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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

NASAR ENTERPRISES, INC., et al.,

Plaintiffs and Appellants,

v.

BP WEST COAST PRODUCTS LLC,

Defendant and Appellant.

DHILLON PARTNERS LLC,

Plaintiff and Appellant,

v.

BP WEST COAST PRODUCTS LLC,

Defendant and Appellant.

B269096 consol. w/
B269104/B276380

(Los Angeles County
Super. Ct. Nos. BC494169,
BC460880

NASAR ENTERPRISES, INC., et al.,

Plaintiffs and Appellants,

v.

BP WEST COAST PRODUCTS LLC,

Defendant and Appellant.

APPEALS from a judgment and order of the Superior Court of Los Angeles County, Elihu Berle, Judge. Affirmed.

Kasowitz, Benson, Torres, & Friedman, Charles Freiberg, Brian Brosnahan, David A. Thomas, Jacob N. Foster, George Chikovani and Danielle Pierre for Plaintiffs and Appellants Nasar Enterprises, Inc., Ganesh Group Corporation, KJYT Visions, Inc., and Dhillon Partners LLC.

Arnold & Porter, Sean M. SeLegue, John D. Lombardo, Ryan Light, and Elizabeth St. John, for Defendant and Appellant BP West Coast Products, LLC.

Nasar Enterprises, Inc. (Nasar), Ganesh Group Corporation (Ganesh), KJYT Visions, Inc. (KJYT), and Dhillon Partners, LLC (Dhillon) (collectively the ARCO dealers) are franchisees of BP West Coast Products LLC (BPWCP). They operate franchise gasoline stations at various locations in California. In 2013, the ARCO dealers sued BPWCP alleging it had failed to set gasoline prices in good faith pursuant to an open price term in their franchise agreement. The ARCO dealers also alleged that BPWCP breached the franchise agreement, the implied covenant of good faith and fair dealing, and the implied warranty of merchantability by selling them defective computer systems.

A jury found that BPWCP had not set prices in bad faith or at commercially unreasonable levels, defeating the ARCO dealers' claim based on the implied covenant of good faith and fair dealing. The ARCO dealers argue the trial court improperly instructed the jury regarding the content of BPWCP's obligation to set prices in good faith. Specifically, they challenge the court's instruction that prices comparable to those charged to other similarly situated purchasers in the industry are, as a matter of law, commercially reasonable prices. We conclude the trial court's instruction regarding the commercial reasonableness of BPWCP's prices was correct.

The jury found for the ARCO dealers on their implied warranty of merchantability claim. In its cross-appeal, BPWCP argues the jury's verdict in favor of the ARCO dealers is not supported by substantial evidence. We disagree and affirm.

In a consolidated appeal, Nasar and Ganesh argue the trial court erred in denying their postjudgment motion for contractual attorney fees under Civil Code section 1717. BPWCP cross-appeals, arguing the court erred in denying its motion for contractual attorney fees. We disagree with both parties, finding the trial court did not err in determining that no party prevailed in the underlying litigation.

FACTUAL AND PROCEDURAL SUMMARY

A. *Implied Covenant of Good Faith and Fair Dealing Claim*

Plaintiffs, the ARCO dealers, are four gasoline dealers who purchase ARCO-branded gasoline from BPWCP, a gasoline refiner that owns the ARCO brand. Between 2006 and 2009, the ARCO dealers each entered into identical franchise agreements with BPWCP. These agreements require ARCO dealers to purchase gasoline exclusively from BPWCP for 20 years. They include an open price term which allows BPWCP to set the price the ARCO dealers pay for its gasoline. The price term reads, in relevant part: "5. Prices. For [gasoline] delivered hereunder, Buyer will pay the price specified by BPWCP in effect at the time and place of delivery for purchasers in Buyer's class of trade."

In 2013, plaintiffs Nasar, Ganesh, and KJYT sued BPWCP, alleging breach of the implied covenant of good faith and fair dealing with respect to gasoline price setting, as well as breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of the implied warranty of merchantability with respect to the sale of point-of-sale computer systems. That year, plaintiff Dhillon Partners, LLC sued BPWCP on the same grounds. The plaintiffs alleged that BPWCP breached the implied covenant of good faith and fair dealing by setting prices for its gasoline at commercially unreasonable levels. These two lawsuits were consolidated and tried together.

A jury trial began in July 2015. At trial, plaintiffs and defendant presented expert opinion testimony indicating that the term "class of trade" is a standard trade usage in the gasoline industry. Expert testimony defined this term as a channel of distribution of refined gasoline to a group of purchasers that share certain characteristics.

One type of class of trade in the gasoline industry is the "branded, direct dealer-supplied" class of trade. The purchasers in this class of trade share the characteristics of purchasing branded gasoline, receiving gasoline deliveries directly from refiners, and purchasing relatively smaller quantities of gasoline than some other classes of purchasers. Examples of members of this class of trade are Shell and Chevron dealers. ARCO dealers are members of the branded, direct-supplied class of trade.

Other classes of trade, such as "unbranded jobbers" and "hypermarketers," have different characteristics. Unbranded jobbers purchase unbranded gasoline and deliver it themselves. Hypermarketers, such as Safeway and Costco, often purchase unbranded gasoline in very large quantities and pay separately to store and deliver it.

BPWCP used a pricing model called "streetback pricing," in which prices are compared to a station's competitors, to determine prices charged to the ARCO dealers. Expert testimony established that this pricing model is common in the gasoline industry.

The ARCO dealers generally were charged lower prices for wholesale gasoline compared to other branded, direct-supplied dealers. Hypermarketers were charged lower prices than the ARCO dealers and hence were able to charge consumers comparatively low prices.

In its pricing model, BPWCP assumed that its ARCO dealer purchasers would operate with an eight-cent per gallon margin of profit. The ARCO dealers' economic expert testified this margin is too low for an ARCO station to be profitable. BPWCP presented evidence that the ARCO dealers' stations were profitable, with each plaintiffs' gross profits exceeding industry averages.

BPWCP submitted proposed special instruction four, entitled "Implied Covenant of Good Faith – Safe Harbor": "If you find that the wholesale prices that BPWCP charged to any given

Plaintiff for ARCO-branded gasoline were within the range of wholesale prices being charged by other refiners in the branded direct supply class of trade, based on the evidence presented, you must find that BPWCP's wholesale gasoline prices to that Plaintiff were commercially reasonable."

Plaintiffs objected to this instruction, arguing that *E. S. Bills v. Tzucanow* (1985) 38 Cal.3d 824 (*E.S. Bills*) established that commercial reasonableness should be based on "whether the prices allow [plaintiffs] to earn a reasonable profit." The court gave BPWCP's proposed instruction and the jury found that BPWCP did not set prices in bad faith and that its prices were not commercially unreasonable. The ARCO dealers appeal from the ensuing judgment.

B. *Implied Warranty of Merchantability Claim*

Along with the gasoline franchise agreement, the ARCO dealers also signed *ampm* franchise agreements in which they gained the right to operate *ampm* convenience stores alongside their gasoline stations. These agreements also required the ARCO dealers to purchase and install an approved point-of-sale computer system. Some dealers later signed purchase or financing agreements specifying the terms of sale for the point-of-sale computer system.

Each of the dealers purchased and installed an approved point-of-sale computer system (referred to as Retalix) from BPWCP. Each experienced problems with the Retalix system, the majority of which occurred within the first year and a half following its installation. These issues included various software and hardware problems that interfered with the system's ability to operate gasoline pumps and accept credit and debit card transactions. A representative of each dealer testified that the dealer had experienced complete shutdowns due to problems with the Retalix system, which prevented it from transacting business for periods of time. Mr. Dhillon, representing plaintiff Dhillon, stated he had experienced a shutdown lasting at least three days. Each dealer also testified to experiencing partial shutdowns at times, which included the inability to operate one or more gasoline pumps, the inability to accept credit or debit cards, or the inoperability of one or more point-of-sale terminals. Many of the problems the plaintiffs described were fixed by rebooting the Retalix system, a process that took between 30 minutes and several hours. The dealers testified that customers would leave, complain, or seem dissatisfied when these problems occurred.

The ARCO dealers presented an accounting expert, Maryellen Sebold, who testified based on her analysis of credit and debit card transaction data from plaintiffs' gasoline stations. She compared the number of transactions from the 2009-2010 period, as to which the ARCO dealers testified the Retalix software problems were more severe, with the period from 2011 to 2014, when the problems were mostly resolved. She projected the number of transactions the ARCO dealers had lost during the period when the Retalix system's problems were more severe and multiplied this figure by the average profit per transaction to estimate damages from lost profits. She considered other potential causal factors such as increases in average miles driven and increased debit card usage, which reduced the overall amount of damages. She explained why she had not attempted to adjust for other potential factors, such as changes in traffic flow, stating that it did not appear likely that these factors had an impact. She calculated the lost profits for each plaintiff as follows: $32,830 (Dhillon), $86,457 (KJYT), $32,178 (Nasar) and $28,267 (Ganesh).

Defendant presented a software expert, Jeff Parmet, who testified that all software has "bugs" or "defects." He analyzed call logs that were created when the ARCO dealers called a help line set up by BPWCP. Mr. Parmet acknowledged that the call log data was an imperfect record of the problems that had existed.[1] Based on the call logs, Mr. Parmet opined that the Retalix software had operated "almost continuously" with very little downtime. He testified that downtime for each plaintiff was, on average, 15-20 hours per year, which was less than .2 percent of operating hours. Based on these numbers, he concluded that the Retalix software was fit for its intended purpose. Plaintiffs did not provide expert testimony on the fitness of the Retalix point-of-sale computer system.

Because Ganesh did not pay for its Retalix system, BPWCP filed a cross-complaint for breach of contract, seeking $35,000, the amount of the purchase price for the system.

Defendant and plaintiffs agreed to a modified version of the CACI No. 1231 jury instruction. As given, that version states, in relevant part:

> "Each plaintiff claims that it was harmed by the Retalix system that it bought from BP because the Retalix system did not have the quality that a buyer would expect. This is known as breach of an implied warranty of merchantability.

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[1] Plaintiffs' expert, Ms. Sebold, also opined that the call logs represented an incomplete record of plaintiffs' issues with the Retalix system.

> For any given plaintiff to prevail on its claim for breach of implied warranty against BP, that plaintiff must prove . . . that the Retalix system, A, was not of the same quality as those generally accepted in the trade; or, B, was not fit for the ordinary purposes for which such goods are used; or, C, did not conform to the priority established by the parties' prior dealings or by usage of trade . . . that plaintiff was harmed . . . [and] that the failure of the Retalix system . . . was a substantial factor in causing plaintiffs' harm."

Plaintiffs' counsel argued to the jury that, based on all three Retalix-related claims (implied warranty of merchantability, breach of contract, and implied covenant of good faith and fair dealing) they were entitled to damages in the following amounts: for the price they each had paid for the Retalix system ($30,000 (Dhillon), $32,500 (KJYT), $41,000 (Nasar)), for the service fees they had paid related to the Retalix system ($5,635 (Dhillon), $4515 (KJYT), $13,336 (Nasar), and $17,876 (Ganesh)), and for lost profits as calculated by their expert witness ($32,830 (Dhillon), $86,457 (KJYT), $32,178 (Nasar) and $28,267 (Ganesh)).[2] The total damages requested were: $68,465 (Dhillon), $123,472 (KJYT), $86,514 (Nasar) and $46,143 (Ganesh). In closing argument, Ganesh requested relief

[2] These damages were requested with respect to all three Retalix-related claims (breach of contract, breach of the implied warranty of merchantability, and breach of the implied covenant of good faith and fair dealing) and the jury was instructed to award only a single recovery for each plaintiff as to which it found more than one of these claims successful.

from its contractual obligation to pay for the system based on the theory that the product was defective.

Before the implied warranty of merchantability claim was sent to the jury, BPWCP moved for nonsuit on the claim. It argued, among other things, that the implied warranty of merchantability claims of plaintiffs Nasar and Ganesh were barred by a contractual statute of limitations contained in the *ampm* franchise agreements these plaintiffs entered into with BPWCP. Those agreements included a provision requiring that a point-of-sale system be purchased and a one year statute of limitations for any and all claims arising out of the agreement, which ran "from the date on which the party asserting the claim knew or should have known of the facts giving rise to the claims."

The two plaintiffs later signed purchase or financing agreements for their Retalix systems. These later agreements each began with a recital stating that the buyer is required by the earlier *ampm* agreement to purchase a point-of-sale system. The purchase and financing agreements each include a provision labeled "Entire Agreement" which states that these agreements "supercede[] [*sic*] any prior agreements" except for a specific Limited Time Offer agreement. This "Entire Agreement" provision also states that all prior agreements in connection with the Retalix system are "expressly merged herein." The later agreements do not include a contractual limitations provision. These two plaintiffs brought their claim of breach of the implied warranty of merchantability in July 2013, just under four years after their Retalix systems were installed. The trial court denied the motion for nonsuit.

The jury found for BPWCP on the claims of breach of contract and breach of the implied covenant of good faith and fair dealing relating to the Retalix point-of-sale computer system. These findings are not challenged on appeal.

The jury returned a verdict in favor of each plaintiff on its implied warranty of merchantability claim. When asked, in relation to each plaintiff, whether that plaintiff's Retalix system was unfit for its ordinary purposes, the jury responded "yes." The jury also found that the Retalix system failure was a substantial factor in causing plaintiffs' harm. The jury awarded the following damages: $34,281 (Dhillon), $21,850 (KJYT), $22,716 (Nasar), $20,643 (Ganesh). BPWCP appeals from the implied warranty of merchantability verdict.

The jury found for BPWCP on its breach of contract claim against Ganesh based on its failure to pay for the Retalix system and awarded BPWCP the purchase price of $35,000. With respect to Ganesh, BPWCP secured a net recovery of $14,357. That award to BPWCP is not challenged on appeal.

C. *Attorney Fees*

Ganesh, Nasar, and BPWCP each moved for an award of contractual attorney fees under Civil Code section 1717 pursuant to a fee-shifting provision in their *ampm* agreements,[3] which provides: "If BP incurs costs and expenses due to Franchisee's failure to pay when due amounts owed to BP . . . or otherwise to comply with this Agreement, Franchisee agrees . . . to reimburse BP for all of the costs and expenses that BP incurs, including, without limitation, reasonable accounting, attorneys', and related fees."

[3] There is no fee-shifting provision in the agreements between BPWCP and the other two plaintiffs, KJYT Visions, Inc. and Dhillon Partners, LLC.

The trial court exercised its discretion under Civil Code section 1717 to deny these motions, finding there was no prevailing party. The court explained: "The jury returned a mixed verdict. On the one hand, the jury found in plaintiffs; favor on their claims that the Retalix system did not satisfy the implied warranty of merchantability. . . . On the other hand, the jury also found that plaintiffs did not establish their claims for breach of a covenant of good faith and fair dealing with respect to gasoline pricing."

The court stated that all parties had achieved some but not all of its litigation objectives, as there was "good news and bad news" in the outcome for all parties. The court phrased its determination in the alternative, stating that whether only Retalix claims or all claims were considered, no party could be considered a "prevailing party."

BPWCP, Ganesh, and Nasar appeal from denial of their attorney fees motions.

DISCUSSION

I

The ARCO dealers argue the court prejudicially erred in instructing the jury that, as long as the prices charged by BPWCP were within the range of prices charged by other refiners to purchasers in the branded direct-supplied class of trade, those prices were commercially reasonable. We do not agree.

"[T]he propriety of a jury instruction is a question of law [citation]," which we review de novo. (*Evans v. Hood Corp.* (2016) 5 Cal.App.5th 1022, 1046.) California law, following the Uniform Commercial Code (U.C.C.), implies an obligation to set prices in good faith in any contract with an open price term. (Com. Code,

§ 2305, subd. (2) ["A price to be fixed by the seller or by the buyer means a price for him to fix in good faith"]; see also U.C.C. § 2-305, subd. (2).) Commercial reasonableness is one component of the definition of "good faith." (Com. Code, § 1201, subd. (b)(20) [defining good faith as "honesty in fact and the *observance of reasonable commercial standards* of fair dealing"], italics added.)

Although the parties have not provided, and we have not found, a California case elaborating on the meaning of "good faith" or commercial reasonableness under U.C.C. section 2-305, subdivision 2,[4] the issue has been the subject of numerous decisions in other jurisdictions. (See *Carrau v. Marvin Lumber & Cedar Co.* (2001) 93 Cal.App.4th 281, 290 [considering interpretations of other jurisdictions of U.C.C. where California case law is silent].) The court instructed the jury that a commercially reasonable price is one "within the range of . . . prices being charged by other refiners to other branded direct-supply dealers." This is similar to the way courts in other

[4] The ARCO dealers suggest that *E. S. Bills, supra,* 38 Cal.3d 824, defines the meaning of "good faith" under an open price term, requiring sellers to set a price which allows purchasers to be competitive in the marketplace. We disagree. *E.S. Bills* arose from an unlawful detainer action brought by a gasoline refiner/franchisor against a gasoline dealer/franchisee. (*Id.* at pp. 826-827.) The Supreme Court reversed the judgment in favor of the refiner because the trial court had failed to allow evidence regarding the putative unreasonableness of prices it charged to the dealer, which would have provided a defense to the franchisee. (*Id.* at pp. 833-834.) This evidentiary holding does not indicate that the court took any position on the correct standard for judging commercial reasonableness of prices fixed under an open price term.

jurisdictions have characterized a commercially reasonable price under U.C.C. section 2-305: one falling within a "range" of prices charged to similarly situated purchasers. (See *Ajir v. Exxon Corp.* (9th Cir. May 26, 1999, Nos. 97-17032, 97-17134) 1999 U.S. App. LEXIS 11046, [commercially reasonable prices are those "similar to what other major oil companies charged their dealers"]; *Shell Oil Co. v. HRN* (2004) 144 S.W.3d 429, 434-435 (*HRN*) [defining commercially reasonable price as "within the range of . . . prices charged by other refiners in the market"]; see also *Havird Oil Co. v. Marathon Oil Co.* (4th Cir. 1998) 149 F.3d 283, 290 [reasonable price was "competitive with other wholesalers . . . being in the 'middle of the pack' of all [gasoline] wholesalers in the area"]; *Two Bros. Distrib. v. Valero Mktg. & Supply Co.* (D. Ariz. 2017) 270 F.Supp.3d 1112, 1123 [finding that "[c]harging different prices to differently situated buyers does not constitute bad faith"] (*Two Bros.*); *United Food Mart v. Motiva Enterprises, LLC* (S.D. Fla. 2005) 457 F.Supp.2d 1329, 1335 [defining commercially reasonable price as "'within the range of prices charged by other refiners in the . . . area'"]; *Casserlie v. Shell Oil Co.* (2009) 902 N.E.2d 1, 3 [commercially reasonable price is one "within the range of [a dealer's] competitors."](*Casserlie*).)[5]

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[5] Although some courts have found that purchasers under an open price term are entitled to a price in the range of their competitors, most courts which have considered this issue have rejected the argument that purchasers are entitled to a price which is "competitive," where "competitive" is defined as allowing the purchasers to make a profit. (See *HRN*, *supra*, 144 S.W.3d at p. 437; see also *Au Rustproofing Ctr., Inc. v. Gulf Oil Corp.* (6th Cir. 1985) 755 F.2d 1231, 1236; 1 White, Summers, & Hillman, Uniform Commercial Code (6th ed.) § 4:17, fn. 3 [noting majority

The ARCO dealers presented evidence that BPWCP charged them higher prices than hypermarketers such as Costco, but those purchasers are not similarly situated within the industry, since hypermarketers purchase unbranded gasoline, must purchase or provide storage and transportation, and purchase gasoline in very large quantities. (See *Casserlie*, *supra*, 902 N.E.2d at p. 6 [purchasers in different classes of trade are not similarly situated because refiners provide different services to each class of trade, warranting different prices]; see also *Tom-Lin Enterprises, Inc. v. Sunoco, Inc.* (6th Cir. 2003) 349 F.3d 277, 285-286.) We find no error in the trial court's instruction, which informed the jury that a commercially reasonable price is one that is within the range of prices charged to these similarly situated purchasers. Because all parties agreed that under this standard, the prices BPWCP charged to the ARCO dealers were commercially reasonable, the ARCO dealers could not have prevailed as a matter of law.[6]

II

BPWCP argues the trial court erred in denying its motion for nonsuit with respect to the timeliness of the implied warranty of merchantability claims of plaintiffs Nasar and Ganesh. We do not agree.

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view is that commercially reasonable prices need not enable dealers to be competitive].)

[6] Because we conclude the ARCO dealers could not have prevailed on their implied covenant of good faith and fair dealing claim as a matter of law, any error with respect to the other issues they raise on this point, including contract interpretation and the restriction of their cross-examination of an expert witness, is harmless.

The *ampm* agreement contains a one-year statute of limitations; the purchase and financing agreements do not. BPWCP based its nonsuit motion on the argument that the one-year contractual limitations period in the *ampm* franchise agreements was applicable to the plaintiffs' implied warranty of merchantability claims.

We review the denial of a motion for nonsuit de novo. (*Saunders v. Taylor* (1996) 42 Cal.App.4th 1538, 1541-1542.) The implied warranty of merchantability arises from "a contract for . . . *sale*." (Com. Code, § 2314, italics added.) The plaintiffs agreed to purchase a point-of-sale system in the *ampm* agreement, in which they became franchisees of BPWCP's *ampm* convenience brand. In the purchase and financing agreements, the parties elaborated and agreed to the specific terms of that purchase. The *ampm* agreements regarding the point-of-sale system are more properly characterized as agreements to agree at a future time, as they do not specify important terms such as the price, which point-of-sale computer system will be purchased, or when the purchase will occur. (*Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 213 [agreement to agree unenforceable under California law].) The purchase and financing agreements are the contracts for sale from which the implied warranty of merchantability arises.

The purchase and financing agreements state that they supersede previous agreements, excepting a specific Limited Time Offer agreement. Yet they also state that all previous agreements related to Retalix are "expressly merged herein." The *ampm* franchise agreements cannot be both superseded by and merged with the later agreements. Commercial Code section 2725, subdivision 1 creates a four-year default statute of limitations as to which any deviation requires agreement of the parties. The excepting of the Limited Time Offer agreement, along with the naming of the *ampm* franchise agreement in the recital section of each of the later agreements, demonstrate the parties knew how to and could have excepted the terms of the *ampm* agreement from being supersede by the "Entire Agreement" provision had that been their intent. Further, the *ampm* franchise agreements contain promises regarding the future purchase of a generic point-of-sale system, but not specifically Retalix. We conclude the provision should be read to state that the purchase and financing agreements supersede the *ampm* franchise agreements.

Based on the foregoing, we conclude that the one-year statute of limitations in the *ampm* agreement does not bind the two plaintiffs with respect to the Retalix point-of-sale system. Because the statute of limitations for breach of contract for the sale of goods is four years under Commercial Code section 2725 and plaintiffs brought their claims less than four years from the time when the issues with their Retalix systems became apparent, their claims were timely.

BPWCP also argues the jury verdict finding that it breached the implied warranty of merchantability is not supported by substantial evidence. We disagree.

In reviewing a jury's verdict for substantial evidence, "we must consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the judgment. [Citations.]" (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630.) """It is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact. Our authority begins and ends with a determination as to whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, in support of the judgment.'""' (*Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, 951, citing *Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 369.)

Under California law, to avoid breach of the implied warranty of merchantability, a product must possess a "'"minimum level of quality,"'" and be "'substantially free of defects.'" (*Isip v. Mercedes-Benz USA, LLC* (2007) 155 Cal.App.4th 19, 26-27; *Brand v. Hyundai Motor America* (2014) 226 Cal.App.4th 1538, 1546; *American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1296-1297.) On the one hand, to demonstrate breach, a buyer need not show that the product is completely unusable. (*Isip*, *supra*, at p. 26.) On the other, to avoid breach, a seller need not provide a product that is "'perfect in every detail.'" (*Brand*, *supra*, at p. 1546.)

Viewed in the light most favorable to the judgment, the ARCO dealers' testimony in this case provided substantial evidence that the Retalix system was more than merely imperfect. A reasonable jury could determine that repeated shutdowns, and the frequent inability to process payments or pump gasoline indicated the Retalix system was unfit for its ordinary purpose. Although BPWCP provided expert testimony indicating that the Retalix system's defects affected the ARCO dealer's business for a small percentage of operating hours, we cannot assume that the jury was persuaded by this testimony, which the expert acknowledged was based on an "imperfect" record of the problems the dealers experienced. The ARCO dealers' testimony may reasonably be understood to indicate frequent and systemic issues sufficient to support a finding of breach.

BPWCP also argues the jury's findings of causation and damages are not supported by substantial evidence. It argues that only expert testimony will suffice to prove causation and damages and that the testimony of accounting expert Ms. Sebold was speculative.

Under substantial evidence review, the testimony of a single credible witness may support the award. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.) However, mere speculation will not suffice to support a verdict. (*Western Digital Corp. v. Superior Court* (1998) 60 Cal.App.4th 1471, 1487.)

Each ARCO dealer testified that it was unable to operate its station partially, or entirely, for periods of time due to problems which recurred with some frequency. The dealers further testified that they saw customers leave and heard their complaints, indicating that they lost business. This testimony supports a reasonable conclusion that the Retalix system's failure caused harm to the dealers. Further, the testimony of Ms. Sebold identified a correlation between the Retalix system's problems and a lower number of transactions at each dealer's station. Although she did not exclude every possible causal factor other than the problems with the Retalix system, she excluded some, and explained her lack of exclusion of others; this suggested a reasonable inference that it was more likely than not that the Retalix system's defects caused harm to the ARCO dealers. (See *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 487 [jury permitted to draw inference of causation when, in the absence of other causal explanations, causation by purported factor is "more likely than not"].)

BPWCP also challenges the amount of the jury award, arguing that it cannot be supported by either the purchase price of Retalix system, the fees associated with the system, or Sebold's estimation of the dealers' lost profits. We agree that the award cannot be justified as a partial or full refund of the purchase price or service fees associated with the Retalix system. The jury could not reasonably have awarded the full purchase price of the system to BPWCP on its cross-complaint against Ganesh if it believed plaintiffs who demonstrated breach of the implied warranty were owed a full or partial refund of the system price. Nor could the jury have awarded service fee refunds, since the implied warranty of merchantability relates only to goods (Com. Code, § 2314; Civ. Code, § 1792), as indicated in the jury instructions.

This leaves only lost profits as a legitimate basis for the damage award. As we have indicated, we find Ms. Sebold's testimony on this point was not speculative. She was transparent regarding the assumptions she made and explained each step of the data analysis she conducted. (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 469 [it is for the trier of fact to decide whether to accept or reject expert testimony so long as it is not "inherently improbable"].)

Although the jury's damage award did not correspond to Ms. Sebold's suggested award in any obvious manner, "[w]here the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. [Citations.]" (*GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 873.) The jury reasonably may have relied on a combination of Ms. Sebold's testimony and the testimony of the dealers in reaching its award amounts. In fact, it awarded the highest damages to plaintiff Dhillon, whose testimony evidenced the most severe problems with the Retalix system, including one shutdown that lasted at least three days. The jury awarded roughly the same amount to each of the other plaintiffs, reasonably corresponding with their testimony, which evidenced roughly the same problems at each of their stations. For the foregoing reasons, we affirm the jury's verdict on the issue of the implied warranty of merchantability.

III

In a consolidated appeal, Nasar, Ganesh, and BPWCP each challenge the trial court's denial of their motions for contractual attorney fees.

Under Civil Code section 1717, the trial court has wide discretion to determine that no party is a "prevailing party." (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 894.) Therefore, we review the denial of a motion under section 1717 for abuse of discretion. (*Ibid.*)

Where the results of a trial are "mixed" with each party receiving "good news and bad news," the trial court is justified in determining that no party is a prevailing party. (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 874-875 (*Hsu*).) Even where a party is ostensibly the prevailing party, Civil Code section 1717 "vests the trial court with broad discretion to deny attorney fees [to that party] . . . based on a wide variety of equitable considerations." (*Id.* at p. 871.) But where "a party obtains a simple, unqualified victory by completely prevailing on or defeating all contract claims," the court lacks discretion to decide that no party has prevailed. (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109 (*Scott*).)

We assume, as do the parties, that the attorney fee provision is applicable.[7] The parties disagree whether only Retalix claims or all contract claims should be considered in determining which party prevailed. As the trial court stated, this determination is unnecessary because in either case, the trial results were mixed, with each party receiving "good news and bad news." (*Hsu*, *supra*, 9 Cal.4th at p. 874.) As between Nasar and BPWCP, each prevailed on at least one issue, with Nasar demonstrating breach of the implied warranty of merchantability and BPWCP avoiding liability on the other three claims brought by Nasar. The same is true as between Ganesh and BPWCP, although BPWCP also prevailed in its cross-complaint against Ganesh for the purchase price of the Retalix system. While Nasar secured damages and BPWCP secured a net judgment against Ganesh, the trial court was not bound to designate the party who secured relatively more relief as the prevailing party. (*Id.* at p. 871.) As neither party can claim to have secured a unqualified victory, the trial court did not abuse its discretion by determining that neither party had prevailed for the purposes of awarding contractual attorney fees. (*Scott*, *supra*, 20 Cal.4th at p. 1109.)

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[7] Although the fee-shifting provision in the *ampm* agreements only protects BPWCP, it is made reciprocal by statute under Civil Code section 1717, subdivision (a), which provides: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

DISPOSITION

The judgment and order are affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P. J.

We concur:

MANELLA, J.

COLLINS, J.