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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CARAVAN CANOPY INTERNATIONAL, INC., Plaintiff and Respondent, v. HUMAN ELECTRONICS CO., LTD., Defendant and Appellant.	B278822 (Los Angeles County Super. Ct. No. BC524882)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael J. Raphael, Judge. Affirmed in part, reversed in part, and affirmed as modified.

Willenken Wilson Loh & Delgado, Jason H. Wilson and Michael Chung for Defendant and Appellant.

Law Offices of Leon Small and Leon Small for Plaintiff and Respondent.

Human Electronics Co., Ltd. (Human) appeals from a judgment following a court trial. The trial court found that Human breached an oral contract with respondent Caravan Canopy International, Inc. (Caravan) by providing defective shade canopies that Caravan sold to retailers, such as Costco, for purchase by end users. The trial court also found that Human breached its contract with Caravan by failing a Costco audit of Human's manufacturing facilities that Costco claimed revealed the use of child labor. The trial court awarded damages in the amount of $906,753.38.

On appeal, Human does not dispute the trial court's findings that Human supplied canopies that did not conform to contractual requirements. Human's arguments focus on the trial court's damage award. Human contends that: (1) the trial court awarded Caravan a windfall by calculating damages based upon Caravan's lost revenues without taking into account payments that Caravan withheld from Human; (2) the trial court should not have awarded damages for Caravan's costs in changing the location for delivery of canopies to address the problem of the failed Costco audit; and (3) the trial court erred in overruling Human's objections to the admissibility of exhibits concerning the value of merchandise that Costco returned to Caravan. We agree with Human's first argument, but reject the other two. Accordingly, we reverse the trial court's damage award, and modify the judgment to reflect the correct damage calculation.

BACKGROUND

1. *The Oral Contract*

Caravan is based in La Mirada, California. It sells outdoor leisure and sporting goods products, such as "pop-up instant shelters," flags, and custom canopies. Lindy Park is the CEO of Caravan, and David Hudrlik, who handles the company's day to

day business, is the President. The majority of Caravan's customer base is "mass marketers," such as Costco.

In 2010, Park negotiated an oral agreement with the owner of Human, Yoon Sik Choi, for Human to manufacture canopies for Caravan to sell. Human is a South Korean company with manufacturing facilities in China.

Human manufactured two different types of canopies for Caravan that are at issue in this case. The "DisplayShade" has a steel frame with a pin that the user pulls to erect the structure that provides shade. The "PerformanceShade" has an aluminum frame and a pin to push to erect the structure. Caravan's customer for the PerformanceShade was Costco Canada, and its customers for the DisplayShade were Costco.com, The Sports Authority (TSA) and Walmart.

Caravan informed Human about the specifications for each of these products by providing a "golden sample," i.e., a prototype that Human was to copy exactly.

For the PerformanceShade, Caravan issued purchase orders to Human and paid Human directly. Purchase orders for the DisplayShade were issued by a South Korean company affiliated with Caravan, Global ING Co., Ltd. (Global). For these purchases, Global paid Human and Caravan paid Global.

2. *Breach*

Human manufactured canopies with pin brackets that did not conform to the golden sample. That caused the pins on each style of canopy to be less effective in holding up the canopy shades, resulting in "collapse during normal use." As a result of the defects in the canopies that Human manufactured, Caravan and Global withheld about $300,000 in payments to Human for purchases of the DisplayShade and Caravan withheld about $100,000 for its purchases of the PerformanceShade.

Human also failed an audit that Costco conducted to verify Human's compliance with Costco's code of conduct. Costco requires its vendors to comply with a code of conduct that includes a provision precluding child labor. In January 2011, Caravan was informed that a Costco audit of Human's manufacturing facility provided "reason to believe that a child employed at this facility may not meet the legal minimum age requirement." This led Caravan to adopt a "workaround" that involved changing the designated place of assembly from Human's factory in China to Caravan's facility in La Mirada. This change involved additional costs to Caravan in the form of freight and customs charges, labor and inland transportation.

3. *Damages*

Caravan claimed three main categories of damages. First, Caravan claimed losses from the defective pins in the canopies that Human manufactured, including labor charges associated with attempting to fix the problem and returns from Caravan's customers. Second, Caravan claimed damages from the additional costs associated with the workaround. These two categories of damages resulted in a damage claim of $906,753.38. Third, Caravan claimed damages of $1.2 million from its loss of other business from Costco from 2012 through 2015.

4. *The Trial Court's Ruling*

The parties tried the case to the court over five days in February 2016. After posttrial briefing, the trial court issued a six page statement of decision. The court found that there was an oral contract between Caravan and Human and that Human breached that contract by manufacturing products that did not conform to the contractual specifications. The court awarded the $906,753.38 in damages that Caravan claimed for its losses on products that it purchased from Human, but rejected Caravan's $1.2 million claim for lost profits on other Costco business.

DISCUSSION

1. *The Trial Court Applied a Legally Flawed Damages Methodology*

Human argues that the trial court erred as a matter of law in calculating damages based upon Caravan's lost revenues without taking into account the costs that it did not incur because of its refusal to pay Human for defective canopies. We agree.

A trial court has discretion to choose between legally permissible measures of damages based upon the specific circumstances of the case. (*New West Charter Middle School v. Los Angeles Unified School Dist.* (2010) 187 Cal.App.4th 831, 843.) However, "whether a certain measure of damages is permissible given the legal right the defendant has breached, is a matter of law, subject to de novo review." (*Ibid.*) We therefore review de novo whether the trial court's failure to exclude from its damage award the $400,000 that Caravan withheld from Human was permissible under the legal standard for awarding contract damages.

As mentioned, a major portion of Caravan's damages consisted of "return" charges for canopies that its customers rejected as defective. When those customers–Costco, TSA and Wal-Mart–returned the canopies, they did not pay for them. Thus, Caravan lost revenue on those sales. The trial court awarded damages consisting of those lost revenues.

However, the amount of Caravan's lost revenues was only one component of a proper damages calculation. The trial court's damage award should have placed Caravan in the same position it would have occupied had Human not breached the contract. (See *Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 967 (*Lewis Jorge*).)

To determine that position, one must consider Caravan's costs as well as its revenues.

Had Human not supplied defective merchandise to Caravan, Caravan would have paid Human for that merchandise and then sold it to its customers. Human's breach caused Caravan to lose some sales when its customers returned defective goods. However, Caravan also withheld approximately $400,000 in payments for canopies that Caravan claimed did not conform to the contractual specifications. Thus, if Human had not breached the contract, Caravan would have received additional revenues by avoiding customer returns, but it also would have *incurred* increased costs by paying Human an additional $400,000. To place Caravan in the same position it would have occupied if Human had not breached the contract, the damage award should have accounted for the costs that Caravan did not incur as well as the revenues that it lost.

Caravan argues that the trial court properly awarded the amount of the return charges from its customers because they were "actual losses" rather than components of a lost profits calculation. The argument ignores the legal principle discussed above. Caravan was not entitled to damages that "exceed what it would have received if the contract had been fully performed on both sides." (*Lewis Jorge, supra,* 34 Cal.4th at p. 968; Civ. Code, § 3358 ["Except as expressly provided by statute, no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides"].) The return charges by Caravan's customers were indeed "actual losses" of revenue. But Caravan's refusal to pay Human also resulted in a cost that it did not need to incur. The damage award should have accounted for both to avoid a windfall to Caravan.

Caravan also contends that Human waived the right to claim the $400,000 because it did not assert a cross-complaint or an affirmative defense of set off. But Human is not claiming a right to payment under the contract; rather, it is attempting to avoid paying more in damages for breach of the contract than Caravan is entitled to receive. Human's general denial was sufficient to preserve its right to dispute Caravan's damage claim. (*Walsh v. West Valley Mission Community College Dist.* (1998) 66 Cal.App.4th 1532, 1545 ["a general denial denies that there is a contract, that the plaintiff performed or had an excuse for nonperformance, that the defendant did not perform, or that the plaintiff was damaged"].)

Code of Civil Procedure section 431.70[1] addresses the defense of set off. It provides that, "[w]here cross-demands for money have existed between persons at any point in time when neither demand was barred by the statute of limitations, and an action is thereafter commenced by one such person, the other person may assert in the answer the defense of payment in that the two demands are compensated so far as they equal each other . . . ." (§ 431.70.) That section codifies the equitable doctrine of set-off, which is based on the principle that " 'either party to a transaction involving mutual debts and credits can strike a balance, holding himself owing or entitled only to the net difference.' " (*Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 744 (*Granberry*), quoting *Kruger v. Wells Fargo Bank* (1974)

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[1] Subsequent undesignated statutory references are to the Code of Civil Procedure.

11 Cal.3d 352, 362.)[2] Setoff is a defensive claim, "being in nature a defensive pleading asserting that the claim constituted prior payment for the amount sought in the plaintiff's complaint." (*Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 197-198.)

Thus, "[i]n order to assert a setoff, cross-demands for money must exist between the parties." (*Birman v. Loeb* (1998) 64 Cal.App.4th 502, 518 [no mutual obligations existed between the parties for purposes of a set off where the defendant's claim to a deficiency judgment was made unenforceable after a non-judicial foreclosure on real property].) Here, there were no "cross-demands" for money that could have been set off against each other once those demands were adjudicated. Rather, there were competing, mutually exclusive arguments concerning the same transactions.

On one hand, Caravan claimed that Human breached the contract by providing merchandise that did not comply with contractual requirements. Caravan's witnesses testified that it withheld the $400,000 in contractual payments because the merchandise that Human provided was defective. Caravan claimed that its refusal to pay was proper, alleging in its complaint that "Caravan has performed all it had to do under their contractual relationship and has been excused from any further performance, including payment of any outstanding invoices as a consequence of Human's breaches." (See *Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186 [to prevail on a

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[2] Section 431.70 "does not create a substantive right to raise setoff as a defense to a claim for monetary relief, but merely describes the procedures to be followed in raising this defense." (*Granberry, supra,* 9 Cal.4th at p. 744.)

cause of action for breach of contract, a plaintiff must prove "the plaintiff's performance of the contract or excuse for nonperformance"].) On the other hand, Human denied that it breached the contract, claiming that the merchandise it provided complied with the contract.

If Caravan was right, it did not owe Human any money. (See Cal. U. Com. Code, § 2717 ["The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract"].) If Human was right, Caravan did owe money for the payments that it withheld.

Had Human prevailed on its argument that the products it provided conformed to the contract, it might not have been able to collect from Caravan without a cross-complaint, at least in this action. But its claim was not a "cross-demand" for money that could be set off against Caravan's claim for damages for breach. Having lost its argument that it did not breach the contract, Human had no claim left to assert. However, it did not lose the right to dispute Caravan's damage claim.

Caravan also argues that the $400,000 should not have been deducted from the damage award because "Human has not traced it to any products in particular." Again, this argument misperceives the role of the $400,000 in the damages calculation.

Caravan is only entitled to damages reflecting its actual losses resulting from Human's breach. Caravan claimed, and proved, that Human breached the contract by providing non-conforming merchandise. That breach caused Caravan to lose some sales, but it also caused Caravan to withhold payments for the merchandise that it identified as non-conforming. Caravan obtained the benefit of the payments that it withheld from Human for non-conforming merchandise whether or not those payments related directly to particular canopies that Caravan's

customers later returned. Caravan is not entitled to receive damages for its lost sales resulting from the non-conforming products that Human provided while failing to account for the payments for those products that Caravan did not need to make.

The trial court failed to recognize the relationship of Caravan's withheld payments to its damage claim, finding incorrectly that "[t]here is no dispute that Caravan paid for the canopies that Human manufactured." That finding was inconsistent with the undisputed evidence that Caravan in fact did not pay about $400,000 for canopies that Human delivered.

Human brought the issue of the unpaid $400,000 to the trial court's attention during trial, but the court did not recognize it as an issue pertaining to the calculation of damages. Rather, the court apparently viewed the unpaid funds as a debt owed to Human unrelated to the issues in this lawsuit. The court was influenced by Human's efforts to recover at least some of these funds in a lawsuit that it brought against Global in Korea.[3]

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[3] The trial court might also have been influenced by Human's own reference to the unpaid money as an "offset." Human's trial counsel argued that, "if Caravan is claiming in this lawsuit [$]900,000 and that relates to defects, and there's still money owed from both the Global and owed to Human, then there should be an offset." However, at another point in the trial Human's counsel also raised the issue of the $400,000 as an element of damages. In response to an argument by Caravan that the existence of "collection type invoices does not go to the issue of the defective product," Human's counsel stated that "in regards to their supposed damages, I think the questions are pretty much, again, not only to offset the claimed damages but to maybe call it into dispute as a material fact." Human also argued in posttrial briefing that Caravan's damage claim should be reduced to account for the contractual payments that it withheld.

Although the record does not contain much detail about the status of this Korean litigation, Human apparently was successful in asserting a claim against Global in Korea for payment because the Korean court concluded that Global had no standing to assert a defense based on damages from non-conforming goods that *Caravan* suffered. The trial court concluded that "apparently the situation is that they [Caravan] potentially recover here, we don't know if they will yet, and Human recovers in Korea because there's a lawsuit there. It doesn't make sense for there to be an offset here and recovery there. Because I can't control what they do there, it seems to me all I focus on is this lawsuit." Thus, the trial court assumed that recognizing the $400,000 as an "offset" could lead to a double recovery by Human in the Korea litigation.

The trial court was correct in concluding that it should focus on the issues in this lawsuit rather than the lawsuit in Korea. But it drew the wrong conclusion from that observation. Neither the trial court nor this court can control whether Human might obtain a double recovery due to a Korean court's ruling that a Korean corporation may not assert a contractual defense belonging to a different, affiliated California corporation.[4] We

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In its objections to the trial court's proposed statement of decision, Human identified the evidence showing that Caravan and Global did not pay for about $400,000 of their orders, and argued that, as a result of that evidence, "there is ambiguity in the court's findings as to whether any damages should be reduced accordingly."

[4] Nor can we assess from the record in this case whether Human is actually likely to collect a double recovery through its Korean litigation against Global. The record does suggest some

can only control whether the damage award in this case is correct. Based on the record in this case, the damage award provides Caravan with a windfall, as Caravan withheld about $400,000 in payments under the contract but obtained a damage award that did not account for that cost savings. The damage award must therefore be revised to reflect that cost that Caravan never incurred.

2. *The Record Supports the Trial Court's Award of Damages for Caravan's Expenses in Changing the Delivery Location*

The trial court specifically found that Caravan was entitled to damages from the cost of the workaround. The court found that, after Human failed Costco's audit, Caravan "came up with a 'workaround' through which Human would ship the canopies to Caravan in La Mirada, California, rather than directly to Costco." The change meant that Caravan in La Mirada became the "point of assembly" and Caravan was therefore the only entity subject to a Costco audit.

This change resulted in additional costs of $158,996.74 in the form of shipping, labor, and other charges. The trial court found that "Caravan's testimony was convincing in establishing that Human agreed to pay the expenses, as the entire shift was a workaround due to a problem Costco found (rightly or wrongly) at Human's factory, that prohibited the sales from occurring as planned."

Human claims that the trial court erred in awarding

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reason to doubt. Caravan's CEO, Park, testified below that Global no longer exists, and that it was "shut down" because "Human placed a lien on Global's bank accounts."

damages due to the workaround because (1) there is no evidence that Human's compliance with Costco's policies was part of Human's contract with Caravan; (2) Human's oral agreement to pay the additional expenses was invalid under the statute of frauds; and (3) that agreement was designed to deceive Costco and was therefore unenforceable as an illegal contract. We conclude that the trial court found that Human's compliance with Costco's code of conduct was part of the parties' original contract, and that this finding is supported by substantial evidence. We therefore need not consider Human's arguments that Human's subsequent agreement to pay the additional expenses was invalid and unenforceable.

In its statement of decision, the trial court prefaced its finding that Human agreed to pay the expenses of the workaround with the finding that "the damages that resulted in the change from FOB China to FOB La Mirada . . . resulted from a breach of the contract." Although the trial court did not say so expressly, that breach must have consisted of Human's failure to pass Costco's audit, as that was the event that created the need for the workaround. Thus, the trial court necessarily found that Human's compliance with Costco's code of conduct was part of the parties' contract.[5]

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[5] Although we conclude that the trial court's findings are clear, even if they were ambiguous we would interpret them in favor of Caravan as the prevailing party. Human objected to the trial court's proposed findings on the workaround on the ground that they were not supported by the evidence, but did not identify any claimed ambiguity in those findings. Such an objection is not sufficient to avoid the doctrine of implied findings under section 634. (*Duarte Nursery, Inc. v. California Grape Rootstock Improvement Com.* (2015) 239 Cal.App.4th 1000, 1012; *Yield*

This conclusion is also supported by the trial court's subsequent observation that Human agreed to pay the additional expenses because the workaround was due to a "problem" that Costco found at Human's factory "that prohibited the sales from occurring as planned." Thus, the trial court viewed Human's subsequent agreement as a logical consequence of its responsibility for causing an expensive problem. Human would not have been responsible for that problem if it had no obligation to comply with Costco's policies.[6]

The trial court's findings concerning the terms of the parties' oral contract are supported by substantial evidence. (*Crail v. Blakely* (1973) 8 Cal.3d 744, 751 [applying substantial evidence standard to trial court's findings concerning the existence of an oral contract].) Hudrlik testified that Caravan presented Costco's code of conduct to Human "in discussing the requirements of Human's factory to not only pass but penalties if we don't deliver." While Hudrlik also testified that the code of conduct "is only between Caravan and Costco," the trial court could have reasonably concluded from Hudrlik's testimony that

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Dynamics, Inc. v. TEA Systems Corp. (2007) 154 Cal.App.4th 547, 560.) We therefore must "imply findings to support the judgment." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134, citing § 634.)

[6] Human appears to interpret the trial court's findings in the same manner. In its opening brief, Human explains that the trial court found that "Human breached the oral contract in two ways: (i) it employed unauthorized child labor in its China factory in violation of Costco's vendor rules, and (ii) the bracket pins it manufactured were not of consistent dimension and thus failed to secure the canopy frames as intended. [Fn. omitted.]"

Human understood its agreement with Caravan required Human's factory to pass Costco's audit.

Caravan dismisses Hudrlik's testimony as irrelevant because he "did not negotiate the contract and was not present when it was made." That argument is inconsistent with the testimony at trial and with Human's own arguments below.

Park testified that Hudrlik was present for part of the initial meeting during which she negotiated the oral contract with Mr. Choi of Human, and that "[r]ight after my conversation with Mr. Choi, Mr. Choi went on to speak to Mr. Hudrlik about the specifics." She also testified that the "full scope" of what had to be done with the canopies "primarily occurred not with me but with David Hudrlik and some of the other staff that was related in purchasing and requisitioning this product." Hudrlik testified that he was involved in negotiating the terms of the contract with Human, and that he participated in the initial meeting with Choi through an interpreter. In written arguments to the trial court, Human characterized Park's testimony as admitting that "she is not the person to testify as to the specific terms of the oral agreement with Human," and that "discussions regarding the full scope of what Human had to do with respect to each canopy primarily occurred not with her but with David Hudrlick . . . and other staff."

Thus, the trial court reasonably concluded that the damages associated with the change in the delivery point "resulted from a breach of the contract." In light of that finding, it is unnecessary to consider Caravan's challenges to the validity and enforceability of Human's subsequent agreement to pay the relocation costs. The costs of changing the delivery point are an

element of damages flowing from breach of the original oral contract regardless of Human's subsequent agreement acknowledging its responsibility for those costs.[7]

3. *The Trial Court Did Not Abuse Its Discretion in Admitting Exhibits 7 and 9.*

Caravan's exhibits 7 and 9 documented Caravan's losses from Costco's returns. Exhibit 7 concerned the DisplayShade product and exhibit 9 concerned the PerformanceShade product. Each exhibit consisted of a check from Costco in payment of a Caravan invoice, followed by lists of specific amounts for each returned item that Costco deducted from the payment.

Hudrlik testified that Caravan received each check along with the lists of returned items from Costco. For the DisplayShade products reflected in exhibit 7, Caravan's accounting employees checked the items identified in the Costco lists to confirm that those items had in fact been returned to Caravan from Costco. The latter portion of exhibit 7 consisted of handwritten lists prepared by these Caravan employees while

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[7] Although it is unnecessary to consider the legality of this subsequent agreement, we note that Caravan did not raise the alleged illegality of Human's agreement to pay the relocation expenses as a defense below. Caravan argues that the defense of illegality may be considered for the first time on appeal, but appellate courts have declined to do so when the facts concerning the alleged illegality of a contract are disputed. (See *Grimes v. Nicholson* (1945) 71 Cal.App.2d 538, 542; 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 1098.) The facts are in dispute here. Hudrlik testified that changing the designated point of manufacture to Caravan in La Mirada complied with Costco's policies even though Human remained involved in the manufacturing chain.

verifying the Costco returns. With respect to the returned PerformanceShade items documented in exhibit 9, Hudrlik testified that the returned items actually went to Caravan's agent, Roe Logistics (Roe), in Canada. Caravan received a list of returned PerformanceShade items from Roe, and then Caravan accounting employees verified that list against the Costco lists of deductions, just as they did for the returned DisplayShade products. Hudrlik tallied the amounts Costco deducted for returned items on these exhibits to arrive at the total damage numbers for returns from Costco.

Human objected to exhibit 7 and at least portions of exhibit 9 on hearsay and other grounds.[8] The trial court overruled the objections. On appeal, Human argues that the exhibits did not qualify for the business record exception to the hearsay rule because Caravan did not call any witness from Costco to lay the necessary foundation for the exception. Human also argues that the exhibits were irrelevant. We reject both arguments.

We review the trial court's evidentiary rulings for abuse of discretion. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9.) We may not disturb those rulings "except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*Id.* at pp. 9-10.) In particular, in determining whether a writing meets the requirements of a business record under Evidence Code section 1271, "the trial judge is vested with broad discretion the exercise of which, absent a showing of abuse, will not be disturbed on appeal." (*Exclusive Florists, Inc. v. Kahn*

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[8] From the record, it appears that Human only registered a hearsay objection to exhibit 9 beginning on page 22 of the exhibit.

(1971) 17 Cal.App.3d 711, 716 (*Kahn*).)

The trial court concluded that exhibit 7 was a business record, and apparently reached the same conclusion for exhibit 9. There is ample support in the record for the conclusion that the exhibits fall within the hearsay objection applicable to business records.

Evidence Code section 1271 provides a hearsay exception for a writing made as "a record of an act, condition, or event" when offered to prove the "act, condition, or event" if: (1) the writing was made in the regular course of a business; (2) the writing was made at or near the time of the act, condition, or event; (3) the custodian or other qualified witness testifies to its identity and the mode of its preparation; and (4) the sources of information and method and time of preparation were such as to indicate its trustworthiness. Human argues that Hudrlik's testimony did not establish the necessary foundation for this exception, as he was not a Costco employee and therefore did not know the mode of preparation of the Costco documents or the trustworthiness of the Costco records.

Human's argument misinterprets the "act, condition, or event" that Caravan offered the business records to prove. Human argues that Hudrlik did not have personal knowledge of Costco's return policies and whether the products that Costco charged back to Caravan were in fact defective due to Human's failure to manufacture to contract specifications. But Caravan did not offer the exhibits to establish the truth of such facts. Rather, exhibits 7 and 9, along with other exhibits, provided back-up detail for Caravan's summary of its damages recorded in exhibit 1. Caravan simply used exhibits 7 and 9 for damages purposes to tally how many products Costco returned and how much Costco charged back to Caravan for those returns.

Hudrlik was competent to testify about those facts. He

explained the steps that Caravan took to verify that the canopies for which Costco refused to pay were in fact canopies that Costco returned to Caravan. Hudrlik's testimony provided an appropriate foundation showing that: (1) Caravan received a list of chargebacks from Costco; (2) those chargebacks corresponded to canopies that Costco actually returned; and (3) the returns resulted in underpayment of Caravan's invoices to Costco in amounts corresponding to the returns. In short, Hudrlik laid the foundation for the admission of exhibits 7 and 9 to show Caravan's lost revenues from Costco's returns—the purpose for which Caravan offered the exhibits.

For that purpose, exhibits 7 and 9 were business records of Caravan. Caravan used the lists from Costco in exhibits 7 and 9 to conduct its own investigation into Costco's returns. That investigation was explicitly reported in the handwritten list in exhibit 7 that Caravan employees actually prepared while cross-checking returned merchandise against Costco's list. The trial court aptly noted that this list was "his [Hudrlik's] business record not Costco's." Although exhibit 9 did not contain a similar handwritten list, Hudrlik testified that Caravan employees followed the same verification procedure based upon the list of actual returned items from Roe. Thus, Caravan itself used the information in exhibits 7 and 9 for its own business purposes to determine and verify the cost of Costco's chargebacks.

The court in *Kahn* considered a similar challenge to the admissibility of business records. The plaintiff in that case relied upon invoices received from a supplier to establish the plaintiff's costs for particular floral jobs. The plaintiff's employees checked that the invoiced flowers had actually been received from the supplier, determined the cost of the flowers from the invoices, and verified their use on particular jobs through its purchase orders. The court rejected the defendant's argument that the

invoices were inadmissible "because they were not prepared by plaintiff." (*Kahn, supra,* 17 Cal.App.3d at p. 715.) The court concluded that "[a]s a business practice, the invoices were used in determining whether the flowers invoiced were the flowers actually received, whether among them were the flowers described in the purchase orders, which would be the flowers used on the job, and the cost thereof to plaintiff. The invoices, if offered in evidence, would have been admissible as part of plaintiff's proof of the method of maintaining *its business records*." (*Ibid*, italics added.)

Similarly, here, Caravan employees used Costco's lists to verify the items Costco returned and to determine the cost to Caravan of those returns. The Costco lists were admissible as part of Caravan's own business records.

The trial court understood the purpose of exhibits 7 and 9 and did not rely on them to find that Human breached the contract by providing defective merchandise. The trial court based its finding of breach on testimony about the nature of the problem with Human's canopies that "caused the tents to collapse during normal use," including an in-court demonstration; another exhibit that "demonstrated Costco's concerns with the product;" and the fact that "Costco actually returned the Performanceshade product." The court relied on exhibits 7 and 9 and the other exhibits "summarized on Exhibit 1" for the purpose of calculating damages and to overcome the arguments Human made concerning Caravan's proof of damages.

Human also argues that exhibits 7 and 9 were not relevant. Human cites testimony by Hudrlik that he did not have personal knowledge of the reasons why Costco's customers returned the particular canopies identified in exhibits 7 and 9 and did not know Costco's criteria for defective products.

The exhibits were clearly relevant. Hudrlik explained that

the number of Costco's returns reflected in those exhibits were dramatically higher than in prior years. And, as the trial court noted, there was other evidence (which Human does not challenge on appeal) showing Costco's concerns about Caravan's high rate of returns and its own customers' comments "about the canopy being bad quality, the legs are being the main comments, they are flimsy, break easily, also the pins . . . ."

In light of that evidence, the number of Costco's returns and chargebacks as reflected in exhibits 7 and 9 was relevant to both the fact and the amount of Caravan's damages. The trial court could reasonably infer from the list of Costco's returns that Caravan was damaged by losing revenues from Costco because of Human's manufacturing errors. Exhibits 7 and 9 identified the canopies that Costco returned as defective. Human manufactured those canopies. Costco's returns certainly had a logical tendency to show that Human's breach caused Caravan to lose sales. (See *Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1211 ["relevant evidence must have logical tendency to prove disputed matter and create reasonable inference as to existence or nonexistence of fact at issue"], citing *Ruiz v. Minnesota Mining & Mfg. Co.* (1971) 15 Cal.App.3d 462, 468.)

Exhibits 7 and 9 were also relevant to calculating the amount of Caravan's damages. For that purpose, Caravan did not need to establish a precise causal link between Human's manufacturing problems and the particular defect in each individual canopy that Costco returned. The trial court could arrive at a reasonable damage award without absolute certainty about the reason for every return recorded in Costco's lists. (*Stephan v. Maloof* (1969) 274 Cal.App.2d 843, 850-851 ["where there is no uncertainty as to the fact of damage, that is, as to its nature, existence or cause, the same certainty as to its amount is not required"].)

Even if the exhibits were not relevant, Human does not explain how their admission was prejudicial. We may not reverse based on the erroneous admission of evidence unless the error resulted in "a miscarriage of justice." (Evid. Code, § 353, subd. (b).) It is difficult to envision how the admission of an *irrelevant* item of evidence could be prejudicial in a court trial unless the trial court misinterpreted or placed undue reliance on the evidence. Human's real argument is not that the trial court erred in admitting exhibits 7 and 9, but that those exhibits provided insufficient evidence to support Caravan's damage claim. However, Human has not challenged the sufficiency of the evidence of damages apart from the admissibility of exhibits 7 and 9. Such an argument would require consideration of *all* the evidence bearing on the damage calculation. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) In any event, as discussed above, the trial court could permissibly rely on exhibits 7 and 9 for its damage calculation.

4. *Conclusion*

Human does not challenge the trial court's findings of breach, except to argue that the claimed errors in the trial court's damage award require retrial on the liability issue of whether Caravan suffered *any* damage from Human's breach. Because we affirm the majority of the trial court's damage findings, we reject this liability argument.

We reverse only with respect to the trial court's failure to include in its damage calculation the costs that Caravan did not incur in the form of the $400,000 that it withheld in payments to Human. The record does not contain a precise total or itemization of those withheld payments. However, both parties refer to the amount at issue as $400,000, which is consistent with the trial testimony. We therefore order the judgment modified to reflect the deduction of that amount from the trial court's damage

award. (See *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 533 ["When the evidence is sufficient to sustain some but not all alleged damages, we will reduce the judgment to the amount supported by the evidence"].)

DISPOSITION

The trial court's rulings are affirmed except for the trial court's failure to deduct from the damage award the costs that Caravan did not incur because it withheld $400,000 in payments to Human.

Accordingly, the Judgment Following Court Trial dated September 6, 2016 (Sept. 6, 2016 Judgment), is ordered modified in the following respects:

1. The principal sum of $906,753.38 in damages is reduced to $506,753.38.

2. The award of prejudgment interest is reduced to reflect the new principal sum of $506,753.38 in damages using the same time period for calculation of prejudgment interest as set forth in the Sept. 6, 2016 Judgment. Accordingly, the prejudgment interest award is reduced from $221,399.00 to $123,714.99, calculated as follows:

$50,675.34 per year x 2 =	$101,350.68
$4,222.95 per month x 5 =	$21,114.75
$138.84 per day x 9 =	$1,249.56
Total prejudgment interest=	$123,714.99

The parties are responsible for their own costs on appeal.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.