d 442, 444.)

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[22] Probate Code section 16440, subdivision (a)(1) reads: "(a) If the trustee commits a breach of trust, the trustee is chargeable with any of the following that is appropriate under the circumstances: [¶] (1) Any loss or depreciation in value of the trust estate resulting from the breach of trust, *with interest*." (Italics added.)

Probate Code section 16441, subdivision (a) provides, "If the trustee is liable for interest pursuant to Section 16440, the trustee is liable for the greater of the following amounts: [¶] (1) *The amount of interest that accrues at the legal rate on judgments in effect during the period when the interest accrued.* [¶] (2) The amount of interest actually received." (Italics added.)

According to Code of Civil Procedure section 685.010, subdivision (a): "Interest accrues at the rate of 10 percent per annum on the principal amount of a money judgment remaining unsatisfied."

Civil Code section 3288 does not specify a rate of prejudgment interest for a fraud or breach of fiduciary duties claim, and thus the constitutional rate of seven percent applies to the amount awarded as damages to respondents. (Cal. Const., art. XV, § 1; *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1585–1586; *Continental Airlines, Inc. v. McDonnell Douglas Corp*. (1989) 216 Cal.App.3d 388, 434; *Conger v. White* (1945) 69 Cal.App.2d 28, 40.) Appellants were not trustees within the meaning of Probate Code section 16440, so the prejudgment interest award at the higher rate of 10 percent cannot stand.

DISPOSITION

That part of the judgment that imposed a constructive trust and equitable lien is reversed. The trial court is directed to modify the judgment to calculate the award of prejudgment interest at a rate of seven percent rather than ten percent. In all other respects the judgment is affirmed. The parties are to bear their own costs on appeal.

Swager, J.

We concur:

Stein, Acting P. J.

Margulies, J.