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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

DONSHEN TEXTILE (HOLDINGS) LTD. et al., Plaintiffs, Cross-defendants and Respondents, v. STUDIOCL CORPORATION et al., Defendants, Cross-complainants and Appellants.	B250226 (Los Angeles County Super. Ct. No. BC469979)

APPEAL from orders of the Superior Court of Los Angeles County. James R. Dunn, Judge. Affirmed.

Schwimer & Weinstein, Michael E. Schwimer, Zev Weinstein for Defendants, Cross-complainants and Appellants.

Hallstrom, Klein & Ward, Grant J. Hallstrom, Paul J. Kurtzhall for Plaintiffs, Cross-defendants and Respondents.

Defendants and cross-complainants StudioCL Corporation (StudioCL), Leonard Rabinowitz, and Carole Little (collectively Appellants) appeal from the denial of their motions for judgment notwithstanding the verdict (JNOV) and for new trial, following jury verdicts favoring plaintiff Donshen Textile (Holdings) Ltd. (Donshen) and cross-defendants Donshen, Savvy Sourcing, LLC, John Chen, and Andrew Stein. We affirm.

Factual and Procedural Background[1]

Respondent Donshen, owned by John Chen, is a Chinese trading company that buys and sells apparel. It (and predecessor companies) had transacted business for some years with Appellant StudioCL (and a predecessor company), a company owned and managed by Appellants Little and Rabinowitz, which sold clothes of its design to retail outlets in the United States. StudioCL would provide Donshen with clothing designs; Donshen would arrange for manufacture of samples, and ultimately the ordered goods, either by its own garment factory (Zhenjiang New Orient) or by a Chinese government-owned and subsidized factory (Zhenjiang Provincial). Appellant Stein, and his company Savvy Sourcing, LLC, acted in a number of capacities at various times in connection with the United States Customs transactions necessary to bring the apparel StudioCL purchased from Donshen to the United States.

Throughout their relationship, Donshen had regularly had difficulty obtaining payment from StudioCL. In November 2010, Donshen's California attorneys wrote to StudioCL saying that StudioCL had failed to pay $90,000 for samples ordered from Donshen, and then owed Donshen $604,569.34.

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[1] The first two sections of Appellants' opening brief (pp. 1-7), titled "Introduction" and "Procedural History," as well as the three-page "Introduction" section of Appellants' Reply Brief, provide no citations to the appellate record. Omitting any statement of the facts, the "Facts" section of the brief (pp. 8-25) instead launches immediately into argument. The result is that although the appeal rests in large part on the claimed insufficiency of the evidence to support critical factual determinations, the brief fails to identify much of the evidence that supports the jury's findings. (See Cal. Rules of Court, rule 8.204(a)(2)(C) [opening brief must provide summary of the significant facts]; *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925-926 [all factual matters will be viewed most favorably to the prevailing party].)

On December 3, 2010, StudioCL entered into a written Settlement Agreement with Donshen, resolving their disputes about the payment of Donshen's outstanding invoices and StudioCL's claims for offsets for nonconforming goods. The agreement granted a $300,000 credit for merchandise StudioCL had previously received; StudioCL, Rabinowitz, and Little agreed to make certain immediate payments and to make future payments on a specified Donshen invoice on or before January 2, 2011; and the parties agreed that Donshen's obligation to perform under existing orders would be suspended pending agreement about the terms of their future business (which, according to Chen, would include Rabinowitz's and Little's personal guarantees).

Of the approximately $90,000 it agreed to pay for sample orders, StudioCL paid only $57,609.10.

On January 6 and January 20, 2011, StudioCL signed purchase orders for additional goods from Donshen, with specified dates for delivery and payment, and with Rabinowitz's and Little's personal guarantees. On July 22, 2011, StudioCL confirmed that as of March 31, 2011, it owed Donshen a balance of $309,774.50.

In November 2011, Donshen sued StudioCL, Rabinowitz, and Little to collect what it was owed. StudioCL, Rabinowitz, and Little cross-complained against Donshen, Savvy Sourcing, LLC, John Chen, and Andrew Stein. During the following year or more the parties were occupied with efforts to attach the defendants' assets and resistance to those efforts, cross-motions for summary judgment and summary adjudication, and motions about discovery and admissibility of evidence.

Following a few weeks of testimony, documentary evidence, and argument, the jury rendered four special verdicts, each favoring Donshen: (1) On Donshen's claim for breach of the December 2010 Settlement Agreement, the jury found that the defendants had entered into the Settlement Agreement and had not been fraudulently induced to do so; that the defendants failed to fulfill the agreement's requirements, and Donshen was excused from doing so; and that Donshen was harmed in the amount of $32,390.90. (2) On Donshen's claim for breach of StudioCL's January 6 and January 20, 2011 contracts for the purchase of goods, the jury found that StudioCL had entered into the contracts and

was not fraudulently induced to do so; that StudioCL failed to do what the contracts required of it, and Donshen was excused from doing so; and that Donshen was harmed in the amount of $277,383.60. On Donshen's claim against Rabinowitz and Little on their personal guarantees, the jury found that Rabinowitz had personally guaranteed a specified purchase order in writing, and was not fraudulently induced to do so; that Rabinowitz failed to fulfill his obligations under the personal guaranty, and that Donshen was excused from fulfilling its obligations; and that Donshen was harmed in the amount of $26,444.80. It found that Rabinowitz and Little had personally guaranteed two other purchase orders in writing, in the amounts of $121,804.15 and $123,469.75, and they were not fraudulently induced to do so; that Rabinowitz and Little failed to fulfill their obligations under the personal guarantees and that Donshen was excused from fulfilling his obligations; and that Donshen was harmed in the amounts of $121,804.15 and $123,469.75. (3) On the claims of StudioCL, Rabinowitz, and Little against Donshen and the other cross-defendants for damages of $150,000 for fraud, the jury found the cross-complainants had not proved their fraud claims.

The court denied the motions of StudioCL, Rabinowitz, and Little for judgment notwithstanding the verdicts and for new trial.

On May 30, 2013, the trial court entered an amended judgment on special verdict ordering that Donshen recover damages from StudioCL in the amount of $5,664.90, from StudioCL and Rabinowitz jointly and severally in the amount of $26,444.80, and from StudioCL, Rabinowitz, and Little jointly and severally in the amount of $277,664.80; that Donshen recover prejudgment interest from StudioCL, from StudioCL and Rabinowitz jointly and severally, and from StudioCL, Rabinowitz, and Little jointly and severally, in the amounts of $1,129.88, $10,406.93, and $99,348.88, respectively; that Donshen recover costs in the amount of $10,140.46, and contractual attorneys' fees in the amount of $478,497.00, from all the defendants jointly and severally. The judgment ordered that StudioCL, Rabinowitz, and Little take nothing on their cross-complainant.

The defendants and cross-complainants filed a timely appeal on July 24, 2013.

Discussion

The appeal challenges the denial of Appellants' motion for partial JNOV, in two respects. It contends that:

(1) JNOV should have been granted based on Rabinowitz's and Little's two personal guarantees because certain conditions precedent to their obligations did not occur as a matter of law; and

(2) Appellants' fraud defense against Donshen's claims was established as a matter of law.

The appeal challenges the denial of their new trial motion on four grounds:

(1) the evidence was insufficient to support the verdicts;

(2) they were prejudiced by the court's ruling permitting an expert to testify on legal standards of United States Customs law;

(3) Appellants were prejudiced when the court permitted cross-defendant Stein to testify on a subject to which he had refused on the basis of the Fifth Amendment to testify at his deposition; and

(4) Appellants were prejudiced by jury instructions that were confusing and mistaken.

We find no merit in these contentions.

A. The Trial Court Did Not Err In Denying Appellants' Motion For Partial JNOV.

An appellate court reviews de novo a grant or denial of a motion for JNOV, using the same standard as the trial court. (*Oakland Raiders v. Oakland-Alameda County Coliseum, Inc.* (2006) 144 Cal.App.4th 1175, 1194; *Mason v. Lake Dolores Group* (2004) 117 Cal.App.4th 822, 829-830.) JNOV must be granted only where, viewing the record in the light most favorable to a verdict, the evidence compels a verdict for the moving party as a matter of law. (*Paykar Construction, Inc. v. Spilat Construction Corp.* (2001) 92 Cal.App.4th 488, 493-494.) The purpose of a JNOV motion "'is not to afford a review of the jury's deliberation but to prevent a miscarriage of justice in those cases

where the verdict rendered is without foundation.'" (*Sukoff v. Lemkin* (1988) 202 Cal.App.3d 740, 743.)

1. The evidence supports the jury's determination that Donshen was excused from timely delivery of goods to Appellants.

Appellants contend that they were entitled to JNOV because Donshen failed to present evidence sufficient to establish an essential element of its claim on Rabinowitz's and Little's personal guarantees of the January 20, 2011 contracts. The missing element, they contend, is that Donshen either performed or was excused from performing the conditions required for the personal guarantees.

On January 20, 2011, Donshen and StudioCL entered into two written contracts for goods from Donshen in the amounts of $122,098.00 and $120,123.75, and Rabinowitz and Little were personal guarantors of StudioCL's obligations. The December 2010 Settlement Agreement provides that "Time shall be of the essence as to all dates and times of performance"; and the language of the January 20, 2011 contracts provides that the personal guarantors' obligations are contingent "upon timely receipt" of the apparel and samples ordered.

StudioCL presented evidence that it received one of the January 2011 orders nine days late, and the other was received one day late. StudioCL contended that these delays made it unable to meet its obligations to others, causing the goods to lose much of their value. However, the evidence was controverted about whether Donshen or Appellants were responsible for the delays. There was evidence that Rabinowitz's and Little's personal guarantees had not been sent to Donshen until January 21, 2011, and were not received until January 22, 2011, delaying Donshen's shipment of the goods from China for three days—the soonest available arrangement after receipt of the guarantees. There was also evidence that certain information that Donshen needed to receive from Little (such as color swatches) was received by Donshen about 10 days behind the parties' agreed schedule, making delivery by the contract date impossible.

The jury received a number of jury instructions bearing directly on this issue. It was instructed that the burden was Rabinowitz's and Little's to establish that an agreed

term of the contracts was that their personal guarantees were conditional upon StudioCL's timely receipt of the goods; and that if the jury found that to be the case, it was then Donshen's burden to prove StudioCL's timely receipt. But it was also instructed that under the Settlement Agreement's terms Donshen was not required to ship any goods unless Appellants had paid Donshen what they had agreed they owed. It was instructed that a party who prevents the performance of a condition precedent to the other party's performance cannot rely on that condition to defeat his or her own liability. And it was instructed that a contract imposes on each party an obligation that the other party's expectations of performance will not be impaired, so that if a party has reasonable grounds for insecurity, he may demand assurance of the other party's performance, and if commercially reasonable, may suspend his own performance until he receives it. The jury was also instructed concerning the effect of a party's acceptance or rejection of goods, and the obligation to pay for goods accepted.

The jury's special verdicts include express findings that Appellants failed to fulfill their obligations under the Settlement Agreement, and that Donshen was excused from fulfilling his obligations under it. And they include express findings that Rabinowitz and Little failed to fulfill their obligations under the personal guarantees of the January 20, 2011 contracts, and that Donshen was excused from fulfilling his obligations under them.

These findings are supported by the evidence cited above, that Appellants and not Donshen were responsible for the goods' untimely delivery under the January 20, 2011 purchase orders. The jury might have found that Donshen's timely delivery of the goods was excused by Appellants' failure to have paid the amounts the parties agreed in the December 2010 Settlement Agreement to be due. It might have found that Donshen's performance was excused by Appellants' failure to timely provide Donshen with Rabinowitz's and Little's personal guarantees. It might have found that Donshen's performance was excused by Appellants' failure to have timely provided Donshen with the information it needed to prepare the goods for shipment. And it might have found that Donshen acted reasonably by shipping the goods as it did, despite the evidence that Donshen had on other occasions found faster shipping arrangements.

The jury unquestionably could have reached conclusions favoring Appellants on each of these points—but it did not. The verdicts on these issues are not without foundation in the evidence, there is no miscarriage of justice, and the court was justified in denying the motion for partial JNOV on these grounds. (*Sukoff v. Lemkin*, *supra*, 202 Cal.App.3d at p. 743.)

2. The jury was entitled to find that Donshen did not fraudulently induce Appellants to enter into the December 2011 Settlement Agreement.

Appellants argue that they are entitled to JNOV on Donshen's breach of contract claim, because their evidence was sufficient to establish each element of their affirmative defense of fraud, and Donshen's contrary evidence was either nonexistent or not credible. Even if they are right about the evidence, they are wrong about the law.

Proof of the fraud defense was Appellants' burden. We need not examine whether their evidence supports each element of their fraud defense, because even if they are right about that, the jury was entitled to disbelieve that evidence. As the trial court explained in its detailed order denying Appellants' JNOV motion, the jury was entitled to disbelieve that Stein's conversations with Rabinowitz about Customs practices constituted a representation that the cross-defendants' practices complied with all United States Customs laws, and it was entitled to find that the written agreements warranted that the apparel complied with United States Customs laws, not that the importer's practices did. The jury might have believed that the plaintiffs' representations (even if made) were not false, or that Stein did not believe them to be false. It might have disbelieved Appellants' claims that they relied on the representations in entering into the agreements.

If any of these factual elements were disbelieved, Appellants' affirmative fraud defense was not proved.[2] The special verdicts' express findings that Appellants were not

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[2] Appellants' reliance on *Hauter v. Zogarts* (1975) 14 Cal.3d 104, for the proposition that JNOV is proper here because some of the plaintiffs' fraud evidence was uncontroverted, is misplaced. That was a suit for products liability, not fraud; moreover, the representations on which the claim in that case was based were made in writing and did not rely on disputed testimony about the reasonable meaning of the alleged representations.

fraudulently induced to enter into any of the relevant agreements establishes that the jury disbelieved some element of the proof of fraud.

B. The Trial Court Did Not Err In Denying Appellants' Motion For New Trial.

Code of Civil Procedure section 657 provides that the trial court may grant a new trial on specified grounds, including (among others) if the substantial rights of the requesting party are materially affected, (1) by an order or abuse of the court's discretion that prevented a fair trial, (2) by insufficiency of the evidence to support the verdict, or (3) by an error in law that was excepted by the party seeking a new trial. Appellants appeal from the trial court's denial of their request for a new trial on each of these grounds.

1. The verdict is supported by substantial evidence.

An order denying (or granting) a motion for a new trial rests in the trial court's sole discretion, which will not be disturbed on appeal except for a manifest and unmistakable abuse of that discretion. As Code of Civil Procedure section 657 mandates, a new trial motion "shall not be granted" for insufficiency of the evidence, "unless . . . the court is convinced from the entire record . . . that the court or jury should have reached a different verdict or decision."

Appellants argue that even if the trial court was not required to grant its JNOV motion on the ground that Donshen had failed, without excuse, to timely deliver goods to StudioCL, the court nevertheless was required to grant a new trial for that failure. Not true. In ruling on the JNOV motion the court identified the evidence supporting the jury's special verdict findings, and in denying the new trial motion it stated its agreement with the jury's findings. The determinations that the jury's findings are supported, and that the court agrees with them, alone justifies the motion's denial. (Code Civ. Proc., § 657 [new trial is not to be granted unless trial court is convinced from all the evidence that the jury should have reached different verdict].)

The trial court stated that it "does not disagree with the findings of the jury and therefore does not grant a new trial," clearly indicating that it was not convinced the jury should have reached a different verdict. And its agreement with the jury's findings is

justified by the fact that the findings were supported by substantial evidence. (See this opinion, § A, above.) (*Casella v. SouthWest Dealer Services, Inc*. (2007) 157 Cal.App.4th 1127, 1160 [trial court denial of new trial motion is supported by court's determination that special verdict is supported by substantial evidence and court's agreement with jury's verdict].) On this record, the trial court had no discretion to grant the new trial motion, and did not abuse its discretion by refusing to do so.

2. Appellants have failed to show error or prejudice in the trial court's denial of the new trial motion due to claimed error in its rulings with respect to the testimony of expert witness Pollack.[3]

The jury was given Defendants' Special Instruction No. 9, entitled "Customs Violation – Transaction value under the First Sale Rule, as requested by Appellants:

"United States Customs primarily assesses import duties on the basis of the 'transaction value' of the imported goods. The transaction value is based on the price actually paid or payable for the merchandise when it is sold for exportation to the United States, plus amounts equal to:

"1. The packing costs incurred by the buyer with respect to the imported merchandise;

"2. Any selling commission incurred by the buyer with respect to the imported merchandise;

"3. The value, apportioned as appropriate, of any assist;

"4. Any royalty or license fee related to the imported merchandise that the buyer is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise for exportation to the United States; and

"5. The proceeds of any subsequent resale, disposal, or use of the imported merchandise that accrue, directly or indirectly to the seller.

"Donshen Textile claims that a Chinese factory manufactured the goods, and that it purchased the goods from the factory and resold them to StudioCL. StudioCL,

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[3] Appellants did not raise this issue as a ground for their new trial motion in the trial court.

Rabinowitz, and Little claim that all or some of the goods were not actually manufactured by that factory.

"If Donshen textile purchased the goods from that factory, then it may use the price it paid to that factory as the transaction value for Customs duties only if:

"1. There was a *bona fide* sale between the factory and Donshen Textile – i.e., title to the goods transferred from that factory to Donshen Textile, and Donshen Textile assumed risk of loss;

"2. The prices that Donshen Textile paid the factory for the goods were negotiated at arm's length, free from any non-market influences; and

"3. The goods were clearly destined for export to the United States."[4]

Appellants argue that their new trial motion should have been granted based on the error and prejudice resulting from the testimony of attorney Elon Pollack, an expert concerning the concept of "transaction value" in reporting the import of goods to the United States Customs service. Appellants contend that Pollack's testimony misstated the law and conflicted with a jury instruction, Special Instruction No. 9; that Pollack was erroneously permitted to testify about the transaction value concept; and that it is reasonably probable that the testimony materially affected the trial's outcome.[5] The record does not sustain these contentions.

First, a little background: One of Appellants' central contentions, both as an affirmative defense and as a cross-claim for compensatory and punitive damages, was that Donshen and its agents (Stein and his company, Savvy Sourcing, LLP) had fraudulently induced them to enter into the Settlement Agreement and the sales agreements, the payment of which was the subject of Donshen's suit. The claim was that Donshen and its agents misrepresented their compliance with all requirements of United States Customs law with respect to the importation of the apparel. Appellants sought to

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[4] The special instruction cites title 19 United States Code section 1401a(b)(1), and *Nissho Iwai Am. Corp. v. United States* (Fed. Cir. 1992) 982 F.2d 505, 509 as authority.

[5] This court granted Appellants' request to augment the record on appeal to include documents from the trial court record to support their contentions on this issue.

prove that Stein knew or should have known that the representations were materially false, and that Appellants had relied on them to their detriment. Appellants contended that Customs law required the value of the goods' first sale to be reported to Customs; but the sale by the apparel's Chinese manufacturer, Zhenjiang Provincial, to Donshen's company, Zhenjiang New Orient, did not in fact represent a valid transaction value, because Zhenjiang Provincial received subsidies and other considerations from the Chinese government.

The jury found that Appellants were not fraudulently induced to enter into any of the relevant agreements.

a. Pollack's testimony did not misstate the law or directly conflict with Special Instruction No. 9.

Pollack, an attorney formerly employed by the United States Customs service and currently advising clients in that field, testified on direct examination for Respondents that transaction value, the preferred basis for Customs appraisement, is "the price paid or payable for imported merchandise when sold for export to the United States," adding that "the law provides for certain additions under certain circumstances." In order to determine transaction value, he testified, there must be a bona fide sale, with a buyer and seller, and a purchase price for the goods sold for export. Appellants objected when Pollack was asked to explain the meaning of "first sale" with respect to transaction value, on the grounds that "We're into legal – we have jury instructions on this." The court ruled at the sidebar that Respondents could testify how transaction value is determined, but not whether the sale from Zhenjiang Provincial to Donshen would establish the transaction value that was legally required to be reported to United States Customs.

Pollack testified under cross-examination that the Customs service sometimes requires reappraisal of a transaction value because "there may be an addition to the value that needs to be added to the price or that transaction value" of the merchandise. But when Appellants' counsel asked about the circumstances under which such a reappraisal would arise, Respondent's objected that "we're getting into areas that have already been ruled on" and are therefore irrelevant. Observing that "it sounds like outside the scope as

well," the court suggesting (without ruling on the objection) that "If you need to discuss it later, we'll talk at the sidebar before [the witness] leaves." Appellants completed their cross-examination of Pollack without further incident, concluding with his testimony that the valid transaction value reported to Customs would result from "an arm's length transaction," but would not necessarily have to represent the goods' market value.

Appellants contend on appeal that the trial court was required to grant the new trial motion because Pollack's testimony was in conflict with Special Instruction No. 9.[6] But the record reflects no fatal inconsistency, and no error in the trial court's rulings.

Special Instruction No. 9 told the jury that Donshen could use the price it paid to the Chinese factory to determine the "transaction value" reported to Customs only if (1) its purchase from the factory was a bona fide sale, (2) the prices Donshen paid the factory for the goods "were negotiated at arm's length, free from any non-market influences," and (3) the goods were clearly destined for export to the United States. Appellants argue that Pollack's testimony on direct examination was inconsistent with the second element of Special Instruction No. 9, because it omitted "the critical requirement that the prices be negotiated at arm's length, free from non-market influences." But the record shows otherwise.

Pollack testified on direct examination that the determination of transaction value requires a bona fide sale, with a buyer and seller and a purchase price for the goods. And under cross-examination Appellants elicited Pollack's testimony that in order to be valid, the transaction value reported to Customs would result from "an arm's length transaction," but it would not necessarily have to represent the goods' actual market value. Appellants ended their examination at that juncture, without asking Pollack what he meant by "arm's length," and without asking whether an arm's length transaction meant a transaction free from non-market influences.

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[6] Appellants' opening brief refers to their motion in limine to exclude Pollack's testimony on the ground it would be inadmissible opinion on the interpretation and application of United States Customs law. But their appeal neither cites any trial court ruling on the motion, nor contends that the court erred in denying it.

This record reflects no inconsistency or conflict between Pollack's testimony and Special Instruction No. 9, but at most a less-complete statement of the meaning of transaction value. Pollack testified that transaction value is determined from a bona fide arm's length sale between a genuine buyer and seller; Appellants argued to the jury that the sales from Zhenjiang Provincial to Donshen did not meet those conditions, because Zhenjiang Provincial was subsidized by the Chinese government and its sales to Donshen therefore were not bona fide arm's length sales between independent companies. Respondents argued to the contrary, that the sales from Zhenjiang Provincial to Donshen do reflect the transaction value that should be reported for Customs purposes.

As the record stands, Special Instruction No. 9 accurately instructed the jury how transaction value is determined, enabling the jury to determine for itself whether Donshen did nor did not comply. If at the close of Pollack's testimony questions remained unanswered with respect to the proper determination of transaction value, it was the result of Appellants' failure to pursue the issue. We find no reason to conclude that the jury was confused or misled with respect to this issue.

b. The trial court did not err by permitting Pollack to testify on his interpretation of the law with respect to transaction value.

Appellants argue that the trial court erred "in its sidebar ruling permitting Pollack to testify on the definition of 'transaction value,'" and that it is probable the trial's outcome was materially affected by this error.

The sidebar ruling to which the argument refers apparently is to a sidebar conference following Appellants' objection when Pollack was asked what the term "first sale" means. The objection was "We're into legal – we have jury instructions on this," with which the trial court agreed. During the resulting conference Respondents made an offer of proof that Pollack would testify that the price at which Donshen purchased goods from Zhejiang Provincial for export to the United States reflected the transaction value to be reported to Customs. The trial court rejected the offer of proof. It ruled that Pollack could testify to his understanding of transaction value and first sale, but not whether the

transactions shown by the evidence in this case did or did not come within those concepts.

Appellants contend that it was error to permit Pollack to testify about even the meaning of transaction value, because that is a legal concept defined in Special Jury Instruction No. 9. The court has discretion to permit an expert to testify about concepts that are sufficiently beyond common experience that the expert's opinion might assist the jury. (See Evid. Code, § 801, subd. (a); *Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178.) It is uncertain in retrospect that Pollack's testimony was ultimately of any great value to the jury's understanding of the concepts it was called upon to evaluate; but at the time of the challenged ruling, that result was not clear. We cannot say that his testimony should have been wholly barred from the outset, on the ground that he could provide the jury with nothing of further value concerning the concepts of transaction value and first sale. And although his testimony amounted to little more than a paraphrase of Special Jury Instruction No. 9's definition of transaction value—probably unnecessary and arguably incomplete—we do not speculate about the appropriate ruling if the court had been asked to strike it, because it was not called upon to make any such ruling.

The decision in *Summers v. A. L. Gilbert Co.*, *supra*, 69 Cal.App.4th 1155, does not support Appellants here. In that case, arising from a truck accident, an expert attorney had been permitted to testify for more than a full trial day to his opinions on a great number of subjects, including his opinion that the hauler's duty to the plaintiff's decedent was nondelegable, that the defendant's contracts with the hauler were illegal, and that the defendant was liable to the plaintiffs for its hauler's conduct on various legal theories. The record here reflects no equivalent error. Pollack gave his opinion as to the meaning of the term transaction value in the context of Customs reporting, but he was not asked whether the conduct shown by the evidence did nor did not come within that definition.

It is true that a court errs by permitting an expert to instruct the jury on the law; But in many circumstances—including the case at hand—a jury's determinations may

require an understanding of the subject beyond that answered by an instruction on the applicable law. (E.g., *People v. Roberts* (2010) 184 Cal.App.4th 1149, 1193-1194 [expert testimony on legality of gang practices]; *PM Group, Inc. v. Stewart* (2007) 154 Cal.App.4th 55, 63-64 [expert testimony on entertainment industry contracting Customs and practices]; *People v. Dodd* (2005) 133 Cal.App.4th 1564, 1569 [35 Cal.Rptr.3d 692] [expert testimony on criteria necessary for committing mentally disordered offender].) In testifying that the sale from the manufacturer to the first buyer determines the transaction value to be reported to Customs, Pollack also testified that "the law provides for certain additions [to the sale price] under certain circumstances"—an answer that left the door wide open for the parties to inquire about what those circumstances might be. We cannot know what his answers might have been if he had been asked, because he was not. He might have testified about how circumstances such as government subsidies to the selling manufacturer would or would not affect the reported transaction value.[7]

We cannot fault the court for having failed to predict that the witness would provide no meaningful opinions on subjects such as this, nor can we presume that the jury disregarded Special Jury Instruction No. 9's definition of transaction value. The court did not err in declining to exclude Pollack's testimony, and in denying the motion for new trial on this ground.

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[7] Respondents' closing argument to the jury did not "emphasize[ ] Pollack's flawed definition of transaction value," as Appellants argue it did. Respondents argued that the "price that Donshen paid to the factory is the transaction value, not the price that StudioCL paid to Donshen," and "that's what must be declared to customs." The argument did not address whether transaction value is affected by the Chinese governments' ownership of, or subsidies to, the goods' selling manufacturer—a subject about which Pollack was not asked. And Respondents also told the jury that "the transaction value that Mr. Pollack told you about" is "beside the point," because there was no misrepresentation at all—no representation that any of the Respondents told any of the Appellants that they were in full compliance with Customs laws.

1. Appellants have failed to show error or prejudice in the trial court's denial of the new trial motion due to claimed error in its rulings with respect to the testimony of cross-defendant Stein.[8]

On May 22, 2012, about nine months before the trial began, Appellants took the deposition of cross-defendant Stein, whose company, Savvy Sourcing, LLC, became a sales agent for Donshen. After Stein testified at his deposition that he was the "importer of record" for the goods purchased by StudioCL, he was asked by Appellants' counsel, "What do you understand to be your obligation as an importer of record in terms of . . . the declarations that are being made to customs?" Respondents' counsel objected and instructed Stein not to answer, citing the Fifth Amendment. At the close of the deposition, Stein confirmed that he was invoking the Fifth Amendment with respect to that question in accordance with his counsel's instruction.

At a February 28, 2013 pretrial conference, Respondents informed Appellants that Stein would waive the Fifth Amendment privilege at trial, which was then set to begin on March 13, about two and one-half weeks hence. Appellants apparently made no attempt either to re-depose Stein, or to postpone the trial in order to obtain further discovery as a result of this revelation.[9]

The issue did not arise again until March 19, 2013, during the trial, when Appellants filed a brief asking for an order precluding Stein from waiving his Fifth Amendment privilege not to respond to questions about his understanding of his obligations as importer of record. They argued that Stein's understanding of his obligations as importer of record was a critical issue, which "directly pertains to whether Mr. Stein knew he was violating customs law," and therefore his knowledge whether his

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[8] Appellants did not raise this issue as a ground for their new trial motion.

[9] Their trial court brief referred (without citing any document) to a refusal by the court to grant a November 2012 request to postpone the trial until a related Customs-fraud investigation of Savvy Sourcing, LLC was resolved. But they have cited no showing they made to support the request, and they have not cited the court's refusal as an abuse of discretion.

alleged contrary representations to Appellants were false—the scienter element of Appellants' fraud claim and affirmative defense.

The court discussed the issue with counsel during a lunch break the next day, March 20, shortly after Pollack began testifying. Appellants confirmed to the court the relief they sought: When questioned on the issue in the jury's presence, Stein should be required either to assert his Fifth Amendment right not to answer, or if he were to answer (as his counsel said he would), he should be impeached by his earlier assertion of the privilege.[10]

Balancing the competing interests in the integrity of the process and discovery rules, as well as Evidence Code section 913's prohibition against impeachment for asserting a privilege, the court ruled that the jury could not be informed that Stein had asserted the Fifth Amendment privilege; but it could be told that Stein had earlier refused to answer the question. In short, Appellants could impeach Stein by asking whether he had previously refused to answer; but neither side could mention the Fifth Amendment, and Stein was precluded from saying that his earlier refusal to answer had been at his counsel's direction. The court recognized that the balance struck by its order was not an ideal substitute for the answer at deposition, but believed it was all it could do under the circumstances. The court explained its reasoning: Stein could not say that he had refused to answer at counsel's direction, because "There have to be consequences to this. You can't roll into court at the last minute and waive." But it also is "too much to bring the Fifth Amendment before the jury. I don't care how many instructions I give not to pay any attention to it, they're going to pay attention to it." The court added, "And that's the best that I can do as a compromise." The court refused to permit Respondents' counsel to speak with Stein before his testimony resumed.

The court also offered Appellants an opportunity to question Stein out of the jury's presence, "for 10 minutes or so" (or "a little more," if Appellants' counsel were to

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[10] Appellants did not suggest that Stein should be permitted to assert his privilege not to testify out of the jury's presence.

request it)—in essence, a mini-deposition—to forewarn them as to what Stein's response on the stand would be. Appellants' counsel declined that offer.

During their cross-examination of Stein, after his testimony resumed, Appellants elicited his testimony that as the importer-of-record in a duty-paid transaction he was responsible for submitting import entry documentation, including the declaration of value, to Customs. And he admitted that at his deposition he had refused to answer that question.

Trial court orders ordinarily are reviewed under the abuse-of-discretion standard. (*Hurtado v. Statewide Home Loan Co.* (1985) 167 Cal.App.3d 1019, 1023, disapproved on another ground in *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479; *Avant! Corp. v. Superior Court* (2000) 79 Cal.App.4th 876, 881.) Under that deferential standard a trial court's ruling will be sustained "'unless it falls outside the bounds of reason'" (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1226; *Fuller v. Superior Court* (2001) 87 Cal.App.4th 299, 304), and in any event unless undue prejudice results. (*Rebney v. Wells Fargo Bank N.A.* (1990) 220 Cal.App.3d 1117, 1141.)

We find no abuse of the trial court's discretion here, and no indication of prejudice. The appropriate remedy for Stein's change of position had passed two and one-half weeks earlier, when Appellants learned of it. The remedy was to make a request—at or soon after the pretrial conference—to reopen Stein's deposition; then, if appropriate, to seek a continuance of the trial to obtain any further discovery, based on a showing of need. But there is no indication Appellants made any such request, or made

any showing of need.[11] They instead waited to take any action until after the trial had begun, and Stein was actually in court, ready to testify.[12]

Nor have Appellants explained why, if they believed Stein's change of position prejudiced their discovery rights, they delayed until mid-trial to seek relief. If Stein's last-minute change of position gave rise to a need for further discovery or time to obtain further evidence, such a need could be far more easily accommodated before trial than after the jury had been seated and the trial had commenced. Appellants' failure to request the trial court for time for further discovery or to obtain further evidence promptly when they learned of Stein's waiver of his Fifth Amendment rights, and their failure to demonstrate any resulting prejudice here, impairs their claimed need for additional time.

It is true that litigating parties are entitled to an expeditious and fair resolution of their civil claims without being subjected to unwarranted surprise, and that the civil discovery statutes are intended to safeguard against surprise and gamesmanship. (*Williams v. Travelers Ins. Co*. (1975) 49 Cal.App.3d 805, 810.) It can be manifestly unfair when a party invokes his or her Fifth Amendment privilege against self-incrimination, but later elects to waive that privilege and testify about the same matters at trial. "A litigant cannot be permitted to blow hot and cold in this manner." (*A & M Records, Inc. v. Heilman* (1977) 75 Cal.App.3d 554, 566; *Avant! Corp. v. Superior Court*, *supra*, 79 Cal.App.4th at p. 882.)

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[11] Appellants alluded in their trial court brief to an earlier refusal by the court to grant a November 2012 request to postpone the trial pending the outcome of a related Customs-fraud investigation of Savvy Sourcing, LLC. However they have not cited any showing to support the request, nor have they suggested that the trial court abused its discretion by refusing to grant the request.

[12] Appellants argue on appeal that the court's proffer of a 10-minute examination of Stein would not be adequate to "delve into the line of questioning" about Stein's obligations as importer of record. But they made no request for any more extensive examination of Stein, despite the court's invitation for them to do so; they attempted no showing (either in the trial court or in this court) that either a more lengthy examination of Stein or a postponement for further discovery was reasonably necessary; nor did their cross-examination of Stein at trial delve any further into the subject.

Nevertheless, Appellants' failure to make any showing that they were actually prejudiced, either by Stein's pretrial change of position on the issue, or by their inability to obtain further discovery from him. They have not suggested what evidence they had intended to present if Stein had not withdrawn his refusal to testify, nor any reason that evidence could not have been presented even after his refusal was withdrawn. They argue that if he had responded at his deposition they could and would have pursued the issue with further questions, and perhaps further discovery; but beyond that assertion, they have not suggested where that pursuit might have led, or to what advantage.[13]

Nor have Appellants suggested what other remedy the trial court could or should have adopted to deal with Stein's change of position. As far as the record shows, both parties wanted Stein's testimony. Respondents wanted to let the jury know that Stein's refusal to answer was because he had been instructed to do so. And Appellants too wanted Stein's testimony, but also wanted the jury to learn that he had previously asserted the privilege not to testify. Both these alternatives would have disclosed to the jury Stein's exercise of his Fifth Amendment privilege. (See *Buehler v. Sbardellati* (1995) 34 Cal.App.4th 1527, 1541-1542 [no abuse of discretion in trial court's refusal to permit disclosure to the jury of witness's exercise, then waiver, of privilege not to answer question].)

The trial court was faced with a change of Respondents' position shortly before trial, on what might have been a significant discovery issue. Yet Appellants apparently did not seek relief from the court until mid-trial, nearly three weeks after they had learned Stein would waive his privilege; and they were then—and are now—unable to articulate how the change in position prejudiced them, or even how it was likely to have done so. We find no abuse of discretion in the trial court's resolution of the conundrum.[14]

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[13] Presumably, another witness could have testified about the duties and obligations of an importer-of-record, a role that Stein had admitted was his.

[14] Neither party has asked us to review—and we have not reviewed—the propriety of the court's remedy, which permitted disclosure to the jury of Stein's earlier refusal to answer the question at his deposition notwithstanding Evidence Code section 913's

2. Appellants fail to demonstrate that confusing and erroneous jury instructions and special verdict forms require reversal.

Appellants contend that the trial court erred in failing to grant their motion for new trial due to "the confusing nature of the jury instructions and mistakes therein." However, the referenced mistake is not in a jury instruction, but in two special verdict questions.[15]

Special Verdict No. 3 addressed Donshen's claim against Rabinowitz and Little for breach of their personal guarantees. Sections B and C of that special verdict dealt with their personal guarantees of two specified purchase orders. Question 5 of each of those sections asked whether all the required conditions for their performance under the referenced personal guarantee had occurred "or were any of the conditions excused?"

The special verdict questions were provided to the jury on the morning of March 22, 2013.

Appellants' claim of error is based on the fact that the language of the special verdict questions provided to the jury differs from that of CACI No. 303, the jury instruction on which the questions are based: The jury was instructed in the language of CACI No. 303, that in order to recover on the personal guarantees Donshen must prove that "all conditions required by the contracts for StudioCL, Rabinowitz and Little's performance had occurred or were excused," but question 5 of the special verdicts provided to the jury asked whether all the required conditions for performance under the personal guarantees had occurred "or were *any of* the conditions excused."

The difference in the wording of the special verdict questions and the instruction on which it is based is undoubtedly significant to its meaning (though Respondents

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prohibition against impeachment based on exercise of a privilege. (See *Buehler v. Sbardellati*, *supra*, 34 Cal.App.4th at pp. 1541-1542 [Evidence Code section 913 permits no comment on witness's exercise, then waiver, of privilege not to answer question].)

[15] The new trial motion did not identify any jury instruction or special verdict error as a ground for relief. The motion for JNOV mentioned it only in a footnote, the text of which the opening brief parrots.

characterize the difference as a "minor issue"). The instruction requires that "all conditions" must have been excused; but question 5 of the special verdicts provided to the jury asks only whether "any of" the conditions, not all of them, were excused. A finding that "any of" the conditions to Donshen's right to enforce the guarantees were excused would not necessarily mean that Donshen was entitled to enforce the agreements.

On the afternoon of Friday, March 22, the jury asked a number of questions about the meaning of various special verdict questions. In response to questions about special verdicts 3B and 3C, the court instructed the jury to cross out question 3, but to answer question 5.

According to a declaration of Appellants' counsel in support of the JNOV motion, Appellants brought the discrepancy in the language of question 5 to the trial court's attention on Monday, March 25, 2013, after having discovered it over the March 23-24 weekend. On Monday, March 25, 2013, the court received another series of questions about the special verdict wordings of questions 3 and 4 of special verdicts 1, 2, 3A, 3B, and 3C. Again according to Appellants' counsel's declaration, the court took that opportunity (which turned out to be just 20 minutes before the jury returned its verdicts) to instruct the jury to cross out the words "any of" from question 5 of special verdicts 3B and 3C.

As submitted to the court by the jury, question 5 of special verdicts 3B and 3C asked whether all the conditions that were required for Rabinowitz's and Little's performance under their personal guarantees occurred, "or were the conditions excused." The jury answered "yes" to both these questions.

The parties dispute whether the error should have been discovered earlier than it was, but Appellants apparently made no effort to challenge the manner in which the court handled its correction when it was brought to the court's attention, either before or after the verdict was rendered. The trial court cannot be faulted for failing to grant a new trial for a claimed confusion in the special verdicts, known to counsel before the jury is

discharged but mentioned for the first time only after the jury was discharged, and even then, only in a footnote.

When they were answered by the jury, the special verdict questions correctly reflected the law on which the jury had been instructed. We have no reason to speculate that the jury failed to answer the questions as it was instructed to do. Moreover, as the trial court pointed out in its detailed account of the evidence supporting the verdicts in response to Appellants' post-verdict motions, the evidence strongly supported the jury's conclusion that the conditions precedent to Rabinowitz's and Little's obligations under their personal guarantees were excused.

The judgment must be affirmed.

Disposition

The judgment is affirmed. Respondents are entitled to their costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

JOHNSON, J.

BENDIX, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.