Filed 8/23/13 Shanghai Linzheng Import & Export v. Playhut, Inc. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

SHANGHAI LINZHENG IMPORT & EXPORT CO., LTD., Plaintiff and Appellant, v. PLAYHUT, INC., et al., Defendants and Appellants.	B237169 (Los Angeles County Super. Ct. No. KC056700)

APPEALS from a judgment of the Superior Court of Los Angeles County. Salvatore Sirna, Judge. Affirmed in part, reversed in part, and remanded.

Hollins Law, Kathleen Mary Kushi Carter and Tamara M. Heathcote for Plaintiff and Appellant.

Buchalter Nemer, Efrat M. Cogan; Pumilia Patel & Adamec, and Jayesh Patel for Defendants and Appellants Playhut, Inc. and Pumilia Patel & Adamec, et al.

This appeal arises from an action involving transactions in goods manufactured in China. Shanghai Linzheng Import & Export Co., Ltd. (Linzheng) initiated the action by suing Playhut, Inc. for the unpaid balance due on invoices issued for the goods. Playhut cross-complained against Linzheng, alleging it breached the parties' contract by failing to manufacture goods that conformed to Playhut's specifications. A jury returned a special verdict on the complaint and a special verdict on the cross-complaint, deciding the case in favor of Linzheng and fixing its damages at the amount of its unpaid invoices. The trial court entered judgment in favor of Linzheng, and thereafter awarded prejudgment interest and costs. We affirm the judgment. As part of its appeal, Playhut, joined by its counsel, challenges a pretrial order imposing Discovery Act monetary sanctions, payable jointly and severally by the company and its counsel. We affirm the order in part, and reverse in part. In a consolidated appeal, Playhut also challenges the trial court's decision to award prejudgment interest. We affirm the trial court's ruling. In another consolidated appeal, Linzheng challenges the trial court's costs order to the extent it denies certain claimed costs. We reverse the order, and remand the case for further consideration of the costs issue.

FACTS

General Background

Linzheng is an import and export company based in China. Playhut is a United States distributor of children's products. Playhut sells goods to retailers such as Target and Walmart. During a course of dealings in 2008, Playhut submitted purchase orders to Linzheng for thousands of children's sleeping or slumber bags. Linzheng arranged for three factories in China to manufacture the goods and to deliver them to Playhut and/or its customers in the United States. Linzheng issued invoices to Playhut for the sleeping bags as they were delivered. Playhut made payments to Linzheng on the invoices for a period of time, then stopped. At trial, the parties stipulated that Linzheng issued invoices to Playhut totaling about $1 million (rounded), and that Playhut paid roughly $400,000 (rounded) to Linzheng. The core issue involved in this case became whether Playhut properly withheld payments to Linzheng of the difference (roughly $600,000) in accord

with the terms of their contract. The payment issue implicates issues concerning the quality of the goods, specifically, did Linzheng deliver goods that conformed to required specifications under the parties' contract?

The Course of the Business Dealings Between Linzheng and Playhut

Prior to 2008, Playhut acquired goods directly from Chinese factories. In 2008, the Chinese government commissioned many factories to produce camping tents for victims of an earthquake. The 2008 Olympics in China also impacted the availability of Chinese factories. Consequently, Playhut began looking for additional manufacturing sources. At about this same time, a business and merchandising manager then working for Linzheng, Grace Liu, wrote a letter "referring" the company to Playhut. At some point around mid-2008, Linzheng and Playhut reached an agreement that Linzheng would procure specially manufactured goods pursuant to purchase orders submitted by Playhut.[1]

In June 2008, Playhut submitted its first purchase order to Linzheng for sleeping bags, along with specification sheets. Linzheng provided price quotes to Playhut based on the requirements in the specification sheets. The specification sheets that Playhut sent to Linzheng called for "polyester" filling. Before Playhut would give approval for the factories to begin full production, it required Linzheng to produce an "approval sample" of a sleeping bag. Linzheng, by Liu, asked Playhut to provide a sleeping bag product sample to Linzheng to compare with the specification sheets and as a guide in producing the approval sample. Playhut arranged for a sleeping bag product sample to be shipped to Playhut Shanghai (see footnote 1, *ante*), and directed Liu to visit Playhut Shanghai for an inspection of the sleeping bag sample.

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[1] Playhut had a so-called "affiliate" in Shanghai which had primary contacts with Linzheng due to location and work hour differences. The parties use the names "Playhut Shanghai" in referring to this affiliate, and "Playhut USA" to refer to Playhut the party involved in the current litigation. The organizational nature of Playhut Shanghai (e.g., separate corporation, foreign corporation, subsidiary, business office) as to Playhut USA is not altogether clear from the record. The only fact clearly shown by the evidence in the record on appeal is that Linzheng, through Grace Liu, primarily dealt with persons at Playhut Shanghai, who in turn dealt with persons at Playhut USA.

During her inspection of the sleeping bag product sample, Liu noticed it was filled with "spray bonded polyester," while the specification sheets had used the more general term "polyester." Liu notified Playhut of the difference, and that spray bonded polyester filling would result in a price increase. Playhut responded the price could not increase, and instructed Linzheng to use the specification sheets. Linzheng made a sleeping bag approval sample with "carded" polyester, and provided it to Playhut's Shanghai affiliate for approval.

Quality control personnel and management personnel from Playhut's Shanghai affiliate approved the pre-production approval sample from Linzheng at about the same time the factories lined up by Linzheng were given authorization to start production.[2] During production and post-production, quality control personnel at Playhut's Shanghai affiliate periodically inspected goods at the factories. Manufactured goods were delivered pursuant to a Free On Board ("F.O.B.") term in the purchase orders, meaning Playhut was responsible for the overseas shipping charges.

Between June and November 2008, Playhut USA submitted dozens of purchase orders (forwarded through Playhut Shanghai) to Linzheng for thousands of sleeping bags. Some of the purchase orders consisted of a single-page, standard printed form document simply stating the order, e.g., ship 500 sleeping bags. Some of the purchase orders included a second page which the parties call "Page 2," and which included specifically typed out terms.[3]

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[2] A fair reading of the record shows that, due to time and procurement constraints and requirements (e.g., the fast-approaching Christmas and holiday shopping season in the United States and customer delivery needs), the various aspects of the manufacturing approval and production events were unfolding at about the same time, in a much-hurried state of affairs.

[3] At trial, Grace Liu (Linzheng) testified she understood that, if a purchase order that Linzheng received from Playhut included Page 2, then the terms and conditions in Page 2 applied. If the purchase order did not include Page 2, then the purchase order did not have those terms and conditions.

Page 2 included a provision stating that the production quality standard for the goods were required to be in full accord with Playhut's specification sheet. Page 2 also included a provision which was labeled: "Quality & Delivery Guarantee." This quality and delivery provision provided:

> "Factory is responsible for timely delivery of total item quantity ordered on PO. Factory is subject to penalties for late shipment, or partial quantity, after required PO ship date: [penalties listed]. [¶] In addition, factory is also subject to penalties and liabilities due to late, non-compliant or incomplete orders. Playhut will also transfer any customer chargeback/penalty to factory as a result of late, non-compliant, or incomplete order delivery. . . ."

In August 2008, a procurement and production manager at Playhut USA, Lee Wang, received an email regarding alleged defects in sleeping bags.[4] Wang decided to draft a "letter of guarantee" which Linzheng would be required to sign. At the same time, Wang also decided that Playhut would withhold payment from Linzheng for six months "to monitor customer's [*sic*] reaction to the products." Wang decided that sleeping bags would continue to be delivered to meet Playhut's customers' shipping date deadlines. Wang himself never personally saw any of the allegedly defective sleeping bags referenced in the August 2008 email, and he never compared any of the allegedly defective sleeping bags to the pre-production approval sample that had been produced by Linzheng. Wang never saw the pre-production approval sample that had been produced by Linzheng.

In late August 2008, after Linzheng had already shipped 60 to 70 percent of the sleeping bags under the purchase orders, Playhut presented Linzheng with the letter of guarantee drafted by Wang. (*Ante.*) Playhut demanded that Linzheng sign the letter of guarantee before Playhut would remit any further payments on Linzheng's invoices. The

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[4] A "chain" of exchanged emails, including attached photographs, related to Wang's trial testimony was excluded based on hearsay and lack of foundation objections. The evidentiary ruling is an issue raised on appeal, and discussed below.

letter of guarantee reads: "[Linzheng] will take the liability for any claim or penalty from [Playhut's] customer with support [*sic*] evidence on this issue — the . . . polyester filing [Linzheng] used according to [Playhut's] . . . specification instead of the spray-bonded polyester." On August 25, 2008, Lina Meng, one of Linzheng's owners and its general manager, signed the letter of guarantee presented by Playhut.

Playhut made no further payments to Linzheng. Instead, Playhut claimed chargebacks to Linzheng. As noted above, of the $1,032,980.02 invoiced by Linzheng, Playhut paid $398,989.02, leaving $633,991 unpaid. Playhut never returned any "defective" sleeping bags to Linzheng. When Playhut began complaining, Meng travelled to Playhut's offices in the United States to check on the matter. Meng asked to see "defective" sleeping bags; a Playhut representative told her that they were all in its customers' warehouses.[5]

The Litigation

In September 2009, Linzheng filed a complaint against Playhut alleging causes of action for open book account and account stated. Linzheng's complaint alleged that Playhut became indebted to Linzheng for goods that Linzheng delivered to Playhut, and that Playhut did not pay money owed. Playhut filed a cross-complaint against Linzheng alleging breach of contract, unjust enrichment, and intentional interference with contractual relations.

In summer 2011, the case was tried to a jury. Prior to the start of trial, Linzheng and Playhut stipulated to the following facts, which were read to the jury at the start of trial:

1. Playhut's purchase orders to Linzheng totaled $1,032,980.02.
2. Linzheng issued invoices to Playhut totaling $1,032,980.02, and delivered the goods identified in those invoices.
3. Playhut paid $398,989.02 to Linzheng.

[5] At trial, John Olsen, a manufacturing sales representative with Playhut, testified that the company had a "destroy" policy with its customers, allowing "defective" goods to be warehoused and then destroyed.

4. Playhut issued chargebacks to Linzheng for $864,356.82.

The following witnesses testified for Linzheng regarding the parties' business dealings and the sleeping bag events: Lina Meng (one of Linzheng's owners and its general manager); Grace Liu (a business and merchandising manager at Linzheng); Lee Wang (a procurement and production manager at Playhut, called as an adverse witness under Evidence Code section 776); Jing Qing Chen (an owner and general manager at Shanghai E.Z. Camping, a manufacturer that fulfilled orders for Playhut); John Nguyen (a sales administration manager at Playhut, called as an adverse witness under Evidence Code section 776); and Roy Juede (an accounting expert who testified as to damages). The following witnesses testified for Playhut regarding the parties' business dealings and the sleeping bag events: John Olsen (a manufacturing sales representative at Playhut) and Kevin Prins (an accounting expert who testified regarding damages). In addition, Playhut questioned the witnesses called by Linzheng.

As noted, both parties presented expert testimony as to the parties' respective damages. Playhut's expert, Kevin Prins, testified that Playhut's damages were $285,594, which consisted of money that Playhut owed to Linzheng for the products in question, less lost profits in 2008 "due to excess returns" of goods from its customers, and less lost profits in 2009 "due to the nonrenewal of the contract between Target and Playhut" resulting in lost sales. Linzheng's expert, Roy Juede, testified that Playhut owed Linzheng a total of $634,001, plus 10 percent interest up to June of 2011 (basically the time of trial), for a total of $818,284. Juede calculated the money owed by taking the total amount of Linzheng's invoices to Playhut ($1,032,980.02) and subtracting Playhut's payments to Linzheng ($398,979.02) and then adding 10 percent interest per year since 2008 to that sum. Juede did not deduct Playhut's claims for chargebacks because those chargebacks were a subject of the dispute between the parties. Juede also opined that the amount of Playhut's lost profits in 2008 and 2009 as testified to by Playhut's expert, Prins, was not valid because it was not supported by the type of documentation that would be appropriate for making such a calculation.

Before the cause was submitted to the jury, the trial court granted Linzheng's motion to amend its complaint to conform to proof to allege a cause of action for breach of contract.[6] The jury commenced deliberations at 10:10 a.m. on July 22, 2011. The jury took the normal lunch recess from 12:00 p.m. to 1:30 p.m., then resumed deliberations. At 2:25 p.m., the jury advised the court that it had reached a verdict.

The jury returned a special verdict on Linzheng's complaint in favor of Linzheng. The special verdict on Linzheng's complaint included the jury's findings that Playhut and Linzheng entered a contract, that Linzheng did "all, or substantially all, of the significant things that the contract required it to do," and that Playhut "fail[ed] to do something that the contract required it to do." The jury found that Linzheng had been harmed by Playhut's failure, and fixed damages in the amount of $633,991.72, reflecting payment owed for goods delivered. At the same time, the jury returned a separate special verdict in favor of Linzheng on Playhut's cross-complaint. The special verdict on the cross-complaint included the jury's findings that Playhut and Linzheng entered a contract, and that Linzheng did "all, or substantially all, of the significant things that the contract required it to do." Addressing a question as to whether Playhut had been "excused from having to do all, or substantially all, of the significant things that the contract required it to do," the jury answered, "No." The jury found that Linzheng had known about Playhut's contract with Target. Addressing a question as to whether Linzheng "intend[ed] to disrupt the performance of this contract," the jury answered, "No."

On August 9, 2011, Playhut filed a motion for new trial and a motion for judgment notwithstanding the verdict. In its motion for judgment notwithstanding the verdict, Playhut asserted that Linzheng lacked standing. In its request for new trial, Playhut claimed that there was juror misconduct, excessive damages, and other errors of law, and also that the trial court erred in granting Linzheng's motion to amend its complaint.

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[6] The added cause of action for breach of contract apparently rested on allegations that Playhut failed to pay money owed under the terms of a contract between the parties. We do not see an amended pleading in the record; the amendment seems to have become a matter of instructions to the jury as is ordinarily the situation where an amendment is granted during trial.

On October 7, 2011, the trial court denied both motions. On October 25, 2011, the trial court granted Playhut's motion to tax certain costs claimed by Linzheng, including interpreter costs and travel costs for witnesses who testified at trial.

In November 2011, Playhut filed a notice of appeal. In December 2011, Linzheng filed a notice of appeal from the order taxing costs.

On January 31, 2012, more than two months after it filed its notice of appeal, Playhut filed a motion to strike or set aside any reference to prejudgment interest in the judgment. On March 2, 2012, the trial court denied the motion, ruling that it no longer had jurisdiction as Playhut had appealed the judgment. In April 2012, Playhut filed a notice of appeal from the order denying its post-judgment motion to strike prejudgment interest.

Our court consolidated all of the appeals.

DISCUSSION

Playhut's Appeal

I. Standing

Playhut contends the judgment in favor of Linzheng must be reversed because Linzheng never had standing to sue for payment for the sleeping bags that were involved in this case. Playhut argues the factories in China that manufactured the sleeping bags, and not Linzheng, were the only proper plaintiffs to prosecute an action against Playhut for failing to pay for the sleeping bags. We disagree.

"Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." (Code Civ. Proc. § 367.) When a plaintiff is not a real party in interest, the plaintiff lacks standing to sue. (*Cloud v. Northrop Grumman Corp*. (1998) 67 Cal.App.4th 995, 1004.) A real party in interest is a party "possessing the right sued upon by reason of the substantive law." (*Killian v. Millard* (1991) 228 Cal.App.3d 1601, 1605.) Lack of standing is a jurisdictional defect that requires judgment against the nominative plaintiff. (*Scott v. Thompson* (2010) 184 Cal.App.4th 1506, 1510.) Lack of standing may be raised at any time in a proceeding, including at the time of trial or on

appeal. (*Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 1000.)

The evidence in the record supports these facts: Linzheng and Playhut entered a contract under which Linzheng would make arrangement for goods to be manufactured and delivered to Playhut and/or its customers, Linzheng would issue invoices to Playhut, and Playhut would submit payments to Linzheng. The evidence further supports these facts: Goods were manufactured and delivered, Linzheng issued invoices to Playhut, and Playhut made payments on the invoices for period of time, then stopped.

Linzheng sued for payment based on common counts and, at trial, amended its complaint to allege a claim under the contract established by the evidence. Playhut filed a cross-complaint against Linzheng *based on the same contract involved in Linzheng's claims*, and thereby judicially admitting for purposes of standing that the parties had a contract. Before trial, in a set of verified responses to requests for admissions, Playhut admitted that it entered into a contract with Linzheng for goods; the admission was read to the jury. In closing argument, Playhut's own trial counsel stated: "And when you get to the [special] verdict on the complaint, question no. 1, did Linzheng and Playhut enter into a contract, that is the one thing that we agree on. It's yes." In its special verdict on Linzheng's complaint, and its special verdict on Playhut's cross-complaint, the jury expressly found the parties entered into a contract.

We reject Playhut's standing argument on appeal because it fails to persuade us that Linzheng — a party to a contract found to exist by the jury, and the same contract upon which Playhut sued Linzheng — did not have standing to sue on the contract. Playhut's argument fails to persuade us that more is needed for standing in a contract-based action than allegations and proof at trial that the parties entered into a contract, and that a party failed to perform under the contract. Whether or not the substantive merits of the action were decided "correctly" by the jury — here, of course, Playhut strongly says no — has no bearing on the issue of whether Linzheng has standing to sue on the contract. Playhut cites no legal authority to support its proposition that a party to a

contract does not have a right to sue on the contract under substantive contract law, i.e., does not have standing to sue on the contract.

At oral argument Playhut emphatically stressed that evidence of certain "agency agreements" between Linzheng and the factories that actually manufactured the sleeping bags showed that the money paid by Playhut to Linzheng was eventually going to end up in the factories' pockets, less a commission retained by Linzheng. If by this assertion Playhut argues the agency agreements somehow defeat standing otherwise shown by the parties' mutual allegations in the case that they entered a contract, and that the other had breached the contract, then we disagree. Again, we note that Playhut has offered no legal authority to support its proposition that a party to a contract does not have a right to sue on the contract under substantive contract law, i.e., does not have standing to bring an action on the contract. If by this assertion Playhut argues the agency agreements defeat standing otherwise shown by the jury's findings that the parties entered a contract, as well as the jury's findings that Playhut breached the contract, then we disagree. Such an argument fails to appreciate the rules governing appellate review of facts (which would include facts related to standing) under the substantial evidence standard of review.

"Appellants often mistakenly assume that, if the evidence against the judgment greatly preponderates, a reversal is proper because of the absence of a *substantial conflict.* The test, however, is not whether there is substantial conflict, but rather whether there is *substantial evidence in favor of the respondent.* If this 'substantial' evidence is present, no matter how slight it may appear in comparison with the contradictory evidence, the judgment will be affirmed. In brief, the appellate court ordinarily looks only at the evidence supporting the successful party, and disregards the contrary showing. 'Of course, all of the evidence must be examined, but it is not weighed. All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable [to the respondent] discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed.' [Citation.]" (9 Witkin, California Procedure (5th ed. 2008) Appeal, § 370, pp. 370-371.)

Here, Linzheng and Playhut sued each other based on the same contract. A jury found the parties entered a contract, and that Playhut breached the contract. The trial evidence supports the jury's findings under the substantial evidence standard of review. Assuming the agency agreements would support a different conclusion, we ignore them. Playhut's arguments on appeal fail to persuade us that standing cannot — as a matter of law and/or the evidence — be found to exist in this case.

II. Contract Interpretation

Playhut maintains that its contract with Linzheng — as evidenced by the purchase orders — gave Playhut the express right to "charge back against defective goods" that were rejected or returned by its customers.[7] On appeal, Playhut contends the trial court wrongly interpreted the parties' contract so that Playhut's express right to charge back was "simply . . . ignored or written out of the agreement." Playhut argues its contract with Linzheng — as evidenced by the purchase orders — included this term: "customer acceptance of the goods [is] a condition of [Linzheng]'s right to payment." Playhut takes the position that (1) its contract with Linzheng included such a contract term — either as a matter of law or as a matter of undisputed fact; (2) that the contract term gave Playhut the right to issue chargebacks against Linzheng's invoices in an amount reflecting goods that were rejected or returned by Playhut's customers as defective, and that (3) the trial court somehow ruled to deny the indisputable existence of Playhut's contract right to issue chargebacks. We disagree that the judgment must be reversed based on Playhut's claimed contract interpretation error.

Playhut's argument on appeal does not persuade us that reversing the judgment is required. First, Playhut's argument does not plainly identify or explain when or under what circumstances the trial court "interpreted" the parties' contract to "write out" a term that was undisputedly a part of that contract. Playhut argues the evidence of its conduct and Linzheng's conduct demonstrates that both parties understood their contract included a term providing that acceptance of goods by Playhut's customers, e.g., Target, was

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[7] Playhut's interpretation argument implicitly recognizes that the parties entered a contract. (See standing discussion, *ante*.)

"a condition for [Linzheng]'s right to payment." In Playhut's view, the evidence showed that Playhut had a contractual right to issue chargebacks against Linzheng's invoices for goods rejected or returned by its customers as being "defective." Playhut further argues Linzheng "cannot claim that no charge back right existed."

We assume without deciding that Playhut did, in fact and under law, have some form of contractual right to charge back for goods rejected or returned by its customers as being defective. Specifically, we assume that the following term which is found in some of the purchase orders (Page 2) that Playhut sent to Linzheng became included in their contract: "[Linzheng] is . . . subject to penalties and liabilities due to . . . non-compliant . . . orders. Playhut will also transfer any customer chargeback/penalty to [Linzheng] as a result of . . . non-compliant . . . order delivery."

We depart with Playhut, however, when it argues the judgment must be reversed in the event the above quoted term is found to be included in its contract with Linzheng. In reviewing an appeal following a judgment on a jury's verdict, our task "begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury." (*Crawford v. Southern Pacific Co*. (1935) 3 Cal.2d 427, 429.) We examine the trial evidence in a light most favorable to the jury's verdict, including reasonable inferences that may be drawn from the evidence, and disregard the evidence that would support a different verdict. Playhut's argument on appeal is that the judgment must be reversed if the chargeback provision quoted above is found to be included in the parties contract. We understand Playhut to argue that this is so because, once the chargeback term is found to be a part of the parties' contract, it must be accepted on appeal that Playhut *proved* — either as a matter of law and/or as a matter of undisputed fact — that it properly issued the $600,000 (rounded) in chargebacks in accord with the quoted chargeback provision. Playhut's argument fails to persuade us to reverse the judgment because it fails to persuade us that its "proof" must be accepted on appeal in place of the evidence in the record supporting judgment in favor of Linzheng.

When examined in light of the properly focused standard of review, the evidence presented at trial supports these facts: Playhut and Linzheng entered a contract under which Linzheng agreed to procure sleeping bags for Playhut according to Playhut's specifications, and Playhut gave approval to Linzheng for the manufacture of sleeping bags of a certain quality (made with "carded" polyester).[8] The chargeback provision quoted above did not give Playhut the right to issue chargebacks to Linzheng for every sleeping bag rejected or returned by Playhut's customers, regardless of circumstances. The plain language of the chargeback provision contemplated that Linzheng would be subject to chargebacks for delivering "non-compliant" goods.

We see no evidence in the record to support Playhut's implicit argument that its customers were the final arbiter of whether or not goods delivered by Linzheng were non-compliant under the contract between Playhut and Linzheng. We conclude the judgment must be upheld based on the jury's special verdict findings that Linzheng performed "all, or substantially all, of the significant things that the contract required it to do." The jury found that Linzheng delivered "compliant" goods under its contract with Playhut. As a result, Linzheng was entitled to be paid. If Playhut had problems with its customers because it promised them something different than Playhut ordered from Linzheng, that was not Linzheng's problem as it did all that it was contractually obligated to do.

Finally, accepting that Playhut had a contractual right to issue chargebacks for goods returned by its customers, it does not necessarily follow that Playhut had a contractual right to issue chargebacks without establishing that goods, in proven amounts, were, in fact, returned, and that the returned goods were, in fact, non-compliant under the contract between Playhut and Linzheng, or even non-compliant under anybody's standard. As we see this case on appeal, it involved facts and evidence as much as

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[8] The evidence also seems to support a factual conclusion that Playhut entered into contracts with its customers, e.g., Target, promising to deliver sleeping bags of a certain quality (made with "spray-bonded" polyester). But, regardless of what Playhut did in its relationships with its customers, the evidence, viewed in favor of the judgment, shows it gave approval to Linzheng to procure sleeping bags of a certain quality, and the jury found Linzheng did so.

contract interpretation, or more so. Playhut's contract argument — abstractly correct as it may be as to the existence of *a* contract term — does not persuade us that reversal of the judgment is necessarily required.

III. Instructional Error

Playhut contends the judgment must be reversed because the trial court erred in giving jury instructions based on provisions of the California Uniform Commercial Code. (See Cal. U. Com. Code, § 1 et seq.; hereafter the UCC.) Playhut argues the court should have limited the jury instructions to common law contract principles. Further, that by giving instructions based on the UCC, the court "abdicated its obligation to construe the writings" and "allowed the jury to construe the purchase orders in a manner that contradicted their express terms." Again, Playhut seems to argue that there was a contract term between the parties — either as a matter of law or undisputed fact — allowing Playhut to issue chargebacks to Linzheng and that, for this reason, there was no place for any jury instructions under the UCC to help the jury to "fill in" contract terms.[9] We disagree that the judgment must be reversed based on the claimed instructional error.

The Governing Law

A trial court is required to instruct the jury on the law applicable to the parties' theories of the case, provided the instructions are supported by the pleadings and the evidence, and whether or not the trial court considers the evidence supporting a particular theory to be persuasive. (*Galvez v. Frields* (2001) 88 Cal.App.4th 1410, 1420.) A reviewing court must review the evidence in the light most favorable to the contention that the requested instruction was applicable. (*Ibid*.)

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[9] Linzheng submitted trial briefs addressing the applicability of the UCC to the claims involved in the case, and the propriety of jury instructions based on the UCC. Summarized, Linzheng's briefs argued that the UCC "is the law applicable to contracts for the sale of goods . . . ." During a conference on jury instructions, Playhut objected overall to any UCC-based instructions, and as to specific proffered instructions. Apart from the UCC-based jury instructions, the court also instructed on contract-related claims pursuant to CACI.

"No judgment shall be set aside . . . in any cause, on the ground of misdirection of the jury, . . . unless, after an examination of the entire cause, the [reviewing] court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) This is the constitutional principle of prejudicial as opposed to harmless error. When a jury is erroneously instructed in a civil case, prejudice appears where it seems "'probable that the jury's verdict may have been based on the erroneous instruction . . . .'" (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 875 (*LeMons*).)

Whether the probable effect of an erroneous instruction was to mislead the jury depends upon the circumstances of the particular case, including the evidence and the other instructions given. (*LeMons, supra*, 21 Cal.3d at p. 876.) There is no precise formula for determining the prejudicial effect of an erroneous instruction, but the following factors are properly considered: (1) the degree of conflict in the evidence; (2) whether a party's argument to the jury may have contributed to the instruction's misleading effect; (3) whether the jury requested the trial court to re-read the erroneous instruction or to re-read related evidence; (4) the closeness of the verdict; and (5) whether other instructions remedied the error. (*Ibid*.) A reviewing court will not presume that an instructional error prejudiced the appellant; instead, the burden is on the appellant to demonstrate that the error prejudiced the appellant. (*Boeken v. Phillip Morris, Inc*. (2005) 127 Cal.App.4th 1640, 1678.)

Playhut's General Objection

Before examining the specific jury instructions challenged on the current appeal, we address Playhut's overriding contention that giving any jury instruction based on the UCC is error in a case where common law contract principles apply. Playhut's opening brief on appeal cites three cases in support of its argument: *People v. Hudson* (2006) 38 Cal.4th 1002, 1012; *Aspen Pictures, Inc. v. Oceanic S.S. Co*. (1957) 148 Cal.App.2d 238, 254; and *Sills v. Los Angeles Transit Lines* (1953) 40 Cal.2d 630, 633. None of these cases hold that instructions based on the UCC should not be given where common law contract principles apply. The cases support no more than the well-established principles

that a trial court must instruct on the principles of law applicable to a particular case, and that the correctness of its charge is evaluated by examining the instructions in their entirety.

The UCC "applies to transactions in goods . . . ." (Cal. U. Com. Code, § 2102.) Common law contract principles "shall supplement" the UCC unless they are "displaced" by particular provisions of the UCC. (Cal. U. Com. Code, § 1103, subd. (b).) As explained in *Chino Commercial Bank, N.A. v. Peters* (2010) 190 Cal.App.4th 1163, 1170: "California . . . has adopted the UCC, and the UCC expressly displaces common law, to the extent that its 'particular provisions' apply. (Cal. U. Com. Code, § 1103, subd. (b).) '[The UCC] is the primary source of commercial law rules in areas that it governs. . . . Therefore, while principles of common law and equity may supplement provisions of the [UCC], they may not be used to supplant its provisions, or the purposes and policies those provisions reflect, unless a specific provision of the [UCC] provides otherwise. In the absence of such a provision, the [UCC] preempts principles of common law and equity that are inconsistent with either its provisions or its purposes and policies.'" (*Ibid*., quoting Cal. Law Revision Com. com, 23A pt. 1 West's Ann. Cal. U. Com. Code (2010 pocket supp.) foll. § 1103.)

Under the common law, a contract was formed only when an offer and acceptance were mirror images of each other. Under the UCC, contracts are recognized where transactions between parties establish an intent to contract. We understand Playhut to argue that its dealings with Linzheng should have been viewed as more akin to the common law situation, and that the UCC should have been ignored accordingly. Even assuming that Playhut's reading of the evidentiary record were correct, its argument fails to persuade us that the UCC could not possibly apply *for purposes of giving jury instructions*. As noted, the UCC applies to transactions involving goods. The UCC is modern contract law that reflects the reality of modern transactions, and the likelihood that mirror image offers and acceptances are not always present in transactions for goods. UCC provisions such as UCC section 2207 are intended to address the proverbial "battle of forms" that may arise in today's commercial world. It does so by providing rules of

contract formation, and determining the terms included in the contract, in transactions involving goods. In short, contract relationships are more readily and common sensibly recognized, and the terms are determined by the rules under the UCC.

Under UCC section 2207, parties may be found to have entered a binding contract despite the absence of a formal, final written document memorializing the agreement. "Instead of fastening upon abstract doctrinal concepts like offer and acceptance, [UCC] section 2207 looks to the actual dealings of the parties and gives legal effect to that conduct. Much as adhesion contract analysis teaches us not to enforce contracts until we look behind the facade of the formalistic standardized agreement in order to determine whether any inequality of bargaining power between the parties renders contractual terms unconscionable, or causes the contract to be interpreted against the more powerful party, [UCC] section 2207 instructs us not to *refuse* to enforce contracts until we look below the surface of the parties' disagreement as to contract terms and determine whether the parties undertook to close their deal. [UCC section] 2207 requires courts to put aside the formal and academic stereotypes of traditional doctrine of offer and acceptance and to analyze instead what really happens." (*Steiner v. Mobil Oil Corp*. (1977) 20 Cal.3d 90, 99-100.)

For all of the reasons discussed above, we reject Playhut's claim of an overriding instructional error in the current case. Jury instructions based on the UCC may properly be given in an action involving transactions involving goods. And, in any event, as noted above, a determination whether a trial court correctly instructed a jury depends upon an examination of the entire charge. Here, the trial court instructed on general contract law using standard CACI instructions (which was the instructional path that Playhut argues should have been followed), so the court's instructions, examined as a whole, included the correct law. The trial court further instructed the jurors that they might find some of the instructions did not apply, so the jury was free to disregard the UCC-based law if they so chose. Given the totality of the circumstances, the true issue here is whether the giving of any particular special jury instruction based on a provision of the UCC was error. With this framework for review in place, we turn to what Playhut says the special

jury instructions told the jurors, what those special jury instructions actually told the jurors, whether there was any error, and if an error occurred, whether the error prejudiced Playhut.

The Challenged Instructions and Analysis

Playhut's argument in its opening brief on appeal cites Special Instruction Nos. 1, 2, 12, 18, 19, 20, and 21. Playhut collectively argues that giving these instructions was error because they "suggested (1) that the jury could ignore the terms of the purchase orders and imply a different contract – one that was entered into orally or by conduct – even if it varied the express terms of the writings; (2) that the jury could use the concept of good faith (without defining it or stating its limits) to gauge the contract and modify its terms; [and] (3) that on [delivery] of the goods, Playhut was obligated to reject the goods or pay for them and hence could not reserve to itself the right to charge back." We now examine each instruction.

1. *Special Instruction No. 1*

Playhut tells us that Special Instruction No. 1 instructed the jurors that a "seller has an obligation to transfer and deliver, at which time buyer's obligation is to accept and pay." This is what Special Instruction 1 actually told the jurors: "The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay *in accordance with the contract*." (Italics added.) Special Instruction No. 1 was based on UCC section 2301.

Special Instruction No. 1 did not, as Playhut claims, instruct the jury that it had an absolute obligation to accept the sleeping bags and pay. The instruction told the jury that Playhut had to accept goods and pay Linzheng *in accordance with the parties' contract.* Assuming the trial court erred in giving Special Instruction No. 1, Playhut fails to explain how the result of the trial would have been any different had the instruction not been given. Playhut could still have won its case even under Special Instruction No. 1. Playhut lost its case because the jury found that Linzheng did all that it was required to do under the parties' contract. Playhut does not explain how Special Instruction No. 1 undermines the jury's finding about Linzheng's performance.

2. *Special Instruction No. 2*

Playhut tells us that Special Instruction No. 2 "advised the jury that every contract for the sale of goods imposes an obligation to act in good faith, but did not define good faith, and did not include the caveat that the covenant of good faith and fair dealing could not be read to contradict the express terms of the parties' argument."[10] The instruction was based on UCC section 1304.

The law stated in Special Instruction No. 2, based on UCC section 1304, is the same under general common law contract principles. As Division Three of our court stated in *Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 885: "Every contract contains an implied covenant of good faith and fair dealing providing that no party to the contract will do anything that would deprive another party of the benefits of the contract." (*Ibid*.) Playhut does not persuade us there was error in giving Special Instruction No. 2. It correctly stated the law, whether the stated law be viewed as based on common law contract principles or the UCC.

To the extent Playhut argues the trial court erred in giving Special Instruction No. 2 without clarifying language that (1) defined good faith and (2) included a caveat that the covenant of good faith and fair dealing could not be employed to contradict the express terms of the parties' contract, we are not persuaded to reverse the judgment. If Playhut wanted the instruction to include amplifying language, then Playhut should have requested such amplifying language. (See, e.g., *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 948 [a party may not complain on appeal that an instruction correct in law was too general or incomplete unless the party requested an additional or qualifying instruction], disapproved on other grounds in *White v. Ultramar, Inc*. (1999) 21 Cal.4th 563, 574, fn. 4.)

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[10] This is what Special Instruction No. 2 actually told the jurors: "Every contract for the sale of goods imposes an obligation to act in good faith in the performance and enforcement of the contract."

Finally, assuming the trial court erred in the giving of Special Instruction No. 2, Playhut again has not demonstrated prejudice. Playhut's argument fails to convince us that the jury employed the implied covenant of good faith and fair dealing to "contradict" any term in the written purchase orders it submitted to Linzheng. Playhut seems to argue that the jury's special verdicts were necessarily based on the jury's finding that Playhut acted in bad faith by issuing chargebacks, even though the purchase orders (or at least some of them) contained an express provision allowing Playhut to issue chargebacks. The problem with Playhut's argument is that the special verdict forms provided to and returned by the jury did not include specific questions asking the jury to find whether Playhut did or did not have a contractual right to issue chargebacks, and/or whether Playhut properly issued chargebacks. Under the special verdicts, the jury may well have found Playhut had a contractual right to exercise chargebacks, but failed to prove up its claimed chargebacks. Playhut has not persuaded us that an error, if any, in giving Special Instruction No. 2 caused the jury to rule against Playhut.

3. *Special Instruction No. 12*

Playhut tells us that Special Instruction No. 12 "dealt with contracts established by conduct (an issue related to claims never raised, made, or argued, but one that again, invited the jurors to find a contract that varied the terms of the writings)."

Special Instruction No. 12 actually told the jurors: "To establish that a contract existed between the parties, a party must prove that there was conduct by the parties that recognizes the existence of a contract for the sale of goods even though the parties' written documents were not sufficient to show agreement. [¶] In determining whether the conduct of the parties establishes a contract, you should consider all the evidence before you, including the statements of the parties, their conduct, and the surrounding circumstances. [¶] If you find that the conduct of the parties establishes a contract, *the terms of the contract are those on which the writings of both parties agree and any*

additional terms supplied by law." (Italics added.) Special Instruction 12 was based on UCC section 2207.[11]

Again, Playhut's argument on appeal does not persuade us that an error, if any, in giving the challenged instructions caused the jury to rule against Playhut. Its argument seems to consist of multiple parts. One, the evidence was undisputed that Playhut and Linzheng entered a contract, so there was no need for an instruction concerning the existence of a contract. (The parties did not stipulate to the existence of a contract.) Two, the evidence was undisputed that the parties' contract consisted of the purchase orders, some of which included an expressly stated provision giving Playhut a right to exercise chargebacks, so there was no need for an instruction concerning the terms of the contract. And, finally, Special Instruction No. 12 *allowed* the jury to find the parties' contract did not include a term giving Playhut the right to issue chargebacks, when the jury should have been told that it was *disallowed* to find a right to issue chargebacks did not exist. As we understand Playhut's argument, if the jury were to be told anything, it should have been that Playhut had a contractual right, as a matter of law, to issue chargebacks.

Assuming everything Playhut argues is correct, Playhut has not shown it was prejudiced by Special Instruction No. 12. The problem with Playhut's argument is that there is no evidence that the jury decided the case based upon its determination that Playhut did not have a contractual right to exercise chargebacks. As we noted above, the special verdict forms given to and returned by the jury did not specifically ask the jury to decide whether Playhut had a contractual right to exercise chargebacks. The special

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[11] In addition to Special Instruction 12, the trial court instructed the jury using CACI No. 304 [oral or written contract terms], No. 305 [implied-in-fact contract], and No. 310 [contract formation — acceptance by silence]. The court also instructed with CACI No. 5000, telling the jurors: "After you have decided what the facts are, you may find that some instructions did not apply. In that case, follow the instructions that do apply and use them together with the facts to reach your verdict. [¶] If I repeat any ideas or rules of law during my instructions, that does not mean that these ideas or rules are more important than the others. In addition, the order in which the instructions are given does not make any difference."

verdicts are just as amenable to an interpretation that the jury found Playhut had a contractual right to issue chargebacks, but failed to prove up its claimed chargebacks.

4. *Special Instruction Nos. 18-21*

Playhut tells us that Special Instruction Nos. 18, 19, and 20 told the jurors: "Linzheng had only to prove that the goods were delivered and taken by Playhut and that once this occurred, Playhut had an absolute obligation to pay." Further, Playhut tells us that Special Instruction No. 21 "expressly made this point by instructing that under the UCC, the burden was on the buyer to establish breach once goods were 'accepted,' all without reference to the express terms of the purchase orders which stated otherwise." In whole, Playhut argues the trial court misdirected the jurors concerning the law governing acceptance of goods.

Special Instruction No. 18 told the jurors: "To establish that the goods were accepted, [Linzheng] must prove that Playhut . . . accepted the goods by: (1) indicating to Linzheng, after a reasonable opportunity to inspect, that the goods conformed to the contract, or (2) indicating to Linzheng, after a reasonable opportunity to inspect, that the goods would be taken or retained despite their nonconformity to the contract, or (3) failing to make a proper rejection after Playhut . . . had reasonable opportunity to inspect the goods, or (4) performing any act inconsistent with Linzheng's ownership." The instruction was based on UCC section 2606.

Special Instruction No. 19 provided: "The seller is entitled to the contract rate for any goods accepted." The instruction was based on UCC section 2607, subdivision (1).

Special Instruction No. 20 provided: "Acceptance of goods by the buyer precludes rejection of the goods accepted and, if made with knowledge of a noncomformity, cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured. *Acceptance does not, of itself, impair any remedy for nonconformity*." (Italics added.) The instruction was based on UCC section 2607, subdivision (2).

Special Instruction 21 provided: "The burden is on the buyer to establish any breach with respect to the goods accepted." The instruction was based on UCC section 2607, subdivision (4).

Playhut is wrong that the instructions told the jury that Playhut had an "absolute" duty to pay once it "accepted" the sleeping bags. The UCC-based instructions told the jury that Playhut's "acceptance" did not, of itself, impair any of Playhut's remedies for nonconformity of goods. At most, the instructions shifted the burden of proof to Playhut to show nonconformity once the jury decided there had been acceptance. To the extent that Playhut argues the trial court should have fashioned an instruction on UCC section 2719, highlighting that the buyer is entitled to include remedies in its contract, Playhut should have requested such an instruction.

Finally, assuming the trial court erred in giving Special Instruction Nos. 18-21, we will not reverse because Playhut has not shown that a miscarriage of justice occurred in this case. The jury's express finding that Linzheng did all that it was required to do under the parties' contract demonstrates that the issue of "acceptance" was not fatal to Playhut's defense. Linzheng prevailed because, in the conclusion of the jury, it did not deliver nonconforming goods.

IV. Evidentiary Error

Playhut contends the judgment must be reversed because the trial court erred in excluding certain evidence during the testimony of Lee Wang, a Playhut manager of procurement and production. We disagree.

Standard of Review

Trial court evidentiary rulings are reviewed under the abuse of discretion standard. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331.) Abuse of discretion is ordinarily based on a showing that a trial court's ruling was arbitrary or capricious, or beyond the bounds of reasonableness. (*Blackman v. Burrows* (1987) 193 Cal.App.3d 889, 893.) A party may also establish an abuse of discretion by showing that a trial court's ruling resulted from a misunderstanding of the law, the principle being that a court cannot properly exercise its

discretion when it does not correctly understand the governing ground rules. (See *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297-1298.)

A party's claim of error regarding an evidentiary ruling is reviewed in light of the constitutional requirement that no judgment may be reversed on appeal unless the party complaining demonstrates a miscarriage of justice, i.e., prejudice. (Cal. Const., art. VI, § 13.) In other words, when an appellant shows that an evidentiary ruling was erroneous, a judgment will not be reversed in the absence of a showing that the error prejudiced the appellant's case at trial. (See, e.g., *Easterby v. Clark* (2009) 171 Cal.App.4th 772, 783.) Prejudice in this context means the reviewing court finds that it is reasonably probable, based on the entire record, that the appellant would have achieved a more favorable result in the absence of the error. (See generally, *Cassim v. Allstate Ins. Co*. (2004) 33 Cal.4th 780, 801-802.)

The Excluded Evidence

Playhut's arguments on appeal challenge the trial court's rulings to exclude two items of evidence during Wang's testimony: (1) an email "chain" starting with an email received by Wang on August 17, 2008, ostensibly from a person in Playhut's affiliate in Shanghai;[12] and (2) photographs of allegedly defective sleeping bags attached to emails.

1. The Email Evidence

As noted above, Linzheng called Wang to testify as an adverse witness pursuant to Evidence Code section 776. Thus, in the trial framework, Playhut's cross-examination of Wang largely constituted Playhut's direct examination of its own manager who had been involved in the sleeping bag events. Playhut's counsel questioned Wang about the email he received on August 17, 2008, ostensibly from a person in Playhut's Shanghai affiliate, reporting problems with the sleeping bags then being manufactured and delivered. When Playhut's counsel indicated an intent to read the content from the email, i.e., the email's statements to the effect that there were problems with sleeping bags, Linzheng interposed a hearsay and authentication objection, and the trial court sustained the objection.

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[12] The contested evidence is Exhibit 222. It is before us as part of the appellant's appendix.

Playhut contends the trial court erred in excluding the evidence of the content of the August 17th email because it was not hearsay in that it was not offered for the truth of the matter asserted in the email, and because it was admissible hearsay. We find no error.

We reject Playhut's argument that it offered the content of the August 17th email for a non-hearsay purpose. As we read the record, Playhut wanted to introduce an email "chain" which included a series of emails discussing problems with sleeping bags. The record convinces that Playhut wanted to introduce this evidence to buttress its claim that the sleeping bags *were, in fact, defective*. We reject Playhut's argument that it merely wanted to introduce the email chain to show how and why Wang acted in the manner in which he did at the time (e.g., recommending that Playhut withhold payments). Indeed, apart from the emails, and with or without the emails themselves being introduced into evidence, Playhut questioned Wang about receiving the August 17th email, and about his actions in response to the email. The record supports the trial court's conclusion that Playhut was offering the content of the August 17th email at trial in an attempt to prove that the sleeping bags were, in fact, defective. The factual matter being asserted – that the sleeping bags were defective – was hearsay. The trial court did not err.

We reject also Playhut's argument that the emails were admissible hearsay. Before the mid-trial exchange addressed above, the trial court had issued a general ruling that materials from "Playhut Shanghai" could not be admitted against plaintiff Playhut USA as "party admissions." The discussion about party admissions concerned evidence *that Linzheng might offer*. In issuing its ruling, the court noted there had been no evidence presented — as of the time of the ruling — showing that "Playhut Shaghai" and "Playhut USA" were parts of one and the same entity. In the court's own words: "As far as the court knows, they're two separate entities."

On appeal, Playhut appears to contend that the court's evidentiary ruling against Linzheng concerning "Playhut" party admissions, as it may implicate the admissibility of the evidence of the August 17th email subsequently proffered by Playhut during trial, was error. If this is Playhut's argument, we reject it because the trial court's party admission

ruling as to evidence proffered by Linzheng is irrelevant to the court's ruling later in trial to exclude the email evidence proffered by Playhut.

Playhut further argues the August 17th email was admissible as its own business record. We disagree. Evidence of a writing made to record an act, condition or event is admissible under the "business record" hearsay exception if: (a) the writing was made in the regular course of the business; (b) made at or near the time of the act, condition, or event; (c) the custodian or other qualified witness testifies to its identity and the mode of its preparation; and (d) the sources of information and method and time of preparation were such as to indicate its trustworthiness. (Evid. Code, § 1271.)

Here, the August 17th email does not satisfy the criteria of the hearsay exception for business records for at least two reasons. First, the August 17th email was not made in the regular course of Playhut's business; it was a special communication reporting a possible problem that had arisen. (*Zanone v. City of Whittier* (2008) 162 Cal.App.4th 174, 191 [to qualify as a business record, a document's author "must have created the document in the ordinary course of his or her business"].) Second, a custodian of records or other qualified witness (such as the author) did not testify regarding the source of the information in and the preparation of the August 17th email. Such testimony was needed to allow the trial court to make a finding that the information was trustworthy. Wang did not compile the information in the email and did not prepare the email; he did not know anything about the manner in which the information in the email was compiled, and, as he did not know anything about how it was prepared, he likewise did not know whether the information was accurately recounted in the email. He just received an email. In the final analysis, the source of the information in and method of preparation of the August 17th email did not have the required indicia of trustworthiness for admissibility as a business record of plaintiff Playhut USA.

We further agree that that trial court correctly ruled the email was not admissible because it was not authenticated. (Evid. Code, § 1401.) A writing may be authenticated by its author of course. And a writing may also be authenticated by "anyone who saw the writing made . . . ." (Evid. Code, § 1413.) A writing may also be authenticated by

circumstantial evidence, including evidence demonstrating that a writing was received in response to a communication sent to the person who is claimed by the proponent of the writing to be the author of the writing. (Evid. Code, § 1420.) The problem here is that Wang's testimony showed he received the August 17th email unsolicited. Wang did not see the email being written. There is no evidence showing that Wang received the email as a response to a communication that he sent. Thus, the writing was not authenticated.

Finally, even assuming the trial court erred in excluding the email evidence, we find no prejudice. We simply are not persuaded that the result of trial would have been any different had the August 17th email been put before the jury. Because Wang testified about receiving the August 17th email, and testified as to its significance in prompting him to take responsive action; the trial court's ruling in excluding the content of the email itself fell short of causing a miscarriage of justice. Wang testified about his involvement in the sleeping bag problems, the email did little more than show the circumstances under which Wang became involved in the problem. Playhut does not present a meaningful explanation for how and why introducing the content of email itself would have made a difference in the outcome of the trial.

2. *The Photographs/Exhibits 583-585*

In questioning Wang about his response to the August 17th email, Playhut's trial counsel questioned Wang about three photographs of allegedly defective sleeping bags. The photographs may have been attachments to the August 17th email sent to Wang from someone in Playhut's Shanghai affiliate.[13] Linzheng objected to the photographs on the ground of lack of foundation. The trial court sustained the objection, but advised that the photographs might be admissible with supporting testimony showing when and under what circumstances they had been taken.

We reject Playhut's contention that the trial court erred. The trial court properly excluded photographs of the sleeping bags because Playhut did not lay a foundation from which the court could determine that the photographs actually depicted what had actually

[13] The contested evidence was identified as Exhibits 583-585. It is before us as part of the appellant's appendix.

been observed by the persons who took the photographs. (See Evid. Code, § 403, subd. (a)(2).) Wang's testimony did not lay a foundation for introduction of the photographs. He did not take the photographs, he was not present when the photographs were taken, and he never personally saw any allegedly defective sleeping bags. Wang could not say that the photographs accurately depicted anything.

V. Judgment Notwithstanding the Verdict

Playhut contends the trial court should have granted its motion for judgment notwithstanding the verdict. We disagree.

Playhut's first argument is that its motion for judgment notwithstanding the verdict should have been granted on the ground that Linzheng lacked standing. For the reasons explained above in section I of this opinion, we reject this argument.

Playhut's second argument is that its motion for judgment notwithstanding the verdict should have been granted on the ground of juror misconduct. In its opening brief on appeal, Playhut argues the following juror activity amounted to misconduct: "The jurors wanted to provide credit for charge backs, discussed the matter, but did not include any in the verdict." That is the entirety of the argument.

Playhut has not shown juror misconduct. Generally speaking, juror misconduct applies to a broad range of actions by a juror that may deprive a party of a fair trial. The following are illustrative of juror misconduct: (1) consideration of evidence outside the trial record; (2) talking about the case to someone outside of the trial; (3) discussing the case with a separate juror outside of jury deliberations; (4) rendering a chance verdict; (5) inattentiveness at trial; and (6) concealed bias. (See 8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 28, pp. 611-613.)

Playhut's argument on appeal is that the jury did not decide the case in its favor. This does not demonstrate juror misconduct. It is not misconduct for jurors to discuss a subject, then reject a party's position as to that subject (here, Playhut's position it had a contractual right to exercise chargebacks, and properly exercised chargebacks). We see no need to address the parties' respective discussions regarding the issue of whether the trial court properly ruled that certain juror declarations were not admissible in addressing

the juror misconduct issue. (See Evid. Code, § 1150 [evidence of jurors' deliberative processes is not admissible].) Playhut's argument on appeal is simply not sufficient to show there is a juror misconduct problem in this case.

VI. Prejudgment Interest

Playhut contends the trial court erred in ruling that prejudgment interest would be awarded. We disagree.

Civil Code section 3287, subdivision (a), provides: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day. . . ." Civil Code section 3287, subdivision (a), establishes the right of a plaintiff to recover prejudgment interest when the amount of money due from the defendant is essentially liquidated -- when the damages are certain, or capable of being made certain by calculation. (*Marine Terminals Corp. v. Paceco, Inc*. (1983) 145 Cal.App.3d 991, 994.) Here, the amount of money owed by Playhut to Linzheng, upon the jury's rejection of Playhut's defense that delivered goods were defective, was certain, and/or easily capable of being made certain by calculation. The amount invoiced by Linzheng, and the amount paid by Playhut, were stipulated. The unpaid amount was easily computed— it took no more than calculating the difference. We see no error in awarding prejudgment interest because a simple calculation could be applied to determine Linzheng's damages, namely, the unpaid money owing under the invoices it issued to Playhut.

Playhut relies extensively on *North Oakland Medical Clinic v. Rogers* (1998) 65 Cal.App.4th 824 (*North Oakland*), for a different result. We find *North Oakland* to be inapplicable. The *North Oakland* decision is largely a *procedure*-focused decision; it has little if any relevance on the issue of whether prejudgment interest has been properly awarded on a fixed amount of damages. In *North Oakland*, a law firm orally contracted to pay a medical clinic for care provided to some of the firm's personal injury clients. The firm thereafter failed to pay for services rendered. The medical clinic sued, and won. The clinic filed a memorandum of costs, which did not include a request for prejudgment

interest. The trial court entered a judgment which included a provision for costs (to be fixed), but not a provision for prejudgment interest. Later, the clinic submitted a proposed order awarding costs, which included an award of approximately $39,000 in prejudgment interest. (*Id*. at pp. 826-828.)

The trial court awarded prejudgment interest as an item of costs, then granted the law firm's motion to set aside the award of prejudgment interest on the ground that the medical clinic had failed to seek prejudgment interest before its attempt to obtain it by a memorandum of costs. (*North Oakland, supra,* at pp. 827-828.) In short, the medical clinic had not sought an award of prejudgment interest by the proper procedural path. The Court of Appeal then affirmed the order setting aside the prejudgment interest award.

North Oakland teaches: "That a party is entitled to prejudgment interest does not make an award automatic . . . . A request for interest must be made in the trial court . . . . [¶] A general prayer in the complaint is adequate to support an award of prejudgment interest. 'No specific request for interest need be included in the complaint; a prayer seeking "such other and further relief as may be proper" is sufficient for the court to invoke its power to award prejudgment interest. [Citations.]' . . . .

[¶] . . . [¶]

"It is well established that prejudgment interest is not a cost, but an element of damages. [Citations.] This distinction persuades us that the cost bill is *not* an appropriate vehicle for requesting [prejudgment] interest under [Civil Code] section 3287. In our view, prejudgment interest should be awarded in the judgment on the basis of a specific request therefor made *before* entry of judgment. This view is buttressed by California Rules of Court, rule 875, which provides: 'The clerk shall include in the judgment any interest awarded by the court and the interest accrued since the entry of the verdict.'" (*North Oakland, supra*, 65 Cal.App.4th at pp. 829-830, fns. omitted.)

Linzheng followed these procedures in the current case. It did not seek prejudgment interest by a memorandum of costs. Linzheng's complaint filed in September 2009 included an express prayer for prejudgment interest as of October 2008, and the judgment entered in August 2011 included a provision for interest commencing

in December 2008. No more was required. Playhut's reliance on *North Oakland* just does not work. Playhut simply misreads *North Oakland* for rules that are not there, or are not applicable in light of the circumstances involved in the matter between Playhut and Linzheng.

VII. Discovery Act Monetary Sanctions

Playhut contends the trial court erred in imposing Discovery Act monetary sanctions and/or in fixing the amount of discovery sanctions. We disagree.

The Litigation Setting

Linzheng served form interrogatories, an initial set of special interrogatories, a second set of special interrogatories, and requests for admissions. It cannot be debated that the promulgated discovery was voluminous. After Playhut provided answers and responses, including objections, Linzheng's counsel faxed a "meet and confer" letter to Playhut's counsel. Over about a two week period, there was some back-and-forth by the lawyers; the lawyers agreed to an ostensible telephonic meeting to discuss their discovery differences. On December 20, 2010, the lawyers met and conferred by telephone for roughly one hour. Agreement was reached on minor matters, but no more; each party blamed the other as the cause of the end of the telephone meeting.

On December 22, 2010, Playhut's counsel, Jayesh Patel, sent an email to counsel for Linzheng. Patel's email opened by stating: "In the future, I expect that one of the partners at your firm involve themselves in this [discovery] effort unless we get clear, written, indication from them that you are authorized to make the kinds of decisions and misstatements that you are making. It will be relevant for the court to assess which of us has engaged in good faith. Your inexperience is a detriment to any real progress." After a short discussion of Playhut's initial discovery responses, and its agreement to provide further responses (correcting "a typographical error"), and what he called Linzheng's "superficial and general complaints," Patel closed his email by stating: "Stop wasting our time. As I said on the phone, if your purpose is simply to avoid any meaningful effort at resolution, then you should bring your motion. Otherwise, have one of your superiors call to actually address these questions constructively without repeating, incessantly, the

complaint that you don't like the responses provided." There was further back-and-forth for the next two to three weeks.

Linzheng eventually filed three discovery motions: (1) a motion to compel further responses to three special interrogatories concerning Playhut's damages as alleged in its cross-complaint (and $2,490 in discovery sanctions) (2) a motion to compel further responses to requests for admissions (and $2,875 in discovery sanctions); and (3) a motion to compel further responses to form interrogatories (and $2,822.50 in discovery sanctions).[14]

The focus of Linzheng's motions to compel further responses to its requests for admissions and form interrogatories was to get Playhut to admit the authenticity of certain documents and certain matters concerning the parties' dealings. As noted above, the focus of Linzheng's motion to compel further responses to special interrogatories was to have Playhut state the damages it suffered as alleged in its cross-complaint. The three special interrogatories that were the subject of Linzheng's motion, and Playhut's responses to those interrogatories, read as follows:

> "SPECIAL INTERROGATORY NO. 59: [¶] State the damages to which YOU claim YOU are entitled as a result of LINZHENG's alleged breach of contract."
>
> "GENERAL OBJECTIONS [¶] Playhut objects to each and every special interrogatory to the extent it seeks information or documents that are confidential or protected by the right of privacy of Playhut or third parties. In addition, Playhut objects to each and Special Interrogatory to the extent it seeks the production of documents or disclosure of information subject to the attorney-client privilege and/or the attorney work-product doctrine. Playhut asserts these objections, protections and limitations with respect to every Special Interrogatory, and every response contained herein

[14] Playhut filed a discovery motion to compel the deposition of Linzheng's "person most knowledgeable," and production of documents. Playhut did not request discovery sanctions. Playhut's motion is not involved in the current appeal. (Playhut won.)

is expressly subject to these objections, protections and limitations. In addition, no incident or implied admissions are intended by these responses and none should be made. Nothing stated in these responses is an admission of facts or documents referred to or assumed in any Special Interrogatory or as an admission that anything stated in these responses is admissible evidence, or a waiver of any objection."

[¶] RESPONSE TO SPECIAL INTERROGATORY No. 59: [¶] In addition to and without waiving the foregoing general objections, Playhut further objects to this interrogatory on the grounds that it is vague, ambiguous and overbroad as to 'contract.' Moreover, Playhut objects to this interrogatory on the grounds that it seeks the production of documents or disclosure of information subject to the attorney-client privilege and/or the attorney work-product doctrine. Without waiving any of the foregoing objections, Playhut responds as follows: The Chargebacks are deducted from any amounts Playhut owes to Linzheng, sometimes on that invoice or against future invoices. The documents related to the order of the goods and Chargebacks were exchanged in the ordinary course of business, as is customary for such transactions. In fact, Linzheng has admitted receiving all of the Chargeback documents for Chargebacks Playhut is claiming in this matter. When the relationship ended, the Chargebacks exceeded the amount of the outstanding invoices. [¶] When Playhut reconciled, the amount Linzheng owed Playhut was in excess of the amount Linzheng claims in this action. Playhut is entitled to the amount of the Chargebacks less the amount of the outstanding invoices. In addition the last debit memo is based on canceled orders from various retailers. The retailers have decreased future orders of the items. The potential value of lost business or lost profits from retailers are subject to expert testimomy."

"SPECIAL INTERROGATORY NO. 62: [¶] State the damages to which YOU claim YOU are entitled as a result of LINZHENG'S alleged unjust enrichment."

"RESPONSE TO SPECIAL INTERROGATORY No. 62: [¶] In addition to and without waiving the foregoing general objections, Playhut further objects to this interrogatory on the grounds that it is vague, ambiguous and overbroad. Moreover, Playhut objects to this interrogatory on the grounds that it seeks the production of documents or disclosure of information subject to the attorney-client privilege and/or the attorney work-product doctrine. Without waiving any of the foregoing objections, Playhut responds as follows: The Chargebacks are deducted from any amounts Playhut owes to Linzheng, sometimes on that invoice or against future invoices. The documents related to the order of the goods and Chargebacks were exchanged in the ordinary course of business, as is customary for such transactions. In fact, Linzheng has admitted receiving all of the Chargeback documents for Chargebacks Playhut is claiming in this matter. When the relationship ended, the Chargebacks exceeded the amount of the outstanding invoices. When Playhut reconciled, the amount Linzheng owed Playhut was in excess of the amount Linzheng claims in this action. Playhut is entitled to the amount of the Chargebacks less the amount of the outstanding invoices."

"SPECIAL INTERROGATORY No. 65: [¶] State the damages to which YOU claim YOU are entitled as a result of LINZHENG'S alleged intentional interference with contractual relations."

"RESPONSE TO SPECIAL INTERROGATORY No. 65: [¶] In addition to and without waiving the foregoing general objections, Playhut further objects that this request is vague, ambiguous and overbroad as to 'contractual relations'. Moreover, Playhut objects to this interrogatory on the grounds that it seeks the production of documents or disclosure of

information subject to the attorney-client privilege and/or the attorney work-product doctrine. Subject to foregoing objections, Playhut responds as follows: Playhut is entitled to lost profits from retailers cancelling orders of children's goods it historically purchased from Playhut prior to Linzheng manufacturing and shipping defective goods pursuant to purchase orders from Playhut. The last debit memo is based on canceled orders from various retailers. The retailers have decreased future orders of the items. The potential value of lost business or lost profits from retailers are subject to expert testimony."

The trial court's tentative ruling indicated that it would grant all of Linzheng's motions, and order Playhut to provide further responses within 10 days, and that it would award "reduced sanctions jointly and severally against Playhut and [its] counsel, Pumilia, Patel & Adamec ('PPA') in the amount of $8,187.50."[15] The court indicated it was satisfied with Linzheng's attempt to meet and confer.

At oral argument, counsel for Playhut (and PPA also for purposes of sanctions) pointed out a number of issues with the court's tentative, including that the court had not acknowledged that Playhut supplemented some of its responses before Linzheng filed its motions, and that Linzheng's motions were based on Playhut's original responses, not its supplemental responses. Counsel for Playhut and PPA also noted that the court's tentative ordered Playhut to respond to at least one special interrogatory ("number 2") that was not the subject of any of Linzheng's motions to compel. Linzheng's counsel acknowledged that Playhut had provided supplemental responses, and represented that he believed he had not moved for further responses as to discovery for which supplemental responses were served. Playhut's counsel pointed out a request for admission ("number 6") that was included in Linzheng's motion for which Playhut had provided a supplemental response. In response to the presentation by the lawyers, the trial court stated it would not order further responses as to discovery which was not part of

[15] There were no "reduced" sanctions, however, in that $8,187.50 was the full amount that Linzheng collectively requested in its three motions.

Linzheng's three motions. The court stated it "got tired of looking" through all the discovery requests, and all the objections and responses, and indicated that, "when I saw the nature of the initial responses and objections, I did what . . . any judge would do and say, 'Okay. I've got game playing going on. We've got to stop it. These aren't difficult questions. They may be voluminous, but they aren't difficult.'" The court indicated the lawyers should have sat down, in person, and ironed out the discovery issues.

Concerning the special interrogatories relating to Playhut's damages claims, the court stated that Playhut should have provided the damages amounts that it was claiming in that Linzheng's questions were "straightforward." Further, the court commented that Playhut's objections amounted to "wordsmithing" that the court found "distressing." As to the requests for admission, the trial court stated that, if the requests were vague and ambiguous as Playhut's counsel contended, then Playhut's counsel should have met and conferred on that issue. Implicit in the court's comments are its conclusion that Playhut's counsel was responsible for the failure of the meet and confer requirement under the Discovery Act. The court also commented that it did not view the requests to be ambiguous ("a thousand other attorneys would have no trouble figuring it out.")

The trial court's minute order adopted its tentative ruling, including its decision to award Discovery Act monetary sanctions of $2,822.50, $2,490 and $2,875, for a total of $8,187.50.

Analysis

Trial courts have broad discretion in controlling discovery and in making orders in discovery proceedings. (See *Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 431-432.) A trial court's order in a discovery matter is presumed correct, and a complaining party must show an abuse of discretion to obtain relief from the order. (*Id.* at p. 432.) A court abuses its discretion when it issues a ruling that is arbitrary or capricious, or beyond the bounds of reasonableness. (*Blackman v. Burrows, supra,* 193 Cal.App.3d at p. 893.)

After reviewing the discovery, and the responses, and the motions, and the trial court's ruling, we are not persuaded to find an arbitrary or unreasonable ruling as to the discovery disputes here. The record supports the trial court's conclusion that discovery process failed because Playhut's counsel did not sincerely meet and confer to resolve questions with the discovery propounded by Linzheng. To the extent Playhut notes some minor problems with the motions and the court's rulings (the court ordered a further response to one interrogatory that was not the subject of Linzheng's motions; and ordered a further response to one request for admission as to which Playhut had already filed a supplemental response), we disagree that this requires a wholesale reversal of the trial court's discovery rulings. Again, the record supports the conclusion that Linzheng was put to the task of seeking further responses by Playhut's failure to meet its discovery obligations. We simply are not persuaded to find an abuse of discretion in this case.

VIII. Discovery Act Monetary Sanctions as against Playhut

As we noted above, the trial court imposed Discovery Act monetary sanctions in the sum of $8,187.50, and ordered the sanctions jointly and severally payable by Playhut and Playhut's counsel. On appeal, Playhut contends the trial court erred in making the sanctions payable by Playhut because "it is the client," and "did not participate in the sanctionable conduct." Playhut's argument relies entirely on California Rules of Court, rule 2.30(b) (hereafter rule 2.30(b).) Although we find Playhut's reliance on rule 2.30(b) to be misplaced, we will accept its offer and will direct the court to modify its order so that the Discovery Act monetary sanctions are payable by Playhut's counsel alone.

Playhut tells us that rule 2.30(b) says the following:

> "If a failure to comply with any particular rule is the responsibility of counsel and not of the party, any penalty must be imposed on counsel and must not adversely affect the party's cause of action or defenses thereon."

Here is a less excerpted picture of rule 2.30:

> "(a) Application
>
> "This sanctions rule *applies to rules in the California*

Rules of Court relating to general civil cases . . . .

"(b) Sanctions

"*In addition to any other sanctions permitted by law*, the court may order a person, after written notice and an opportunity to be heard, to pay reasonable monetary sanctions to the court or an aggrieved person, or both, *for failure without good cause to comply with the applicable rules*. For the purposes of this rule, 'person' means a party, a party's attorney, a witness, and an insurer or any other individual or entity whose consent is necessary for the disposition of the case. If *a failure to comply with any particular rule* is the responsibility of counsel and not of the party, any penalty must be imposed on counsel and must not adversely affect the party's cause of action or defenses thereon."

Playhut's reliance on rule 2.30(b) is misplaced because the trial court imposed sanctions against Playhut under the Discovery Act, not for a violation of any California Rule of Court. Under the Discovery Act (see, e.g., Code Civ. Proc., §§ 1230.300, subd. (d) [interrogatories]; 2033.290, subd. (d) [requests for admission]), the trial court was required to impose a monetary sanction against any party or attorney who unsuccessfully opposed a motion to compel further responses, unless the court found that the person subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. In other words, the rule is that everyone on the losing side of a discovery motion may be made to pay, and the exception applies for a person who shows reason for not being sanctioned. The purpose of monetary sanctions under the Discovery Act is to compensate those who are the victims of misuse of the Act. (*Townsend v. Superior Court* (1998) 61 Cal.App.4th 1431, 1438.)

Although rule 2.30(b) does not apply to the Discovery Act monetary sanctions, the record supports the conclusion that the misuse of discovery in the current case came from Playhut's lawyers, and not Playhut. The objections to discovery that were interposed to obstruct discovery have every appearance of being lawyer-speak, and it does not appear

from the record that the failure to provide responses to Linzheng's discovery was due to Playhut's recalcitrance or omissions in providing information.

Linzheng's Cross-Appeal

Linzheng contends the trial court erred in taxing certain costs. We agree in part, and disagree in part.

The Claimed Costs in Question and Motion to Tax the Costs in Question

Linzheng filed a memorandum of costs (Code Civ. Proc., § 1035, subd. (a); Cal. Rules of Court, rule 3.1700) in which it claimed a total of $35,941.15 in costs. Among the listed costs were the costs for a Mandarin-English interpreter at trial, and the travel costs (airfare and hotels) for three witnesses who testified at trial.[16]

Playhut filed a timely motion to tax costs, including the interpreter and travel costs. Playhut's motion argued that all or at least some portion of the interpreter costs were unnecessary because a portion of Lina Meng's trial testimony involved going over purchase orders "in minute detail," Grace Liu had already testified in English at her deposition regarding the purchase orders, and Jing Qing Chen's testimony had been unnecessary to assist the trier of fact. Playhut argued that, at most, it should only have to pay for half of one day of interpreter fees because "that was all that was necessary to assist the trier of fact." Playhut argued the travel expenses claimed as costs were not recoverable because they were not necessary.

The trial court ruled that Linzheng's claimed travel expenses were not recoverable as costs, citing *Ladas v. California State Auto Assn*. (1993) 19 Cal.App.4th 761, 777-775 (*Ladas*) for the proposition that "'[t]he only travel expenses authorized by section 1033.5 are those to attend depositions.'"

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[16] Jing Qing Chen ($5856.29 airfare claimed), Grace Liu ($2,477.54 airfare claimed), and Lina Meng ($2,477.54 airfare claimed), plus hotel costs of approximately $1,250.

The trial court granted Playhut's motion to tax the claimed costs of the interpreter from $5,564 to $795. The court did not expressly state its reasons, but in reducing the amount of costs claimed for the interpreter, it implicitly agreed with Playhut's assertion that a significant portion of the interpreter's services had not been necessary.

The Governing Law

Under Code of Civil Procedure section 1033.5, subdivisions (a), (b), and (c)(4), some expenses are expressly allowed as costs, some expenses are expressly disallowed as costs, and unmentioned expenses may be allowed or denied in the trial court's discretion. In all situations, expenses awarded as costs shall be "reasonable in amount," and shall be "reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation." (*Id*., subds. (c) (2), (c)(3).) On appeal, a trial court's order granting or denying a party's motion to tax costs is reviewed under the deferential abuse of discretion standard. (See *Chaaban v. Wet Seal, Inc*. (2012) 203 Cal.App.4th 49, 53.) Some cases frame the test for determining abuse of discretion to be whether or not the trial court exceeded the bounds of reason, all of the circumstances before the court being considered. (See *Miyamoto v. Department of Motor Vehicles* (2009) 176 Cal.App.4th 1210, 1218.) Other cases frame the test to be whether the trial court's ruling may be declared arbitrary, whimsical, or capricious. (*Ibid*.) Whatever the syntax, we may not reverse a trial court's ruling under the abuse of discretion standard unless we find at a minimum that it was unreasonable.

Analysis

We decline to declare the trial court's ruling as to the interpreter's services to be without basis in reason. The trial court was in the best position to evaluate the necessity for the interpreter's services, specifically as to the extent they were used, and we decline to second-guess its evaluation. Linzheng presents a cogent, persuasive argument against taxing the costs of the interpreter, but we find its argument better suited for a trial court. On appeal, we must be persuaded that the trial court abused its discretion, that the court acted unreasonably. We simply decline to make such a finding here.

Travel expenses for a witness to attend trial are neither expressly authorized nor expressly disallowed as costs. (See Code Civ. Proc., § 1033.5, subds. (a), (b).) Code of Civil Procedure section 1033.5, subdivision (c)(4), provides that expenses which are not specifically mentioned in the costs statutes may be allowed or denied as costs in the trial court's discretion.

No case cited in Linzheng's briefs on appeal expressly holds that travel expenses for a witness to attend trial may be recoverable as costs under Code of Civil Procedure section 1033.5, subdivision (c)(4). No case cited in Playhut's briefs on appeal expressly holds that travel expenses for a witness to attend trial shall not be recoverable as costs under Code of Civil Procedure section 1033.5, subdivision (c)(4). The trial court, in citing *Ladas v. California State Auto Assn*., *supra*, 19 Cal.App.4th at pages 777-775, seems to have resolved the issue by way of making a statutory interpretation, ruling that, because travel expenses to attend a deposition are expressly allowed as costs (see Code Civ. Proc., § 1033.5, subd. (a)(3)), and travel expenses to attend trial are not expressly allowed as costs, it follows, by a statutory implied exclusion, that travel expenses for trial are not allowed as costs.

We find the trial court abused its discretion by applying an incorrect legal rule to the issue of whether travel expenses for a witness to attend trial are recoverable as costs. Under Code of Civil Procedure section 1033.5, subdivision (c)(4), expenses that are not mentioned in the costs statutes may be recovered in the trial court's discretion. We see nothing in the language of Code of Civil Procedure section 1033.5, subdivision (c)(4), to support the proposition that expenses for a witness to attend trial, without regard to the circumstances, are never recoverable as costs. The issue is a matter for the trial court's discretion, not a matter of a statutory proscription against recovering a certain type of costs, namely, witness travel expenses. Accordingly, we find it appropriate to remand this issue to the trial court to determine, in its discretion, whether the claimed travel expenses in this case should be recovered as costs.

DISPOSITION

The judgment is affirmed, including the award of prejudgment interest. The order imposing Discovery Act sanctions is affirmed in part and reversed in part. The order concerning costs, to the extent it includes a blanket denial of witness travel expenses is reversed. Linzheng is awarded costs on appeal.

BIGELOW, P. J.

We concur:

FLIER, J.

GRIMES, J.