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The Honorable Richard A. Jones

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

T-MOBILE USA, INC., a Delaware
corporation,

Plaintiff

v.

HUAWEI DEVICE USA, INC., a Texas
corporation,

Defendant.

No. C14-1351 RAJ

**DEFENDANT HUAWEI DEVICE
USA, INC.'S OPPOSITION TO T-
MOBILE USA, INC.'S MOTION
FOR A NEW TRIAL PURSUANT
TO FED. R. CIV. P. 59**

Noting Date: July 7, 2017

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INTRODUCTION

1
2 The Parties waged a weeks-long, hard-fought trial over T-Mobile's causes of action and
3 its claim to have suffered damage as a result of Huawei Device USA's alleged conduct. The
4 Parties offered competing experts and competing witnesses. The jury agreed with T-Mobile's
5 witnesses and experts on some issues and Huawei's on others, as the verdict reflected. The jury
6 parsed four different contracts, found liability on some and no liability on another, and awarded
7 restitutionary damages for the former. And the jury found misappropriation under Washington's
8 trade secret law, but agreed with Huawei that T-Mobile suffered no harm and that Huawei gained
9 no unjust benefit as a result. This careful, deliberate verdict is not the stuff for which new trial
10 orders are made.

11 Contrary to T-Mobile's new trial motion, the jury was plainly within its rights to award
12 zero damages for trade secret misappropriation based on the evidence at trial. There was ample
13 ground to reject T-Mobile's *post hoc* request for investigation costs—a measure of damages that
14 T-Mobile did not even request from the jury—because the evidence showed that the investigation
15 was not carried out in good faith but was merely a ploy to ready T-Mobile for litigation. And
16 there was extensive evidence that supports the jury's rejection of any unjust enrichment award on
17 the misappropriation claim, not the least of which was that T-Mobile's own expert admitted that
18 he could not draw a "causal link" between the supposed copycat testing robot and any change
19 made to any phone.

20 Also, contrary to the new trial motion, the jury's verdict for Huawei on T-Mobile's claim
21 for breach of the MetroPCS Agreement finds strong foundation on the evidence. To begin,
22 T-Mobile failed to prove that the agreement was even assigned to Huawei Device USA from the
23 party that signed the agreement: Futurewei. And, putting that evidentiary failing aside, T-Mobile
24 never linked the alleged misuse of confidential information to the terms of the MetroPCS
25 Agreement, instead focusing its case on other agreements. The jury's verdict reflects that it
26 parsed through the trial evidence and carefully measured that evidence contract-by-contract.

27 Similarly meritless is T-Mobile's challenge to two jury instructions. The Court can
28

1 simply disregard T-Mobile's arguments regarding the Court's exemplary damages instruction,
2 because T-Mobile does not seek a new trial on this basis at all. T-Mobile merely claims a
3 different instruction should be given at a retrial, an argument that is both premature (at best) and
4 waived. T-Mobile *does* seek a new trial on the basis of the Court's contract damages instruction.
5 But T-Mobile also waived that argument by failing to make it before the jury was instructed. In
6 any event, T-Mobile offers no explanation of how the Court supposedly erred when it hewed to
7 the Washington model jury instructions; T-Mobile simply relies on an out-of-circuit trade secret
8 case that, if anything, proves the correctness of the Court's instruction.

9 T-Mobile's arguments do not amount to a miscarriage of justice; they amount to sour
10 grapes over the jury's thoughtful verdict and criticisms over the Court's instructions that both
11 come too late and lack merit.

12 LEGAL STANDARD

13 Federal Rule of Civil Procedure 59(a) provides that a new trial may be granted "after a
14 jury trial, for any reason for which a new trial has heretofore been granted in an action at law in
15 federal court." A district court may grant a new trial if the jury verdict is contrary to the clear
16 weight of the evidence. *DSPT Int'l, Inc. v. Nahum*, 624 F.3d 1213, 1218 (9th Cir. 2010). Under
17 this "stringent standard," a motion for new trial may be granted "only if the verdict is against the
18 great weight of the evidence or it is quite clear that the jury has reached a seriously erroneous
19 result." *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1229 (9th Cir. 2001)
20 (quotation marks and citation omitted). In evaluating the jury's verdict, the Court cannot
21 "substitute its evaluations for those of the jurors" or grant a new trial "simply because it would
22 have arrived at a different verdict." *Tortu v. Las Vegas Metro. Police Dep't*, 556 F.3d 1075, 1084
23 (9th Cir. 2009) (quotation marks and citations omitted).

24 Erroneous instructions may, in some instances, present grounds for a new trial. *See*
25 *Murphy v. City of Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990). The movant, however, must
26 show that there was instructional error and that such error was prejudicial. *See Tritchler v. Cty. of*
27 *Lake*, 358 F.3d 1150, 1154 (9th Cir. 2004). In addition, a movant cannot obtain a new trial based
28

1 on a purportedly erroneous jury instruction without first preserving its objection to the instruction.
 2 See *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 512 (9th Cir. 2000).

3 ARGUMENT

4 I. The Jury's No-Damages Award on Misappropriation Is Supported by the Evidence.

5 The jury's damages verdict of zero dollars on T-Mobile's claim for trade secret
 6 misappropriation is not contrary to the great weight of evidence. At trial, the parties vigorously
 7 disputed whether T-Mobile had suffered any harm and whether any Huawei entity had been
 8 unjustly enriched as a result of misappropriation. The Parties offered competing expert opinions
 9 and other evidence on the issue, and the jury agreed with Huawei. T-Mobile may disagree with
 10 the jury's verdict, but none of its arguments meet the "stringent" new trial standard.

11 1. Despite framing its motion as one based on the weight of the evidence, T-Mobile
 12 begins by arguing that the jury's verdict is inconsistent because it found for T-Mobile on liability
 13 but awarded no damages. T-Mobile's argument is both waived and wrong.

14 A party waives its objection to an alleged inconsistency in the verdict when it fails to
 15 object at the time the verdict was read. In *Philippine Nat'l Oil Co. v. Garrett Corp.*, 724 F.2d
 16 803, 805 (9th Cir. 1984), the plaintiff sought a new trial after the jury found the defendant liable
 17 for negligent misrepresentation but awarded no damages. The plaintiff, like T-Mobile here,
 18 claimed the verdict was inconsistent because the jury was instructed that damages is an element
 19 of the claim. *Id.* The plaintiff waived that argument, the Ninth Circuit held, "when it failed to
 20 raise it at the time the verdict was read." *Id.* at 806. If T-Mobile "wished to remedy the possible
 21 inconsistency in the verdict, it should have objected before the Court discharged the jury.
 22 Because it decided not to do so, it has waived its right to object...." *O2 Micro Int'l Ltd. v.*
 23 *Monolithic Power Sys., Inc.*, 420 F. Supp. 2d 1070, 1078 (N.D. Cal. 2006), *aff'd*, 221 F. App'x
 24 996 (Fed. Cir. 2007) (applying Ninth Circuit law).

25 In any event, the settled Ninth Circuit rule is that "when a jury finds liability but
 26 nonetheless awards zero damages . . . that failure to award damages does not by itself render a
 27 verdict invalid." *Zhang v. Am. Gem Seafoods*, 339 F.3d 1020, 1036 (9th Cir. 2003) (quoting
 28

1 *Philippine*, 724 F.2d at 806). T-Mobile nonetheless claims that, because actual damages or unjust
2 enrichment is an element of trade secret misappropriation, the jury’s “yes” answer on
3 misappropriation implies that it must have found that T-Mobile suffered injury or that Huawei
4 was unjustly enriched. On the contrary, such a verdict is more reasonably interpreted to mean
5 that T-Mobile “experienced a technical violation of [its] rights, but suffered no damages.” *Joseph*
6 *v. Rowlen*, 425 F.2d 1010, 1012 (7th Cir. 1970); *see generally Poulin Corp. v. Chrysler Corp.*,
7 861 F.2d 5, 7 (1st Cir. 1988) (“the jury is to be taken at its word, and that, as a matter of
8 substance, it found that plaintiff met its burden of proof as to defendant’s affirmative misconduct
9 on one or more of its claims, but failed to meet it as to damages”); *Spears v. Hough*, 458 F.2d
10 529, 531 (8th Cir. 1972) (“The mere fact that the jury returned a verdict for a plaintiff but
11 assessed the damages as ‘none’ does not make such a verdict invalid or ambiguous nor does it
12 necessitate a new trial.”).

13 This interpretation is consistent with the phrasing of the verdict form, on which Question
14 2 invited the jury to award “damages, *if any*,” upon answering yes to the initial misappropriation
15 question. ECF No. 484 at 2 (emphasis added). The “if any” language communicated to the jury
16 that it should bifurcate its consideration of the elements of misappropriation and could answer
17 “yes” to the initial question without finding any damages. As a result, there is no support for T-
18 Mobile’s conclusion that the jury necessarily found damages or unjust enrichment.

19 **2.** The jury’s finding that T-Mobile suffered no actual damages as a result of trade secret
20 misappropriation is fully in accord with the weight of the evidence. T-Mobile asked the jury for
21 \$8,277,757 in actual damages based on Dr. Ryan Sullivan’s Honor III lost profits theory. The
22 jury rejected this actual loss figure twice: once in the context of T-Mobile’s misappropriation
23 claim, and again in the context of T-Mobile’s breach of contract claims. T-Mobile did not ask the
24 jury to award it any other amount for its supposed actual loss.

25 Now, in post-trial briefing, T-Mobile acknowledges that the jury was justified in rejecting
26 the Sullivan damages theory it presented at trial but claims that a new trial is warranted because
27 the jury failed to award \$15,800 in investigation costs that T-Mobile never requested. It is
28

1 improper for T-Mobile to ask the Court to grant a new trial on the basis of a demand not
2 presented to the jury. *See, e.g., Black v. Pan Am. Labs., L.L.C.*, 646 F.3d 254, 261 (5th Cir. 2011)
3 (declining to address whether evidence supported theory of recovery that plaintiff “did not
4 advance ... at trial”).

5 Even if T-Mobile had properly requested damages for its investigation expenses, T-
6 Mobile neither introduced evidence of its investigation costs nor linked such costs to Huawei
7 Device USA’s actions in this case. In fact, the evidence revealed that T-Mobile’s investigation
8 was not conducted in good faith and that the investigation was, instead, a ploy by T-Mobile to
9 obtain information for the purpose of filing this lawsuit. T-Mobile’s tactics were revealed during
10 its case-in-chief, when it attempted to conceal from the jury that Huawei had given T-Mobile its
11 complete, unredacted investigation report and that, even though T-Mobile had the full report in its
12 possession for three years, it withheld that information from its lead corporate investigator,
13 Corban Cunningham. May 8, 2017 Trial Tr. 130:4-131:18, 149:4-6, 149:17-150:10
14 (Cunningham); May 9, 2017 Trial Tr. 163:22-164:21 (Buckland). The jury’s verdict of \$0 for
15 actual damages fully comports with the evidence presented at trial.

16 **3.** There was also abundant evidence from which the jury could conclude that Huawei did
17 not benefit from any misappropriation. First, the evidence showed that Tappy was not valuable or
18 beneficial because it did not work—it was bad technology that did not replicate the human user
19 experience and therefore did not have any effect on device quality or return rates. Second, the
20 evidence showed that Huawei did not use Tappy technology or incorporate it into xDR. Third,
21 the evidence showed that Huawei never made any change to any phone as a result of xDR. Each
22 of these points is a more than sufficient evidentiary basis for the verdict that there was no unjust
23 enrichment in this case.

24 The first point—that Tappy simply does not work—is established by the testimony and
25 reports of William Wevers, a third party who examined Tappy in 2012. He explained that “the T-
26 Mobile contact area was not representative of a human finger” and the robot applied so much
27 force that it “could actually compromise” the screen technology. May 11 Trial Tr. at 25:8-27:20.
28

1 As a result, T-Mobile's overly rigid "rubber tip barely triggers the touch threshold" unless it uses
2 so much excessive force that it "bend[s] the sensor and caus[es] baseline shift." DTX4145.

3 When presented with this information, T-Mobile's own "inventor" observed that it "will be the
4 first time we'll have some actual data regarding how well the phone senses [Tappy] touch" and
5 acknowledged that it "reinforces the need for a rubber tip redesign." DTX4140; DTX4145.

6 These problems with Tappy explain why, according to T-Mobile's own analysis of one of
7 Huawei's phones, T-Mobile needed to "investigat[e] why the robot has problems triggering
8 touch." DTX4387. It appears that T-Mobile never solved these problems; two years later, Mr.
9 Jenkinson was promising "a redesign so this cannot be pointed to as a weakness in our test in the
10 future." DTX4296. Given Tappy's inability to replicate the human user experience, it is
11 unsurprising that the evidence showed it had no effect on return rates, reduction of which was the
12 mechanism by which T-Mobile claimed Huawei was unjustly enriched. As Dr. Debra Aron
13 explained, T-Mobile's own data showed that return rates were flat (or even slightly *increasing*)
14 for six years after the introduction of Tappy, including the period in which T-Mobile's Rule
15 30(b)(6) witness claimed that Tappy had its greatest effect. May 12 Trial Tr. at 17:8-20:11;
16 Rothschild Decl. Ex. D (slides 12, 14). Return rates did not decline until the introduction of the
17 iPhone in 2013. *Id.*

18 Moreover, even if Tappy technology were effective or valuable, the evidence showed that
19 Huawei never incorporated it into its own robot. As Dr. Smith and Dr. Wolfe explained, Tappy
20 and xDR were completely different in almost every respect. May 11 Trial Tr. at 188:3-90:17,
21 198:2-99:5, 205:8-206:6, 208:10-16; May 9 Trial Tr. at 198:4-199:13. The jury was more than
22 entitled to credit the specific testimony of Dr. Smith and Dr. Wolfe and reject Mr. Davies's vague
23 nostrums about "functional equivalence."

24 Finally, the evidence also showed that Huawei never integrated xDR into its testing
25 processes, never used it to test non-T-Mobile phones, and never made any change to any phone as
26 a result of testing with xDR. May 3 Tr. at 83:4-84:7; May 10 Tr. at 48:4-7. Of the minimal
27 testing that was done on xDR, other than use of reference phones to calibrate or check the robot,
28

1 every phone tested was for T-Mobile. May 10 Tr. at 41:7-43:24, 74:2-75:8; May 3 Tr. at 74:8-
2 77:10. Most importantly, Huawei did not make “any modification or change . . . to a phone based
3 on the xDeviceRobot, or even [have] a process to do that.” May 10 Tr. at 50:2-7, 59:15-60:3. T-
4 Mobile’s own expert admitted that there were no documents showing that testing with xDR led to
5 any changes to the hardware or software of phones and that he could not “specifically ma[k]e that
6 causal link” between “xDeviceRobot testing” and “any changes in phones.” May 8 Tr. at 57:13-
7 58:1. As Dr. Aron explained, without that “causal link . . . [i]f there’s no effect on the handsets,
8 then there can’t be any unjust enrichment.” May 12 Tr. at 16:16-17:7.

9 T-Mobile’s new trial motion contains four and a half pages of argument that the no-
10 unjust-enrichment verdict was against the weight of the evidence, but it does not address any of
11 the evidence on which the jury could properly have relied. Nor does T-Mobile point to a shred of
12 contrary evidence from which the jury might have determined that Huawei obtained any benefit
13 from the alleged misappropriation. On this record, it could be argued that any verdict *other* than
14 no unjust enrichment would have been against the weight of the evidence.

15 T-Mobile argues that, because Huawei would have agreed to pay for the robot technology
16 in a hypothetical negotiation and T-Mobile would have demanded payment, the jury was required
17 to award unjust enrichment in the form of a reasonable royalty. This argument fails at the
18 threshold because there is no requirement that the jury use a reasonable royalty approach to
19 calculating unjust enrichment. The Jury Instructions explained that, “[a]s an *alternative* means of
20 calculating unjust enrichment, you *may* award a reasonable royalty.” ECF No. 476 at 29 (No. 26)
21 (emphasis added). T-Mobile’s authority is to the same effect. *Veritas Operating Corp. v.*
22 *Microsoft Corp.*, No. C06-0703-JCC, 2008 WL 7404617, at *2 (W.D. Wash. Feb. 26, 2008)
23 (holding that a reasonable royalty is “one of a number of calculations available” and “may be the
24 best means of approximating the defendant’s unjust enrichment”).¹ Thus, the jury was free to find
25 that Huawei obtained no unjust enrichment without resorting to a reasonable royalty analysis.

26 And even if the jury were required to consider a reasonable royalty, T-Mobile’s brief
27

28 ¹ The jury’s verdict is also proper because, as Huawei has previously argued, reasonable royalty is not an available measure of unjust enrichment under WUTSA. ECF No. 357 at 14-17.

1 addresses only two of the many factors relevant to the analysis. T-Mobile’s considerations are
 2 “neither exclusive nor necessarily pertinent to every reasonable royalty analysis,” and the jury
 3 was entitled to focus on other factors as it saw fit. Instruction No. 28. In particular, the complete
 4 absence of additional “sales and profits that Huawei Device USA and its related corporate entities
 5 would make from the trade secrets,” Instruction No. 27, was more than an adequate basis for the
 6 jury to conclude that a reasonable royalty is zero.²

7 Finally, T-Mobile raises a belated objection to the reference to “unjust enrichment
 8 damages . . . T-Mobile incurred” in Question 2(b) of the verdict form. This challenge is plainly
 9 waived. While T-Mobile observes that the language was added after the charging conference, it
 10 had three days to object between May 12, when the Court sent the Parties the final Jury
 11 Instructions (Rothschild Decl. Ex. C), and May 15, when the instructions were read. Its failure to
 12 do so prevents it from raising the issue now. *See Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*,
 13 259 F.3d 1101, 1109-10 (9th Cir. 2001) (party waives objection to jury form by not challenging it
 14 until the jury has rendered its verdict and been discharged). Moreover, the Court’s instructions
 15 made crystal clear that unjust enrichment consists of the benefits obtained by Huawei. *See*
 16 Instruction No. 26.³

17 **II. T-Mobile Waived Any Objection to the Court’s Contract Damages Instruction, Which**
 18 **Was Proper.**

19 T-Mobile next claims that a new trial is required because the Court instructed the jury
 20 that, although it could award unjust enrichment damages in the form of a reasonable royalty for
 21 breach of the MSA and Clean Room Letter, “unjust enrichment damages . . . must be measured

22 ² T-Mobile also mischaracterizes the record. There was substantial evidence that
 23 Huawei’s interest in Tappy, including the testimony and email T-Mobile cites, was only to test
 24 phones for T-Mobile, not because Huawei thought Tappy had independent value. *See* April 26
 25 Tr. at 93:12; DTX4327; PTX1149; DTX3313TD; DTX3159; PTX4184; PTX892; DTX3314TD;
 PTX83; PTX874. And, contrary to T-Mobile’s assertion, Dr. Aron addressed a hypothetical
 negotiation both at trial and in her expert report. *See* May 12 Trial Tr. at 47:13-52:2; Dkt. 330-2
 ¶¶ 130-167.

26 ³ In a citation parenthetical on the last page of its misappropriation argument, T-Mobile
 27 appears to suggest that unjust enrichment on its misappropriation claim is supported by “identical
 28 facts” as the unjust enrichment that the jury awarded for breach of contract. But as Mr. Kaba
 himself argued, there is a substantial difference between trade secrets and confidential
 information. April 28 Trial Tr. at 6:18-8:15. As a result, Huawei may have benefitted from
 breach of contract but not misappropriation.

1 according to any unjust enrichment conferred on Huawei Device USA.” ECF No. 476 at 32-33
2 (No. 29). T-Mobile did not timely object to the Court’s instruction and, accordingly, it cannot do
3 so now. In any event, its argument is without merit.

4 **1.** Before trial, the Court held that, unless T-Mobile “can establish that Huawei USA is
5 responsible for Huawei China’s unjust enrichment *as a matter of contract law*,” T-Mobile’s
6 contractual remedies would be limited to Huawei Device USA’s unjust enrichment. ECF No. 400
7 at 6:6-10. T-Mobile did not contemporaneously object to the Court’s ruling or suggest that the
8 Court had erred in its interpretation of Washington contract law.

9 At the charging conference, Huawei reminded the Court of its earlier ruling and submitted
10 that T-Mobile had proffered no evidence to support an award measured by the enrichment of
11 Huawei Device USA’s affiliates. Jury Instruction Conf. Tr. 23:1-13 (May 11, 2017). In
12 response, T-Mobile did *not* object to the instruction limiting damages to the enrichment of
13 Huawei Device USA as a matter of law; rather, it argued only that it had adequately
14 “demonstrated that Huawei Device China and its affiliates were enjoying the benefits of the
15 contract.” *Id.* at 37:8-19. That evidentiary argument, however, was not sufficient to notify the
16 Court that T-Mobile legally objected to the Court’s prior ruling on the contract law point.

17 On the contrary, it is hornbook law that “[a] party may not state one ground when
18 objecting to an instruction to the jury under Rule 51 and later attempt to rely on a different ground
19 for the objection ... on a motion for a new trial.” *Statement of Grounds for Objection*, 9C FED.
20 PRAC. & PROC. CIV. § 2554 (3d ed. 2017). To preserve an objection, rather, “the party must state
21 the same grounds when objecting to the jury instruction as it does in its motion for a new trial....”
22 *Davis v. Wessel*, 792 F.3d 793, 802 (7th Cir. 2015) (quotation marks and citation omitted). Put
23 simply, T-Mobile did not state its current grounds of objection “distinctly.” Fed. R. Civ. P.
24 51(c)(1).

25 T-Mobile had additional opportunities to object to the jury instruction, but it never did so.
26 On the evening of May 11, the Court ordered the parties to file a brief on whether “the evidence
27 presented at trial supports instructing the jury on unjust enrichment damages for Huawei Device
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1 USA’s alleged breaches of” the MSA and Clean Room Letter. Rothschild Decl. Ex. B. Yet T-
2 Mobile’s responsive brief never argued, as T-Mobile does now, that there is no basis for
3 distinguishing between misappropriation and breach claims for purposes of unjust enrichment
4 relief. *See* ECF No. 471. Finally, after the Court sent the parties a copy of its final instructions
5 on May 12 (Rothschild Decl. Ex. C), T-Mobile had three days to object to the Court’s contract
6 damages instruction before the jury was actually instructed. T-Mobile did not object to the
7 Court’s proposed final instruction, and cannot properly lodge a complaint now. *See* Fed. R. Civ.
8 P. 51(c)(2)(B); *Cosper v. S. Pac. Co.*, 298 F.2d 102, 104 (9th Cir. 1961).

9 2. In any event, T-Mobile’s argument that the jury was required to consider alleged unjust
10 enrichment to Huawei Device China as a matter of contract law rests on a false premise—to wit,
11 T-Mobile’s argument that, under Washington law, unjust enrichment of affiliated entities is
12 equally available under misappropriation and contract claims. ECF No. 514 at 14:1-4. That
13 premise is demonstrably wrong.

14 Starting at first principles, it is well-established that damages in contract actions are “less
15 expansive than the damages in tort actions.” 25 WASH. PRAC., CONTRACT LAW AND PRACTICE §
16 14:1 (3d ed. 2016). Indeed, the economic loss doctrine has evolved precisely because of, and to
17 maintain, that distinction. *See Giles v. Gen. Motors Acceptance Corp.*, 494 F.3d 865, 873 (9th
18 Cir. 2007). There is simply no legal reason automatically to equate unjust enrichment principles
19 for trade secret misappropriation claims—*i.e.*, tort claims—and breach of contract claims.

20 Moreover, the Court’s challenged instruction properly adhered to Washington’s pattern
21 jury instruction, which provides that, where unjust enrichment is an appropriate remedy for an
22 alleged breach of contract, “then in order to prevent unjust enrichment of the [*defendant*],
23 [*plaintiff*] is entitled to restitution, or the restoration of any benefit conferred on the [*defendant*].”
24 WPI § 303.08 (2013) (emphasis added); *Fisse v. Garvie*, 186 Wn. App. 1016, at *1 (2015)
25 (unpublished) (giving model instruction).

26 Both the Court’s instruction and the Washington model instruction are consistent with the
27 Restatement of Contracts, which provides that restitution is “available to a party only to the extent
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1 that he has conferred a benefit on the other party” to the contract. RESTATEMENT (SECOND) OF
 2 CONTRACTS § 370 cmt. a (1981). The Court’s instruction also is consistent with the
 3 Restatement’s explanation of the measure of restitution allowed for breach of contract, to wit “the
 4 extent to which *the other party’s* property has been increased in value or his other interests
 5 advanced.” *Id.* § 371 (emphasis added); *see also id.* cmt. a (“a party who is liable in restitution
 6 for a sum of money must pay an amount equal to the benefit that has been conferred *upon him*”) (emphasis added); *Young v. Young*, 164 Wn. 2d 477, 487 (2008) (applying Restatement § 371).
 7 Damages are limited to the benefit conferred on the defendant because the purpose of a damages
 8 award in this context is “to prevent unjust enrichment of the *party in breach*....” *Bernstein v.*
 9 *Nemeyer*, 570 A.2d 164, 168 (Conn. 1990) (emphasis added).⁴

11 T-Mobile offers no explanation for how the Court erred in giving an instruction that
 12 hewed to these well-worn principles and model language. It relies solely on *Storagecraft*
 13 *Technology Corp. v. Kirby*, 744 F.3d 1183 (10th Cir. 2014), a case that addressed the unjust
 14 enrichment and reasonable royalty remedies that are expressly permitted under Utah’s trade secret
 15 law, *id.* at 1185; *Storagecraft* has nothing to do with the Court’s instruction for breach of contract
 16 under Washington law.

17 To the extent that it is relevant, *Storagecraft* supports the Court’s instruction.
 18 *Storagecraft* held that “[a]n award based on unjust enrichment risks undercompensating the
 19 plaintiff when the defendant has no gains of *his own* to disgorge.” *Id.* at 1186 (emphasis added).
 20 By contrast, the Court held a *reasonable royalty* could take into account a third party’s use of the
 21 trade secret in a case where the defendant took trade secrets and disclosed them to a competitor
 22 that intended to use the trade secrets to compete with the plaintiff. *Id.* at 1189-90.

23 *Storagecraft* undercuts T-Mobile’s position, because the challenged instruction relates to
 24 unjust enrichment damages (and not to a reasonable royalty). As to that measure of damages,
 25 *Storagecraft* confirms that any award must be limited to the defendant’s “*own*” gains. *See also*

26 ⁴ Because Washington courts have adopted the principles of the Restatement (Second) of
 27 Contracts, and because those principles are clear, there is no merit to T-Mobile’s suggestion that
 28 certification to the Washington Supreme Court is warranted. *See* Wash. Rev. Code § 2.60.020
 (authorizing certification when local law “has not been clearly determined”).

1 RESTATEMENT (SECOND) OF CONTRACTS § 373(1) (1981) (“[O]n a breach by non-performance ...
 2 the injured party is entitled to restitution for any benefit that he has conferred *on the other party*
 3 by way of part performance or reliance.”) (emphasis added).

4 *Storagecraft* is unhelpful to T-Mobile for the additional reason that it was premised on the
 5 language of Utah’s trade secret law, which permits a reasonable royalty when the defendant
 6 discloses a trade secret to a third party “without express or implied consent.” *See* 744 F.3d at
 7 1185; Utah Code Ann. § 13-24-2(2)(b). The Court here provided T-Mobile with an opportunity
 8 to establish that, as a matter of contract law, Huawei Device USA was responsible for Huawei
 9 Device China’s enrichment under the terms of the agreement. But T-Mobile never explained—
 10 and still has not explained—how this might be the case or why the Parties might have
 11 contemplated this as a matter of contract. *See* PTX 953-040; ECF No. 514 at 15:21; *see also* 224
 12 *Westlake, LLC v. Engstrom Properties, LLC*, 169 Wn. App. 700, 729 (2012) (“[d]amages are
 13 recoverable if they were within the contemplation of the parties at the time the contract was
 14 made”); *Document Sec. Sys., Inc. v. Coupons.com, Inc.*, 55 F. Supp. 3d 485, 496 (W.D.N.Y.
 15 2014) (lost royalties not recoverable because parties did not contemplate royalties in the event of
 16 breach).

17 **III. T-Mobile Waived Any Objection to the Court’s Exemplary Damages Instruction,**
 18 **Which Was Proper and Harmless in Any Event.**

19 T-Mobile argues that, if there is a retrial, the jury must be instructed differently on
 20 exemplary damages. Because T-Mobile does not actually seek a new trial on this basis, the
 21 argument is either moot or premature. For that reason alone, the Court need not consider it. Even
 22 if T-Mobile were seeking a new trial on this basis, however, T-Mobile waived any objection to
 23 the Court’s instruction that the jury could award exemplary damages under WUTSA only if it
 24 found Huawei’s conduct to be “malicious,” which the Court defined as conduct “accompanied by
 25 ill will, or spite, or ... for the purpose of injuring the plaintiff.” In any event, the Court’s
 26 instruction was correct and any error would have been harmless. ECF No. 476 at 35 (No. 31).

27 **1.** As to waiver, on May 10, 2017, the Court clerk e-mailed a copy of the Court’s
 28 proposed instructions to the parties. *See* Rothschild Decl. Ex. A. The Court’s proposed

1 exemplary damages instruction stated, “Conduct is malicious if it is accompanied by ill will, or
 2 spite, or if it is for the purpose of injuring the plaintiff.” *Id.* at 37 (Instruction No. 31). At the
 3 Parties’ May 11 charging conference, T-Mobile never objected to the Court’s proposed
 4 instruction. *See* Jury Instruction Conference Tr. (May 11, 2017). Nor did T-Mobile object
 5 between May 12, when the Court e-mailed the parties its final Jury Instructions (Rothschild Decl.
 6 Ex. C), and May 15, when the challenged instruction was read. *See* Trial Tr. 23:2-4 (May 15,
 7 2017). T-Mobile’s argument, therefore, is plainly waived. *See, e.g., Passantino*, 212 F.3d at 512;
 8 *El-Hakem v. BJY Inc.*, 262 F. Supp. 2d 1139, 1145 (D. Or. 2003), *aff’d*, 415 F.3d 1068 (9th Cir.
 9 2005).

10 T-Mobile notes that it filed an alternative instruction, which stated that ill will need not
 11 exist to find maliciousness. ECF No. 514 at 20:4-10. But to preserve an objection, “[i]t is not
 12 enough for a party simply to propose an alternate instruction.” *Masson v. New Yorker Magazine,*
 13 *Inc.*, 832 F. Supp. 1350, 1364 (N.D. Cal. 1993), *aff’d*, 85 F.3d 1394 (9th Cir. 1996) (citing
 14 *Robert’s Waikiki U-Drive, Inc. v. Budget Rent-a-Car Systems, Inc.*, 732 F.2d 1403 (9th Cir.
 15 1984)). Merely proposing alternative language does not “stat[e] distinctly the matter objected to
 16 and the grounds of the objection,” as Federal Rule of Civil Procedure 51(c) requires. *See United*
 17 *States v. Elias*, 269 F.3d 1003, 1018 (9th Cir. 2001).

18 **2.** Even if T-Mobile had preserved its objection, the objection fails on the merits. As T-
 19 Mobile concedes, WUTSA does not define “malicious.” Black’s Law Dictionary defines
 20 “malice” to include “[t]he intent, without justification or excuse, to commit a wrongful act,” and
 21 “[i]ll will” or “wickedness of heart.” *Malice*, BLACK’S LAW DICTIONARY (10th ed. 2014). That
 22 definition, in turn, is “similar to the definition” of malice “used for purposes of determining the
 23 appropriateness of a punitive damages award at common law.” *Becker Equip., Inc. v. Flynn*,
 24 2004-Ohio-1190, ¶ 16 (Ohio Ct. App. 2004). Indeed, in giving meaning to this term, the Court
 25 sensibly adopted the Ninth Circuit’s model language for punitive damages. *See* 9TH CIR.
 26 MANUAL OF MODEL CIVIL JURY INSTRUCTIONS No. 5.5.

27 Since malice is used in trade secret cases as a guidepost for punitive or exemplary
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1 damages, numerous courts have defined “malicious” in precisely the manner used in the Court’s
2 jury instructions. *See, e.g., Becker*, 2004-Ohio-1190, ¶ 16; *Texas Tanks, Inc. v. Owens-Corning*
3 *Fiberglas Corp.*, 99 F.3d 734, 740 (5th Cir. 1996); *Mattern & Assocs., L.L.C. v. Seidel*, 678 F.
4 Supp. 2d 256, 271 (D. Del. 2010); *MicroStrategy, Inc. v. Business Objects*, 331 F. Supp. 2d 396,
5 430 (E.D. Va. 2004); *see also* 140 Am. Jur. Proof of Facts 3d 291 (2014) (for purposes of trade
6 secret misappropriation, “‘malice’ is defined as ill-will, hatred, or intent to cause injury”).

7
8 Contrary to T-Mobile’s insinuation, the Washington Supreme Court has never cast doubt
9 on this approach. In *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38 (1987), the court upheld an
10 award of punitive damages because the defendant “engaged in a massive effort to disguise its
11 copying of Boeing’s drawings.” *Id.* at 62. But a “massive effort to disguise” is quintessential
12 evidence of malicious purpose. T-Mobile also relies on *Petters v. Williamson & Assocs., Inc.*,
13 151 Wn. App. 154 (2009), where the Washington Court of Appeals upheld a finding of
14 maliciousness under WUTSA because the defendant concealed its continued use of a trade secret,
15 even after it had been found liable and enjoined from further use. *Id.* at 173. *Petters*, however,
16 was not a case about jury instructions and does not come close to compelling the conclusion that
17 the Court’s instruction was wrong as a matter of law.

18 **3.** Finally, a new trial is not warranted because any error in the exemplary damages
19 instruction is manifestly harmless. If a jury finds that willful and malicious appropriation exists,
20 an exemplary award “in an amount not exceeding twice” any compensatory damages award is
21 available. RCW 19.108.030(2). Here, however, the jury awarded \$0 in compensatory damages.
22 And \$0 doubled is still \$0. Accordingly, even assuming the Court altered its exemplary damages
23 instruction, and even assuming that alteration caused the jury to find willful and malicious
24 misappropriation, an award of exemplary damages still would not be available. *See Deland v.*
25 *Old Republic Life Ins. Co.*, 758 F.2d 1331, 1339 n.4 (9th Cir. 1985) (“There can be no punitive
26 damages where compensatory damages have not been awarded.”).

27 **IV. The Jury’s Verdict on the MetroPCS Agreement Is Consistent with the Evidence.**

28 The jury’s verdict that Huawei Device USA did not breach the MetroPCS Agreement is

1 well supported by the evidence. T-Mobile’s contrary argument fails for two reasons.

2 *First*, T-Mobile failed to introduce any evidence that the MetroPCS Agreement was
 3 assigned to Huawei Device USA, as required by the terms of the contract. PTX 952 at 21
 4 (Section 15.2). The fact that the MSA—a separate agreement—was assigned from Futurewei to
 5 Huawei Device USA does not establish that the MetroPCS Agreement was also assigned to
 6 Huawei Device USA. T-Mobile failed to present evidence to the jury sufficient to meet its
 7 burden of proof that any purported breach of the agreement was chargeable to Huawei Device
 8 USA. *See, e.g., Manes v. Metro-North Commuter R.R.*, 801 F. Supp. 954, 957 (D. Conn. 1992)
 9 (consideration is limited to “the evidence put before the jury”). A verdict cannot be contrary to
 10 the clear weight of evidence when contrary evidence was never introduced at trial.⁵

11 T-Mobile invokes the Court’s ruling on summary judgment as evidence that Huawei
 12 Device USA and T-Mobile were the parties to the MetroPCS Agreement. In doing so, T-Mobile
 13 points to information presented on summary judgment that was never presented to the jury. It
 14 was T-Mobile’s burden to make the requisite evidentiary showing *at trial*. T-Mobile cannot now
 15 claim that the jury’s verdict is against the weight of evidence that the jury never heard, because
 16 “[o]nce the case proceeds to trial, the full record developed in court supersedes the record existing
 17 at the time of the summary judgment motion.” *Ortiz v. Jordan*, 562 U.S. 180, 184 (2011); *see*
 18 *also Maresca v. Mancall*, 135 F. App’x 529, 531 (3d Cir. 2005) (evidence offered at summary
 19 judgment, but not at trial, could not support jury verdict).

20 *Second*, T-Mobile presented no evidence that the MetroPCS Agreement covered any
 21

22 ⁵ T-Mobile argues Futurewei’s obligations were automatically assigned to Huawei Device
 23 USA because the MetroPCS Agreement did not automatically terminate upon a change in
 corporate control. ECF No. 514 at 18.

24 This argument flies in the face of the Agreement’s unambiguous contractual term
 25 **requiring** assignment. PTX-952 at 21 (Section 15.2) (“Neither party may assign this Agreement
 26 or any right or interest under this Agreement, nor delegate any obligation to be performed under
 this Agreement without the other party’s prior written consent . . . and any attempted assignment
 in contravention of this Section 15.2 is null and void.”).

27 It also makes no sense. The fact that the MetroPCS Agreement did not automatically
 28 terminate upon assignment says nothing about whether a valid assignment was required in the
 first place to transfer Futurewei’s obligations to Huawei Device USA.

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DATED this 3rd day of July, 2017.

GORDON TILDEN THOMAS & CORDELL LLP
Attorneys for Defendant Huawei Device USA, Inc.

By s/Franklin D. Cordell
Franklin D. Cordell, WSBA #26392
Jeffrey M. Thomas, WSBA #21175
1001 Fourth Avenue, Suite 4000
Seattle, Washington 98154
Telephone: (206) 467-6477
Facsimile: (206) 467-6292
Email: fcordell@gordontilden.com
Email: jthomas@gordontilden.com

STEPTOE & JOHNSON LLP
Attorneys for Defendant Huawei Device USA, Inc.

By s/Timothy C. Bickham
Timothy C. Bickham*
James F. Hibey*
Michael J. Allan*
Jeffrey M. Theodore*
Jessica I. Rothschild*
1330 Connecticut Avenue NW
Washington, DC 20036
Telephone: (202) 429-3000
Facsimile: (202) 429-3902
Email: jhibey@steptoe.com
Email: tbickham@steptoe.com
Email: jrothschild@steptoe.com
* Admitted Pro Hac Vice

JONES DAY
Attorneys for Defendant Huawei Device USA, Inc.

By s/Nathaniel P. Garrett

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Nathaniel P. Garrett*
555 California Street, 26th Floor
San Francisco, CA 94104
Telephone: (415) 875-5731
Facsimile: (415) 875-5700
Email: ngarrett@jonesday.com
* Admitted Pro Hac Vice

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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Michael E. Kipling
Marjorie A. Walter
KIPLING LAW GROUP PLLC
3601 Fremont Avenue N., Suite 414
Seattle, WA 98103
kipling@kiplinglawgroup.com
walter@kiplinglawgroup.com

John Hueston
Alison Plessman
Eric Hayden
HUESTON HENNIGAN LLP
523 West 6th Street
Los Angeles, CA 90014
(213) 788-4340
jhueston@hueston.com
aplessman@hueston.com
ehayden@hueston.com

s/ Jessica I. Rothschild

Jessica I. Rothschild*

(*admitted *pro hac vice*)