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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

EMBASSY APPAREL, INC., Plaintiff and Appellant, v. PIXIOR, LLC, Defendant and Respondent.	B272110 (Los Angeles County Super. Ct. No. BC512516)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gail Ruderman Feuer, Judge. Affirmed.

Gerald P. Peters and Brad Snyder for Plaintiff and Appellant.

Browne George Ross, Peter W. Ross and Ira Bibbero for Defendant and Respondent.

In May 2009, appellant Embassy Apparel, Inc. and respondent Pixior LLC entered into an unsigned written contract under which Pixior agreed to provide Embassy with storage and distribution services for Embassy's goods, and Embassy agreed to pay Pixior for those services. Over the course of their business dealings, the parties had a number of disputes about the fees charged by Pixior and the payments made by Embassy. In June 2012, Pixior served Embassy with a notice of enforcement of a warehouse lien on the goods in its possession, and later sold the goods to a third party. Embassy then filed this action against Pixior for, among other claims, breach of contract and violation of Commercial Code section 7210. At trial, the jury returned a special verdict in favor of Pixior on all claims. On appeal, Embassy contends the evidence was insufficient to support the jury's verdict, and the trial court erred in denying its motion for a directed verdict on its Commercial Code claim. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The Evidence at Trial

In June 2013, Embassy filed suit against Pixior. The case was tried to a jury in January 2016 on Embassy's claims for breach of contract, violation of Commercial Code[1] section 7210, and conversion.

A. The Parties' Respective Businesses

Embassy is a New York-based clothing manufacturing company owned by Ezra Cattan and his brother. The company

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1 Unless otherwise stated, are further statutory references are to the Commercial Code.

was formed in 2007 for the purpose of licensing certain men's apparel bearing the Ed Hardy trademark. Under the licensing agreement, Embassy had the right to design, manufacture, and sell Ed Hardy underwear, socks, sleepwear, and loungewear for a period of five years. The license expired on December 31, 2012, after which Embassy would have 90 days to sell any existing product through its established network of distributors. The Ed Hardy brand reached its sales peak in about 2009, and thereafter declined in popularity.

Pixior LLC is a Los Angeles-based warehousing fulfillment center whose sole member is Yassine Amallal. Pixior provides warehousing and distribution services primarily for apparel companies. These services include receiving and storing the clients' goods in its warehouse, picking and packing the goods into boxes according to the clients' purchasing orders, and then shipping the goods to the clients' vendors. As of 2016, Pixior had been in business for 16 years.

B. May 2009 Service Agreement

In February 2009, Cattan and Amallal met at a trade show in Las Vegas and discussed the possibility of Pixior providing warehousing and distribution services for Embassy's Ed Hardy goods. During their initial meeting, Cattan promised Amallal that Embassy's goods would move quickly and would not need to be stored in Pixior's warehouse for longer than three months at a time. Based on that promise, Amallal told Cattan that Pixior would not charge Embassy separate storage fees as part of its warehousing services. Over the next few months, Cattan and Amallal negotiated the specific terms of a written contract. On May 5, 2009, Amallal emailed Cattan a 17-page Service Agreement encompassing the terms of the final agreement

reached by the parties. Neither Amallal nor Cattan ever signed the Service Agreement; however, they each testified at trial that they had agreed to be bound its terms.[2]

Under the Service Agreement, Pixior agreed to provide Embassy with certain services in its Los Angeles warehouse, including "receipt of Client Materials, warehousing, detailed management of inventory, order retrieval and confirmation, supply of packaging materials, and pick/pack/ship operations." In exchange, Embassy agreed to pay Pixior certain fees for those services, including a "Pick and Pack" fee. As defined in the Service Agreement, the "Pick and Pack" fee was "based on an incoming and outbound process, which includes the following: (a) storage of Client's Materials; (b) inventory management, including preparation and reporting of inventory; (c) processing of pick tickets for outbound shipments; (d) account service communication and coordination with client; and (e) freight arrangements with carriers." The "Pick and Pack" fee varied depending upon the type of item being shipped, and was set at 30 cents apiece for underwear, 45 cents apiece for loungewear and sleepwear, and 30 cents per bag of socks. It was agreed that Pixior would send invoices to Embassy on a monthly basis, and that payment would be due 30 days from the date of the invoice.

With respect to termination, the Service Agreement provided that Embassy "shall have the right to terminate this Agreement for any reason without further liability upon thirty

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[2] Cattan testified that he had a habit of never signing a written agreement. Amallal testified that his practice was to a sign written agreement, but only after it was signed by the client.

(30) days' prior written notice to PIXIOR." It further provided that, "[i]n the event [Embassy] fails to pay any undisputed amount for which it has been properly invoiced within forty-five (45) days of having received such invoice, PIXIOR may terminate this Agreement without further notice or liability to [Embassy]." The Service Agreement also stated that, upon termination, "PIXIOR agrees that it shall promptly but no later than thirty (30) after termination of this Agreement and at the request of [Embassy], . . . have ready for transport by a designated freight company by [Embassy] in writing, of [sic] all records, files data, customer information and other property in its possession or under its control relating to [Embassy]."

C. May 2009 to December 2010 Performance

The parties' negotiations about the cost of Pixior's services to Embassy did not end when they entered into the Service Agreement. Rather, the negotiations continued throughout their business relationship as the parties regularly haggled over price. As described by Cattan, he and Amallal would "chisel each other." As described by Amallal, Cattan repeatedly sought to "dictat[e] how much he want[ed] to pay." On May 6, 2009, the day after Amallal sent the final version of the Service Agreement, Cattan began trying to renegotiate the cost of certain services. Cattan thereafter approached Amallal on a regular basis to seek discounts in the agreed upon fees. At times, Amallal agreed to give Cattan a credit or discount on the fees charged by Pixior. However, even with these discounts, the parties still had disputes about Pixior's fees and Embassy's payments.

Under the terms of the Service Agreement, the cost of storing Embassy's goods was included in the "Pick and Pack"

fee charged by Pixior. Amallal testified, however, that about five months after the parties entered into the Service Agreement, he met with Cattan at Embassy's office to discuss the issue of storage fees. During the meeting, Amallal expressed his concern that Embassy's goods were not moving every three months as had been promised by Cattan, and that it was too costly for Pixior to continue storing the goods indefinitely. After some negotiation, Amallal and Cattan orally agreed that Pixior would provide Embassy with six months of free storage, and that a separate storage fee would be charged for any goods that remained in Pixior's warehouse for longer than a six-month period. Starting in January 2010, Pixior's monthly invoices to Embassy generally included a separate storage fee for certain goods. The storage fee was $10 per pallet on the invoices issued between January and October 2010, and $15 per pallet on the invoices issued in November and December 2010.[3]

Cattan, on the other hand, testified that Embassy never agreed to pay storage fees to Pixior. Cattan acknowledged that, at some point in the parties' business relationship, he had discussions with Amallal about Pixior charging Embassy a separate fee for storing the goods. Cattan denied, however, that the parties ever reached an agreement on a specific price for storage. Cattan further testified that, when Pixior began to include storage fees in its invoices, Embassy refused to pay those fees. Instead, in making the payments to Pixior, Embassy's

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[3] The invoices issued between October 2009 and December 2009 also included a $10 per pallet storage fee; however, Pixior later gave Embassy a credit for the storage fees charged in each of those invoices.

practice was to deduct any storage fees and other fees that it disputed from the total amount due on the invoices.

Between June 2009 and December 2010, Pixior generally sent the invoices for its services to Embassy on a monthly basis as required by the Service Agreement. However, there were occasions when Pixior did not send an invoice at the end of each month, but instead sent multiple invoices after a period of a few months. Although the Service Agreement required Embassy to pay Pixior within 30 days of the date of each invoice, Embassy repeatedly failed to comply with this term. Even when the invoices were timely sent, Embassy typically did not pay them until they were at least 30 to 60 days past due. Embassy also rarely paid the invoices in full. Between June 2009 and December 2010, Pixior sent Embassy a total of 20 monthly invoices for its services. During that time period, Embassy made a total of seven payments to Pixior. Of those seven payments, six were for less than the balance due on the invoices.

D. January 2011 Termination of Agreement

On January 17, 2011, Amallal sent an email to Cattan entitled "Notice of Termination." Amallal informed Cattan that he was terminating the parties' agreement because Embassy was not paying its bills and was ignoring Pixior's repeated demands for payment. Amallal explained that Embassy would have 30 days to remove its goods from Pixior's warehouse. Amallal also stated that Pixior was placing a hold on all of Embassy's pending orders until Embassy paid the outstanding balance that was due.

Over the next few weeks, the parties exchanged a series of emails about Embassy's unpaid bills and the terms of their agreement going forward. Embassy asserted the balance due was $36,500, and agreed to pay that amount to Pixior. Embassy also

expressed that it wished to continue doing business with Pixior, but did not want to overpay for storage. Embassy noted it was paying $10 per pallet for storage while Pixior wanted $15 per pallet, and suggested the parties reach a compromise on price. In response, Pixior disputed Embassy's calculation of the balance that was due, but agreed to resume shipping Embassy's pending orders upon receipt of the $36,500 payment. Pixior also stated that the prior storage fee of $10 per pallet had been a discounted rate, and that it would have to charge Embassy $15 per pallet if the parties were to continue doing business.

In a February 25, 2011 email to Cattan, Amallal reiterated that Pixior had terminated the Service Agreement due to Embassy's failure to pay its bills, and that any agreement going forward would be subject to new terms. With respect to the timing of Embassy's payments, Amallal stated: "Due to the fact that you have consistently been late on all your payments, all of your invoices are due upon receipt." With respect to storage fees, Amallal maintained the price would be $15 per pallet, and noted: "There is no free storage. I have on some occasions charged you $10.00 per pallet, as you know [I] did charge only for 25% of your stored merchandise, just to accommodate you and to get the outstanding bills paid and help you with the bad economy; [t]his is no longer the case as you are consistently late on your payments." In his email, Amallal set forth the following terms to be effective immediately: "1. Storage fees: $15.00 per pallet position[;] 2. In/Out fees: As original agreement[;] 3. Late fees: 5% per month[;] 4. Final count: Final Inventory, plus the out fees." At trial, Amallal testified that he did not change these terms after setting them, and that Cattan could have paid his bill

and collected his goods at any time if he was unwilling to accept them.

E. February 2011 to November 2011 Performance

In the months following Pixior's January 2011 termination of the Service Agreement, the parties continued doing business with one another. They still had disputes, however, over the terms of their agreement and Embassy's failure to timely pay its bills. Between February and November 2011, Embassy did not make payments upon receipt of the invoices as required by Pixior; rather, it typically paid the invoices about 30 to 60 days after receipt. Embassy also refused to pay the $15 per pallet storage fee charged by Pixior, and instead continued its prior practice of deducting the amount of any storage fees from its payments. In November 2011, Pixior advised Embassy that there was a balance of approximately $17,000 in unpaid fees, and that it would not release any more shipments until that balance was paid in full. On November 16, 2011, Embassy accordingly paid Pixior $17,189.82, and Pixior resumed shipping Embassy's goods.

F. June 2012 Notice of Warehouse Lien

Although Pixior continued to provide Embassy with warehousing and shipping services after November 2011, it did not send any invoices to Embassy between November 17, 2011 and June 4, 2012. According to Amallal, Pixior's failure to send the invoices to Embassy during this period was due to an accounting error. On June 5, 2012, Pixior sent an email to Cattan and attached eight monthly invoices dated November 30, 2011 to June 19, 2012. The invoices included "Pick and Pack" fees of varying amounts, which totaled $6,480. Each invoice also included a flat-rate storage fee of $2,000, along with the notation

"Merchandise Not Moving."[4] The total balance due on the invoices was $22,480.60. Although Cattan received the June 5, 2012 email on the day it was sent, he did not open it because he did not recognize the name of the Pixior accounting employee who had sent it.

On June 19, 2012, Pixior served Embassy with a "Notice of Enforcement of Warehouseman's Lien." The notice stated that Pixior was claiming a warehouse lien of $22,480.60 on the Embassy apparel in its possession. The notice further stated that, if Embassy failed to pay Pixior the amount of the lien on or before June 26, 2012, the goods would be sold at a public auction to be held on June 29, 2012 at Pixior's warehouse. As set forth in the notice, the total amount due after a public sale would be $30,830.60, consisting of the amount of the lien plus additional expenses related to the sale of the goods.

On June 26, 2012, following Embassy's receipt of the notice, Cattan sent an email to Pixior in which he stated that the notice was "a total surprise considering that you have not sent an invoice for many months." Cattan asserted that Pixior was not authorized to sell Embassy's goods, and noted that, if Pixior wished for Embassy to move its goods, it could arrange to do so "at once." In a June 27, 2012 reply to Cattan, Pixior's bookkeeper stated that she had "been sending invoices all the time." She also reminded Cattan that Pixior had "been asking you to remove your merchandise from our warehouse for more than a year and

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[4] At trial, Amallal testified that the amount of storage fees included in these invoices was consistent with the $15 per pallet position fee that Pixior imposed in February 2011 when setting the new terms of the parties' contract.

half because it was always a dispute to get our invoices paid." She attached another copy of the November 2011 through June 2012 invoices to her reply, and requested that Embassy pay the total amount due by July 3, 2012. Pixior also agreed to postpone the auction for a few days to allow Embassy this additional time to pay the invoices. Embassy did not, however, make any payments on the invoices by Pixior's July 3, 2012 deadline.

G. July 2012 and October 2012 Sale of Goods

On July 3, 2012, Pixior held a public auction of Embassy's goods, and sold a small portion of the goods to 2.6 Distributions, a company in the business of buying close-out apparel. Simon Bouzaglou, the sole owner of 2.6 Distributions, was a friend of Amallal and a customer of Pixior. At some point during the auction, Amallal spoke with Philippi Chriki, who was a mutual friend of both Amallal and Cattan. Chriki offered to act as an intermediary between the parties to assist them in trying to resolve their dispute. At Chriki's request, Amallal agreed to stop the auction to allow Embassy additional time to pay the amounts due.

Despite this, over the next few months, Amallal did not have any contact with Cattan about the lien or pending sale. According to Amallal, he tried calling Catton a couple of times to discuss the matter, but did not hear back from him. Between July and August 2012, the accounting employees at Pixior and Embassy exchanged a few emails about the quantity of goods being stored at Pixior's warehouse. Embassy did not, however, offer to pay any portion of the balance due on the invoices despite having hundreds of thousands of dollars in the bank at that time. On September 13, 2012, an attorney retained by Embassy sent a letter to Pixior demanding the return of Embassy's goods. The

letter indicated that Embassy would pay $9,500 to move its goods out of Pixior's warehouse, but would not pay any of the storage fees charged by Pixior. Amallal forwarded the letter to his own attorney, but did not take any other action in response to Embassy's demand. On October 6, 2012, Cattan sent an email to Amallal in which he suggested an in-person meeting. In a reply, Amallal provided his telephone number and told Cattan to call him anytime. The parties did not, however, have any further contact prior to the sale of Embassy's goods.

On October 27, 2012, Pixior resumed the public auction of Embassy's goods. Prior to doing so, Pixior placed advertisements for the auction on Craigslist, PennySaver, and another classified advertising website, but did not provide notice to Embassy that the auction was going forward on this date. Ultimately, none of Embassy's goods were sold at the October 27, 2012 auction because Pixior did not receive the minimum bid price. Over the next few days, Amallal pursued a private sale of Embassy's goods by contacting companies that specialize in buying and selling wholesale close-out apparel. One of the companies contacted by Amallal was 2.6 Distributions, which previously had purchased a small portion of Embassy's goods at the July 3, 2012 auction. In his discussions with Bouzaglou, the owner of 2.6 Distributions, Amallal initially sought to sell the goods for $30,000, which was the approximate amount owed by Embassy under the lien. After some negotiating, Amallal and Bouzaglou agreed that 2.6 Distributions would pay a total of $27,000 for all of the goods, including the items it had purchased at the July 3, 2012 sale. Pixior completed the sale of Embassy's goods to 2.6 Distributions on October 30, 2012. The goods sold consisted of 85,000 pairs of socks, 14,000 pairs of underwear, and 1,244 lounge pants. Other

than offering $9,500 to cover the cost of moving the goods out of Pixior's warehouse, Embassy never agreed to pay any portion of the amount claimed by Pixior in its warehouse lien.

H. Value of Embassy's Goods at the Time of Sale

At trial, Cattan testified the wholesale value of Embassy's goods as of October 30, 2012 was $512,707.70. Cattan based this figure on the quantity of Ed Hardy goods that Pixior sold to 2.6 Distributions, and the price at which Embassy was selling those types of goods to its customers in 2012. Cattan also testified that Embassy had stored some of its Ed Hardy products at another warehouse, and that it was able to sell those items for a profit after October 2012.[5] Cattan admitted, however, that Embassy's sales of its Ed Hardy goods began to steadily decline in 2010, and that the decline continued during the first three quarters of 2012.

Embassy also called Antonio Sarabia, an expert on apparel trademark licensing, to testify about the sale conducted by Pixior. Sarabia opined that Pixior's sale of Embassy's goods for $27,000 was not commercially reasonable because the price was too low. Sarabia based his opinion on the power and prestige of the Ed Hardy brand, and on Embassy's reported sales of Ed Hardy products after October 2012. According to Sarabia, Embassy's sales showed that, as of October 2012, Ed Hardy apparel had a market value that was higher than the price obtained by Pixior.

Pixior called Darren Metzner to testify as an expert on the commercial reasonableness of its sale. Metzner was in the

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[5] According to Cattan, when Embassy's Ed Hardy license expired at the end of 2012, Embassy sold the remaining goods in its possession to Ezrasons, an affiliated family business, and Ezrasons began selling those goods in 2013.

business of buying wholesale close-out apparel and selling it to discount stores. He testified that Ed Hardy was a trendy brand that "exploded" on the high-end apparel market, but "died" in 2011 or 2012. Metzner opined that there was a recognized market in Los Angeles for selling close-out apparel to liquidators or other wholesale discount buyers. He further opined that Pixior sold Embassy's goods in the usual manner for such sales. Pixior advertised the public sale of Embassy's goods in the places that are customarily used for advertising a close-out apparel auction. Pixior also followed commercially reasonable practices in first conducting a public auction of the goods and then contacting known liquidators about a private sale when the minimum bid price was not achieved. Metzner opined that, as of October 2012, the wholesale value of the Ed Hardy goods sold by Pixior was $28,094.

Ziv Pas also testified as an expert witness for Pixior. Like Metzner, Pas was in the business of buying and selling wholesale apparel at discount prices. He testified that the popularity of the Ed Hardy brand ended around 2011. Pas further opined that, as of October 2012, the wholesale value of the Ed Hardy goods sold by Pixior was $27,783.

II. The Jury Verdict and Judgment

Following the close of the evidence, each party brought a motion before the trial court. Pixior moved for a nonsuit on the claims for violation of section 7210 and conversion based on a defense of failure to mitigate damages. Embassy moved for a directed verdict on its section 7210 claim on the ground that, as a matter of law, Pixior violated the notice provisions of the statute. The court denied both motions, concluding that the issues raised were questions of fact for the jury.

At the conclusion of the trial, the jury returned a special verdict in favor of Pixior on all claims. With respect to each cause of action, the special verdict form asked the jury whether Embassy was "entitled to prevail on its claim." The jury answered "No" as to each cause of action. The trial court thereafter entered judgment in favor of Pixior on the jury's verdict. On May 6, 2016, Embassy filed a timely notice of appeal.

DISCUSSION

I. Sufficiency of the Evidence Supporting the Verdict

On appeal, Embassy challenges the sufficiency of evidence supporting the jury's special verdict on its claims for breach of contract and violation of section 7210.[6] In particular, Embassy contends it was entitled to prevail on these claims because the undisputed evidence established that Pixior breached the Service Agreement and violated section 7210 in selling Embassy's goods.

A. Standard of Review

Generally, "[w]hen a party contends insufficient evidence supports a jury verdict, we apply the substantial evidence standard of review. [Citation.]" (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1188.) "We must 'view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. . . .' [Citation.]" (*Ibid.*) "'[N]either conflicts in the evidence nor "'testimony which is subject to justifiable suspicion . . . justif[ies] the reversal of a judgment, for it is the

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[6] Embassy does not raise any argument regarding the jury's special verdict on the conversion claim.

exclusive province of the [jury] to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.'" [Citations.]' [Citation.]" (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968.)

However, "'where the trier of fact has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals, "'it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment. . . . [¶] Thus, where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding."'" (*Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013) 218 Cal.App.4th 828, 838 (*Dreyer's*); accord, *In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.)

B. Breach of Contract

Embassy argues it was entitled to prevail on its breach of contract claim because the undisputed evidence showed that the parties were bound, by their conduct, to the terms of the Service Agreement, and that Pixior breached the agreement in multiple ways. As alleged by Embassy, Pixior's breaches consisted of charging unauthorized fees, terminating the agreement based on Embassy's non-payment of those fees, and failing to prepare the goods for return to Embassy upon termination of the agreement.

To establish a cause of action for breach of contract, the plaintiff must plead and prove each of the following elements:

(1) the existence of the contract, (2) the plaintiff's performance or excuse for nonperformance, (3) the defendant's breach, and (4) resulting damages to the plaintiff. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821; *Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1244.)

Once the parties enter into a contract, they may agree, by their words or conduct, to modify its terms. (Civ. Code, § 1697 [modification of oral contracts], § 1698 [modification of written contracts]; see also *Vella v. Hudgins* (1984) 151 Cal.App.3d 515, 519 ["It is axiomatic that the parties to an agreement may modify it."].) For instance, "[a]n agreement to modify a written contract will be implied if the conduct of the parties is inconsistent with the written contract so as to warrant the conclusion that the parties intended to modify it. [Citation.]" (*Daugherty Co. v. Kimberly-Clark Corp.* (1971) 14 Cal.App.3d 151, 158; see also *Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 1038 ["where the subsequent conduct of parties is inconsistent with and clearly contrary to provisions of the written agreement, the parties' modification setting aside the written provisions will be implied"]; *Wagner v. Glendale Adventist Medical Center* (1989) 216 Cal.App.3d 1379, 1388 [a written contract may be modified by contrary oral representations or conduct inducing reliance thereon by the other party].)

1. Imposition of Unauthorized Fees

Embassy argues Pixior breached the Service Agreement by imposing unauthorized storage and manual labor fees. Embassy notes that both Cattan and Amallal testified that they agreed to be bound by the May 5, 2009 Service Agreement even though neither ever signed it. Embassy further notes that, under the terms of the Service Agreement, Pixior agreed to charge Embassy

a "Pick and Pack" fee, which included the cost of both storage and manual labor. Embassy asserts Pixior indisputably breached this provision in the Service Agreement when it began to include separate storage and manual labor fees in its invoices.

It is true that, under the terms of the May 5, 2009 Service Agreement, the cost of storage and manual labor was included in the "Pick and Pack" fee charged by Pixior. However, Amallal testified that, about five months after entering into the Service Agreement, the parties agreed to modify this term. Amallal specifically testified that he and Cattan orally agreed that Embassy would start paying a separate storage fee for goods that remained in Pixior's warehouse for longer than six months. In January 2010, Pixior accordingly began to charge Embassy a separate storage fee of $10 per pallet for certain goods. Amallal further testified that, in January 2011, Pixior terminated the Service Agreement based on Embassy's repeated failure to pay the invoices, and imposed new terms on the parties' agreement going forward. One of the terms imposed by Pixior was an increased storage fee of $15 per pallet, which was included in the invoices issued in February and March 2011. In his February 2011 email correspondence to Cattan, Amallal made clear that "[t]here is no free storage," and that Embassy would have to pay the increased fee if the parties were to continue their business relationship. Amallal also testified that, even though the parties continued doing business under these new terms, Cattan never stopped haggling over price and consistently sought to "dictat[e] how much he want[ed] to pay."

While Cattan admitted the parties had ongoing discussions about storage fees after entering into the Service Agreement, he denied they ever agreed to a specific price for storage. Cattan

also testified that he only paid the storage fees charged by Pixior when Amallal agreed to give Embassy a discount on the balance due on certain invoices. However, it was the exclusive province of the jury to evaluate the credibility of the witnesses and the weight to be accorded their testimony. (*Lenk v. Total-Western, Inc.*, *supra*, 89 Cal.App.4th at p. 968.) Based on Amallal's testimony that the parties agreed to modify their contract to include a separate charge for storage, the evidence did not compel a finding by the jury that Pixior breached the Service Agreement by charging Embassy storage fees.

On appeal, Embassy contends that, as a matter of law, the parties could not have orally agreed to modify the terms of their contract because the Service Agreement included the following provision precluding any oral modifications: "This Agreement shall not be changed or modified in any respect except by written agreement signed by each of the parties hereto." However, the parties to a contract "'may, by their conduct, waive [a no-oral-modification] provision' where evidence shows that was their intent." (*Biren v. Equality Emergency Medical Group, Inc.* (2002) 102 Cal.App.4th 125, 141; see *Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 78 ["notwithstanding a provision in a written agreement that precludes oral modification, the parties may, by their words or conduct, waive contractual rights"].) Here, the conduct of the parties showed that they did not intend to abide by the no-oral-modification provision in the Service Agreement. Indeed, the day after the parties entered into the Service Agreement, they began modifying its terms. They continued to renegotiate the terms of their contract throughout their business relationship, and agreed to additional modifications without ever entering into a signed

written amendment. At trial, Cattan admitted that it was his practice to never sign written contracts, and Amallal testified that he only signed written contracts if his client signed first. Thus, the fact that the parties never signed a written agreement authorizing Pixior to begin charging for storage did not preclude the jury from finding that the parties mutually agreed to the imposition of storage fees. Based on this record, Embassy has not established that, as a matter of law, Pixior breached the contract by including separate storage fees in its invoices.[7]

2. Termination for Non-Payment of Fees

Embassy contends Pixior also breached the terms of the Service Agreement when it terminated the agreement in January 2011 based on Embassy's non-payment of certain disputed fees. With respect to Pixior's right of termination, the Service Agreement provided: "In the event Client fails to pay any undisputed amount for which it has been properly invoiced within forty-five days of having received such invoice, PIXIOR may terminate this Agreement without further notice or liability to client." Embassy claims Pixior did not comply with this provision because "the evidence is unequivocal that Embassy properly disputed numerous charges on Pixior's invoices,

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[7] Embassy claims Pixior also breached the Service Agreement by charging manual labor fees. The record reflects that Pixior did include manual labor fees in seven invoices issued between October 2009 and November 2010. However, the record shows that, as to each of those invoices, Pixior later gave a credit to Embassy for the manual labor fees charged. Hence, Embassy was not required to pay those fees, and there is no evidence in the record that it did so.

especially its unilateral and improper imposition of storage and manual labor charges." This claim lacks merit.

First, as discussed above, the jury reasonably could have concluded that Pixior included storage fees in its invoices because the parties agreed to the imposition of those fees. Second, the evidence showed that, at the time Pixior terminated the Service Agreement on January 17, 2011, Embassy had repeatedly failed to pay the invoices in accordance with the agreement. For instance, during the first year of the agreement, Embassy made the following payments more than 45 days after its receipt of the invoice: (1) the October 2009 invoice was paid on January 15, 2010, (2) the December 2009 and January 2010 invoices were paid on March 23, 2010, and (3) the February 2010 and March 2010 invoices were paid on June 23, 2010. For the eight invoices issued between April 2010 and November 2010, Embassy made a total of two payments–one on September 8, 2010 and the other on December 30, 2010. While Embassy may have disputed some of the charges in these invoices, the Service Agreement required it to pay the undisputed charges in a timely manner. Because Embassy consistently failed to do so, Pixior had the right to terminate the Service Agreement on January 17, 2011 "without further notice or liability" to Embassy.

Embassy argues that, even if Pixior had a contractual right to terminate the Service Agreement, it did not properly exercise that right when it served its Notice of Termination by email. In support of this argument, Embassy points to a paragraph in the "Standard Terms and Conditions" section of the Agreement, which stated that "all notices, demands or requests ('Notices'), which are required or permitted to be given pursuant to this Agreement, shall be in writing," and "may be given by email

between the parties, provided the parties affirmatively agree to receive Notices by email by initially this paragraph." However, given that the parties never signed the Service Agreement, their failure to initial this particular paragraph does not evince an intent to preclude any electronic delivery of notices. In fact, the evidence showed the parties regularly communicated via email about modifications to the terms of their agreement. It is also undisputed that Cattan received the January 17, 2011 email notifying Embassy of Pixior's termination of the Service Agreement, and that the parties thereafter exchanged a number of emails about the termination and the terms of their agreement going forward. Therefore, on this record, the evidence did not compel a finding by the jury that Pixior's January 17, 2011 Notice of Termination constituted a breach of the Service Agreement.

3. Failure to Return Goods on Termination

Embassy further asserts that, once Pixior terminated the Service Agreement on January 17, 2011, it was required to prepare Embassy's goods for removal from its warehouse. The Service Agreement provided, in relevant part: "Upon termination of this Agreement, PIXIOR agrees that it shall promptly but no later than thirty (30) after termination of this Agreement and at the request of Client, PIXIOR shall have ready for transport by a designated freight company by Client in writing, of [sic] all records, files data, customer information and other property in its possession or under its control relating to Client." Embassy argues that Pixior failed to comply with this provision when it terminated the Service Agreement because it did not prepare the goods for transport, despite Embassy's request.

The evidence showed that, in the January 17, 2011 Notice of Termination, Pixior informed Embassy that it had 30 days to

remove its goods from Pixior's warehouse, and that Pixior would count the goods and send Embassy a final bill. Upon receiving this notice, however, Embassy did not request that Pixior begin preparing its goods for transport to another facility. Rather, Embassy initially responded to the notice by stating that it was ready to pay the full balance due on the invoices, but it wanted Pixior to credit certain charges that it was disputing. Embassy also proposed compromising on the price of storage. When Pixior maintained that Embassy would have to pay a storage fee of $15 per pallet if the parties were to continue doing business, Embassy replied that it "would like to continue with you but do not wish to overpay." Embassy also indicated that it was sending $36,500 to Pixior as payment on the outstanding balance that was owed.

Over the next few weeks, the parties continued to negotiate the terms of their agreement going forward. While the record reflects that Embassy inquired whether Pixior would accept $1,400 to move the 140 pallet of goods that it was storing, there is no indication that the parties reached an agreement on costs or that Embassy requested Pixior prepare its goods for transport. Instead, the evidence demonstrated that, after Pixior terminated the Service Agreement on January 17, 2011 and imposed new contract terms, Embassy did not elect to move its goods elsewhere, but rather chose to continue doing business with Pixior for another one and a half years. Based on this evidence, Embassy has not shown that, as a matter of law, Pixior breached the Service Agreement in January 2011 when it failed to return Embassy's goods upon termination of the agreement.[8]

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[8] Embassy contends Pixior also breached the Service Agreement in June 2012 when it refused to return Embassy's goods upon request and instead proceeded to sell the goods to

C. Violation of Section 7210

Embassy argues it was entitled to prevail on its claim for violation of section 7210 because Pixior is not a warehouse within the meaning of the statute and did not have a valid warehouse lien. Embassy also asserts that, even if Pixior had a valid warehouse lien, it violated the requirements of section 7210 in enforcing the lien because it did not conduct the sale of Embassy's goods in a commercially reasonable manner.

The Commercial Code provides warehouses with an extra-judicial sale remedy for the enforcement of liens on the goods that are deposited with them. (§§ 7209, 7210; see *Melara v. Kennedy* (9th Cir. 1976) 541 F.2d 802, 805.) Under section 7209, "[a] warehouse has a lien against the bailor on the goods covered by a warehouse receipt or storage agreement or on the proceeds thereof in its possession." (§ 7209, subd. (a).) A warehouse "loses its lien on any goods that it voluntarily delivers or unjustifiably refuses to deliver." (§ 7209, subd. (e).) Under section 7210, "a warehouse's lien may be enforced by public or private sale of the goods . . . at any time or place and on any terms that are commercially reasonable, after notifying all persons known to claim an interest in the goods." (§ 7210, subd. (a).) A warehouse "is liable for damages caused by failure to comply with the requirements for sale under [section 7210] and, in case of willful violation, is liable for conversion." (§ 7210, subd. (i).)

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satisfy the amount of its claimed lien. Embassy notes that the Service Agreement did not grant Pixior a lien on the goods, nor did it authorize Pixior to sell the goods based on Embassy's non-payment of its bills. However, it is undisputed that Pixior's sale was made pursuant to a statutory warehouse lien, rather than a contractual provision in the Service Agreement.

1. Definition of a "Warehouse"

Embassy contends Pixior was not entitled to sell its goods under section 7210 because Pixior was not a warehouse within the meaning of the Commercial Code. Section 7102 defines a "warehouse" as a "person engaged in the business of storing goods for hire." (§ 7102, subd. (a)(13).) Embassy claims that, as a matter of law, Pixior did not meet this definition of a warehouse because Pixior was in the business of providing "pick and pack" services rather than storage services.

The Service Agreement specifically provided, however, that Pixior's services included "storage and warehousing." With respect to such services, the Agreement further stated that Pixior "shall allocate sufficient warehouse space at its principal pick, pack and ship facility . . . to store such Materials as may be delivered to Pixior from time to time." In defining the scope of the services to be provided to Embassy, the Agreement specified that Pixior's "warehousing and shipping services include receipt of Client Materials, warehousing, detailed management of inventory, order retrieval and confirmation, supply of packing materials, and pick/pack/ship operations." It also stated that Pixior would "provide secured storage of client materials and make infrastructure improvements to optimize storage and flow of Client's merchandise, including shelving and hanging racks." The plain language of the Service Agreement thus reflected that the storage of goods was not merely incidental to Pixior's business, but rather was one of the primary services it provided to its clients, including Embassy.

Consistent with this language in the Service Agreement, Amallal testified that Pixior was in the business of providing warehousing and distribution services primarily to apparel

companies. In describing Pixior's services, Amallal testified: "[W]e're a warehouse and fulfillment center. We specialize in the apparel industry. And most of the clients, they produce their products overseas or local[ly] . . ., and we receive the product in our warehouse. We store them properly by location to make sure we can find them when the customer sends the orders. . . . And we pick-and-pack the orders, put them in boxes. We use the routing guide, place the labels. . . . Basically we follow [the client's] instructions. We ship [the] orders." While it is true that Amallal also testified Pixior was "not a storage facility," he described his understanding of the difference between a warehouse and a storage facility as follows: "A storage facility is -- for example, like a public storage, that's a storage facility. In warehousing, . . . you store products for other people and you do the work. They don't come and store their product or pick up their product. We do the work for them." In his testimony, Amallal made clear that Pixior was a warehouse because it was in the business of storing goods for other people.

Embassy nevertheless argues that Pixior did not meet the definition of a "warehouse" because it did not charge storage fees. Embassy primarily relies on the decision in *Harry Hall & Co. v. Consolidated Packing Co.* (1942) 55 Cal.App.2d 651, in which the appellate court concluded that a supplier of raisins who failed to deliver its product to a buyer "was not a public or a private 'warehouseman' [citation], nor was it to receive compensation for the storage." (*Id.* at p. 654.) In this case, however, Pixior was not a supplier of Ed Hardy goods; rather it was in the business of storing the goods supplied by Embassy and then shipping the goods to Embassy's vendors based on their purchase orders. Moreover, the evidence showed Pixior did receive compensation

for its storage services. Under the original terms of the Service Agreement, the cost of storage was part of the "pick and pack" fee charged by Pixior. The fact that Pixior did not separately charge for storage when the parties first entered into the agreement is not dispositive of whether it was engaged in the business of storing goods. (*Ferrex International, Inc. v. M/V Rico Chone* (D.Md. 1988) 718 F.Supp. 451, 457 ["[S]imply because there is not a separately billed charge for warehousing does not mean that [a terminal operator] is not paid for storing the goods. Storage of goods is one component of its duties . . . ."].) In any event, the record reflects that Pixior did begin charging separate storage fees in January 2010. On this record, Embassy has not shown that, as a matter of law, Pixior failed to meet the definition of a "warehouse" within the meaning of the Commercial Code.

2. Existence of a Valid Warehouse Lien

Embassy asserts that, even if Pixior met the definition of a warehouse, it was not entitled to sell Embassy's goods to enforce its warehouse lien. Embassy specifically argues that, as a matter of law, Pixior did not have a valid warehouse lien because it never issued a "warehouse receipt" or entered into a "shipping agreement" for the goods within the meaning of section 7209.

Section 7209 defines the scope of a warehouse's statutory lien. It provides, in relevant part, that "[a] warehouse has a lien against the bailor on the goods covered by a warehouse receipt or storage agreement or on the proceeds thereof in its possession for charges for storage or transportation, including demurrage and terminal charges, insurance, labor, or other charges, present or future, in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law." (§ 7209, subd. (a).) As noted in the Uniform

Commercial Code (UCC) Comments to section 7209, "[a] possessory warehouse lien arises as provided under subsection (a) if the parties to the bailment have a storage agreement or a warehouse receipt is issued." (§ 7209, com. 6.) The term "warehouse receipt" is defined in section 1201 as "a receipt issued by a person engaged in the business of storing goods for hire." (§ 1201, subd. (b)(43).) The term "storage agreement" is not defined, but the UCC Comments to section 7204, concerning contractual limitations on a warehouse's liability for damages, provide the following guidance: "Storage agreements commonly establish the contractual relationship between warehouses and depositors who have an on-going relationship. The storage agreement may allow for the movement into and out of a warehouse without the necessity of issuing or amending a warehouse receipt upon each entry or exit of goods from the warehouse." (§ 7204, com. 5.)

On appeal, Embassy argues that Pixior did not have a valid warehouse lien because none of the evidence at trial established the existence of a warehouse receipt or storage agreement that covered Embassy's goods. Notably, however, Embassy never raised the question of whether Pixior had a warehouse receipt or storage agreement within the meaning of section 7209 as an issue at trial. While Embassy did contend that Pixior could not properly enforce its lien under section 7210 because it was not a "warehouse" within the meaning of the Commercial Code, Embassy never challenged the validity of the lien on the ground that Pixior had failed to issue the type of documentation required under section 7209. Embassy thus seeks to raise this theory for the first time on appeal. Yet "'[t]he rule is well settled that the theory upon which a case is tried must be adhered to on appeal.

A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant.' [Citations.]" (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1350, fn. 12; see also *Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316 ["It is a firmly entrenched principle of appellate practice that litigants must adhere to the theory on which a case was tried."].)

In its opening brief, Embassy acknowledges the general rule that issues not raised in the trial court cannot be asserted for the first time on appeal. Embassy nonetheless suggests that it may raise the alleged lack of a warehouse receipt or storage agreement covering its goods for the first time on appeal because the issue involves a pure question of law based on undisputed facts. It is true that an appellate court has the "discretion to consider a new theory on appeal when it is purely a matter of applying the law to undisputed facts. [Citations.]" (*Brown v. Boren*, *supra*, 74 Cal.App.4th at pp. 1316-1317; see also *Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 879 ["an appellate court may allow an appellant to assert a new theory of the case on appeal where the facts were clearly put at issue at trial and are undisputed on appeal"].) On the other hand, "'if the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at trial the opposing party should not be required to defend against it on appeal. [Citation.]' [Citation.]" (*Richmond v. Dart Industries, Inc.*, *supra*, at p. 879.)

Here, the record is devoid of any facts about whether Pixior had a warehouse receipt or storage agreement for the goods it sold because Embassy never raised this as an issue at trial.

Accordingly, neither party presented any evidence at trial to prove whether these types of documents existed, nor did they make any argument to the trial court or the jury about whether the absence of such documentation would preclude Pixior from claiming a warehouse lien. Because the record does not show that this new theory of the case is truly one based on undisputed facts, Embassy cannot raise it for the first time on appeal.

Alternatively, Embassy contends that it was not required to present any evidence at trial regarding the validity of Pixior's warehouse lien because Pixior had the burden of proving that its lien was valid. In support of this argument, Embassy cites to cases where appellate courts held, in other contexts, that the lien claimant has the burden of proof to establish the validity of its lien in an action to recover the lien amount. (See, e.g., *State Farm Mutual Automobile Ins. Co. v. Huff* (2013) 216 Cal.App.4th 1463, 1470 [hospital lien]; *Zenith Ins. Co. v. Workers' Comp. Appeals Bd.* (2006) 138 Cal.App.4th 373, 376 [medical provider lien]; *Boehm & Associates v. Workers' Comp. Appeals Bd.* (2003) 108 Cal.App.4th 137, 150 [same]; *Basic Modular Facilities, Inc. v. Ehsanipour* (1999) 70 Cal.App.4th 1480, 1485 [mechanic's lien].) Embassy asserts that Pixior failed to satisfy its burden in this case because it did not present any evidence to prove that it had a warehouse receipt or storage agreement covering the goods within the meaning of section 7209. Embassy, however, has forfeited this argument on appeal.

Because Embassy never raised the question of whether Pixior possessed the type of documentation required under section 7209 at trial, the jury was not instructed on which party would have the burden of proving whether Pixior had a valid warehouse lien. Instead, the jury was instructed on the elements

of Embassy's claim for violation of section 7210, and was told that Embassy had the burden of proving each element of the claim by a preponderance of the evidence. The record further reflects that Embassy expressly agreed to the instructions given to the jury for its section 7210 claim. Embassy never raised any objection in the trial court about the burden of proof set forth in the instructions,[9] nor does it assert any claim of instructional error on appeal. Under these circumstances, Embassy has forfeited its argument that Pixior failed to establish the validity of its warehouse lien because it did not prove that it had a warehouse receipt or storage agreement that covered Embassy's goods.[10]

3. Commercial Reasonableness of the Sale

Embassy next contends it was entitled to prevail in its claim for violation of section 7210 because Pixior did not conduct the sale of the goods in a commercially reasonable manner. In

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[9] After the case was submitted to the jury, Embassy did raise a different objection to the instruction on the elements of its section 7210 claim, which the trial court overruled. Specifically, Embassy requested the instruction be modified to include the first sentence from the statute, which provides: "[A] warehouse's lien may be enforced by public or private sale of the goods, in bulk or in packages, at any time or place and on any terms that are commercially reasonable, after notifying all persons known to claim an interest in the goods." (§ 7210, subd. (a).) The trial court concluded the language included in the instruction adequately set forth these statutory requirements.

[10] Because Embassy has forfeited this issue on appeal, we do not address which party had the burden of proof on the validity of the claimed warehouse lien, or whether any of the documents presented as evidence at trial may have constituted a warehouse receipt or storage agreement within the meaning of section 7209.

particular, Embassy asserts the sale was not commercially reasonable because Pixior failed to provide notice of the October 2012 public sale where no goods were sold and the subsequent private sale where the goods were sold for $27,000. Embassy also argues the sale was not commercially reasonable because Pixior did not seek to maximize the return, did not properly advertise the sale, and did not sell the goods in a recognized market.

Section 7210 permits a warehouse to enforce its lien "by public or private sale of the goods, in bulk or in packages, at any time or place and on any terms that are commercially reasonable, after notifying all persons known to claim an interest in the goods." (§ 7210, subd. (a).) With respect to notice, section 7210 provides that the "[n]otification may be made by mail, personal service, or verifiable electronic mail," and that it "must include a statement of the amount due, the nature of the proposed sale, and the time and place of any public sale." (*Ibid.*) With respect to commercial reasonableness, section 7210 states that the warehouse "sells in a commercially reasonable manner if [it] sells the goods in the usual manner in any recognized market therefor, sells at the price current in that market at the time of the sale, or otherwise sells in conformity with commercially reasonable practices among dealers in the type of goods sold." (*Ibid.*) "The fact that a better price could have been obtained by a sale at a different time or in a method different from that selected by the warehouse is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner." (*Ibid.*)

The evidence presented at trial showed that, on June 19, 2012, Pixior provided Embassy with notice of its intent to sell Embassy's goods. The notice was served on Embassy by regular and electronic mail, and included a statement of the amount due,

the nature of the proposed sale, and the time and place of the intended public sale. The evidence also showed that Pixior first conducted a public sale of Embassy's goods on July 3, 2012 and sold a small portion of the goods to 2.6 Distributions at that time; however, Pixior stopped the sale at the request of a mutual friend of the parties to allow them additional time to try to resolve their dispute over Embassy's unpaid bills. In the ensuing four months, Embassy never made an offer to pay any portion of the balance due on the invoices. The only offer that Embassy made during this period was to pay $9,500 to cover the cost of moving its goods out of Pixior's warehouse. In addition, the evidence showed that Pixior held a second public sale of the goods on October 27, 2012. Pixior posted advertisements for this sale in various classified advertisement websites, but did not provide a second notice to Embassy of its intent to go forward with the public sale. When Pixior did not receive the minimum bid price at the October 27, 2012 public sale, it began contacting wholesale buyers of close-out apparel to inquire about a private sale of Embassy's goods. On October 30, 2012, Pixior completed a private sale of Embassy's goods to 2.6 Distributions for a total of $27,000, which, according to Amallal, was the best price that he could obtain for the goods.

On appeal, Embassy argues that Pixior did not comply with the notice requirements of section 7210 because it failed to provide Embassy with separate notice of the October 27, 2012 public sale or the October 30, 2012 private sale. In support of this argument, Embassy cites to cases arising under Division 9 of the Commercial Code concerning secured transactions. (See, e.g., *Union Safe Deposit Bank v. Floyd* (1999) 76 Cal.App.4th 25; *Rutan v. Summit Sports* (1985) 173 Cal.App.3d 965; *Western Decor & Furnishings Industries, Inc. v. Bank of America* (1979)

91 Cal.App.3d 293.) In those cases, a creditor sold the collateral at a foreclosure sale and thereafter sought to recover a deficiency judgment against the debtor. The courts held that, under former section 9504 governing the requirements for a foreclosure sale, the creditor's failure to provide the debtor with notice of the specific type of sale that it intended to undertake precluded the creditor from subsequently recovering a deficiency judgment.

In this case, however, Pixior was not seeking a deficiency judgment against Embassy for the difference between the proceeds of the sale and the amount of its warehouse lien. Rather, Embassy was seeking to recover damages from Pixior for violating the requirements of section 7210 in selling Embassy's goods. Section 7210 allows for the recovery of "damages caused by failure to comply with the requirements for sale under this section." (§ 7210, subd. (i).) Therefore, even if a warehouse violates section 7210 by failing to comply with the statutory notice requirements, the bailor still must prove that the violation caused damages. (*Shimamoto v. S & F Warehouses, Inc.* (N.Y. 2002) 99 N.Y.2d 165, 175 ["[e]ven if a failure to comply with [the notice] requirement [of UCC 7-210] violates some right, a plaintiff still must plead and prove that the violation caused damages"].) "[A]ctual damages flowing from a violation that is less than willful have been defined as the difference between the amount actually made from the sale of goods and the amount that would have been realized had the sale been commercially reasonable. [Citation.]" (*Id.* at p. 173.)

Based on the evidence presented at trial, Embassy has not shown that, as a matter of law, any failure by Pixior to provide separate notice of the October 2012 public and private sales caused damages to Embassy. The jury heard evidence that

Embassy received notice of the first public sale that was held in July 2012 and took no action in response to such notice. Embassy did not attend the sale, did not arrange for anyone to appear at the sale on its behalf, and did not attempt to submit a bid. Even after Pixior voluntarily stopped the July 2012 sale to allow further negotiations, Embassy did not make an offer to pay any portion of the balance that was due on the invoices, including the amount of any undisputed charges. The jury also heard evidence that the October 2012 sales were conducted in a commercially reasonable manner, and that the price at which Pixior sold the goods was consistent with their wholesale value at the time of the sale. In particular, Pixior presented the opinion of two experts, who testified that the wholesale value of the goods sold in October 2012 was between $27,000 and $28,000. One of the experts further testified that Pixior advertised the goods in the customary manner for close-out apparel sales in Los Angeles and followed commercially reasonable practices in conducting a public auction followed by a private sale when the minimum bid price was not achieved. Based on this evidence, the jury reasonably could have concluded that Embassy did not suffer any damages from the lack of separate notice of the October 2012 sales.

Embassy's remaining arguments about the commercial reasonableness of the sale are unpersuasive. Embassy asserts the sale was not commercially reasonable because Cattan testified that the wholesale value of the goods in 2012 was $512,000, while Amallal admitted that he only sought to recover the amount of the $30,000 lien in his private negotiations with 2.6 Distributions. As discussed, however, Pixior's two expert witnesses testified that the wholesale value of the goods as of October 2012 was between $27,000 and $28,000, which was close

to the amount that Pixior received in the private sale. The experts also testified that, by 2012, the popularity of the Ed Hardy brand had "died." Given the conflict in the evidence about the fair market value of the goods as of October 2012, it was a question of fact for the jury to decide whether the price at which Pixior sold the goods was reasonable.

Embassy also argues that Pixior failed to properly advertise the sale and to sell the goods in a recognized market. However, one of Pixior's experts testified that there is a recognized market in Los Angeles for the goods sold by Pixior, that Pixior advertised the goods in the customary places for close-out apparel sales, and that Pixior sold the goods in conformity with commercially reasonable practices for such sales. Consequently, on this record, the jury reasonably could have concluded that Embassy was not entitled to prevail on its claim for violation of section 7210.

II. Denial of Embassy's Motion for a Directed Verdict

Embassy contends the trial court erred in denying its motion for a directed verdict on its claim for violation of section 7210. "'A directed verdict may be granted only when, disregarding conflicting evidence, giving the evidence of the party against whom the motion is directed all the value to which it is legally entitled, and indulging every legitimate inference from such evidence in favor of that party, the court nonetheless determines there is no evidence of sufficient substantiality to support the claim or defense of the party opposing the motion, or a verdict in favor of that party. [Citations.]' [Citation.] On appeal we apply the substantial evidence standard of review. 'Only if there was no substantial evidence in support of the verdict could it have been error for the trial court . . . to have

denied [appellant's] motion for directed verdict. [Citation.]' [Citation.]" (*Eucasia Schools Worldwide, Inc. v. DW August Co.* (2013) 218 Cal.App.4th 176, 180-181.)

On appeal, Embassy argues that the trial court should have granted a directed verdict on its section 7210 claim because the sale of its goods was not commercially reasonable in that: (1) the price at which the goods were sold bears no reasonable relationship to the wholesale value of the goods; (2) Pixior did not give notice of the October 2012 public and private sales; (3) Pixior did not properly advertise the July 2012 and October 2012 sales; and (4) Pixior made no effort to maximize the return on the goods. At trial, however, Embassy moved for a directed verdict solely on the ground that it did not receive notice of the October 2012 sales as required by section 7210. Embassy therefore has forfeited its argument that a directed verdict was required on these other grounds. (*In re Marriage of Nelson* (2006) 139 Cal.App.4th 1546, 1558 [an appellate court ordinarily will not consider an alleged erroneous ruling where an objection could have been, but was not, raised in the trial court].)

With respect to the issue of whether Pixior violated section 7210 by failing to provide notice of the October 2012 sales, we conclude that the trial court did not err in denying Embassy's motion for a directed verdict. As discussed above, a warehouse is only liable for a violation of section 7210 if the plaintiff proves the violation caused damages. (§ 7210, subd. (i).) Here, there was substantial evidence from which the jury could have concluded that Embassy was not damaged by Pixior's failure to provide separate notice of the sale of the goods in October 2012 because Pixior conducted the sale in a commercially reasonable manner and obtained a price that was consistent with the wholesale value

of the goods at the time of the sale. Because the evidence at trial was sufficient to support a verdict in favor of Pixior, Embassy was not entitled to a directed verdict on its section 7210 claim.

DISPOSITION

The judgment is affirmed. Pixior shall recover its costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.